



Current Issue

Articles & Analyses
Print Issue

Archives

By Topic
By Issue Date
Search

Product Information

Subscribe Now

Product Support
Copyright & Disclaimer
Send Us Feedback

Editorial

Contribute an Article
Contributing Editors
Editorial Staff

Published by



March 5, 2004

[Print Issue](#)
[Print Article](#)

Management Of Regulatory Risk In Light Of Recent Federal Trade Commission Sanctions Imposed On Messenger Model Networks

By James R. Paine, June Ann Sauntry, and Thomas W. Baker, Troutman Sanders, LLP*

One does not have to look beyond the popular press to see that antitrust enforcement has become a critical issue in the managed care arena. Both the Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ) are cracking down on independent practice associations (IPAs) and physician hospital associations (PHOs) for collectively negotiating agreements with payors. With the increased scrutiny by the FTC and DOJ, professional liability insurance that covers antitrust is becoming increasingly difficult to obtain. Insurers are often requiring minimum deductibles in excess of \$100,000 for antitrust claims or are excluding antitrust from professional liability policies altogether. To further complicate matters, recent corporate fraud cases have continued the trend in the law to hold individuals accountable for corporate actions. For example, the enactment of the Sarbanes Oxley Act of 2002 implemented certifications specifically designed to increase the individual responsibility of officers for the conduct of the enterprise they oversee. The general trend to hold individuals accountable for corporate acts, combined with the recent activity of the FTC and DOJ, have renewed the focus of IPAs, PHOs, and other healthcare providers on managing regulatory risk, especially risk of antitrust liability associated with joint activity.

Generally, physicians and hospitals are prohibited from jointly negotiating price and price-related terms with payors. The FTC and DOJ have indicated that the only exception to the general prohibition arises when the physicians or hospitals are financially or clinically integrated and, as a result of that integration, achieve efficiencies in the form of reduced costs or increased quality of care. According to Jeffrey W. Brennan, Assistant Director of the FTC's Bureau of Competition, in the absence of such financial or clinical integration, collective negotiation by physicians simply results in an agreement between competitors on prices, which is per se illegal.¹ For non-integrated IPAs and PHOs, this means that any evidence of collective negotiation might result in liability.

Search

Search

In This Issue

Vol. 2, Issue 10

Top News

[GAO Finds Growing Problem Of Unauthorized Entities Selling Insurance](#)

[CMS Will Match State Costs For Running Disease Management Programs](#)

[FDA Improves Access To Generic Drug Information, Requests Comments On MMA Changes](#)

Articles & Analyses

[Management Of Regulatory Risk In Light Of Recent Federal Trade Commission Sanctions Imposed On Messenger Model Networks](#)

[Marketing Under HIPAA](#)

Food & Drug Law

[White House Announces New Drug Strategy, NABP Releases List Of Commonly Counterfeited Drugs](#)

[Dorgan Introduces Bill On Reimportation Of Drugs](#)

[FDA Approves New Cancer Treatment That Cuts Off Tumor's Blood Supply](#)

[Federal Circuit Says Patent Extension Period Covers All Patent Claims For Active Ingredient](#)

[GAO Finds State Monitoring Reduces Illegal Drug Diversions](#)

[Fraud & Abuse Update](#)

Non-integrated networks must attempt to restrict their conduct to activities that are permitted. To assist providers in navigating through the assortment of permitted and prohibited activities, DOJ and the FTC have issued guidelines setting out "safe harbors" for joint conduct and describing how certain healthcare antitrust issues are analyzed.² Under the guidelines, non-integrated IPAs and PHOs can contract using a "messenger model." In the traditional messenger model, a payor submits a fee schedule to the network, which then transmits the fee schedule to the member providers. The member providers then independently determine whether to accept or reject the proposed fee schedule. The network responds to the payor, and the payor contracts with those physicians who accepted the offer. The guidelines also provide for certain permitted variations from the traditional messenger model, which are set forth below.

1. A network messenger that is unaffiliated with any of the network members may obtain from each member individually a fee schedule or conversion factor (for example, a percentage of the resource-based relative value scale (RBRVS)) that represents the minimum payment that the member will accept from a payor. The network messenger may also be authorized to contract on behalf of the members with payors offering prices at or in excess of the individual member's fee schedule. The network messenger must not share one member's minimum authorized fees with other members. The network messenger must convey all payor proposals to the network members without regard to whether the proposal meets the fee schedule authorized by the individual network members. The network messenger must not negotiate price or price-related terms with the payor.
2. If done under the limitations of item 1 above, a network messenger also may be authorized by individual network members for a specified period of time to bind the network members to any contract offers with prices equal to or better than those in a contract that the individual network member has previously approved.
3. If done under the limitations of item 1 above, a network messenger may aggregate the price information of network members, develop a chart that sets forth the percentage of members in the network who have authorized contracts at various levels, and provide that information to payors at the payor's request.

The guidelines specifically prohibit a network

Healthcare Spending

[Study Finds No Racial, Gender Spending Disparities During Last Year Of Life](#)

HIPAA

[CMS Says Non-HIPAA Compliant Claims Will Have Longer Wait For Payment Than Compliant Claims](#)

Home Healthcare

[Second Circuit Says Home Health Agencies Must Provide Written Notice To Medicare Beneficiaries Before Terminating Or Reducing Services For Any Reason](#)

Hospital Issues

[Emergency Department Diversions Have Slowed, Study Finds](#)

[Tenet To Offer Uninsured Patients Price Discounts](#)

Information Technology

[Virginia Unveils New Online Alert Service That Tracks License Status Of Healthcare Professionals](#)

Managed Care

[HMO Profits Up 73% In Second Quarter Of 2003, Weiss Ratings Reports](#)

Medicare & Medicaid

[GAO Finds Home Health Agency Medicare Payments More Than Cover Cost Of Care](#)

[Democrats Press DHHS For Information On Cost Estimates Of Medicare Law](#)

[CMS Says Seniors In Medicare Advantage Health Plans Will See Improved Benefits, Lower Costs](#)

[MedPAC Issues Report On Medicare Payment Policy](#)

[DHHS OIG Says Medicaid Missed Out On Savings For Drugs Omitted From Federal Upper Limit List](#)

Tax

from hiring an agent to negotiate prices with payors on behalf of the network's members even when the agent does not propose a fee schedule and relays the negotiated contract to each member for an individual decision to accept or reject.

Despite the FTC and DOJ guidance, it is exceedingly difficult to determine at what point conduct ceases to create efficiency by streamlining contracting and begins to become illegal anticompetitive conduct. The recent enforcement cases suggest that, in practice, networks frequently deviate from a permitted messenger model. In order to stay within permissible antitrust bounds, IPAs and PHOs should avoid the following conduct:

1. Forming an association in order to gain market power and increase fees from payors.
2. Adopting a fee schedule, even if the schedule is developed by an independent third party.
3. Suggesting a price level required in order to obtain full participation of the members.
4. Negotiating price or price-related terms even if negotiations are conducted by a third party.
5. Refusing to messenger some payor proposals to members.
6. Expressing an opinion on payor proposals.
7. Causing members to terminate individual payor contracts.
8. Encouraging members to refuse to negotiate individually with payors or insist that contracts be through the network.

Of course this list does not cover every possible antitrust violation. Conduct that is not set forth above but that creates or facilitates an agreement between competitors on price or price-related terms is also prohibited. It is critical that, in all circumstances, members make independent determinations of whether to accept or reject payor proposals.

Individuals involved with a network that is engaged in conduct that sounds similar to the activities described above, whether as a member, network leader, outside consultant, or legal advisor, should take action to stop such activities. Individuals participating in such activities are increasingly being named in enforcement actions.

In 2003, the FTC brought twice as many enforcement actions against networks as it did in

[IRS Issues Proposed Rule And Notice On FICA Exemption For Medical Students](#)

[Rep. Stark Introduces Bill To Remove Tax Deductions For Physician Giveaways By Pharmaceutical Companies](#)

[Studies Find Health Tax Credits Insufficient, Tax Policies For Health Insurance Favor Wealthy](#)

News In Brief

[DHHS Announces Grants For People With Disabilities, AIDS Care](#)

[U.S., Canada, and Mexico Sign Agreement To Work Together For Public Health](#)

[Pharmacy Group Praises CMS' Switch On Discount Drug Card Terminology](#)

[Consumer Group Gives Tips To Seniors On Avoiding Drug Discount Card Fraud](#)

[FDA Launches New Web Site On Drug Products](#)

[DHHS Leads Effort To Enhance Biosecurity For Research](#)

[Comment Calendar](#)

[Hearsay](#)

[Listserve Roundup](#)

2002, and, in several cases, charged the individuals responsible for the illegal conduct. In *Piedmont Health Alliance, Inc.*, ten individual physicians who served on the network's board of directors or contract committee were charged.³ In *Physician Network Consulting, L.L.C.*, the network's managing director was charged.⁴ In *The Maine Health Alliance*, the network's executive director was charged.⁵ In *Carlsbad Physician Association*, the network's executive director and seven individual physicians who served on the network's board of directors or contract committee were charged.⁶ The increased enforcement activity and focus on individual accountability evident in the 2003 FTC enforcement actions clearly indicate the FTC's desire to end illegal joint negotiations.

Recent cases also demonstrate that associations should be careful when relying on the advice of outside advisors. Some outside advisors are not well versed in the antitrust rules and the boundaries imposed on group negotiations. There have been a number of cases in which associations have engaged the services of outside advisors, including consultants, to handle contract negotiations with payors, and, at least in part due to the advice of the outside advisors, been determined by the FTC to have violated the antitrust laws. In *R. T. Welter & Associates, Inc.*, an outside consultant advised the creation of a "steering committee" composed of one member of each member practice to meet periodically to decide on strategy apparently to increase fees, conduct deemed illegal by the FTC.⁷ In *Aurora Associated Primary Care Physicians*, a consultant compiled a "Confidential AAPCP Play Book" in which the consultant advised physicians how to leverage their collective strength to get higher fees from payors.⁸ In *The Maine Health Alliance*, the network's lawyer and business agent sent a letter to the payor demanding that the payor retract its offers for direct contracts with network physicians, notify the physicians that the network's contract with the payor governs the relationship between the physicians and the payor, and "return, marked void, to the physicians any contract executed by the physician" in response to the payor's offer.⁹ The incorrect advice of outside advisors had serious adverse consequences for the associations as well as the individuals providing the advice. It is critical that networks select experienced and knowledgeable outside advisors and that outside advisors understand that the FTC will hold them accountable for the advice they give.

Importantly, recent signals from the FTC and DOJ indicate that the consequences for such anticompetitive conduct could increase. Deborah Majoras, Deputy Assistant Attorney General, DOJ, stated that, if the Antitrust Division finds

healthcare businesses engaging in explicit collusion on fees or market division, it will consider prosecuting such conduct criminally.¹⁰ Furthermore, the Antitrust Division has established a procedure whereby the FTC, which lacks the power to prosecute criminally, can refer any such cases of explicit collusion or market division to the Antitrust Division's National Criminal Enforcement Section.

It should be clear to everyone associated with non-integrated IPAs and PHOs, whether as a member or an outside advisor, that the advice of experienced counsel is critical to ensuring that the network's structure and conduct fall within the guidance provided by the FTC and DOJ. The antitrust laws are complex, and compliance is difficult. Payors know the law and are actively reporting representatives of non-integrated IPAs and PHOs who cross the line. Individual consequences for involvement with an IPA or PHO that engages in prohibited joint negotiations are serious. Those affected by the increased scrutiny by the FTC and DOJ should take steps to obtain the guidance necessary to avoid the embarrassment of an investigation, potential civil sanctions, or even criminal prosecution.

* Tom Baker is Chairman of the Troutman Sanders Health Care Practice Group. He has a national corporate and business transactions practice that is concentrated in representing a wide variety of clients in the healthcare industry. His health law practice includes advice regarding organization, mergers, acquisitions, and financing as well as specialized advice regarding managed care contracting, Corporate Compliance Plans, Medicare reimbursement, fraud and abuse, licensure, and certificates of need. June Ann Sauntry is a partner in the Litigation section and head of the Antitrust practice. Ms. Sauntry's principal practice area is antitrust, including civil and criminal litigation, business counseling and compliance programs, mergers and acquisitions, and dealing with federal and state agencies. James R. Paine (Jim) is an associate with the Health Care and Corporate practice groups in the Atlanta office of Troutman Sanders LLP. Jim graduated from the University of Florida with his B.S. in 1997, his M.B.A. in 1999, and his J.D. in 2001. Jim represents healthcare organizations with formation and capitalization, sale and acquisition of equity and assets, and the negotiation and drafting of various agreements including licensing, consulting, management, and distribution agreements. Jim also regularly advises clients on compliance with HIPAA, Stark, Medicare Anti-Kickback Statute, EMTALA, and other state and federal laws.

¹ "The Feds are cracking down against 'price-fixing' by doctors. A top enforcer explains how and the AMA's president-elect responds," Wayne J. Guglielmo, Senior Editor, Medical Economics, www.memag.com (May 9, 2003).

² Department of Justice and Federal Trade Commission Statements of Antitrust Enforcement Policy in Health Care—Statement 9, "Statement of Department of Justice and Federal Trade Commission Enforcement Policy on Multi-Provider Networks."

³ *Piedmont Health Alliance, Inc.* (complaint issued Dec. 24, 2003).

⁴ *Physician Network Consulting, L.L.C.*, C-4094 (consent order issued Aug. 27, 2003).

⁵ *The Maine Health Alliance*, C-4095 (consent order issued Aug. 27, 2003).

⁶ *Carlsbad Physician Association*, C-4081 (consent order issued June 13, 2003).

⁷ *R.T. Welter & Associates, Inc.*, C-4063 (consent order Oct. 8, 2002).

⁸ *Aurora Associates Primary Care, L.L.C.*, C-4055 (consent order issued July 16, 2002).

⁹ *The Maine Health Alliance*, C-4095 (compliant issued July 18, 2003).

¹⁰ Health Care and Competition Law and Policy Workshop, FTC, Washington, D.C., Sept. 9, 2002.

Health Lawyers Weekly © 2004 is published by the [American Health Lawyers Association](#). All rights reserved. No part of this publication may be reproduced in any form except by prior written permission from the publisher. Sharing passwords is also prohibited.

[Return to Current Issue](#)

[Top of Page](#)