

Health Law Alert

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FTC Provides Guidance For Independent Practice Associations

In a November 29, 2005 opinion, the Federal Trade Commission ("FTC" or "Commission") unanimously held that North Texas Specialty Physicians ("NTSP"), an association of approximately 480 independent physicians in the Fort Worth, Texas area, illegally fixed prices in negotiations with insurance companies, health plans and other payors for non-risk sharing contracts.¹ The FTC opinion, written by soon-departing Commissioner Thomas B. Leary, affirmed a November 2004 ruling by Administrative Law Judge D. Michael Chappell, with some modifications. The FTC ordered that NTSP cease and desist its illegal conduct and terminate pre-existing contracts with payors for physician services. However, in so doing, the Commission went out of its way to provide guidance for independent practice associations ("IPAs") concerned with possible antitrust liability. The decision highlights the care that even legitimate physician associations must take in structuring their relationships with payors.

Alleged Misconduct

According to the FTC, NTSP negotiated and reviewed contract proposals for the services of its members, reviewed payment issues, and acted as a lobbyist for the interests of its members. NTSP had negotiated both risk-sharing contracts (where doctors are typically reimbursed on a dollar-per-patient basis) and non-risk sharing contracts (which provide "fee-for-service" payments). However, the FTC's challenge

involved only NTSP's negotiation of non-risk sharing contracts.²

According to the FTC, in negotiating non-risk sharing contracts, NTSP engaged in conduct designed to enhance the collective bargaining power of its members in a way that affected payment levels in those contracts. For example, NTSP polled its individual members regarding the minimum price each would accept from a private payor and then shared the results of these polls with its members. Further, the Commission found that NTSP's agreement with its members gave NTSP the right of first negotiation with payors and inhibited independent negotiations by individual physicians. NTSP also refused to accept and refused to forward to its member physicians payor offers that NTSP's management deemed unacceptable.

Historical Context

The FTC's antipathy towards the conduct described above is not new. The Commission has issued numerous administrative complaints in the past decade seeking to prevent conduct similar to NTSP's — coordinated bargaining by groups of competing physicians. Instead of litigating these charges, IPAs have typically entered into consent orders whereby they voluntarily agree to alter their business practices. NTSP, however, declined to enter into a consent order and elected instead to litigate the case before the FTC in the first administrative trial of a physician association case in over 20 years. Accordingly, the FTC used the case as an opportunity to provide guidance to the health care community on the proper bounds on collective negotiation by physicians.

¹ The FTC's full, 41-page opinion is available at <http://www.ftc.gov/os/adjpro/d9312/051201opinion.pdf>. The FTC's order can be found at <http://www.ftc.gov/os/adjpro/d9312/051201opinion.pdf>.

² With respect to risk-sharing contracts, the FTC and the Department of Justice have already issued detailed guidance for how such contracts can be structured so as not to run afoul of the antitrust laws. See U.S. Dep't of Justice & Fed. Trade Comm'n, *Statements of Antitrust Enforcement Policy in Health Care* (1996), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,153 and available at <http://www.ftc.gov/reports/hlth3s.htm#5>.

The Opinion

In its opinion, the FTC emphasized that it wants to “encourage providers to engage in efficiency-enhancing collaborative activity.” The FTC did *not* decide that NTSP engaged in *per se* illegal conduct, a method of antitrust analysis that does not take possible justifications into consideration. However, in examining NTSP’s conduct under the “inherently suspect” analysis of *Polygram Holding, Inc. v. FTC*,³ which dispenses with an elaborate inquiry into market effects, the FTC concluded that NTSP’s activities, taken as a whole, amounted to horizontal price fixing unrelated to any procompetitive efficiencies. The *Polygram* approach does allow for consideration of legitimate justifications for inherently suspect practices. At the same time, the *Polygram* approach dispenses with proof of market definition and market power, thereby significantly easing the government’s burden of proof at trial.

The Commission concluded that NTSP’s contracting activities with payors “amount[s] to unlawful horizontal price fixing.” The opinion states that, through a variety of mechanisms, NTSP orchestrated price agreements among its physicians. The Commission found that the evidence “shows not only negotiation activity in aid of a collective agreement on a minimum fee schedule, but also specific enforcement mechanisms — such as the powers of attorney and collective withdrawal from payor networks — in order to coerce agreement from payors.” Viewed as a whole, the Commission concluded, these actions “leave no doubt that the overriding purpose behind NTSP’s conduct was to fix prices.”

The FTC rejected NTSP’s argument that NTSP is a “sole actor” unable to conspire with itself when it negotiates on behalf of the competing physicians who control it. The FTC held that when an association, controlled by a group of competitors, “negotiates prices for services that the *members* will provide, the organization’s conduct is considered to be that of a combination or conspiracy of its members, not unilateral action.” Applying the “hub-and-spoke” conspiracy analysis of *Toys “R” Us*,⁴ the FTC held that the member physicians conspired to fix prices through NTSP even though they did not communicate directly with one another.

Guidance for IPAs

Recognizing the “frustration of many physicians over their perceived lack of bargaining power in negotiations with large health care payors,” the Commission dedicated part of its opinion to giving guidance on what conduct would *not* run afoul of the antitrust laws. As the FTC explained: “We would view NTSP’s activities very differently if NTSP were

able to demonstrate that the participating physicians were financially or clinically integrated in performing its numerous non-risk contracts, and thus driven by incentives similar to those present in its single remaining risk contract.” According to the FTC, NTSP “could have prevailed if the integrated venture were likely to enhance efficiencies and NTSP’s conduct were reasonably related to the overall agreement and reasonably necessary for achieving those efficiencies.”

The FTC also identified various lawful ways an IPA like NTSP could actively operate as a contracting network even without clinical or financial integration:

- member physicians could provide the IPA with current price information for a purpose unrelated to the establishment of prices, *e.g.*, physicians could agree collectively, through the association, to jointly adopt an electronic billing system that would permit them to run their offices more efficiently. The practice would not be suspect under the antitrust laws if there were sufficient safeguards to shield the billing rates of individual physicians from IPA members;
- the IPA could poll its members on future fees in order to inform payors regarding the fee levels acceptable to a majority of the association’s physicians, provided that:
 - (1) results of the poll are not communicated to the physicians in any manner;
 - (2) the IPA messengers all payor offers to the physicians, regardless of how many physicians are likely to accept the offer based on the poll results; and
 - (3) the IPA does not use the polling results to negotiate price with payors;
- the IPA can charge a reasonable transmittal fee to cover its contract administration costs as a condition to messengering contract offers with rates below the level a threshold percentage of the IPA’s physicians are likely to consider acceptable based on the IPA’s polling data;
- the IPA can act as a messenger so long as it adheres to the legal standards summarized in the FTC/DOJ’s *Health Care Statements*. The Commission explained that “the key to a lawful messenger model is that the IPA must be willing to messenger *all* payor offers, and refrain from any activity that amounts to influence over physicians, negotiations on their behalf and coercion of payors”;

³ 416 F.3d 29 (D.C. Cir. 2005).

⁴ See *Toys “R” Us, Inc. v. FTC*, 221 F.3d 928, 934-36 (7th Cir. 2000).

- the IPA can review and comment on non-economic terms of a contract; and
- the IPA can utilize powers of attorney or agency agreements in a manner that does not facilitate a price-fixing agreement. For example, a power of attorney could authorize the IPA to enter a contract on behalf of a physician when a physician's stated price minimum and other terms are met, so long as the IPA does not attempt to influence those key terms, or use powers of attorney to negotiate with a payor.

In presenting its examples of acceptable conduct, the FTC differentiated NTSP from *MedSouth, Inc.*⁵ and *California Pacific Medical Group*,⁶ two instances in which advisory opinions were issued by Commission staff permitting joint negotiations because of those entities' significant clinical integration. The Commission noted, for example, that "NTSP has no disease management program or patient register that would improve health care quality . . . NTSP has no data for patients under its fee-for-service contracts, and NTSP's hospital utilization management program does not apply to patients under its non-risk contracts."

Conclusion

The Commission's decision that NTSP engaged in price fixing is not surprising, given the history of enforcement actions that the FTC has consistently brought against physician groups in similar circumstances. What is most important about the decision is what the Commission said would *not* run afoul of the antitrust laws. The FTC has stated that it wants to encourage providers to engage in efficiency-enhancing collaborative activity when they intend to negotiate contracts that do not incorporate risk-sharing or significant clinical integration among the providers. To that end, the FTC's decision in *NTSP* gives IPAs a roadmap for how to engage in such activity without engaging in price fixing.

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⁵ See FTC staff advisory opinion letter of February 19, 2002, available at <http://www.ftc.gov/bc/adops/medsouth.htm>.

⁶ See FTC staff advisory opinion letter of April 5, 2005, available at <http://www.ftc.gov/os/adjpro/d9306/050405cpbresponsetbnotice.pdf>