



Joint Price Negotiations



By Glenn Stover

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An FTC Advisory Opinion spells out more details on how "clinical integration" might avoid anti-trust problems.

Under the antitrust laws, physicians cannot ordinarily negotiate fees jointly unless they work together in a fully integrated group practice or they jointly contract under the auspices of an IPA that accepts financial risk through capitation, withholds or a similar "risk bearing" structure.

In 1996, the antitrust authorities hinted that a new mechanism called "clinical integration" might allow otherwise independent physicians to engage in joint price negotiations. Until recently, there were no clear examples of "clinical integration."

A Federal Trade Commission ("FTC") Advisory Opinion issued last year in the matter of MedSouth, Inc. sheds light on the circumstances in which semi-integrated physician groups may negotiate jointly with payors in setting fee-for-service reimbursement rates.

The text of the Opinion can be found at www.ftc.gov/bc/adops/medsouth.htm

MedSouth is a combined general practice and multi-specialty IPA serving patients in the southern suburbs of Denver. It had capitated contracts with area payors, which it found unremunerative and terminated. MedSouth decided to implement an extensive "clinical-integration system" and asked the FTC for an Advisory Opinion on whether this would justify the group negotiating jointly with payors.

Although extensively hedged, the Advisory Opinion gives a cautious "go ahead" to the joint negotiations, once the clinical integration system is completed and implemented.

MedSouth's "Clinical Integration"

At the heart of the system is web-based, computerized access to patient treatment records, allowing primary care and specialist doctors to coordinate patient care more easily. Included is online ordering of prescriptions, and the ability to check on patients' filling of the prescription.

The system permits and facilitates the production of detailed reports on treatments prescribed for certain diagnoses, trends in test results as a result of differential treatments, and other reports useful in guiding treatments.

Coupled with the information system is a program of clinical protocols covering the majority of diagnoses which the group's doctors encounter, together with measurable performance goals relating to quality and utilization. MedSouth monitors member physicians' adherence to the protocols and achievement of the performance goals, counsels doctors who may not fully implement the protocols and, in extreme cases, expels doctors that consistently fail to do so.

The system required a large capital outlay to develop and implement computer systems. A group Medical Director was hired and a Clinical Integration Committee appointed to carry out the monitoring, counseling and discipline functions.

The FTC's MedSouth Opinion suggests that, in the case of nonexclusive groups (whose non-exclusivity can be affirmed by evidence of actual individual contracting), an extensive and rigorous system of clinical integration — involving an appreciable financial investment in technology and a considerable human investment in disciplinary processes — can sometimes serve as the substitute for what are now conventional measures of risk-sharing.

Five Caveats

The opinion places five key caveats on its approval of joint price negotiations by the MedSouth group: First, the FTC demands "rigorous and effective implementation" of the program. Second, the computerized system for sharing data, automating certain clinical functions, and producing reports would not be enough, standing alone, to immunize the group from prosecution for price-fixing. The monitoring, counseling and disciplinary programs are, to the FTC, essential to the efficiency enhancements necessary to justify collective price setting.

A third caveat is full participation by all physicians who would be represented in the collective price negotiations; the implication is that the group must exclude from any joint negotiations any doctor who declines to implement the program fully.

A fourth condition is actual individual contracting by group physicians with area payors. The Opinion notes that, even though the group's proposed Agreement explicitly permits doctors to contract individually with payors for fee-for-service payment, the doctors will have an incentive, and the ability, to refuse to enter into such individual contracts. In effect, the FTC requires evidence that doctors are actually engaging in such contracting in order to give the group's joint price negotiations a clean bill of antitrust health.

Finally, the Opinion notes the difficulty of getting physicians to change their medical practices in response to initiatives like clinical integration. Should the FTC not find an (undefined) adequate level of compliance with the system's performance goals, the yellow light given to collective price negotiation would switch to red.

The MedSouth model potentially provides another avenue for physicians who wish to retain some independence to negotiate jointly with payors and survive antitrust scrutiny.

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