The cost of confusion: Trying to decipher FTC’s rules on negotiation

More than two dozen physician organizations have settled antitrust cases with the commission in the past four years. Doctors say guidelines on joint arrangements are unclear.

By Amy Lynn Sorrel, AMNews staff. Nov. 6, 2006.

Family physician Elizabeth Gallup, MD, thought she had followed all the government rules when in 2002 she joined her Kansas City-area independent practice association’s forces with those of another local IPA to negotiate jointly with health plans.

The physician organizations established a medical management committee, which reviewed doctors’ practice habits and issued report cards. The IPAs thought this effort would show that they were integrated -- a Federal Trade Commission requirement.

But the FTC disagreed and in August issued an antitrust complaint accusing them of price-fixing. The physician organizations didn’t have the finances to fight the challenge, and ultimately both disbanded.

“It’s always a risk when physicians negotiate as a group,” said Dr. Gallup, former president of one of the IPAs, New Century Health Quality Alliance Inc. “You think you’ve done everything right, and you haven’t.”

Dr. Gallup’s case is one of about 28 actions against physician entities for anticompetitive conduct that the FTC has brought since 2002. All but one resulted in a settlement. That group has appealed the FTC’s charges -- the first appeal in more than 20 years.

Many doctors argue that the government’s guidelines are hazy on how to integrate without running afoul of antitrust laws. They say the FTC road map gives them little direction, while leaving them at risk for a lot of legal trouble.

The government standards “help shape some of the parameters” for joint negotiation, said Markus H. Meier, assistant director in the health care services and products division of the FTC Bureau of Competition. “But I’ll admit it’s a high standard, because allowing people to jointly set prices is not pro-competitive to begin with.”

This conflict between the two sides doesn’t appear to be headed toward resolution. At a Senate Judiciary Committee hearing in September, the FTC and the Dept. of Justice, which both enforce antitrust matters, recently reiterated their stance that more competition improves health care quality and cost and that physician collective bargaining would hurt competition.

Organized medicine “has been very disappointed that the response of federal antitrust enforcement agencies to rising health care costs has been to devote an inordinate amount of resources to ‘finding and bringing’ cases against physicians -- the least consolidated component of the health care industry,” said Edward L. Langston, MD, chair-elect of the American Medical Association Board of Trustees.

Meanwhile, the government tends to ignore the role of managed care in the market when evaluating
whether physicians’ joint activity is having an anticompetitive effect, Dr. Langston added.

The AMA has lobbied for legislative reforms that would permit physician groups to negotiate effectively with insurers without facing antitrust violations. The federal government has consistently rebuffed those efforts, saying they would lead to increased health care costs.

Antitrust laws generally prohibit individual doctors from getting together to set the fees they charge insurers. But joint statements issued by the FTC and the Justice Dept. in 1996 and 2004 outlined two ways that physicians can get together in legitimate joint ventures: through financial integration with risk-sharing agreements or through clinical integration.

The government says joint activity typically will pass antitrust muster if it can demonstrate substantial efficiencies, such as lower prices or better quality services, that will be passed on to patients. Joint negotiation also must be reasonably necessary for the group to reach those goals.

“It’s actually got to be something that has the potential of being of value,” Meier said. “The question is, how often do you see doctors doing this?”

Not very often, according to the government. But many doctors say the government has set the bar so high that it is difficult to innovate, leaving little recourse when contracting with dominant insurers. They say the odds are stacked against them, and what they believe to be “following the rules” often has proved costly, legally and financially.

“The government starts from the premise that doctor groups are primarily organizing for the purpose of enhancing prices,” said Gregory R. Piche, a health care lawyer and partner at Holland & Hart in Denver.

To get past this hurdle, the joint arrangement among physicians must create efficiencies that couldn’t be accomplished by a single practice, he said. The government also looks at the percentage of market share the organization might have in the area and how its prices compare with what other doctors are paid for the same services.

“The degree of integration is not very well understood, and if [doctors’] prices are high, it’s hard to suggest that there is a pro-competitive aspect to their organization,” Piche said.

No one to share risk

Another problem with the government’s guidelines, doctors say, is that financial risk-sharing arrangements are not much of an option because many payers have stopped offering risk contracts in favor of fee-for-service or preferred-provider agreements.

“I don’t think it’s difficult, I think it’s impossible” to meet government antitrust standards, said New Century’s Dr. Gallup.

In addition to price-fixing, the complaint against New Century and its partner, Prime Care of Northeast Kansas LLC, alleges that the combined network’s 127 primary care physicians refused to deal with Humana and other health plans regarding fee-for-service contracts, except on collective terms. The government also charged the doctors joined under the IPAs’ umbrella to increase their bargaining power to keep original risk contracts.

The FTC said the IPAs represented about 50% of Humana’s primary care network and used that clout to coerce the plan into accepting its demands. According to the FTC, the doctors’ joint activity “was not reasonably related to any efficiency-enhancing integration that benefits consumers.”
Dr. Gallup disagrees. She said New Century had been created with quality and cost goals in mind and carefully crafted along the FTC’s safe harbors. The group had a 50% risk contract with Humana for five years. Humana approved its medical management committee’s processes on a yearly basis, she added.

“Instead of there being a huge disparity, we brought doctors together in practicing alike, and as an offshoot, there was money saved and quality improved,” Dr. Gallup said. “In negotiating with Humana, all we asked was that they continue signing up the IPA as a group, as they had for the five previous years.”

The doctors entered into a consent decree with the FTC that prohibits them from facilitating any agreements together, but they admitted no wrongdoing. Since then, doctors have moved to individual contracts with Humana for lower reimbursement because “the only other recourse would be to drop out of the [health plan] network,” she said.

**Uphill battle**

Physician organizations that choose to take on an unfavorable FTC ruling face an uphill battle in the appeals process, which goes through a judge appointed by the FTC and then the full commission.

“Usually people give up because it costs so much to fight it, and the process is not really fair,” said Rocky Wilcox, general counsel of the Texas Medical Assn. The TMA, joined by the AMA/State Medical Societies Litigation Center, filed a friend-of-the-court brief supporting North Texas Specialty Physicians, which, for three years, has fought an FTC ruling. The case is now before the 5th U.S. Circuit Court of Appeals.

The FTC charged the Texas group with price-fixing in 2003. It alleged that the IPA had conspired to set minimum fees when negotiating non-risk contracts with health plans for its members, which numbered about 600 physicians at the time. An administrative law judge ruled against the doctors in their 2004 appeal, and the commission upheld that decision in 2005. The agency concluded that there was “no doubt that the overriding purpose behind NTSP’s conduct was to fix prices.”

The physicians say the FTC’s strict analysis of joint ventures does not permit them to show the pro-competitive benefits of their activities.

“The difficulty is that the guidelines are not broad enough to allow the physician innovation that needs to be allowed if health care is going to improve,” said Gregory S.C. Huffman, the attorney representing the IPA and partner at Thompson and Knight in Dallas.

He said the IPA did not preclude payers from contracting with member doctors individually. The group’s negotiation of prices for non-risk contracts was not price-fixing, because the quality and cost efficiencies from the risk side of the business benefited all patients, he said. But the group was prevented from gathering evidence to show that.

Thomas M. Deas Jr., MD, the group’s board chair and medical director, summed up the IPA’s attitude. “We are frustrated that the FTC is trying to block the spillover of these improvements into treatment of other patients,” said Dr. Deas, a Fort Worth, Texas, gastroenterologist.

**Rare stamp of approval**

Since the government issued its 1996 statements on health care competition, the FTC has approved only two clinically integrated networks. Doctors say this is a testament to their rarity and the confusing nature of the rules.

One of those advisory opinions was issued in 2002 when the FTC gave the green light to Denver-
area MedSouth. The IPA touts two main features to help improve quality: clinical guidelines across all specialties and an electronic medical records system that connects its 280 physician members through the Internet.

Member doctors can contract with health plans independently or with insurers other than those chosen by the IPA.

“Our goal was if we provided better care, we would be compensated for that,” said internist Ellen M. Burkett, MD, MedSouth’s clinical director. “A lot of people have called us to get a quick fix, and this is something that has substantial effort involved,” she said. It took about two years to get the program off the ground and $100,000 to get past the FTC, she noted.

The cost of establishing and maintaining a program like MedSouth’s may be beyond the means of the average physician practice, said the group’s attorney, John J. Miles.

And MedSouth is still not out from under the FTC’s shadow. “What the FTC said was, given the plan, it would not be an automatic violation per se, but there was concern it might have such a large percentage of physicians that it could exercise market power,” Miles said.

Compared with MedSouth, a number of integrated physician groups may include a quality component, but it’s typically loose and not enforced, he warned.

To stay out of legal trouble, Miles said, doctors should be aware of antitrust risks and get legal counsel if they are considering integration. “And make sure they are doing it for the right reason: simply getting together and aggregating to increase reimbursement is not the right reason.”

ADDITIONAL INFORMATION:

Antitrust 101

The government says antitrust laws are meant to protect competition in the health care market and prohibit doctors from negotiating jointly with health plans except:

- If the joint venture will generate significant cost efficiencies and quality improvements that cannot be obtained individually, AND
- If joint negotiation is necessary to achieve those efficiencies.

Federal authorities say they will not challenge cooperative physician ventures if they show “substantial” efficiency in one of two ways:

- Financial integration, through risk-sharing agreements.
- Clinical integration, through an ongoing practice evaluation program and a high degree of interdependence and cooperation.

Regarding clinical integration, the FTC and the Justice Dept. in a 2004 report outlined some questions the agencies are likely to ask when analyzing a physician joint venture:

- What do the physicians plan to do together from a clinical standpoint?
- How does this differ from what each physician already does individually?
• How do the physicians expect to accomplish these goals?
• What results can reasonably be expected from undertaking these goals?
• What does joint contracting with payers contribute to accomplishing the program’s clinical goals?
• Is joint pricing reasonably necessary to accomplish these goals?

If doctors are considering integration, they should:

• Make sure a market exists for whatever “product” the network is selling.
• Weigh the antitrust risk seriously.
• Get legal counsel.

Sources: American Medical Association, Federal Trade Commission