

MEDSOUTH: FTC Advisory Opinion February 19, 2002

A physician IPA located in Denver, Colorado.

- MedSouth is a non-exclusive network, so its participating physicians are able to contract with payors on an individual basis.
- FTC stated “As long as MedSouth’s physician members actually are available and willing to contract individually with payors who prefer not to contract with the network, at prices that do not reflect the aggregate power of the group, or its membership is at a level where the network physicians are unable to exercise significant market power, implementation of the arrangement is not likely to endanger competition unreasonably”.
- FTC will monitor MedSouth’s activities.

Facts

- MedSouth includes approximately 432 physicians in 216 practices. 101 of the physicians are primary care physicians – 331 are specialists in 39 specialties and subspecialties.
- Until 2000, MedSouth had capitated risk contracts.
- MedSouth now wants to enter into fee-for-service contracts with payers.
- MedSouth’s physicians and its consultants in conjunction with a health care information technology provider has developed a program that has two major parts:
 - (1) a web based electronic clinical data record system that enables MedSouth physicians to access and share clinical information relating to their patients;
 - (2) the adoption and implementation of clinical practice guidelines and performance goals relating to quality and appropriate use of services provided by MedSouth physicians.
- All physicians contracting through MedSouth are required to participate in these activities.
- MedSouth claims its program will improve and standardize members’ treatment of specific diagnoses and reduce errors and improve patient care outcomes; permit its

members to provide their services more efficiently and to reduce aggregate long-term cost of physician services; and demonstrate to payors, employers and others that the integrated and coordinated delivery of services by primary care and specialist physicians can improve the quality and delivery of physician services.

- The web-based clinical data record system is intended to permit MedSouth members rapidly to access and exchange clinical information relating to patients, including lab and radiological reports, transcribed patient records and office visit information, treatment plans, and prescription information.
- The system can aggregate data from multiple doctors to show for example, the trend of results on tests done at different times and places.
- Each practice is required to acquire the hardware necessary to use the system.
- MedSouth is developing: (1) clinical protocols covering the majority of MedSouth physicians' patient population; and (2) measurable performance goals, relating to the quality and appropriate utilization of services. The IPA will secure members' commitment to adhere to protocols in their office and hospital practices; review the performance of MedSouth physicians both individual and collectively with goals; assist members in meeting goals; and, if necessary, expel physicians who cannot or will not meet the goals.
- Clinical protocols were selected based on a review of local and national guidelines and assessment of the diagnosis encountered by MedSouth physicians. Each protocol will be reviewed periodically. MedSouth estimates that protocols will cover 80%-90% of the diagnosis that are prevalent in its physicians' practices.
- All MedSouth physicians will receive training on implementation of guidelines relevant to their practices, and on the reporting requirements of each one.
- Network utilization and quality goals or benchmarks are being developed on the clinical protocols. Under development is a computer based infrastructure that will permit a committee to collect and analyze information on individual physicians' performance, and on the performance of the network as a whole.
- MedSouth will employ a Medical Director and necessary staff to implement the program.
- The Medical Director and a Clinical Integration Committee will meet with any physician whose performance is deficient with reference to established benchmarks, and develop a correction plan that the physician must agree to implement.

Negotiation of Contracts

- IPA will seek to negotiate price and other contract terms on behalf of physician members.
- It will hire a consultant to develop fee proposals to use in contract negotiations. A Consultant may gather fee information from member physicians but will not disclose

sensitive fee information received from MedSouth physicians to other physicians in the network.

- MedSouth will offer its members' services as a "package", but the network will actually be non-exclusive. The MedSouth Physician Participation Agreement will specifically state that physicians are not precluded from participating in other physicians' organizations, or from contracting with payors independently. Payers not wishing to purchase the network services will be able to contract with MedSouth physicians individually. MedSouth physicians will be advised by legal counsel that they may not reach agreements or understandings with competing physicians in the IPA to contract only through MedSouth, or exchange information about their fees or contracting strategies other than as they relate to MedSouth.

FTC Analysis

- Joint negotiation of price terms by non-integrated competing physicians would be illegal per se.
- Per Se treatment is inappropriate, however, and more elaborate analysis under Rule of Reason is warranted when joint negotiation of price is reasonably related to efficiency enhancing integration, and is reasonably necessary to achieve the pro-competitive benefits of the integration.
- FTC stated MedSouth's proposed course of conduct described in the information it supplied should not be accorded per se treatment but accorded Rule of Reason analysis. The program in which MedSouth is engaged appears capable of creating substantial partial integration of the participating physicians' practices, and to have the potential to produce efficiencies in the form of higher quality or reduced costs.
- The collective negotiation must be reasonably necessary to accomplish the goals of the integration. FTC concluded that in the case, the joint negotiation of contracts for services to be provided appears reasonably related to the integration.
- In spite of MedSouth's explicit policy of non-exclusivity, MedSouth members may have the incentive and the ability to agree not to contract independently of the venture. Negotiation of fee-for-service rates for the group services may lead to collusion on individual contracts. FTC stated that it will monitor MedSouth's operations and the behavior of its physicians for indications that the conduct is resulting in anticompetitive behavior.

Summary

JOINT NEGOTIATION IS ONLY PERMITTED TO EXTENT IT RELATES TO CONTRACTING WITH PAYORS THAT SEEK TO PURCHASE THE NETWORK INTEGRATED "PACKAGE". JOINT NEGOTIATION IS STILL NOT PERMITTED AS IT RELATES TO PHYSICIANS CONTRACTING ON AN INDIVIDUAL BASIS OUTSIDE OF THE NETWORK INTEGRATED "PACKAGE".

