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Physician Antitrust Update: Fifth Circuit Affirms FTC's Decision in *North Texas*

Three years after the Federal Trade Commission (FTC) ruled that the *North Texas Specialty Physicians (NTSP) independent practice association (IPA)* was engaging in *illegal price-fixing*,[1] the Fifth Circuit Court of Appeals affirmed the decision, stating that negotiation (on behalf of physician members) that doesn't involve risk sharing with payors or any form of improved efficiency arising out of clinical integration, runs afoul of *antitrust laws*.[1] The FTC originally examined the NTSP arrangement under a "*quick-look*" analysis. Under such an analysis, if the FTC finds that there is *inherently suspect conduct*, the respondent must then provide a *procompetive business justification* for the conduct. In this case, NTSP's joint contracting activities neither saved money nor improved quality, leading the FTC to the conclusion that they constituted illegal price-fixing under Section 1 of the Sherman Antitrust Act.

NTSP is not the first, and is unlikely to be the last, IPA that has faced antitrust scrutiny and has been found to be in violation. Traditionally, IPAs have been able to negotiate on behalf of their members if the joint-contracting agreement has an element of risk-sharing built into it, or if the IPA has embarked on a clinical integration scheme to improve efficiency among its members (and even under this latter exception, only two clinically integrated IPAs have successfully survived antitrust challenges).[1] The significance of the NTSP decision for future IPA activities is the FTC and the Court's interpretation of the IPA's use of the "*messenger model*", which NTSP used to poll members to find out minimum fees they would accept before negotiating with insurers.[1] The "*messenger model*" has traditionally been a way for physician networks to use a single agent to relay contract information between the group and a payor, but has never allowed the group to set contract terms or negotiate on behalf of the group. NTSP argued that there are actually "*spillover*" effects from previous risk-sharing contracts that helped improve quality, and that the FTC failed to consider these "*spillover*" effects carefully enough when making its decision..

Even though the Fifth Circuit affirmed the FTC's decision as a whole, the Court did rule that the portion of the decision in which the FTC prohibited NTSP from facilitating any contract negotiations on behalf of its members was overbroad. While there is a delicate balance between the ability of IPAs to facilitate easier negotiations between member physicians and payors and activity that verges on being anticompetitive, it is important for physicians to be able to negotiate with payors, particularly in those instances in which physicians face a disproportionate disadvantage against "*large, sophisticated payors*".[1] In order to combat this disadvantage at the bargaining table, physicians have to hope that joining an IPA will help bolster their negotiating leverage, and critics of the decision argue that it is "*likely to prevent doctors from trying to come up with efficient and innovative ways of coming together to practice medicine*."[1]

NTSP is considering appealing the Fifth Circuit decision, which may or may not get a court to look at the clinical efficiencies that it argues are present. Regardless of what happens in this particular case, the important lesson for other IPAs to take away is that the more obscure the procompetitive benefits of an IPA's joint-contracting practice are, the less likely it will be able to withstand antitrust scrutiny.

[1] "Opinion of the Commission: In the Matter of North Texas Specialty Physicians, a corporation," by Thomas B. Leary, Commissioner, Federal Trade Commission, Dec. 1, 2005, http://www.ftc.gov/os/adjpro/d9312/051201opinion.pdf (Accessed 6.30.08).

[1] North Texas Specialty Physicians v. Federal Trade Commission, 2008 WL 2043040 (5th Cir. 2008).

[1] *See* Letter from Jeffrey W. Brennan, Assistant Director, Federal Trade Commission Bureau of Competition, to John J. Miles, Law firm of Ober, Kaler, Grimes & Shriver, *Staff Advisory Opinion: MedSouth, Inc.,* February 19, 2002, http://www.ftc.gov/bc/adops/medsouth.shtm (Accessed 4.18.08); Letter from Markus H. Meier, Assistant Director, Federal Trade Commission Bureau of Competition, to Christi J. Braun and John J. Miles, Law firm of Ober, Kaler, Grimes & Shriver, *Greater Rochester Independent Practice Association, Inc., Advisory Opinion,* September 17, 2007, http://www.ftc.gov/bc/adops/gripa.pdf (Accessed 4.18.08).

[1] "Texas IPA's contract talks are price-fixing, appeals court rules," By Amy Lynn Sorrel, AMNews, June 23/30, 2008, http://www.ama-assn.org/amednews/2008/06/23/gvsc0623.htm (accessed 6.30.08).

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