

STRATEGIC

MANAGEMENT

*The Newsletter for
Hospital Strategists*

Volume 20, Number 3

March 2002

ANTITRUST

Messenger models still are antitrust problems for providers

By Michael R. Bissegger, J.D.

Considerable attention and publicity has surrounded the recent proposed consent agreement between the Federation of Physicians and Dentists ("Federation") and the United States Department of Justice ("DOJ").

The settlement agreement reflects the DOJ's belief that the physicians had engaged in improper joint negotiation with managed care companies. It imposes standard compliance requirements on the federation that will allow the DOJ to verify the federation's compliance with the antitrust laws for several years.

A messenger model is an agreement among providers to appoint or engage an individual or entity (the messenger) to facilitate communication between individual physicians and managed care plans during contract negotiations. It does not allow the messenger to engage in negotiations or otherwise act as the agent of a physician or managed care plan.

Unfortunately, much of the publicity incorrectly suggests that the proposed consent agreement represents a relaxation of antitrust rules applicable to the use of a messenger model and greater freedom for unintegrated providers to negotiate with payers jointly.

In reality, the proposed consent agreement provides no basis or support for any suggestion that the DOJ and/or the Federal Trade Commission (FTC) have relaxed the rules or their positions on the messenger model.

Far from relaxing the rules applicable to the messenger model, the terms of the proposed consent agreement reaffirm the existing rules and restrictions generally applicable to messenger model. Moreover, as is common with consent agreements, this proposed consent agreement places greater restrictions on the federation and its providers than they would face under generally applicable messenger model rules. The proposed consent agreement also demonstrates the continued commitment of the DOJ to challenging messenger models that it believes violate the antitrust laws.

The FTC and DOJ only enter into consent agreements as settlement of pending litigation against entities and individuals that the agencies believe have violated the antitrust laws. The DOJ had previously filed a complaint against the federation charging it with violations of the antitrust laws

and only entered into the proposed consent agreement with the federation to settle the litigation.

The federation's spin notwithstanding, the existing rules applicable to messenger models remain in force and every indication is that the DOJ and FTC will continue to enforce those rules vigorously. Whether or not the structure and/or operation of a particular messenger or similar model complies with the antitrust laws requires a factually specific analysis. However, remembering some "Dos" and "Don'ts" will help providers using a messenger or messenger-like model to avoid running afoul of the antitrust laws.

Do communicate individually with each provider.

Don't discuss or communicate with (or among) providers common issues or positions, or make subjective judgments about particular offers/contracts.

Do make clear to payors and providers that the messenger is a messenger, not a negotiator.

Don't prescreen or preauthorize offers, or make counter offers before submitting a payer's initial offer to providers. Moreover, don't tell or suggest to payers that an offer must/should meet certain criteria or reimbursement levels before it will be communicated to providers.

Do make clear to providers and payers that either one can bypass the messenger and communicate with the other party directly.

Don't advise providers to refuse to negotiate directly, or suggest to payors that they will fail or that their offer will be rejected if they bypass the messenger.

Do establish clear procedures for the messenger to follow and ensure that such procedures are in fact followed.

Don't just leave it all up to the messenger and assume that he or she will do it right.

Do have a messenger model structure and operation reviewed by competent antitrust counsel, both initially and periodically thereafter.

Don't assume that a particular messenger model structure and operation is fine just because the government has not knocked on your door—what you don't know can hurt you. ■
Michael R. Bissegger is an associate in the Washington, D.C. office of Epstein Becker & Green, P.C. Call 202-861-0900. mbissegger@ebglaw.com