

PUBLICATION

FTC Releases Follow-Up Opinion On Clinical Integration Of Provider Networks

Authors: Amelia W. Koch, Alexander M. McIntyre, Jr.

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In early 2002 the FTC issued its advisory opinion to MedSouth, Inc., a physician network joint venture in Denver, Colorado, concluding that MedSouth's clinical integration efforts were sufficient to justify collective pricing. This particular opinion was especially important, as it was the first to explore clinical integration in any detail, and the first approval of physician joint pricing based upon clinical, as opposed to financial, integration. (Notably, four years later the FTC issued another opinion to a purportedly clinically integrated network joint venture, this time rejecting the network's integration rationale as a justification for physician agreement on price. See FTC Advisory Opinion re: Suburban Health Organization, March 2006.) In its Opinion, however, the FTC warned that it would monitor the future of MedSouth, worried that unduly anticompetitive results would outweigh the proposed efficiencies.

On June 18, 2007, the FTC released its long anticipated follow-up to the 2002 MedSouth advisory opinion (the Follow-up). It seems the MedSouth network got it right, as the FTC "see[s] no reason at this time to rescind or modify" its earlier conclusions approving MedSouth's operations.

In the Follow-up, the FTC examined three general areas: 1) the extent of integration between and among MedSouth members due to MedSouth's operations, policies and procedures; 2) the extent to which the efficiencies initially proposed had been realized; and 3) whether MedSouth had market power or otherwise anticompetitively affected the market. As noted, MedSouth passed muster in all areas.

Of particular interest to the FTC were the mechanisms MedSouth had adopted to ensure cooperative interaction. These included establishing clinical guidelines to be followed (to the extent relevant to a particular physician's practice), which are periodically reviewed and updated. The network physicians are required to review and sign off on these guidelines. In addition, each year MedSouth reviews its performance and selects 10 practice guidelines to focus on in the upcoming year, with an effort to set ever-increasing performance goals for its physicians to meet. The physicians are given a yearly "report card" comparing their performance against the group, and MedSouth also has a major payer contract with significant "pay for performance" provisions, rewarding good performance of the network as a whole with individual financial bonuses. Further helping the integration process, MedSouth implemented an electronic information exchange system concerning practice performance, including required software and at least one computer dedicated solely to clinical use (i.e., not for billing or other office use).

Notably, MedSouth was able to report significant improvement in individual and group performance since its formation in 2002, consistently raising and meeting benchmarks and goals over that time. These practice improvements have been rewarded under the "pay-for-performance" program, with the payer taking an active role in deciding guidelines and performance goals, resulting also in modest fee increases over the last three years.

Finally, the FTC noted that MedSouth was a non-exclusive network, and that its membership had been reduced by a third over time. This was seen as a result of the required effort and commitment required of the physicians to work with the network, and underscored an absence of market power. Also of interest to the FTC was MedSouth's practice of using a third party contractor to collect individual fee information to be used in

developing MedSouth's fee structure during negotiations with payers, thus reducing or eliminating the opportunity for improper information exchange among the network physicians.

The MedSouth opinion shows (among other things) that there are circumstances which will justify joint pricing among physicians, and that clinical integration, if achieved, can result in important efficiencies and improvements in the delivery of health care services. The Follow-up, along with the original advisory opinion, also exemplifies the difficulties and burdens undertaken to achieve proper clinical integration. As the FTC understates: "Achieving such integration among otherwise independently practicing physicians is not simple, easy or costless." But it can be done.