Two years ago this column reported on a case the Federal Trade Commission brought against a large California physician organization charging that it was used by competing physicians to fix prices. The FTC alleged that:

- The physicians did not "share financial risk" in any manner sufficient to make them anything other than competitors.
- The organization did not monitor the physicians' practice patterns, impose utilization standards on them, or carry out other activities reasonably calculated to increase materially the efficiency of their clinical operations.
- The physicians had actually acted in concert through the organization to cancel their individual contracts with payers for preferred provider organization services which did not respond favorably to their attempts to set higher prices; and the physicians had thus actually fixed prices in violation of federal antitrust laws.

This column noted that if the case were not settled, the courts might tell the public in their ultimate resolution of the case what degree of "financial risk sharing" and "clinical integration" are really necessary for otherwise separate physician practice groups to act jointly in negotiating prices.

Physicians regularly want more precise answers to their persistent (and reasonable) question -- what is the minimum amount of "merging" which their practice groups must carry out in order to act together in setting prices? They want to maintain as much independence as possible, and they note that they are small, the payers are large, and they have little leverage in negotiating separately the prices they will charge.

The California case settled. It led to no definitive statement from the courts. Other actions the federal antitrust authorities have brought in similar situations also regularly settle, with the physicians not conceding guilt but entering into a consent decree that on its face leaves obscure exactly what caused the enforcement action and what will happen next.

Publicly available information is, nevertheless, revealing more each year about the enforcement agencies' view of what is necessary to avoid penalties for price fixing.
The Federal Trade Commission and the Antitrust Division of the U.S. Justice Department have issued and refined guidelines stating that a wide variety of risk sharing arrangements and methods of partial clinical integration may be sufficient for physicians maintaining otherwise separate practices to act jointly to set prices.

Settlement documents in several cases present far more detail. For example, the California group presented in its submission to the FTC after the consent order, as part of its effort to move ahead with its plan to negotiate prices as a group, fairly detailed descriptions of the shared costs of the network physicians and their actual and proposed systems for:

- Developing, adopting, and revising practice guidelines and protocols to which each network physician would be contractually required to adhere and the benchmarks used to assess compliance.
- Conducting utilization reviews to monitor the delivery of care and enforce adherence.
- Carrying out case management for patients who are diabetics, have experienced congestive heart failure, have asthma, or have other chronic conditions for which active oversight in accordance with case management plans can be most beneficial.
- Improving communication among network physicians to support quality improvement and clinical coordination.
- Credentialing new physician members and recredentialing existing members periodically.

Any physician groups considering any joint activity regarding setting prices must be very wary. The antitrust laws have always had as one of their prime goals outlawing price fixing by competitors. The enforcement authorities have successfully brought criminal, as well as civil, actions against some health care providers for illegal price fixing.

Nevertheless, each passing year brings more information about the safest ways for separate providers to share costs, and to coordinate and, to some degree, integrate their clinical activities, in order to negotiate prices jointly.

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