



# Latest in Health Care



## **FTC ABMG Antitrust Settlement Shows Risks For Health Care Providers Using "Messenger Model" To Negotiate Payor Contracts**

*June 15, 2009*

The Federal Trade Commission's (FTC's) June 9<sup>th</sup> announcement of a [settlement agreement](#) with the multi-practice specialty group, Alta Bates Medical Group (ABMG) highlights the continuing need for physicians and other health care providers and their contracting representatives to exercise care when negotiating in fee-for-service contract negotiations using a messenger representing other health care providers.

The settlement agreement resolves price-fixing charges brought by the FTC against ABMG and certain Northern California health care providers for refusing to deal with payors except on a collectively determined basis with respect to fee-for-service (non-capitated). The FTC charged ABMG and certain physicians with violating Section 5 of the Federal Trade Commission Act, 15 U.S.C. Sec. 45, by fixing prices charged to those offering coverage for health care services ("payors") in the Berkeley and Oakland, California areas and refusing to deal with payors except on a collectively determined basis.

July 6, 2009 is the deadline for interested persons to submit comments to the FTC on its proposed consent order proposed as a part of the ABMG settlement agreement. The invitation to comment on the proposed settlement order appears [here](#) in today's Federal Register. Interested parties may submit written comments electronically or in paper form. Comments should reference "Alta Bates, File No. 051 0260." Comments, along with the name and state of the party making the submission, will appear in the public record of this proceeding including on the publicly accessible [FTC website](#).

### **FTC Price Fixing Charges Against Alta Bates Medical Group, Inc.**

ABMG is a multi-specialty independent practice association ("IPA") comprised of multiple, independent medical practices serving the Berkeley and Oakland, California areas. It has approximately 600 physician members, including approximately 200 primary care physicians. The price-fixing charges challenge negotiation practices by ABMG with respect to fee-for-service contracts on behalf of physician members of the IPA. Under the fee-for service arrangements, the payor compensates physicians or group practices for services actually rendered pursuant to agreed-upon fee schedules.

The complaint challenges the conduct of ABMG while ABMG participated in negotiations relating to fee-for-service contracts as a "messenger" where ABMG claimed to act as a conduit facilitating negotiations between individual physician members and health plans. The FTC complaint does not challenge ABMG's activities concerning capitated contracts as it viewed the capitated agreements as providing sufficient financial integration among members to qualify the IPA and its member physicians as a single entity for antitrust purposes when engaging in negotiations relating to capitated contracts.

Since its formation, ABMG has negotiated group contracts with payors on behalf of IPA member physicians. The negotiations cover both contracts for fee-for-service and contracts for capitated (per member, per month) payment arrangements. The charges related to the negotiation practices relating to fee-for-service contracts.

In the absence of financial risk-sharing or clinical integration on the part of providers, the FTC takes the position that IPA members are competitors for purposes of its price-fixing antitrust analysis. Federal antitrust laws generally prohibit collaboration or other joint action among competitors to fix or conspire to fix price.

The FTC complaint charges that since at least 2001, ABMG, acting as a combination of its physician members and in conspiracy with its members, illegally acted to restrain competition in violation of federal antitrust laws with respect to fee-for-service contracts in Northern California. The FTC complaint charges that ABMG and its members engaged in prohibited price-fixing by:

- Facilitating, entering into, and implementing agreements, express or implied, to fix the prices and other terms at which they would contract with payors;
- To engage in collective negotiations over terms and conditions of dealing with payors; and
- To have ABMG members refrain from negotiating individually with payors or contracting on terms other than those approved by ABMG.

The FTC charged that, although claiming to employ a lawful messenger arrangement, ABMG on behalf of its physician members instead orchestrated collective negotiations for fee-for-service contracts. The FTC alleges specifically prohibited acts by ABMG, including the following in the absence of the required clinical or financial practice integration required to exempt the collective action from price-fixing prohibitions:

- Making proposals and counter-proposals, as well as accepting or rejecting offers, without consulting with its individual physician members regarding the prices they unilaterally would accept, and without transmitting the payors' offers to its individual physician members until ABMG had approved the negotiated prices;
- Participation in a concerted refusal to deal intended to impede competition by one of ABMG's major competitors, the Permanente Medical Group, which provides physician services to Kaiser Foundation Health Plan, Inc.

According to the FTC, under a lawful messenger model, ABMG could only act as a messenger and was prohibited from collectively negotiating the terms of the contracts on the prices its members would accept for their services on behalf of providers that have not sufficiently clinically or financially integrated their practices to create efficiencies sufficient to justify their acts and practices.

### **Proposed Consent Order**

Among other things, the proposed Consent Order, if adopted as proposed would:

- Require ABMG to terminate, without penalty, pre-existing payer contracts that it had entered into since 2001, within the time periods covered by the Consent Order;
- Prohibit ABMG from entering into or facilitating any agreement between or among any health care providers, negotiating with any physician on behalf of any physician and/or refusing to deal, or threatening to refuse to deal with any payor regarding any term, condition, or requirement upon which any physician deals, or is willing to deal, including, but not limited to price terms;
- Prohibit AMBG (or encouraging any individual physician ) from refusing or threatening to refuse to deal individually with any payor, or not to deal with any payor other than through ABMG;

- Require ABMG provide certain notifications about the settlement agreement and complaint order to its member physicians and others.

As a means for monitoring and enforcing compliance with these commitments, the Consent Order also would:

- Require that ABMG notify the FTC and file contracts and other documentation when it deals on behalf of providers with respect to pay-for-performance contracts;
- Prohibit ABMG from facilitating exchanges of information between health care providers concerning whether, or on what terms, to contract with a payor;
- Bar attempts to engage in any action prohibited by the Consent Order;
- Proscribe ABMG from encouraging, suggesting, advising, pressuring, inducing, or attempting to induce any person to engage in any action that would be prohibited by the Consent Order;
- Require ABMG to notify the FTC before it acts as a messenger on fee-for-service contracts with payors on behalf of its member physicians.

As in other FTC orders addressing health care providers' collective bargaining with health care payors, the proposed Consent Order excludes from coverage by its bar against joint negotiations agreements involving sufficiently integrated groups, such as:

- Conduct "reasonably necessary" to form or participate in legitimate "qualified risk-sharing" or "qualified clinically-integrated" joint arrangements;
- Agreements that only involve physicians who are part of the same medical group practice

### **Health Care Providers Must Manage Antitrust Risks**

These DOJ actions and a host of others in recent years document DOJ's willingness to investigate and prosecute non-integrated health care providers that try to band together to gain leverage when negotiating fee-for-service or other contracts with health plans or other payors for price-fixing, boycott and other antitrust violations. The felony penalties associated with federal antitrust violations bring antitrust sanctions within the purview of the Federal Sentencing Guidelines. The action also makes clear that health care providers should not assume that representation by an entity claiming to act as a "messenger" and negotiating under the "messenger model" will escape scrutiny. Rather, the action makes clear that federal regulators will look beyond the surface for anticompetitive collaboration hidden behind the activities of the claimed messenger. Accordingly, to prevent and position themselves and their organizations to defend against potential antitrust complaints, health care providers and practice managers and others involved in negotiation of fee-for-service contracts for independent practitioners must exercise caution.

To effectively manage these exposures, health care providers and others involved in negotiations relating to fee-for-service contracts where other independent practitioners are involved or are represented by the same organization as the practice should take affirmative steps that their organization has in place appropriate procedures for preventing, investigating and redressing potential violations. For example, most practices would want to be certain their practice and its consultants:

- ✓ Can demonstrate it prohibits, and abstains from participation in prohibited collective action directly or through a messenger;
- ✓ Includes written provisions in contracts with practice consultants and others prohibiting involvement in prohibited anti-competitive activity;
- ✓ Has up-to-date policies in place and a process to monitor regulatory and enforcement developments for necessary updates;
- ✓ Can demonstrate that it is appropriately administering well-documented audit, training and enforcement practices to prevent and redress potential violations as part of its corporate ethics and human resources practices;

- ✓ Uses appropriate vendor selection, contracting, audit and oversight processes to promote compliance by business partners, agents and others with which it does business;
- ✓ Has identified experienced counsel and developed a process for engaging counsel to assist in the audit of ongoing compliance efforts as well as the timely conduct of internal investigations of possible infractions within the scope of attorney-client privilege;
- ✓ Designated an ethics or compliance officer, or other appropriate party to receive and investigate suspected compliance concerns and reports;
- ✓ Has effective privacy, investigations, employment and other policies and procedures to enable the business to investigate, discipline and defend employment actions against employees or other workers for improper conduct;
- ✓ Has appropriate processes and procedures for responding to government investigations and private compliance complaints;
- ✓ Promptly investigates and responds to reports of infractions or other compliance concerns in an appropriate and well documented manner.

### **Curran Tomko Tarski LLP Attorneys Can Help**

Cynthia Marcotte Stamer, Lea Courington and other attorneys practicing with Curran Tomko Tarski LLP have significant experience assisting health industry and other businesses to establish, administer, enforce and defend antitrust and other compliance and internal control policies and practices to reduce risk under federal and state antitrust and other laws covered by the Federal Sentencing Guidelines. If you need assistance with these or other compliance concerns, wish to inquire about arranging for compliance audit or training, or need legal representation on other matters please contact Cynthia Marcotte Stamer, at [cstamer@cttlegal.com](mailto:cstamer@cttlegal.com), 214.270.2402; Lea Courington, [lcourington@cttlegal.com](mailto:lcourington@cttlegal.com), 214.270-1412, or your other favorite Curran Tomko Tarski LLP attorney.

### **Other Helpful Resources & Other Information**

We hope that this information is useful to you. Curran Tomko Tarski LLP offers a variety of updates, publications, training and other resources to assist its business clients and their leaders meet their legal and operational challenges. If you or someone else you know would like to receive future updates about developments on these and other concerns, please be sure that we have your current contact information – including your preferred e-mail – by creating or updating your profile [here](#). You can access other recent updates and other informative publications and resources provided by Curran Tomko Tarski LLP attorneys, get information about their briefings and speeches, and review highlights of their experience and credentials at [www.cttlegal.com](http://www.cttlegal.com).

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