

PHYSICIAN INFORMATION SHARING

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**Antitrust Coalition for Consumer Choice
in Health Care**

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Antitrust Coalition for Consumer Choice in Health Care

- **Composed of employers, health plans, providers and others**
- **Dedicated to the preservation and promotion of competition in health care and strong antitrust enforcement**
- **Actively opposes antitrust exemptions that would allow joint physician negotiations with health plans**

Access to information

- **Access to information by buyers and sellers plays a vital role in ensuring competitive markets**
- **But information sharing can lead to price stabilization and collusion**
- **Especially a concern with physician services because there have been numerous instances of collusive conduct**

Washington State Medical Society Business Review Letter (9/23/02)

- **WSMA represents 75% of Washington physicians**
- **Proposed an information gathering and dissemination program**
- **ACCC-HC believes**
 - ⌚ **Little basis for procompetitive justifications**
 - ⌚ **Serious risk of facilitating collusion and stabilizing prices**
 - ⌚ **Could send an unfortunate “green light” for anticompetitive information exchanges**

WSMA proposed to collect and publish two types of statistics

- **Average amount charged for particular services by Washington physicians**
 - ⌚ Covered by Statement 6 Safety Zone
- **Average reimbursement for specific services**
 - ⌚ By health insurer
 - ⌚ By geographic region
 - Not covered by Safety Zone – raises serious issues

BRL recognizes potential competitive harms

- **Collusion in the sale of physician services**
- **Physician boycotts of insurers offering lower reimbursement rates**
- **Could facilitate an agreement among physicians on a starting point for negotiations with insurers**

Previous agency enforcement action and guidance

- ***United States v. Burgstiner*** (S.D. Ga. 1991) (consent decree settling price-fixing charges against OB/GYNs who exchanged current and future fee information)
- ***United States v. Utah Soc’y for Healthcare Human Resources Admin*** (D. Utah 1994)(consent decree settling action alleging agreement to exchange prospective and current information about entry-level wages for nurses)

WSMA's proposed justifications

- **“Will allow a better and less costly comparison of insurers' fee schedules”**
 - **WSMA: Providers often do not receive fee schedules from insurers**
 - **WSMA: Providers don't know what they will be paid for specific procedures**
- **But:**
 - **Physicians have information about fees, particularly conversion factor**
 - **Survey will not give physicians more information about what rates are being offered to them; rather, it will disclose what has been *accepted by other* physicians**
 - **WSMA already offers a collective negotiation service for its members on non-price terms, which is allowed under Washington state law**

WSMA's proposed justifications

- “Will provide information to other parties “such as insurers, employers, and academic researchers, and therefore will allow each of them to take better informed actions.”
- **But no light shed on**
 - ⌚ What kinds of actions would be “informed” by the data
 - ⌚ Whether any of these parties have sought such information
 - ⌚ Whether the information could be provided in a way with less potential for anticompetitive effects

WSMA's assurances of little anticompetitive risk

- **WSMA: “Physician marketplace is relatively unconcentrated”**
- **But:**
 - ⌚ **No data submitted by WSMA to support that assertion, nor any analysis done by DOJ**
 - ⌚ **Markets would have to be analyzed on a local basis by specialty**
 - ⌚ **No question that in non-urban settings, there are a limited number of physicians in many specialties**
 - ⌚ **WSMA accounts for 75% of all Washington physicians, and would disseminate results to non-members as well**

WSMA assurances, cont'd.

- **WSMA: Data will be at least 3 months old**
- **But:**
 - ⌚ Physician fee schedules are typically negotiated on an annual basis or longer
 - ⌚ “3 month-old” data will likely reflect not only current reimbursement rates, but rates for remainder of the year

WSMA assurances, cont'd.

■ WSMA:

- ⌚ No individual providers' data will be disseminated
- ⌚ Only average reimbursement data will be furnished

■ But:

- ⌚ Could still provide common starting point for negotiations and identify target for a group boycott
- ⌚ Identical concerns are behind agencies' strict views about messenger model "negotiations"

Prior Agency advice

“Dissemination of the *average* prices charged for particular procedures can be more troublesome from an antitrust standpoint [than dissemination of a range of charges]. A danger in the dissemination of average price information to physicians who currently charge varying prices and may provide services of varying levels of quality can be that the stated average may, through tacit or express agreement, serve as a focal point for artificial price conformity. For example, price dissemination of an average price may be part of competitors’ reaching a common understanding that the stated average will become the price they usually will charge, or even the minimum price charged, for a particular product or service.”

--FTC Staff Advisory Opinion to Utah Society of Oral and Maxillofacial Surgeons (Feb. 8, 1985) (emphasis added).

WSMA assurances, cont'd.

■ WSMA:

- ⌚ It would be difficult to monitor a price-fixing agreement
- ⌚ Agreement among physicians is unlikely because the same service often is categorized by different CPT codes or combinations of codes

■ But:

- ⌚ Typically, the crucial negotiating issue is the conversion factor or rates for a few key procedures
- ⌚ If it is true that there is no common use of codes, then any survey results are meaningless!

Additional concern

- **Terms and conditions under which plans are willing to contract reflects information of the most competitively sensitive nature**
- **Plans typically consider this information to be highly confidential, and are very concerned about it being released to their competitors**
- **WSMA's proposed conduct would make such information widely available**

Concluding thoughts

- **ACCC-HC applauds the longstanding efforts of the FTC and DOJ to ensure competitive markets and prosecute collusion and price-fixing**
- **It is equally important that the agencies strictly scrutinize information sharing activities to be sure that they do not facilitate illegal collusive activities**