

Battling the **GIANTS**



Until recently, separate physician practices attempting to collectively negotiate contracts with managed-care organizations could be charged under antitrust legislation.

A Texas law challenges that practice, but physicians must be aware of legal complexities and work with insurance companies to restore the balance of power.

BY LESTER A. PICKER

David Hilgers remembers that day in March 1998 all too well. As the well-respected attorney for Texas Surgeons, a 26-member IPA in Austin, Hilgers sat in his office and shook his head in disbelief. He had just read a letter from the Federal Trade Commission notifying the group that they were being investigated for possible federal antitrust violations, a serious felony. Their ‘crime?’ The physicians had allegedly communicated with each other while the group was in the process of negotiating a contract with a large Blue Cross/Blue Shield. What followed was a nightmare of depositions, requests for detailed records, and hundreds of thousands of dollars in legal fees. “They really went after us,” Hilgers recalls of the FTC’s actions. “After all this time we’re still



Hilgers

working on a settlement.”

Unfortunately, the Texas Surgeons case is far from unique. Throughout the country, individual physicians and group practices are being threatened with federal antitrust violations as they attempt to negotiate contracts with insurance behemoths. In many cases, the insurance companies just use the threat of raising antitrust charges with the FTC to coerce physician groups to agree with their contract terms. The fear of the legal costs involved in defending even a frivolous claim has been enough to force some physician groups to fold. This lopsided display of economic power has physicians, professional associations, and legislators so concerned, they are beginning to fight back with legislation to exempt physicians from federal antitrust actions.

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The Texas Law: An Overview

The Texas law providing independent physicians with a safe harbor exemption from antitrust scrutiny is now being viewed as a standard for other states.

Here are some of the basic provisions of that law.

Who Can Negotiate?

✓ Individual, competing physicians, so long as the negotiating physicians do not represent more than 10 percent of the physicians in a health plan's service area or dominate any one specialty. On a case-by-case basis, the Texas Attorney General may establish a higher or lower percentage as conditions warrant.

✓ Physicians wishing to negotiate must designate a third party to represent them during talks with health plans. Individual physicians may opt to be bound by the terms negotiated between their representative and the health plan. However, health plans retain the right to contract with or offer different terms to individual physicians.

✓ If a plan agrees to come to the table, negotiations between physicians and the health plan are voluntary and non-binding. Either party may end negotiations at any time.

What Is the State's Role in the Negotiation Process?

✓ The attorney general must approve all negotiations prior to initiating discussions with a health plan. The attorney

general must give a decision within 30 days of receiving a request. If the request is disapproved, the attorney general must specify why the request was denied and suggest remedial steps to conform to the law.

✓ Prior to implementing an agreement with a health plan, the attorney general must review the agreement to ensure that it is reasonable, will not hurt competition, and will serve the best interests of patients.

What Contract Terms or Provisions Can or Cannot Be Jointly Negotiated?

NEGOTIABLE PRACTICES/PROCEDURES:

- Patient referral procedures
- Utilization review and quality assurance procedures
- Formulation of reimbursement methodology
- Programs to improve the cost-effective delivery of preventive services, such as immunizations, prenatal care, or cancer screenings, and to enhance detection and cost-effective management of diseases and illnesses in children
- Efforts to improve women's health care delivery

• Clinical criteria relating to disease management programs and clinical guidelines

• Programs to enhance or improve patient education and treatment compliance

• Methods to detect and prevent health care fraud and abuse

• Physician selection and termination criteria

• Administrative issues, such as timing of payment

• Reimbursement, if certain tests are met

PROHIBITED ACTIVITIES

• Negotiations or communications related to reimbursement rates, except when a health plan has substantial market power and the plan's fee schedule threatens to (or already has) jeopardize patient access. The attorney general will define "substantial market power."

• Negotiations aimed at removing "tied products" provisions

• Negotiations aimed at excluding, limiting, or otherwise restricting the plan participation of allied health practitioners, unless the law allows such limitations or exclusions.

• Strikes, boycotts or work slow downs ■

Washington was the first state to pass an antitrust exemption for physicians, but there is broad agreement that the law must be strengthened to be effective since, for example, it does not allow for the negotiation of fees. More recently, the Texas legislature passed the nation's first physician exemption law with teeth. Pennsylvania and other states are in various stages of draft-

The field of managed-care contract negotiations is littered with casualties, from wounded egos to destroyed practices and lives. By removing the threat of antitrust prosecution, the new "Physician Negotiation Bills" now being considered by individual states will level the playing field between health insurers and health providers, but only to a degree. In negotiating in this new landscape, experts offer the following advice.

1. Check your footing.

Have your attorneys brief the entire practice on antitrust laws and what behaviors are acceptable and unacceptable under its provisions. Make sure you are on solid legal ground. For example, individual physicians within a fully integrated practice (clinical and financial) are allowed to communicate about the negotiations. Partially integrated practices may not be, unless state laws permit antitrust exemptions. Antitrust convictions can mean up to three years in prison, six-figure fines and legal bills, civil penalties, and a criminal record.

2. Read the contract.

Health insurers are not obligated to offer the

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ing similar legislation. In fact, Congress is also considering a bill, sponsored by California Representative Tom Campbell, which would specifically provide physicians with antitrust exemption, while also prohibiting them from collectively halting service to patients.

But, even under the best of circumstances, the road before these new laws designed to protect physicians is filled with legal potholes and economic hur-

dles. To survive in today's harsh economic environment, physicians must be knowledgeable about existing laws, proposed antitrust protections, and how to best negotiate fair contracts with insurers given today's fiscal realities.

An antitrust primer

Federal antitrust legislation is steeped in the mercantile history of our country. In the late 1800s, businesses

formed anti-competitive agreements, called trusts, which were designed to dominate their markets. They did this by cutting prices and driving competitors out of business. The Sherman Antitrust Act, passed in 1890, made trusts and monopolies that destroyed competition illegal. In 1911, the Standard Oil Company and the American Tobacco Company were the

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Ten Tips from the Trenches

same deal to two different practices. Do not gloss over even the most innocuous clauses in the contract; they might come back to haunt you. For

example, pay attention to issues of timeliness of payments, not just the fees offered.

3. Invest in information systems.

Accurate information and thorough preparation are the trump cards of successful negotiation, according to Ron Shapiro, the well known sports agent, attorney, and co-author of *The Power of Nice* (John Wiley and Sons, 1998). Most new IPAs believe they cannot afford the technology investment they need. Question that assumption. Without detailed practice management reporting, you are at a terrible disadvantage in negotiating your next contract.

4. Know your costs.

"I can tell you that if you don't know what your costs are, if you



don't know what your utilization patterns are, when you go into a negotiation with an HMO you'll get killed, because they do know, they know a lot better than you," says Austin health industry attorney David Hilgers.

5. Get expert help.

Your physician practice may handle a few contract negotiations a year. The insurers you're up against handle thousands. You need all the expert help you can get. The first step on the road to getting that expert help is your state medical society. In today's complex legal environment, you should have an experienced health-care attorney on your side, along with an accountant who can crunch the numbers you'll need.

6. Walk in the other person's shoes.

"Physician practices have to know about how the HMOs function," advises Hilgers. "You can't as a physician just bash the HMOs, because they're trying to function in very difficult world. They've got lots of pressures on them. You've got to understand those pressures. You're going to have to compromise, to understand that if you give here, you can get something else over there that might be valuable."

7. Don't be lulled into complacency.

"All this law does is to allow you to negotiate with these guys," says Joe Cunningham, a Texas physician and PHO executive director. "It doesn't say that you have to come up with an agreement."

8. Be prepared to leave.

"Call a spade a spade," advises Stan Pomarantz, MD and the former vice president of medical affairs for Genesis Physicians Practice Association. "If you're in a bad deal with a health plan, after a reasonable period of time

trying to negotiate problems, don't be afraid to walk away."

9. Deliver cost-effective services.

The flip side of the management equation is that now physicians will have to be more conscious of controlling costs. "There are different methods for treating the same condition," says Hilgers. "Some are better than others. I think doctors are going to have to be better informed about the best treatment methods for different conditions. Health organizations will have to get more information disseminated and the doctors are going to have to be more diligent about how they can deliver services in a cost-effective way."

10. Be part of the solution.

By the time this issue went to press, only a few states actually had legislation on the books or were close to passing legislation providing antitrust exemption for physicians. Take an active interest in seeing such laws passed in your state. Against corporate giants with valuations in excess of \$20 billion, there are few other ways to equalize the playing field. ■

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Act's first targets. In 1914, Congress strengthened antitrust protection for the American public with passage of the Clayton Antitrust Act. Among other activities, the Act made it illegal to conspire with other businesses to fix prices or to control supplies of products. The Federal Trade Commission was chartered with antitrust enforcement. Since then, the government has fought huge, costly antitrust battles against United States Steel in 1920, IBM in 1982 and AT&T in 1983. Most recently the media have been filled with news of the government case against Microsoft.

While the framers of antitrust legislation could never have imagined how the landscape of American business would change, the courts have established what has become known as the 'state action doctrine.' That doctrine allows states to create a safe harbor exemption to protect certain business interests from antitrust prosecution. Two stringent standards must be met to qualify for the state exemption. First, there must be a clearly articulated statement of policy to replace marketplace competition with state regulation. Second, the collective effort must be supervised by a designated state agency. Increasingly, states are using this antitrust exemption to protect their most valuable health-care asset—the physicians that form the backbone of the delivery system.

Health care today

Sixty-one percent of Americans are frustrated and angry over the state of the health-care system, according to a poll conducted by *Newsweek* in November 1999. Fifty-one percent feel there are too many coverage restrictions and an equal percentage

worry that health professionals no longer control treatment decisions. A whopping 72 percent believe that pressures to lower costs have hurt the quality of health care.

It's no coincidence, say many experts, that those attitudes parallel unprecedented changes in the business side of health care. Corporate HMOs have been reduced to 13 in 1998, from 20 in 1995. Just four managed-care companies control 30 percent of HMO lives, according to *Physician News Digest*. In some cases, these mergers and acquisitions have resulted in one company controlling as much as an 85 percent market share in a geographic region.

This creates a severe imbalance of power when it comes to contract negotiations, according to the American Medical Association, an opinion shared by attorneys general and legislators in many states.

The Texas experience

Like their colleagues throughout the country, Texas physicians have experienced that severe imbalance repeatedly over the past several years. The Federal Trade Commission's investigation of Texas Surgeons IPA for antitrust violations is but one example.

Consider also the case of Genesis Physicians Practice Association, a 900-physician group in Dallas. For years they worked with Aetna on a managed-care contract with no more than the normal number of problems.

Then, after Aetna acquired US Health Care, serious problems arose. Incompatible computer systems between Aetna and US Health Care resulted in no practice management reports for months at a time. Claims forms from Genesis suddenly could not be accepted due to repeated

computer glitches. Doctors weren't getting paid and had to obtain lines of credit. While Aetna represented only 13 percent of the practice's patients, they accounted for more than half of the claims complaints.

High level discussions between Genesis and Aetna dragged on for months and finally reached an impasse. More than 550 physicians in the practice terminated their participation in the Aetna HMO. Aetna, which had an all-products agreement with the practice, responded by terminating doctors in their PPO. Shortly after, the doctors stopped seeing Aetna patients altogether. The stage was now set for the antitrust hammer to fall.

"Aetna sent us a threatening letter from a high-price lawyer in Washington, DC accusing us of antitrust violations," says Stan Pomarantz, MD, former vice president of medical affairs for Genesis. "We felt that was totally inappropriate. Here we were, up against a \$19 billion behemoth, and we hadn't done anything wrong. We were just communicating within our group."

The letter from Aetna backfired—big time. Its bold threat incensed the entire Texas medical community and infuriated legislators. Genesis was a clinically and financially integrated IPA, so its physicians were legally entitled to communicate among themselves regarding contract negotiations.

That foment lead directly to the law now on the books which exempts Texas physicians who are not in a fully integrated practice from being prosecuted for antitrust violations (see sidebar). The Texas Attorney General's office is the state agency charged with regulating the negotiations. "We were the poster child for

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this law," says Pomarantz. "We just wanted a fair shake from Aetna and we didn't feel we were getting it."

Antitrust complexities

A physician practice that is fully integrated, both clinically and financially, is considered one business unit in the eyes of antitrust regulators.

Individual physicians within that practice are allowed to communicate with each other throughout the contract negotiation process. Problems arise, however, with a practice that is not fully integrated. Antitrust regulators view such practices as a group of independent businesses. As such, two or more physicians discussing even one contract issue while negotiations are in process are open to charges of collusion.

However, antitrust laws allow for a practice known as 'messenger integration.' A newly formed IPA, for example, may hire a "messenger," typically an attorney or accountant experienced in health-management contracts. The messenger discusses contract issues with each physician separately, serving as a de facto messenger, or mediator, between each of them and the health insurer until a contract is ready for signing. This is the negotiating model currently used by most new IPAs to comply with antitrust laws, since they cannot afford the investments in attorneys fees and the technology required to fully integrate a practice from the outset.

What has gotten many such practices into antitrust trouble is when a substantial majority of these independent physicians end up rejecting a contract from an insurer, especially after contentious negotiations. To the FTC it may smack of collusion. But, there is an alternate, more benign view.

Take the case of Texas Surgeons of Austin, which had been trying for nine months to renegotiate a contract with a major Blue Cross HMO before its current contract expired. Negotiations stalled over clinical changes requested by the physicians and fees offered by the Blues. When the existing contract was about to expire, the physicians decided they weren't going to renew it. The argument is whether that decision was made independently by each individual physician or whether it was made by all physicians acting in concert. The FTC believed the latter scenario. "If the substantial majority of physicians makes the same decision, the FTC finds it easy to say this was collusion," David Hilgers observes. "But it's very possible that intelligent people would all make the same, very legitimate decision independently, given the low fees and the position that the Blues were taking in our negotiation, for example. Any way you slice it, it's a very difficult position for an IPA to be in."

Lessons for the future

While the brouhaha over the Texas Surgeons and Genesis Physicians Practice Association led directly to the safe harbor exemption law for physicians in Texas, it is by no means a cure for the larger malady.

"The law is only a stepping stone," according to Joe Cunningham, MD, the executive director of the Providence Health Alliance, a physician hospital organization (PHO) in Waco, Texas. "This has educated a lot of the legislators about what's going on in the real marketplace and what's happening with these negotiations, so that it's gotten them past the propaganda of the insurance industry. And it's given a venue for doctors to be

able to organize themselves in a fashion, without having to join a group. But, I wouldn't want to overstate it. The fact is that it's not such a powerful tool, but it does level the playing field somewhat."

What does the future hold to restore a balance between the insurance giants and physician groups? Clearly, a combination of forces at work in American society will shape the debate and swing the pendulum back toward the center, according to many experts. Patients and consumer groups are upset and have instituted legal challenges and class-action lawsuits against health insurers. The media are raising seminal issues regarding the ethics of managed care. Even insurers are recognizing that they may not be the most effective guardian of costs, as proven by United Health Care's newly announced policy of allowing physicians to approve most health-care procedures. And physicians themselves are joining together to express their dissatisfaction with insurance companies that they believe are jeopardizing both their patients' health and their earnings.

So, the stage has been set for the political process which will inevitably result in a more level playing field for physicians. But, physicians need to recognize one key principal—both they and insurers must learn to co-exist. "Physicians have to learn that this is not just a war," says attorney Hilgers. "This is negotiation between two sides that need each other. They've got to figure out how to come to something that is a compromise and that is effective for both of them and the patients." ■

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