



Portfolio Media, Inc. | 648 Broadway, Suite 200 | New York, NY 10012 | www.law360.com
Phone: +1 212 537 6331 | Fax: +1 212 537 6371 | customerservice@portfoliomedia.com

The FTC-Alta Bates Price-Fixing Settlement

Law360, New York (July 15, 2009) -- On June 4, 2009, the Federal Trade Commission accepted, subject to final approval, a proposed consent order with Alta Bates Medical Group Inc. (Alta Bates).

The consent order would settle the charges by the FTC that Alta Bates fixed prices in violation of the antitrust laws through its joint contracting activities on behalf of its member physicians.

The proposed consent order prohibits Alta Bates from collectively negotiating fee-for-service reimbursements and engaging in related anticompetitive conduct.

This proposed settlement is consistent with and in furtherance of the FTC's aggressive enforcement stance on joint contracting by independent health care providers. It is another example in what has become a long line of "failed messenger model" cases.

Alta Bates is a multi-specialty independent practice association (IPA) comprised of 600 physicians serving the Berkley and Oakland areas in Northern California.

Alta Bates negotiated group contracts with payors on a capitated basis, where it received a fixed fee per member, per month from the payors.

In addition to the capitated contracts, Alta Bates also contracted on behalf of its members on a fee-for-service basis, where the health plans compensated the member physicians for services actually rendered pursuant to agreed-upon fee schedules.

It is this second, fee-for-service contracting activity by Alta Bates that is the subject of the FTC's complaint and consent order.

The FTC alleged that, since 2001, Alta Bates acted to restrain competition with respect to fee-for-service contracting by, among other things, facilitating, entering into and implementing agreements:

- 1) to fix the prices and other terms at which its members would contract with payors;
- 2) to engage in collective negotiations over terms and conditions of dealing with payors;
and
- 3) to have members refrain from negotiating individually with payors or contracting on terms other than those approved by Alta Bates.

Each of these activities violates the antitrust laws.

The FTC alleged that the joint contracting activities by Alta Bates varied from a lawful "messenger model," under which the IPA acts as a simple conduit of information between the health plans and the physicians.

Under the messenger model, the IPA communicates to its members the terms of the fee-for-service contracts, which the members may then independently accept or reject, but the IPA does not negotiate the terms of the contracts.

Although Alta Bates claimed that it employed the messenger model, the FTC asserted that Alta Bates orchestrated collective negotiations for fee-for-service contracts by, among other activities, making proposals and counter-proposals as well as accepting or rejecting offers, without consulting with the individual physician members and without transmitting the payors' offers to the individual physician members until Alta Bates had approved the negotiated prices.

The FTC also alleged that Alta Bates facilitated a concerted refusal to deal, which was intended to thwart competition from one of Alta Bates's major competitors, the Permanente Medical Group, which provides physician services exclusively to Kaiser Foundation Health Plan Inc.

According to the complaint, in 2006 Kaiser was expanding a fee-for-service product, under which covered individuals could access physician services through a national third-party network that included Alta Bates's physicians.

Kaiser's expansion threatened to reduce Alta Bates's business under its capitated contracts by giving Kaiser the ability to offer employers both capitated and fee-for-service health plan options.

The complaint alleged that, in order to thwart the threat of competition by Kaiser, Alta Bates attempted a concerted refusal by its physicians to serve Kaiser fee-for-service enrollees.

The FTC found that the Alta Bates fee-for-service contracting did not have any countervailing efficiencies or benefits to competition that might justify collective agreements on the prices its members would accept for their services.

For example, the FTC concluded that the Alta Bates physicians did not clinically or financially integrate their practices to create an improved product, lower prices or other efficiencies sufficient to justify their collective acts and practices.

Thus, according to the FTC, the joint contracting activities had no other effect than to restrain prices and other forms of competition among physicians in the Berkeley and Oakland areas in violation of the antitrust laws.

Under the terms of the consent order, Alta Bates is prohibited from entering into or facilitating any agreement between or among any health care providers:

- 1) to negotiate on behalf of any physician with any payor;
- 2) to refuse to deal, or threaten to refuse to deal, with any payor;
- 3) regarding any term, condition, or requirement upon which any physician deals, or is willing to deal, with any payor, including but not limited to price terms; or
- 4) not to deal individually with any payor, or not to deal with any payor other than through Alta Bates.

The order also prohibits Alta Bates from facilitating exchanges of information between health care providers concerning whether, or on what terms, to contract with a payor.

Furthermore, Alta Bates must notify the FTC prior to initiating any plan to employ a messenger model or engaging in any activities to achieve clinical integration.

Finally, Alta Bates must terminate, without penalty, pre-existing payor contracts that it has entered into since 2001, at the request of the payors or upon the termination date of the contract, in order to eliminate the effects of the collective behavior.

The consent order will be in effect for 20 years. The FTC is accepting comments on the order until July 6, 2009, at which point it will decide whether to make the order final.

The FTC's challenge of Alta Bates's joint contracting activity and resulting consent order demonstrates that, while integration among health care providers can improve patient care and create efficiencies in the delivery of care, joint contracting by physicians outside of a qualifying financial-risk-sharing arrangement or sufficient clinical integration poses a significant risk of antitrust liability.

--By David W. Simon and Michael A. Naranjo, Foley & Lardner LLP

David Simon is a partner with Foley & Lardner in the firm's Milwaukee office. Michael Naranjo is senior counsel with the firm in the San Francisco office.

The opinions expressed are those of the authors and do not necessarily reflect the views of Portfolio Media, publisher of Law360.