



Health Insurance Association of America

**Presentation by**

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**On**

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I am Henry R. Desmarais M.D., MPA, Senior Vice President of Policy and Information for the Health Insurance Association of America (HIAA). HIAA is the nation's most prominent trade association representing the private health care system. Its nearly 300 members provide the full array of health insurance products, including medical expense, long-term care, dental, disability, and supplemental coverage to more than 100 million Americans. HIAA is also the nation's premier provider of self-study courses on health insurance and managed care.

We appreciate the opportunity to participate in this workshop. Let me begin by noting that HIAA has been supportive of *The Statements of Antitrust Enforcement Policy in Health Care*, first issued by the Department of Justice and the Federal Trade Commission in 1993. This document clearly demonstrates that physicians and other providers currently have the ability to legally integrate to improve quality and create a more efficient health care system. Having said this, however, we remain concerned about the potential implications of a recent FTC advisory opinion relating to MedSouth, Inc., a multi-specialty physician practice association in Denver, Colorado.

In that advisory opinion issued this past February, FTC staff broke new ground when it formally advised MedSouth that it “has no present intention to recommend a challenge to the organization's proposed operation as a nonexclusive physician network joint venture.”<sup>1</sup> What is novel about MedSouth's plans is that it would be a clinically integrated joint arrangement rather than a risk-sharing one. In reaching this decision FTC staff and individual FTC Commissioners have thoughtfully described many of the uncertainties and difficulties that exist in determining if the clinical integration model described by MedSouth will function as proposed and not violate antitrust law. The desired efficiencies of expanding output, reducing price, and/or enhancing quality, service or innovation to balance the ability to collectively bargain with health plans are

at best difficult to quantify. This poses a challenge to the commission to ensure that MedSouth achieves its desired effects while keeping affordable health insurance available to consumers within the affected area in which MedSouth operates.<sup>2</sup> For these reasons, the advisory opinion itself underscores the importance of the commission monitoring this arrangement on an ongoing basis.

There are three major aspects to the opinion that create challenges for the commission in enforcing antitrust laws and ensuring the clinical integration model functions appropriately.

First, as is stated in the advisory opinion,

“To change practice patterns requires an ongoing commitment of time, effort, and expertise, and it can be difficult to accomplish even when there are significant external incentives to do so.”<sup>3</sup>

Whether the expected clinical efficiencies are achieved will be very difficult to determine when evaluating a patient population. Given the variety of specialties and types of providers within MedSouth, and the number of conditions these physicians treat, statistically valid data on the use of clinical measures or practice guidelines will prove challenging enough for MedSouth to find, and the commission would need significant additional resources to proactively seek out such information even if it were available.

Second, efficiency-enhancing integration establishes goals that are both important and make sense for improving clinical processes and health care delivery, but as stated by Commissioner Thomas B. Leary “those who provide the best product are able to charge more for it, they can charge a ‘quality premium,’ . . . So in the case of MedSouth, if rates go up, how will we know if that’s the quality premium, or a result of anticompetitive practices?”<sup>4</sup>

It is not clear how the commission will determine whether the achievement of efficiencies occurred and whether these achievements outweigh the likely anticompetitive effects of allowing for collective negotiation of fees.

Third, the task of ensuring that antitrust law has not been broken will hinge upon how the commission will review whether the network remains non-exclusive. The FTC staff's concerns stated in the advisory opinion – “Health plans appear to be vulnerable to a threat by the group's members not to contract outside the group unless the plans pay higher than prevailing fees”<sup>5</sup>— justify the need for adequate monitoring by the commission before any potential antitrust violation takes place. With such a large number of providers — some 400 physicians within 40 specialties and subspecialties — located in a specifically defined area, as in the case of MedSouth, health plans could be put in the position of having no choice but to agree to any higher-than-prevailing fees or simply be unable to provide insurance coverage to their covered population in this area of Denver. If such a violation were to occur, costs would rise, the MedSouth experience would be a failure, and the ability of the commission to approve any future clinical integration arrangement would be compromised. It is particularly critical in this instance that providers have the freedom and demonstrated ability to contract individually with health plans.

Throughout the advisory opinion, the commission's staff states that at this early point in time and based on the information provided by MedSouth, it would not take any enforcement actions. Also stated is the desire to re-evaluate based on “rule of reason analysis” after MedSouth is operational to determine if the efficiencies are realized and if antitrust laws and competition are still operating intact. With the commission in uncharted waters with the “rule of reason” analysis, determining how this process is operating will be challenging. Clearly, an

ongoing monitoring process of MedSouth or any other future “clinically integrated” provider group will be necessary.

Even though it is not an “enforceable” document, by issuing the advisory opinion on MedSouth, the FTC staff has essentially created a detailed blueprint for other provider groups to follow in creating identical or similar clinically integrated joint arrangements. While MedSouth voluntarily asked the commission to evaluate the format it had established for its organization to see if the operations would be found to be ‘per se’ illegal under antitrust law, nothing requires any other provider group wishing to be considered “clinically integrated” to ask the commission to review its operations or to proactively seek any type of approval.

The commission is to be commended for its diligence in keeping the operation of the health care marketplace in line with current antitrust law, but the resources and manpower needed to appropriately evaluate any number of “clinically integrated” organizations such as MedSouth would be significant. Relying on complaints from the various players in the market is an important enforcement tool for the commission, but this cannot be relied upon solely for operations of this type. As Commissioner Leary stated “we should conduct the rule of reason analysis and not rely on complaints from the industry.”<sup>6</sup>

By providing demonstrated evidence of efficiencies or updates to the commission, MedSouth would offer the commission the necessary information to understand and monitor the impact of such a clinically integrated joint arrangement. Of course, the FTC advisory opinion itself envisioned the need to examine MedSouth once operations have been up and running for a period of time. Considering the information and management systems that MedSouth will be putting into place, providing the information that the commission needs should not be too difficult.

In addition, HIAA believes that the commission should require any group wishing to be recognized as a “clinically integrated” organization to submit an application and undergo a review process similar to that of the advisory opinion issued in the case of the MedSouth. We consider this essential until there is more experience with clinically integrated joint arrangements. Any mergers that are proposed in other industries, including health plans and hospitals, undergo strict regulatory approval requirements, and the providers in this instance should also be subject to some form of proactive enforcement. Having a prior approval mechanism in place for “clinical integration” would allow the commission to develop an understanding as to which organizations are making such claims and also to notify health plans and others in the market about the existence of such organizations.

Recent commission complaints and enforcement actions show that there are many provider organizations engaged in questionable behavior, including price fixing and illegal collective bargaining.<sup>7</sup> For example, given MedSouth’s Denver location, we believe it is noteworthy that in May of this year the Commission proposed consent orders in the case of two Colorado organizations, Physicians Integrated Services of Denver, Inc. and Aurora Associated Primary Care Physicians. In both of these cases, the FTC’s complaints charged that the organizations collectively agreed to fix prices and other terms they would accept from payers, and then terminated or threatened to terminate their contracts with payers if their demands for significantly higher fees were not met. The opportunity for a physician group acting as a “clinically integrated” organization to disguise illegal activity would provide a moral hazard to many without a proactive application process for such organizations.

In closing, let me express our thanks for the opportunity to participate in this workshop. We look forward to working with the Commission and other interested parties to “ensure that the

nation's markets function competitively, and are vigorous, efficient, and free of undue restrictions.’<sup>8</sup>

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<sup>1</sup> Federal Trade Commission, public statement, February 21, 2002.

<sup>2</sup> Federal Trade Commission and U.S. Department of Justice, *Antitrust Guidelines for Collaborations Among Competitors* § 3.2 (*Competitor Collaboration Guidelines*)

<sup>3</sup> Federal Trade Commission, Staff Advisory Opinion: MedSouth, Inc., February 19, 2002.

<sup>4</sup> Thomas B. Leary, Commissioner, Federal Trade Commission; Comments at St. Louis University School of Law, April 12, 2002.

<sup>5</sup> MedSouth, Inc., Advisory Opinion.

<sup>6</sup> Thomas B. Leary, Commissioner; Comments, April 12, 2002.

<sup>7</sup> See, e.g., *R.T. Welter and Associates, Inc.*, FTC, File No. 011 0175, August 20, 2002.

<sup>8</sup> Federal Trade Commission, Vision, Mission & Goals, as cited at <http://www.ftc.org>.