



BUREAU OF COMPETITION

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

March 25, 1988

Sharon B. Donzis, Esq.
Barger & Wolen
530 West Sixth Street, Ninth Floor
Los Angeles, Cal. 90014

Dear Ms. Donzis:

This letter responds to your request for an advisory opinion¹ concerning the legality under the antitrust laws of a proposal by your client, Intracorp, to use a relative value schedule (RVS) developed by a physician group, along with conversion factors developed by Intracorp, in providing a medical provider bill review service for third-party payers and self-insured employers. As is explained below, it does not appear that Intracorp's use of an RVS in the manner discussed in your letters is likely to violate the antitrust laws.²

Intracorp engages in the business of providing medical cost containment services to third-party administrators and self-insured employers throughout the United States. Among other services, Intracorp provides a medical provider bill review service that gives advice to payors as to whether charges by medical providers are usual, customary, and reasonable ("UCR"). This is a new service, and at the present time is available in only six states.

¹ Under the Commission's Rules of Practice, a Commission advisory opinion may be warranted when the matter involves a substantial or novel question of fact or law that has no clear Commission or court precedent; a proposed merger or acquisition is involved; or the matter is of significant public interest. 16 C.F.R. §1.1(a). Because, as is discussed below, the Commission has addressed the major issues raised by your request in other advisory opinions, we have prepared a staff opinion letter pursuant to Section 1.1(b) of the Commission's Rules of Practice. 16 C.F.R. §1.1(b).

² This advisory opinion is based on the facts set out in your letters of August 17 and September 10, 1987, and February 9, 1988. This opinion is limited to the proposed program described in your letters and does not constitute approval for actions that are different from those described, or for those not specified.

Currently, Intracorp collects a sample of medical provider bills and uses them to set the UCR amount for each procedure by region within a state. Intracorp devises a single standard of reasonableness for each procedure in each geographic area. However, a customer may instruct Intracorp to use a specific percentile level of the charges in Intracorp's data base as the amount it will pay for services. In that case, Intracorp will advise the customer of the amount for each procedure that would correspond to the indicated level of payment.

In place of its present method of determining UCR price screens, Intracorp would prefer to use physician-developed RVSs. RVSs are listings of relative values of various medical procedures. Each service or procedure is given a numerical value that purports to identify its worth in relationship to that of every other service in the same section of the RVS. An RVS is not in itself a price schedule. However, it can very easily be converted to a price schedule by multiplying the unit value of each service by a "conversion factor," which is a dollar figure.

Intracorp plans to calculate conversion factors using data obtained from various insurers relating to workers' compensation, auto, health, and accident coverage. The data obtained would indicate for each service the geographic area (by zip code) of the provider, the date of service, and the actual charge made. The combination of the RVS and the conversion factors would create a fee schedule, which Intracorp would use to set the price screens used in advising third-party payors as to the reasonableness of claims for reimbursement from all types of physicians. The conversion factors would be used solely by Intracorp and would not be disseminated to third-party payors, health care providers, or any other entities in the marketplace.³

The Commission has challenged the preparation, publication, and circulation of RVSs by several medical associations as having the effect of establishing, maintaining, or otherwise influencing physician's fees in violation of Section 5 of the Federal Trade Commission Act. The Commission obtained consent orders terminating RVS activity by several medical organizations.⁴

³ Intracorp is not controlled by or affiliated with any medical provider groups or individuals.

⁴ California Medical Ass'n, 93 F.T.C. 519 (1979) (consent order); Minnesota State Medical Ass'n, 90 F.T.C. 337 (1977) (consent order); American College of Radiology, 89 F.T.C. 144 (1977) (consent order); American Academy of Orthopaedic Surgeons, 88 F.T.C. 968 (1976) (consent order); American College of Obstetricians & Gynecologists, 88 F.T.C. 955 (1976) (consent

The principal concern expressed by the Commission about relative value schedules has been that RVSs developed and published by a physician group could be used to facilitate an agreement among the group's members to adhere to the RVS in charging for their services or to use the RVS in collective negotiations with third-party payers about the amounts to be paid to the physicians. This concern is not present when a third-party payer or its agent uses an RVS, even one developed by a physician group,⁵ to determine unilaterally the amounts it will pay for covered services rendered to beneficiaries of the payer's health plan.⁶

order). The Department of Justice also challenged promulgation of RVSs by medical societies as illegal price fixing in violation of the Sherman Act in three proceedings. A consent decree was obtained in two of the cases. *United States v. Illinois Podiatry Soc'y, Inc.*, 1977-2 Trade Cas. (CCH) ¶61,767 (N.D. Ill. 1977) (consent decree); *United States v. Alameda County Veterinary Medical Ass'n*, 1977-2 Trade Cas. (CCH) ¶61,738 (N.D. Cal. 1977) (consent decree). In a third case, a federal district court held that an RVS did not violate the antitrust laws. *United States v. American Soc'y of Anesthesiologists, Inc.*, 473 F. Supp. 147 (S.D.N.Y. 1979).

⁵ Of course, a third party's voluntary use of an RVS does not remove the antitrust issues that arise from a physician group's development of an RVS, either independently or at the request of a third party.

⁶ However, physician developed RVSs may have some drawbacks even for a third-party payor who decides independently to use them. For example, physicians who know that a particular RVS is being used and have a copy of it may find it easy to determine the conversion factor being used by the third party and thus to determine the maximum allowable charges for all procedures covered by the RVS, creating an incentive for them to raise all their charges to the maximum payment level. In addition, relative values are usually based to some extent on physicians' subjective feelings about the value of various procedures. Therefore, the third party may pay prices that are based not on market conditions but on physicians' views about what prices should be, at least in relation to the prices of other services. Also, an RVS may establish new billing categories leading to payment for more procedures than would otherwise be the case. For example, a study of the California Medical Association RVS concluded that the more detailed and fractionalized RVS descriptive codes resulted in overall increases in payments to physicians. Sobaski, Health Ins. Statistics, USDHEW, Effects of the 1969 California Relative Value

A third-party payer may determine unilaterally the amounts it will pay for covered medical services. Antitrust issues are raised only if it enters into prohibited price-related agreements with physician groups or with other third-party payers. The orders entered by the Commission in the RVS cases do not in any way restrict third parties' use of relative value schedules. Moreover, the Commission made clear in an advisory opinion letter to the American Society of Internal Medicine that an agreement in restraint of trade does not result from a third-party payer's unilateral decision to adopt an RVS as the basis for its reimbursement system.⁷ Therefore, a decision by Intracorp, acting as agent for a third-party payer, to substitute a fee screen based on an RVS for a UCR screen based solely on historical charges for particular procedures does not, standing alone, appear to raise antitrust issues.

A separate issue to be considered is whether Intracorp's providing identical advice to several third-party payers poses any danger to competition among the third-party payers. The Commission has stated that agreements between individual medical care providers and an independent intermediary acting as agent for third-party payers about the prices to be charged by the providers to the third-parties did not violate the antitrust laws, where there were no agreements among the third parties concerning the prices to be paid for health care services.⁸ However, antitrust issues could be raised if Intracorp's customers agreed among themselves to accept Intracorp's UCR levels as their payment rates.⁹

There does not appear to be a substantial danger that Intracorp's activities will facilitate unlawful collusion among

Studies on Cost of Physician Services Under SMI, Pub. No. (SSA) 75-11702 (June 20, 1975), at 5; See also Urban Institute, Alternative Methods of Developing a Relative Value Scale of Physicians' Services: Year End Report 7-8 (1983).

⁷ Letter to William G. Kopit, 105 F.T.C. 505, 511 (1985).

⁸ Letter to Irwin S. Smith, M.D., 101 F.T.C. 1014 (1983).

⁹ Two staff opinion letters have considered the application of the antitrust laws to joint action among purchasers of health care services. Letter from Art Lerner to Michael L. Denger (Sept. 24, 1985); Letter from M. Elizabeth Gee to Jonathan E. Gaines (March 26, 1986). I am enclosing copies of those letters for your information.

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competing third-party payers. There is no indication that Intracorp's customers have agreed among themselves to adopt Intracorp's fee levels. In addition, Intracorp's customers do not necessarily use the same price screens, since they are under no obligation to adopt Intracorp's recommended fee levels and a customer may ask Intracorp to use a separate fee screen set by it.

The above legal advice is that of the staff of the Bureau of Competition only. Under Section 1.3(c) of the Commission's Rules of Practice, the Commission is not bound by this advice and reserves the right to rescind it at a later time.

We are placing copies of your request and this response on the public record pursuant to Section 1.4 of the Commission's Rules of Practice.

Yours truly,



M. Elizabeth Gee
Assistant Director

Enclosures