

# PUBLICATION

---

## FTC Continues Crackdown on Physician Associations and Targets an Executive Director

**Authors: Alexander M. McIntyre, Jr., John G. Calender**

**February 23, 2010**

The Federal Trade Commission recently announced a Consent Order with Roaring Fork Valley Physicians I.P.A., Inc (RFV), an independent physician association representing approximately 85 physicians, or almost 80 percent of the doctors in Garfield County, Colorado, settling charges of price-fixing and other anticompetitive conduct by RFV.

The FTC alleged that, although purporting to use a messenger model, RFV negotiated price-related terms on behalf of its members, who otherwise were competing small and solo practices. RFV increased rates by pressuring payors to include automatic cost-of-living adjustments and other terms in their provider contracts, and refusing, on behalf of its members, to messenger contracts with Medicare-based rates because of the potential of those rates to decline over time. The FTC also charged that, to enhance its bargaining power, RFV actively discouraged members from entering into individual contracts with insurers, while at the same time agreeing to contracts only if at least 80 percent of RFV's primary care physicians and 50 percent of its specialty doctors accepted the proposed contract's rates and terms. The FTC further found no efficiency enhancing or quality of care improvements based upon the collective behavior.

The FTC settlement bars RFV from encouraging, aiding or organizing its members to engage in collective price negotiations and collectively refusing to deal with insurers. In addition, RFV must terminate existing provider contracts entered into as a result of the illegal activity; for three years notify the FTC before acting as agent or messenger for providers negotiating contracts with payors; and, for three years notify the FTC before participating in any collaborative arrangement with its members.

In an unrelated matter, by a majority of 3-1, the FTC issued for public comment a decision and order settling charges that the executive director of another Colorado independent physicians association attempted to circumvent the terms of an earlier settlement between the physicians association and the Commission. This matter is significant because it targets an individual and because of the very strong dissent of one commissioner.

In a 2008 settlement agreement, the FTC issued a decision and order against Boulder Valley Individual Practice Association (BVIPA) for price fixing. The FTC alleged that BVIPA, a 365-member IPA in Boulder County, Colorado, negotiated price and other contractual terms on behalf of its members, encouraged its physicians not to contract with payors independently, and threatened payors with a boycott of its members if they refused to negotiate (or renegotiate) higher reimbursement rates. The FTC's order prohibited BVIPA from facilitating certain physician negotiations; threatening to refuse to deal with payors based upon price terms; or otherwise facilitating improper collective activity among its members, except that BVIPA is not precluded from engaging in conduct that is reasonably necessary to form or participate in legitimate joint contracting arrangements among competing physicians, such as financially or clinically integrated joint arrangements. The order also contained various notification provisions if BVIPA again acted as an agent or representative of any of its members. The Commission alleged that M. Catherine Higgins, BVIPA's executive director, sought to circumvent the FTC order, by maintaining that because she was not named personally in the previous proceedings, she was free to personally negotiate contractual agreements on behalf of BVIPA's members. The

settlement with Ms. Higgins contains broad limitations and notification requirements restricting her activities as an agent or representative for BVIPA's members.

Commissioner Rosch dissented, complaining that the order was unnecessarily punitive, punishing Ms. Higgins for publicly criticizing the FTC order concerning BVIPA; overly broad, in that it prohibited Ms. Higgins from negotiating non-price terms with payors; and, contrary to what he believed to be the FTC's earlier agreement not to pursue Ms. Higgins individually, a shift he suggests might have been influenced by Anthem Blue Cross. According to Commissioner Rosch: "Today's events represent a sad conclusion to an unnecessarily sordid tale."

In a statement issued with the decision and order, the other three commissioners responded to Mr. Rosch's criticism, stating that they "had reason to believe that, absent injunctive relief against her in her individual capacity, Ms. Higgins is likely to engage in conduct that is prohibited by the BVIPA order." Additionally, the majority pointed out that, while perhaps not common, the FTC has on numerous occasions named individuals, including non-physician contracting agents in IPA consent orders, and insisted that there was nothing in the BVIPA decision and order prohibiting future action against Ms. Higgins.

The Consent Orders with RFV and Ms. Higgins are the latest in a string of enforcement actions brought by the FTC against physician groups, especially those claiming to use a messenger model in facilitating contracting between doctors and third-party payors. This is a reminder of the need to properly structure messenger model arrangements. Of particular importance, among other things, is that any entity acting as a messenger may not:

- negotiate price or other competitive contractual terms with payors;
- take any action to influence provider members from negotiating separately with insurers; or
- refuse to convey an offer of a payor to messenger's members when requested by the payor to do so.

Baker Donelson attorneys have extensive experience on antitrust issues relating to physician collective negotiations, messenger models and clinical and financial integration. For more information, please consult your Baker Donelson attorney or any of the attorneys in the Health Care Government Investigations or Antitrust groups.