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The Messenger Model: Don't Ask, Don't Tell?

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Major transitions in the delivery and financing of health care have led to numerous organizational changes and innovations. One important facet of this change involves efforts to increase power on the provider side of the market as physicians and hospitals confront large buyers who are able to wield monopsony power.[1] Efforts to consolidate on the selling side have not always run smoothly, and over the past fifteen or twenty years providers have learned more about antitrust than they would probably like to know.

In the 1990s, the United States Department of Justice (DOJ) and the Federal Trade Commission (FTC) issued broad and extensive statements pertaining to enforcement policy in health care markets, including reactions to various provider agreements.[2] The latest of these is the 1996 Statement of Antitrust Enforcement Policy in Healthcare (Statement). The objective of the Statement and its predecessors is to reduce uncertainty by announcing in advance the types of mergers, integrations, and consolidations the enforcement agencies view as unlikely to raise antitrust concerns. It is important to note that the Statement does not necessarily reflect antitrust law. In fact, sometimes it reads like an effort to describe an *ex ante* settlement agreement in which there is something for both buyers and sellers.

This last interpretation seems especially appropriate with respect to Section 9 of the Statement (Statement 9), in which the "messenger model" is described. The "messenger model" permits competing providers—physicians, hospitals, etc.—to make use of a common agent in

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[1] *See* Roger D. Blair & Jill Boylston Herndon, *Physician Cooperative Bargaining Ventures: An Economic Analysis, supra* this issue, 71 ANTITRUST L.J. 989 (2004).

[2] The initial Statement was issued in 1994 and then revised a year later. The Statement referred to throughout this article is the one issued in 1996, *reprinted at Antitrust Enforcement Policy in Health Care,* 71 Antitrust & Trade Reg. Rep. (BNA) (Aug. 28, 1996 Spec. Supp.); *available at* http://www.ftc.gov/reports/hlth3s.htm.

their dealings with payers. In the terms of the Statement, the "messenger model" involves the use of "an agent or third party to convey to purchasers information obtained individually from the providers about the prices or price-related terms that the providers are willing to accept."[3] In addition, "the agent may convey to providers all contract offers made by purchasers, and each provider makes an independent, unilateral decision to accept or reject the contract offers."[4] The messenger model may not, however, involve an arrangement that "creates or facilitates an agreement among competitors on prices or price-related terms."[5]

This latter qualification is crucial. The model, at least officially, cannot be used to further efforts to engage in the type of price fixing or stabilization that would ordinarily violate Section 1 of the Sherman Act. In keeping with the objective of precluding price-fixing efforts, the Statement includes a list of activities that are off limits for messengers:

- Coordinating the providers' responses to a particular proposal;
- Disseminating to providers the views of other providers;
- Collectively negotiating for providers; and
- Deciding whether to convey an offer to providers based on the messenger's judgment about the attractiveness of price or price-related terms.[6]

On the other hand, these prohibitions do not preclude efforts by messengers to "help providers understand the contracts offered, for example, by providing objective or empirical information about the terms of an offer (such as a comparison of the offered terms to other contracts agreed to by network participants)."[7] In other words, in what appears to be a narrow distinction, a messenger may not share the "views" of one provider with another but can provide information about the "terms" other providers have *already* found acceptable.

What makes the messenger model puzzling is that no serious student of antitrust would conclude that those employing the model precisely as described in the Statement would be exposed to antitrust liability. Unilateral agreements with passive suppliers of information are hardly viewed as suspicious. On the other hand, even those with a modicum of cynicism must look at Statement 9 with wonder because the structure it

[3] *Id.* § 9, C.

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

describes is ideal for facilitating horizontal price fixing or stabilization. Indeed, the use of a central figure or agency to coordinate price fixing by competitors—a hub with price-fixing spokes—is standard antitrust fare.[8] In addition, DOJ and FTC approval of indirect competitor contact can make price-fixing claims more difficult to prove because the agreement element of a price-fixing case is typically proven with circumstantial evidence, including the opportunity to share information. The messenger model, in effect, legitimizes one of the elements that can be crucial in a circumstantial evidence case.

Given that the drafters of the Statement are well-versed in economics and antitrust law, a case can be made that Statement 9 carries an implicit "don't ask, don't tell" message about tolerable limits of collective action. If implicit approval of collective provider conduct is, in fact, intended, then a second, perhaps more important, issue arises: could a policy that permits greater collective action by competitors actually benefit health care consumers? In other words, suppose that use of the model does actually increase the incidence of price fixing above what may occur by virtue of the proverbial locker room conversation. It may not follow that collective provider action would necessarily harm health care consumers. In fact, it is possible that some element of increased bargaining power is a necessary part of a cost-reducing effort.

The questions of what the DOJ and FTC intend and whether it makes sense from an economic efficiency perspective are critical issues, and often can be addressed in a straightforward manner. Here, that is not the case, because an explicit "don't ask, don't tell" policy is one that would put the chief antitrust enforcement agencies at odds with well-established case law.[9] The antitrust agencies cannot advocate such a policy openly. Thus, one is left to inferences and the impressions of others. This gray area of uncertainty is consistent with the existence of a subtle "don't ask, don't tell" policy. Importantly, whether such a policy is a good idea amounts to attempting an evaluation of a policy that may not exist and would be impossible to assess as an empirical matter if it did exist.

One can, however, at least approach these issues, and this is the principal purpose here. More specifically, this article makes the case that the messenger model is either tacitly or inadvertently a "don't ask, don't tell" policy when it comes to competitor cooperation. In addition, this article presents an economic framework that explains how such a policy

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[8] *See* Interstate Circuit v. United States, 306 U.S. 208 (1939).

[9] Most directly on point would be *Arizona v. Maricopa Medical Society*, 457 U.S. 332 (1978).

may benefit health care consumers.[10] Finally, it is suggested that the "don't ask, don't tell" policy has created an area of per se legality that precludes an examination designed to distinguish consumer-benefiting practices from those that provide no benefit. The messenger model system does have its limits: the DOJ and FTC do take actions when providers stray well outside of the model. What begins to emerge is an image of a broad area of give and take between providers and payers in which some competitor cooperation is tolerated with the referees intervening only when the action of the "players" becomes too extreme.

I. THE ECONOMICS OF THE MESSENGER MODEL

The express goal of the messenger model is to "minimize the costs associated with the contracting process" between health care providers and third-party payers. Two necessary conditions must hold, however, for this objective to be achieved. First, there must be savings available to providers; otherwise there is little incentive to engage a messenger.[11] Second, the cost of the messenger to the provider must be less than the savings captured by the provider. In sum, the provider will engage the messenger only if the costs are less than the amount saved and the provider is able to internalize some portion of this surplus.[12]

Even if these conditions are met, there is still no guarantee of a benefit to health care consumers unless there is also an impact on provider fees. Provider savings from lower costs of contracting, in theory, may be reflected in lower charges to patients directly or through insurance premiums.[13] The mechanics of how messenger model benefits find their way to patients is not susceptible to a simple analysis. To understand why, consider the somewhat tortured route these savings would have to travel. The provider who engages a messenger and experiences savings would have an incentive to pass some part of the savings through to patients. Because most patients will feel health care costs largely in the form of insurance premiums,[14] the savings "shared" by the physician would have to be reflected in lower fees charged by physicians to third-

[10] A fourth question arises even if one accepts the messenger model at face value. More specifically, is it the most effective way to achieve the sought-after savings? These savings are only possible if competition-neutral benefits result from using the model and the costs of examining those efforts and detecting those that go beyond its limits do not exceed those benefits.

[11] These savings could take the form of lower actual office expenses or lower physician-provider time spent on non income-generating activities.

[12] *See generally* Blair & Herndon, *supra* note 1.

[13] Or, in theory, through higher wages when health insurance is part of an employer's benefit package.

[14] Or lower wages.

party payers who would then lower premiums to subscribers. At one extreme of the "sharing" scenario, suppose the use of a messenger enabled a physician to save, after costs, $3.00 per procedure. Further suppose relative bargaining power in the market is such that the third-party payers could lower reimbursement rates by an equal amount.[15] The result in this scenario is that providers will have little incentive to decrease costs. The analogy here would be to a regulated utility that must pass its savings through to ratepayers.[16]

There are, however, three ways that consumer savings might come about as a result of physicians employing the messenger model to create "savings." The first is that the third-party payer simply does not have the power to exact the entire savings. The portion that the payer is able to capture is, assuming competitive third-party payer markets,[17] passed on to consumers.[18] Second, the dominant buyer (i.e., third-party payer) may understand at some level that there will be no savings unless the parties are able to solve a strategic problem similar to the prisoners' dilemma.[19] In effect, a dominant buyer who adopts the most self-interested strategy and attempts to capture all the savings will realize that there will be no savings. A more cooperative strategy that permits providers to capture part of the savings will actually be more beneficial to payers and providers and, again assuming competitive third-party payer markets, consumers. Third, the messenger model may also make it easier for providers to engage in subtle forms of price fixing that would permit them to keep some portion, but not all, of the savings.

This third option gives rise to the "don't ask, don't tell" possibility. Collective actions to increase the bargaining power of providers would clearly violate the Sherman Act as well as the express description of the messenger model. This possibility of price fixing as a means of sharing the savings is not, however, that far-fetched. First, as already noted, it is hard to comprehend that those approving the messenger model did not also understand the temptation to collude or, at least, to stabilize prices.

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[15] Obviously, if providers have some leverage already, they would internalize some of the gain.

[16] The same savings would be possible if the third-party payer, recognizing the potential for reducing transaction costs, unilaterally lowered reimbursement rates. Here the provider would adopt the messenger model to avoid losses. This too is like a regulated utility that is treated, for cost-recovery purposes, as though it is using the most efficient production methods.

[17] Unless third-party payers resell under competitive conditions, there will be no motivation to reflect savings in lower premiums.

[18] *See generally* Blair & Herndon, *supra* note 1.

[19] In the Prisoners' Dilemma, both parties must adopt a less than fully self-interested strategy in order to maximize joint benefits.

Second, the concept of a trade-off between efficiency and price stability (i.e., through price fixing) is hardly novel in antitrust circles.[20] Moreover, the underlying theory is not inconsistent with the general policy of weighing procompetitive effects against anticompetitive effects in other contexts, including mergers and provider risk-sharing arrangements.[21] The key point is that the potential trade-off in the messenger model case is between price fixing in one market and possible benefits in a different, albeit related, downstream market.

Another economic reality of the messenger model is that potential savings in contracting costs are likely to be highest when the incentive for collusion is also the highest. The cost-saving or transaction-cost reducing element of the messenger model is likely to be greater if the messenger is itself specialized and can deal in sufficient volume. With any given volume, savings are likely to increase if the providers are faced with the same issues, are located in the same communities, and are bargaining with the same payers. In other words, the potential for both savings and collusion would seem to be highest when the individual providers and/or provider networks are close competitors. What is likely to emerge is a joint sales agent that, technically, must function as though only a series of unilateral contacts are involved. Whether this is even possible is itself an interesting question.[22] In fact, the instances reviewed below in which the model has come under scrutiny uniformly involve close competitors. Again, one would expect the DOJ and FTC to have anticipated this in drafting Statement 9 and to have concluded that the benefits of shared savings outweighed the risks of price collusion.

Those who are cynics, or perhaps just realists, about human nature and markets will undoubtedly see another economic element to the model. One version of the messenger is a highly ethical person who is knowledgeable about what information can and cannot be shared. Whatever the demand may be for these services, there is also likely to be intense demand for less ethical messengers who will exploit the gray area of enforcement created by the model. The existence of a messenger model that has the approval of the chief enforcement agencies may, in

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[20] *See, e.g.*, Broadcast Music Inc. v. CBS, 441 U.S. 1 (1979); *see generally* E. THOMAS SULLIVAN & JEFFREY L. HARRISON, UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS 132–36 (4th ed. 2003).

[21] One cannot help but recall in this context *Appalachian Coal v. United States*, 288 U.S. 344 (1933), a case that seems inconsistent with most subsequent cases but which has never been overturned.

[22] Its counterpart would be a buying co-op that is permitted to achieve lower prices because of increased volume but not as a result of increased leverage. *See* Roger Blair & Jeffrey L. Harrison, *Cooperative Buying, Monopsony Power, and Antitrust Policy*, 86 Nw. U. L. Rev. 331 (1992).

effect, provide cover for these less ethical messengers. In economic terms, it lowers the cost of operating unethically by decreasing the likelihood of detection. If standard economic theory holds, this will increase the "output" of those willing to take a chance on breaking the rules, and, therefore, increase the likelihood of competitor (i.e., provider) cooperation. The problem is the empirical question of whether this is good or bad for consumers.

A final economic complexity involves the incremental impact of the messenger model on price fixing even if the messengers themselves stick to the rules. For example, a group of providers may agree on a fee or exchange information about the fee and then individually convey the information to the messenger. It is not clear in this instance that the existence of the third party has increased the likelihood of collusion. There is, however, the possibility that utilization of the messenger may make the collusion more difficult for enforcement agencies to detect by making it appear to have been unnecessary. Thus, although the messenger itself may not be in violation of Statement 9, the use of the messenger would increase the likelihood of collusion by the providers.

In sum, it is possible that the messenger model can lower transaction costs. It is also more likely that cost savings measures will be undertaken if providers are permitted to keep some of the savings. In addition, in some markets, the only way to retain some of the savings may be for providers to have additional market power vis-à-vis payers. In effect, the increased cooperation is analogous to an ancillary restraint, a concept long embraced by antitrust law. It is equally clear that the DOJ and FTC cannot adopt an express policy of market equalization. There is, however, a fair amount of evidence that this is the de facto policy.

II. THE MODEL IN PRACTICE: DISAGREEMENT AND MISUNDERSTANDING

The analysis above suggests an economic rationale for a "don't ask, don't tell" policy. A policy that cannot be adopted expressly, however, can be furthered by creating a gray area of enforcement. In the case of the messenger model there can be little doubt that such a gray area exists. Existence of this gray area is exemplified by the confusion the messenger model has created among scholars, judges, and those in the industry and the absense of any serious effort to eliminate it. In the literature, for example, one author touts the messenger model as the "most promising method currently available for shifting the balance of power over managed care fee structures back to the independent physicians."[23] Elsewhere it is suggested that following the messenger model allows physicians to engage in "a kind of 'collective' bargaining without violating federal antitrust laws."[24] Yet, on its face, if there is anything Statement 9 seems to rule out officially, it is facilitating a shift in the "balance of power" or collective bargaining in any sense that the term is ordinarily used.[25]

The only reported federal court opinion discussing the model outside the context of a consent decree also seems to misunderstand the limits of the model. In *Levine v. Central Florida Medical Affiliates, Inc.*,[26] a physician sought membership in Healthchoice, Inc., a preferred provider organization, and Central Florida Medical Affiliates, Inc. (CFMAI), a physicians' advocacy group, allegedly as a means of attracting more patients.[27] When admission was denied he claimed that the maintenance of a closed panel violated Section 1 of the Sherman Act.[28] For the purposes of examining the messenger model, it is interesting to focus on the court's characterization of one of the defendants—Healthchoice.[29] Healthchoice marketed a panel of providers to payers. Provider fees were initially determined by a relatively complicated formula and then could be changed in negotiations between Healthchoice and payers. The fees were then presented to providers, who were permitted to opt out of contracts with specific payers if the negotiated fee was unacceptable. The Healthchoice role was not to present individual physician fees to possible third-party payers;[30] rather, Healthchoice established an initial fee that was then subject to negotiation between Healthchoice and payers. The negotiated fee was then presented to providers on a take-it-or-leave-it basis.

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[23] Miriam L. Clemons, *Don't Shoot the Messenger: Independent Physicians and Joint Payment Contracting Using the Messenger Model*, 32 U. MEM. L. REV. 927, 930 (2002).

[24] Guy O. Farmer & John H. Douglas, *Physician Unionization—A Primer and Prescription*, 75 FLA. B.J. 37, 39 (2001).

[25] Such an interpretation would be inconsistent with the teachings of *Arizona v. Maricopa Medical Society*, 457 U.S. 332 (1978), which held that horizontal maximum price fixing is a per se violation of Section 1 of the Sherman Act.

[26] 72 F.2d 1538 (11th Cir. 1996).

[27] Part of the complaint stemmed from the suspension of hospital privileges at Orlando area hospitals.

[28] Dr. Levine's lawsuit ultimately failed because of his inability to demonstrate the alleged violations had harmed competition.

[29] For a more detailed analysis of *Levine* and the messenger model analysis, see James Ponsoldt & Lance McMillan, *The Judicial Legitimization of Horizontal Price-Fixing Among Partially Integrated Health Care Providers: An Antitrust/Health Care Case Study*, 50 ALA. L. REV. 465 (1999).

[30] It has been suggested that the court purposely avoided a full discussion of the requirements of the messenger model. *Id.* at 504 n.210.

Dr. Levine argued that the closed panel was a boycott and that aspects of the fee determination process constituted illegal price fixing.[31] It is difficult not to see the Healthchoice process as a collective negotiation. Although individual physicians could opt out of specific contracts, it is far from clear that this was a realistic option. In any case, the entire notion of limiting the size of the panel, which Healthchoice did, and then negotiating fees for the panel, seems at odds with the express guidelines of the messenger model. In reviewing that claim, the court seemed to misunderstand what the DOJ and FTC mean by a "messenger" and found that Healthchoice was, in effect, a messenger.[32] It then took the DOJ's and FTC's approval of messengers into consideration in finding that the defendants had not violated the Sherman Act.

In the past eight years, one avenue for clarification of the gray area created by the messenger model outlined in Statement 9 could have been through cases in which the model was challenged by private parties. There appear, however, to be no cases in which a private party has brought a claim based on the use of the messenger model that facially complies with Statement 9. This makes it difficult to bring the model into focus and to assess judicial perceptions of its consistency with established antitrust doctrine.[33]

That leaves consideration of actions by the DOJ and the FTC as the primary source of clues for parsing the messenger model. Although agency enforcement efforts seem to have increased in the last year or two, there appear to be no DOJ or FTC actions in instances in which messengers secretly attempt to go beyond Statement 9 guidelines. Such an action would likely require going through the relatively expensive and risky process of proving an agreement through circumstantial evidence—drawing on the teachings of *Interstate Circuit v. United States*[34]—and examining the actual impact of the messenger model on consumer welfare. The cases that have been brought by the agencies have involved open practices that are egregious, with the parties flaunting the antitrust laws and veering well outside the parameters of the model. The effect of limiting enforcement actions to "easy" cases is to leave the details of the messenger model unresolved. It can be inferred, then, that the enforcement agencies act as referees only when conduct gets seriously

[31] 72 F.2d at 1541.

[32] *See generally* Ponsoldt & McMillan, *supra* note 29, at 502–04.

[33] According to the 1996 Statement, the desired impact of the messenger model is to lower the costs of contracting.

[34] 306 U.S. 208 (1939). This analysis would require the examination of behavior and opportunities for contact as opposed to direct evidence of agreement.

out of hand and are willing to allow the parties a fair amount of leeway within certain limits. Precisely what goes on in secret, when messengers meet with providers, is anyone's guess. The cynical among us doubt that messengers always operate as passive conduits or that their clients expect them to.

One recent case involving a well-publicized action by the DOJ against the Federation of Physicians and Dentists, Inc.[35] illustrates two seemingly inconsistent realities. First, it is consistent with a persistent willingness to go after only easy cases, thereby leaving a broad area of behaviorial possibilities untouched. Second, commentary after the action illustrates that the model can give rise to significant disagreement over what is permissible even following the entry of a consent decree purporting to govern the participants' future conduct. At the time the case was brought, four major health insurers operated in Delaware with Blue Cross covering roughly 200,000 residents. All forty-seven of Delaware's orthopedic surgeons were providers through Blue Cross. The Federation, principally a labor organization that has branched out by offering its services to independent physicians, recruited nearly all of the orthopedic surgeons in Delaware. When Blue Cross notified the surgeons of a fee cut, the Federation members agreed that their fees would be negotiated exclusively by the Federation. In addition, the Federation advised the physicians to reject offers made by Blue Cross and to give notice of their intent to terminate contracts with Blue Cross. The Federation argued that it was acting as the third-party messenger. The decree required the Federation to stop the practices the DOJ had identified, to adhere to the messenger model as understood by the DOJ, and to undertake a compliance program.[36]

In the aftermath of the decree there has been disagreement about its implications. In one newspaper report, a defendant-physician in the case is quoted as saying "this [the consent decree] spells the end for the insurance companies' way of doing business."[37] Another view was that the outcome "can help curb abuses and scare tactics commonly utilized by many payers in their one-sided dealings with busy physicians and other providers."[38] Other commentators viewed claims of victory by the Federation as "spin," noting that the restrictions on the Federation after

[35] United States v. Fed'n of Physicians and Dentists, Inc., 2002 Trade Cas. (CCH) ¶ 73,868 (D. Del. 2002).

[36] *Id.*

[37] Tanya Albert, *Don't Shoot the Messenger: Path Opens for Contract Talks*, amednews.com, http://www.ama.assn.org/sci-pubs/amnews/pick_01/prl1111.htm.

[38] Letter from Hal. K. Litchford to Sharon L.West, (Jan. 26, 2001), *available at* http://www.fpdunion.org/federationofphysicians/Private/USvFPD/messenger_model.htm.

the consent decree were actually more confining than those applied to messengers more generally.[39] In fact, any victory enjoyed by the defendants could only be viewed as stemming from the fact that more serious sanctions were avoided. Still, this type of exchange suggests that both sides believe there is broad room for interpreting just what a legal messenger model looks like.

In another case, a similar pattern of a messenger acting as a collective negotiator emerged in Florida in the late 1990s. The Federation of Certified Surgeons and Specialists, Inc. (FCSS) was composed of twenty-nine competing surgeons in the Tampa area. FCSS retained Pershing Yoakley & Associates, P.C. (PYA), an accounting and consulting firm, to coordinate FCSS's activities aimed at improving "overall managed care reimbursement."[40] PYA represented the surgeons as a group, and negotiated a contract with United Health-Care on terms more favorable than those offered to the physicians initially. Subsequently, PYA continued to negotiate with additional payers on behalf of FCSS but stopped upon learning of the DOJ investigation. Again, the defendants claimed that they were merely making use of the messenger model as described in Statement 9. The court noted that the arrangement fell outside the messenger model because "a legitimate messenger does not coordinate or engage in collective pricing activity for competing independent physicians."[41] Here again the consent decree required close adherence to the "messenger model" as understood by the DOJ.

More recently, the messenger model was improperly used by physicians in both Dallas and Denver, resulting in investigations by the FTC and consent decrees. The Dallas case involved the use of Systems Health Providers (SHP) as a messenger on behalf of Genesis Physicians' Group (GPG), its parent company. SHP actually bargained collectively for GPG members, as a group, by proposing fee schedules to payers. In addition, physicians were urged by SHP not to enter into unilateral agreements with payers.[42] This is obviously quite different than the actions permitted

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[39] Michael R. Bissegger, *Messenger Models Are Still Antitrust Problem for Providers,* 20 BUS. WORD, Mar. 1, 2002, at 9.

[40] United States v. Fed'n of Surgeons and Specialists, Inc., 1999-1 Trade Cas. (CCH) ¶ 72,549 (M.D. Fla. 1999).

[41] *Id; see also* United States v. Woman's Hosp. Found. and Woman's Physician Health Org., 1996-2 Trade Cas. (CCH) ¶ 71,561 (M.D. La. 1996); United States v. Health Choice of Northwest Mo., 1996-2 Trade Cas. (CCH) ¶ 71,606 (W.D. Mo. 1996); United States v. Heathcare Partners, Inc., 1996-1 Trade Cas. (CCH) ¶ 71,337 (D. Conn. 1996).

[42] FTC Press Release, Dallas-Fort Worth Area Physicians Group Agrees to Settle (Aug. 20, 2002), *available at* http://www.ftc.gov/opa/2002/05/denverdocs.htm More recently, actions have been taken against physicians in St. Louis, South Georgia, Dallas, Fort Worth, and Asheville, N.C.

under the messenger model. Adherence to the model would mean that the messenger would provide individual physicians with information about possible payers and their offers and leave the decision to the individual physician.

The Denver case focused on R. Todd Welter & Associates, a consultanting firm, and eight physician groups specializing in obstetrics and gynecology, which were organized as "Professionals in Women's Care." [43] The group, through Welter, then engaged in boycotts and price fixing. Fees were negotiated collectively, and fee offers by payers deeded to be "unacceptable" were not communicated to individual physicians. Fees and terms that were agreed upon were more favorable than those available to physicians making unilateral decisions.

In all four of these cases, the DOJ or the FTC acted in circumstances that were quite straightforward. The parties involved would have been viewed as violating the antitrust laws independent of the existence of a messenger or any claim to be utilizing a messenger model. Put bluntly, the cases were easy ones, stressing the difference between collective negotiations and the messenger as conduit. Since this distiction is plain from the description of the messenger model itself, the cases did little to clarify the gray area within which a "don't ask, don't tell" policy can survive. In fact, if there are two lessons for providers from these cases it is to be discreet and not too greedy.

Confusion and disagreement are also found among the market participants affected by the messenger model. In preparing this article, I conducted a modest series of interviews with those in the health care industry who are principally, but not exclusively, payers. Although not scientific, the survey yielded responses that were completely consistent with a broader search of the literature devoted to the messenger model and the existence of a purposefully created gray area of enforcement. When asked about the messenger model, responses ranged from "disguised price fixing" to "it can work as suggested by the guidelines in very few instances" and "it depends on the market." No one I spoke with viewed the messenger model as a panacea. Those who described it as potentially cost saving envisioned a setting in which a messenger canvasses providers in order to determine what are acceptable fees.[44] In response to fees then proposed by payers, the messenger can indicate what percentage of the providers would be likely to find the fee acceptable. Clearly, this

[43] John W. Jones, *Physician Messenger Model Under Fire*, PHYSICIAN'S NEWS DIGEST, Feb. 2003.

[44] In this sense, the effect is improved information and a smoothly working market. This is obviously good.

type of arrangement lowers contracting costs by avoiding one-on-one negotiations between each payer and each provider.

Interviewees also related experiences that were inconsistent with the messenger acting as a passive provider of information. In some instances, payers reported that messengers quickly became hard-nosed negotiators delivering what were, in effect, take-it-or-leave-it messages from the provider-physicians. In still other cases, payers found themselves negotiating with messengers with a deal being struck "subject to the approval" of the affected providers. Interviewees suggested that the "approval" process was a charade motivated by the desire to appear to fit within the guidelines of Statement 9.[45]

Even those interviewed who had a very negative view of the messenger model noted that it was impossible to tell whether the messenger made the likelihood of price fixing any greater, given that providers might secretly agree on fees before the messenger entered the process.

The possibility of a knowing toleration of a gray area of no enforcement is also consistent with express elements of Statement 9: it includes ambiguities that provide ample "wiggle room" for colorable arguments that providers followed the rules. To be fair, Statement 9 could not be more emphatic about the permitted sources of benefits to providers and the forbidden sources of benefits. The messenger model is "designed simply to minimize the costs associated with the contracting process," and anticompetitive measures cannot be used as a means to this end. Questions arise, however, in the details and the omissions, as is so often the case. For example, messengers may not provide information about prices and price-related terms. Presumably, they may provide information about other terms deemed not to be "price-related." But how broadly is the term "price-related" to be defined? It would not be unreasonable for providers to infer that Statement 9's reference here means that joint agreements on such matters as arbitration clauses, liquidated damages, and forum selection are permitted areas of collective agreement.[46] But any negotiated term has a price-like character. In this sense, Statement 9 falls well short of cost-decreasing clarity and creates an inference of legality with respect to actions that the antitrust laws clearly prohibit.[47]

A second ambiguity concerns just what the messenger may reveal to the provider. According to Statement 9, the messenger may give a provider "a

[45] One interviewee felt that it seemed unlikely that approval of 900 physicians could be obtained virtually instantly as it was in one case.

[46] I am indebted to Michael Bissegger for suggesting this ambiguity.

[47] *See, e.g.*, Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980); Paramount Famous Lasky Corp. v. United States, 282 U.S. 30 (1930).

comparison of the offered terms to other contracts agreed to by network participants." On the other hand, in consent decrees, the DOJ has added that "competitively sensitive information" may not be conveyed.[48] Competitively sensitive information is a provider's "actual or possible view, intention, or position concerning the negotiation or acceptability of any proposed or existing payer contract or contract term."[49] The messenger is permitted to convey accurate information "about a proposed payer contract offer or contract terms, including, if requested, objective comparisons with terms offered to that participating physician *by other payers*."[50] Two distinctions seem to be at work here. The first is a difference between offers currently available to the provider (allowed) and those offers currently available to competing providers (disallowed). Obviously, the latter type information could be useful for facilitating parallel pricing. The second distinction is between past economic data and intentions. This is a fairly common distinction in antitrust with the general sense being that past information is less likely, or even unlikely, to facilitate price fixing.[51] Still, past information is not wholly useless for price coordination, and the impact of information may vary with market conditions. In markets in which there are numerous competitors, complete information—even as to intent—does not ordinarily facilitate price fixing and instead may further sharpen competition. But in markets in which the number of competitors is small enough to permit collusion, the same information may be critical for the collusion to take place. The Statement and subsequent consent decrees seem designed to find a middle ground in which the information can be used by a physician in order to contract on the best terms available, but not to open the door to coordination. But, as suggested here, these possibilities may be more a function of market conditions than finding precisely the right form of the information. In any case, the broad language of the Statement creates significant interpretative questions regarding what is meant by "contracts agreed to by network participants."

Statement 9 seems, perhaps, naive and imprecise in another respect. The messenger appears to be principally a conduit and compiler of information, shuttling between providers and payers. In some instances, providers have engaged as messengers entities like the Federation of Physicians and Dentists[52] that are also labor organizations and which

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[48] *See* United States v. Fed'n of Physicians and Dentists, Inc., 2002 Trade Cas. (CCH) ¶ 73,868 (D. Del. 2002).

[49] *Id.*

[50] *Id.* (emphasis added).

[51] *See generally* SULLIVAN & HARRISON, *supra* note 20, at 148–52.

[52] *See supra* text accompanying notes 35–40.

obviously employ individuals who are adept at negotiations. Presumably, in addition to a messenger, a provider could hire someone to negotiate on his or her behalf. There is nothing to suggest this could not be the same person or entity. In fact, there is nothing to suggest that the same person or entity could not negotiate for competing providers as long as they were not treated as a group. Not only does this present the issue of which role the messenger/negotiator is in at a particular moment but what information may be divulged from the messenger to the provider(s).[53] For example, as a messenger, information about the offers made to and acceptable to others appears to be off-limits.[54] On the other hand, in the role as advisor, consultant, or negotiator, the "messenger" would seem to be obligated to keep the client informed about what is acceptable and unacceptable to others. At what point this would cross into the area of stabilizing prices is not clear, but the dual-role option enhances the danger by creating the possibility of having to determine the role the messenger/negotiator is in at a specific time.[55] This dual-role possibility clearly increases the costs of detecting illegal activity and may be further evidence of a tacit "don't ask, don't tell" policy.

III. THE FUTURE OF THE MESSENGER MODEL

The messenger model is in some ways symptomatic of the current dilemma in antitrust. Beginning with *Continental T.V., Inc. v. GTE Sylvania Inc.*,[56] the Supreme Court and, presumably, enforcement agencies have come to realize that practices that restrict some facets of competition may be necessary to achieve a greater procompetitive end.[57] Even the possibility of permitting some types of price fixing to achieve desired procompetitive ends is suggested by *Broadcast Music, Inc. v. CBS*.[58] Still, no cases have gone so far as to allow price fixing among direct competitors as a means to achieve a procompetitive end. Moreover, the implicit

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[53] *See, e.g.*, Letter from Litchford to West, *supra* note 38.

[54] This, in itself, is not crystal clear as messengers are permitted to offer comparisons of offered terms to other contracts agreed to by network participants. The key element seems to be that the offer can be compared to past experience.

[55] Commentary after a recent DOJ action against physicians retaining a union as its messenger suggests that this lack of clarity does exist and allows for different interpretations of just how far the messenger can go as a negotiator. *See supra* text accompanying notes 35–40.

[56] 433 U.S. 36 (1977).

[57] In effect, they have revitalized the ancillary restraints doctrine first announced in *United States v. Addyston Pipe*, 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

[58] 441 U.S. 1 (1979). In *BMI*, the Supreme Court distinguished literal price fixing from "per se price fixing." In that case, an agreement among composers to set the price for a joint license for their compositions held not be be per se price fixing. The Court reasoned that the agreement on price could have a procompetitive effect.

bargain suggested here would seem to stretch the teachings of *BMI* well beyond their limits. Consequently, if there is a "don't ask, don't tell" policy implicit in the messenger model, it is likely to remain that way.

A "don't ask, don't tell" policy rules out the type of analysis that would distinguish messenger models that lead to lower costs for consumers from those that do not. Ironically, the need to disguise the actual policy can be traced to the per se prohibition of price fixing itself. Open toleration of provider cooperation would put the DOJ and FTC at odds with bedrock antitrust law. And, for the most part, per se prohibition of some practices makes economic sense because those practices rarely, if ever, benefit consumers. In effect, the per se rules eliminate the weighing of costs and benefits of some practices because we know the answer in the vast majority of instances beforehand.

Here, however, the per se rule, and the resulting "don't ask, don't tell" policy mean that an ongoing practice cannot be evaluated and may never be evaluated. In fact, if "don't ask, don't tell" is the effective policy, then the per se rule against price fixing has resulted in a gray area in enforcement in which collusion by providers is lawful by default, whether or not consumers are better off. Whatever the advantages of the per se rule, they have already been lost in this area and have not been replaced by a careful examination of the impact of the messenger model on consumers in a range of market structures.