

FELDMAN & KIEFFER

ATTORNEYS AT LAW

268 MAIN STREET
BUFFALO, NEW YORK 14202

JAMES M. KIEFFER
ANDREW FELDMAN

(716) 852-5875
FAX (716) 853-0308

COPY

November 30, 1993

Hon. Anne K. Bingaman
Assistant Attorney General
Antitrust Division
United States Department of Justice
Room 317
10th and Constitution Avenue NW
Washington, DC 20530

Re: Request for Business Review Letter by Preferred
Podiatric Network Inc., a Subsidiary of New York State
Podiatric Medical Association

Dear Ms. Bingaman:

This request for expedited review is submitted on behalf of (i) Preferred Podiatric Network Inc., (the "Network"), a wholly owned subsidiary of New York State Podiatric Medical Association (the "Association"), and (ii) the Association itself, pursuant to the Department of Justice's business review procedure [28 CFR Section 50.6] and its recently announced expedited health care project review policy. On behalf of the Network and the Association, we are requesting a statement of the Department's current enforcement intentions with respect to the proposal to utilize the Network to act as an intermediary on behalf of members of the association to solicit enrollment of such members as providers in managed care plans, health maintenance organizations, preferred provider organizations, union plans, indemnity plans and similar third party payer systems, and to expedite and facilitate communication and contract negotiation between such third party payers and member podiatrists.

The Association is aware of the Department's careful scrutiny of association-sponsored provider networks, and has examined pre-existing submissions to the Department concerning similar networks that received no-action Department responses under its business review procedure, including the application of the California Pharmacists Association, which

received a no-action response from the Department dated October 3, 1986, and the application of Case Western Reserve University School of Medicine and University Hospitals of Cleveland, which received a no-action response from the Department dated January 7, 1993. In addition to modeling the function of the Network along the lines described in those previous applications, we have also examined the Final Judgment entered in the United States District Court for the District of Massachusetts dated May 18, 1992, in the Department's action against Massachusetts Allergy Society, Inc., with particular focus upon the restrictions imposed in the judgment on the Massachusetts Allergy Society with respect to the communication of fee information to third-party payers.

I. PRINCIPAL PARTIES.

A. *New York State Podiatric Medical Association.* The Association is a New York not-for-profit corporation with its principal place of business at 1255 Fifth Avenue, New York, New York 10029. It is exempt from tax as a professional association under Section 501(c)(6) of the United States Internal Revenue Code. It maintains an affiliated charitable foundation (the Foundation for Podiatric Medicine) exempt from tax under Section 501(c)(3) of the Internal Revenue Code. As of December 4, 1992, it had 1,358 members. There were 2,501 licensed podiatrists in the State of New York as of July 7, 1993, as indicated by a verification clerk of the New York State Education Department Division of Professional Licensing Services. The Association therefore represents approximately 54 percent of licensed New York podiatrists.

The Association's charter documents include a constitution and bylaws, copies of which are enclosed as Exhibits A and B, respectively. The constitution and bylaws of the Association do not refer to or pertain to the Network.

As evidenced by its constitution and bylaws, the association has geographic divisions that function semi-autonomously within the state Association framework. Membership of the Association is dispersed throughout the State of New York.

B. *Preferred Podiatric Network Inc.* The Network is a business corporation incorporated under the laws of the State of New York. It is a subsidiary of the Association, through the device of sole ownership by the Association of all of the Network's issued and outstanding common stock. Copies of the Network's certificate of incorporation, bylaws, and minutes of the organizational meeting of its board of directors are attached for your information as Exhibits C, D, and E, respectively. The certificate of incorporation and bylaws are generic; minutes of the organizational meeting describe with specificity the affiliated management of the Association and the Network. This affiliation has been effected in order to provide necessary financial and consulting support, so as to give the Network a reasonable chance of success.

C. *Member Podiatrists.* Membership in the Network is limited to podiatrists licensed to practice in the State of New York who are also members in good standing of the Association and who execute a Network Participation Agreement.

II. NETWORK PARTICIPATION AGREEMENT. The Network participation Agreement, a copy of which is attached as Exhibit F, is the document that articulates in detail the function and goals of the Network. It has been drafted to conform to previous networks sponsored by professional associations or health care competitor groups who have sought to develop a single intermediary to deal with third party payers on non-fee issues in order to facilitate communication, the exchange of information, and economic activity between non-integrated groups of health care providers and third party payers.

Under existing circumstances, individual podiatrists or podiatric group practices throughout the state are required to communicate with third party payers if these podiatrists wish to attempt to become panel members of third party payers such as managed care companies, health maintenance organizations, union trust plans, preferred provider organizations, or similar managed care entities. In addition, the health care reforms recently proposed by President Clinton anticipate the formation of health care alliances of purchasing cooperatives that may in fact function as statewide monopsonies. In the Association's view, it is unlikely that the Association's diffuse membership will be able to effectively deal with such large entities from a communications standpoint without the creation of the Network to act as intermediary.

The Participation Agreement authorizes the Network to actively solicit general contract offers from third party payers to purchase podiatric medical services from individual podiatrists that participate in the Network. The final terms and form of all contract offers and contracts are to be determined by the third party payers and participating podiatrists individually. Any communications by the Network concerning podiatric services fee schedules or relative value guides may be provided only upon specific restrictive terms, such terms being derived from the final judgment negotiated by the Department of Justice in *United States of America v. Massachusetts Allergy Society, Inc., et al.* [May 18, 1992].

If third party payers ask the Network in writing to negotiate and represent the interests of participating podiatrists as a group on contract matters not involving fees, such as utilization review, credentialing standards, indemnification and hold harmless agreements, and the like, the Network will at its discretion engage in such representation only where the requesting third party payer agrees that any such negotiated terms must be ratified by each participating podiatrist and that the Network itself will have no power and authority to bind any participating podiatrist. It is the intention of the Association, through the Network, to encourage economic activity through the facilitation of business solicitation and contract negotiations without authorizing the Network to bind either the third party payer or any

participating podiatrist to any particular economic terms. The Network will in effect function as an intermediary to facilitate the exchange of information between third party payers and participating podiatrists.

The Network may also provide a contract "hotline" in which individual podiatrists may obtain legal consultation on issues of contract interpretation. Consulting a single attorney familiar with contract proposals should result in significantly less legal expense to each participating podiatrist than if each podiatrist was required to have a different attorney analyze the legal effect of a proposed contract. The attorney will not negotiate the contract on behalf of the podiatrist nor recommend fee schedules or other fee matters.

The Participation Agreement describes the information to be exchanged and legal limitations on Network and participating podiatrist activity and should be examined as the key document for consideration.

III. RELEVANT MARKET. The Network will be limited to participating podiatrists who are licensed to practice podiatric medicine in the State of New York and are members of the Association. As previously stated, the maximum potential Network participation would be 54 percent of all New York State licensed podiatrists of 100 percent of membership of the Association participates in the Network. New York State is the potential geographic market. The relevant medical services market is not limited to podiatrists, however.

The scope of practice of podiatric medicine is defined by Section 7001 of the New York Education Law, as follows:

Section 7001. Definition of Practice of Podiatry.

The practice of the profession of podiatry is defined as diagnosing, treating, operating, and prescribing for any disease, injury, deformity or other condition of the foot or operating on the bones, muscles, or tendons of the feet for the correction of minor deficiencies and deformities of a mechanical and functional nature. The practice of podiatry includes treating simple and uncomplicated fractures of the bones of the foot; administering only local anesthetics for therapeutic purposes as well as for anesthesia; treating under general anesthesia administered by authorized persons; using non-narcotic post-operative sedatives; but not treating any other part of the human body nor treating fractures of the malleoli or cutting operations upon the malleoli. A podiatrist licensed to practice

Hon. Anne K. Bingaman
November 30, 1993
Page 5

podiatry, only after certification by the Education Department of the State of New York, in accordance with qualifications established by the commissioner, shall have the right to administer or prescribe narcotics.

Podiatrists are in direct competition with physicians. Physician practice is defined, under Section 6521 of the New York Education Law, as follows:

Section 6521. Definition of Practice of Medicine.

The practice of the profession of medicine is defined as diagnosing, treating, operating, or prescribing for any human disease, pain, injury, deformity, or physician condition.

There were 54,608 M.D. physicians licensed to practice in the State of New York as of July 7, 1993, as stated by a verification clerk of the New York State Education Department Division of Professional Licensing Services. It is the Association's position that physicians are authorized to perform all medical practices within the scope of licensure of podiatry, as defined in Section 7001 of the New York Education Law, and that virtually all licensed physicians in the State of New York that provide general medical and surgical care, such as general and family practitioners, internists, orthopedists, general surgeons, and orthopedic surgeons are either actual or potential competitors of podiatrists under New York State law.

An example of the competitive pressures under which podiatrists are practicing is the recent elimination under New York State law of reimbursement for podiatric services under the state Medicaid program. A copy of the statutory amendment deleting reimbursement for podiatric services, and an explanation of the amendment, are appended hereto as Exhibit G. The complaint of the Association challenging the exclusion is attached hereto as Exhibit H. Implicit in the legislative denial of reimbursement for medical services provided by podiatrists is that physicians are able to provide medically necessary foot care services to Medicaid-eligible patients. Although the Association strongly believes that podiatrists are the most able practitioners of foot care because their practice is limited to such care, the relevant supply of service providers for foot care clearly includes physicians as well as podiatrists.

Expansion of practice and economic opportunities is viewed by the Association as crucial to the continued viability of the podiatric medical profession within the State of New York. The Network is viewed as a method by which to facilitate access to the third party payers by podiatrists and further to facilitate access by third party payers to the podiatric medical services market, to the benefit of the podiatrists, third party payers, and

the health care consumer. competition between physicians and podiatrists should be enhanced by increased access by podiatrists to third party payers.

It is the Association's belief that the Network will have a beneficial effect upon competition, does not restrain either the third party payers or the participating podiatrists in the pursuit of their independent business interests, and will lead to greater choices for consumers. The terms of the Participation Agreement provide safeguards against the possibility of horizontal activities that could be viewed as unlawful under a per se, or rule of reason, analysis.

The third party payers deemed most significant in the State of New York by market share would be the regional Blue Cross/Blue Shield indemnity and managed care plans, such as Empire Blue Cross/Blue Shield, and Blue Cross and Blue Shield of Western New York. Health maintenance organizations such as GHI, Health Care Plan, Independent Health, and HIP would also be significant. Preferred provider organizations and managed care plans operated by insurance affiliates such as CIGNA may also be significant market participants.

IV. CURRENT STATUS OF NETWORK ACTIVITIES. A solicitation letter (a copy of which is attached as Exhibit I) and a copy of the Participation Agreement will be circulated by the Association to its membership. Preferred Podiatric Network Inc. has been incorporated under the State of New York and is organized as a for-profit corporation. Initial dues solicitations have been requested, and preliminary activity with respect to identifying third party payers for solicitation purposes has been or will soon be commenced.

Section 10 of the Podiatrist Participation Agreement states the following:

X. ANTITRUST CLEARANCE. This Agreement is the subject of a business review request to the United States Department of Justice, Antitrust Division, pursuant to its Business Review Procedures, and shall not be operative in respect of Section II(c) or Section VIII hereof until such clearance is obtained or until the business review request is withdrawn.

The effect of Section 10 of the Participation Agreement is that the Network will not provide any fee information to third party payers, even if specifically requested in writing by such third party payers, until a business review letter is obtained from the Antitrust Division or until the request for business review letter is withdrawn. In addition, the Network will not engage as an intermediary in pass-through negotiations solicited by third party payers with respect to non-fee matters, until a business review letter is obtained

Hon. Anne K. Bingaman
November 30, 1993
Page 7

or until the business review request is withdrawn. Because the Association and the Network believe that time is of the essence, preliminary steps have been taken to develop the Network structure and begin obtaining the necessary information to pursue Network goals, while deferring on activities deemed to involve material risk of antitrust scrutiny, so that a business review letter may be obtained on those areas of material risk.

V. STATE PREFERRED HEALTH CARE NETWORK STATUS. On March 27, 1993, New York Governor Mario Cuomo issued a "Special Message to the Legislature on Health Care System Reform" entitled "Reforming the Health Care System". This message includes a description of "Preferred Health Care Networks". Attached hereto as Exhibit J is a copy of the Executive Summary of the Special Message and the excerpt of the section describing "Preferred Health Care Networks". The Association believes that the Network proposal described herein may enable the members of the Association to effectively participate in a managed care environment as proposed by Governor Cuomo, rather than face exclusion from such programs as has recently occurred with the state's Medicaid program.

VI. CONCLUSION. In view of the above analysis and disclosure, it is hereby submitted that the proposed activities of the Association and the Network meet all of the antitrust concerns of the Department of Justice. It is, therefore, respectfully requested that the Department of Justice issue a statement of its present intention not to seek enforcement action to enjoin the proposed and current activities of the Association and Network.

Very truly yours,

Andrew Feldman

rl