



DEPARTMENT OF JUSTICE
Antitrust Division

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H. Kennedy Hudner, Esquire
Murtha, Cullina, Richter and Pinney
Cityplace I
185 Asylum Street
Hartford, CT 06103-3469

Dear Mr. Hudner:

This letter responds to your October 23, 1995 request for a statement pursuant to the Department of Justice Business Review Procedure, 28 C.F.R. § 50.6, of the Department's present enforcement intentions regarding the proposal of eight plastic surgeons practicing in southwest Connecticut to form a network joint venture, Plastic Surgery Associates of Connecticut, LLC ("PSAC"). For the reasons set forth below, the Department has no present intention to challenge the formation of the joint venture.

Background

As we understand from the materials you have provided, PSAC has been formed as a for-profit corporation under the Connecticut Limited Liability Company Act to contract with HMOs, employers, primary care IPAs, PHOs and other payers to provide plastic and reconstructive surgery, cosmetic surgery, maxillofacial surgery, surgery of the hand, microsurgery, burn and cancer surgery, and surgery to correct congenital abnormalities. Each of PSAC's eight initial members will contribute \$3,000 as a capital contribution and will hold a 12.5 percent interest in the corporation. Each founding member will also be a member of the Management Committee, which will elect one of its members to serve as Managing Director and have sole authority to bind PSAC contractually. The Operating Agreement will expressly permit each member of PSAC independently to contract with third-party payers or other health care provider networks in competition with PSAC.

According to your calculations, the eight founding members of PSAC comprise 15 percent of the 52 plastic surgeons currently practicing in the areas of Connecticut from which PSAC draws most of its patients. In addition, you maintain that several other types of physicians practicing in that area provide many services in competition with plastic surgeons.

PSAC will contract on behalf of its participating providers using either a discounted fee-for-service or a capitated fee structure. When contracting on a fee-for-service basis, PSAC will withhold a substantial percentage (anticipated to be 20 percent) of fees paid, to be retained by PSAC only if it meets specific cost-containment goals negotiated between PSAC and the payer. PSAC plans to develop an integrated management system and claims processing mechanism to create administrative efficiencies and aid in outcomes tracking. PSAC will also establish protocols for high volume plastic surgery procedures to insure service quality, stabilize outcomes and, by reducing

post-surgery complications, reduce utilization. Members will agree to comply with any utilization review and quality assessment programs, as well as any practice standards and protocols developed by PSAC and/or payers, in order to be able to meet cost-containment goals.

PSAC intends to market its services within the aggregate geographic area served by the eight initial members. To determine this area, each PSAC doctor reviewed his 1994 records to determine the towns from which he drew the nearest 75% of his patients, based on home addresses. The combined 75% areas for all eight members included 34 towns in southwest Connecticut, and three towns in southeast Connecticut. Within this primary area there are 31 other plastic surgeons, so that PSAC would comprise 21% of the total of 39 plastic surgeons in the delivery area. The members also identified 13 additional plastic surgeons outside the primary area who are known to compete with PSAC members for patients. This increased the competitive pool calculated by PSAC to 52 plastic surgeons, of which PSAC members would account for 15%.

PSAC will engage an independent consultant to survey the fees presently charged by the initial members as well as generally available published market rates. With this information, the consultant will prepare a proposed fee schedule, which will be delivered only to PSAC's Managing Director. The consultant will not disclose to the Managing Director (or to PSAC's other members) any of the specific fees or costs obtained from members, although he may disclose such market-wide averages as are needed for the Managing Director to determine whether PSAC's proposed rates are low enough to make PSAC a strong competitor for contracts with payers. It is anticipated that the minimum fee schedule adopted by PSAC will be lower than the average fees presently charged by the members. The Managing Director will sign a confidentiality agreement with PSAC prohibiting him from disclosing the supporting details of the consultant's report to any other member.

Rule of Reason Analysis

Based on these representations, the Department has no intention to challenge the formation of PSAC. PSAC is a *bona fide* joint venture whose members are assuming substantial financial risk in the provision of plastic surgery services to health care plans, either through the acceptance of capitation or through fee withholds pending accomplishment of cost-containment goals. PSAC has also adopted a method of fee-setting designed to prevent the exchange of individual fee information among member physicians.

In first defining the relevant service market, we note that PSAC maintains that several other types of physicians located in its service area perform many of the same procedures and services as plastic surgeons, and should therefore be included in the product market. Our investigation determined, however, that managed care payers in the area require the services of board-certified plastic surgeons in order to successfully market their plans, and that neither they nor their enrollees would find other types of specialists to be acceptable substitutes for the services of plastic surgeons. Consequently, for purposes of this business review, we have assumed the relevant service market to be board-certified plastic surgeons.

On the issue of geographic market, the information submitted is insufficient to allow for a precise definition. However, based on that information as well as our independent inquiries to managed care payers, it appears that PSAC's proposed service area is not unreasonable, and we are persuaded that PSAC will not possess anticompetitive levels of market power in any geographic market we might reasonably configure.

The 31 plastic surgeons identified by PSAC in its primary service area appear to be reasonable substitutes for the members of PSAC. Furthermore, we determined that there are no hospitals at which PSAC members have privileges where they do not face competition from other plastic surgeons, both at that hospital and at other nearby hospitals. Payers generally confirmed that there are adequate reasonable substitutes for the plastic surgery services provided by PSAC members. Indeed, PSAC's formation, as described above, appears to fall well within the 30% Safety Zone for non-exclusive physician networks. [See Statements of Enforcement Policy and Analytical Principles Relating to Healthcare and Antitrust, Issued by the U.S. Department of Justice and the Federal Trade Commission, September 27, 1994, at 68].

The formation of PSAC appears likely to provide efficiency-based benefits, including lower prices for plastic surgery services, to health care payers and consumers in Connecticut. It also appears likely to foster increased competition in the delivery of plastic surgery services in the relevant geographic market.

In light of these facts, the Department has no present intention to challenge the formation of PSAC. In accordance with our normal practice, however, the Department remains free to bring an enforcement action in the future should the operation of PSAC prove anticompetitive in purpose or effect.

This statement is made in accordance with the Department's Business Review Procedure, 28 C.F.R. § 50.6, a copy of which is enclosed. Pursuant to its terms, your business review request and this letter will be made available to the public immediately. Information supplied to support your request will become publicly available within 30 days of the date of this letter unless you request that all or part of it be withheld in accordance with Paragraph 10(c) of the Business Review Procedure.

Sincerely,

Anne K. Bingaman