



DEPARTMENT OF JUSTICE
Antitrust Division

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July 17, 1995

Linda M. Sekely, Esq.
Hagan McClintock & Co.
1100 Benedum-Trees Building
Pittsburgh, PA 15222

Dear Ms. Sekely:

The letter responds to your request on behalf of the Pennsylvania Orthotics & Prosthetics Enterprise ("POPE") for the issuance of a business review letter pursuant to the Department of Justice's Business Review Procedure, 28 C.F.R. § 50.6, regarding POPE's plans to form an orthotists and prosthetists contracting organization in Pennsylvania.¹

Based on the information provided, we understand that POPE is an Individual Practice Association ("IPA"), established as a nonprofit nonstock taxable corporation under Pennsylvania law. POPE's network of orthotics and prosthetics providers will be open to any qualified applicant, subject to credentialing and market share considerations.

POPE'S bylaws require that each provider facility be registered with the American Board for Certification in Orthotics and Prosthetics, Inc. The bylaws also require that each member's facility have on its staff at least one certified orthotist and one certified prosthetist, or one certified prosthetist and orthotist.

¹Orthotics is concerned with the design and use of mechanical devices to support or supplement weakened joints or limbs, whereas prosthetics is concerned with the artificial replacement of a limb, tooth, or other part of the body.

POPE will hire a management company to negotiate contracts for orthotic and prosthetic services with third-party payors. To assist in negotiating contracts, the management company will collect fee and cost information from members. However, safeguards will be in place to prevent the dissemination of any individual member's fee and cost information to any other member. All information collected by the management company will remain confidential. Members must participate with the payors and accept the negotiated contract terms. However, members are free to terminate their membership in POPE at any time. Members who terminate their membership in POPE forfeit their annual membership fee, currently set at \$1,500 per member as noted in POPE's bylaws.

To provide incentives to its members to achieve cost-reducing utilization goals and other customer benefits, POPE will establish a "risk pool." That is, POPE will withhold no less than 20 percent of each participating member's billings, which will be distributed to members periodically only if as a group they meet established efficiency and quality goals. The amount each member receives will be based on a formula that calculates each member's success in achieving four quality service standards: 1) whether the remanufacturing of an orthosis or prosthesis is required; 2) whether the initial contact with an inpatient after referral occurs within 48 hours and the product is delivered within 48 hours after that; 3) whether clinical review standards and utilization management are satisfactory to the third-party payor; and 4) whether patient surveys, which are to be given to every patient, indicate patient satisfaction. Members who fail to maintain a satisfactory level of quality service will lose their membership in POPE.

You have represented that the POPE network will be nonexclusive, with the participating members free to contract directly with third-party payors, or to participate in other provider-controlled or non-provider-controlled networks outside the context of the POPE network, and without any requirement of notification to, or approval by, POPE.

POPE will limit its network to no more than 20% of the orthotists and 20% of the prosthetists in any relevant geographic market who deliver the type of orthotic and prosthetic services POPE's network will offer. You have represented that if POPE learns that its share of the orthotists or prosthetists exceeds 20% in any relevant geographic market, POPE will take appropriate action to reduce its membership to a level not exceeding 20% of the orthotists or prosthetists in that market.

From this information, it appears that POPE is a bona fide joint venture in which member orthotists and prosthetists will assume significant financial risk by participating in the fee withhold arrangements described above. Furthermore, in analyzing POPE's provider network under the rule of reason given the factors discussed above, we have concluded that the proposed network is not likely to create, enhance, or facilitate the exercise of market power (i.e., the ability to impose supracompetitive prices or to prevent the formation of competing networks of orthotists or prosthetists), and may provide procompetitive benefits. In addition, third-party payors have told us that they do not believe that POPE's operations are likely to cause anticompetitive effects.

For the foregoing reasons, the Department has no present intention to challenge POPE's proposed network. See generally Department of Justice and Federal Trade Commission Statements of Antitrust Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust, at 68-70 (Sept. 1994) (establishing antitrust safety zone for nonexclusive physician joint venture with 30 percent or less of the physicians in

each specialty in a relevant geographic market who share substantial financial risk). In accord with our normal practice, however, the Department remains free to bring whatever action or proceeding it subsequently concludes is required by the public interest if the actual operation of POPE proves anticompetitive in purpose or effect.

This statement of the Department's enforcement intentions is made in accord 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. Your supporting documents will be publicly available within 30 days of the date of this letter, unless you request that any part of the material be withheld in accordance with Paragraph 10(c) of the Business Review Procedure.

Sincerely,

/s/

Anne K. Bingaman
Assistant Attorney General