Health Law Bulletin

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Federal Trade Commission Issues Positive Advisory Opinions On Antitrust Implications of Clinical Integration

From time to time, groups of physicians in an area may determine that they would benefit from "integrating" their practices into an IPA, PHO, or other joint venture. The anticipated benefits may include economies of scale, the ability to co-ordinate care between primary care physicians and specialists, providing disease management services for patients with certain conditions, or a myriad of other reasons. A key characteristic of these proposed integrated models is the ability for the group as a whole to negotiate with insurance companies and self-funded health care plans. When a group reaches the point of negotiating collectively for the fees that a payor is going to pay for various services throughout the plan, possible antitrust implications arise.[1]

Federal antitrust laws are designed to benefit consumers by protecting and promoting competition. The specific antitrust concern with a physician integration arrangement is called "horizontal price-fixing." Horizontal price-fixing is a situation where competitors (physicians in separate practices, for example) agree among themselves what they will charge for their goods or services. If an integrated physician arrangement were to negotiate with payors for the fees to be paid to all its physicians solely for the purpose of exercising its market power to get higher rates, that would constitute "naked" horizontal price-fixing, which is illegal under the federal Sherman Antitrust Act.

However, it is possible for competitors (physicians, other health care providers, or other businesses) to lawfully engage in integrated models that include collective price negotiations *if* the collective rate-setting is part of a larger integrated venture that is likely to have pro-competitive effects and *if* the collective rate-setting promotes or is reasonably necessary to the achievement of those pro-competitive effects.

The Federal Trade Commission, in a series of three advisory opinions over the last three years, has analyzed the antitrust implications of three proposed physician integration models. In each case, the FTC has determined that the proposed integration models are lawful because the

[1] This analysis does not apply to physicians who are part of the same group practice; they are not considered "competitors." However, if that group practice enters into an arrangement with other group practices or other individual physicians, then the antitrust issues must be considered.

integration is likely to result in benefits to consumers that outweigh any anti-competitive effects that might result from collective rate-setting or collective rate negotiations.

The key question, then, is: Does your model have sufficient integration so as to be likely to produce the efficiencies that will benefit consumers?

If you are considering entering into an integrated or joint venture arrangement, there are several positive features of the three arrangements analyzed by the FTC that you should be aware of. Examining these FTC-approved arrangements will give you and your legal counsel a sense of the kinds of things that the FTC considers and that you should consider in creating your integrated model.

1. Selective Participation of Network Physicians—By requiring all physician members who join the network to agree to the arrangement's requirements, it is more likely that those who participate will be fully committed to the goals and requirements of the integrated system.
2. Investment of Monetary and Human Capital—Investment of financial capital or "sweat equity" (participation in committees, development of protocols, etc.) is seen as a likely motivation for the participants to work toward success in the market and toward accomplishing the quality and cost objectives of the integration.
3. Infrastructure and Program Capability—Your integration model should have processes in place that actually are likely to support the success of your model.
4. Measurement and Evaluation of Performance Results—Development of goals and measurements will enable you to prove that the beneficial results of your model are in fact occurring.
5. Quality Improvement Programs—Consider developing programs that will encourage quality improvement and potentially reward member physicians when those quality measures are met.

Including these features in your integration model will not guarantee compliance with the antitrust statutes. However, they do provide pro-consumer benefits that the FTC would weigh against the collective negotiation of contracts in determining whether your model is compliant.

One final point to keep in mind when contemplating an integration model is what is termed the "spillover effect." This refers to the concern that an individual provider might try to use the rates that are negotiated as part of the integration model with his other patients or with other networks that he might join or already be a member of. If your integration model does not include substantially all of the providers in the market (which raises other issues of concern), the FTC generally assumes that the existence of non-integrated physicians and alternative networks will make it likely that the market will prevent an individual provider from charging higher rates for services that do not come with the benefits of the integrated model. Engaging in "spillover" pricing would defeat that safeguard.

The antitrust concerns of provider integration models go well beyond what can be covered in this bulletin. If you or your practice are approached about an integration venture or are contemplating initiating one, you should consult your attorney from the outset in order to avoid the pitfalls that might cause your plans to be out of compliance with federal antitrust law. Failure to follow the legal guidelines could result in serious financial penalties.