

Please Don't Shoot The Messenger: Antitrust Concerns In Physicians Network

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In response to the increasing pressures of managed care, many physicians have banded together to form contract-based "networks" to capture managed care business. The distinguishing feature of these networks is that the physicians do not integrate their medical practices. Instead, they retain their independent practices and continue to compete for non-network business. Examples of contract-based networks include PPOs, IPAs, PHOs, physician organizations and MSOs. Because the network members remain competitors, these networks will be susceptible to antitrust scrutiny.

The antitrust laws prohibit agreements among competitors that reduce competition without offering benefits to consumers. Arrangements that raise antitrust concerns may be challenged by criminal prosecution, by civil suits brought by the state or Federal governments and/or by private actions for damages by competitors, consumers or others. Although in recent years antitrust actions in many industries have declined, enforcement in the health care industry has been vigorous.

Joint decisions made by otherwise competing physicians concerning prices, discounts or other terms of doing business may raise serious antitrust concerns or even amount to per se illegal price fixing if the physicians have not substantially integrated their medical practices or do not share substantial financial risk through the network. In a contract-based network, there will not be substantial integration of the physicians' medical practices. Therefore, these networks may jointly negotiate price only if their members share substantial financial risk. Capitated contracts and contracts which include a substantial withhold are examples of arrangements under which substantial financial risk would be shared. Under contracts of this type, the network's physicians would jointly be at risk if the network exceeded certain utilization or cost containment goals contained in the contract.

Locally, networks are primarily pursuing discounted fee-for-service managed care contracts. Because these contracts usually do not involve the shar-

ing of substantial financial risk, the networks cannot negotiate price or other substantive business terms with the payers. Instead, these networks must use the "messenger model" to arrange relationships between payers and the network's physicians.

Under the messenger model, the network, acting through an agent, transmits proposed contracts from the payers, including fee schedules, to the network's physicians. Each network physician individually decides whether or not to accept the proposed payer contract. The agent does not collectively negotiate on behalf of the physicians, influence the physicians to make or accept a particular offer or in any way serve to facilitate coordinated behavior among the physicians.

Because the messenger model is so cumbersome, some networks have begun to use a modified or accelerated messenger model. Under this model, the network's agent directly discusses fees with the payers. Each physician approves in advance a minimum fee schedule (which schedule is not shared with the other network members). This information forms the basis of the agent's negotiations with the payers and allows the agent to advise payers of its ability to deliver a network of providers at a stated price. From a business standpoint, this model is clearly superior to the "pure" messenger model; however, from an antitrust standpoint, there is a concern that this conduct may be challenged as price fixing.

As contracts with managed care organizations become more risk-based, there will be greater risk sharing among network members and the concern over joint pricing decisions will lessen. Until that time, however, physicians in contract-based networks should make certain that their networks adequately analyze and address the antitrust issues. A violation of the antitrust laws not only puts the network at risk, but also may expose the network's board of directors to personal liability or criminal prosecution. ■