Network Conduct: Avoiding The Antitrust Pitfalls

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Agenda

- Negotiation Models
- Network Conduct

Objectives

- Identify the kinds of activities that can create serious practice antitrust risks in connection with network conduct.
- Understand the steps that can be taken to minimize these risks, consistent with the provider's strategic objectives.

The General Principle

- Antitrust laws require competitors to act independently, i.e. to compete, unless:
  - They act as part of an integrated joint venture, and
  - Their joint actions will not harm competition, e.g. result in higher prices or poorer quality.

Areas Of Antitrust Concern Relating To Networks

- Limiting competition between Independent competitors, e.g. independent physicians.
  - Aggregating market power by joining together.
  - Using power to exclude other competition.

Areas Of *Practical* Antitrust Concern For Networks

- Gaining power
- Using power to demand higher prices from payors
- Using power to exclude payors

It’s all about the payors

FTC Actions Against Networks: Common Elements

- Joint negotiation by independent providers
- Dominant shares
- Absence of substantial integration
- Aggrieved payors

Common Remedies

- Order to cease and desist
- Dissolution of IPA or PHO

Potential Remedies

- Disgorgement of “price-fixing” profits
- Treble damages
- Criminal penalties

The Antitrust Standards

Activity	*Legal Standard for Analysis*
Price fixing	*Per se illegal*
Joint negotiation through integrated joint venture	Rule of reason

An Illegal Agreement Must Involve *Separate* Competitors

- E.g. two independent orthopedic groups, or: Independent orthopedic group and employed orthopedic surgeons.
- Wholly-owned surgery center and minority-owned surgery center.

Joint Ventures

- Two entities will be treated as one person, not conspirators:
  - Where one entity owns 100% of another.
  - Likely, where one entity owns the majority (>50%) of another.
  - NOT, where entity owns a minority (<50%) of another.

Networks Without Agreement Concerns

- All employed physicians
- Only one group per specialty

What Makes a PHO An Integrated Joint Venture?

- Financial risk sharing, or
- Clinical integration
  - FTC pronouncements
  - ACO standards

The Standard For Clinical Integration

- The physician organizations must "(b) implement an active and ongoing program to evaluate and modify practice patterns. . .”[1]

[1] *In the Matter of Urological Stone Surgeons, Inc.* (emphasis added).

FTC: Networks Not Sufficiently Clinically Integrated

- Clinical integration was found insufficient where:
  - IPA did "not: engage in case management; provide feedback to physicians concerning patient care; require adherence to its clinical guidelines and protocols; operate or refer patients to any disease management programs or patient registries; or engage in meaningful education." [1]
  - IPA did "not monitor practice patterns and quality of care, or enforce utilization standards regarding services provided by its PPO network." Its physicians were "required to abide by the utilization management guidelines established by payors, not by the guidelines in [the IPA's] risk-sharing contracts."[2]
  - Network provided "practice management programs (including two quality improvement projects, clinic inspections, and quarterly quality council meetings)" but "[t]hese activities . . . [did] not involve collaboration to monitor and modify clinical practice patterns to control costs and ensure quality or otherwise integrate their delivery of care to patients.[3]

[1] *N. Tex. Specialty Physicians,* Dkt. No. 9312 (FTC Nov. 16, 2004) (initial decision).
[2] *Cal Pac. Med. Group,* 137 F.T.C. 411 (2004) (consent order).
[3] *Minn. Rural Health Coop.*, Dkt. No. 0510199 (FTC Dec. 28, 2010) (consent order).

One PHO That "Failed" The Test

- "SHO does not explain why a single hospital could not develop [its] type of program and itself provide higher quality services."
- "SHO's program also apparently lacks a mechanism for dealing with a member hospital that fails to adequately assure its physicians' compliance and cooperation with the program requirements. . ."

Advisory Opinion Letter, Suburban Health Organization, Inc. (March 28, 2006).

The Rule Of Reason Factors

- Market definition.
- Market share by specialty.
- Entry.
- Exclusivity?

A Market Share Hypothetical

Hospital: 40% share of county

Primary Care Doctors: 50% share

Cardiac Surgeons: 70% share

Gastroenterologists: 30% share

The Key Role Of Entry And Exclusivity into the Market

Quorum: 58% share of physicians with easy entry not problematic.[1]

Hassan: 75% nonexclusive share of physicians not a concern.[2]

[1] *HTI Services v. Quorum Health.*
[2] *Hassan v. Independent Practice Associates.*

Entry Questions

- How successful is recruiting outside the network?
- Can new doctors succeed outside the network?
- Is there a shortage – or a surplus – of of the relevant specialties?

Exclusivity Questions

- Do providers in fact contract outside of the network?
- What happens if the network reaches an impasse with payors?

Practical Advice For "High Share" Networks

- Don't be greedy
- Don't be boastful

The *Evanston* Case

- "The larger market share created by adding Highland Park Hospital has translated to better managed care contracts."

- "Some $24 million of revenue enhancements have been achieved – mostly via managed care negotiations…. None of this could have been achieved by either Evanston or Highland Park alone. The 'fighting unit' of our three hospitals and 1600 physicians was instrumental in achieving these ends."

Hospital documents.

Other Conduct Subject To Rule Of Reason

- Selective contracting
- Tying
- Most Favored Nations Clauses
- Spillover Effects
- Other Agreements Outside the Network

Selective Contracting

- Can be an issue if harms overall competition in a market
- But – selectivity can be a result of competition –
  and therefore procompetitive

The key question – will the contracting reduce price and cost?

Selective Contracting: Problematic Examples

(1) A network with market power refuses to deal with one or more payors in order to keep managed care out of a market or to disadvantage competitors.

(2) A network of providers pressures payors to refuse to deal with a competing provider.

Selective Contracting: More Benign Examples

- One hospital in a competitive market enters into agreements with payors, trading low price for a narrow network.
- One PHO excludes high cost physicians.

Tying

- Dominant market power in A.
- “If you want A, must buy B,” or “If you want A at a viable price, must buy B.”
- Buyer is forced to buy B.

Examples Of Tying

- Multiple geographic areas
  - Tie Hospital A to Hospital B
- Multiple product contracts
  - Tie hospital services to physician specialties
  - Tie OB to cardiology

Most Favored Nations Clauses

- Only an issue with a dominant payer like BCBSM.
- DOJ alleges in Michigan:
  - BCBSM's MFN clauses have raised prices to BCBSM's competitors and have limited expansion and/or entry.
  - As a result, competition between BCBSM and other payors has lessened.

Spillover Effects

- Can’t aggregate outside of integrated network activities
  - Contracts outside of network
  - Charges
  - Wages and (local) supplies
- Generally shouldn’t share information in these areas

Agreements Outside The Network

- Agreements with non-network providers can create serious antitrust risk
  - Rates
  - Managed care dealings
  - What services to provide
  - Information exchange

Other “Spillover” Concerns

- Who will and won’t provide services
- Refusals to deal with payors
- Decisions on recruiting