New York State Council for Community Behavioral Healthcare

Commercial Contracts and Antitrust: Why it is Never a Good Idea to Share Reimbursement Rates with Other Providers

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- Partner in FTLF's national health law practice.
- Counsels health centers, behavioral health providers, and provider networks on a wide range of health law issues, including fraud and abuse, reimbursement and payment, and antitrust and competition matters.
- Began his legal career in Washington, D.C. as a trial attorney in the Antitrust Division's Health Care Task Force at the U.S. Department of Justice.
- Served as Policy Counsel for the Alliance of Community Health Plans, representing non-profit and provider-sponsored managed care organizations before Congress and the Executive Branch.
- Received a B.A from Brandeis University, an M.P.H. from Boston University School of Public Health, and a J.D., cum laude, from Boston University School of Law.

AGENDA

- Purpose of Antitrust Laws
- Antitrust Legal Standards
  - Per Se Offenses (with compliance tips!)
  - "Rule of Reason" (applies to joint ventures)
- Safety Zones: Sharing and Exchanging Information by Providers

WHAT IS THE PURPOSE OF ANTITRUST LAWS?

Federal antitrust laws prohibit anti-competitive activities among private, competing businesses that unreasonably restrain competition.

- Reflecting our nation's primary economic policy, the purpose of the antitrust laws is to protect and promote competition.
- The antitrust laws assume that competition is good and that vigorous competition among private firms results in lower prices, better products, and greater consumer choice.

TO WHOM DO THE ANTITRUST LAWS APPLY?

The antitrust laws apply to both nonprofit and for-profit organizations.

Up to the mid-1970s, there was a widely held belief that federal antitrust laws did not apply to health care.

- That changed after the Supreme Court decided Goldfarb vs. Virginia State Bar, a 1975 case in which the Supreme Court ruled that learned professions were not exempt from application of the federal antitrust laws.
- In 1982, the Supreme Court decided Arizona vs. Maricopa County Medical Society holding that physicians also were not exempt from antitrust laws.
- Since that decision, the health care industry has been held subject to the antitrust laws and treated the same as any other industry.

Key Supreme Court Cases

- **Goldfarb v. Virginia State Bar** (1975): Supreme Court decides that antitrust laws apply to "learned professions"
- **Arizona v. Maricopa County Medical Society** (1982): Supreme Court applies antitrust laws to physicians
- **Federal Trade Commission v. Superior Court Trial Lawyers Association** (1990): First Amendment immunity does not extend to private defense lawyers boycotting DC courts.

WHAT DO THE ANTITRUST LAWS PROHIBIT?

Sherman Act (1890)

- "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." (Sec. 1)
- "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony." (Sec. 2)
- Enforced by both the U.S. Department of Justice (Antitrust Division) and Federal Trade Commission (FTC), state attorneys general, as well as private parties.
- Violations of the Sherman Act can result in criminal penalties of up to $100 million for a corporation and $1 million for an individual, along with up to 10 years in prison.

ARE THERE EXCEPTIONS?

Noerr-Pennington Doctrine

- First amendment immunity for influencing government (i.e., lobbying) on issues related to price and non-price
- Applies to the:
  - Legislative Branch
  - Executive Branch
  - Judicial Branch

➢ This allows providers to jointly lobby for Medicare and Medicaid rates!

WHAT ARE THE ANTITRUST LEGAL STANDARDS?

'Per-Se' Offenses (*e.g.*, price-fixing, market allocation, refusals to deal / boycotts, tying)

Rule of Reason (applies to joint ventures)

Agency Guidance (including "Safety Zones")

- DOJ/FTC Statements of Enforcement Policy in Health Care (1996)
- FTC/DOJ Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program (2011)

WHAT ARE 'PER SE' ANTITRUST OFFENSES?

Horizontal Price Fixing

- When competitors agree on specific prices or make agreements that substantially affect on price or restrict price competition

Market Allocation/ Division

- When actual or potential competitors agree to allocate or divide markets or customers by geographic area or by product

Group Boycotts

- When competitors with market power take action to injure or exclude a party from access to the market

Tying

- When a seller with market power sells one product only on condition that the buyer purchases second product

EXAMPLE OF A "PRICE-FIXING"

- Three competing providers complain about commercial reimbursement rates.
- The providers agree not to accept reimbursement from commercial insurers below Medicaid rates.
- Price fixing occurs when competitors agree on prices to charge for services.
- Price-fixing is "per se" unlawful.

Does the agreement need to be in writing?

- No, an agreement need not be written but can be oral, or even implied or tacit, so long as it reflects a "meeting of the minds" to commit to a common scheme that has either an anticompetitive purpose or an unreasonable anticompetitive effect.

Compliance Tips:

- **Do not discuss with other providers what reimbursement rates you currently receive from commercial insurers, or what rates that you may be willing to accept from commercial insurers in the future.**
- **Disclosure of commercial reimbursement rates will likely breach confidentiality obligations in current insurance contracts and may result in financial penalties under the contract.**
- **You may, however, disclose rates set by the government, e.g., Medicaid APG rates.**

EXAMPLE OF A "MARKET DIVISION"

- Two competing providers complain about commercial reimbursement rates.
- To increase market power, the providers agree that one will limit the scope of its services to mental health and the other will limit its services to substance use disorders.
- Market allocation occurs when competitors agree to allocate geographic areas, sale of goods or services, or types of customers.
- Market allocation is "per se" unlawful.

Would this be permitted as a joint venture?

- Legitimate joint ventures allow competitors to work together to conduct an activity that otherwise would not occur by each entity separately. Joint ventures are analyzed under the rule of reason standard. However, in this example, because both providers had been furnishing mental health and SUD services prior to the market allocation agreement, this is unlikely to be viewed as a legitimate joint venture.

Compliance Tip:

- **Do not discuss with other providers plans to limit or reduce scope of services, service area, or types of customers.**

EXAMPLE OF A "GROUP BOYCOTT"

- Three competing providers complain about commercial insurers payment policies, credentialing procedures, and prior authorization requirements.
- The providers collectively refuse to deal with a commercial insurer unless the insurer agrees to the providers' demands for changes.
- The boycott denies the insurer an adequate provider network for the providers' service and limits access to care to the insurer's members.
- Group boycotts (*i.e.*, refusals to deal) occur when competitors agree not to deal with another firm.
- Group boycotts are per se unlawful so long as the boycotting parties have market power. If the boycotting parties do not have market power, then the boycott is analyzed under the rule of reason standard, and still may be illegal.

Compliance Tip:

➢ **Do not coerce commercial insurers by boycotting or threatening to boycott them until they change their policies.**

EXAMPLE OF A "TYING AGREEMENT"

- A provider offers both mental health and substance use disorder services.
- An insurer wants to contract with the provider for mental health services but does not wish to contract with the provider for substance use disorder services.
- Tying agreement occurs when seller with market power will only sell a buyer one product (the typing product) if the buyer also agrees to buy second product (the tied product).
    - Tying Product– mental health services
    - Tied Product-- substance use disorder services
- Tying Agreements are per se unlawful if an entity has market power for the tying product. If the entity does not have market power in the tying product, then the conduct is analyzed under the rule of reason standard, and still may be illegal.

Compliance Tip:

➢ **Do not force a commercial insurer to contract for a service they do not want as a condition of contracting for another service that they do.**

WHAT IS THE RULE OF REASON STANDARD?

Step 1: Define the Relevant Market

What substitutes, as a practical matter, are reasonably available?

Step 2: Evaluate the Competitive Effects

Could the conduct result in higher prices?

Could the conduct harm competitors?

Step 3: Evaluate the Impact of Procompetitive Efficiencies

Will the conduct result in lower prices or higher quality?

DOJ/FTC POLICY STATEMENTS

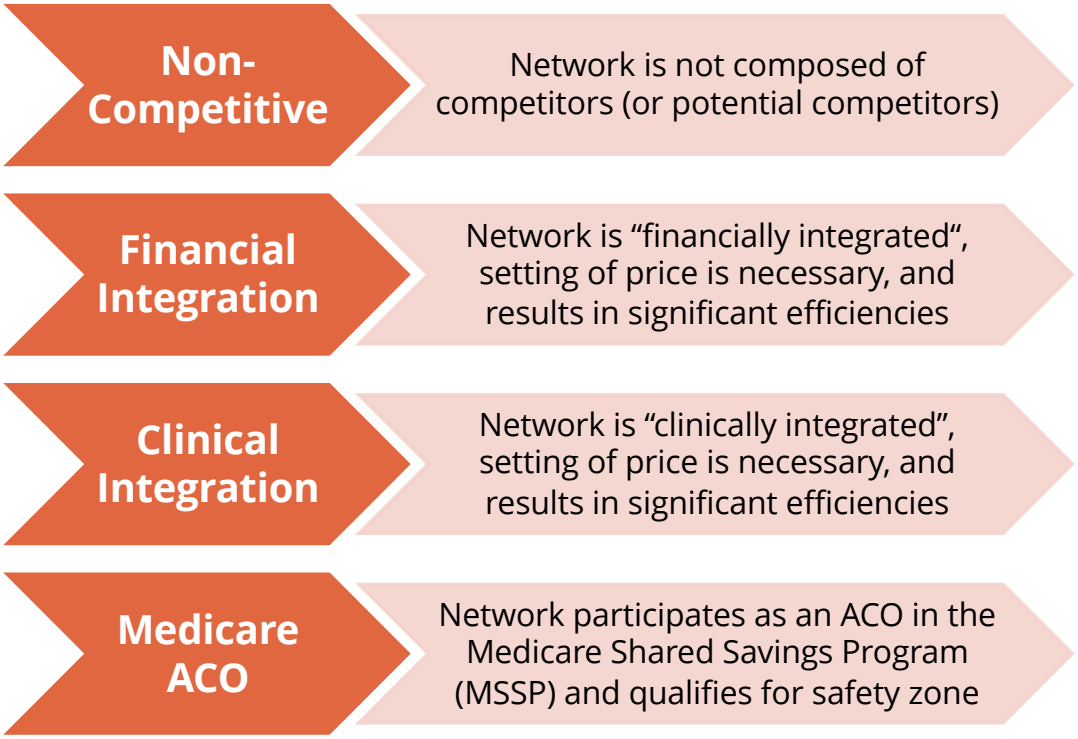
Statement 9 of the DOJ/FTC Policy Statements applies to so-called "Multiprovider Networks" comprised of competing providers as well as networks of providers offering complementary or unrelated services.

- **Pro-Competitive Benefits.** Per the Policy Statements, Multiprovider Networks offer significant procompetitive benefits to consumers by contracting to provide services to subscribers at jointly determined prices and by agreeing to controls aimed at containing costs and assuring quality.

- **No Safety Zone.** Because multiprovider networks involve a large variety of structures and relationships among many different types of health care providers, and new arrangements are continually developing, the DOJ and FTC were unable to establish a meaningful safety zone for these entities.

- **Rule of Reason Standard.** Applies IF the providers' integration through the network is likely to produce significant efficiencies that benefit consumers (i.e., **clinical or financial integration**), and any price agreements (or other agreements that would otherwise be per se illegal) by the network providers are reasonably necessary to realize those efficiencies.

PATHWAYS TO JOINT NEGOTIATION



WHAT IS FINANCIAL INTEGRATION?

Financial Integration: Sharing "substantial financial risk" for the services provided (and jointly priced) through the network.

Examples of "substantial financial risk-sharing" include:

- Capitation payments
- Global fee arrangements
- Fee withholds
- Cost or utilization based bonuses or penalties for providers in the network, as a group, to achieve specified cost-containment goals (i.e., shared savings/shared risk arrangements related to TOC)
- A fixed, predetermined payment amount to provide a complex or extended course of treatment that requires the substantial coordination of care by different types of providers.

FINANCIAL INTEGRATION SAFETY ZONE

Applies Exclusively to Physician Network Joint Ventures

- A physician-controlled network is one in which the network's physician participants collectively agree on prices or price-related terms and jointly market their services
- **Avoids Rule of Reason analysis if financially integrated physician-controlled network meets market share limitations below.**

Non-Exclusive Network – 30% Market Share Limitation

- Network permits physician participants to affiliate with other networks or contract individually with MCOs.
- If the network is non-exclusive, it must be comprised of no more than 30% of the physicians in the relevant market (e.g., primary care physicians)

Exclusive Networks – 20% Market Share Limitation

- Network restricts physician participants to individually contract or affiliate with other provider network or MCOs.
- If the network is exclusive, it must be comprised of no more than 20% of the physicians for the relevant market (e.g., primary care physicians)

SAFETY ZONE FOR COLLECTION/SHARING OF NON-FEE RELATED INFORMATION

DOJ/FTC Statements of Enforcement Policy in Health Care (1996)
Statement 4

- Collective provision of **non-fee related information** by competing health care providers to a purchaser [such as an MCO] in an effort to influence terms upon which the purchaser deals with the providers does not necessarily raise antitrust concerns.
- Does not apply to providers acting individually (which may provide any information to purchasers) or the collective provision of information through a legitimate joint venture, as those activities generally do not raise antitrust concerns.

Safety Zone (Not challenged "absent extraordinary circumstances"):

- Collection of outcome data from network members about a particular procedure that they believe should be covered by a purchaser or
- Providers' development of suggested practice parameters (e.g., standards for patient management to assist clinical decision-making)

- Collective provision of such information poses little risk of restraining competition and may help in the development of protocols that increase quality and efficiency.

SAFETY ZONE FOR COLLECTION/SHARING OF NON-FEE RELATED INFORMATION

DOJ/FTC Statements of Enforcement Policy in Health Care (1996)

Statement 4

Conduct Falling Outside of Safety Zone:

- Any attempt by providers to coerce a purchaser's decision-making by implying or threatening a boycott of any plan that does not follow the providers' joint recommendation;
- Providers who collectively threaten to or actually refuse to deal with a purchaser because they object to the purchaser's administrative, clinical, or other terms governing the provision of services run a substantial antitrust risk; or
- Providers' collective attempt to force purchasers to adopt recommended practice parameters by threatening to or actually boycotting purchasers that refuse to accept their joint recommendation also would risk antitrust challenge.

EXAMPLE: AGREEMENT ON NON-PRICE TERMS

International Healthcare Management v. Hawaii Coalition for Health (9th Circuit 2003)

- Hawaii Coalition for Health (the "Coalition") included independent, competing physician groups
- The Coalition demanded changes in IHM's proposed contract with physicians to make it more acceptable to physicians
- The demanded changes address exclusively non-price terms: UM; credentialing; medical records; termination; and indemnification
- The Coalition was sued for price-fixing and group boycott
- The Court found no evidence of threats by Coalition's physician members to withdraw from health plan contracts if the Coalition did not get its way
- The Coalition won; upheld on appeal

Lesson learned: Even if you ultimately win on the merits, you can still face legal risks!

SAFETY ZONE FOR COLLECTION/SHARING OF FEE RELATED INFORMATION

DOJ/FTC Statements of Enforcement Policy in Health Care (1996)

Statement 5

- Collective provision to purchasers of **information concerning fees charged currently or in the past for the providers' services** does not necessarily raise antitrust concerns.
  - Factual information includes other aspects of reimbursement, such as discounts or alternative reimbursement methods accepted (including capitation arrangements, risk-withhold fee arrangements, or use of all-inclusive fees)
- Such factual information can help purchasers efficiently develop reimbursement terms to be offered to providers and may be useful to a purchaser when provided in response to a request from the purchaser or at the initiative of providers.
- Does not apply to providers acting individually (which may provide any information to purchasers) or the collective provision of information through an integrated joint venture, which does not necessarily raise antitrust concerns.

SAFETY ZONE FOR COLLECTION/SHARING OF FEE RELATED INFORMATION

DOJ/FTC Statements of Enforcement Policy in Health Care (1996)

Statement 5

Safety Zone (Not challenged "absent extraordinary circumstances"):

In order to qualify for this safety zone, the collection of information to be provided to purchasers must satisfy the following conditions:

1. Collection is managed by a third party; and
2. Although current fee-related information may be provided to purchasers, any information that is shared among or is available to the competing providers furnishing the data must be more than three months old; and
3. For any information that is available to the providers furnishing data, there are at least five providers reporting data upon which each disseminated statistic is based, no individual provider's data may represent more than 25 percent on a weighted basis of that statistic, and any information disseminated must be sufficiently aggregated such that it would not allow recipients to identify the prices charged by any individual provider.

SAFETY ZONE FOR COLLECTION/SHARING OF FEE RELATED INFORMATION

DOJ/FTC Statements of Enforcement Policy in Health Care (1996)

Statement 5

Conduct Falling Outside of Safety Zone:

- Collective negotiations between unintegrated providers and purchasers in contemplation or in furtherance of any agreement among the providers on fees or other terms or aspects of reimbursement, or to any agreement among unintegrated providers to deal with purchasers only on agreed terms;
- Providers who collectively threaten implicitly or explicitly, to engage in a boycott or similar conduct, or actually undertake such a boycott or conduct, to coerce any purchaser to accept collectively-determined fees or other terms or aspects of reimbursement; or
- Providers' collective provision of information or views concerning prospective fee-related matters (which is assessed on a case-by-case basis based on all the facts and circumstances surrounding the provision of the information.)

SAFETY ZONE FOR PROVIDER PARTICIPATION IN EXCHANGES OF PRICE AND COST INFORMATION

DOJ/FTC Statements of Enforcement Policy in Health Care (1996)

Statement 6

- Participation by competing providers in **surveys of prices for health care services, or surveys of salaries, wages or benefits of personnel** does not necessarily raise antitrust concerns.
  - Providers can use information derived from price and compensation surveys to price their services more competitively and to offer compensation that attracts highly qualified personnel.
  - Purchasers can use price survey information to make more informed decisions when buying health care services.
- Such factual information can help purchasers efficiently develop reimbursement terms to be offered to providers and may be useful to a purchaser when provided in response to a request from the purchaser or at the initiative of providers.
- Without appropriate safeguards, however, information exchanges among competing providers may facilitate collusion or otherwise reduce competition on prices or compensation, resulting in increased prices, or reduced quality and availability of health care services.

SAFETY ZONE FOR PROVIDER PARTICIPATION IN EXCHANGES OF PRICE AND COST INFORMATION

DOJ/FTC Statements of Enforcement Policy in Health Care (1996)

Statement 6

Safety Zone (Not challenged "absent extraordinary circumstances").

Provider participation in written surveys of (a) prices for health care services or (b) wages, salaries, or benefits of health care personnel, if the following conditions are satisfied:

1. Collection is managed by a third party; and
2. Information provided by survey participants is more than three months old; and
3. There are at least five providers reporting data upon which each disseminated statistic is based, no individual provider's data may represent more than 25 percent on a weighted basis of that statistic, and any information disseminated must be sufficiently aggregated such that it would not allow recipients to identify the prices charged by any individual provider.

QUESTIONS?

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