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BUSINESS & LEGAL ISSUES FOR HEALTH SYSTEM LEADERSHIP

FTC and Texas Align to Challenge Physician Network for Price Fixing

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The announcement on May 10, 2011, by the Federal Trade Commission and the State of Texas of their successful antitrust prosecution of Southwest Health Alliances, Inc. for price fixing juxtaposes against the FTC's Accountable Care Organization workshop, held on May 9, 2011. Together, these events illustrate the significant antitrust challenges faced by physicians attempting to form effective networks.

The Affordable Care Act of 2010 makes the formation of ACOs and other shared savings arrangements an important component of healthcare reform. Through the formation of ACOs, among other initiatives, CMS is seeking to shift healthcare delivery to models with an emphasis on improving quality and reducing costs.

The sine qua non of an ACO is its physician network. In-

deed, CMS requires a minimum number of primary care physicians for a qualified ACO. While hospitals, surgical care centers and other providers may participate in an ACO, it is the physician network that lies at its core. Thus, the formation of effective physician networks is an essential component of a viable ACO.

One of the impediments to the formation of ACOs has been the fear of antitrust enforcement. To mitigate that fear, the FTC published, jointly with the Department of Justice, a proposed Statement, which lays out the antitrust regulatory requirements for ACOs. ACOs that receive antitrust approval from the federal antitrust regulators can engage in collective negotiation of price without fear of being accused of a per se antitrust violation.

However, instead of dispelling fears, the proposed Statement

has opened up a new set of concerns about the significant antitrust hurdles it will impose on providers considering the creation of an ACO. The May 9, 2011 FTC workshop was held to air those concerns. The commentary at the workshop revealed that to become a qualified ACO, a physician network must undertake a serious — and expensive — antitrust review, and that most may well have to be approved by the FTC or the DOJ before they can proceed.

The FTC's release of the settlement in the Texas case at the same time as its workshop on its proposal for protecting ACOs and their physician networks from antitrust enforcement delivers a potent message: a physician network that opts in to the ACO program will have to make a substantial investment in getting antitrust approval, but once approved is protected, while a physician

network that opts out because of the expense of getting ACO qualified foregoes the protection from per se antitrust scrutiny. The Southwest Health Alliance, Inc. settlement makes clear that such networks proceed at their peril.

Southwest Health Alliances, Inc. is a 900-physician network based in Amarillo, Texas. Three hundred of the physicians in the network are devoted to primary care. The network includes employed physicians and multiple independent medical practices.

The FTC alleged that these physicians had not engaged in adequate efficiency-enhancing integration so as to justify collective fee negotiation. However, the FTC complaint suggests that the physician network did not purport to exclusively represent the physicians in the network in connection with fee negotiations. Rather, the Alliance was formed to administer contracts on behalf of the physicians through the “messenger model” framework, long blessed by the antitrust regulators as a permissible joint activity by healthcare providers not sufficiently integrated to engage in collective price negotiations. The member physicians were free to continue to sell their medi-

cal services individually on a fee-for-service basis, outside of the Alliance, both to individuals and through payer contracts. Acting as messenger, the Alliance received offers from payers and conveyed those offers to the physician members, each of whom made a unilateral and independent decision to accept or reject the offer.

In addition to its pure messenger function, the Alliance also had constructed a “reverse messenger model.” Through this mechanism, the Alliance formulated its own fee schedule, to which all of its physicians were prepared to commit. The Alliance made this fee schedule available to any payor that might choose to contract on that basis.

The allegations by the FTC and the Attorney General of Texas focused on how the Alliance managed the messenger model and reverse messenger model mechanisms during a period beginning in 2000. According to the complaints, the Alliance drifted from its pure messenger model roots to a mechanism that effectively constituted collective price negotiations.

This successful enforcement proceeding reveals the importance of antitrust planning and vigilance for physicians seeking to form effective networks.

The need for effective antitrust advice becomes acute in light of the Affordable Care Act’s incentives to induce physicians to join networks. The Southwest Alliance appears to be an example of a network started with good intentions that drifted over the line as time passed from acceptable messenger model arrangements to price fixing. ■

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