

Antitrust Alert

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FTC Issues Favorable Clinical Integration Advisory Opinion to Norman, Oklahoma PHO

BY [BRUCE D. SOKLER](#) AND [CHRISTI J. BRAUN](#)

Since the passage of the Affordable Care Act (ACA), much attention has been paid to the antitrust treatment of Accountable Care Organizations, provider ventures contemplated by the ACA that the Federal Trade Commission and Department of Justice have said are, essentially, clinically integrated organizations. Nothing new, however, was said about clinical integration, the major provider initiative of the 2000s that could provide a basis for joint contracting with third-party payers without the sharing of financial risk. On February 13, 2013, the FTC staff issued a favorable Advisory Opinion to the Norman [Oklahoma] Physician Hospital Organization allowing a contemplated clinical integration program to move forward.

The Norman PHO was founded in 1994 between the Norman Regional Health System and physicians who hold a medical staff appointment or clinical privileges at the System's hospitals. It currently has approximately 280 participating physicians. The PHO has previously used a messenger model when dealing with payers, but now intends to transition to a clinically integrated approach with the expectation that they would jointly contract with payers.

By the time the Norman PHO finished providing the FTC with information from May 2011 through January 2013, it had basically "checked every box" from the FTC's previous clinical integration advisory opinions:

New Infrastructure for Norman PHO

The Norman PHO has established a new organization structure, including Specialty Advisory Groups, Mentor's Committee, and Quality Assurance Committee, for accomplishing the integrative goals of its proposed program. It also created and approved a new Participating Practitioner Agreement reflecting the clinical integration focus of the PHO.

Clinical Practice Guidelines

The Norman PHO and its participating physicians expect to develop their own evidence-based clinical practices guidelines for up to 50 disease-specific conditions. At the time of the Advisory Opinion, the PHO had identified nine diseases for which the Specialty Advisory Groups, with oversight from the Mentor's Committee, have developed, and will be implementing, clinical practice guidelines.

Electronic Platforms and Interface

The Advisory Opinion indicated that the PHO had invested substantial time, money, and effort in developing an electronic platform and views full use of the platform by participating physicians as a "critical component" of its clinical integration program. The platform includes an electronic clinical decisions support system, e-prescribing, electronic medical records system, and an electronic health interface system.

Participating Physician Commitment, Investment, and Involvement

The Advisory Opinion recounted that each physician must pay a \$350 membership fee, pay \$150 annual dues, enter into and comply with the new Participating Practitioner Agreement, and generally commit to the clinical integration program. Each physician must make commitments of time and effort to the development, implementation, and enforcement of clinical practice guidelines. To support the effort, each physician would also make a financial commitment in the form of “withholds” from payer contracts to support the clinical integration activities.

Payer Contracting and Non-Exclusivity

The Norman PHO intends to establish a contracting committee to evaluate payer contract proposals. It will require all participating physicians to participate in any contract between the Norman PHO and a payer. Importantly to the FTC staff, the Norman PHO will be non-exclusive, meaning that its participating providers will remain free to contract independent of the Norman PHO with any payer that chooses not to contract with the network. The PHO will clearly inform payers and participating providers that the network is non-exclusive.

Anticipated Savings, Efficiencies, and Other Benefits

As a “clinical integration start-up,” the Norman PHO made no attempt to quantify to the FTC the likely overall efficiency benefits or specify how overall cost of quality efficiency gains will be measured. On a general, macro level, the PHO projected potential benefits for each of the patients, payers, and participating providers.

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The FTC staff concluded that, in light of the proposed clinical integration activities, the Norman PHO’s proposed joint pricing of and contracting activities for physician services qualified for rule-of-reason analysis.

Importantly, the Advisory Opinion concluded that the “proposed joint contracting appears to be subordinate to the network’s effort to improve efficiency and quality through the clinical integration of its participating physicians.” The FTC staff accepted the PHO’s arguments that joint contracting is necessary to establish and maintain a consistent panel of like-minded physicians who share a commitment to the program. The Norman PHO pointed to the fact that of the twenty-four contracts it had in 2012, using the messenger model, the number of participating physicians ranged from 107 to 237. (The Advisory Opinion cautioned that this justification should not be confused with an argument that the physicians would not be incentivized to participate absent the ability to engage in joint negotiations with payers).

Applying the rule of reason analysis, and analyzing competitive effects, the FTC staff did indicate that the Norman PHO “appears to have the potential to exercise market power in the sale of its participating hospitals’ and physician services.” This concern was mitigated, to the FTC staff, by the fact that payers will have the ability to bypass the network and contract directly with the individual providers. Thus, as is frequently the case in antitrust and, particularly, in the health care area, non-exclusivity was the key to receiving the FTC staff’s advisory blessing.

The 21-page Advisory Opinion does touch upon other antitrust related issues, including a vertical analysis and a discussion of spillover effects. In this alert, however, we wanted to focus on the most germane and practical aspects of the Opinion.

It is important to emphasize, as did the Norman PHO, that it had no clinical integration contracts, and the marketplace will decide whether their program has sufficient value to attract payers. In some other markets, entities with such programs have gotten little or no traction — and no contracts. The Norman PHO is undoubtedly correct that the market still must speak about its aspirations. The FTC staff has given the Norman PHO the OK to try to succeed.

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