BURR ARTICLE

Discussions Among Physician Groups - Avoiding Antitrust Issues

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Driven by Federal Health Care Reform and a desire to remain independent of hospitals and health care systems, physician groups are actively exploring different collaborative and alignment options, including the formation of independent practice associations (IPAs) and participation in accountable care organizations (ACOs). Various physician groups which otherwise compete are also discussing the possibility of merging or other integration strategies. These discussions are important and necessary in a health care environment that requires greater access to capital and a coordinated and accountable approach to health care in order to meet payor demands for quality and the implementation of new payment methodologies. However, physician practices need to be mindful that such discussions can raise antitrust concerns.

The Federal Antitrust statutes govern competition between competitors, including the formation and operation of joint ventures and other collaborative arrangements. In particular, Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." There are two methods of analysis under Section 1 of the Sherman Act. The so-called "Per Se Rule" provides that certain conduct, including agreements by competitors to fix prices and allocate markets, is deemed so egregious and lacking in redeeming value that it is *per se* or inherently illegal. Conduct not subject to the Per Se Rule is reviewed under the so-called "Rule of Reason", which provides that the conduct is subject to a fact-intensive analysis that takes into account the reason for the restraint and its effects on competition, both pro-competitive and anti-competitive, resulting in a balancing of the pro-competitive benefits of the arrangement against its anti-competitive results. Further, Section 2 of the Sherman Act prohibits monopolization, attempts to monopolize and conspiracies to monopolize.

So, what does this mean in the context of two or more legally, separate physician groups discussing the possibility of merging or forming an integrated network, such as an IPA? As an initial matter, meetings of physician groups should be pursued only for pro-competitive reasons, including, for example, enhancing patient care services, creating efficiencies and promoting accountability in health care delivery, implementing health information technology, and responding to changes in the health care market. It is recommended that each meeting follow an appropriate, written agenda and that simple minutes are maintained. This will allow the participants, if ever questioned, to demonstrate that the purpose of the meetings were not anti-competitive within the meaning of the antitrust laws. As discussions progress, it can also be helpful to utilize the services of an outside third-party, such as a consultant or attorney. These individuals can help collect and manage competitive information from the

participants, so as to avoid sharing that information directly among competitors, and help ensure that the discussions remain legally compliant.

Any discussions among legally, separate physician groups should absolutely avoid agreements to fix prices or agreements to divide or allocate markets or patients (*e.g.*, two competing physician groups in Birmingham agree to work at different hospitals in order to divide the market). The agreement itself (written, verbal, or inferred from conduct) is *per se* illegal, even if the arrangement proves unsuccessful. Following are a few other items to avoid when it comes to discussions among physician competitors:

- Don't share fee schedules, market share data or other competitively sensitive information. (Certain data sharing can be accomplished through an independent third-party, such as a consultant, who can compile and distribute aggregated data.)

- Don't discuss limiting the amount of care you provide to any individual or group.

- Don't compare or otherwise discuss contract negotiations with third parties, including in particular third-party payors, or what you believe are the contract terms other providers have received.

- Don't discuss ways to eliminate or reduce competition in your market, such as the exclusion of particular providers or health systems, or reducing or eliminating referrals to certain providers.

- Don't collectively agree to refuse to do business with specific individuals or businesses except on agreed-upon terms. Examples of questionable conduct include physician competitors refusing to contract with a particular payor except on certain terms or boycotting a health plan that does not agree to a collective proposal. Each provider group can individually and separately reject a third-party payor or provider offer, but the groups cannot collectively agree on a position.

Exploring various integration options in this challenging health care environment is a necessity. However, such discussions must be approached thoughtfully and with an understanding that certain agreements and collaborations, even if ultimately not successful, can be viewed as unlawful under the Federal Antitrust laws.

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