Physicians and Antitrust Issues With Respect to Accountable Care Organizations – Health Reform Update

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MEDICARE SHARED SAVINGS PROGRAM – ACO ELIGIBILITY

“(b) ELIGIBLE ACOS.—
“(1) IN GENERAL.—the following groups of providers of services and suppliers which have established a mechanism for shared governance are eligible to participate as ACOs under the program under this section:
“(A) ACO professionals in group practice arrangements.
“(B) Networks of individual practices of ACO professionals.
“(C) Partnerships or joint venture arrangements between hospitals and ACO professionals.
“(D) Hospitals employing ACO professionals.
“(E) Such other groups of providers of services and suppliers as the Secretary determines appropriate.
Lawton Burns and Ralph Muller of the University of Pennsylvania have observed that hospitals use the sort of integration associated with ACOs as a way of keeping physicians (particularly specialists) from competing with hospital outpatient service lines in the future. “Hospital-Physician Collaboration: Landscape of Economic Integration and Impact on Clinical Integration. The Milbank Quarterly, Vol. 86, No. 3, 2008” (pp. 375-434)
Reducing Hospital Costs

A study by McKenzie & Company found that spending on hospitals was the biggest reason that healthcare cost in the United States are higher than in other countries. “Accounting for the cost of health care in the United States.” McKinsey & Company, 2007 Jan.
ACO Financial Integration: Avoidance of Price Fixing Antitrust Liability

While risk arrangements can take a variety of forms, most typically include some combination of the following:

(1) capitation;

(2) a substantial withhold (15%-20% range);

(3) a percentage of premium;

(4) global fees or all-inclusive case rates; and

(5) cost and utilization targets.
Physician Network Clinical Integration
Requirements For Avoidance of Price-Fixing Antitrust Liability, In the View of Federal Trade Commission

Based on FTC guidance, clinical integration is evidenced by the network:

a) implementing an active and ongoing program to evaluate and modify practice patterns by the network physician participants, and

b) creating a high degree of interdependence and cooperation among the physicians to control costs and ensure quality.
Accountable Care Act Clinical Integration Requirements

The Affordable Care Act requires an ACO to:

i) have in place clinical and administrative systems,

ii) define processes to promote evidence based medicine and patient engagement,

iii) report on cost and quality measures, and

iv) coordinate care.
Future CMS Rules and FTC Enforcement Policy

CMS is developing regulations for the Medicare Shared Savings Program. Additionally, the Federal Trade Commission wants to know whether and how to create a safe harbor so that ACOs that contract with Medicare can have some certainty when they contract with commercial payors.
“An antitrust safe harbor could be established when an ACO meets the Medicare Shared Savings Program clinical integration requirements, is approved by CMS, and agrees to participate in the shared savings program.”
By Definition ACOs are not Cartels Engaged in Naked Pricing-Fixing

When an ACO--whose mission is by definition to manage and be accountable for the overall cost and quality of care for a defined population--sets its prices, that conduct cannot be characterized as price-fixing.
The Court held in *Broadcast Music Inc., v. Columbia Broadcasting System Inc.*, 441 U.S. 1 (1979) (*Broadcast Music*), that it was inappropriate to attach the per se price fixing characterization to an association of competitors that set the fees for its members’ work where the arrangement made possible, to some extent, a new product by reaping otherwise unattainable efficiencies. This rule should apply to ACOs.
Government Should Declare New ACO Product

ACO services are those of their individual physicians plus management and accountability for overall costs and quality of care for a defined population. Hence as in *Broadcast Music*, the whole is truly greater than the sum of its parts and is a different product. Accordingly, the government should trumpet the applicability of the Supreme Court precedent established by *Broadcast Music* and declare in ACO regulations, that ACOs furnish a new product and thus are not subject to the per se rule.
AMA Concerns Over Vagueness In Antitrust Enforcement Policy

The FTC/DOJ should clarify the clinical integration requirements an ACO should meet in order to avoid application of the per se rule. Moreover, the FTC/DOJ should not put forward ACO clinical integration requirements that will themselves pose an unreasonable barrier to ACO development. The current FTC/DOJ clinical integration standards will deter the formation of ACOs. If the FTC/DOJ standards remain unaltered, the ACA’s important invitation to physicians to form ACOs will be reduced to a mere gesture.
Market Power Concerns – In General

Solving the “per se” illegal price-fixing problem, while necessary, may not be sufficient to support physician decisions to invest in ACOs. Physicians may for example, worry that an ACO might raise market power concerns.
Market Power Concerns – Natural Monopolies

In many communities a combination of the ACO scale requirement and the accident of geography (for example, a small metropolitan area) would require physician networks to possess large market shares.
ACO Performance Metrics

The government should publish performance measures for determining the competitive effect of an ACO in the market. This would allow physicians to emphasize their ACO’s demonstrated beneficial effects—a result that under antitrust principles, should trump market share/power concerns.
ACO Requirements and Scale/Market Share

Government should be cautious of overly prescriptive regulations that may impose such heavy investment requirements that a physician network must distribute the cost over an organization of correspondingly large scale and hence, market share.
Non-Exclusive ACOs Do Not Have Market Power

The federal trade commission and the DOJ also need to advise physicians that a non-exclusive ACO—one that does not prohibit its members in law or in fact from contracting with payors apart from the network—cannot possess and exercise market power, regardless of the market share of the ACO.
State Action Immunity

States should be encouraged to enact laws that treat ACOs in metropolitan areas with small populations or ACOs in rural areas as natural monopolies subject to state regulation and thereby immune from the federal antitrust laws under the state action doctrine.
ACO Exclusive Dealing May Be Reasonably Necessary

A good and reasonably necessary way for an ACO to prevent health insurers from free riding on ACO clinical integration efforts is through an exclusive dealing arrangement with its physicians. This would require ACO physicians to contract with health insurers solely through the ACO.