

HEALTH CARE ISSUES

The Health Care Practice Group at Murtha Cullina is pleased to provide clients and friends with information about topics of interest in the health care area.

If you have questions about the issues addressed in this newsletter, or any other matters involving health care legal issues, please feel free to contact the following attorneys:

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FTC ISSUES CONSENT ORDER TO PROHIBIT PRICE FIXING AND  
BOYCOTTS BY NINE PHOS AND 3,000 PHYSICIANS



H. Kennedy Hudner

The Federal Trade Commission has proposed a Consent Decree with a “super physician-hospital organization” in the greater Chicago area. The defendants comprised nine PHOs and an additional corporation that handled payor negotiations for them. Together, the PHOs included almost 3,000 physicians. No individual physicians were named in the Consent Decree. The proposed Consent Decree was filed December 29, 2006.

The essence of the FTC claim was that the PHOs were fixing the prices that physicians would accept from payors, and organizing a boycott among the physicians such that the physicians would not individually contract directly with the payors.

The PHOs negotiated prices on behalf of the physicians without first establishing either a “qualified risk-sharing joint arrangement” or a “qualified clinically-integrated joint arrangement.” In the absence of either of those two antitrust safe harbors, the FTC alleged that the PHOs were simply engaging in prohibited collective bargaining on behalf of the physicians, many of whom competed with each other. Put another way, since there was no risk-sharing or clinical integration, collective negotiation by the competing doctors was simply price fixing.

The Consent Order prohibits the defendants from entering into or facilitating any agreement by or among doctors:

- to negotiate with payors on any physician’s behalf;
- to deal, not to deal or threaten not to deal with payors;
- to collectively agree on what terms to deal with any payor; and
- not to deal individually with any payor, or to deal with a payor only through an arrangement involving the defendants.

The only exceptions to these prohibitions are if the defendants work within one of the two antitrust safe harbors described above.

The problem here was that the defendants were using their market share to muscle price concessions from payors, but without first creating either a risk sharing or clinically integrated program. In one instance, the lead defendant, Advocate Health Partners (“AHP”), developed a strategy to force Blue Cross to replace its individual contracts with physicians with a group contract with AHP, at substantially higher rates than Blue Cross was paying physicians through their individual contracts. AHP requested that its physicians give AHP an “Agency Agreement” that would authorize AHP to terminate the individual physicians’ existing Blue Cross contracts. When Blue Cross would still not negotiate with AHP, AHP then used its authority to terminate some 1,700 individual physician agreements, leaving Blue Cross with little choice but to negotiate with AHP or sue. Blue Cross sued.

In another instance, AHP was dealing with United Healthcare of Illinois, a large health care payor in the area. AHP polled its nine PHO affiliates in order to determine what the minimum rates were that they would accept on behalf of their physicians. AHP then established a single benchmark for the entire group that was higher than the rates some of the PHOs were willing to accept. AHP presented that benchmark rate to United Healthcare. When United refused to agree to the new rates, AHP terminated not only United’s contracts with the AHP physicians, but also with affiliated hospitals. When United then tried to deal directly with individual physicians, AHP threatened that United would be unable to contract with the affiliated hospitals unless United first agreed to a group contract for physician rates. United finally agreed to rates 20-30% higher than it had paid under the individual physician contracts.

The FTC charged that this was blatant price fixing as there was no risk-sharing or clinical integration among the physicians.

Under the Consent Order, for the next three years the defendants must notify the FTC if they intend to act as the “messenger” under any messenger-model fee negotiations, or if they intend to negotiate with health plans on behalf of any qualified risk-sharing or qualified clinically-integrated joint arrangements. Additionally, AHP must terminate any contracts it entered into illegally upon the request of the applicable health care payor.

This is another example of what can happen when a physician-hospital organization takes on more and more negotiating responsibility without taking care to meet one of the antitrust safe harbors. As soon as the PHO has enough market power in its community to successfully extract higher prices from payors, it attracts the attention of the antitrust enforcement agencies. If the PHO cannot show reasonable evidence of either significant risk sharing among its physician members, or clinical integration with active and ongoing programs to evaluate and modify clinical practices in order to ensure quality and control costs, it leaves the PHO – and its physicians – open to antitrust claims and civil and criminal penalties.

*If you would like to receive our health care bulletins via electronic email,  
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