Legal Corner

Matters of Antitrust: Professional Society Communication With Private Payers

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In 2005, changes in the Medicare reimbursement methodology mandated by the Medicare Prescription Drug, Improvement, and Modernization Act (MMA) of 2003 fundamentally realigned the way oncologists are paid for drugs and drug administration services. As contracts with commercial payers come up for renegotiation and renewal, many expect private payers to take Medicare's position that payments

to oncologists for drugs should be based on the average sales price reimbursement methodology and payments for drug administration services rendered should be increased. Under Medicare, these drug payment reforms had lowered overall reimbursement for oncologists, and this, in turn, might spill over into the commercial arena as well.

Various stakeholders, including patient advocacy groups and oncology professional societies, continue to engage in advocacy activities to frame the public policy debate and mitigate downward pressures on drug reimbursement for oncologists. From a legal standpoint, however, communications with private payers are treated differently than advocacy activities associated with legislatively established health care programs such as Medicare or Medicaid. The US Constitution protects discussion and advocacy in connection with these programs, where reimbursement is made according to publicly available formulas. As the payment debate spreads from the public policy arena into contract negotiation with commercial payers, the antitrust alarm should sound. Antitrust laws apply whenever competing physicians or their representatives (including medical professional societies) discuss prices or other payment-related terms, or if they otherwise organize to address specific payer contracts.

Legal Framework

Antitrust laws protect the competitive free market, generally prohibiting improper collusive conduct and making it illegal to unilaterally exercise market power that interferes with the operation of the free market. Agreements among competitors, no matter how informal, with respect to prices or other

aspects of the market may be prohibited by antitrust laws. In addition, under well-defined principles, the antitrust laws apply to the health care market, including physicians and medical professional societies.

Three society advocacy activities with commercial payers can easily raise antitrust concerns: price-fixing, collective refusal to deal, and information sharing among competitors.

Price-Fixing

When competing physicians or their agents, such as medical professional societies, jointly negotiate prices, it is deemed illegal per se under antitrust laws. If competitors engage in naked price-fixing (such as combining contract negotiation activities), they are deemed to have violated the antitrust laws and are barred from even trying to justify their activities. The only exception applies to integrated physician contracting joint ventures (see sidebar "Integrated Physician Network Joint Ventures").

If medical professional societies advance a common pricing or reimbursement agenda on behalf of their member physicians, they might cross the line of permitted advocacy, even if they do not purport to facilitate joint contracting on behalf of their members. Therefore, societies should not make

Integrated Physician Network Joint Ventures

If a physician network is found by the enforcement authorities to have a certain level of financial or clinical integration such that it is likely to achieve significant efficiencies that benefit consumers, it *may* be permitted to engage in joint contracting activities *if* the federal government agrees that the activities are reasonably necessary to realize those efficiencies. The activities, in addition, must survive the "rule of reason" analysis, which inquires into whether the activities are, on balance, procompetitive. In recent years, the Federal Trade Commission has increased its scrutiny of physician contracting joint ventures, and a number of organizations have entered into consent agreements agreeing to cease negotiating contracts on behalf of network physicians. Physician networks should consult antitrust counsel well before undertaking any joint contracting activities to prevent running afoul of the antitrust laws.

proposals or counter-proposals regarding contract payment terms or other conditions that could affect prices or otherwise advocate to private payers regarding suggested reimbursement levels under a particular contract. Societies also should not express an opinion on a particular contract offer, especially its payment provisions.

Collective Refusal to Deal

Medical professional societies often develop and publicize policy positions regarding best practices, which may be implicated by contract terms that would generally advance the professional interests of their members. However, societies and their members risk violating antitrust laws if they have joined to manipulate the competitive market in an unreasonable exercise of market power. Anticompetitive activities of this nature may be condemned as a boycott or collective refusal to deal. Impermissible conduct includes refusing to contract with a particular payer except on terms proposed by the medical professional society, or boycotting a health plan that does not agree to a collective proposal.

Information Sharing Among Competing Physicians

Advocacy activities often involve collecting, aggregating, and distributing health care market information. The federal regulatory authorities have expressly recognized that disseminating such information has the potential to enhance competition. However, when competing physicians use shared information to collude on prices or to exercise collective market power to refuse to deal with payers, they will be found to violate the antitrust laws. The antitrust enforcement agencies have stated that the collection of non-fee-related information, its dissemination among competing providers, and its provision to payers do not raise significant antitrust concerns, absent other impermissible collusive behavior. However, collecting fee-related information is subject to scrutiny under the antitrust laws to determine whether the activity is reasonable and, on balance, procompetitive. The antitrust enforcement agencies have published guidelines for a safe harbor that may be available for surveys and exchanges of price and cost information. In general, the safe harbor standards provide that the shared information must be historical, collected by an independent third party, and sufficiently aggregated in accordance with the safe harbor. Societies and physician groups should consult antitrust counsel before collecting any price or cost information to ensure that the survey complies with the safe harbor or is otherwise unlikely to be challenged under the antitrust laws.

Selected Antitrust Compliance Issues in Society Advocacy

Coverage Advocacy

Generally, professional societies may (1) collect outcome data from their members regarding a particular procedure they

Good Practices for Medical Professional Societies

Local medical professional societies often set the tone in a particular health care market for how physicians approach certain business issues. For this reason, it is essential that societies set a good example of proper competitive behavior for their physician members. Physicians should expect their representative professional societies to establish good practices and maintain principled positions when navigating issues relating to reimbursement under private contracts. Following is a partial list of good practices:

- Set clear standards for when and what the society will advocate with private payers, and then apply those standards in a consistent and transparent manner.
- Establish policy positions that deal strictly with the facts, and don't express an opinion on the adequacy of proposed contract terms.
- Avoid enforcing society policies regarding payer contracting on members, and reinforce the principle that member physicians must make independent decisions on contract proposals.
- Develop policy positions to advance the professional interests of all member physicians, and don't focus on or take any position regarding the economic interests of any particular group of physicians.
- Encourage member physicians to discuss reimbursement concerns with their own legal counsel, and then address any concerns directly with payers.

believe should be covered by a payer, (2) provide those data to payers, and (3) develop position statements regarding appropriate coverage policies. It is a good practice for societies to present data-driven arguments that focus on such elements as quality of care and patient outcomes, and not on the economic impact of the policy on physicians. If a society wishes to assign price values to services for which it advocates coverage, it should choose a pricing scale that is publicly available (such as the Medicare fee schedule) or other historical prices also accessible to the public.

Technical Payment Guidance

Societies may offer their members general technical guidance services regarding claims-collection practices. They also may assist directly with claims adjustments so long as they do not facilitate sharing pricing information among competing physicians. As a general guideline, societies may provide assistance with issues that arise under pre-existing, previously

negotiated contracts. However, professional societies may not help physicians reopen contract terms for further negotiation.

Discussion Lists for Physicians

Competing physicians should never discuss prices or joint action in connection with payer contracts. Electronic discussion formats, such as listservs, can be a danger zone for antitrust compliance. All discussions regarding prices, even among non-physician office administrators, raise a red flag in the minds of enforcement authorities. Moreover, if physicians take action that could be construed as having been coordinated, such as mass termination of a contract (even if the termination was not actually coordinated or agreed on), courts or enforcement authorities may conclude that the terminations are evidence of an impermissible group boycott if evidence exists that the issues were discussed on a listserv (as if discussed at a meeting) before the action. Discussions regarding prices should be strictly prohibited in electronic

formats, and electronic lists and list-posting activity should be monitored to ensure discussions are appropriate.

Conclusion

Although physicians may provide practical or business rationales for their desire to work together to counter the power of payers, they provide no defense against charges of violating antitrust laws. Physicians, and the medical professional societies whose mission is to advance physicians' interests, should fully understand the line between proper procompetitive policy advocacy and improper collusive manipulation of payer contracts.

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