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Federal Trade Commission Issues New Advisory Opinion Approving Joint Contracting for Clinically Integrated PHO

Executive Summary

In an Advisory Opinion issued April 13, 2009, the Federal Trade Commission ("FTC") concluded that a proposed program by TriState Health Partners, Inc. ("TriState") involved sufficient clinical integration to justify TriState's joint contracting with payors to provide services to patients. This is the most recent in a series of FTC guidance concerning clinical integration among providers.

Absent sufficient financial or clinical integration, joint provider contracting with third party payors would be considered anticompetitive and illegal *per se* as violative of the antitrust laws. But the FTC found TriState's proposed program was likely to create substantial integration and produce significant efficiencies, including improved quality and more cost-effective care. Moreover, the proposed joint contracting with payors was ancillary, or subordinate and reasonably related, to TriState's plan to clinically integrate its members' services, and reasonably necessary to implement the program and achieve the program's efficiency benefits.

Background

TriState is a physician-hospital organization or PHO located in Hagerstown, Maryland, which includes a 292-bed hospital, Washington County Hospital, and 212 physicians (primary care, specialists, and hospital-based), of which 40 are employed by the Hospital. TriState physicians comprise 64% of Hospital's medical staff of 319 physicians. The Hospital draws 80% of its patients from Washington County, Maryland, and there are four competing hospitals within 30 minutes of Hagerstown. And there are no IPAs or PHOs other than TriState operating within Washington County.

TriState's payor mix is 48% governmental payor programs, 4.5% self-pay, and roughly 46% commercial payors, of which 71% are covered by either Blue Cross or United Healthcare. In addition, Aetna and Cigna do business in the area.

TriState's Program

TriState describes its program as, "offer[ing] payers a network of primary care and specialist physicians whose services will be integrated through a formal and stringent medical management program that includes protocol development and implementation, performance reporting, procedures for corrective action when necessary, and aggressive management of high-cost, high-risk patients." Like MedSouth and Greater Rochester IPA, TriState demonstrated significant interdependence among providers across specialties.

TriState's program implements a web-based health information technology system that will identify "high-risk and high-cost patients," and "will facilitate the exchange of patients' treatment and medical management information." TriState has developed 18 clinical practice guidelines with another 30 under development, and will monitor physicians' adherence to them. TriState will use software from InforMed—a healthcare consulting and information technology company—to

manage "episodes of care; i.e., 'all the medical care and services a patient receives from the onset of an illness or disease through final treatment,' to determine where performance improvement will have the greatest financial and quality benefits." TriState will monitor physician performance against peer, regional, and national benchmarks using physician report cards, and subject to peer review, education, discipline and expulsion if necessary. Perhaps in an effort to distinguish the Suburban Health program, the FTC specifically noted that the development protocols, selection of benchmarks, performance assessments and disciplinary actions would be performed by, or under the supervision of TriState physicians and not TriState staff personnel.

Physicians who wish to participate in the program must become members of TriState. There is a written application, a credentialing process, and a $2,500.00 "joining fee," to become a member. After an initial period for current non-members to join, physicians will be limited in their opportunity to do so. Although the FTC noted the intent of TriState to develop a P4P bonus plan, there was no financial commitment required of the TriState physicians other than the initial joining fee.

Physicians are required to participate in all TriState payor contracts and in all medical management programs. Physicians are also expected to personally participate in the program spending time on committees or otherwise adhering to the tenets of the program and sharing best-practice ideas and methods. Finally, to ensure that patients stay within the program, physicians must refer patients to network providers when medically appropriate.

Analysis

In determining whether the joint contracting portion of the TriState program would be summarily condemned as *per se* illegal price fixing under the federal antitrust laws or whether it was ancillary to the joint venture—and allowed to occur as potentially procompetitive—the FTC examined the degree of "clinical integration" in the program, and specifically, the likelihood of the program to achieve significant efficiencies, TriState's justifications for joint contracting, and the potential for adverse competitive effects of the program.

1. Integration and Likelihood of Achieving Significant Efficiencies

In determining whether a provider program is likely to achieve integrative efficiencies, the FTC looks towards a number of different factors. One factor is whether the program is "selectively choosing network physicians who are likely to further . . . [the program's] efficiency objectives." While the FTC noted that TriState's program was not initially selective—in that any area provider was eligible to participate—the program did impose a number of requirements that would discourage participation by any physician who was not fully committed to the program. Each physician is required to become a full member and execute a participating provider contract which obligates the physician to participate in all the various aspects of the program. The FTC found that this ensures a physician's willingness to commit to the efficiency-enhancing goals and requirements of the program.

The next factor the FTC looked towards was whether the physicians would invest both monetary and human capital into the program. The FTC found the $2,500 "joining fee" to be too modest to "strongly motivate the majority of TriState physicians to work toward the success of the program." But the significant physician investment in time and effort on committees developing protocols, integrating medical management into their practices, collaborating with other members and performance monitoring evidenced a substantial degree of commitment to the program. The FTC's explicit acknowledgement of the "value" of physician "sweat equity" is a positive development.

Next, the FTC found that the structural and operational aspects of the program would result in "significantly increased interaction and cooperation among its physician members in the treatment of patients." These aspects included evidence based medicine standards and clinical guidelines to be used by the providers, the continuity of care through the referral policy, the use of health information technology, the collection and use of performance data, requirement of participation by the physicians in the programs operations, and the use of various mechanisms to provide feedback.

While the FTC found there was a lack of information on how the success or failure of the program would be measured over time, it found that the success of a pilot diabetes program was predictive of the clinical integration program in general. The FTC also noted TriState's intent to "further develop a pay-for-performance program" and the business necessity of providing performance data to attract payors.

Lastly, the FTC noted the inherent conflict of Hospital's participation (i.e., Hospital's need to fill beds and provide outpatient services with the cost-reducing goals of program). But as the area's largest employer and given Maryland's unique rate regulatory system, the Hospital did not appear to the FTC to have any incentive to provide excess utilization of services. On the facts presented, however, it was not clear whether Hospital's apparent conflict would enhance, undermine, or have no effect on the program's achieving efficiencies. In the final analysis, the critical issue is whether a program's medical management process is strong enough to overcome any participating provider's potential conflicts of interest.

Overall, the FTC found that the program was likely to create substantial integration and had the potential to result in significant efficiencies in both terms of cost and quality.

2. Justification for Joint Contracting

In order for joint contracting to be justified, it must be ancillary to—that is, related and subordinate to, and reasonably necessary to further—the potential efficiency-enhancing and procompetitive integration of the program.

The FTC found the following: (i) success of the program depended significantly on all physicians participating in all contracts under the same performance criteria and clinical protocols; (ii) joint contracting would reinforce in-network referrals and thereby maximize the program's effectiveness; (iii) a greater number of payor contracts would increase the willingness of the physicians to commit time and effort in developing and implementing the program; (iv) there was certain economies of scale involved; (v) the "branding" of a single entity would enhance the business operations; and (vi) certain administrative and transaction costs could be reduced.

The FTC found that joint contracting was subordinate to and supportive of TriState's legitimate effort to improve efficiency and quality.

3. Potential Adverse Competitive Effects of TriState's Program

The FTC did not conduct a full market analysis, but rather relied on information provided by TriState. While there is a substantial likelihood that TriState could have market power due to the substantial majority of TriState physicians on the Hospital's medical staff and the percentage of area patients seen at the Hospital, the FTC found that it was unlikely that TriState would exercise market power under the program. The program is non-exclusive and allows any payor that does not want to contract with the program to contract individually with TriState's

physicians. But the FTC noted that should it become apparent that TriState was not operating on a non-exclusive basis and that competition was being undermined, then the TriState program would require a reassessment.

Conclusion

The FTC determined TriState's program was sufficiently clinically integrated and therefore did not warrant a challenge under the federal antitrust laws. The program involved substantial integration by TriState's physicians with the potential to achieve significant efficiencies that could improve quality and lower cost. Joint contracting under the program was deemed to be ancillary to the significant efficiencies, and it was determined that the program would not lead to market power for TriState.

The development and operation of an effective, compliant clinical integration program is expensive and very time consuming. It requires political will and true collaboration among diverse provider constituencies. Yet, in an environment of ever-escalating health care costs and political support for global payments for episodes of care, clinical integration is a prudent strategy for progressive provider groups.

The advisory opinion can be found at:
http://www.ftc.gov/os/closings/staff/090413tristateaoletter.pdf

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