



## FTC Staff Will Not Challenge PHO's Clinical Integration Plans

02.19.2013

BY: ERIC S. BERMAN, PATRICK C. DEVINE, JR. & ROBERT S. ZUCKERMAN

On February 13, 2013, FTC staff indicated that it “has no present intention to recommend an enforcement action” in an Advisory Opinion regarding Norman Physician Hospital Organization’s (“PHO’s”) proposal to create a clinically integrated network of physicians. Norman PHO consists of (i) the Norman Regional Health System which owns the only hospital in the immediate Norman, Oklahoma area and some other small facilities outside of Norman and (ii) an entity (the Norman Physicians Association) comprised of approximately 280 participating physicians representing 38 specialty practice areas, most of whom practice in or around Norman and have clinical privileges at the only hospital in Norman. Norman, Oklahoma is in the Oklahoma City geographic region. The Norman Regional Health System and the Norman Physicians Association share equally the costs associated with the PHO. The PHO proposes switching from a “messenger model” of contracting (one that uses an independent third-party as a conduit for exchanging information between providers and payers, and in which providers unilaterally decide on pricing terms) to a joint contracting system in which its participating physicians and hospitals will jointly set prices and contract with payers.

While the PHO represented that it would have “service area” overlaps with Oklahoma City and other adjacent Cities and Counties and, thus, only a 10% market share, the FTC concluded that the PHO appeared to have “the potential to exercise market power” in the sale of hospital and physician services in Norman because payers likely would not “have practical alternatives to contracts with the Norman PHO ... for the purposes of providing services to patients who live in the immediate Norman area.” The Advisory Opinion is particularly significant because of (i) the specific guidance it provides on activities that may constitute “clinical integration”, (ii) the FTC’s recognition of the market power that the PHO potentially could exercise in the immediate Norman area by virtue of the participation of the only hospital and most of the physicians in Norman, (iii) the fact that the Board of the PHO is controlled by physicians, and (iv) the PHO’s acknowledgment that it likely would negotiate an increase in reimbursement to help fund the increased costs of its integration.

*PHO Qualifies For “Rule of Reason” Treatment*

U.S. antitrust law prohibits so-called “naked” horizontal agreements – that is, price fixing, group boycotts and customer or market allocation agreements between competitors. Such agreements are expected to almost always result in higher prices and/or lower output and quality for consumers and are therefore proscribed as facially or *per se* illegal. When competitors sufficiently integrate their resources, however, antitrust law recognizes that such integration can in some cases benefit the marketplace and consumers. Therefore, when competing health care providers achieve clinical or financial integration that is likely to generate significant efficiencies that benefit consumers, the FTC and other enforcers will not reflexively condemn pricing agreements among those competitors that are reasonably necessary to achieve those efficiencies. Rather, such agreements are evaluated for their net effect on competition in the relevant market under the “rule-of-reason.”

In this case, FTC staff determined that the PHO’s proposed joint pricing and contracting with payers qualified for rule-of-reason analysis “because the network reportedly will require its participating physicians to integrate their clinical services in a manner that appears to create the potential for significant efficiencies that benefit patients and payers *and* because the participating physicians’ pricing agreements are ... ancillary to ... their integrative activities.” The FTC concludes that the “joint contracting...appears to be both subordinate to the network’s integrative activities and reasonably necessary to implement the proposed program and achieve its efficiency benefits.”

*PHO’s Clinical Integration Passes Reasonableness Test and is Unlikely to Have Negative Effect on Competition*

In its Advisory Opinion, FTC staff informed the PHO that its “formation and operation do not appear likely to have a substantial anticompetitive effect in the provision of physician services, and any such potential effect is likely to be outweighed by plausible procompetitive efficiencies.” The PHO’s proposed infrastructure and operations appear to have been carefully crafted to satisfy any potential FTC concerns by fostering concrete protocols that represent clinical and financial integration, including:

- **True clinical integration.** The PHO proposed several mechanisms to facilitate the physicians’ ability to monitor and control costs, enhance patient care, and develop evidence-based clinical practice guidelines designed to lower cost, increase quality and improve payer and patient satisfaction. Several advisory groups and committees comprised of PHO physicians would be tasked with the establishment, monitoring and enforcement of compliance with clinical practice guidelines, and the creation of an electronic platform that will increase physician communication as well as transparency so payers and patients can evaluate practice patterns and performance.
- **Significant Physician Commitment.** Participating physicians must satisfy credentialing and medical staff appointment requirements, pay a membership fee and annual dues, be subject to reimbursement withholds, and comply with PHO practice protocols. Physicians must make additional investments in the network, both financial (*e.g.*, acquiring computer equipment and licenses to access the network’s electronic platform) and time and effort (*e.g.*, identifying and updating evidenced based clinical practice guidelines, serving on committees or advisory groups, adhering to the clinical practice guidelines, and making practice data and medical records available).

- **Non-exclusivity.** The PHO's participating physician providers will be allowed to contract individually, outside the network or through other networks, with payers who do not wish to contract with the PHO. Moreover, the PHO will not attempt to force payers to contract with it via exclusionary conduct and will make clear to payers and providers that the network is non-exclusive.
- **Safeguards/Antitrust Counseling.** As an added precaution, the PHO has committed to implement other safeguards to ensure that its network will be antitrust compliant, including the provision of antitrust counseling and training to its physician providers and preventing the improper disclosure of competitively sensitive information among competing providers.

The PHO clearly was very careful in developing and seeking FTC guidance on the creation of its proposed joint contracting physician network. Nearly two years passed between the PHO's initial request letter to the FTC in May 2011 and the FTC staff's recent Advisory Opinion, during which time the PHO engaged in numerous dialogues and provided additional responsive information to staff. Both the FTC (which issues Advisory Opinions) and its sister antitrust agency, the Department of Justice (which issues Business Review Letters), allow parties to gauge their enforcement intentions in order to minimize antitrust risk for a proposed business venture. Members of the health care industry, particularly those contemplating joint action among potential competitors, would benefit from analysis and consideration of potential antitrust issues early in the planning process.

## Related People

- Patrick C. Devine, Jr. – 757.629.0614 – [pdevine@williamsmullen.com](mailto:pdevine@williamsmullen.com)

## Related Services

- Antitrust & Trade Regulation
- Health Care