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Price Fixing and Leveraging Concerns Alleviated by Promoted Efficiencies: More FTC Guidance on Clinical Integration [Ober|Kaler]

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The Federal Trade Commission (FTC) has provided additional guidance, and comfort, to physicians seeking to clinically integrate for the purpose of, among other things, jointly negotiating payor contracts. This additional guidance has come in the form of an Advisory Opinion, dated February 13, 2013, to the Norman Physician Hospital Organization (Norman PHO) that details the promoted benefits from the arrangement and the FTC's corresponding antitrust analysis.

According to the Advisory Opinion, Norman PHO sought the FTC's enforcement intentions with respect to a plan to clinically integrate its physician members and thereafter negotiate physician contracts. Based on information provided to the FTC, dating as far back as May 26, 2011, Norman PHO plans to replace its current messenger model arrangement with a network that it believes promotes quality and efficiencies through clinical integration. Among other things, Norman PHO has (or will) put into place various quality-related committees that will: 1) establish performance measures and clinical guidelines; 2) audit members' medical records and generate individual and aggregate performance reports measuring compliance with clinical guidelines; 3) compile recommendations for improving performance; 4) provide medical education and training; 5) oversee corrective actions when needed; and 6) implement and carry out penalties if needed, including payment withholds and expulsion from the group as necessary. Norman PHO's quality-related committees will be aided by an extensive electronic platform and interface that each of its participating physicians will be obligated to invest in and utilize.

Although the FTC did not seek information from outside sources, its review of the proposal was evidently extensive and deliberate as it was provided information regarding the proposed arrangement from the Norman PHO on no less than six occasions covering a span of almost 20 months. Ultimately, and based on the proffered level of clinical integration, the FTC determined that the actions of the Norman PHO would qualify for rule-of-reason review rather than per se condemnation generally applied to physician price fixing arrangements. Furthermore, the FTC concluded that the joint contracting was reasonably necessary for the PHO to achieve its objectives and, therefore, ancillary to the clinical integration initiatives and not something the FTC would seek to challenge.

The FTC noted that given its size, Norman PHO might be able to exercise market power over the prices for physician services in the Norman, Oklahoma, area and questioned whether other viable alternatives for payers existed. The Agency's conclusion is made all the more interesting by an acknowledgement from the PHO that it expected physician reimbursement rates to rise in order to offset the increased use of physician resources to achieve the promoted efficiencies and quality improvements. Nevertheless, the FTC took comfort in the fact that the arrangement between the Norman PHO and its physician members was non-exclusive, thereby permitting payers who did not want to contract with the PHO to contract directly with participating physicians.