American Academy of PAs

Antitrust Implications of Negotiating with Third Party Payers

Q. Can a professional PA association negotiate with private insurers on behalf of its members; that is, recommend fee schedules, specific prices for medical services, or reimbursement percentages (for example, 90% of the fee paid to physicians)?

A : A basic tenet of federal and state antitrust law is that otherwise competing sellers of services cannot directly, or indirectly (e.g., through a professional association), agree among themselves on price or price related terms at which they will sell their services. Price fixing violations can occur even when the competitors do not actually agree to uniform prices. For example, if competing PAs were to agree to uniform discount rates from their existing fees, such an agreement would be illegal price fixing, even if the prices before the discount were not uniform and the resulting discounted prices are different. In fact, it is even unlawful when competing providers agree to different discount rates (e.g., they agree with each other to discount their fees 3% and 5%, respectively). Moreover, since under the antitrust laws, the term "price" includes payment mechanism or formulas, it would also be unlawful if competing PAs were to agree on a formula for calculating fees, such as a percentage of physician fees.

Accordingly, a PA association, which by definition represents competing providers, cannot agree with payers regarding price terms of PA-payer contracts. Because of the broad definition of "price fixing," it will usually be unlawful for the association to "negotiate" with private payers regarding the price terms in PA-payer contracts.

It is for this reason that professional associations do not typically engage in the negotiation of prices at which their members will sell their services. On the other hand, the association can be an advocate with payers that PAs be included as eligible participants in provider panels of payer contracts.

Q: Can a PA association, on behalf of its members, negotiate with private insurers regarding issues other than reimbursement, such as credentialing requirements or scope of services?

A: An association's negotiation with private insurers of non-price terms in PA-payer contracts can also be targeted as an antitrust violation. For example, a concerted refusal to deal violation (sometimes referred to as group boycott) results if the association would negotiate with private insurers under a threat, expressed or implied, that unless the insurer would accede to the association's position, the association would urge its members to not contract with that payer. Such violations, like price fixing, are among the most serious antitrust violations.

On the other hand, if a private insurer desires the views of the association (e.g., as part of such a payer's effort to construct an attractive offer to association members), the association should be able to respond to the payer's request for advice on the non-price terms of the proposed payer-member contract. Contract uniformity on administrative and utilization issues often is desired by a payer. In such circumstances, it is incumbent upon the association which intends to discuss such contracting terms, to obtain, in advance, payer encouragement (or, at least, acquiescence) of such collaboration. Under no circumstances, however, should the association threaten that it will recommend or advise its members not to contract with the insurer unless the insurer accedes to the association's position. Any resulting concerted refusal to deal is a serious and potentially even criminal violation. In such circumstances, the aggrieved payer would likely be able to file an antitrust suit itself, alleging damages from the failure to achieve a contract, or, even more likely, contact federal or state antitrust authorities and ask for an investigation of the association and its providers.

Q: Can a PA association, on behalf of its members, negotiate with a state Medicaid or workers' compensation office on issues such as levels of reimbursement, credentialing, or other issues affecting physician assistants?

A: For purposes of both price fixing and concerted refusal to deal violations, the fact that the payer is a governmental program rather than a private insurer will usually not make a difference. This is especially so in an era in which governmental programs increasingly use the competitive model (i.e., selective contracting on a discounted price basis) in purchasing professional services.

On the other hand, it is entirely appropriate for a professional association to lobby legislatures and government officials about issues of concern to the association's membership -- including compensation levels as well as non-price terms. This ability to "lobby" without incurring an antitrust violation is premised on the constitutional right of all persons to "petition government." Urging government to act in a way that is consistent with a petitioner's request is, in general, immunized from antitrust violations. However, the petitioning effort cannot go so far as to represent an agreement among the providers, directly or indirectly through their association, about the price terms at which they will provide the services, nor can the association threaten or facilitate a boycott of the government program by the association member- ship if the compensation levels or non-price terms do not meet the association's desires. Thus, the association can urge governmental officials to adopt reimbursement mechanisms favorable to PAs but cannot orchestrate an agreement among the providers regarding the rates they will accept or threaten a boycott of the program.

Q: What then are the legal boundaries for associations when negotiating on behalf of their members with third party payers and managed care organizations?

A: In general, any true "negotiation" by the association with payers or their representatives concerning the terms upon which association members will provide their services is inherently fraught with potential antitrust violations. Professional associations do not have the antitrust immunity enjoyed by labor unions who can lawfully negotiate contract terms on behalf of their union membership. Trade associations representing health care professionals have been the target of numerous private and governmental antitrust prosecutions. In almost every case, these cases have been premised on an alleged attempt by the association to negotiate terms regarding the sale of their member services.

This negotiation of contract terms with payers must be distinguished from an appropriate role of the association, which is to educate its members and the public of the association's concerns and to urge governmental authorities, at legislative or regulatory levels, regarding the enactment of legislation or issuance of regulations which would benefit the association's membership. Thus, unlike the antitrust and business tort risks inherent whenever an association injects itself into member- payer specific contracting scenarios, the association is on a much more secure legal basis when it pursues its constitutional right to petition government at the federal, state, or local levels. In such petitioning efforts, the motivations of the association and its members are largely irrelevant in the context of enjoying antitrust immunity.

Q: Can an association conduct a survey regarding prevailing fees and other conditions of PA-payer contracts?

A: Conducting a survey and publishing its results should not result in an outright "price fixing" violation, since there is no agreement among the PAs or their association regarding the fees to be charged. However, antitrust violations can exist if, as a result of the survey, there is a lessening in competition among the participants.

So-called "exchanges of competitive information" among competitors have a tendency to stabilize competition and, therefore, in many circumstances can be found to be an antitrust violation because of resulting anticompetitive effects. It is for this reason that when professional associations conduct surveys regarding fees or other terms under which their members provide services, certain safeguards are implemented. Essential to these safeguards is that the information collected is historical (rather than current or future data); the individual input information is maintained confidentially (i.e., no specific responses are disseminated); the disseminated information is aggregated — perhaps depicting high, low and average; independent contractors (not association members or staff) are used to collect and compile the data on a confidential basis; and the survey results are not accompanied by any recommendations regarding the price terms that the participating professionals ought to seek in future contracts. In other words, the legitimate purpose of a fee survey is to provide information about market conditions, such that each individual competitor can then decide on which terms it will sell its services.