

ANTITRUST AND IDNs: HOW FAR CAN WE GO?

Clear Antitrust Policies Will Be Needed to Guide Providers As They Form Integrated Delivery Networks

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No matter what shape healthcare reform eventually takes, it seems certain that the cornerstone of the new system will be some form of integrated delivery network (IDN)—a group of providers, physicians, and payers working together to provide a full continuum of services. However, as healthcare providers move into collaborative ventures, they are often uncertain how far can they go without violating antitrust laws. In developing closer ties with their former competitors, healthcare facilities need clearer policies about what is permissible.

PREDICTABLE OUTCOMES

Since the 1970s, the outcomes in antitrust actions against healthcare facilities have become significantly more predictable. Antitrust laws employ a consistent analytical discipline that generally pro-



INTEGRATED
DELIVERY
NETWORKS

duces predictable results. The Department of Justice (DOJ), the Federal Trade Commission (FTC), and the courts have become knowledgeable about healthcare. Many cooperative healthcare ventures have withstood antitrust scrutiny and gone through to completion. But there are still differences of opinion among healthcare providers and antitrust enforcers as to how far antitrust enforcement activities should go.

In the antitrust regulator's view, U.S. healthcare is a significant economic activity. The ideals of competition and market efficiency apply and must be promoted. Healthcare will be improved by the competition. The DOJ and FTC apply their usual concepts to test how this economic activity operates and promotes competition, a fundamental national economic policy.

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Summary Since the 1970s, the outcomes in antitrust actions against healthcare facilities have become significantly more predictable. But there are still differences of opinion among healthcare providers and antitrust enforcers as to how far antitrust enforcement activities should go.

Antitrust enforcement involves a determination of reasonable and unreasonable activities, rather than the application of clear rules. This can lead to confusion over what is legal and may inhibit providers from engaging in collaborative efforts.

Intent is very important in antitrust matters. A cooperative venture's effect on the consumer is the primary factor in the enforcers' consideration of whether it is reasonable. Thus well-planned and

appropriate healthcare ventures will succeed in most places.

Congress has been considering the antitrust implications of healthcare reform. To date, however, there is no consensus on what antitrust laws need changing, if any, or whether new definitions or exemptions could address the problem. Integrated delivery networks (IDNs), the central feature of many healthcare reform proposals, could raise many classic antitrust concerns. Antitrust enforcers' interest in these arrangements will vary according to their effect on competition. Any attempts to establish IDNs will need to also ensure clear language exists regarding the reach of antitrust laws.

than the application of clear, bright-line rules. Thus healthcare providers may complain about a perceived lack of common sense in the government's application of antitrust rules to some healthcare activities. Antitrust enforcement is fact specific. Different regulators, courts, and lawyers judging similar facts can and do reach different conclusions. This can lead to frustration and confusion over what is legal and may inhibit providers from engaging in collaborative efforts.

Intent is very important in antitrust matters. Antitrust regulators believe that many plans by healthcare providers are devised to stifle competition and create monopolies rather than to benefit the community. A cooperative venture's effect on the consumer is the primary factor in the enforcers' consideration of whether it is reasonable.

Any hope that healthcare could be free of antitrust laws is wishful thinking. Healthcare costs are too large a part of the nation's economy, and a century-old tradition is at least as significant as healthcare policy. Exemptions to antitrust laws for the development of IDNs could be introduced, but only if accompanied by significant, ongoing regulation.

Would the IDN regulatory structure justify granting exemptions from traditional antitrust economic control? It seems so, but legislation should be clear on this point to avoid future confusion over the applicability of antitrust laws.

EFFORTS FOR CHANGE AND EDUCATION

Various legal education programs have spread the message that well-planned and appropriate healthcare ventures will succeed in most places. This does not eliminate the uncertainty, but it addresses the myth that antitrust laws prevent any collaborative healthcare activities.

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tend to support the traditional philosophical assumptions favoring competition, they also reveal a willingness to restrain antitrust enforcement in defined healthcare ventures.

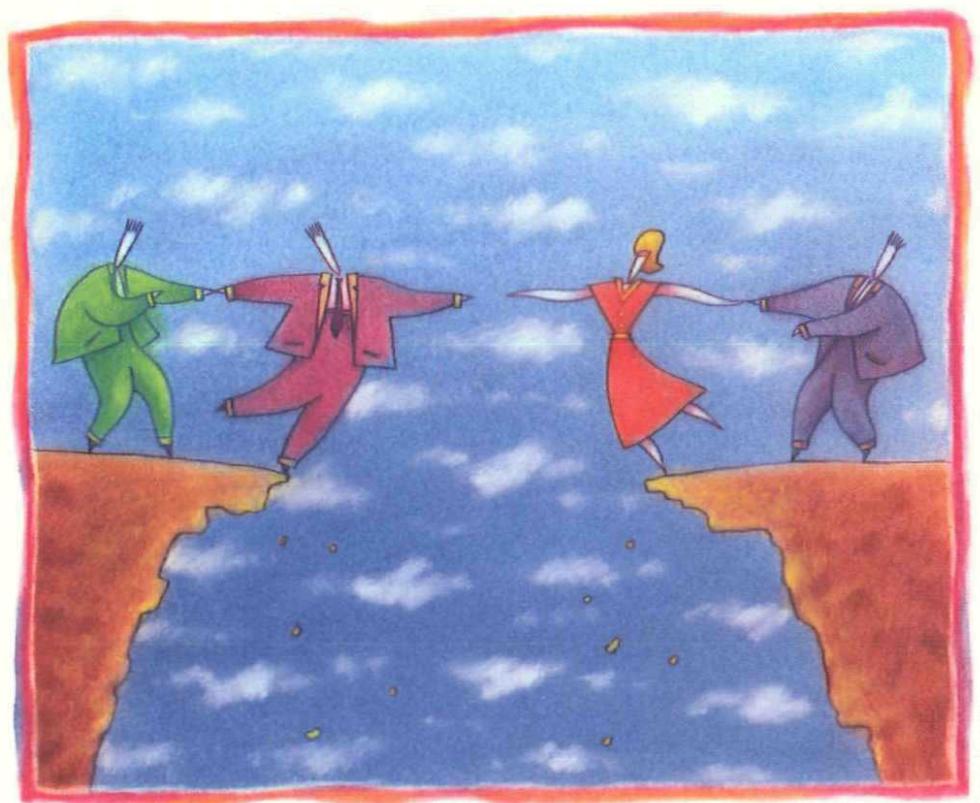
The American Hospital Association has engaged antitrust legal counsel to help avoid antitrust problems with its healthcare reform package. Although avoidance of regulation altogether seems unattainable, the AHA may be able to reach its stated goal of securing a reasonable application of antitrust rules or reasonable exemptions of the laws. AHA has been educating its members about the many possible avenues for cooperation.

The Catholic Health Association (CHA) and its members need to be aware of what other organizations are doing to seek changes in antitrust regulations and avoid duplicating these efforts. And we need to support and broaden congressional actions to encourage healthcare collaboration and avoid unreasonable antitrust entanglements.

IDNs AND ANTITRUST ISSUES

CHA's healthcare reform proposal centers on IDNs—"a self-contained system of providers offering a full continuum of integrated care to an enrolled population." IDNs may be organized in different legal structures and managed by a variety of entities. Antitrust law is not concerned with the structures, only with the effects on com-

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HOLISTIC RETREATS

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lives. Many say they are improving their physical health by exercising, losing weight, coping with stress in more positive ways, and integrating prayer into their lives.

Finally, the recent offshoot from participants of the holistic spirituality retreats is Lourdes Associate Ministry Process (LAMP). LAMP members are persons who have participated in retreats and are now sharing their experiences with others. For example, LAMP members have given presentations on a variety of holistic topics to Mercy Corps (a group of volunteers who work with the Sisters of Mercy), to a bereavement group, and to several other groups.

LIFE AS GIFT

Lourdes wellness retreats have a bright future. More and more people are turning to spirituality, preventive care, and alternative ways of healing in our high-stress and environmentally threatened society.

In addition, the medical center's constituents appreciate that it seeks creative ways to take its mission seriously.

Lourdes, through its holistic retreat program, can provide a caring experience for an individual, enabling him or her to achieve wellness. It can cooperate in forming communities that attend to the whole person—body, mind, and spirit—and that care for the environment. It can influence the Christian theology of wellness, of living life to the fullest, no matter what limitations the individual faces.

The Scriptures say, "I have come so that you may have life, and have it in abundance." The holistic retreats at Lourdes Wellness Center help people to know and name life as gift and to commit to living it more fully for themselves and, ultimately, for their society and their world. □

ANTITRUST

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petition. On the one hand, this allows broad freedom for developing efficient IDN structures, even without any antitrust exemptions. On the other hand, no specific legal structure offers more or less antitrust protection under current rules.

An IDN could raise all the classic antitrust concerns such as horizontal arrangements between like providers, vertical arrangements between different types of providers, and even per se violations that fix prices. Antitrust enforcers' interest in these arrangements will vary according to their effect on competition. Coordination of services among providers who do not compete because of differences in service area or product will raise less concern than plans involving the same kinds of providers or price fixing.

If an IDN can remain focused on the patient and efficiently deliver services to the community, as is proposed, this would minimize antitrust concern. Unfortunately, some features integral to IDNs (especially pricing and arrangements among like providers) could raise serious antitrust problems.

Another antitrust challenge common in healthcare is the private use of antitrust laws to fight a hospital's denial of physician's privileges, bid to provide medical services, or medical staff membership based on the quality of his or her medical care. Providers who are shut out of IDNs for similar reasons could sue the IDN, alleging antitrust violations. And some healthcare providers, motivated by politics or self-interest, doubtless will harm the consumer and merit antitrust enforcement.

Any attempts to establish IDNs will need to also ensure clear language exists regarding the reach of antitrust laws. Healthcare providers will need support to act without being tied up by those who oppose change or believe they have lost some economic benefits. No one needs a valid reason to sue, but clear, coordinated government healthcare and antitrust policies will help ensure a successful defense and timely IDN development. □

POSITIVE CHANGE

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retaining qualified medical and allied health professionals.

If managed care is at the heart of reform, we will become part of a network or a continuum of care. Our external relationships will require considerable interaction, dialogue, and mutual accountability. We shall have less autonomy and more interdependent relations. This will challenge us to determine what specific roles we want to play in the network, and it will raise delicate ethical questions about cooperation with other organizations. Boards of directors of Catholic healthcare organizations will be driven to review mission and constantly evaluate participation in a pluralistic network.

As we cope with external realities, we must also attend to internal concerns. Sponsorship of Catholic healthcare providers will change in the next two decades. We shall have to identify and recruit lay leaders to exercise governance of our institutions, and we will have to establish stronger ties with local Churches. The maintenance of Catholic identity and integrity will be more difficult in a reformed delivery system, but we have educated and capable lay leaders to sustain our distinctive presence. Religious sponsors, along with CHA, are already developing educational institutes to focus on training our lay leaders. In urban areas we shall have to give greater attention to identifying, recruiting, and training minority lay leaders.

WE CAN MEET OUR CHALLENGES

These are exciting times, providing real opportunity to bring about positive changes in healthcare. I believe we have the history, the experience, and the will to preserve a Catholic presence in the provision of healthcare. CHA has positioned itself strategically to be an active and influential player in the reformed system. The challenges may be more complex but are not more daring than the efforts made by the pioneers of Catholic healthcare. □