Antitrust Issues in Psychology
Networks, Unions, and Associations

Matthew C. Rosser
McDermott, Will & Emery

Like competitors in any other profession or industry, psychologists must understand basic antitrust principles in order to avoid unnecessary legal exposure. Antitrust awareness is particularly important for psychologists who participate in, or are interested in joining, managed care contracting networks, provider "unions," or professional associations with their competitors. While these organizations can provide valuable benefits to their members, they also can create significant antitrust risks if operated inappropriately. This article briefly outlines potential antitrust risks in each of these organizations, and provides some basic guidelines for minimizing those risks.

Antitrust Overview

The purpose of the antitrust laws is to protect free and open competition for the benefit of consumers. Competition ensures that consumers will have access to high quality, competitively priced goods and services. In order to protect these benefits, Section 1 of the Sherman Act (the principal federal antitrust statute) prohibits all agreements that unreasonably "restrain" competition. Certain types of agreements are so inherently unreasonable that they are always condemned as "per se" illegal. These per se offenses include agreements among competitors to coordinate or "fix" their prices, to divide "markets" between themselves, and, in some situations, to refuse to deal with their customers ("group boycotts"). Two independent psychology practices must not, for example, agree on the rates they will charge for office visits, the communities or customers they will serve, or the payors with whom they will contract.

The federal antitrust agencies have actively challenged such per se illegal conduct by health care providers and other professionals. The Department of Justice ("DOJ"), for example, recently filed criminal charges against a local society of Texas optometrists who had allegedly met and agreed upon the fees that they would charge for eye examinations. The optometrists pled guilty, and agreed to pay a fine of $75,000. The Federal Trade Commission ("FTC") similarly filed a civil action against an association of trial lawyers who had boycotted the District of Columbia court system in order to obtain an increase in the fees paid in court-appointed cases. The Supreme Court held that this group boycott was per se illegal under Section 1 of the Sherman Act.

Agreements that are not "per se" illegal may still be unlawful if, on balance, their anticompetitive effects outweigh their procompetitive benefits. This balancing test is known as the "rule of reason." An agreement between two psychology and psychiatric groups to merge into a single practice, for example, would be analyzed under the rule of reason. If the merged practice included such a large share of the communities' mental health professionals that it could raise prices above competitive levels, it is possible that the anticompetitive effects from this "market power" might outweigh any efficiencies from the merger. Short of full mergers, agreements to enter into joint ventures raise similar issues under the rule of reason. When mergers or joint ventures consolidate all or nearly all of the mental health professionals in a

market, antitrust exposure may also result under Section 2 of the Sherman Act, which prohibits monopolization, attempted monopolization, and conspiracies to monopolize.

Certain types of activities among health care providers (and among competitors generally) are immune from antitrust liability. The Supreme Court has recognized, for example, that petitioning or lobbying the legislature and executive branch to take potentially anticompetitive actions will not generally result in antitrust exposure. Similarly, legitimate attempts to obtain relief through administrative agencies or courts are also generally protected. This protection does not apply, however, when the petitioning activity is simply a sham or when the petitioners engage in illegal activity as a means of obtaining government relief (like the lawyers who boycotted the District of Columbia to obtain higher fees).

The penalties for violating the federal antitrust laws are quite serious. Violation of the Sherman Act is a felony punishable by imprisonment for up to three years, fines of up to $350,000 for individuals, and fines of up to $10 million for corporations. The FTC and DOJ share responsibility for enforcing the federal antitrust laws. Private parties injured by antitrust violations can also file civil actions seeking treble damages and attorneys fees and costs.

Guidelines for Provider Networks

Psychologists and other health care providers can collaborate in certain types of "provider networks" without significant antitrust risks, so long as the networks are structured and operated carefully. Provider networks are joint ventures formed by otherwise independent providers. The networks are generally designed to market the providers' services to payors, and to enter into payor contracts on behalf of those providers. The network is typically owned by the participating providers, and can take any number of organizational forms (such as a limited liability company, a not-for-profit corporation, or a for-profit corporation). For example, independent psychologists, psychiatrists, and clinical social workers might form a limited liability company network to offer mental health services to managed care payors. The providers would continue to operate independent practices, but would agree to participate in certain types of contracts that the network is able to obtain.

Price Setting and Contracting Issues. Regardless of organizational form, the price-setting activities of networks raise some of the most significant antitrust risks. Only in limited circumstances can networks legitimately negotiate contract rates with managed care companies, employers, and other payors. Specifically, price negotiation is permissible only when the payor contract creates substantial financial risk-sharing or "clinical integration" among the competing providers in the network. When a particular contract does not involve financial risk-sharing or clinical integration, any attempts by networks to negotiate fees for participating psychologists and providers would create significant price-fixing exposure.

In recent health care policy statements, the FTC and DOJ describe a number of types of contracts that create the necessary financial risk-sharing. For example, when a psychology network receives a fixed capitated fee for each enrollee regardless of the actual services provided, the network's psychologists share in the financial risk that the cost of those services will exceed the capitated amounts. This shared risk results in common incentives to control utilization and provide care in a cost-effective manner. Similar risk-sharing exists when the

network is paid a fixed percentage of the payor's premium for all required mental health services, or when the psychologists' fees are subject to substantial withholds, penalties, or bonuses based upon their ability to meet utilization or cost-containment goals as a group. Likewise, substantial risk-sharing can result from the payment of "global case rates" for a complex course of treatment requiring coordination and management of varying services from providers in multiple disciplines (e.g., psychologists, psychiatrists, and hospitals). Each of these arrangements creates a shared financial incentive among providers to furnish care in an efficient manner. As a result, the FTC and DOJ will not view the network simply as a mechanism for entering into anticompetitive price-fixing agreements. Psychology networks are therefore free, for example, to negotiate with payors about the level of capitated, percentage-of-premium, or global case rates that they are willing to accept.

Arrangements involving "clinical integration" can also result in efficiencies, and can similarly permit networks to negotiate price terms with payors. For example, a network that invests significant capital in computer systems and personnel to monitor overall utilization, quality, and cost-effectiveness of participating psychologists, and that disciplines and excludes psychologists who fail to meet these goals, may be considered clinically integrated. In contrast, a network that simply creates a utilization review committee, but does not actively monitor, educate, or discipline its psychologists, would not be considered clinically integrated. Unfortunately, the agencies do not provide much guidance about networks falling between these two extremes. As a result, networks should be very cautious in relying upon clinical integration alone to justify price negotiations with payors.

Without financial risk-sharing or clinical integration (for example, when a contract reimburses psychologists using a simple fee schedule), networks must not negotiate fees on behalf of their participating psychologists and providers. Such collective negotiations would be considered per se illegal price-fixing. The mere fact that the providers have created a new corporation or limited liability company to perform the negotiations does not insulate them from this price-fixing liability. In fact, the FTC and DOJ have been very active in challenging physician networks and physician-hospital organizations that have attempted to negotiate fee-for-service rates. Most recently, the FTC challenged the activities of a Colorado physician network that allegedly negotiated non-risk fees for its participating physicians. Only in very limited circumstances – for example, where the substantial majority of a network's business involves risk-sharing – might a network avoid price-fixing exposure for negotiating fee-for-service rates.

However, networks can facilitate non-risk contracting using a mechanism commonly known as the "messenger model." Under this model, an independent third-party or network employee would act as a "messenger" between payors and individual network psychologists. The messenger would simply transmit payor offers to participating psychologists for their individual consideration, and relay the psychologists' responses back to the payor. The messenger would not negotiate rates or attempt to coordinate the psychologists' responses. One variation of the messenger model allows individual psychologists to commit in advance to any payor offers that exceed predetermined fee schedules set independently by the psychologists. Because these models can create significant risks if not implemented correctly, networks should seek antitrust counsel before dealing with payors.

Network "Overinclusion" Issues. In addition to raising price-fixing issues, networks can also raise market-specific issues if they include too large a panel of providers. When such "overinclusion" occurs, the antitrust concern is that an insufficient number of providers will be available to form competing networks or contract with competing managed care plans. Overinclusive networks may therefore be able to exercise "market" or "monopoly power," and raise prices above competitive levels.

The FTC and DOJ have issued guidance in two "safety zones" created for "physician network joint ventures." Although the safety zones are technically limited to physician networks, the safety-zone standards nevertheless provide useful guidelines for networks involving psychologists and other providers. Absent extraordinary circumstances, the enforcement agencies explain that they will not challenge a "non-exclusive" network in which the physicians (i) share substantial financial risk, and (ii) constitute no more than 30% of any given specialty in the relevant market. Similarly, they will not challenge an "exclusive" risk-sharing network with 20% or less of the physicians in each specialty. The agencies are more concerned about overinclusion in "exclusive" networks because they restrict the ability of participants to join other networks or contract directly with payors, and therefore are more likely to have anticompetitive effects.

Physician networks that fall outside of the safety zones are not necessarily unlawful under the antitrust laws, and will be examined by the FTC and DOJ on a case-by-case basis. Where the physicians are sufficiently integrated, these enforcement agencies have looked at the likely competitive effects of such networks, and have concluded that many non-exclusive networks exceeding the thresholds were nevertheless unlikely to pose antitrust problems. For example, the FTC staff concluded that a physician network with approximately 45% of the obstetricians and 50% of the pediatricians in the relevant market did not raise concerns where the network was non-exclusive, and where competing networks already existed. In contrast, DOJ rejected a proposed network accounting for 50% to 77% of the pediatricians in several New Jersey communities where payor objections and network contract provisions suggested that the network would likely be able to exercise market power.

When applying these principles to psychologists, the calculation of market shares would be somewhat different, because psychologists compete not only with other psychologists, but also with other types of mental health professionals (such as psychiatrists and possibly clinical social workers). In order to determine whether a network includes more than 20% or 30% of area providers, it would be appropriate to include other mental health providers who are viewed by payors and patients as substitutes for psychologists. Thus, even a network with 50% of the market's psychologists might not pose competitive concerns if the network's overall percentage of mental health professionals were less significant. Again, these antitrust risks depend upon the specific nature of competition in the relevant market, and must be reviewed on a case-by-case basis.

Do Unions Provide Antitrust Protection?

In recent years, health care professionals have become increasingly interested in joining unions. Under certain circumstances, the collective bargaining activities of unions on behalf of their members are exempt from the antitrust laws. However, this "labor exemption" applies only

when employees are using a union to bargain with their employer. As a result, independent psychologists and psychology practices could not use a union to negotiate provider contracts with a health plan. A Regional Director of the National Labor Relations Board, for example, recently refused to certify a New Jersey union as the exclusive bargaining agent for independent physicians in contract negotiations with an HMO. The union had argued that the physicians should be considered HMO "employees," as a practical matter, because of the significant control exercised by the HMO. The Director rejected these arguments, however, and concluded that the physicians were simply independent contractors not covered by the labor laws.

Collective action by independent psychologists through a "union" is therefore no different than collective action through a provider network. Absent financial risk-sharing or clinical integration among the psychologists, union negotiation of the psychologists' fees would be per se illegal, just as it would be in the context of provider networks. Last year, for example, the FTC challenged a "strike" called by the College of Physicians-Surgeons of Puerto Rico to demand pricing changes under the Puerto Rican government's indigent care plan. Under the settlement agreement, the physicians agreed to pay $300,000 in restitution and agreed not to engage in any future group boycotts or collective price negotiations. The FTC is also presently investigating the activities of the Florida-based Federation of Physicians and Dentists, which claims to be engaging in "messenger model" contracting on behalf of its independent physician members.

What Can Associations Do?

Like provider networks and "unions," professional associations are organizations of otherwise competing providers that should not be used as a means of setting prices or boycotting health plans. These activities create significant antitrust exposure. Nevertheless, national, state, and local associations can engage in a number of valuable collective activities without substantial antitrust risks. For example, associations can represent psychologists' interests before legislatures, government regulatory agencies, and courts. These government advocacy activities are generally immune from antitrust scrutiny. As the Puerto Rico case demonstrates, however, the protection is not available when the government is simply acting as a purchaser of health care services, and the association uses an illegal boycott as a means of demanding more favorable pricing.

Associations can also provide various types of information to health plans and other purchasers. In one "safety zone," the FTC and DOJ explain that they will not challenge the collective provision of medical information to purchasers, absent extraordinary circumstances. Associations can collect outcomes data related to a particular procedure that the members believe should be covered, and provide that data to a purchaser. The association can also discuss the scientific merit of that data with the purchasers. Similarly, an association can develop suggested practice parameters for particular types of clinical cases. The Agencies recognize that such information exchanges can ultimately increase quality and efficiency.

Nevertheless, associations will be exposed to substantial antitrust risks if they attempt to coerce a purchaser's decision-making or threaten a boycott of a purchaser that does not follow the associations' recommendations. In one Supreme Court case, for example, a federation of dentists refused to provide payors with x-rays used in making utilization and coverage decisions.

The Court agreed with the FTC's allegations that the agreement was an illegal group boycott, and rejected the dentists' argument that quality of care concerns justified their actions. In reviewing association activities generally, it is also important to recognize that antitrust exposure can result not only from explicit agreements, but also from unspoken agreements and parallel conduct among their members.

* * * * *

In general, psychology networks and associations are capable of providing significant procompetitive benefits, and their related antitrust risks are manageable. Because the consequences of improper formation and operation can be so significant, however, it is imperative that the participants in these organizations understand the relevant antitrust issues and conduct themselves accordingly.