Office of the Attorney General

Presentation to Commission to Study Maine's Hospitals

March 1, 2004

Antitrust Limitations On Hospital Collaboration

- State antitrust laws, enforced by Attorney General and private parties
- Federal antitrust laws, enforced by USDOJ and Federal Trade Commission

Antitrust laws generally prohibit competing hospitals from:

- Collaborating in setting fees
- Collaborating in refusing to deal with a payor
- Collaborating in dividing territories
- Collaborating in dividing services

Mergers

- Under state law, prohibited if effect “may be substantially to lessen competition or tend to create a monopoly”
- Under federal law, large mergers ($100 million dollar companies) require federal pre-notification and waiting period

"PER SE" ILLEGAL AGREEMENTS

Certain types of agreements are automatically illegal; no defenses or justifications allowed

- Price fixing
- Bid rigging
- Resale price maintenance
- Market allocation
- Customer allocation
- Group boycotts aimed at competitors

"RULE OF REASON"
Some agreements lessening competition may be justified by overriding pro-competitive advantages

Examples:

- Joint ventures
- Exclusive contracts

Might be permitted under a Rule of Reason analysis if there are cost advantages or quality gains outweighing any anticompetitive effect

Joint ventures usually get benefit of Rule of Reason test

- Restraints on competition may be justified by overriding cost or quality advantages
- E.g.,Collaborating to purchase high-technology or expensive equipment, or offer specialized health care, that would otherwise not be available to the community
- Restrictive components of agreement unnecessary to achieving efficiencies sought (e.g., agreement on prices for unrelated or ancillary service) won’t be allowed

Hospital Cooperation Act

Vehicle for legal hospital collaboration even if otherwise antitrust problem. Activities covered:

- Sharing, allocation or referral of patients or services
- Coordinated negotiation and contracting with payors
- Mergers

Hospital Cooperation Act (cont.)

Won’t be approved unless “the likely benefits resulting from agreements outweigh any disadvantages attributable to a reduction in competition that may result from the agreements.”

Hospital Cooperation Act (cont.)

Factors on the benefits side:

1. Enhancement of quality of care
2. Preservation of services close to communities served
3. Gains in cost efficiency
4. Improvements in utilization of resources
5. Avoidance of duplication of resources
6. Continuation or establishment of provider education

Hospital Cooperation Act (cont.)

Factors on the disadvantages side:

1. Extent of likely adverse impact on payors' ability to negotiate optimal payment and service arrangements with hospitals and providers

2. Extent of reduction in competition

3. Extent of likely adverse impact on quality, availability and price

4. Availability of less disadvantageous arrangements for achieving same benefits

5. Extent of likely adverse impact on in-state access to clinical training programs

Hospital Cooperation Act (cont.)

- DHS may hold a public hearing
- Others may intervene
- DHS decides, after consulting AG on competition issues
- AG can still sue if DHS approves an agreement we don't like (standard is whether benefits outweigh disadvantages, maybe harder for AG than usual antitrust standards, depending on type of agreement)

Hospital Cooperation Act (cont.)

Why does no one use it?

1. State antitrust immunity if approved, but no guarantee of federal antitrust immunity.

   If there were more regulatory oversight, there would be more reassurance of federal immunity.

2. Most activities that would receive certification likely pass antitrust scrutiny anyway?

Physician-Hospital Organizations

- One type of network among otherwise competing providers, as well as complementary providers, which can offer significant pro-consumer efficiencies

- Contract with third-party payors at jointly determined prices and other terms and simultaneously agree to measures aimed at controlling costs and assuring or improving quality

PHOs (cont.)

Agreements among competing providers on price and other competitively significant contract terms may be acceptable if:

- Real potential to increase quality or reduce cost, AND
- Joint contracting appears reasonably necessary to achieving those goals

Integration means either:

Economic integration, participants collaborate in an integrated economic entity, such that their financial interests are intertwined and all have incentive to keep costs down

Clinical integration, participants collaborate in clinical initiatives or programs to create quality efficiencies or enhancements they couldn’t achieve separately

The MAINE HEALTH ALLIANCE, a PHO case study

- Formed in 1995, comprised of 11 (of 16) hospitals and 325 physicians in five northeast counties
- For the purpose of negotiating joint contracts with third-party payors

Anticompetitive conduct

- Collectively refused to deal with payors independent of Alliance
- Joint pricing – joint contracts the primary goal and activity of the Alliance

Insufficient corresponding Benefits

- Recognized that not economically integrated, resisted risk contracts (payor-driven as well)

- Clinical activities, some commendable joint programs, but they didn’t require or promote interdependence, rather seemed achievable individually

- No demonstrable link between pricing and clinical programs; equally attainable without joint contracts

Settlement

- Federal Trade Commission ordered prohibition against group contracting unless “qualified” (FTC must pre-approve)
- Largely parallel state court order
- Runs against Maine Health Alliance and its Executive Director
- Separate settlement whereby hospital members agree to similar terms

Governance

- Nonprofit corporation governed by a Board of Directors
- Board comprised of 1 representative of each hospital (hospital trustee or manager) and 1 staff physician from each hospital
- Hospital and physician members of the Alliance, through their participation agreements, delegated to the Alliance, the authority to act and contract on their behalf
- Staff took the lead in negotiating with payors, accountable to contracts committee, which provided guidance, and full Board

Hospital Management Accountability

Nonprofit Statutes

- Public Charities law, 5 M.R.S.A. §§ 194 through 194-K
- The Maine Nonprofit Corporation Act, 13-B M.R.S.A. §§ 101 through 1406

Public Charities

- Defines Public Charity to include: charitable trusts and charitable corporations formed under Title 13 or 13-B
- Gives the AG formal investigatory powers
- Prescribes a procedure to be followed whenever and public charity converts to a for profit enterprise

When can the Attorney General Investigate?

When he reasonably believes that:

- A conversion is taking place and the converting nonprofit has not complied with the statutory conversion process or
- A public charity has applied its funds or assets
  - In violation of a statute;

Investigation

- For noncharitable purposes unrelated to the operations of the public charity; or
- For private inurement or excess benefits provided to directors, officers, disqualified persons or others deemed insiders under applicable federal law for tax-exempt organizations

The Maine Nonprofit Corporation Act, Title 13-B

- Financially interested person
- Standards for Directors
- Conflicts of interest
- Misapplication of funds

Who is Financially Interested?

- Anyone who has received compensation from the corporation for personal services rendered to it within the previous 12 mos
- A spouse, sibling, parent or child of the individual receiving compensation
- No more than 49% of the individuals on the board of a public benefit corporation may be financially interested persons

Standards for Directors

A director shall discharge his duties

- In good faith
- With care
- In a manner he reasonably believes to be in the corporation’s best interest

Discharge of Duties

In discharging his duties a director can rely on information, opinions, reports, or statements and other financial data presented by

- Officers or employees of the corporation
- Legal counsel, public accountant
- A committee of the board

Access to records

Directors have a right to inspect books and records

- For the purpose of enabling the director to fulfill duties and responsibilities conferred by articles, bylaws or the law
- Must give 5 days notice of inspection of records

Conflicts of Interest

- A transaction in which the director has a direct or indirect financial interest

- An indirect financial interest exists if

  - Another entity in which the director has an interest or is a general partner is a party to the transaction; or

  - Another entity of which the director is a director, officer or trustee is a party to the transacton.

Approval of Conflict of Interest Transactions

A transaction in which a director or officer of a public benefit corporation has a conflict of interest may be approved before or after consummation as follows:

- The board of a committee of the board may approve the transaction if the material facts are disclosed;

Approval of Conflict of Interest Transactions (cont.)

- The director's or officer's interest is disclosed;
- The transaction is fair and equitable to the corporation; and
- The director with the conflict cannot vote

Misapplication of Funds or Assets of a Public Benefit Corp.

A transfer is prohibited if

- It is a conflict of interest transaction that is neither fair nor properly approved
- It misapplies funds or assets in violation of a statute including the conversion statute
- It constitutes private inurement; or
- It is to subsidiary or joint venture, UNLESS certain prerequisites are met.

Resources

- Public charities required to file 990s w/IRS
- Private foundations also required to file w/AG
- Guidestar (www.guidestar.org), a national database on nonprofit corporations, is one place to get the returns
- Guide for Board Members of Charitable Corporations