Antitrust – A Variety of Concerns

written by Richard Leslie | May 24, 2016

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Most mental health practitioners are likely not aware of the ins and outs of state and federal antitrust laws – and how these laws may impact their ability to earn a living. While liability for violations of these laws can be significant, most individual practitioners will likely never experience a problem with an alleged violation of the antitrust laws, provided that they avoid conspiring or agreeing with their competitors (other practitioners) to charge a particular fee (price fixing) or boycott a managed care company for paying what they consider to be an inadequate fee. The Federal Trade Commission and the U. S. Department of Justice, in enforcing antitrust laws, are trying to promote competition and encourage innovation. Competition, as the theory goes, helps to contain or reduce costs to the consumer without negatively affecting the quality of care.

Individual practitioners must of course decide how they are going to conduct their businesses. Some might not desire to affiliate with managed care companies at all, but would rather see clients who pay out of pocket and do not, or are not willing, to rely upon insurance reimbursement. The requirement of specifying the diagnosis of a mental disorder and the real or imagined “invasion” of confidentiality may influence some practitioners and some consumers to forego what may turn out to be limited reimbursement benefits. On the other hand, recently licensed people may jump at the opportunity to grow their practices with clients insured through a particular plan, even if the hourly fees are considered low. A practice begun in that manner may grow with referrals from existing or former clients.

Licensing boards must be concerned about antitrust violations as well. The federal government has taken the position that certain state regulations or interpretations of licensing laws by licensing boards may be in violation of antitrust laws if they prohibit unlicensed persons from performing certain functions considered by the licensing board to be within the exclusive province of the licensed health practitioner. For example, non-physician providers of pain management services may not, according to the federal government, be arbitrarily stopped by a medical board (relying upon the scope of practice section of the licensing law) from providing services to the public under certain circumstances. There has also been litigation involving the North Carolina Dental Board’s attempt to shut down teeth –whitening businesses operated by non-dentists. The Federal Trade Commission opposes the dental board’s interpretation of the scope of practice section of the licensing law. Additionally, licensing boards (and professional associations) must be careful when they try to restrict advertising by health professionals. Overly broad restrictions on advertising negatively affect competition and deny consumers access to information.

The Federal Trade Commission and the Department of Justice are aware that medical boards may be composed primarily of physicians and that dental boards are populated by dentists, and that these

licensees might be concerned about competition from others, including those not licensed. Licensing laws usually define the scopes of practice of particular professions and prohibit anyone who is not licensed from performing those services for remuneration. These statutes may prohibit unlicensed persons from providing those services to the public, even where those services may be provided competently and safely. If a licensing board's interpretation of the scope of practice section of a particular licensing law is too broad and sweeping, the Federal Trade Commission might have concerns. Could a mental health counselor licensing board seek cease and desist orders against life coaches from "counseling" clients? Might such action by the board violate the antitrust laws by stifling competition?

Insurers must also be concerned about antitrust laws. The federal government has blocked certain attempted mergers by insurers because it believed that the mergers would give the insurers too much market power, allowing them to control physician reimbursement rates in a manner that could harm the quality of care delivered to patients. Similarly, a merger of insurers could create too much power for the resulting insurer, thus allowing it to insist upon certain contractual provisions for providers to agree to, which may be seen by the government as violating antitrust laws. Or, the insurer may set their reimbursement rates so low that competing insurers are prevented from entering the market. Such actions should be and have been of concern to the Federal Trade Commission and the Department of Justice, arguably not often enough! Hospitals and their peer review committees must be concerned about antitrust issues because they are often sued by individual physicians and other licensees who allege that they were denied privileges or credentialing for anti-competitive reasons.

With respect to individual mental health practitioners, it must be understood that they are competitive with one another for business (for clients), at least in particular geographic locations. With this in mind, it is true that many practitioners are concerned about the low rates paid by managed care companies and insurers in general. While there are things that can be done in order to address these concerns, price fixing is not one of them. In other words, they (two or more) cannot agree on a price they will charge for their services or engage in behavior that would explicitly or implicitly threaten a boycott. If two or more practitioners are doing business as a partnership or participate in a fully integrated practice, fees can typically be set by the business entity after internal discussions. While individuals may have a limited ability to affect the offer or payment of inadequate fees, professional associations can be active in this regard.

Associations can, among other things, petition the government on fee issues, whether it be a department of managed health care, an insurance commissioner, or the state legislature, without triggering antitrust concerns. The American Medical Association has been active for years, and has addressed a variety of antitrust concerns, including the issue of payment of inadequate fees. The AMA has promulgated a model law regarding antitrust that they have sought passage of in various states. My understanding is that it would provide an exemption to the antitrust laws for self-employed physicians and would provide for state regulation of physician collective bargaining. The AMA Litigation Center, and other associations, have used the courts to address a variety of concerns about managed care, such as improper market dominance by particular insurers and unfair practices by managed care companies and insurers, including issues related to inadequate fees that negatively affect quality of care.