



Accountable Care Organizations and Antitrust

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Policy Rationale for Accountable Care Organizations

Encourage co-operation and clinical integration among providers to accomplish the Triple Aim:



Improve the health of individuals;

Bend the cost curve for the provision of care;

Improve the health of populations.

Policy Rationale for Antitrust

To encourage competition
and eliminate restraints on competition.



Competition is good because it allows markets to
operate efficiently.

Per Se or Rule of Reason

Many types of anti-competitive conduct are illegal per se.

However, some conduct that may appear anti-competitive may have pro-competitive elements.

If that is the case, courts (and regulators who follow case precedent) will apply a “rule of reason” to determine whether the pro-competitive effects outweigh the negative effects on competition.

Acts That Cause Antitrust Injury Per Se

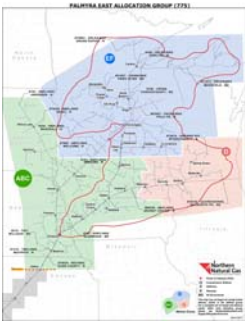
Attempts to Monopolize

A firm utilizes its market power to eliminate its competitors.



Market Allocation Agreements

Competitors divide the market among themselves so that they do not compete, and so can raise prices within their service area.



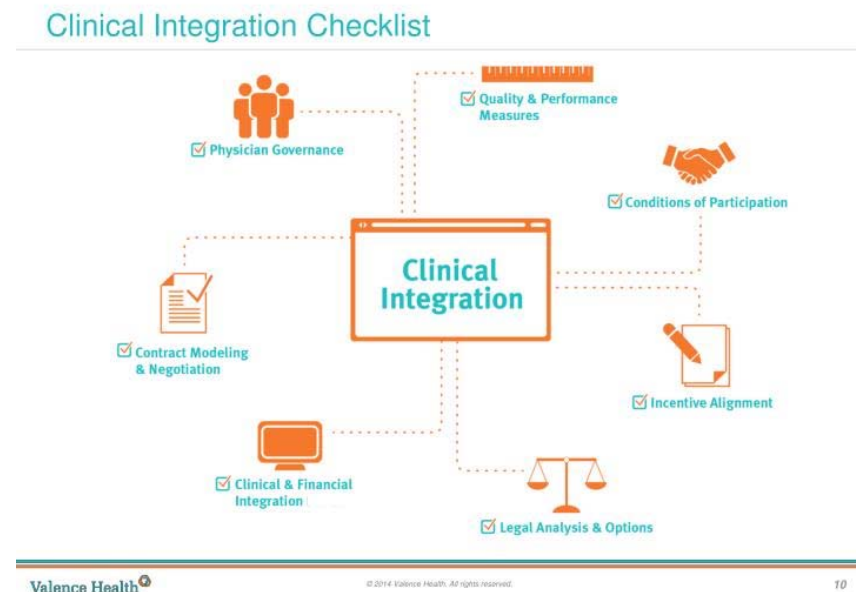
Price Fixing

Competitors agree among themselves on the price they will charge for goods or services in the marketplace, thereby establishing artificial price levels that adversely affect competition.



How Does This Apply to ACOs?

As a matter of policy (articulated by the antitrust enforcement agencies – FTC and DOJ – in 2011), the fact that ACOs are clinically and financially integrated is pro-competitive as relates to participation in Medicare Shared Savings Programs.



However, the agencies have cautioned that on the commercial side, there is danger of setting artificially high prices in order to cost-shift.



Antitrust Safety Zones

ACOs are not required to undergo antitrust analysis before going into business.

ACOs should evaluate each participant's share of services in its Primary Service Area (PSA).

Participants that provide the same service should have a combined share of 30% or less of the market for that service in the PSA.

Dominant Participant Limitation

An ACO participant with a >50% share in its PSA of any service that no other ACO participant provides to patients in that PSA cannot be exclusive to that ACO.

Safety Zone Rules of Thumb

Hospitals
and ASC

Must be
Non-
Exclusive

*Dominant
Participant

Must be
Non-
Exclusive

Primary Care
Physician

Must be
Exclusive

Specialist

Must be
Non-
Exclusive

Best Practice #1 (for the ACO)

- Keep contracts within the Safety Zone.
 - As discussed in previous slide.

Best Practice #2 (for ACO Providers)

- Do not improperly share Competitively Sensitive Information (CSI), contracting strategies outside the ACO, or allocation of services outside the ACO.
 - “CSI” is any non-public, company-specific information, in any format, that describes the business or strategic structure or process of the ACO that could influence or fix prices or restrict competition within the business.
 - “Improper Sharing” means disclosure by ACO providers to non-ACO providers of rates negotiated by the ACO, or disclosure to the ACO and its providers of rates negotiated by direct contracts outside the ACO.

Best Practice #2 (continued)

- What information can be shared within the ACO?
 - Clinical and quality information and metrics
 - Utilization patterns of participating providers
 - Modeling costs of care under contracts
 - Identifying high-cost services and providers
 - Internal sharing regarding rates under the ACO's contracts
 - Contracting strategies for the ACO
- Remember: the justification for information sharing is the financial integration of the network (i.e., risk sharing) and/or its clinical integration.

Best Practice #3 (for the ACO)

- Do not attempt to prevent or to discourage the commercial payers with whom you contract from directing or incentivizing patient choice of providers.
 - No contractual elements like “anti-steering” or “most-favored nation” clauses.

Best Practice #4 (for the ACO)

- Do not attempt to restrict a commercial payer's ability to provide its members with information about cost, quality, efficiency or performance that would help the member choose a provider.
 - Avoid contractual clauses that prohibit transparency of performance information.

Best Practice #5 (for the ACO)

- Do not tie the ACO contract to the purchase of other services from providers outside the ACO.

Best Practice #6

- No exclusive contracting by providers (other than participation by primary care providers with a single ACO).
 - ACO providers should be able to contract with other private payers outside the ACO either individually or (other than primary care) through other ACOs.

What to Do If You Suspect a Violation

Notify the appropriate Banner contact person (i.e., Provider Rep, department liaison, etc.).

Contact your Compliance Officer.

Call the ComplyLine 1-888-747-7989 or submit a report online: <https://bannerhealthcomplyline.alertline.com/>