



## Probationary Medicaid RCOs – How Do Physicians Respond Without Subjecting Themselves to Potential Criminal And Civil Liability?

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There are now eleven organizations across the State of Alabama that have been granted probationary certification as Medicaid Regional Care Organizations or “RCO”s. Physicians have begun receiving notices from some of these RCOs asking them to return a letter of intent to participate in the RCO network of providers. RCOs must be able to demonstrate to the Medicaid Agency that they have an adequate provider network in place by April 1, 2015. The RCOs are now on a fast track to put together the Primary Care Networks, and will be sending provider contracts out next. This will be the time that physicians and other providers will be negotiating with the RCOs for the best agreement they can get.

The letters of intent that are being sent out are non-binding on physicians, and merely acknowledge that the physician is willing to negotiate with the RCO. However, the issuance of the letters of intent by the RCOs will trigger discussions among physicians that may have antitrust implications. While a physician who simply sends in a letter of intent is acting individually, if that physician begins discussing with other physicians whether or not the physicians should send letters of intent, the physicians involved in the discussions may be deemed to be acting collectively.

Under antitrust laws, physicians are considered horizontal competitors who compete with each other for patients just as car dealers are horizontal competitors who compete for customers. Any distinction in the law for professions has long been abandoned. Violations of the antitrust laws carry very severe penalties including potential criminal prosecution, trebled damages and an award of the plaintiff’s attorney fees. The enormous legal fees involved in defending an antitrust investigation by the Department of Justice or the Federal Trade Commission alone can be devastating to a physician practice.

In order to protect physicians who negotiate with RCOs, the Alabama Legislature sought to provide immunity from liability under the antitrust laws by putting these negotiations under an exemption to antitrust known as the “State Action Doctrine”. This is a doctrine set forth by the U.S. Supreme Court that exempts actions of a state from application of the antitrust laws. To qualify for the exemption, the state must clearly articulate and express a state policy to exempt the anticompetitive conduct and then actively supervise the anticompetitive conduct.

The Legislation in which MASA actively participated provides the necessary elements to exempt physician negotiations from antitrust liability if the physicians carefully follow the Medicaid Regulations that implement the exemption. Before talking with other physicians about the pros and cons of contracting with a Medicaid RCO, physicians should apply through an online process to the

Medicaid Agency for a Certificate to Collaborate. The electronic application is available at <https://rcportal.medicaid.alabama.gov>. Once the application is approved, a Certificate to Collaborate will be issued which will allow for collective negotiation, bargaining, and cooperation regarding payment and health care delivery. Careful attention must be paid to the Medicaid Regulations to assure that the Certificate to Collaborate continues in force.

Now is the time for physicians to get their Certificates to Collaborate, as the provider contracts will be next on the agenda for the RCOs. In all likelihood, physicians in the different regions who jointly negotiate with the RCOs either solely as physicians or in collaboration with one or more hospitals will be in position to get better contracts than those who individually negotiate.

MASA will be publishing another article on what to look for in the provider contracts themselves.

**REMEMBER: YOU NEED A CERTIFICATE TO COLLABORATE BEFORE EVEN TALKING INFORMALLY WITH OTHER PHYSICIANS ABOUT CONTRACTING WITH A MEDICAID RCO. VIOLATION OF THE ANTITRUST LAWS PARTICULARLY REGARDING PRICE CAN SUBJECT PHYSICIANS TO CRIMINAL AND CIVIL LIABILITY.**

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