



CENTER FOR IMPROVING
VALUE IN HEALTH CARE

Antitrust Legality of Reports and Analytic Data Sets Generated based on All Payer Claims Data

DISCLAIMER: This document is intended to provide a high-level summary of findings drawn from a legal opinion developed specifically for the Center for Improving Value in Health Care (CIVHC), Administrator of the Colorado All Payer Claims Database (APCD). While this summary may be helpful to entities other than CIVHC who manage or administer an APCD or similar data resource, the information contained herein is intended to be general in nature and thus not specific to the unique characteristics of any entity other than CIVHC. Organizations interested in fully understanding the antitrust legality of reports, datasets and other information products generated based on their unique circumstances and resources should retain the services of a qualified attorney with expertise in the area of antitrust law.

This document summarizes key findings of an opinion letter generated for CIVHC by an attorney with expertise in antitrust law. CIVHC’s specific request was to consider the legality of various types of analytic reports CIVHC plans to generate and distribute based on Colorado All Payer Claims Database (APCD) data from an antitrust enforcement perspective. The findings summarized here are broadly applicable to a variety of reports that contain comparative price information generated based on paid or allowed amounts submitted by insurance carriers to an APCD.

Principal Source of Antitrust Guidance for Health Care Industry Information Exchanges

To assist the health care industry in determining whether particular price and cost information exchanges, reports, or other industry data surveys or compilations are lawful under the antitrust laws, the two government agencies responsible for enforcement of those laws, the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC) (together, the “Agencies”), have issued guidelines to help distinguish lawful from unlawful information exchanges, surveys, reports, and other data dissemination. *See* U.S. DOJ & FTC, STATEMENTS OF ANTITRUST ENFORCEMENT POLICY IN HEALTH CARE, Statement 6 (1996) (Statement 6).

Paragraph A of Statement 6 identifies an “antitrust safety zone [“Safety Zone”] that describes exchanges of price and cost information among providers that will not be challenged by the Agencies under the antitrust laws, absent extraordinary circumstances.” Paragraph B of Statement 6 explains how even exchanges of information that fall outside the Safety Zone may still be lawful and identifies the factors taken into account in determining such antitrust legality.

Antitrust Legality of APCD Reports and Analytic Data Sets Under the Safety Zone

Under the Safety Zone, the Agencies will not challenge health care surveys or exchanges of price information if the following conditions described in Paragraph A of Statement 6 are satisfied:

- (1) the survey is managed by a third-party (e.g., a purchaser, government agency, health care consultant, academic institution, or trade association);
- (2) the information provided by survey participants is based on data more than 3 months old; and
- (3) there are at least five providers reporting data upon which each disseminated statistic is based, no individual provider's data represents more than 25 percent on a weighted basis of that statistic, and any information disseminated is sufficiently aggregated such that it would not allow recipients to identify the prices charged or compensation paid by any particular provider.

Most reports and analytic data sets generated based on APCD data would fall within the antitrust Safety Zone because they can be designed to meet all three conditions. Reports based on APCDs that are managed or administered by an independent, non-market participant will satisfy the first two conditions. Those reports or analytic data sets that do not satisfy the third condition would generally be lawful and are highly unlikely to be challenged by the Agencies because they will have little or no anticompetitive effect and may have substantial procompetitive benefits. It is well settled today that the exchange of price or cost information is not unlawful unless it leads to an unlawful agreement by two or more competitors to set or "fix" their prices.

The essence of the third condition is "de-identification" so that recipients cannot "identify the prices charged . . . by any particular provider." Although neither the case law nor the Agencies have defined the meaning of "sufficiently aggregated" in this context with any precision, one of the safest and surest ways to do so is to only disseminate averages or medians that prevent connecting specific prices to particular providers or payers. There is no *requirement* that the information be averaged in order for it to be considered "sufficiently aggregated," as long as it is somehow de-identified to prevent recipients from being able to associate specific prices or reimbursement levels with a particular provider or payer. Thus, APCD reports or analytic data sets that contain average or median price or cost information would generally satisfy the third condition.

Examples of APCD Reports and Analytic Data Sets that may contain Price Information

1. An APCD public website that provides consumers with comparative cost and quality data for named facilities and physician groups. Cost information reflects median total paid amounts for a variety of common medical procedures and allows consumers to more meaningfully shop for health care services.
2. Benchmarking reports that allow health care providers like hospitals and physician groups to develop a sense of market reimbursement levels and help them to price their services more competitively. Such reports might include median or average reimbursed (paid) amounts for common procedures and facilitate comparisons to other providers in the state or located in a particular service area.
3. Reports designed for payers like health insurers, HMOs, and managed care entities that help to better inform decisions when buying health care services for their patients. An annual summary of average or median payments by the largest health plans for the 25 most common medical procedures is one of many possible examples.

4. Analytic data sets to support research that addresses issues such as utilization, consumer choice, market share trends, or quality and safety issues. For example, a nonprofit research entity may want to study variation in utilization and average or median reimbursement rates for high-cost, high-use procedures in outpatient and emergency care settings.

Although specific payers, facilities and provider groups might be identified in some of these reports, average or median reimbursement rates would sufficiently disconnect specific prices from particular market participants to satisfy the third condition's de-identification requirement. Aggregating data from five or more payers, facilities or provider groups to generate the average or median reimbursement rates would provide additional protection. Many of these reports have the additional benefit of furthering public policy goals of greater price transparency and may, in turn, help to lower costs and actually be viewed as procompetitive under the antitrust laws.

Antitrust Legality of APCD Reports and Analytic Data Sets Outside the Safety Zone

There may be reports or analytic data sets that might not satisfy the third condition because they do not contain de-identified, averaged, or otherwise "sufficiently aggregated" data. That does not mean such reports violate antitrust laws, it only means that they may not be entitled to the *presumptive legality* of the Safety Zone. Paragraph B of Statement 6 states that "[e]xchanges of price and cost information that fall outside the [Safety Zone] generally will be evaluated to determine whether the information exchange may have an anticompetitive effect that outweighs any procompetitive justification for the exchange." It is unlikely that such reports would be deemed significantly anticompetitive unless competitor recipients of the reports used the information to enter into price-fixing agreements.

Applicability of State Action Antitrust Immunity

Creation and dissemination of APCD reports or analytic data sets may be entitled to protection from antitrust liability under the state action immunity doctrine enunciated by the U.S. Supreme Court in *Parker v. Brown*, 317 U.S. 341 (1943), depending on the nature and mandate of the APCD entity at issue. When a government agency or private entity acts pursuant to a federal or state governmental policy that mandates potentially anticompetitive conduct for policy reasons, the *Parker* "state action immunity" doctrine can shield the conduct and the entity from liability. In order for an entity to be entitled to such immunity, the Supreme Court has set forth two requirements: (1) the challenged conduct must be clearly articulated as state or government policy, and (2) the policy must be actively supervised by the state or other government agency. In the case of CIVHC, in its role as Administrator of the Colorado APCD, both requirements are satisfied.

First, even though the collection and distribution of health care cost information can be viewed as anticompetitive and reduce price competition to some degree, CIVHC is doing so "pursuant to a clearly articulated and affirmatively expressed state policy." *Hoover v. Ronwin*, 466 U.S. 558, 567-68 (1984). Colorado's APCD Statute and its implementing regulations mandate the creation of the APCD, submission of price and cost information to it, and the preparation and dissemination of reports drawn from the APCD data for public and private use. The Statute requires the APCD Administrator (CIVHC) to "collect, aggregate, distribute, and publicly report performance data on quality, health outcomes, health disparities, cost, utilization, and pricing in a manner accessible for consumers, public and private purchasers, [and] providers."

The second requirement for state action immunity is also satisfied because both the creation of the APCD and appointment of CIVHC as its Administrator has been dictated and overseen by the state. For these reasons, CIVHC's creation and issuance of reports based on the Colorado APCD fall within the immunity from antitrust liability afforded by the state action doctrine.

Additional Protection: Include an Indemnity Clause in the Data Use Agreement

To realize additional protection from potential antitrust enforcement action, an entity managing an APCD could add an antitrust indemnification clause to its standard Data Use Agreement stipulating that the data recipient will not sue for alleged antitrust violations, will indemnify the APCD from any private liability that might result from that customer's requested report, and reimburse for expenses incurred in responding to or defending any governmental investigations or enforcement actions stemming from or related to the customer's report.