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Competition

FTC Urges Alabama Medical Board to Drop Plan to Limit Pain Management to Doctors

A proposed state regulation that would restrict the practice of interventional pain management to qualified licensed doctors of medicine and osteopathy is overly restrictive and may have an adverse impact on competition in the health care industry, the Federal Trade Commission said Nov. 3 in a letter to the Alabama State Board of Medical Examiners.

Under the regulation, the letter said, physicians would be prohibited from delegating to “non-physician personnel the authority to utilize such procedures to [diagnose], manage, or treat chronic pain patients.”

The letter, issued jointly by FTC’s Office of Policy Planning, the Bureau of Economics, and the Bureau of Competition, said that the proposed regulation “appears to prohibit certified registered nurse anesthetists (CRNAs) from performing, under the supervision of a physician, pain management procedures that the Board of Nursing considers within the scope of CRNA practice.”

According to antitrust lawyers and an FTC staff attorney, it is not uncommon for the commission to comment on proposed regulations that, in the opinion of commission staff, could adversely affect competition in the health care industry.

Daniel Gilman, an attorney-adviser in FTC’s public policy office, confirmed for BNA Nov. 16 that the agency even has taken action in opposition to proposed restrictions on health care providers. For example, he said, the commission currently has a complaint pending against the North Carolina Board of Dental Examiners challenging a law that could reduce competition in cosmetic dentistry.

Gilman emphasized, however, that comment letters are not legally binding, and have led to varying results. In some cases, the relevant state body has found the comments persuasive and withdrawn the proposal. In others, he said, the state has revised a proposal to address the commission’s concerns. Gilman said the FTC can take further action if the state elects to ignore its comments, but that is a separate consideration for the commission. There is no set course for what happens after the commission issues a comment letter, he said.

No Justification for Restriction. FTC acknowledged in the letter to the Alabama board that “[p]atient safety or consumer protection concerns can justify licensure requirements and scope of practice restrictions.” The proposed rule’s list of practices that would be limited to

physicians may contain procedures that require special skills or certification, it said. But, FTC said, the Alabama board cited “no evidence that the current practice has harmed patients” or that CRNAs operating within scope of practice restrictions cannot perform interventional pain management services safely.

CRNAs currently are allowed to provide many pain management procedures under physician supervision, and studies “have not found any safety or quality defects in CRNA practice,” the letter said. Therefore, unless “the proposed restrictions are necessary to protect the public, there appears to be no reason to sacrifice the benefits of CRNA pain management services as currently available under Alabama law.”

“The Proposed Rule appears to provide no countervailing evidence that CRNAs operating within their established scope of practice impose substantial risks on Alabama health care consumers in chronic care settings or otherwise,” FTC staff wrote.

FTC’s comment on the Alabama proposal “is consistent with a long line of actions taken by the agency over the years.”

DOUGLAS ROSS, DAVIS WRIGHT TREMAINE, SEATTLE

Absent proof that “particular interventional pain treatment services demonstrably require more specialized training and experience than CRNAs working under physician supervision possess,” the board should reject the proposal “outright,” FTC said.

Effect of Practice Restrictions. FTC staff cautioned that restrictions on the ability of CRNAs to provide pain management services could reduce the availability of such services in Alabama. If adopted, the proposed rule could prove to be particularly burdensome for “cancer patients and others with chronic pain, rural Alabamans and others whose access to health care, or ability to pay for it, is limited, and hospice patients.” CRNAs disproportionately serve in smaller rural hospitals in the state and, therefore, the rule could preclude patients served by such hospitals from obtaining pain management treatment, the comment letter noted.

The letter pointed out that prices for interventional pain management services could rise if the proposed rule is adopted. By limiting the number of professionals qualified to perform such services, the rule “would reduce price competition,” FTC said. Additionally,

“prices may rise to the extent that physician services are substituted for lower-cost CRNA services.”

FTC noted that the proposed rule also “may thwart innovation in health care delivery by limiting the ability of health care providers to develop, test, and implement the most efficient teams of pain management professionals.”

For these reasons, the staff urged the board “to consider carefully the impact of the [p]roposed [r]ule and to avoid adopting provisions that would limit the role of CRNAs in pain management more strictly than patient protection requires.”

FTC’s Role in Health Care Regulation. FTC said in the letter that it is charged under the Federal Trade Commission Act “with preventing unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.”

The commission’s letter said that, because of the “importance of health care competition to the economy and consumer welfare, anti-competitive conduct in health care markets has long been a key target of FTC law enforcement, research, and advocacy, such as this letter.”

Gilman, at FTC, said that it is not unusual for the FTC to weigh in on proposed state laws and regulations that the staff, after review, believes may harm competition in health care. He noted, for example, advocacy letters the agency directed to officials in Kentucky, Illinois, and Massachusetts concerning proposed regulation of limited service clinics.

The FTC also previously has commented on scope-of-practice regulations like the proposed rule involved in the Alabama case, he said. In the North Carolina case, for example, the commission challenged a statute that makes it illegal for nondentists to render teeth-whitening services (FTC Docket No. 9343).

Douglas Ross, chair of firm-wide litigation practice at Davis Wright Tremaine in Seattle, Nov. 15 said FTC’s comment on the Alabama proposal “is consistent with a long line of actions taken by the agency over the years.” He noted that “the FTC consistently urges that states open their markets to more competitors from whom consumers can choose to obtain health care.”

Ross pointed to the agency’s stance opposing certificate of need (CON) laws “on the grounds these laws ex-

clude providers who are ready, willing and qualified to provide services in competition with incumbents from doing so. FTC believes that exclusion of qualified providers drives up costs,” he said.

“The letter to the Alabama board is not the first time the FTC has urged a state to permit all qualified providers to offer services to the public rather than using distinctions in licensure as a basis for excluding some providers from the market,” Ross said. “The FTC’s position is simply a reflection of the basic principle that if some providers who are qualified to render a services are prohibited from doing so, the tendency will be for those providers who remain to raise prices to the detriment of consumers.”

Toby Singer, a partner in Jones Day’s Washington office, agreed that the letter “is not unusual for the FTC.” An e-mail alert Singer, Ross, and others prepared for the American Health Lawyers Association’s Antitrust Practice Group, observed that this “comment is consistent with FTC’s tradition of competition advocacy. Where the FTC believes that proposed state laws and regulations may hinder competition, it will often provide comments to the relevant state legislature or regulatory boards.”

The e-mail alert also noted that “where a state regulatory board’s restrictions on competition are not, in the FTC’s view, protected by the state action doctrine, the FTC will bring a lawsuit challenging the restrictions.”

Gilman told BNA that the Alabama medical board’s proposal was brought to the commission’s attention after it was posted for public comment. He said FTC has not received any response from the board.

Patricia Shaner, the board’s general counsel, told BNA the comments to the proposed rule on interventional pain management were scheduled to be discussed at the board’s Nov. 18 meeting. However, she said, “because of the volume of material to be considered, we do not expect that any decision on the rules will be made today. We expect that the matter will be carried over to the December agenda to allow sufficient time to study all comments received.”

By MARY ANNE PAZANOWSKI

More information is at <http://www.ftc.gov/os/2010/11/101109alabamabrdme.pdf>.