



Alabama Medicaid: The Move to a Managed Care Program (Part II)

By Howard E. Bogard and Kelli C. Fleming

Reprinted with Permission from the *Birmingham Medical News*

This is Part II of a two-part series on the new Medicaid structure in Alabama. Part I of the series, which was published last month, discussed organizational and operational requirements of RCOs. This Part II will discuss the antitrust immunity provided to third-party payers, health care providers and other individuals and corporations to collectively cooperate, negotiate and agree on price and health care delivery.

Earlier this year Governor Bentley signed into law Act 2013-261, Ala. Code § 22-6-150 et seq. (SB 340), drafted by Senator Greg Reed (R-Jasper), which completely restructures the Alabama Medicaid program (the "Act"). Under the Act, Medicaid services will be delivered on a managed care basis through five (5) risk-bearing regional care organizations ("RCOs") which will be paid on a capitated basis. The new Medicaid structure is expected to be fully implemented and operational by October 1, 2016.

In order to establish the new Medicaid structure and create RCOs, collaboration among payers, providers, consumers, and governmental entities regarding the delivery of health care and the payment for health care is a necessity. Therefore, the Act statutorily recognizes that any such collaboration is in the best interest of the public and will displace competition in order to achieve "a coordinated system of health care for the public benefit."

In order to avoid antitrust implications normally associated with such collaboration, the Act specifically exempts from state antitrust laws and provides immunity from federal antitrust laws, through the "state action doctrine", those "collaborators" who cooperate, negotiate, or contract to bring Medicaid services to Alabama beneficiaries under the terms of the Act. Generally speaking, the state action doctrine provides immunity from the federal antitrust laws to actions of a state even if the conduct unreasonably restrains trade. When a state delegates responsibilities to others, the allegedly anticompetitive actions are also immune from federal antitrust attack if taken pursuant to a clearly articulated and expressed state policy and if the activity is supervised by the state.

A "collaborator" is defined by the Act as a "private health carrier, third party purchaser, provider, health care center, health care facility, state and local governmental entity, or other public payers, corporations, individuals, and consumers who are expecting to collectively cooperate, negotiate, or contract with another collaborator or regional care organization in the health care system."

In order to achieve antitrust exemption and immunity, collaborators must apply through an on-line process to the Medicaid Agency for a Certificate to Collaborate. The electronic application is

available at <https://rcoportals.medicaid.alabama.gov>. During the application process, the applicant must provide detailed background information regarding the applicant and the persons who may collaborate on the applicant's behalf, describe the intent of the collaboration (e.g., whether the collaborator intends to establish a RCO, enroll as a provider with a RCO, or engage in other activities), identify the relevant RCO region, describe entities and/or persons the applicant intends on collaborating or negotiating with and the effects of the negotiations and collaborations (e.g., improve quality health care services to Medicaid beneficiaries, contain cost in providing health care services, enhance technology, or maintain competition in the health care services market), and certify that the collaboration is in good faith and necessary in order to carry out the provisions of the Act. The Medicaid Agency may request additional information as it deems appropriate.

If the application for a Certificate to Collaborate is denied, the decision is deemed to be the final decision of the Agency and the applicant can appeal the denial directly to the circuit court. Alternatively, the applicant may submit an amended application for review by the Medicaid Agency.

If the application is approved, a Certificate to Collaborate will be issued, which will allow for collective negotiation, bargaining, and cooperation concerning payment and health care delivery. However, a Certificate to Collaborate will only be issued if the applicant has sufficiently shown that the collaboration is necessary in order to facilitate the arrangement and establishment of RCOs or health care payment reforms. The Certificate to Collaborate is effective immediately upon issuance and will expire on October 1, 2016. The Certificate will only extend to those persons listed on the application as having the authority to collaborate on behalf of the applicant.

A Certificate may be revoked if the holder violates any of the certifications made in the application. Further, the holder of the Certificate must inform the Medicaid Agency of any substantial or material corrections or updates to the information submitted with the application. Such corrections or updates will be considered an amended application and, following review, an Amended Certificate to Collaborate may be issued.

In order to promote state action immunity under state and federal antitrust laws, the Medicaid Agency will monitor and supervise the negotiations and collaborations among those who have received a Certificate to Collaborate. In accordance with such supervision, among other things, collaborators will be required to submit periodic reports to the Medicaid Agency containing the following information: description of the collaboration activities during the reporting period, description of entities and persons with whom the collaborator negotiated or bargained with during the reporting period, description of concerns or problems encountered during the collaborative process, description of future collaboration activities, and certification that the collaboration and bargaining was done in good faith and is necessary to carry out the provisions of the Act. Additional information for those collaborators who intend to establish or develop a RCO may also be required. Failing to make a periodic report to the Medicaid Agency is grounds for revocation of a Certificate to Collaborate.

The names and addresses of all holders of a Certificate to Collaborate are posted on Medicaid's website, available at http://www.medicaid.alabama.gov/CONTENT/2.0_newsroom/2.7.3_Regional_Care_Organizations.aspx. A number of Certificates have already been issued by the Medicaid Agency, both to individual and business entity applicants.

From a legal standpoint, in order to avoid antitrust concerns, obtaining a Certificate to Collaborate before discussing, negotiating, and bargaining in a manner that can be perceived as anti-competitive is extremely important. However, Certificates are not automatically granted to all who apply, as certain requirements and qualifications must be satisfied. Therefore, health care providers should start the application process before entering into any discussions, negotiations, or bargaining arrangements and should seek appropriate guidance regarding the application process and the requirements for the issuance of a Certificate to Collaborate.

Howard E. Bogard

Partner Birmingham Office
Phone (205) 458-5416
E-Mail hbogard@burr.com

Howard Bogard is a partner in the Health Care Practice at Burr & Forman LLP and exclusively represents health care providers in regulatory and corporate matters.



Kelli C. Fleming

Partner Birmingham Office
Phone (205) 458-5429
E-Mail kfleming@burr.com

Kelli Fleming is a partner in the Health Care Practice at Burr & Forman LLP and exclusively represents health care providers in regulatory and corporate matters.

