

# The Antitrust Implications of Health Care Reform

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Setting precedent.



# Health Care Reform

- Patient Protection and Affordable Care Act – PPACA
- Health Care Reform
- ObamaCare
- The Gift that Keeps on Giving



# PPACA

- March 23, 2010
- Effective dates 2010 - 2018
- 906 pages
- House vote 219-212
- Lawsuit seven minutes after passage

# Objectives of PPACA

- Improve Quality
- Increase Access
- Lower Costs





# Accountable Care Organizations

- PPACA § 3022
- 7-page statute
- “ACO”
- Primary vehicle to deliver on promises

# What is an ACO?

- Group practices, physician networks, partnerships, joint ventures
- 5000 Medicare beneficiaries
- Three-year agreement
- Shared savings  
(and maybe losses)



# Achieving PPACA Goals

- Shared savings/losses
  - one-sided model
  - two-sided model
- 33 quality measures determine share of savings/loss
- Beneficiaries participate in governance





# Eligibility

- Legal structure
- Leadership and management
- Evidence-based medicine and patient engagement
- Quality and cost reporting
- Coordinated care





# The Antitrust Concern

- 15 U.S.C. § 1 (Sherman Act)
    - combinations/agreements
  - 15 U.S.C. § 2 (Sherman Act)
    - monopolization
  - 15 U.S.C. § 18 (Clayton Act)
    - acquisitions/mergers
- 

# Sherman Act Section 1

- Agreement
- In restraint of trade/competition
- Examples:
  - price fixing/exchanging sensitive information
  - market allocation





# Sherman Act Section 2

- Willful acquisition, maintenance, or expansion
- Monopoly power
- Anticompetitive conduct
- Examples
  - predatory pricing
  - exclusive dealing arrangements



# Clayton Act Section 7

- Acquisition
- Substantially lessen competition/create monopoly
- Concerns:
  - coordinated interaction
  - unilateral effects



# Antitrust Analysis

- Per se illegality
- “Quick look” rule of reason analysis
- Rule of reason analysis

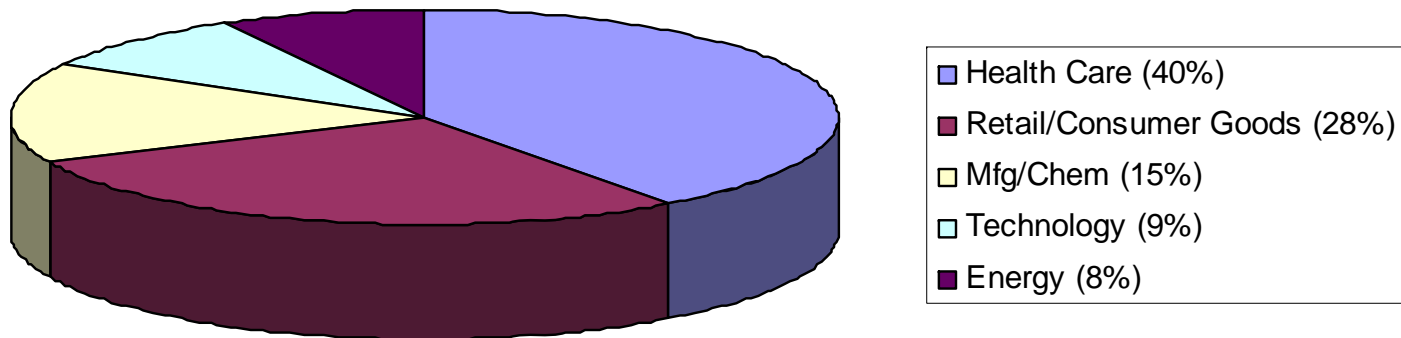


# Defining the Market

- Product – Reasonable interchangeability of products
- Geographic – Geographic area in which the purchaser can practicably turn for supplies

# Enforcement Trends

FTC Enforcement Actions - FY 2007 through Feb. 2011





# Health Care Industry Consolidation

- 2009-2010: 70% increase in hospital mergers
- Mid-90s-2003: hospital prices increased between 5% and 40%

-Source: Federal Trade Commission





# When Could ACO Be at Risk?

- Exclusivity
- High Market Share
- Lack of efficiency-enhancing integration



# DOJ/FTC Guidance

- Statements of Antitrust Enforcement Policy in Health Care (1996)
- Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program (2011)



# DOJ/FTC Guidance

- Applies to ACOs that intend to apply or have been approved to participate in Shared Savings Program
- Applies to both Medicare and commercial operations of ACOs



# DOJ/FTC Guidance

- Rule of Reason applied when:
  - meets CMS eligibility requirements
  - participates in Shared Savings Program
  - same governance and leadership structure is used in commercial practice



# DOJ/FTC Guidance

- 1996 Health Care Statements
  - Redesigned care protocols
  - Substantial use of health information technology
  - Substantial investment in infrastructure and equipment
  - Agreement to meet quality and cost goals
  - Agreement to capitated rate
  - Agreement to payment based on pre-determined percentage



# DOJ/FTC Guidance

- Safety Zone
  - 30% combined share for common services
  - hospitals and ambulatory surgery centers non-exclusive
- Rural exception
- Dominant participant limitation



# DOJ/FTC Guidance

- Outside the Safety Zone
  - not automatically anticompetitive
  - conduct to avoid
- Voluntary 90-day Antitrust Review



# Best Practices for ACOs

- Adhere to formation regulations
- Be wary of including competitors
- Avoid unnecessary exchange of information
- Consider exclusion carefully
- If hospital has dominant market share, be as inclusive as possible





# Unanswered Questions

- Start-up costs
  - AHA estimates \$26.1m for first year\*
- More risk than reward
- Cost shifting to private market
- Greater consolidation in commercial market
- Role of physician-led models
- Effect of DOJ/FTC guidance on 1996 Health Care Statements
- Survival of non-ACO practices
- Private antitrust litigation


\*1200-bed, 5-hospital system



# QUESTIONS?

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