The Antitrust Implications of Health Care Reform

Dallas Bar Association
Antitrust & Trade Regulation Section
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Bill Morrison
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

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 practically turn for supplies
Enforcement Trends

FTC Enforcement Actions - FY 2007 through Feb. 2011

- Health Care (40%)
- Retail/Consumer Goods (28%)
- Mfg/Chem (15%)
- Technology (9%)
- Energy (8%)
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?
Contact Information:

Bill Morrison
214-651-5018
bill.morrison@haynesboone.com

Haynes and Boone
2323 Victory Ave, Suite 700
Dallas, Texas 75219