Health Care Reform and the Antitrust Laws: Big Concerns for Health Care Organizations and Their D&O Insurers

By Kevin LaCroix on February 10, 2014 Posted in Health Care Organizations

In a recent industry study concluding that health care organizations face increasing rates for management liability insurance, as well as tightening terms, one of the explanations suggested for these restrictive conditions is that the carriers are concerned that as health care organizations respond to the incentives and pressures of the Affordable Care Act – particularly as they seek to form Accountable Care Organizations (ACOs) with other health care providers as a way to try to control costs – that the health care organizations couldrun afoul of the antitrust laws. Among other things, the carriers are concerned that the ACA's antitrust protections are "untested," particularly in connection with private antitrust litigation.

If a recent decision from the District of Idaho is any indication, there may be increased reason to be concerned. In January 24, 2014 findings of fact and conclusions of law (here), which were implemented in a January 28, 2014 order (here), District of Idaho Chief Judge B. Lynn Winmill ordered a hospital to divest itself of a local physicians' practice it had acquired. As Eduardo Porter wrote in a February 5, 2014 *New York Times* article entitled "Health Law Goals Face Antitrust Scrutiny" (here), the ruling "underlined a potentially important conflict between the nation's antimonopoly laws and the Affordable Care Act."

In 2012, St Luke's Health System, which operates multiple hospitals and other healthcare facilities in Idaho, acquired the Saltzer Medical Group (SMG), in Nampa, Idaho. Two competitors of St. Luke's, as well as the FTC and the Idaho AG, filed lawsuits against St Luke's and SMG, alleging that the acquisition violated the federal antitrust laws, and seeking to have the Court unwind the deal.

In its defense in the antitrust lawsuit, St. Luke's contended that its acquisition of SMG was a critical part of its long-term plans, specifically arguing that it sought to improve care coordination and the development of an Accountable Care Organization (ACO) through the SMG acquisition. Judge Winmill acknowledged the value of the hospital's efforts, saying that St. Luke's "is to be complemented on their foresight and vision" and "to be applauded for its efforts to improve the delivery of health care."

Judge Winmill nevertheless ordered the divestiture of the affiliation between St. Luke's and SMG based on the conclusion that the acquisition would have "anticompetitive effects." Specifically, Judge Winmill found that "Although possibly not the intended goal of the Acquisition, it appears highly likely that health care costs will rise as the combined entity obtains a dominant market position which will enable it to (1) negotiate higher reimbursement rates from health insurance plans that will be passed on to the consumer, and (2) raise rates for ancillary services (like x-rays) to the higher hospital-billing rates."

According to a February 6, 2014 memo from the McGuire Woods law firm (here), the ruling represents the first time that a federal district judge has required the unwinding of a hospital's acquisition of a physician group practice based on antitrust concerns. As a minimum, the ruling shows that hospitals' acquisitions of physician group practices "are not immune from antitrust scrutiny and may require careful analysis under the antitrust laws."

But as the law firm memo also notes, the decision may also suggest that "health reform's goals do not trump antitrust concerns," and that even though Affordable Care Act encourages providers to form ACOs through horizontal and vertical integration "courts have not found these arguments to be sufficient justifications to overcome concerns of reduced competition on a given geographic area."

In a post on St. Luke's hospital's blog, St. Luke's CEO David C. Pate says that "The court's decision calls into question whether accountable care can be an option for the people of Idaho, and specifically those who live in towns like Nampa."

The Court's decision highlights the fact that, in the words of one of the ACA's architect's quoted in the *Times* article, "there is a tension between the benefits of coordinated care and the possible consequences of market power."

The challenge for health care organizations is that economic reality and the incentives of the ACA both militate in favor of consolidation. The *Times* article underscores the fact that hospitals have been acquiring physician networks to improve their bargaining power with health insurers and to capture a larger share of the patient pool. The ACA provided extra motivation and a potential justification as well.

Given the economics and atmospherics, consolidation seems likely to continue. The challenge for the health care organizations – and for their insurers—is that the combinations could attract antitrust scrutiny, even if a combination is undertaken in order to form an accountable care organization under the ACA.

As I noted in my earlier post about the current insurance marketplace conditions for healthcare organizations, the management liability insurers active in this space have already been raising their rates for health care organizations, as well as restricting the coverage available under their policies for antitrust claims. Premiums have been increasing steadily since the fourth quarter of 2011. Coverage restrictions include in some instances the introduction of sublimits and/or coinsurance for antitrust claims. In addition, the insurers' underwriting practices have changed as well. Insurers are seeking a great deal more renewal underwriting information, particularly with respect to ACO formation and strategy.

In an environment where the carriers are already proceeding defensively, the court's decision in the St. Luke's case can only serve to reinforce concerns. The *Times* article hopefully suggests that regulators could introduce regulations to complement the antitrust laws. For now, however, it seems likely that carriers will now proceed even more cautiously, and that increasingly restrictive conditions in the marketplace will continue. Health care organizations should be prepared to face additional rate increases as they renew their D&O insurance program in 2014 and to address underwriters' questions about their strategies for the formation of ACOs.

Source: http://www.dandodiary.com/2014/02/articles/health-care-organizations/health-care-reform-and-the-antitrust-laws-big-concerns-for-health-care-organizations-and-their-do-insurers/