Sounding the Alarm

The healthcare industry is fast finding itself between a rock and a hard place. On one side we are seeing tumultuous change (posed by governmental reforms like the Affordable Care Act) and pressure to reel in costs and coordinate care. On the other side, we are seeing conflicting messages from government agencies like the Federal Trade Commission (FTC) that are pursuing their directives to monitor and disband anti-competitive initiatives. Healthcare organizations are finding that their attempts to survive and thrive in this new market place are coming under intense fire and scrutiny.
Tremendous Upheaval within Healthcare

In order to adapt to the changes wrought by healthcare reform, hospitals, medical groups and physicians are looking for new ways to align and coordinate care. Contracting issues, new alliances through consolidation and association, changes in payment incentives for physicians, and overall business model changes are impacting the way healthcare organizations operate as well as increasing liability and risk.

Consolidation can create a stronghold around pricing. This goes against one of the major goals of the Affordable Care Act—cost savings for the consumer. Given that healthcare reform has not been fully implemented, it is entirely possible that the greatest impact has yet to be felt.

Antitrust Exposure is Increasing

Due to the activities described above, there has been a significant increase in litigation and government investigations and prosecutions relating to alleged antitrust law violations. Litigation is being brought by competitors, providers and state and federal government (FTC, Department of Justice, State Attorney Generals). The frequency and severity of such litigation is increasing.

Tension is growing between healthcare organizations (as they work towards developing models suitable for healthcare reform) and the government (particularly the FTC’s Health Care Division, which focuses exclusively on health care antitrust matters) as scrutiny of these models continues to be a priority. The FTC has been actively reviewing all M&A activity and other potentially anticompetitive activities in the healthcare space. These reviews have not been limited to just hospital/hospital transactions; hospital/physician group transactions, network creation initiatives and other vertical alignments are also under fire.

• In June of 2013, while speaking at an American Bar Association Symposium, FTC Chairwoman Edith Ramirez discussed how the FTC had “revamped” their approach to litigating horizontal hospital merger challenges by focusing on how the merger affects price and quality of services. The result from this new approach, according to Chairwoman Ramirez, has been a “winning streak that now includes three successfully-litigated merger challenges and a growing list of hospital deals abandoned after the FTC threatened the challenge.”

• In addition, Chairwoman Ramirez indicated that the FTC will not only look to current and contemplated M&A but also look to investigate past acquisitions or consolidations as well. She told attorneys and academics in the audience to “stay tuned” for additional FTC action and added “I view retrospectives as an important complement to commission enforcement efforts, and I will be on the watch for more opportunities to conduct new retrospective studies...”

• Former FTC Chair Jon Leibowitz told the Wall Street Journal, “If you want to do something about controlling costs in healthcare, you have to challenge anticompetitive hospital mergers.”

FACTS

• The healthcare industry is riding the biggest merger wave since the 1990’s.

• In 2012 there were 109 M&A deals involving 352 healthcare facilities. What’s more, over 50% of hospitals surveyed planned to acquire a physician practice within a year’s time.
Extensive due diligence is being done by Insureds to evaluate and address the risk exposures of antitrust – particularly regarding M&A activity, contracting or partnerships. However there is no clear answer to what constitutes the market, market share or market power around these structures. Defining it differs extensively and can be based on geography, specific specialties, and extent of contracts to name a few. As the Affordable Care Act drives the industry to align, consolidate and find partnerships that will help it shift towards value-based medicine, antitrust consequences are likely. The challenge for these organizations is daunting.

Underwriting to this Exposure

The ability to underwrite Healthcare antitrust exposures is extremely difficult. In the past, questions centered around market share, 'most favored nations' clauses in health insurance contracts, and exclusive contracts. With almost all of our Insureds expecting a merger, acquisition, joint venture, affiliation or some sort of consolidation or collaboration within the next year, anticipating how an Insured’s competitors (or the FTC) will react to these transactions is difficult. The environment is changing so rapidly that what we know at the time of quoting, in terms of proposed transactions and business models, is likely to change as organizations move forward with structure alignments. What’s more, the FTC has commented that potential antitrust litigation is no longer only about current or future transactions; scrutiny will be expanded to include past transactions as well, in some instances re-opening files on transactions many years after the original transaction occurred.

The last time the Healthcare market space saw similar upheaval in exposure was during the Regulatory Fraud and Abuse issue of the late 1990s. Antitrust has many of the same characteristics (an inability to price for the exposure, difficulty in underwriting where the higher risk potential lies and the significant defense expenses associated with defending an allegation of antitrust). Restrictions of coverage, limit management, and participation with insureds will be needed to manage through this highly volatile exposure.

What Lies Ahead

Allied World Healthcare is committed to this industry space and is confident that we can continue to provide our policyholders and brokers with the products, education, guidance, long-term partnership and legal support needed. This takes knowledge and preparation. Our focus is and has always been understanding the nuances associated with healthcare organizations, educating ourselves on changes they are facing and being prepared for the risks that this may present. We have a dedicated team of Healthcare underwriters with a broad healthcare reform knowledge base. In a time of uncertainty we need to be bold in our strategy and creative with our solutions.

We are prepared to maneuver through this changing environment over the next few years and remain a viable market committed to this industry.

FACTS

- In 2012 the FTC blocked four deals from taking place.
- Between 2011 and 2012, the FTC brought eight enforcement actions against healthcare organizations... and in most of the cases, successfully managed to reverse or disband parts or all of the acquired organizations. Prior to this the FTC averaged only one per year since 1996.
- The average cost to defend an antitrust claim is about $800 per hour. Defense expenses can be as high as $1,000,000 per month during trial and discovery.
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Medical Staff Relations
There has been a recent trend in the number of healthcare antitrust suits arising from medical staff. Physicians have alleged that the discipline they received through a peer review process was instigated by other physician competitors who desired to exclude them from practicing at the hospital. (In Bolt v. Halifax Hospital Medical Center, 851 F.2d 1273 (11th Cir. 1988) hospital and individual members of the medical staff were deemed to be separate actors who conspired in the peer review process to revoke Dr. Bolt’s staff privileges, for purposes of the plaintiff establishing a claim under Section 1 of the Sherman Act.)

Exclusivity contracts
Exclusivity contracts between hospitals and physicians for certain hospital-based services such as anesthesiology are commonplace in the healthcare industry. These exclusive contracts are sometimes challenged by unsuccessful provider groups under Sections 1 and 2 of the Sherman Act as being illegal exclusive dealings cases. (In Jefferson Parish Hospital District No. 2 v. Hyde, a challenge was made regarding an exclusive contract for anesthesiology services. In this instance the exclusive contract barred the plaintiff, a rival anesthesiologist, from providing services at the hospital. The court ultimately held that any anticompetitive effects created by the exclusivity contract were offset by the hospital’s interest in providing efficient healthcare services to its patients.)

Network Issues
There are substantial antitrust concerns arising out of healthcare provider networks. Network arrangements typically include agreements between payers (health insurers) and organizations of providers to provide healthcare services that the payers offer to their enrollees. The antitrust concern in such networks is that otherwise independent providers are agreeing to a price structure where they will offer and provide services in the marketplace that thereby eliminates previously-existing or potential competition among those providers. (In Arizona v. Maricopa County Medical Services Society, 457 U.S. 332 (1982), providers combined in the form of network-like foundations for medical care allowing them to sell their services to certain customers at fixed prices and affected (negatively) the prevailing market price of medical care.)

Most-Favored-Nation ("MFN")
A MFN provision is generally an agreement imposed by a buyer that states that the seller may charge the buyer no more than the lowest price it charges to any other buyer. In the healthcare industry context, an MFN clause guarantees a health insurer the same low price as their market competitors. (In the U.S. v. Medical Mutual of Ohio, 1999-1 Trade Cas. (CCH) 72,465 (N.D. Ohio 1999), the DOJ alleged that Medical Mutual of Ohio had violated Section 1 of the Sherman Act by including MFN clauses in their agreements with participating hospitals. The DOJ alleged that the MFN clauses increased the cost of hospital services and health insurance for businesses and consumers in the certain geographic market the institutions were located.)
Call out box / separate section: