

Accountable Care Organizations and Antitrust Issues

- Brief Overview of ACOs
- FTC/DOJ Antitrust Policy Statement
- State Action Immunity Doctrine

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Accountable Care Organizations (ACOs)

ACOs are voluntary networks of physicians, hospitals, and other health care providers that share financial and medical responsibility for care provided to a population of patients.

The Affordable Care Act authorized the use of ACOs in the Medicare program.

Private payers are also forming ACOs. ACOs may serve both Medicare and commercially-insured patients.

Medicare ACOs

- Medicare ACOs still use the traditional fee-for-service payment system.
- They are eligible for additional payments when providers coordinate care, reduce Medicare spending, and meet specified quality of care benchmarks.
- Providers must notify patients that they are participating in an ACO. Patients retain right to see any Medicare provider, including those outside the ACO.
- An ACO may share patients' claims data for care coordination, but patients may decline to have their protected health care information shared.

Medicare ACOs cont.

- Medicare offers three ACOs programs; the most common is the Shared Savings Program (MSSP).
- Under the MSSP, ACOs may choose to either (1) share in up to 50% of Medicare savings with CMS or (2) assume greater risk and share in up to 60% of both savings and losses.
- CMS has recently proposed various changes to the program (such as extending, from three to six years, the grace period for underperforming ACOs).

MSSP—Antitrust Issues and FTC/DOJ Policy Statement

- The Federal Trade Commission and Department of Justice issued an antitrust policy statement for ACOs participating or intending to participate in the MSSP.
- Concern: “While ACOs may allow health care providers to innovate and improve care for both Medicare and commercially insured patients, under certain conditions ACOs could reduce competition and harm consumers through higher prices or lower quality care” (Agencies’ press release).

MSSP – FTC/DOJ Policy Statement

- Elements of Policy Statement:
 - Rule of reason analysis
 - Safety zone
 - Additional guidance for ACOs outside the safety zone

FTC/ DOJ Policy Statement: Rule of Reason Analysis

- The agencies evaluate whether the collaboration is likely to have anticompetitive effects and whether any procompetitive efficiencies outweigh those effects.
- The agencies will apply this to a program ACO that also jointly negotiates with private payers, if the ACO:
 - complies with the MSSP's eligibility criteria (e.g., clinical integration) and
 - uses the same governance, clinical, and administrative processes to serve patients in both Medicare and commercial markets.

FTC/ DOJ Policy Statement: Safety Zone

- The policy statement establishes a “safety zone” for program ACOs deemed “highly unlikely to raise significant competitive concerns.”
- To qualify, two or more independent providers in the ACO generally cannot provide more than 30% of a common service in each provider’s primary service area (PSA), if two or more provide that service.
- Hospitals and ambulatory surgical centers must be free to contract with payers outside the ACO, regardless of their PSA share.

FTC/ DOJ Policy Statement: Outside of Safety Zone

- The policy statement gives examples of conduct that may raise antitrust concerns.
- This includes conduct by ACOs with high PSA shares or other possible signs of market power.
 - Example: an ACO preventing or discouraging private payers from directing or incentivizing patients to choose providers that do not participate in the ACO.
- The agencies offer expedited 90-day, voluntary antitrust reviews to newly formed ACOs.

Antitrust: State Action Immunity Doctrine

- Originated with a 1943 U.S. Supreme Court decision.
- For actions by private parties, the doctrine allows an exception to federal antitrust laws for the party's anticompetitive activity if:
 - it occurs pursuant to a clearly articulated and affirmatively expressed state policy to displace competition and
 - the state actively supervises that policy.

Antitrust: State Action Immunity Doctrine cont.

- Lots of case law, including cases involving health care (but not ACOs).
- “Clear articulation” of state policy:
 - Intent for anticompetitive effect need not be in statute or legislative history; immunity applies if the anticompetitive effect was a foreseeable result.
- Active state supervision:
 - State must retain ultimate control over the anticompetitive conduct.

Antitrust: State Action Immunity

Doctrine cont.

- A small number of states have enacted laws intending to provide state action immunity for ACOs or similar provider organizations.
- Examples include Alabama, New Jersey, New York, and Oregon.
- Vermont's law on health payment reform pilot projects references "state-supervised cooperation and regulation" for antitrust compliance purposes.

State Action Immunity Doctrine: New York

- New York established a voluntary certification program for ACOs.
- The law requires the Department of Health (DOH) commissioner to engage in state supervision to promote state action immunity under antitrust laws.
- This fall, DOH issued proposed regulations for the certification program. Those regulations:
 - specify the factors that DOH must consider in evaluating requests by ACOs seeking state action immunity from antitrust laws; and
 - provide that a certified ACO that falls within the FTC/DOJ “safety zone” is not considered to be in violation of state antitrust laws.

More Information

- CMS [website](#): Accountable Care Organizations
- FTC [website](#): Accountable Care Organizations (includes links to policy statement and related documents)
- OLR Reports
 - 2014-R-0238: *Facility Fees and Accountable Care Organizations*
 - 2014-R-0268: *New York Law and Proposed Regulations on Accountable Care Organizations*