HealthInformation &theLaw
HealthInfoLaw.org
Myth Busters October 2015

MYTH: Antitrust waivers protect anyone participating in an Accountable Care Organization.

FACT: Only ACOs that fall within the federal government's "safety zone" are eligible for the protection of an antitrust waiver.

An Accountable Care Organization (ACO) is a delivery-system reform born out of the Patient Protection and Affordable Care Act that encourages hospitals and other Medicare providers to form integrated health care delivery systems to care and become accountable for a specific fee-for-service Medicare population. An ACO may share in some portion of the savings it creates for the Medicare program.

Yet antitrust law prohibits some of the very collaborations among otherwise competing providers that ACOs encourage. And, the fact that some ACOs serve both Medicare and commercially insured patients has given rise to certain antitrust concerns with respect to the effect ACOs could have on reduced competition and harm to patients through higher prices. Therefore, federal antitrust enforcers have set forth through guidance several categories of ACO antitrust review for those ACOs participating in the Medicare ACO program to clarify how competition will be protected in the health care marketplace.

Safety Zone Waiver. The highest level of protection from an antitrust investigation are those ACOs that fall within the "safety zone" and are therefore entitled to a waiver. ACOs granted waivers are assured that no antitrust investigation will occur. However, waivers are only granted to ACOs that are highly unlikely to raise significant competitive concerns through a showing that the ACO itself does exceed a 30% Primary Service Area share for any common service it provides. Otherwise, the ACO will be held to the "Rule of Reason" test.

Rule of Reason. For ACOs that cannot meet the 30% threshold requirement for a waiver, a rule of reason analysis will be applied to any ACO that can show evidence of financial or clinical integration with pro-competitive effects. This allows the ACO to put forth an argument that, even in the face of horizontal collaborations among its providers, overall the effect of the ACO helps rather than harms patients in terms of health care cost and quality.

Per Se Liability. For ACOs that cannot show any evidence of a pro-competitive effect, the antitrust enforcers will impose per se liability under federal antitrust law. Activities such as naked price fixing and market allocation agreements among competitors is illegal, and without any evidence that such an arrangement is helping competition, the ACO will not receive federal approval and may be subject to sanctions.

For More Information:

- See our resources on antitrust.
- Learn about antitrust.

Follow us on Twitter at @HealthInfoLaw