

Prescriptions for Excellence in HEALTH CARE

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A Message from Lilly

Health Care Reform – Are all the Laws Being “Reformed”?

By *Steven C. Benz, Esq.*

For the past few months, focus has been on the Supreme Court and what it might say regarding the Affordable Care Act (ACA). Now that it has made its decision, what's next? The first thing to consider is that health care reform is more of a continuing effort than simply an event. Given current politics, new technologies, and a volatile economy, ongoing reform may be the “new normal.”

Going forward, the legal community will be called upon to interpret the continuous change as companies make business decisions and to counsel clients on how to be compliant in this evolving landscape. The latter point is complicated by a legal system wherein the laws governing how companies are to behave often lag behind the realities of the health care environment (an environment that increasingly is being shaped by the government through laws such as ACA). In many instances, laws were written to address circumstances that are no longer relevant or nonexistent. It follows that another role of the health care lawyer is to assess where and how laws can be reformed.

Before discussing some laws that need updating to further reform, it is important to note that such hopeful changes will take time. So what should be done in the short run? In order to deal with continuous change, the key is to stay grounded and avoid making legal concepts any more complicated than they are. Many basic concepts that predate the ACA will continue throughout all of the reforms.

As a rule, the following points are at issue: (1) Is the right patient getting the right treatment? (2) Are providers getting the right information in order to make the best decisions for the patient? (3) Are payers paying what they should? (4) Are the financial relationships between the players in the health care sector appropriate and not creating incentives for bad behavior? In the absence of clear guidance, if a contemplated action causes anxiety with respect to the 4 points above, it certainly requires further scrutiny by a legal team and, beyond that, simply may not be the right thing to do.

Our continuous health care reform has not changed any of the above but it has made the situation more acute.

In particular, as the government plays a larger role, federal and state fiscal challenges will continue. Approximately 10,000 people turn age 65 every day. Costs will continue to rise and those who pay those costs will wonder how the money is being spent. This leads to an increased emphasis on compliance.

What laws need reform? We need laws that allow for more collaboration between the participants in the health care industry rather than less. An example of a positive action along those lines is the effort by the Centers for Medicare and Medicaid Services and the Office of the Inspector General to develop fraud and abuse waivers for certain beneficial Accountable Care Organization arrangements. On a less positive note, many potential opportunities between the pharmaceutical industry and providers may be missed when an industry member cannot find a way to enter into a program with a provider and still be able to account for it in its Government Price Reporting in the Medicaid and Medicare programs, if required. Steps must be taken to assure that

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new scientific information is relayed quickly and thoroughly to provide decision makers with the most complete information available.

A vibrant marketplace where participants have financial incentives to do better is a great way to improve the abilities of all involved. However, some are concerned that such incentives may lead to bad behavior.

Often these fears lead policy makers and enforcement agencies to create and enforce laws that curtail the “right” behaviors to promote good health care. For this reason, some laws actually may be prohibiting reform or moving further away from it. To overcome such skepticism, different stakeholders in the health care sector must agree on a best practice (that existing laws may be

preventing) and work together to create legal reform. This reform could allow innovative practices to spring forward, benefitting the health care system and the patients its serves.

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