The Role of Consumer Protection by State Attorneys General in Health Care Reform Implementation and Enforcement

Introduction:

The Federal Patient Protection and Affordable Care Act (ACA) of 2010 was enacted to improve health care in the United States. The ACA, when fully implemented, will significantly expand health coverage to most of the uninsured, create new market places – insurance exchanges – in each state to help individuals and small businesses get health insurance coverage, and require insurance reforms and transparency that simplifies the purchase of health insurance.

The law requires most individuals to have coverage and provides deep subsidies to help them afford it. Medicaid may be expanded, if a state chooses to do so, with full federal funding initially to cover those up to 133 percent of the federal poverty level. Tax credits are available to individuals up to 400 percent of the federal poverty level who purchase insurance in the newly

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2 On June 28, 2012 the Supreme Court ruled that the individual insurance mandate was constitutional under the taxing power of Congress. The Court also ruled that requiring the states to expand Medicaid or lose funding for existing Medicaid programs was unconstitutional coercion. Nat'l Fed'n of Int'l Bus. v. Sebelius, 567 U.S. ___ (2012) available at http://www.supremecourt.gov/opinions/11pdf/11-393c3a2.pdf.


created marketplaces – called American Health Benefit Exchanges (Exchanges) – that will be operated in each state either by the state or federal government and that will offer a choice of qualified health plans. Small employers will buy insurance through Small Business Health Options Exchanges (SHOP) and will be eligible for tax credits. The ACA and this new program build on the employer-based system and expect employers to continue to offer coverage. Significantly, the law allows for great flexibility in how states implement key provisions.

Opponents of the ACA see it in a very different light. They see the ACA as an indefensible extension of the federal government into the lives of all Americans. They predict that the ACA will increase health care costs and hold back any economic recovery.

The National State Attorneys General Program at Columbia Law School, with a generous grant from the Ford Foundation, is a resource for state attorneys general and their staffs as they address the ramifications of the ACA for their states. We have identified three major areas of responsibilities for Attorneys General with respect to the ACA.

- First, there is the responsibility each state faces for implementation of the ACA provisions already in effect or required by the end of 2012.
- Second, there is planning for potential defensive obligations that will arise as state decisions to comply (or not comply) with the Act’s requirements are challenged.
- Third, there are affirmative responsibilities to ensure the bill’s benefits are enforced without fraud and misrepresentation so that they are made meaningful for each state’s residents.

**Consumer Protection in Health Care**

Today we will focus on the consumer protection ramifications of the ACA and of the evolving sphere of health care more generally.

Regardless of the ACA, the delivery of health care is changing rapidly. In 1980, when Kentucky Governor Steve Beshear and I became attorneys general of our states, our country had 220 million people. We were a country of manufacturers and unions where employers provided most health insurance. Our life expectancy was lower, our hospital stays longer, our cars and

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6 § 1421, 124 Stat. 238.


roads more dangerous, and heart attacks and lung cancer killed millions in a country where over half of the population smoked cigarettes. Independent providers delivered health care in small offices and in non-profit community hospitals.

For better or worse, that world no longer exists. The costs of health care are now bourn by government and individuals. Americans pay more for health care and get poorer results, relative to what they pay, than citizens of many other countries, and yet the United States remains the location of extraordinary health care success.

We are indeed in the best and the worst of times.

Consumer protection by attorneys general relies on the combination of prosecution and education in order to assure that unfair and deceptive practices do not occur in the marketplace. These efforts are often bolstered by the existence of a private right of action and marked by single cases pursued by one or more attorneys general that are designed to punish the transgressor and to generate both penalties and reimbursement for consumers.

Consumer protection jurisdiction for attorneys general and private counsel comes from Unfair and Deceptive Acts and Practices (UDAP) laws, passed 30 years ago, that provide strong enforcement tools and have created a proud culture of success.

Opponents of strong consumer protection have been unsuccessful in amending these laws, but have lobbied with some success to limit the size of attorney general consumer protection offices and have achieved unexpected success in litigation from a hostile judiciary, as evidenced by the limitation of private actions imposed by the U.S. Supreme Court’s AT&T v. Conception decision in 2011.8

Technology has proven a double-edged sword by empowering both consumers and those who would commit fraud. Clearly the entire face of consumerism is changing.9

While much has changed, some things do not.

Years of consumer protection experience makes clear to me that consumer fraud is most likely to increase when an industry undergoes significant change that attracts new entrants, large amounts of money, vulnerable populations and low or fractured regulation.

All of these indices exist now in health care.


All of them.

This means that consumer fraud will increase as the ACA is implemented, but not because the ACA is being implemented. Should a President Romney repeal “Obamacare” on “Day One,” as he has been repeatedly promised, none of the problems in health care consumer protection will disappear.

In my personal judgment, they will only get worse – far worse.

Be that as it may, I will talk today as if the ACA is the law of the land and will continue to be the law of the land.

I will make very concrete suggestions for immediate action and remain available in person and over the phone to discuss these suggestions in greater detail along with Cindy Lott, who will be speaking next, and Rob Greenleaf and Jacob Meyer, who are members of my staff. 10

Office Wide Commitment

Because of the size of the problems – and the opportunities – presented, consumer protection officials in state attorneys general offices must at the outset realize that consumer protection duties will lie across many divisions within an office of attorney general.

Bluntly speaking, the changes in health care are so sweeping that consumer protection divisions are not able to handle the challenges alone. Several attorneys general have realized the need to cut through existing organizational structures by creating “Health Care Bureaus” that go beyond representing the state department of health. But even in those states, the need for expertise in traditional consumer protection is deeply felt. 11

Recommendation #1 – The breadth of health care delivery issues are such that they far exceed the Unfair and Deceptive Practices Act. The issues are office wide and will continue regardless of the Presidential election.

This means that each Attorney General must designate a senior person to maintain have overall familiarity with the provisions of the ACA. It is vital that someone in the AG office –

10 See National State Attorneys General Program Staff Biographies, http://www.law.columbia.edu/center_program/ag/AGs_About/StaffBios .

someone who is not a member of the consumer protection division or the health division – see the big picture.

The changes sweeping health care delivery and the ACA impact different bureaus or attorneys in any office of Attorney General.

Attorney General expertise that will be needed to understand the ACA and its implications involves:

- Insurance issues that will expand and consumers’ need to be assured of transparency and honesty in a newly competitive environment
- Advising state agencies on compliance issues including their role in consumer protection.
- Overview of charitable and not-for-profit entities that are set to play an even bigger role, and AG office regulation of these non-profits
- Antitrust enforcement that permeates every aspect of the rapidly consolidating health delivery system
- Medicaid expansion and compliance
- State licensing boards and commissions

II. What the ACA Means for State Attorneys General for Consumer Protection

The State Attorney General Program at Columbia Law School has constructed tools that we hope will assist attorneys general and their offices in carrying out their responsibilities. We also hope that advocates and providers review these tools and additional resources at our website, accessible at www.stateag.org. We will also post a fuller version of my remarks today and with your assistance we will be adding to that site daily.

This afternoon, however, I am going to focus on four areas of consumer protection, and Cindy Lott will talk about the non-profit implications.

(1) reforms to the insurance market;
(2) changes to the healthcare marketplace
(3) the consumer protection implications for the expansion of Medicaid
(4) the increase in fraud usually by someone with a state license.

State Health Insurance Exchange

The ACA authorizes each state to create its own exchange for the purchase of health insurance.\(^\text{12}\) Exchanges are designed to facilitate the purchase of insurance coverage by

\(^{12}\) § 1311(b), 124 Stat. 173 - 174.
qualified individual consumers through qualified health plans (QHP) and to assist qualified employers in the enrollment of their employees.

A great deal has been written about these exchanges and the reaction of states has varied a great deal. If a state does not create such an exchange, the Act expressly provides that the federal government will do so.\textsuperscript{13} In addition, the ACA authorizes the creation of Federal/State partnerships to establish an exchange, again to allow state flexibility in determining the specific details of the exchange within that state. These exchanges will be state-based governmental or quasi-governmental agencies or non-profit entities where individuals and small businesses will be able to purchase affordable private health insurance.\textsuperscript{14} States may create a separate exchange for individuals and one for small businesses, may merge them, or may form regional alliances.\textsuperscript{15}

The goals of the exchanges are:

1. To provide a venue for insurance companies to compete for business by the same set of rules and standards;
2. To give consumers and small businesses a venue to be able to easily compare qualified health plans. Individuals can only receive tax credits by purchasing through the Exchange.\textsuperscript{16}

Significantly, state or federal exchanges will have a single web portal where a consumer can go to access health insurance information and eligibility status for any type of insurance -- private, Medicaid and the Children’s Health Insurance Program (CHIP), as well as the State Small Business Health Options Program (SHOP).\textsuperscript{17} In other words, all consumers will enter through the same portal to purchase insurance, and there must be a seamless system that does not segregate consumers by type of coverage. Of great import to those responsible for consumer protection is that millions of individual consumers will have to figure this framework out for themselves.

In most states, the State Insurance Department or Division is responsible for making sure the state exchange is in compliance with ACA requirements. If a state exchange is not operational by 2014, the Department of Health and Human Services (HHS) Secretary will establish and operate an exchange in the State and implement all regulatory requirements.\textsuperscript{18} Insurance Commissioners have many other duties including making sure that companies comply

\textsuperscript{13} § 1321, 124 Stat. 186 - 187.

\textsuperscript{14} § 1311(d), 124 Stat. 176 - 178.

\textsuperscript{15} § 1311(b), 124 Stat. 173 - 174; § 1311(f), 124 Stat. 179.


\textsuperscript{17} § 1103 124 Stat. 146; § 1311(d)(4)(C), 124 Stat. 176

\textsuperscript{18} § 1321, 124 Stat. 186 - 187.
with insurance codes, maintain sufficient reserves and remain economically viable. As a result, as we all know, Insurance Departments vary tremendously in their ability to assist individual consumers who now will have to personally navigate a new system, especially if employer provided insurance becomes scarcer.

Consumer protection advocates in AG offices are experts in assuring that complex information is provided to consumers in a clear and non-misleading manner. It is now more important than ever that insurance companies provide accurate and comprehensible information in accessible language – including languages other than English – and it may be necessary for consumer protection lawyers to be sure this occurs.

In establishing standards for exchange operation and benefits, the ACA required HSS to consult the National Association of Insurance Commissioners (NAIC) to draft a sample and standard summary of benefits and coverage explanation for health plans offered on the exchanges. The purpose of the resulting Rule is to give consumers a better, simpler, standardized way of understanding benefits and coverage, which in turn will allow them to better comparison-shop when purchasing health insurance. NAIC includes in its recommendations that sanctions be imposed if a health plan fails to create the required summary of benefits and coverage and if the health plan fails to provide the summary to a consumer in the required time period set by the Rule. In addition, the information must be provided in a culturally and linguistically appropriate manner, which is defined in the ACA.

Attorneys General should work with their Insurance Commissioners, or independently, to ensure that disclosures to consumers are accurate and adequate in light of state and federal law.

It is very important that attorneys general weigh in to make sure that a summary of health insurance benefits and coverage is explained to all applicants, enrollees and policyholders in accordance to the new rule promulgated as part of the ACA exchange process.

Consumer interaction with the exchanges is a classic consumer protection issue. Consumers must be afforded fairness, honesty, lack of misrepresentation, and information in their primary language. This is an area where the consumer protection capabilities of attorneys general are second to no one. AG’s are the experts and have a great deal to teach.

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19 § 1001, 124 Stat. 132


21 § 2590.715–2719(e)
**Recommendation #2** – State attorney general office consumer protection divisions should expand their relationships with the state Insurance Commissioners to make sure that consumers enter the exchanges fully able to understand the choices they will have to make in the new world of health care delivery.

**Other Insurance Commission and Consumer Protection Related Issues:**

**HIPPA** - All exchanges must comply with the Health Insurance Portability and Accountability Act of 1996 (HIPAA); privacy issues are not unsubstantial in this area. Someone in every attorney general office must have basic working knowledge of HIPAA compliance. Under the newly adopted Health Information Technology for Economic and Clinical Health Act (HITECH), HHS will now pursue audits of covered entities for HIPAA violations, and fines, penalties and reporting requirements are much more stringent. In addition, under HITECH, state Attorneys General now have expanded jurisdiction through specific statutory authority to pursue violations of HIPAA.

**Pre-existing Conditions** - The ACA requires that health plans will not be allowed to deny coverage or charge more in premiums to anyone (including adults) because of a pre-existing condition. Governor Romney supports this part of the ACA, so attorneys general must presume that it will remain and will need enforcement regardless of who wins the upcoming presidential election. The incentives for insurance plans to avoid these provisions are obvious and insurance commissioners may need the assistance of attorneys general to make sure that the law is obeyed.

**Rate Review** - The ACA requires that insurance companies provide disclosure and allow review of unreasonable health insurance premium increases. Generally, plans with a rate increase of over 10 percent or more are required to publicly disclose the proposed increase and justifications for them. The U. S. Centers for Medicare and Medicaid Services, (“CMS”) has issued a final rule to implement this provision. The new rule gives CMS and states the authority to review “unreasonable health insurance premiums” to determine whether or not the rate increase was justified.

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23 § 13410(e), 123 Stat. 274 - 275.


26 The Rule sets three criteria used by CMS to determine “whether a rate increase is excessive, unjustified, or unfairly discriminatory, and, therefore, unreasonable.” (1) the increase is excessive if the premium is unreasonably
Under the ACA, neither CMS nor the US Department of Human Services (“HHS”) nor states can reject a proposed rate increase. The act does not prevent or preempt broader state authority to review rates and does give CMS and HHS the authority: (1) to ask for background information reasoning on the rate increase before implementation of the rate increase; (2) to review the rate increase; and (3) to disclose the rate increase to the public.27

States with effective rate review systems will conduct the reviews, but if a state lacks the resources or authority to conduct actuarial reviews, HHS would conduct them. As you know, in many states, attorneys general are authorized to become involved in insurance rate review issues. The rule requires the federal and/or state review process of a premium rate increase to provide an opportunity for public comment.28 State attorneys general who enforce their state’s open meetings laws will need to be mindful of these provisions.

The rule states that some of the information submitted by an insurer to justify the premium rate increase is public information and not confidential or protected health or financial information. This is a key issue for attorneys general who oversee and enforce state inspection of Public Records Acts and HIPAA.

Loss Ratio Determination

Working with their state insurance commissioners or independently, state attorneys generals may be interested in bringing actions against insurers that improperly calculate their medical loss ratio (MLR), and in asking HHS or a court to order that any such insurer refund money to their policyholders to the extent necessary to bring the insurer into compliance with the 80% MLR standard as required under the law.29

III. Health Care Marketplace Changes and Consumer Protection under the ACA

All Attorneys General must anticipate continued shifts in the health care delivery system regardless of the ACA, but because the ACA is intended to expand care to the uninsured while

27 See § 1003, 124 Stat. 139-140.

28 Rate Increase Disclosure and Review, at 29973.

controlling cost, it contains numerous provisions that encourage outcome-based provision of care and will likely accelerate the rapid changes that are occurring.

These provisions are likely to continue reshaping the health care marketplace towards consolidations and mergers.

**Antitrust**

The antitrust implications of health care reform are immense as consolidation is occurring at every level. A debate rages within federal and state government as to the appropriate role for competition policy and how it relates to health regulatory policy. Federal and state antitrust enforcers argue for vigorous antitrust enforcement and health regulators are just as firm in their belief that larger and integrated providers that are strongly regulated provide better results.

The ACA attempts to balance antitrust with regulation and bring order from chaos by incentivizing the creation of Accountable Care Organizations (ACO), collaborations of integrated providers of physicians, hospitals, and others able to receive shared savings bonuses from payers by reaching set quality goals and showing real reductions in medical costs.30

The United States Department of Justice (USDOJ) and the Federal Trade Commission (FTC) have issued a policy statement that describes the conditions under which the agencies do not view an ACO as anticompetitive and will not seek to challenge it.31 Some ACOs will not meet the conditions set forth in the Policy Statement and will engage in anticompetitive activity that is not protected by the Policy Statement. Attorneys General and their antitrust divisions will be interested in seeking to enjoin such activity, and seeking to obtain monetary relief on behalf of direct purchasers.

Attorneys General already have extensive independent antitrust authority under state and federal statutes. Their role in enforcing antitrust laws in the formation of ACOs, or in the review of other healthcare mergers or consolidations, is an increasing priority. The authority of state attorneys general in antitrust must now operate within the broader mandate of ACA implementation. It is important that state antitrust enforcers cooperate closely with other staff within Attorney General offices in order to assure consistent implementation.

**Recommendation #3** – Assistant attorneys general in state antitrust divisions must become familiar with the ACA and develop close ties with assistant attorneys general involved in consumer protection and those advising state agencies on health care regulatory matters.


Consumer Protection

Medicaid Expansion and Consumer Protection –

The ACA will bring millions of Americans into insured status. This obviously positive reform will change the way care is provided to many vulnerable populations accustomed to going without medical care or relying on hospital emergency room visits. With this shift comes new challenges for state government and state attorneys general.

The ACA mandates that by 2014, adults under the age of 65 with incomes up to 133 percent of the federal poverty level be deemed eligible for Medicaid coverage. This greatly expands the pool of Medicaid beneficiaries. 32 However, the Supreme Court ruled that the federal government cannot require states to expand Medicaid or lose all Medicaid funding. 33 As a result some states have indicated that they will not expand their Medicaid programs. 34

Millions of Americans will receive benefits, and many will have low levels of education and may not speak English as their first language. It is important for the voices of consumer protection to reach out to the Medicaid Fraud Units, Medicaid delivery agencies, state licensing boards, advocacy organizations and both for profit and not for profit providers to make sure that the voice of consumers is heard in the midst of this expansion.

Recommendation #5 – Consumer protection lawyers within attorney general offices must reach out to those responsible to providing Medicaid services and those prosecuting Medicaid Fraud to assist in assuring that new Medicaid entrants understand the benefits to which they are now entitled.

New Health Care Delivery Entities –

Health care will be delivered by many different entities. Many of them will not be traditional health services facilities. 35 These new entities will attract a great deal of money, but they will lack the culture of traditional hospital settings.


These entities will also not be used to facing regulation and may be totally unfamiliar with consumer protection laws. As seen in issues that have arisen for dental managers and health bill collectors – companies that are owned by private entity conglomerates – allegations emerge that these owners with little background or sophistication in health care are more bottom-line driven than their predecessors.\textsuperscript{36}

The ACA encourages cost-efficient and competitive delivery of services and making a profit is essential to the delivery of care, but there is no reason to assume that this approach produces a more consumer-friendly environment. To the extent that these entities are regulated at all, it is most likely through the licenses possessed by individuals employed by the entities. This results in significant regulatory gaps and under-review by overwhelmed state agencies.

A host of state law enforcement issues will arise from new delivery mechanisms, and there is a real need for the consumer divisions of attorney general offices to become involved at every level.

**Recommendation #6 – Health care delivery systems will attract significant monies and be lightly regulated regardless of the future of the ACA. Consumer protection lawyers in state government must assert direct jurisdiction in order to reduce the likelihood of consumer harm. They should also share their expertise with other state agencies who have some jurisdiction over these new entities and seek ways to cooperate with them.**

**Consumer Protection - Language Issues**

There is growing evidence of lower quality of care and excessive costs incurred due to a lack of understanding by health care consumers, particularly where medical treatment is not provided in a patient’s native tongue.\textsuperscript{37} The availability of language options is an essential element of consumer protection and provisions of the ACA require that insurance plans explain plan benefits in a culturally and linguistically appropriate manner.\textsuperscript{38}

**Recommendation # 7** – Consumer protection divisions should be mindful that many of the citizens of their states lack proficiency in English. It is important that special attention be paid in all consumer protections efforts – and especially those in health care – to ensure that consumers are able to understand the consumer protection laws that exist to protect them.

**Charities and non-profit oversight**

The ACA also imposes several new obligations on tax exempt non-profit hospitals and other non-profit health delivery systems that clearly intersect with traditional charitable oversight functions of Attorneys General, and that in some states may supersede state laws regarding non-profit hospital requirements.

**Non-Profit Mergers**

The ACA includes significant new incentives for mergers and provider collaborations to improve delivery of care and almost all of them will involve not-for-profit entities. Changes that occur as the health system is transformed are likely to require additional attention to these shifts to ensure that the public interest is served. In many states, the primary responsibility for this review will continue to fall on state Attorneys General. Under their traditional common-law authority, most Attorneys General have the responsibility to supervise not-for-profit entities including those involved in health care delivery. Some of these mergers may include religious and non-religious affiliated hospitals, and for-profit hospitals with non-profit hospitals.

**Community Health Needs Assessment**

The ACA does not explicitly obligate states to define and enforce a non-profit hospital’s required level of community benefits. Instead, new section 501(r) of the Internal Revenue Code requires these hospitals to 1) conduct a community health needs assessment (CHNA) every three years; 2) establish a financial assistance policy and policy related to emergency medical care with details about the basis for charges; 3) limit charges for medically necessary care to persons eligible for assistance pursuant to their hospital’s financial assistance policy and 4) forego extraordinary collection actions against some individuals who may be eligible for financial assistance. The Federal Government enforces these particular obligations – failure to accurately and fully provide information is sanctioned through a $50,000 IRS penalty – but the process of obtaining CHNA information, as well as what to do with the amplified transparency, is a state decision.

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**Non-Profits in the Exchange**

In addition, the ACA indirectly expands the charitable oversight functions of Attorneys General by authorizing the creation of new non-profit entities subject to state non-profit laws.

Any non-profit health plan to be offered on the exchange must meet the standards set in each individual state of a qualified health plan (QHP). For example, under the ACA, attorneys general will need to consider charitable oversight over any newly authorized Consumer Oriented & Operated Plans (“Co-Ops”) that are intended to be alternative not-for-profit insurance plans that provide better coordination of care, while keeping some competition in the marketplace. The co-ops are created as non-profit entities and must be majority-controlled by consumers. As non-profit entities, they are subject to attorney general oversight and to state law. Co-oOps may be offered as QHPs on the individual and SHOP exchanges. These co-ops may face predatory pricing practices by competitive for-profit insurance companies within the exchange, which may require consumer protection activity by Attorneys General.

**Privacy Concerns**

Lastly, there are new privacy requirements for health information technology. Of particular importance is § 1561, which “requires the Secretary and the HIT Policy and Standards Committees to develop interoperable and secure standards for the enrollment of individuals in Federal and State health service programs,” but “these standards must allow for electronic matching against existing data, simplification of documentation, reuse of stored eligibility information, capability for individuals to manage information online, integration with new programs and rules, and other functionalities necessary to streamline the process.” As far as security goes, the recommendations do not internally address privacy, instead outsourcing privacy requirements to the Office of the National Coordinator’s Fair Information Practices

**Recommendation #8** – To adequately enforce charities laws, attorney general staff will need to work and communicate within office between sections or divisions, particularly if there is no specific charities bureau or attorneys that focus on charities. Coordination will be required due to the overlapping areas of charities, antitrust, bankruptcy, and those responsible for policy issues.

**Conclusion**

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41 § 1301


43 Id.

44 § 1301(a)(2), 124 Stat. 163.
The ACA is a complex, lengthy statute that includes multiple new provisions requiring state compliance. Although the statute rarely mentions state attorneys general specifically, there is no question there will be substantial involvement by attorneys general, both in planning and implementation for the foreseeable future. Consumer Protection by attorneys general is therefore an essential part of ACA implementation. The changes in health care delivery driven by competitive markets, demographics, economic reality, and the passage of the ACA only enhance this responsibility.

The State Attorney General Program at Columbia Law School stands ready to assist state attorneys general, their staff, advocacy groups and providers in their important work and will hopefully contribute to the ongoing discussion as to how best to provide for the health of the United States.