Maine Hospital Association

MAINE'S LEADING
VOICE FOR HEALTHCARE

TESTIMONY OF THE MAINE HOSPITAL ASSOCIATION

In Opposition To

LD 1815 - *An Act to Protect Maine's Consumers by Establishing an Abuse of Dominance Right of Action and Requiring Notification of Mergers*

January 9, 2024

Senator Curry, Representative Roberts and members of IDEA Committee, my name is Jeff Austin and I am presenting testimony in opposition to LD 1815 on behalf of the Maine Hospital Association. The Maine Hospital Association (MHA) represents all 36 community-governed hospitals including 33 non-profit general acute care hospitals, 2 private psychiatric hospitals, and 1 acute rehabilitation hospital.

Overview

Our comments are restricted to section 6 of the legislation.

I will note at the outset, that I am not an expert in either U.S. antitrust law or European-style dominance laws. But, based upon my limited understanding, we do have concerns.

Initially, it appears to us that the title of the bill is actually misleading. Existing U.S. antitrust law "centers" the consumer in the analysis. Competition, and therefore competitors, are vital to preventing monopolies and the kinds of threats monopolies pose. However, the competitor is not what is being protected; it's the consumer that is being protected under existing law.

The European model that LD 1815 is replicating, it's the competitor that is centered, not the consumer. That is a potentially significant shift in focus.

It also presents a challenge for the regulated community; what if an action is acceptable under traditional antitrust analysis (consumer focused) but not acceptable under the European analysis (competitor focused)?

Ultimately, most of us simply don't know what this bill does and its impact is immediate. No U.S. state has adopted this law, the federal government has not adopted this law and we simply don't know what it means.

Neither do the supporters.

Hospitals & Healthcare.

I represent the 36 private hospitals in Maine. They are all non-profits; that is unusual in the United States.

There are only 3 communities with more than one hospital (Portland, Bangor and Lewiston – Waterville is arguably a fourth). Washington County has 1 hospital.

You heard criticism that the Portland market is one of the least competitive in the United States. I don't know enough about that analysis to comment. However, healthcare has always presented challenges to regulators.

For example, would it be better if there were 100 hospitals in Maine rather than 36? There would certainly be more competition. But, consumers, businesses and payers would have to finance the existence of those 100 hospitals. Is that what you want?

One of the public policy issues for the past 25 years in healthcare has been "fragmentation." That is, criticism of the health care system for not really being a coordinated system but a maze of unrelated, uncoordinated independent doctors and hospitals.

Recently, and seemingly on a dime, the conversation has turned to the exact opposite: too much "consolidation." Many of our members feel whipsawed by this change.

One thing you should understand is that Maine government has tried to balance the need for competition against a goal of not over-investing in unnecessary healthcare facilities. In fact, here is what a predecessor Legislator found:

Findings. *The Legislature finds that unnecessary construction or modification of health care facilities and duplication of health services are substantial factors in the cost of health care and the ability of the public to obtain necessary medical services*. 22 MRSA §327.

So, is there a lack of a competitor hospital because existing hospitals are abusive? Is it because Maine is a relatively rural and relatively poor state and is not attractive to capital investors? Or is it because it has been Maine policy for over two decades to challenge "duplication of health services."

Healthcare is complicated. Are any of our members "dominant" actors in the market under LD 1815? I don't know.

If so, do our members engage in activities that LD 1815 deems "abusive"? Yes, to at least some of the activities and I don't know to most others.

When the representative of the Consumers for Affordable Healthcare (CAHC) was asked the relatively straightforward question: How does this bill improve on the existing anti-trust laws? Her answer was: I'll have to get back to you.

Proponents don't know what this bill does. Even worse, they seemingly believe the bill will produce contradictory things.

One proponent bemoaned the recent fate of local, independent pharmacies. She noted that large Pharmacy Benefit Managers (PBMs) working on behalf of insurance carriers, can demand huge reductions in reimbursement to the small pharmacies and drive them out of business.

To her, insurance carriers driving down reimbursements to small pharmacies is bad.

But, the representative from CACH wants more of that. She bemoaned that small hospitals which are part of larger healthy systems are being protected. She would like for insurance carriers to be able to exclude these small rural hospitals them from the insurance companies' provider networks or she would like the insurance companies to be able to cuts reimbursement rates for small hospitals.

To her, insurance carriers being allowed to use their "leverage" to impose lower prices for rural hospitals is good.

What each proponent failed to mention, even once, is access. We don't think that larger health systems rescuing small, rural hospitals from being driven out of business is bad for competition. If the larger systems did not protect those hospitals, and they failed, what would be left? Only larger hospitals. What the systems are doing is protecting both access and competition.

Conclusion.

Overnight, many of our members could be declared in violation of this bill. This bill is not simply a merger bill that only comes into play when relatively rare mergers occur. It penalizes all manner of conduct if you meet the nebulous standard of dominant as presented in the legislation.

I will note for you an observation made by the Antitrust Section of the American Bar Association (a fairly progressive group) when this legislation was presented, and rejected, in New York:

An abuse of dominance prohibition could be interpreted to prohibit conduct for reasons other than its anticompetitive effects, … Both the uncertainty from such a prohibition and its potential undesirable reach are concerning to the [ABA].

We would appreciate much more information about the concrete impact of this legislation on our sector – healthcare – before you move forward.

Thank you.