



H.S. Grace & Company, Inc.

Healthcare Governance: The Next Litigation Wave?

Ever since the 2008 presidential election, much of the focus on governmental and partisan issues has been on the expansion of our system of healthcare and the underlying perceptions of our current health services system. Enactment of legislation in a highly partisan atmosphere ensures that the spotlight will become sharper as we move forward, much as it was during the New Deal. That era brought forth an enormous amount of litigation to determine the parameters of what is permissible and what is not in each sector of newly expanded federally designated areas of public responsibility. Similarly, there is likely to be huge growth in health industry litigation in the next several years. This is especially true since the health sector has been one of the most rapidly expanding parts of the economy over the last decade, even before the new legislation.

As plans are developed for new or expanded entities, both profit and not-for-profit, there will be increasing attention paid to the roles and responsibilities of governance structures and of the boards that may guide them. There will be questions as to best practices of management of existing entities and of the possibility of such practices' relevance to the new federal laws. There will be issues of criteria for measurement of performance and underlying philosophical issues such as service rationing. Standardization vs. innovation will become a major area of debate. Access to services and quality of service and the relationship between the two will be hotly debated. There is a huge amount of data on these issues, but that data has rarely been analyzed sufficiently to become information cogent enough to be the basis for policy formulation, let alone litigation determination.

H.S. Grace & Company, Inc.'s team of senior management level executives and board members offers a wide range of real life experience in governance and tough business practice and process issues in many industry areas that relate to the problems faced by the health sector. Indeed, the company has served as an expert witness in more than a dozen court cases focused on governance issues in the healthcare industry.

In establishing new entities or reviewing the capabilities of existing entities to provide the greatly expanded services which are covered in the new law, the governance structure should be examined, not only with an eye toward its capacity to perform, but also its ability to cope with the onrush of potential litigation it may face. Entities must be thoroughly familiar with their responsibilities under federal legislation, as well as with the legislation of each state in which they intend to operate. For example, health providers in a state like New York or California need to follow the various reporting provisions of the United States government, as well as the extremely tough, and in some ways conflicting provisions of the state health laws. Penalties for noncompliance can be severe.

The state provisions, like the federal, deal with responsibility for quality of care as well as for reporting, both programmatic and financial. The roles of governance structures may be covered by widely varying state laws, especially for not-for-profits, and tend to be increasingly enforced by aggressive attorneys general, as well as the health and insurance regulators. Qualification and licensing provisions for staff may also differ widely from state to state as does the responsibility of the governing structure for adherence to those laws.

Fraud and abuse rules and corporate liability vs. individual liability are major concerns. Due diligence and sufficient structural safeguards and policies could become key. Documentation policies are crucial so that how and why decisions were made can be explained. Transparency of products is important in order to deal with potential denial-of-care litigation.

The question of who the client is may be litigated heavily, as may antitrust issues, as relationships are worked out. Conflict-of-interest issues must be dealt with firmly. Executive and professional compensation issues will be very controversial, especially given the complexity of specialization in medicine. The role of conflicting governmental reimbursement policies will be central to all of these concerns.

Therefore, it is crucial that advice on all of these issues be provided before the structural and governance decisions are made so that jury second guessing can be minimized and services can be provided with little litigation distraction. It is also crucial that planning for the onslaught of potential litigation be done as entities are established so that litigation can be dismissed quickly.

H.S. Grace & Company, Inc. is a team of senior executives who diagnose and resolve critical corporate problems in business governance, operations, finance and control. With more than 1,000 years of experience, our goal is to help companies enhance shareholder value, protect reputation and their long-term ability to succeed, avoid and manage litigation, and navigate major changes such as mergers and acquisitions or bankruptcies. We often serve as consulting and testifying experts, identifying and analyzing critical business issues.

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