

## Health Care M&A: Now Insurable

By David Kuffler, partner in the Kaufman Dolowich & Voluck New York City office, and Brian Thede, senior vice president, Ethos Specialty Insurance Services LLC .

*Published by Law360 (February 28, 2019, 5:00 PM EST) —*

*There have been many changes in the representations and warranties insurance market as it has grown over the past 10 years from a handful of markets to over 20 and counting. Whether due to the continued attraction of talented and knowledgeable personnel to the underwriting and insured representative sides, the growth of underwriting experience and capitalization on other internal resources at insurers, a greater understanding on the part of insureds and their advisers of the insurers' underwriting diligence process, the development of claims information and experience or simply competition, the market is seriously considering and writing risks that were once considered anathema.*

*For example, insureds can currently obtain full or partial coverage for exposures such as the Fair Labor Standards Act, as well as environmental and cyber risks, which in the past would have drawn automatic exclusions in quote letters from carriers. Nevertheless, underwriters have continued to shy away from acquisition targets in certain heavily regulated sectors such as financial institutions and participants in the health care field.*

*Now, a limited number of market participants are insuring health care transactions on a primary basis.*

*Historically, Coverage Has not Been Available for the Specific Risks Associated With Health Care*

*Health care companies participate in a highly complex, regulated environment. Most health care providers receive payments under federal and state Medicaid and Medicare insurance programs. In particular, violations of the False Claims Act due to billing errors can carry stiff penalties subject to trebling for violations. The sales and marketing of health care products and services is also highly regulated and scrutinized across many different kinds of health care industry participants and presents risk under the FCA, the Stark Law, the Anti-Kickback Statute and related statutes. The FCA also incentivizes whistleblowers to pursue claims by paying them a significant portion of any recovery.*

*Coupled with these heightened risks was a knowledge gap on the part of the carriers. These risks generally have not been covered by standard liability insurance products such as directors and officers and errors and omissions insurance. As a result, underwriting personnel migrating to transactional insurance did not have experience in evaluating these risks and carriers did not have any kind of actuarial history from which to draw. Thus, insurers would underwrite the other areas of risk as for any other target but would exclude government billing and marketing risks endemic to the industry.*