

# Antitrust in Healthcare

September 17-18, 2007  
Westin Washington DC  
City Center Hotel  
Washington, DC



Planning Committee:  
Robert F. Leibenluft, Esq.  
Toby G. Singer, Esq.  
Martin J. Thompson, Esq.

## Program Agenda

### Monday, September 17, 2007

7:00 am-5:10 pm

#### Registration and Information

7:00-9:45 am

#### Continental Breakfast

(attendees, speakers and registered spouses and guests are welcome)

7:30-9:30 am

#### Antitrust Primer

*Phillip A. Proger*

A basic introduction to the concepts of antitrust law for non-antitrust lawyers or a refresher for antitrust lawyers, the Primer will cover the basics of:

- How antitrust and health law intersect
- What constitutes an agreement
- What are the antitrust statutes and immunities that apply to the delivery of healthcare services

#### GENERAL SESSION

9:45-10:00 am

#### Welcome and Introduction

*Robert F. Leibenluft*

*Toby G. Singer*

*Martin J. Thompson*

10:00-10:45 am

#### Keynote Address

*J. Thomas Rosch*

*Commissioner, Federal Trade Commission*

11:00 am-12:00 noon

#### Year in Review

*Thomas L. Greaney*

*Douglas C. Ross*

*Martin J. Thompson*

- Historic opinion affects hospital mergers
- Provider networks continue to create controversy
- Latest analysis, decisions and advice on clinical integration
- Specialty hospitals and ASCs create issues for general acute care hospitals
- Bundling and exclusionary tactics stimulate private litigation

- Health plans face issues as defendants as well as challenging provider activities
- Pharmaceutical mergers and controversial practices continue

12:00 noon-1:30 pm

#### Luncheon

(all attendees and speakers are welcome)

#### Hot Issues and New Developments

*John J. Miles*

#### CONCURRENT SESSIONS

1:50-2:50 pm

#### A. Antitrust Considerations in Negotiating and Preparing for a Merger (not repeated)

*Roxane C. Busey*

*Ann Malester*

*Monica G. Noether*

- Strategic options when planning a deal
- Negotiating antitrust risk provisions
- Due diligence considerations
- Role of the economist
- Pre-closing concerns: Gun-jumping

#### B. Clinical Integration: The Latest Developments

*Lawrence P. Casalino*

*Robert F. Leibenluft*

*David Wales*

- Lessons from FTC enforcement actions and advisory opinions, including *Brown & Toland*, *Suburban Health Organization*, *Advocate Health Partners* and *MedSouth II*
- *North Texas Specialty Physicians* – the Fifth Circuit litigation
- Practical advice on passing antitrust scrutiny

#### C. When Does the Flow of Competitively Sensitive Information Create Antitrust Concerns?

*Mark J. Botti*

*Thomas R. McCarthy*

- When can information exchanges go so far as to give rise to price fixing concerns?

## Program Agenda

- Do the antitrust principles differ when the competitive concern arises in the context of the purchase of goods versus services, or with buyers instead of sellers?
- Is it only the exchange of price that is a problem or can the exchange of other types of information raise antitrust concerns?
- What are the structural characteristics of markets where the exchange of information may be anticompetitive?
- What are the characteristics of markets whose performance might be improved through the exchange of competitively sensitive information?

3:00-4:00 pm

### **D. The Litigation of an Exclusionary Conduct Case** (not repeated)

*David Marx, Jr.*

*Neil P. Motenko*

- Litigation strategies and management in Sherman Act § 1 and § 2 cases involving exclusive or preferential arrangements, including:
  - Pre-litigation issues, such as budgeting, hold notices and spoliation, ADR, managing client expectations
  - Standing
  - Discovery, including e-discovery issues
  - Proof of conspiracy, competitive effects and antitrust injury
  - Expert testimony
  - Strategies for obtaining or avoiding summary judgment
  - Trial considerations

### **E. State Attorney General Enforcement in Healthcare** (not repeated)

*James A. Donahue*

*Wendelynn Newton*

*Lizabeth A. Leeds*

- The multiple roles of the Attorney General in hospital mergers
- Consent decrees (and the potentially broader approach of the State)
- Other healthcare competition issues

### **F. Antitrust Enforcement in the Healthcare Arena: Practical Considerations from the Perspectives of the Government, the Subjects of an Investigation and the Victims**

*Kenneth T. Bowden, III*

*Christi J. Braun*

*Steve Kramer*

- The “complaint” process
- Confidentiality of the investigative process
- The investigative process
- After the investigation

4:10-5:10 pm

### **G. Health Plan Competition and Practices**

(not repeated)

*Sourav Chattejee*

*Howard Feller*

*Peter J. Mucchetti*

- DOJ review of health plan mergers, including:
  - Product market definition
  - Barriers to entry
  - Monopoly and monopsony issues
  - Competitive effects
- Scrutiny of “most-favored-nation” clauses in health plan contracts
- All-product provisions in health plan contracts

### **C. When Does the Flow of Competitively Sensitive Information Create Antitrust Concerns?** (repeat)

### **F. Antitrust Enforcement in the Healthcare Arena: Practical Considerations from the Perspectives of the Government, the Subjects of an Investigation and the Victims** (repeat)

5:15-6:45 pm

### **Reception**

(attendees, speakers and registered spouses and guests are welcome)



## Program Agenda

**Tuesday, September 18, 2007**

7:00 am-4:35 pm

### Registration and Information

7:00-8:00 am

### Continental Breakfast

(attendees, speakers and registered spouses and guests are welcome)

### GENERAL SESSION

8:00-9:00 am

#### Antitrust Developments Involving Providers, Payers and Pharma: Views from the Enforcement Agencies

*Kevin E. Grady (Moderator)*

*Robert L. Hubbard*

*Markus Meier*

*Joseph M. Miller*

This session will address recent government actions, enforcement priorities, and possible future directions, including:

- Physician collective bargaining litigation, consent agreements, and advisory opinions
- Investigations and actions involving health plans
- Hospital mergers, including the *Evanston* case
- Investigations and litigation concerning pharmaceuticals

9:00-10:15 am

#### Mergers Analysis

*Meg Guerin-Calvert*

*Jeffrey Schmidt*

*Toby G. Singer*

- Latest developments in healthcare merger enforcement
- Economic issues raised by market definition in healthcare mergers
- Enforcement priorities for hospital mergers
- Antitrust concerns raised by mergers of pharmaceutical companies and health insurers

10:15-10:35 am

#### Break

10:35-11:50 am

#### All of Me, Why Not Take All of Me: Antitrust Issues Affecting Bundling Contracts in Healthcare

*David A. Argue*

*Jonathan M. Jacobson*

*Arthur N. Lerner*

- Monopolization, tie-in and exclusive dealing antitrust issues arising in:
  - Health systems contracts with managed care plans
  - Group purchasing organization multiple-product arrangements
  - Pharmaceutical pricing

11:50 am-1:05 pm

#### Lunch on your own or attend the Antitrust Practice Group Luncheon

(additional fee; limited attendance; pre-registration required –see p. 11)

#### Everything You Need to Know About the FTC's Advisory Opinion Letters and the DOJ's Business Review Letters

*David Narrow, Esq.*

*Bureau of Competition, Federal Trade Commission  
Washington, DC*

*Joshua Soven, Esq.*

*Chief Litigation I Section, Antitrust Division  
U.S. Department of Justice  
Washington, DC*

### CONCURRENT SESSIONS

1:15-2:15 pm

#### H. General Hospitals' Response to Physician-Owned Specialty Facilities: Competition or Exclusion? (not repeated)

*William E. Berlin*

*Jon B. Jacobs*

- Various types of physician-owned specialty facilities, their proffered benefits and general hospitals' actions, practices and policies responding to them
- Legal theories and antitrust claims raised in litigated cases brought by physician-owned specialty facilities against general hospitals – is



## Program Agenda

the distinction between unilateral and concerted conduct critical?

- Federal enforcement agencies' view – recent DOJ Antitrust Division commentary in statements to the South Carolina and Georgia state governments
- Can general hospitals “level the playing field?” – business justifications for general hospital responses, including the legal, economic and empirical rationales supporting them
- A hierarchy of antitrust risk ranking general hospitals' responses to specialty facilities

### J. Issues Involving Generic Competition

(not repeated)

*Michael Kades*

*Seth Silber*

2:25-3:25 pm

### K. International Developments in Healthcare Antitrust (not repeated)

*Sean Ennis*

*John Pheasant*

- The inter-relationship of EU and national law, particularly antitrust laws, in healthcare and related industries
- Government procurement of medical services, pharmaceuticals and related services
- Government oversight of hospital mergers

- Restrictive practices in the healthcare professions
- Pharmaceutical distribution and pricing
- Single firm conduct issues related to tying, bundling and margin squeeze

### B. Clinical Integration: The Latest Developments (repeat)

3:35-4:35 pm

### L. Tactics and Legal Ethics in Antitrust Investigations (not repeated)

*Ray V. Hartwell, III*

- Legal and ethical risk on and before “day one”
- Internal and external communications: Who is the client?
- Internal investigations: Practical and ethical concerns
- Dealing with executives: Conflicts and separate counsel issues.
- Joint defense communications and cooperation

### M. Legal Clinic (not repeated)

*Robert F. Leibenluft*

*Toby G. Singer*

*Martin J. Thompson*

## Program Faculty

### PLANNING COMMITTEE

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Deputy Director  
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Federal Trade Commission  
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## Program at a Glance

Monday, September 17, 2007

7:00 am– 5:10 pm	<b>Registration and Information</b>		
7:00– 9:45 am	<b>Continental Breakfast</b> (attendees, speakers and registered spouses and guests are welcome)		
7:30– 9:30 am	<b>Antitrust Primer</b> <i>Proger</i>		
9:45 am– 12:00 noon	<b>GENERAL SESSION</b> 9:45-10:00 am <b>Welcome and Introduction</b> <i>Leibenluft, Singer, Thompson</i> 10:00-10:45 am <b>Keynote Address</b> <i>Rosch</i> 11:00 am-12:00 noon <b>Year in Review</b> <i>Greaney, Ross, Thompson</i>		
12:00 noon– 1:30 pm	<b>Luncheon and Presentation</b> (attendees and speakers are welcome) <b>Hot Issues and New Developments</b> <i>Miles</i>		
1:50– 2:50 pm	<b>A. Antitrust Considerations in Negotiating and Preparing for a Merger</b> (not repeated)  <i>Busey Malester Noether</i>	<b>B. Clinical Integration: The Latest Developments</b>  <i>Casalino Leibenluft Wales</i>	<b>C. When Does the Flow of Competitively Sensitive Information Create Antitrust Concerns?</b>  <i>Botti McCarthy</i>
3:00– 4:00 pm	<b>D. The Litigation of an Exclusionary Conduct Case</b> (not repeated)  <i>Marx Motenko</i>	<b>E. State Attorney General Enforcement in Healthcare</b> (not repeated)  <i>Donahue Newton Leeds</i>	<b>F. Antitrust Enforcement in the Healthcare Arena</b>  <i>Bowden Braun Kramer</i>
4:10– 5:10 pm	<b>G. Health Plan Competition and Practices</b> (not repeated)  <i>Chattejree Feller Mucchetti</i>	<b>C. When Does the Flow of Competitively Sensitive Information Create Antitrust Concerns?</b> (repeat)  <i>Botti McCarthy</i>	<b>F. Antitrust Enforcement in the Healthcare Arena</b> (repeat)  <i>Bowden Braun Kramer</i>
5:15 pm– 6:45 pm	<b>Reception</b> (attendees, speakers and registered spouses and guests are welcome)		

## Program at a Glance

Tuesday, September 18, 2007

7:00 am– 4:35 pm	<b>Registration and Information</b>	
7:00– 8:00 am	<b>Continental Breakfast</b> (attendees, speakers and registered spouses and guests are welcome)	
8:00– 11:50 am	<b>GENERAL SESSION</b> 8:00-9:00 am <b>Antitrust Developments Involving Providers, Payors and Pharma: Views from the Enforcement Agencies</b> <i>Grady (Moderator), Hubbard, Meier, Miller</i> 9:00-10:15 am <b>Mergers Analysis</b> <i>Guerin-Calvert, Schmidt, Singer</i> 10:15-10:35 am <b>Break</b> 10:35-11:50 am <b>All of Me, Why Not Take All of Me: Antitrust Issues Affecting Bundling Contracts in Healthcare</b> <i>Argue, Jacobson, Lerner</i>	
11:50 am– 1:05 pm	<b>Lunch on your own or attend the Antitrust Practice Group Luncheon</b> (additional fee; limited attendance; pre-registration required; see page 11)	
1:15– 2:15 pm	<b>H. General Hospitals' Response to Physician- Owned Specialty Facilities: Competition or Exclusion?</b> (not repeated)  <i>Berlin Jacobs</i>	<b>J. Issues Involving Generic Competition</b> (not repeated)  <i>Kades Silber</i>
2:25– 3:25 pm	<b>K. International Developments in Healthcare Antitrust</b> (not repeated)  <i>Ennis Pheasant</i>	<b>B. Clinical Integration: The Latest Developments</b> (repeat)  <i>Casalino Leibenluft Wales</i>
3:35– 4:35 pm	<b>L. Tactics and Legal Ethics in Antitrust Investigations</b> (not repeated)  <i>Hartwell</i>	<b>M. Legal Clinic</b> (not repeated)  <i>Leibenluft Singer Thompson</i>

## Program Information

**Dates:** September 17-18, 2007

**Place:** Westin Washington, DC  
City Center Hotel  
1400 M Street, NW  
Washington, DC 20005

**Phone:** (202) 429-1700

**Fax:** (202) 728-0530

### Registration Fees:

#### Postmarked and paid by August 27

\$675 For the first AHLA, Antitrust and Health Law  
Section Member

\$600 For each additional Member

\$875 Non-Members

#### Postmarked and paid between August 28 and September 7\*

\$775 For the first AHLA, Antitrust and Health Law  
Section Member

\$700 For each additional Member

\$975 Non-Members

\* Registration fees increase \$100 after this date.

If you have indicated an incorrect amount due to errors in addition or not being eligible for a specific rate, AHLA will charge the correct amount to the credit card you have supplied.

**Discounted Registration Fees:** Government employees, in-house counsel, academicians, solo practitioners and students: please call for special discounted registration fees.

**Spouse/Guest Fee:** For an additional \$30 spouses and adult guests can register to attend the reception on Monday evening and the breakfasts on Monday and Tuesday mornings. Please sign up on the registration form. *(Children are welcome to attend these events at no additional charge.)*

**Continuing Education:** Participants will be given continuing education forms at the program. Forms must be completed and returned to AHLA staff to receive credit. AHLA is an approved sponsor of continuing legal education credits in most states. This seminar will be worth approximately 13.25 continuing education credits (including 1.0 ethics credit) based on a 60-minute hour and 15.9 credits (including 1.2 ethics credits) based on a 50-minute hour.

AHLA is registered with the National Association of State Boards of Accountancy (NASBA) as a sponsor of continuing professional education on the National Registry of CPE Sponsors. State boards of accountancy have final authority on the acceptance of individual courses for CPE credit. Complaints regarding registered sponsors may be addressed to the National Registry of CPE Sponsors, 150 Fourth Avenue North, Suite 700,

Nashville, TN 37219-2417. Web site: [www.nasba.org](http://www.nasba.org). This seminar will be worth approximately 15.0 CPE credits.

There are no prerequisites or advanced preparations required to register for this group live program. Sessions are intermediate unless otherwise stated.

**Hotel Reservations:** Hotel accommodations are not included in the registration fee. Call Westin Hotel at (202) 429-1700 or go online to [www.starwoodmeeting.com/StarGroupsWeb/res?id=0707050814&key=20CFA](http://www.starwoodmeeting.com/StarGroupsWeb/res?id=0707050814&key=20CFA).

**If calling, please indicate that you are attending the AHLA program. Rooms at the group rate are limited and may sell out.**

**Cancellations/Substitutions:** Cancellations must be received in writing **no later than September 10, 2007**. Refunds will not be issued for cancellations received after this date. Registration fees, less a \$125 administrative fee, will be refunded approximately 3-4 weeks following the program. If you wish to send a substitute or need more information regarding refund, complaint and program cancellation policies, please call the Member Service Center at (202) 833-0766. Please note that registration fees are based on the membership status of the individual who actually attends the program.

**Special Needs:** If you need any of the auxiliary aids or services identified in the Americans with Disabilities Act, please call the Member Service Center at (202) 833-0766.

**Travel:** Association Travel Concepts (ATC) has negotiated discounts with United, American, Enterprise and Avis Rental Car to bring you special airfares and car rental rates lower than those available to the public. Discounts apply for travel September 14-28, 2007. For tickets purchased less than 30 days prior, the discounts will be 5% to 15% off of the lowest available fares. Some restrictions may apply and a service fee may apply. ATC will also search for the lowest available fare on any airline.

### ASSOCIATION TRAVEL CONCEPTS

1-800-458-9383

email: [reservations@atcmeetings.com](mailto:reservations@atcmeetings.com)

[www.atcmeetings.com](http://www.atcmeetings.com)

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Fax: (858) 362-3153

ATC is available for reservations from 8:30 am until 8:00 pm Eastern, Monday through Friday.

## Registration Form: Antitrust in Healthcare

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**To register:** Remit payment and completed registration form by mail to the American Health Lawyers Association • P.O. Box 79340 • Baltimore, MD 21279-0340 or fax with credit card information to (202) 775-2482. To register by phone call (202) 833-0766. If the program is over-subscribed, only members of the sponsoring organizations will be placed on a waiting list. On-site registrations will be accepted on a space-available basis only.

Name: \_\_\_\_\_ Member ID #: \_\_\_\_\_

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**Early Registration Fees (faxed/postmarked and paid on or before August 27, 2007):**

**AHLA, Antitrust and Health Law Section Members:**  \$675      **Non-Members:**  \$875

\$600 each additional member registering from same organization at same time on the same check or credit card payment

**Registration Fees (faxed/postmarked and paid between August 28 and September 7, 2007):**

**AHLA, Antitrust and Health Law Section Members:**  \$775      **Non-Members:**  \$975

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Please Indicate to which of the following you belong:

AHLA       ABA Health Law Section       ABA Section of Antitrust Law

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**Please fill in applicable amount: (Sorry! Registrations cannot be processed unless accompanied by payment.)**

\$ \_\_\_\_\_ Registration Fee

\$ \_\_\_\_\_ Antitrust Practice Group Luncheon (\$38 for members of the Antitrust PG/\$45 for non-members of the Antitrust PG; Tuesday, September 18, 2007)

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Check enclosed (Make checks payable to American Health Lawyers Association)

Bill my credit card:      

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AMERICAN  
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# Antitrust in Healthcare Washington, DC

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**Register by August 27 and save!**  
**Register online today at**  
**[www.healthlawyers.org/Antitrust2007](http://www.healthlawyers.org/Antitrust2007)**

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