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Antitrust In Healthcare

May 24-25, 2010
Ritz-Carlton, Pentagon City
Arlington, Virginia



2010

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2010 Antitrust In Healthcare

Join your colleagues May 24-25, 2010 at *The Ritz-Carlton, Pentagon City in Arlington, Virginia* as the ABA Health Law Section, ABA Section of Antitrust Law and the American Health Lawyers Association join together to present the 2010 Antitrust in Healthcare Conference.

The Antitrust in Healthcare Conference continues its rich 25-year tradition with this jointly sponsored program. The conference brings together an expert faculty made up of the leading government enforcers, private counsel representing both plaintiffs and defendants, and economists to share their insights and offer both practical advice and policy recommendations.

There have been a number of developments since the conference was last held in September 2007, and we hope to see you this spring to share the most timely and significant information on key antitrust issues affecting the healthcare industry.

Sincerely,
2010 Antitrust in Healthcare Conference Co-Chairs

Christi J. Braun, Ober, Kaler, Grimes & Shriver, Washington, DC
Toby G. Singer, Jones Day, Washington, DC
Martin J. Thompson, Manatt Phelps & Phillips, LLP, Costa Mesa, CA

FACULTY MEMBERS

Henry S. Allen, Senior Attorney, Advocacy Group, American Medical Association and Adjunct Professor, Northwestern University Law School and Kellogg School of Management, Chicago, IL

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Susan S. DeSanti, Director, Office of Policy Planning, Federal Trade Commission, Washington, DC

James A. Donohue, III, Chief Deputy Attorney General, Antitrust Section, Office of the Attorney General, Commonwealth of Pennsylvania, Harrisburg, PA

Richard A. Feinstein, Director, Bureau of Competition, Federal Trade Commission, Washington, DC

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Mark L. Mattioli, Partner, Post & Schell, P.C., Philadelphia, PA

Robert W. McCann, Partner, Drinker Biddle Reath LLP, Washington, DC

Markus Meier, Assistant Director, Health Care Services & Products Division, Bureau of Competition, Federal Trade Commission, Washington, DC

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Joseph M. Miller, Assistant Chief, Litigation I Section, Antitrust Division, U.S. Department of Justice, Washington, DC

David Narrow, Staff Attorney, Federal Trade Commission, Washington, DC

Monica Noether, Executive Vice President, Chief Operating Officer, Charles River Associates, Boston, MA



PROGRAM AGENDA

MONDAY, MAY 24, 2010

7:00 am – 5:30 pm

Registration and Information Desk Open

7:00 am – 9:30 am

Continental Breakfast

7:30 am – 9:30 am

Antitrust Primer

Phillip A. Proger, Jones Day, Washington, DC

A basic introduction to the concepts of antitrust law for non-antitrust lawyers or a refresher for those who practice in this area, the Primer will cover the basics of:

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

GENERAL SESSION

9:45 am – 10:00 am

**Welcome and Introductions
2010 Antitrust in Healthcare
Conference Co-Chairs**

Christi J. Braun, Ober, Kaler, Grimes & Shriver, Washington, DC

Toby G. Singer, Jones Day, Washington, DC

Martin J. Thompson, Manatt Phelps & Phillips, LLP, Costa Mesa, CA

GENERAL SESSION

10:00 am – 10:45 am

Keynote Address

The Honorable Christine A. Varney, Assistant Attorney General, U.S. Department of Justice, Antitrust Division, Washington, DC

10:45 am – 11:00 am

Break

GENERAL SESSION

11:00 am – 12:00 noon

**Year in Review: Healthcare
Antitrust in Transition**

Christi J. Braun (Moderator), Ober,

Kaler, Grimes & Shriver, Washington, DC

Thomas (Tim) L. Greaney, Professor of Law and Co-Director, Center for Health Law Studies, Saint Louis University School of Law, St. Louis, MO

Douglas C. Ross, Davis Wright Tremaine LLP, Seattle, WA

- Healthcare enforcement under the Obama administration
- Healthcare reform and antitrust provisions in current legislation
- Class certification changes
- The latest on clinical integration
- Exclusionary conduct litigation

CONFERENCE LUNCHEON

12:00 noon – 1:30 pm

**No Higher Priority: An Update on
the FTC's Healthcare Antitrust
Agenda**

Richard A. Feinstein, Director, Bureau of Competition, Federal Trade Commission, Washington, DC

CONCURRENT SESSIONS

1:45 pm – 2:45 pm

**Government Changes to the Rules
of Competition**

Dionne C. Lomax (Moderator), Vinson & Elkins LLP, Washington, DC

Arthur N. Lerner, Crowell & Moring, Washington, DC

Michael M. Maddigan, O'Melveny & Myers LLP, Los Angeles, CA

Mark R. Ustin, Manatt Phelps & Phillips, LLP, Albany, NY

Federal and state laws can seek to alter application of the antitrust laws in healthcare markets. They can also interfere with, or seek to protect consumers or industry participants from, the workings of the marketplace. This session will explore this topic, including:

- McCarran-Ferguson Act health insurance exemption repeal – What's it all about?
- New York State's Berger Commission – A case study in local health planning as an antitrust exception
- Provider collective bargaining

statutes – The current status of efforts to leverage the state action doctrine in payor negotiations

**New Ideas on the Exercise of and
Response to Provider Market
Power**

Elinor R. Hoffman (Moderator), Assistant Attorney General, Antitrust Bureau, Department of Law, Office of the New York State Attorney General, New York, NY

Richard D. Raskin, Sidley Austin LLP, Chicago, IL

Gregory S. Vistnes, Vice President, Charles River Associates, Washington, DC

Tracy Wertz, Deputy Attorney General, Antitrust Section, Office of the Attorney General, Commonwealth of Pennsylvania, Harrisburg, PA

- What are the causes of increased market power? To what extent can cross-market mergers lead to the exercise of market power?
- How have providers and payors addressed perceived imbalances?
- What are the implications for PHOs and geographic expansion?
- What is the impact on competition: cost, quality and access?

**2:45 pm – 3:00 pm
Break**

CONCURRENT SESSIONS

3:00 pm – 4:00 pm

**New Developments in
Accountable Care, Clinical
Integration, and the Messenger
Model: Addressing the Risks of
Provider Joint Contracting**

Mark L. Mattioli (Moderator), Post & Schell, P.C., Philadelphia, PA

Robert Canterman, Staff Attorney, Federal Trade Commission, Washington, DC

James E. Hartley, Holland & Hart LLP, Denver, CO

Julie S. Marder, Latham & Watkins LLP, Chicago, IL

- Practical considerations for providers engaged in joint contracting

Leslie C. Overton, Partner, Jones Day, Washington, DC

Phillip A. Proger, Partner, Jones Day, Washington, DC

Richard D. Raskin, Partner, Sidley Austin LLP, Chicago, IL

Matthew J. Reilly, Assistant Director, Mergers IV, Bureau of Competition, Federal Trade Commission, Washington, DC

Douglas C. Ross, Chair, Firmwide Litigation Practice, Davis Wright Tremaine LLP, Seattle, WA

Fiona Schaeffer, Partner, Weil, Gotshal & Manges LLP, New York, NY

Seth C. Silber, Of Counsel, Wilson Sonsini Goodrich & Rosati, Washington, DC

Toby G. Singer, Partner, Jones Day, Washington, DC

Joshua H. Soven, Chief, Litigation I Section, Antitrust Division, U.S. Department of Justice, Washington, DC

Jeffrey S. Spigel, Partner, King & Spalding LLP, Washington, DC

Scott J. Thomas, Vice President, NERA Economic Consulting, Los Angeles, CA

Martin J. Thompson, Partner, Manatt Phelps & Phillips, LLP, Costa Mesa, CA

Jennifer A. Thomson, Deputy Attorney General, Antitrust Section, Office of the Attorney General, Commonwealth of Pennsylvania, Harrisburg, PA

Willard K. Tom, General Counsel, Federal Trade Commission, Washington, DC

Mark R. Ustin, Partner, Manatt Phelps & Phillips, LLP, Albany, NY

Christine A. Varney, Assistant Attorney General, U.S. Department of Justice, Antitrust Division, Washington, DC

Gregory S. Vistnes, Vice President, Charles River Associates, Washington, DC

Tracy Wertz, Deputy Attorney General, Antitrust Section, Office of the Attorney General, Commonwealth of Pennsylvania, Harrisburg, PA

Christine White, Partner, Crowell & Moring, New York, NY

Lawrence Wu, Senior Vice President, NERA Economic Consulting, San Francisco, CA

- Structuring a provider organization to avoid antitrust pitfalls
- The role of accountable care and clinical integration in improving healthcare quality and efficiency
- The importance of market power to the antitrust analysis
- More than 37 complaints filed by the FTC since 2000 against provider contracting networks

Hot Issues in Pharmaceutical Antitrust – From Pay-for-Delay Settlements to Product Hopping

Seth C. Silber (Moderator), Wilson Sonsini Goodrich & Rosati, Washington, DC
Sourav Chatterjee, Senior Consultant, NERA Economic Consulting, Los Angeles, CA
D. Bruce Hoffman, Hunton & Williams LLP, Washington, DC
Michael B. Kades, Attorney Advisor to Chairman Leibowitz, Federal Trade Commission, Washington, DC

- Status of pay-for-delay patent settlements in the courts, at the FTC, and in Congress
- Current FTC enforcement priorities concerning pharmaceutical markets, including its retrospective review of Ovation/Lundbeck
- Recent case developments challenging pharmaceutical conduct, including product-hopping, loyalty discounts, and citizen petitions
- Economic analysis of pharmaceutical markets, and the importance of innovation markets and potential competition theories

4:00 pm – 4:15 pm

Break

CONCURRENT SESSIONS

4:15 pm – 5:15 pm

Anatomy of an Information Exchange Healthcare Antitrust Case

Martin J. Thompson (Moderator), Manatt Phelps & Phillips, LLP, Costa Mesa, CA
Robert E. Bloch, Mayer Brown LLP, Washington, DC
Margaret E. Guerin-Calvert, Vice Chairman and Senior Managing Director, Compass Lexecon, Washington, DC

- Information sharing by providers through professional associations: benefits and risks; per se versus rule of reason
- Key antitrust and class certification issues in an information exchange case

- Key economic and evidentiary issues in a wage-fixing conspiracy case
- Practical guidance for those who participate in surveys and information exchanges

Joint Ventures under Copperweld and American Needle: When Does a Healthcare Transaction Create a Single Entity?

Roxane C. Busey (Moderator), Baker & McKenzie LLP, Chicago, IL
Patrick S. Cross, Baker & Daniels LLP, Indianapolis, IN
Robert W. McCann, Drinker Biddle Reath LLP, Washington, DC,

- What the Copperweld doctrine does and does not protect
- Why is it important to know if a joint venture is protected?
- Why is the Supreme Court's forthcoming decision in American Needle important?
- What are the key indicia of a single entity?
- Practical advice for joint venture creation

5:30 pm – 6:30 pm

Conference Reception

TUESDAY, MAY 25, 2010

7:00 am – 4:30 pm

Registration and Information Desk Open

7:00 am – 9:00 am

Continental Breakfast

GENERAL SESSION

8:00 am – 9:15 am

Is it David v. Goliath or Goliath v. Goliath? Consolidation among Payors and Providers

David A. Argue, PhD (Moderator), Corporate Vice President, Economists Incorporated, Washington, DC
Henry S. Allen, Senior Attorney, Advocacy Group, American Medical Association and Adjunct Professor, Northwestern University Law School and Kellogg School of Management, Chicago, IL
Stephanie Kanwit, Special Counsel, America's Health Insurance Plans, Washington, DC
Jeffrey G. Micklos, Vice President and General Counsel, Federation of American Hospitals, Washington, DC

- The state and pace of consolidation within payor, hospital, and physician markets
- The vigor of federal antitrust enforcement and

the role of state enforcers

- "Power buyer" (or "power seller") counterweights
- Arguments favoring consolidation: clinical integration, accountable care organizations, and other efficiencies
- Is there a role for payor-provider vertical integration?

GENERAL SESSION

9:15 am – 10:30 am

Views from Federal and State Antitrust Enforcers

Toby G. Singer (Moderator), Jones Day, Washington, DC
James A. Donohue, III, Chief Deputy Attorney General, Office of the Attorney General, Commonwealth of Pennsylvania, Harrisburg, PA
Markus Meier, Assistant Director, Health Care Services & Products Division, Bureau of Competition, Federal Trade Commission, Washington, DC
Joshua H. Soven, Chief, Litigation I Section, Antitrust Division, U.S. Department of Justice, Washington, DC

- Update on current enforcement initiatives
- Priorities for future enforcement
- Federal-state coordination
- Practical advice for healthcare providers and healthcare companies

10:30 am – 10:45 am

Break

GENERAL SESSION

10:45 am – 12:00 noon

Exclusionary Practices in Healthcare: Foreclosure or Competition-Enhancing?

William E. Berlin, Ober, Kaler, Grimes & Shriver, Washington, DC
Scott J. Thomas, Vice President, NERA Economic Consulting, Los Angeles, CA
Willard K. Tom, General Counsel, Federal Trade Commission, Washington, DC

- Types of concerted and unilateral practices: exclusive contracting, bundling, tying, group boycotts, refusal to deal, economic credentialing, and others
- Legal issues raised by these practices under Sections 1 and 2, including unilateral versus concerted conduct, per se versus rule of reason, pleading the proper relevant market and competitor-parties





- Factors for analyzing these practices: foreclosure, price and quality effects, and procompetitive justifications
- Federal agency perspectives
- Examples and lessons learned from *Little Rock*, *Heartland*, and other recent cases

12:00 noon – 1:00 pm

Lunch on Your Own

CONCURRENT SESSIONS

1:00 pm – 2:00 pm

Tying and Bundling in the Sale of Healthcare Services and Products

Leslie C. Overton (Moderator), Jones Day, Washington, DC

Cory S. Capps, PhD, Bates White, LLC, Washington, DC

David Marx, Jr., McDermott Will & Emery LLP, Chicago, IL

- The evolution of the law of tying and bundling, from *Jefferson Parish* to *Massimo* and *PeaceHealth* – the Circuit matters
- Who are the potential plaintiffs in tying and bundling cases and what do they have to prove?
- Who are the target defendants and how can they minimize their risk of litigation and liability?
- The economic analysis of tying and bundling – what are the potentially relevant economic issues?

Advanced Session on Health Insurance Transactions

Fiona Schaeffer (Moderator), Weil, Gotshal & Manges LLP, New York, NY

Joseph M. Miller, Assistant Chief, Litigation I Section, Antitrust Division, U.S. Department of Justice, Washington, DC

Monica Noether, Executive Vice President, Chief Operating Officer, Charles River Associates, Boston, MA

Jennifer A. Thomson, Deputy Attorney General, Antitrust Section, Office of the Attorney General, Commonwealth of Pennsylvania, Harrisburg, PA

- In-depth discussion of antitrust implications of mergers of health insurance companies
- Economic considerations for analyzing health insurance mergers
- Federal and state enforcement initiatives
- What to expect in the future

2:00 pm – 2:15 pm

Break

CONCURRENT SESSIONS

2:15 pm – 3:15 pm

The FTC and DOJ are Your Friends

Karen G. Bokart (Moderator), Wiley Rein LLP, Washington, DC

Barry Joyce, Trial Attorney, Litigation I Section, Antitrust Division, U.S. Department of Justice, Washington, DC

David Narrow, Staff Attorney, Federal Trade Commission, Washington, DC

Christine White, Crowell & Moring, New York, NY

Providers, payors, and other healthcare entities often think of the FTC and DOJ as purely enforcement oriented agencies. But the Agencies also offer valuable, concrete guidance to healthcare entities in the form of advisory opinion or business review letters that provide an antitrust review of proposed network joint ventures, mergers, or other courses of action.

The Agencies also make resources available to review, and where appropriate to investigate, concerns that a business client is a victim of apparently unlawful collusion or anticompetitive activity. This program will answer the following questions:

- When is it appropriate to seek an advisory opinion or business review letter? What information should you be prepared to share with the government? What does the review process entail? What are the pros and cons of seeking an advisory opinion or business review letter?
- When does it make sense to seek government antitrust enforcement? What information should you be prepared to share with the government? What should be considered before raising a complaint with the FTC or DOJ? Is “educating” the wrongdoer ever a reasonable alternative to filing a complaint?
- What other sources of guidance are available from the agencies?

Mergers and Acquisitions Among Healthcare Providers in 2010: Are There New Rules for the Game?

Matthew J. Reilly, Assistant Director, Mergers IV, Bureau of Competition, Federal Trade Commission, Washington, DC

Jeffrey S. Spigel, King & Spalding LLP, Washington, DC

Lawrence Wu, Senior Vice President, NERA Economic Consulting, San Francisco, CA

- Revisions to the Horizontal Merger Guidelines and their implications for hospitals,

physicians, and providers of outpatient clinical services

- Issues in identifying transactions for second requests
- Merger simulation and its use in hospital merger reviews as a way to assess the likely competitive effects
- The viability of the failing/flailing company defense

3:15 pm – 3:30 pm

Break

CONCURRENT SESSIONS

3:30 pm – 4:30 pm

Use of Section 5 for Effective Healthcare Antitrust Enforcement

Susan S. DeSanti (Moderator), Director, Office of Policy Planning, Federal Trade Commission, Washington, DC

David Balto, Senior Fellow, Center for American Progress, Washington, DC

Mark J. Botti, Akin Gump Strauss Hauer & Feld LLP, Washington, DC

- Are there anticompetitive practices in healthcare that cannot be reached under Sections 1 and 2?
- Should Section 5 be used if Sections 1 or 2 are not available?
- Are there analogies to healthcare situations from prior FTC Section 5 cases, such as N-Data and Intel?
- Can Section 5 be used to address anticompetitive uses of healthcare regulations?
- What should be the limits on using Section 5 in healthcare?

ETHICS SESSION

At the Heart of the Matter: Issues in Joint Representation

Andrew J. Demetriou, Fulbright & Jaworski LLP, Los Angeles, CA

Antitrust lawyers are often in the position of acting for multiple parties with interests in a matter, including HSR filings, investigations and joint defense arrangements in litigation. This program will examine the ethical issues that arise in the context of these types of joint representations through the prism of case studies.

4:30 pm

ADJOURN

CONFERENCE INFORMATION

REGISTRATION

Register by **MAY 3, 2010** to receive the **Early Registration Discount**. You can register by fax or US Mail and registration will be accepted only when accompanied by a check, money order, Visa, American Express or MasterCard information. Registrations will not be held without payment. Space is very limited, and the conference is expected to sell out, so please be sure to register as early as possible!

Fax: 312/988-5814
US Mail: American Bar Association
Health Law Section (MS 18.1)
321 N. Clark Street
Chicago, IL 60654

ON SITE REGISTRATION

Please call 312/988-5532 by **MAY 17, 2010** to ensure space availability. On site registration will only be accepted when accompanied by check, money order, Visa, American Express, or MasterCard information.

CANCELLATION POLICY

Tuition, less a \$50 handling charge for each registration, will be refunded upon written cancellation received no later than **MAY 10, 2010**. Cancellations received after this date cannot be refunded but substitutions are encouraged. The ABA reserves the right to cancel any program and assumes no responsibility for personal expenses.

REGISTRATION FEE

Your payment will cover admission to the program, continental breakfasts, coffee breaks, conference luncheon, conference reception, and one set of program course materials in the format of your choice.

HOTEL INFORMATION

The conference will be held at The Ritz-Carlton, Pentagon City, 1250 S. Hayes Street, Arlington, VA 22202. The Ritz-Carlton Pentagon City, is approximately two miles from Ronald Reagan National Airport. If traveling by Metro, use the Pentagon City Metro stop. Please call the hotel directly at 703-415-5000 (or 1-800-241-3333) by **MAY 3, 2010** to reserve your room. Room rates are \$239 single/double.

AIRLINE INFORMATION

Discounted airfares are available from ABA Orbitz for Business including ABA negotiated discounts on American and United. To book online, go to www.abanet.org/travel > click under the Orbitz for Business logo at the top of the page > click on the appropriate link in the Self Paid Travel box. For assistance with online or offline reservations, call toll free 1-877-222-4185.

Discounts can also be obtained directly from the carrier. American: Call 800-433-1790 code A1210SS; United: Call 800-521-4041 code **578IG**.

CLE CREDIT

CLE has been requested from every state with general mandatory continuing education requirements for lawyers. States with lawyer specialization programs have not been requested to certify this conference. For information on the approved number of credit hours to be awarded by each state, please contact the ABA Health Law Section at 312/988-5532 **after MAY 3, 2010**.

TAX DEDUCTION FOR EDUCATIONAL EXPENSES

An income tax deduction may be allowed for educational expenses undertaken to maintain or improve professional skills. This includes registration fees, travel, meals, and lodging expenses. (See Treas. Reg. 1.162-5) (*Coughlin vs. Commissioners*, 203 F.2d 307).

SERVICES FOR PERSONS WITH DISABILITIES

If special arrangements are required for an individual with a disability to attend this program, please submit your request in writing to the Health Law Section, American Bar Association, 321 N. Clark Street, Chicago, IL 60654 or fax to 312/988-5814.

DRESS CODE

Business attire, including business casual, is appropriate for all meetings, CLE programs and social events during the program.

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CONFERENCE LUNCHEON

Your registration fee includes tickets to the Monday Conference Luncheon.

To assist us in our planning, please let us know if you plan to attend.

I will attend the Monday Conference Luncheon

Please share any dietary restrictions: Vegetarian Kosher Lactose Intolerant
 Food Allergies _____

REGISTRATION FEES:

General Attendees: \$875 Early Registration (must be postmarked/faxed and paid by May 3, 2010)
 \$975

Members: ABA Health Law Section*, ABA Antitrust Law Section, AHLA
 \$775 Early Registration (must be postmarked/faxed and paid by May 3, 2010)
 \$875

Please indicate to which of the following you belong:

ABA Health Law Section ABA Section of Antitrust Law AHLA

Government/Academic: \$275 Early Registration (must be postmarked/faxed and paid by May 3, 2010)
 \$375

Law Students: \$75

\$50 Please enroll me as a member of the Health Law Section. I understand I must be a member of the ABA to join the Section.

* Take advantage of this rate today when you sign up for ABA Health Law Section membership!

You must be a member of the ABA to join an individual Section.

COURSE MATERIALS:

One set of course materials (either Paperback Book or CD ROM) is included in the registration fees. Please indicate your preference below. For an additional charge of \$25, attendees can receive both versions of the materials. *Please note that those registrants not indicating a preference will receive materials in the CD ROM version only.*

- Complimentary**—2010 Antitrust in Healthcare Conference **Paperback Book**
 Complimentary—2010 Antitrust in Healthcare Conference **CD ROM**
 \$25—2010 Antitrust in Healthcare Conference **CD ROM** and **Paperback Book**

Unable to Attend and Wish to Purchase the Materials?

Conference materials will be available after May 21st at the ABA on line Bookstore; please visit www.ababooks.org to purchase your conference materials. Upon request, section staff will gladly send you a reminder e-mail when materials are available at the bookstore.

TOTAL FEES: \$ _____

METHOD OF PAYMENT:

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