AHLA

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Transcript

Expert Insights: 2018 Health Care Antitrust Developments and What to Look For in 2019

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John D. Carroll (Carroll): Hello everyone, welcome to the American Health Lawyers Association first ever health care Antitrust podcast. We are brought to you today by First Chesapeake Group. The First Chesapeake Group was established in 1987 to provide consulting services to senior executives, lawyers, and government officials in the health care industry who are responsible for leading their organizations in today's complex and changing environment.

My name is John Carroll, I'm a partner at King & Spalding in the Antitrust Practice group here in Washington, DC and I am joined by Alexis Gillman, Alexis could you please introduce yourself?

Alexis J. Gilman (Gilman): Hi, I'm Alexis Gillman and I'm a partner in the Antitrust Group at Crowell & Moring in Washington, DC.

Carroll: Thanks Alexis. Alexis and I are excited to be recording the first ever Health Care Antitrust Practice Group Podcast. This year we are going to start us off on the first one by providing an overview of top developments of 2018 in the health care antitrust world, roughly ranked from 10 to 1, although that was a challenge to put together, and then we're going to talk about what's in store for 2019 in terms of the top developments we think will be occurring in 2019, of course many of these are contingent on our federal governments reopening and the partial shutdown being concluded, so going to be a little bit speculative for a number of reasons.

2018, before we get started, was a really big year, and we think that there's a lot still coming out. A number of themes here in the health care antitrust arena consisted with things generally in the antitrust world, which is that transactions and conduct have been under significant scrutiny not just by the federal government but by various state AG's that of course in the litigation world with private plaintiff. Without further ado, we're going to go ahead and get started. We hope you enjoy today's podcast and we appreciate any feedback from folks who download and listen to this. Our goal is to make this both

informative and accessible, and by that I mean not just to antitrust lawyers but certainly to health care lawyers and also of course to non-lawyers as we continue to roll out a number of new initiatives at the Antitrust Practice Group of AHLA and hopefully to keep up with the times and provide our subscribers and those who may be interested in the group with new and exciting information in our world.

Starting off with development number 10 in 2018, last but not least of the FTC the Federal trade commission, their pre-merger notification office issued new guidance on reporting requirements for nonprofit entities. In November of last year the FTC made some changes to their Hart-Scott-Rodino reporting rules. The Hart-Scott-Rodino statute, or act, is that act that requires parties to file notification with the FTC and DOJ when putting together a transaction that meets certain requirements both in terms of the size or value of the transaction but also the structure of that transaction. Previously, before this change, the parties obligation to file under the HSR Act turned on whether the combination would result in a change of control of the Board of Directors of either party. However, as our audience well knows, hospital affiliations are often structured to form a new corporate parent for both hospitals meaning that board control may not change really at all.

So as a result, Antitrust practitioners had previously assumed that hospital affiliations structured this way that did not involve a change of beneficial ownership, consequently no HSR filing would be required. And so recognizing this, and recognizing that potentially reportable combinations would occur, even when there's no change of control of the board, the PNO announced that beginning in the end of October of last year it would look at non-profit combinations of hospitals and outside of hospitals, focusing on whether one party had gained beneficial control over the assets of the other party, thus increasing, materially perhaps, the number and type of transactions that now would require HSR filings, thus requiring of course potentially a 30 day waiting period and affirmative notice to the government before they could close their transactions. Alexis?

Gilman *[4:55]*: Thanks John. Development 9, Seamen's settles with UNC court certifies class. A hot topic in the interest bar generally is so called no-poach agreements. These are agreements between two companies not to solicit, hire, or compete for each other's employees. In 2018 we saw some no-poach developments in the health care context. As background, in 2015, a Duke radiology professor, Danielle Seaman, filed a class action against Duke University, the dean of the University of North Carolina medical school, and others alleging that Duke and UNC had agreed not to poach each other's medical faculty. Seaman alleged that in response to her inquiries about a job at UNC she was told that the Duke and UNC med school deans had agreed not to recruit each other's medical faculty.

The defendant's motion to dismiss was denied by a district court and their attempt to immediately appeal to the fourth circuit was denied as well. In January 2018 UNC settled. UNC agreed among other things not to engage in any agreements that restrained hiring or recruiting of employees and it agreed to cooperate with the plaintiff's

case against Duke. In February 2018, the district court certified a class of 5,000 plus faculty members with medical employment at these schools. That case is ongoing. John?

Carroll *[6:19]*: Thanks Alexis. Now we're on to development number 8 of 2018 in health care antitrust. The FTC charged and secured a consent order against a therapist staffing agency and its competing therapist staffing agency for price fixing over therapist wages. Interesting here for a number of reasons, basic facts are that at the end of July the FTC announced the settlement with Your Therapy and a competing staffing agency for price fixing. According to the FTC's compliant, the two owners, who are competitors, agreed to lower their therapist pay rates to the same level and they also invited several other competitors to lower their rates in an attempt to keep therapists from switching to staffing companies that paid more. The FTC's complaint alleges that they entered into the agreement after learning that a home health agency planned to significantly lower rates to therapist staffing companies for therapist services. So interesting here, there is of course the ability and jurisdiction had by the DOJ to bring criminal antitrust actions, the DOJ has that jurisdiction uniquely. However, in the civil side, for things like invitations to collude and civil price fixing, the FTC is able to bring actions like this and this one serves as a reminder that no poach agreements, agreements regarding pricing, particularly in the health care arena are receiving significant scrutiny and practitioners should take care advising the client on whether they can be engaging in these types of agreements and similar ones. Alexis?

Gilman *[7:57]*: Development 7, Mass AG settles with Beth Israel and Lahey. 2018 also saw a large multi hospital merger approved in Massachusetts, subject to, however, settlement with the state attorney general which then was followed by the FTC decision to close the investigation. In November, Mass AG Maura Healey approved the combination of Beth Israel Deaconess, Lahey Health System, and other area health care providers. As a condition of that approval, though, the parties agreed among other things to cap price increases for seven years and make over $70 million in community health care investments. A couple interesting things about this matter, first, back in 2015, attorney general Healey did not support a similar agreement negotiated by her predecessor AG Martha Coakley that would have settled concerns about the Partners Healthcare, Southshore Hospital, Hallmark Health System merger. After her election General Healey said she would challenge that Partners, Southshore, Hallmark merger, the Massachusetts state court did not approve the settlement. Ultimately the court did reject the settlement and the merger was abandoned. Much different results here. The second interesting thing I think is the FTCS response to the settlement here. The FTC's repeatedly expressed concern with so called behavioral merger remedies like the one agreed to here. The FTC thinks that such remedies are difficult to craft, implement and monitor plus they usually expire. In its closing statement the FTC noted its concern with behavioral remedies and said that its decision to close the investigation was "not an easy one" and "a close call." The FTC also said, or perhaps even warned, that this merger might be a good opportunity to retrospectively study the effects of the merger. John?

Carroll *[9:48]*: Thanks Alexis. Moving on to development number 6 in health care antitrust for 2018. Back in April of 2018, chief judge William Smith denied summary judgement to Blue Cross Blue Shield of Rhode Island on all counts in an antitrust case brought by plaintiff Steward Health Care System which allowed the case to proceed to trial. The plaintiff, Steward Health Care System, had alleged that Blue Cross Blue Shield had unlawfully blocked Steward from entering the Rhode Island health care and health insurance markets by thwarting its acquisition of Landmark Medical Center, which was, or is, a Rhode Island community hospital that was in some financial trouble. Steward had sued Blue Cross and some allegations included that Blue Cross had illegally refused to deal on reasonable reimbursement rates, with the intention of stopping Steward from entering the Rhode Island market. There was a really interesting, lengthy opinion from the judge that seemed to reverse what he had indicated he would do previously, in denying summary judgment, and the case would have proceeded to trial but for the fact that the parties settled the matter a couple of months after this opinion came out. Thus we won't get the benefit of having this go to trial but the parties decided to settle it. Nevertheless, we suggest that those who are interested in refusal to deal actions and in private antitrust litigation, take a look at this opinion because there is a lot going on there, it's a pretty detailed analysis. Alexis?

Gilman *[11:25]*: Development 5 California sues Sutter. A case in California may tell us about the antitrust implications of anti-steering and anti-tiering provisions in contracts between large hospital systems and payers. In March 2018 California sued Sutter Health in state court alleging that Sutter was requiring health plans to include terms in their contracts that allegedly stymied competition and resulted in higher health care prices. In particular, the complaint alleges that Sutter, which was described as a "must have provider" in certain parts of California, prevented payers from steering patients or tiering their networks to prevent or penalize payers from directing patients away from Sutter to lower cost providers.

The complaint also alleged that Sutter would only negotiate with payers on an all or nothing basis, meaning that a payer had a contract with all Sutter providers or none, and that the Sutter providers all had, all the contracts with Sutter providers had a single expiration date. So of course, some contesting allegations in fighting this suit. I think in addition to the mayor's question about whether and when anti-steering or anti-tiering provisions can be unlawful, the other interesting aspect of this case is the remedy that California is seeking. Its asking for disgorgement of profits, that Sutter be required to stagger the terms of their hospital, physician and other provider contracts, and asking that Sutter create separate contract negotiating teams for its hospitals, physicians, and other providers. So, case to watch. John?

Carroll *[13:05]*: Thanks Alexis. Counting down further to number four, two vertical mergers that were cleared by the Department of Justice and FTC. CVS-Aetna, and Cigna-Express Scripts. There's been, of course, a lot out in the atmosphere about how aggressive the agencies are with respect to transactions. I'm sure folks remember that not too long ago the DOJ successfully blocked what was considered a complete reorganization of the health insurance industry involving two mergers of the major

health insurance companies. Out of the wake of that we see transactions being signed between CVS and Aetna and between Cigna and Express Scripts. The CVS-Aetna deal is subject to certain conditions, but both deals being cleared and these will go a long way, I think, in reorganizing in many important ways the health care industry and it will be interesting to see how the industry continues to evolve, not just from an antitrust perspective, frankly, or even a legal perspective but just from an overall industry perspective as health care continues to change and as part of that, of course, as the antitrust laws and the enforcers tries to keep up with all that's going on in the industry. Alexis, back to you for development number three.

Gilman *[14:26]*: Yeah, DOJ settles with Atrium. In another case, which a close cousin of the Sutter case that I mentioned, DOJ and the state of North Carolina sued Atrium Health, which was previously doing business as Carolinas Healthcare System. In 2016, the DOJ and North Carolina alleged that Atrium, which was said to have a 50% share of the in-patient hospital service market in the Charlotte area, had imposed anti steering and anti-tiering provisions in payer contracts, sound familiar? In exchange for some modest price increases. The government also alleged that Atrium prevented payers from providing truthful information to consumers about Atrium prices and quality. One of Atrium's defenses in response to the allegations was it was merely protecting the benefits of the bargain that it negotiated with payers, in other words, these terms really just prevented payers from obtaining discounts from Atrium based on certain patient volume expectations, only to have the payers turn around and steer patients away from Atrium. After the district court denied Atrium's motion for judgement on the pleadings, the parties ended up settling the case in November 2018. That settlement bars Atrium from enforcing or seeking anti-steering restrictions in its contracts with payers. John?

Carroll [*15:45]*: Thanks Alexis. Now we're down to number two. But quickly before I do that, I think I may have misspoken when speaking about CVS-Aetna and Cigna-Express Scripts by mentioning the FTC. So hopefully our friends at DOJ will forgive me, both of those cases, those transactions, were reviewed by the Department of Justice and neither was reviewed by the Federal Trade Commission.

So, back to development number two, a judge ruled against Blue Cross Blue Shield in a market allocation MDO. A note for our listener who are subscribers, you will have gotten in January an AHLA email bulletin describing this case, and that's just one of the many benefits of becoming a member of the Antitrust Practice Group is you get really great content that describes what's going on in the health care antitrust world. For those of you who are not members and didn't receive the bulletin, quick description for you, back in December 12th of 2018 the 11th circuit issued a brief order that denied a request for interlocutory review by the Blue Cross Blue Shield association, an ongoing antirust litigation over territorial allocation along its 36 constituent companies, which you all know as Blues.

The Blues appeal came from a 2018 district court ruling that granted partial summary judgement on the standard of review, meaning whether per se or rule of reason, to the

plaintiffs, which determined that the Blue Cross's agreements should be reviewed for antitrust violations under the per se illegality standard. So, this has been enough of a development, and this case is enough of a case, where we could have multiple podcasts just talking about this, because if the plaintiffs win, assuming this does continue to go on to trial, this goes to the core of the operations of Blue Cross Blue Shield, and that is, how they do business across their associations. So, while this was just a brief one of denying or request for review, it was not accompanied by an opinion, it makes certainly our top ten and comes in at number two given the implications for this case as it moves forward. And with that, Alexis will take us home with the top development of 2018 in health care antitrust.

Gilman ***[18:05]***: Drumroll please, concerns about consolidation. 2018 brought increased scrutiny in health care consolidation from the Trump administration, the media, and other quarters. Just to mention a couple, one the Trump administration issued a report on "Reforming America's Healthcare System through Choice and Competition." In 2017, an executive order called for this report by HHS and other agencies about various issues, including the extent to which state and federal laws, regulations, and policies impeded health care competitions. It also recommended actions that states and the federal government could take including by limiting excessive consolidation. And the report that was published last month the recommendations included 1. Continued vigilance by the antitrust agencies to prevent anti-competitive transactions, 2. That states repeal or scale back certificate of need, CON, statutes, which the report blamed for impeding entry by new competitors, and 3. That states discontinue certificates of public advantage, or COPA laws, which the report says shielded anti-competitive provider mergers from antitrust scrutiny.

And second, just last month, in November, the New York Times published a lengthy story about hospital consolidation, one of the many news stories on [*inaudible*]. The Times, which it engaged academic researchers that studied 25 mergers from 2010 to 2013 wrote that hospital mergers have "essentially banished competition and raised prices for hospital admissions in most cases" rather than resulted in savings for consumers. The report did note, almost parenthetically, that large systems acquisition of struggling hospitals can provide critical capital investment and management skills to the acquired hospital. That's our top development for 2018, which seems like its not going to end any time soon. With that I'll turn it over to John.

Carroll ***[20:12]***: Thanks Alexis. So now let's talk a little bit about what we think is going to happen this year. We're 22 days in, the government remains closed which goes to the lack of development to some extent at the FTC and DOJ, although of course essential staff are working hard on a number of matters and litigations and as former FTC lawyers, both Alexis and I, certainly feel sympathetic to those having to work without pay at this time and complete and fulfill their obligations under the mission of both agencies. That being said, a lot of what we're looking at in terms of predictions for 2019 and what we recommend we look for in 2019 is really developments on a number of cases and enforcement decisions by both agencies. So, we're going to go through these relatively quickly, many of them, given that we only have a few minutes left.

Starting off with the first one, Fresenius-NxStage, we're waiting on an FTC enforcement decision there. This was a deal that's taken quite some time, it's a $2 billion transaction between two dialysis providers, NxStage being an at home dialysis company. I think the parties had hoped to have a decision potentially closed by February of this year, we will see what happens given the shutdown. But that is something that we will be looking for, particularly if there is any corresponding analysis or guidance that we can review that comes out from the FTC.

Gilman *[21:45]*: ALJ decision in *in re:* Ottobock. We're also waiting for a decision from an administrative law judge in the FTC's challenge to a medical device merger. In December 2017, the FTC challenged the consummated merger of two prosthetic knee manufacturers, Ottobock and Freedom Innovations. As in many mergers, one of the key issues in the case is product market definition. The FTC alleges that the merger will harm competition in the market for micro-processor knees, which, as I understand it, use a micro-processor to adjust the stiffness and position of the knee joint in response to a user's movement and ground condition. The merging parties, on the other hand, argue the market is much broader and includes other types of prosthetic knees. The litigating parties completed post trial briefing at the end of November 2018, and we're awaiting a decision from the ALJ which has been delayed by the government shutdown. This will be the first ALJ decision in a health care merger case since an ALJ decision in 2011, Walking ProMedica Health Systems acquisition of St. Luke's Hospital.

Carroll *[22:53]:* Thanks Alexis. The third one is we're waiting for another FTC/ALJ decision but this time a dental distributor group purchasing case. In February of last year, the FTC filed a complaint against the country's three largest dental supply companies. The FTC alleged they violated the antitrust laws by conspiring to refuse to provide discounts to, or even to otherwise serve, buying groups representing the dental practitioners. It will be interesting to see what the ALJ decision looks like here and you will certainly be getting some analysis from the AHLA Antitrust Practice Group when that decision is issued. Alexis?

Gilman *[23:32]*: 8th circuit decision in FTC v. Sanford Health. In 2019 we could expect a decision from the 8th circuit in the appeal of the FTC's successful preliminary injunction action blocking Sanford Health's acquisition of Mid Dakota Clinic, a multi-specialty physician group in the Bismarck, North Dakota area. At the end of 2017, a district court entered a preliminary injunction blocking the proposed transaction. The merging parties appealed to the 8th circuit. While there hasn't been a provider merger case decided in the 8th circuit since 1999, the last case decided there was a decision by the 8th circuit to reverse a district court decision in joining a hospital merger in Poplar Bluff, Missouri. So, the 8th circuit may offer the best opportunity for health care providers to break the FTC's win streak in litigated provider mergers. On the other hand, if the 8th circuit affirms the decision in the FTC's favor, the FTC will have secured favorable decisions in provider mergers from the 3rd, 6th, 7th, 8th and 9th circuits in the last 5 years. John?

Carroll *[24:40]:* Thanks. And I can't help but point out that Alexis had something to do with that win streak as he headed the division of the FTC that oversees provider mergers for a number of years. Moving on to our sixth thing to look for in 2019 in health care antitrust, another FTC enforcement decision that we're eagerly anticipating and that is in United-DaVita. That transaction, it will be interesting to see whether the FTC does anything there or just clears that transaction without conditions. Again, stay tuned, and to the extent the FTC does do anything by way of an enforcement action you will certainly be hearing from the AHLA Antitrust Practice Group. Alexis back to you for number 5.

Gilman *[25:25]*: Number 5, competition hearings. In June last year the new FTC chairman, Joe Simons, announced a series of hearings on competition in consumer protection issues, and it's going to use those hearings to send the FTC short and long term enforcement policy agenda and perhaps identify areas where the FTC might adjust its enforcement policy, and perhaps the industry's process and other areas that might warrant additional study. The hearings in general in scope have had somewhat of a tech focus but the FTC did solicit public comments about competition issues and specific industries such as health care and one comment that was submitted was one by the American Hospital Association which said that the FTC's approach to viewing hospital transactions is "over broad, does not properly credit the many pro-consumer benefits of hospital transactions and ignores key realities in the marketplace." So, while I'm not expecting big changes to how the FTC approaches health care provider mergers it will be interesting to see if the FTC does adjust any changes to its broader enforcement approach that may affect health care, so stay tuned. John?

Carroll *[26:44]*: Thanks Alexis. We're now on to our next development, which is any decisions or updates in the Washington-CHI Franciscan case. In August of 2017, Washington Attorney General Bob Ferguson filed a federal lawsuit in the western district of Washington against CHI Franciscan. The Doctors Clinic and WestSound Orthopedics are seeking to undo what it alleges are unlawful agreements between and among those competitors that raise prices and decrease competition in an area of the state of Washington. We will see what happens. This is a reminder that there are actions taking place by the state, that health care antitrust is not just a matter, or does not just concern federal law enforcement. Alexis?

Gilman *[27:30]:* Returning to a case we mentioned earlier, California versus Sutter, that suit challenging Sutter Health's contracting terms made our list of top developments of 2018. Now that the DOJ and North Carolina's suit against Atrium is settled, if there is a decision or settlement in the Sutter case that is definitely going to be one of our top stories of 2019 to see how anti-tiering and steering provisions are treated there. John, take us home.

Carroll *[28:02]*: Thanks Alexis. So, we've got one left, which is, we think is number one, but again these are in no particular order so maybe it's just the last one we're covering, and that is congressional investigations and actions by congress more largely in the antitrust arena. There has been a lot of news about this, and this is

continuing our number one development that Alexis described for 2018, and that is that antitrust seems to be, for lack of a better description, in the news and trending. And we saw with the democratic majority coming into the house, they put forth what they call a better deal plan and in that antitrust featured very prominently. Antitrust has certainly been a part of political platform for both parties in the past, but this is unique with respect to the attention that antitrust received, in particular in a congressional platform. I went back and looked at 2006 when the democrats took over, went back even to 1994 in the Contract for America when Republicans took over the congress during that midterm election, and this is the first time in a very long time that antitrust is featured so prominently. So, what does that mean? Well, it means that there are going to be investigations and hearings into a number of sectors, of course, and perhaps most notably the tech industry, but health care is not far behind, and that includes certainly pharmaceutical pricing. But also, as was mentioned in the HHS report that Alexis described, in the health care industry, in the provider industry, whether that's consolidations, COPA laws, other things that people are concerned are restricting competition.

There is also a broader, perhaps, less likely to be successful, attempt, to examine whether the antitrust laws are, according to some, outdated. Just recently we saw a number of Democrats saying that the Sherman Act and the FTC Act and other antitrust laws were enacted back when the most prominent industry in the United States was railroads. And to clamp down on certain trusts and other anti-competitive behavior. And there are questions out there about whether the antitrust laws have kept up with the times. We will not imply whether that's the case, because we do not have time on today's podcast, and it's a really interesting, difficult question. But just the fact that this is being discussed will have implications, if you're looking at doing a deal or if you're just in the industry and you get a subpoena from a house committee, that will perhaps drastically affect what your 2019 looks like for a number of reasons. As things progress, whether its hearings or potential changes to the regulatory landscape, by, among others, Senator Klobuchar of the Senate, we will be keeping a close eye on this and continuing to inform our subscribers and members of the Antitrust Practice Group.

With that, this was a great, fun podcast, thanks very much to Alexis for helping put this together and to the folks at AHLA. This was our first one, so please excuse if there was anything if you think we could have done better we look forward to your feedback. And I strongly encourage you not just to join the practice group but also to follow us on Twitter. We are @AHLA_Antitrust. We tweet almost daily, if not more than that, check out our tweets, tweet at us, let us know what you're thinking. There's a lot going on as we keep saying and so we look forward to engaging in a serious discussion with those who are interested in health care antitrust issues and we love doing this. We look forward to getting this podcast up and getting peoples feedback. And of course, to recording additional podcasts on a number of issues. Look forward to hearing from you and thanks again very much.