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Interview with Bruce Sokler, Member and Co-Chair of the Antitrust Practice at Mintz

This Bulletin is brought to you by AHLA's Antitrust Practice Group.

Bruce Sokler is a renowned antitrust practitioner with extensive experience in health care matters. He has undertaken cases spanning the full range of antitrust matters: government merger reviews and investigations, litigation and class actions, and cartel-related conduct issues. The health care industry is a particular focus for Bruce. In the course of his distinguished career, he has represented a number of health care providers, not-for-profits, and trade associations.

Bruce has been recognized annually by *Best Lawyers in America*, *Super Lawyers*, and *Chambers USA* for Antitrust: Washington, DC. *Chambers USA* wrote of Bruce that "he is one of those guys who understands the healthcare competition aspects very well." Bruce has served as the Managing Member of Mintz's Washington, DC office for 12 years and has been on the firm's Executive Committee for 13 years. He is a graduate of Princeton University and of Georgetown University.

AHLA thanks Bruce Sokler for participating in this interview and Lona Fowdur, Ph.D., (Economists Incorporated, Washington, DC and Vice Chair of Publishing for the Antitrust PG) for conducting the interview.

1. **You are a distinguished antitrust practitioner in the health care space. How did you start in this space and how has your health care antitrust practice evolved over the years?**

Health care antitrust has been an enforcement priority at the federal level for decades in both Democratic and Republican administrations. As a young associate, I was involved in the early 1980s in a HSR Second Request DOJ review of a proposed merger of two proprietary hospital chains, with overlaps in multiple geographic markets; the investigation was eventually closed. I joined Mintz shortly thereafter, and since Mintz has always had a premier health care practice, I have been able to use my health care antitrust skills on counseling, mergers, investigations, and litigations.

2. **You career has spanned a full range of antitrust cases including mergers, class actions, private litigation, government investigations, and cartel-related issues. What are some of the most noteworthy cases that you**

believe have shaped antitrust practitioners' thinking in the health care space in the past decade or so?

In the past decade, the FTC has successfully challenged a series of hospital and physician mergers around the country, obtaining favorable decisions in at least five courts of appeal. In doing so, they have obtained widespread acceptance of their analytical approach and of iterations of their economic modeling. The implications of those decisions have led to the need for practitioners to utilize those tools proactively to assist counseling parties who are contemplating transactions.

Another important line of cases are the federal and state challenges to anti-steering, anti-tiering contractual provisions in payer-provider contracts. The DOJ successfully challenged such provisions in North Carolina, and the state of California reached a very detailed consent decree with Sutter arising out of contracting practices. With the constant changes in the health care delivery system and payor approaches to reimbursements, these issues will continue to arise in different forms.

3. **What is the most memorable health care case you have personally worked on and why was it so?**

I'll take the liberty of mentioning three—two that ended favorably and one disappointingly.

The first was the antitrust class action challenge to the medical resident "Match" system. Medical students obtain a single offer of a residency from training hospitals after going through a match process in which the student lists his/her preferences and the hospitals list theirs, and an organization uses an algorithm that matches those preferences. This system was attacked as being anticompetitive and holding down payments to residents. Aided by a partial antitrust exemption for the "Match" passed during the litigation, we were able to get summary judgment on all claims.

The second was a private class action challenging limited pharmacy networks offered by payers. In an unusual result in any jury trial, we were able to obtain a directed verdict at the end of plaintiffs' case, a result that was affirmed by the First Circuit in an interesting opinion by Judge Boudin, a former head of the DOJ Antitrust Division.

The third, and disappointing one, was a simultaneous state and DOJ conduct investigation and HSR review of two proposed acquisitions by a leading Academic Medical Center. We thought we had a good resolution in negotiating a consent decree at the state level, which would have resolved all matters at both the state and federal levels. However, a state trial judge found the decree too complex and refused to enter it. After an election, a new state AG withdrew support for the settlement. The two transactions thereafter did not go forward (although the conduct investigation was closed).

4. **We are in the middle of the Covid-19 crisis now which will undoubtedly have far-reaching effects on the health care industry. How do you think the crisis might reshape the industry and what do you think the follow-on antitrust implications might be?**

I am answering these questions during the middle of the COVID-19 virus pandemic, which is putting enormous strains on the health care delivery system and particularly on providers. I think when the country comes out the other side, there will need to be a reexamination of the system and whether the current state of regulatory enforcement is consistent with policy needs and policy decisions that will be made in the post-coronavirus world.

One would expect that the effect of the pandemic on independent physicians, community hospitals, and alternative facilities will turn out to be economically challenging, if not devastating. There consequences will likely prompt proposed consolidations and acquisitions. The changes may well also make some of the current economic modeling obsolete, or, at a minimum, contestable.

Having said that, I recognize that some of the same types of questions about the appropriate extent of antitrust enforcement were raised after the passage of the Affordable Care Act, and the enforcement agencies at that time reaffirmed their antitrust enforcement roles. Nonetheless, I think we will be entering a stage where some rethinking is appropriate and desired. I also believe that effective advocacy and compelling rationales for transactions will make a difference. At the state level, you may well see legislative initiatives to displace antitrust enforcement with the development of a health care delivery system designed to meet a state's perceived needs.

5. **As merger scrutiny by regulators intensifies, do you believe there are specific arguments that resonate with regulators as to whether or not to issue a second request or a complaint against a merger?**

I don't think that there is a one-size-fits-all answer. As the FTC has suggested, it is best that you engage with staff early. The rationale for the transaction is important, and it is very important that the rationale comes from the parties and is reflected in the discussions (and 4(c) documents) leading to the transaction. I also think it is important to attempt to simultaneously convince the state regulators of the wisdom of the transaction. While not dispositive, the FTC staff is emboldened in situations where the state AG is also on board in challenging the transaction.

6. **As a litigator, how do you weave expert testimony into your legal argument when presenting to regulators, judges, and juries?**

We probably do not have space for the answer the question deserves. Let me just generalize that in health care antitrust matters, expert analysis and testimony is virtually mandatory. What I think is important is that the testimony/analysis is consistent with the rest of your story—the testimony of witnesses, what the documents suggest, the reality

on the ground. On the defense side, we are frequently arguing that the economic analysis is sterile and not predictive of the future; so far recently in the merger space, that argument has not been ultimately embraced by the courts.

7. **What advice do you have for junior attorneys who are starting out in the health care antitrust space?**

Do more than just learn the state of the law—although the AHLA and ABA Antitrust Section have excellent programs geared to help you do just that. You need to understand the fast-changing industry and ever-changing payment and reimbursement practices. Very few of the questions I am asked and situations I see have black and white answers. Nuanced judgment requires knowledge, leavened by experience. Work to get both.