

***Assisted Living and the Law — Antitrust Considerations in Long-Term Care*****Hosts: Cal Stein and Emma Trivax****Guests: Melissa O'Donnell and Michael Hartman****Recorded 8/23/24****Cal Stein:**

Hello and welcome to *Assisted Living and the Law*, the podcast series that discusses legal consideration within the long-term care sector. I am your host, Cal Stein, and I'm a litigation partner in the health sciences department at Troutman Pepper. I work with a broad variety of clients in the healthcare space in matters involving litigation and government investigations. I also do quite a bit of counseling work where I advise clients in advance so issues can be avoided altogether or resolved so they never even ripen into litigation or an investigation. In my career, I have represented a number of nursing homes and skilled nursing facility clients as well as executives at both. I am joined by my co-host, Emma Trivax.

**Emma Trivax:**

Hello all, and thank you for joining us today. I am an attorney in Troutman's health sciences department, and I practice transactional and regulatory law. I represent a wide range of healthcare providers, including of course, long-term care facilities. You'll often see me advising on multi-state licensure matters, HIPAA, fraud and abuse analyses, and large-scale mergers and acquisitions. In today's episode, we delve into the complexities of antitrust in the healthcare sector. We are so happy to welcome Melissa Hatch O'Donnell and Michael Hartman, who will be shedding light on the intricacies of antitrust considerations within the long-term care space. Melissa, Mike, would you like to introduce yourselves?

**Melissa O'Donnell:**

Sure, Emma. I so appreciate you and Cal having us on today. I'm a partner in Troutman's health sciences department. I litigate complex disputes involving pharmaceutical manufacturers and other health sciences companies, including a variety of antitrust and economic loss class actions. Between my time as an associate and a partner, I was an in-house attorney at Cigna and Express Scripts. That experience at the center of the healthcare ecosystem really helped me get some deep subject matter expertise that I used to better counsel my clients today. Plus, it helped me to think like a client.

**Mike Hartman:**

Thanks, Melissa, Emma, Cal, happy to be joining you today. I, like Melissa, am a partner in Troutman's health sciences department and spend most of my time working on massive class action antitrust cases. When I am not litigating competition law disputes, I'm usually advising clients on antitrust compliance, whether performing risk assessments, drafting and revising antitrust policies, or providing antitrust training for executives and lower-level employees. And in the antitrust world, it's always good to get ahead of risk. So that's a lot of what I spend my time doing for my clients.

**Cal Stein:**

Thank you all for being here today. And as Emma mentioned, and as our listeners can certainly guess from the illustrious bios of our two guests here today, in this episode, we are going to be talking about U.S. antitrust laws and specifically how they are currently impacting and may impact in the future nursing homes, skilled nursing facilities, and other long-term care facilities, including in the context of sales, acquisitions, mergers, and other types of transactions. But before we really get into those details, I think it makes sense to discuss some antitrust law basics.

**Emma Trivax:**

Let's start with some historical context here. As I understand it, for most of the past few decades at least, general principles of antitrust have been based on the premise that competition benefits purchasers or consumers by producing the best mix of quality goods and services at the lowest prices. Traditionally, the U.S. antitrust enforcers being the Federal Trade Commission or the FTC and the Department of Justice or the DOJ examine markets to determine whether actions promote or hinder consumer welfare in choosing among various quality and price options. The FTC enforces antitrust laws to ensure competitive forces stimulate the development of healthcare delivery systems desired by consumers. Through antitrust enforcement, the FTC seeks to eliminate anti-competitive restraints, allowing market forces to create an environment where innovative healthcare delivery can emerge and compete on their merits. I also understand that more recently, the FTC has begun to shift its focus away from the consumer welfare standard and to a more fairness-based approach. But since we're here to discuss long-term care, Melissa, can you give us a sense of the history of federal antitrust enforcement in the nursing home industry?

**Melissa O'Donnell:**

Sure, Emma. Historically, there have been relatively few antitrust enforcement actions targeting nursing home mergers or conduct. In fact, there have been very few antitrust cases focused on nursing homes at all, whether brought by private plaintiffs or the government. For instance, a survey of 394 healthcare antitrust lawsuits from 1985 to 1999, so a little dated, found that only four involved nursing homes, and that included both public and private suits covering conduct and mergers. Our follow-up research found very few additional antitrust cases involving nursing homes in the interim.

**Emma Trivax:**

That's really interesting. Can you elaborate on why there has been such limited enforcement?

**Melissa O'Donnell:**

In the merger space, one reason is that until recently, informal FTC interpretations related to the valuation of nursing home transactions suggested that those transactions should be treated similarly to real estate transactions, and that meant that combinations of nursing homes weren't viewed as reportable typically under the Hart-Scott-Rodino Act. The agencies weren't reviewing those transactions as often. Now, those interpretations related to reportability are changing, so over time there will likely be more filings that prompt agency review. There's a little speculation

here on my part, but I also think the industry has been less consolidated than hospitals. I know the 10 largest nursing home chains own over just 10% of nursing homes. It doesn't tell us much about the concentration in particular geographic markets, but I get the sense that historically there are more nursing homes than hospitals and they're less consolidated. I do think that's changing.

**Cal Stein:**

Yeah, that's a really interesting point, Melissa. I mean, consolidation among hospitals is something that we've seen an increase in recently. Wouldn't be surprising to see an increase in the nursing home industry as well. I wonder what impact that'll have on agency scrutiny of these in the antitrust context, particularly if the reporting obligations change as you suggested. It sounds to me like the structure of the long-term care facility industry itself has played a significant role in the enforcement or lack thereof in the antitrust space. Mike, are there any other factors that you can think of that may have contributed to this lack of enforcement?

**Mike Hartman:**

Yeah, Cal. So another key factor is that government insurers are usually the primary payer for long-term care, and many nursing homes are primarily funded by Medicaid. This makes enforcement actions more complicated generally, because the government can't look for a price effect. It needs to focus on factors like quality. It's more of a challenge to economically model what a competitive market should look like and just a tougher case to make out. Moreover, in contrast, the hospital systems affiliations with nursing homes are just not crucial to most physicians' livelihoods, which may lead to fewer private antitrust suits. For instance, of those 394 healthcare antitrust lawsuits we talked about in that previous survey, 63% were physician-centric disputes. So you just don't have the same driving force here.

**Emma Trivax:**

That's a great point. So to kind of pivot just a touch, let's shift to the current landscape that we're looking at now. Mike, how has the Biden Administration's approach to antitrust enforcement changed things?

**Mike Hartman:**

Yeah, it's been interesting. Under the Biden Administration, we've really seen this interesting combination of a more economic-based approach to competition along with this kind of concurrent underlying populist theme of helping small businesses and consumers. So although the Biden Administration has increased its focus on structural and fairness-based concerns rather than this previous singular focus on consumer welfare, enforcement efforts have remained concentrated on the industries with significant consumer welfare components. So for instance, DOJ and FTC have been particularly active in the healthcare pharmaceutical sectors, and the Biden Administration's policy directives have targeted agricultural industries to combat rising food prices, allegedly caused by consolidation. Private equity-led consolidation in the nursing home industry could raise similar concerns such as rising prices and decreased quality in a consumer welfare-based industry. I think it would be unsurprising to see this trend continue, especially under a Harris Administration, if that comes to be. I mean, she's already previewed

plans to target price gouging for food products, which just shows this policy-oriented manner in dealing with consumer prices and rising prices in consumer-based industries.

But of course, it's worth noting that there was fairly aggressive antitrust enforcement in healthcare under the Trump Administration as well. In this space, I think with the direction the Biden Administration is going and where enforcement trends are going generally, if we see enforcement anywhere, it's going to focus on issues such as aggregator companies consolidating nursing homes and driving up prices, kind of monopolization-based claims. These no-poach, no-hire claims we've seen in other healthcare industries due to high staff turnover rates and very straightforward pricing claims. On that latter one, there's the trend of private equity entities attempting to break payer contracts for nursing homes so that they can charge out of network pricing, which is not normally an antitrust violation, but you could see it leading to conduct that falls kind of within this collusive pricing area that we do normally see government enforcers going after.

Additionally, I think the increase in private equity activity in this space can mean the introduction of new pricing methodologies, reliance on consultants. I could see that spilling over into the use of things like pricing algorithms and AI-assisted pricing strategies, very, very current hot button issue for the DOJ and their enforcement priorities.

**Melissa O'Donnell:**

That's interesting what you said about no-poach cases before Mike. Remember just last year, a jury acquitted owners and managers of home healthcare staffing agencies of fixing wages of unlicensed health caretakers and agreeing not to hire each other's caretakers. That was part of a series of losses in no-poach cases, but I think just the existence of the case goes to show that the agency's concerns about labor markets find easy expression in cases involving large workforces of nurses. Fun fact, I had some research done in the last antitrust enforcement action specifically targeting a nursing home's conduct was a 1992 case about a conspiracy among nursing homes to fix the wages of temporary nursing assistants. I could totally see this kind of case happening again.

**Cal Stein:**

Yeah, I agree Melissa. I mean, first it's hard to believe that it's been more than 30 years since a genuine antitrust enforcement action specifically targeting this industry, but I do wonder if the recently announced CMS staffing mandates for nursing homes could impact this. As Melissa just noted, the last nursing home antitrust case involved price fixing the wages of nursing assistants. And as we'll discuss in another episode, the recently announced staffing mandates are very likely to hit facilities bottom lines and further strain an already strained nursing home labor market. It really wouldn't be surprising to see in these circumstances government investigations into similar wage fixing or no-poach or other antitrust allegations. But like I said, more on those staffing mandates in a different installment of this podcast. So for now, let's return to the topic at hand, and I want to pivot and talk about merger reviews. Melissa, what do you think about merger reviews involving nursing homes?

**Melissa O'Donnell:**

There's a lot going on. There's the revised guidance making nursing home transactions more likely to be reportable. There's the 2023 merger guidelines, which now make clear that a pattern of multiple small acquisitions can violate the antitrust laws. And that a merger that doesn't raise issues as to the scale of products or services might substantially lessen competition in labor markets. And I think there's a higher level of sophistication in the government about the ways that some nursing homes are making money. I think we can anticipate enforcement actions aimed at preventing excessive consolidation among nursing homes. I think the agencies will bring a case when they find the right one. And I think the right one will most likely involve private equity.

**Emma Trivax:**

Why is that?

**Melissa O'Donnell:**

For one, there's a lot of growth in the area. One report I saw said there was a 17-fold increase in PE healthcare investments from 2009 to 2018 with elder care investments comprising the second-largest area of PE healthcare investment. There's clearly a lot of press on law enforcement on private equity-owned nursing homes. We had the HHS final rule last year that requires nursing homes to disclose additional information about their owners, operators and management, about the entities that exercise financial control over the facilities, and the entities that lease or sublease property to them. HHS's announcements of its disclosure really takes aim at PE owned nursing homes. It does so in a way that must perk up the antitrust agency's ears. For example, HHS's announcement cites a study saying that, "Between 2016 and 2021, 4 times more nursing homes changed ownerships in hospitals, and those with lower star ratings change ownership more often." That announcement cites another study that PE investment is associated with higher costs, including higher costs for Medicare and lower quality. I think the government would love for a good merger case involving PE owned nursing homes to come its way.

**Cal Stein:**

So FTC and DOJ are taking a good hint from HHS?

**Melissa O'Donnell:**

I don't mean to be saying that the FTC would just be picking up on an HHS suggestion. The antitrust agencies have been quite clear that they're focused on enforcement targeting private equity investments in health care. FTC held a workshop on this precise issue earlier this year. Their FTC Chair, Lina Khan said that, "The short-term high risk and low consequence ownership model can encourage a flip and strip approach. The FTC at the workshop heard worries that the private equity model and the financial incentives of private equity have led to negative consequences in healthcare, including staff reductions, elimination of less profitable services and use of quality equipment." So I think they're all over it.

**Cal Stein:**

Yeah, that is certainly some very strong language and rhetoric. Did the agencies do anything?

**Melissa O'Donnell:**

Well, around the same time, FTC, DOJ and HHS launched an inquiry into private equity and other corporations increasing control over healthcare and the impact of corporate greed in healthcare. As part of that inquiry, the agencies issued a request for information requesting public comment on deals conducted by private equity funds and other private entities. The release emphasized the need to preserve competition in healthcare markets. It also explicitly called for comments relating to nursing homes among a handful of other areas. So yes, I think these are strong signals and that the most likely merger case probably involves PE in light of all these signals. It's also worth noting that in any case, involving the merger of non-PE nursing homes, the agencies might also take the view that a divestiture to private equity does not replace or maintain competition in the same way another divestiture could. So the PE considerations might even come up in a merger that doesn't on its face involve PE.

**Emma Trivax:**

And just so all of our listeners are aware, we will dig more into the PE component in nursing homes in another episode of this podcast. But for now, Mike, how has the Administration's approach to antitrust law differ from previous administrations?

**Mike Hartman:**

As I discussed a little earlier, the focus for the government for quite some time had been this consumer welfare standard. But again, under the Biden Administration, we've been seeing this shift in the focus of antitrust enforcement and regulation to prioritize economic efficiency. What does that look like? At least from a policy perspective, the Administration has taken the view that the government can and should use antitrust law to protect small and medium-sized enterprises from "unfair practices" that pose structural anti-competitive threats. Following this direction, FTC Chair, Lina Khan has advocated for gauging competition by analyzing the underlying structure and dynamics of markets rather than just short-term consumer interests. You have to remember that consolidation at any level of the market could lead to anti-competitive effects at other levels. So if there is this consolidation in the nursing home industry, any newly created market power could impact other product or service markets as well. And the FTC is really taking an expansive view of what anti-competitive effects could be created through consolidation.

**Emma Trivax:**

So that's the Administration's approach, but what are some specific actions that the Administration has taken to address these concerns?

**Melissa O'Donnell:**

It's done quite a lot, but even if we look at healthcare specifically, we can see the new focus of the antitrust enforcers. For example, the DOJ announced the creation of the Antitrust Division's



Task Force on healthcare monopolies and collusion to address competition concerns in healthcare. That task force, I think, is all over the kind of structural issues that the FTC and DOJ now see as particularly within their ambit and wheelhouse. That Federal Trades Commission's 6(b) study into pharmacy benefit managers is the perfect example. I actually think some of the ways that the antitrust agencies are hearing and thinking about nursing homes is totally in sync with the new shift in focus. For example, the focus on the contracting and vertical arrangements of nursing homes is in line with the more structural orientation of the agencies that I just mentioned.

**Emma Trivax:**

So we've talked a lot about approaches, specific strategies, but all that said and done, Mike, do you think these changes will lead to actual better outcomes for residents in long-term care facilities?

**Mike Hartman:**

Yeah, I think it's definitely possible, Emma. Increased scrutiny and enforcement actions could lead to better outcomes for residents by preventing excessive consolidation, and ensuring that private equity firms prioritize quality of care and long-term stability. However, it's important to note that these changes could also lead to increased costs and regulatory burdens for long-term care facilities. I think the real key thing here is that consolidation isn't this automatic bad thing when it comes to things like patient and resident care. We often think consolidation is this boogie man that's going to automatically drive up prices. But in this industry in particular, there could be many instances where independent nursing homes may not be viable, absent acquisition or an influx of private investment. We've seen that in rural healthcare facilities where you really do need this consolidation. You do need this activity in order to continue to provide care for people. What one would hope is the efficiencies that are created by these acquisitions and increased investment will actually lead to improved management and care for residents. But we'll have to see if that actually happens.

**Cal Stein:**

I think that's such an important point, Mike, and one that gets lost in the shuffle a little bit, the potential benefits here in these transactions. So I'm really glad you raised that. Melissa, we're winding down here. Any final thoughts from you on what we might expect in the future regarding antitrust enforcement in the long-term care facility space?

**Melissa O'Donnell:**

As we've been discussing, I think we can expect continued focus on preventing excessive consolidation and protecting smaller competitors. The Administration's emphasis on structural issues and fairness-based concerns means that even if a consolidation doesn't harm consumers in the short term, it could still face antitrust scrutiny. Additionally, practices at private equity managed nursing homes will be closely monitored, and we might see more enforcement actions aimed at ensuring quality of care and long-term stability, particularly in that private equity space.

**Cal Stein:**

Well, Melissa, Mike, thank you guys so much for joining us for this insightful discussion, and for really bringing what is a clear expertise in the area of antitrust law to this discussion. We'll certainly continue to monitor these developments and their impact on the industry.

**Emma Trivax:**

Agreed. Thank you both. It's been a pleasure.

**Melissa O'Donnell:**

Thank you.

**Cal Stein:**

And thank everyone out there for listening and for tuning into *Assisted Living and the Law*. If anyone has any thoughts, comments, or questions about this podcast series or about this episode, please contact any of us. Please subscribe and listen to this podcast and other Troutman Pepper podcasts wherever you listen to your podcasts, including on Apple, Google, and Spotify. Thank you for listening, and as always, stay informed and stay healthy.

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