80 Although the Supreme Court in *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 510 (1991), held that the mere filing of a suit does not waive an Indian tribe's sovereign immunity, other cases have affirmed the narrow principle that "'when the sovereign sues it waives immunity as to claims of the defendant which assert matters in recoupment-arising out of the same transaction or occurrence which is the subject matter of the government's suit.'" *Jicarilla Apache Tribe v. Andrus,* 687 F.2d 1324, 1344 (10th Cir. 1982) (citation omitted). *See also, e.g., Flandreau Santee Sioux Tribe v. Gerlach*, 162 F. Supp. 3d 888, 894 (D.S.D. 2016) (when a tribe brings suit, tribal immunity waived for counterclaims sounding in recoupment) (*citing Berrey v. Arasco, Inc*., 439 F.3d 636, 643 (10th Cir. 2006)); *Buchwald Capital Advisors, LLC for Greektown Litig. Trust v. Sault Ste. Marie Tribe of Chippewa Indians*, 584 B.R. 706, 717 (E.D. Mich. 2018) (recognizing the "narrow recoupment exception could apply to Indian tribes") (*citing Andrus*, 687 F.2d at 1344).

81 *See Ericsson Inc. v. Regents of the Univ. of Minn.,* No. IPR2017-01186, et al. (P.T.A.B. Dec. 19, 2017) (Paper No. 14, at 9) (*citing Lapides v. Bd. of Regents of Univ. Sys. of Ga.,* 535 U.S. 613, 619-20 (2002)).

82 *Ericsson, Inc.*, IPR2017-01186 (Paper No. 14, at 8-9).

83 *Regents of the Univ. of New Mexico v. Knight*, 321 F.3d 1111, 1125 (Fed. Cir. 2003). However, a few years later in 2007, the Federal Circuit in *Tegic Communications Corp. v. Board of Regents of Univ. of Texas Sys.*, 458 F.3d 1335 (Fed. Cir. 2007), upheld a state university's immunity from plaintiff's declaratory judgment action because the declaratory judgment action was brought in a different district court from the one where the university was prosecuting an infringement action against other parties. But later that year, the Federal Circuit cautioned that *Tegic* did not "draw a bright-line rule whereby a State's waiver of sovereign immunity can never extend to a separate action *simply because* the action involves the same parties and same subject matter." *Biomedical Patent Mgmt. Corp. v. Cal. Dep't of Health Servs.,* 505 F.3d 1328, 1339 (Fed. Cir. 2007) (emphasis in original). Whether the Federal Circuit will read *Tegic* to bar IPR petitions against state institutions prosecuting parallel infringement actions in federal court is an open question.

84 *Compare Michigan v. Bay Mills Indian Cmty*., 134 S. Ct. 2024, 2030 (2014) ("Among the core aspects of sovereignty that tribes possess . . . is the common-law immunity from suit traditionally enjoyed by sovereign powers") (quotes omitted) *with Principality of Monaco v. Mississippi,* 292 U.S. 313, 322-23 (1934) ("There is also the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been a surrender of this immunity in the plan of the [Constitutional] [C]onvention") (quotes and citation omitted). *See also* U.S. Const., amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

85 IPR Tribe Decision at 12 (*quoting Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2144 (2016)).

86 *See supra* note 21.

# Multi-Agency Report Emphasizes Importance of Competition in Health Care

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Before the close of the year, the Departments of Treasury, Labor, and Health and Human Services (HHS), with input from the Federal Trade Commission (FTC) and certain offices within the White House, issued a report containing policy recommendations to improve competition and choice within the health care industry.[1] The report reaffirms long-held positions articulated by the federal antitrust agencies: health care markets benefit from competition, and government interference is restricting competition through unnecessary regulation. Taking aim at both federal and state regulations, the report cites free market principles to achieve a more efficient market for health care services and reflects the Trump administration's increasing focus on the health care industry. The report strongly criticizes the Affordable Care Act (ACA) as a large reason for soaring health care prices in the private sector.

The cover letter to President Trump accompanying the report stated that the blueprint was borne out of the responsibilities with which the President charged his administration to "facilitate the development and operation of a health care system that provides high-quality care at affordable prices" and was prepared in response to Americans' increased spending on health care in the face of stagnant quality, a lack of innovation, and increasing prices.[2] The cover letter also touts the administration's efforts over the past year to enhance choice and competition in the health care sector, such as related rulemaking and the HHS plan to lower prices for prescription drugs.

Largely focused on deregulation, the report outlines recommendations for improving competition and expanding choice in the areas of provider options, payer contracting, and consumer engagement. Those three categories are the focus of this article. The report argues that certain state laws restrict incentives for

health care providers to improve quality and condemns certain government mandates that impede payers' ability to contract with providers, thereby reducing the choices available to members and unnecessarily driving up premiums. The final section of the report highlights the benefits of bridging the gap between patients—the ultimate consumers of health care—and providers and criticizes the current third-party payment model.

The report recommends other policy changes related to increasing the supply of medical professionals, including expanding scope-of-practice programs, relaxing supervision requirements, and increasing portability of state medical licenses, as well as calling for streamlined funding for graduate medical education programs and more "residency waivers" for foreign-trained physicians.

## Deregulation

The report argues that the key mechanism to ensure Americans are receiving the appropriate value from our health care system is to increase competition but that some federal and state regulation stands in the way of that objective. The report states that the most effective way to increase competition is to eliminate or reduce current state and federal regulations that have the practical effect of impeding innovation and new entrants. According to the report, "[m]arket competition should encourage healthcare providers to charge lower prices and provide higher-quality services."[3]

The report further argues that competition would be better protected if the FTC could more freely regulate nonprofit entities. Noting the FTC's "particular expertise" in health care provider markets, the report urges an expansion of the FTC's jurisdiction to include the conduct of nonprofit hospitals, which need the same antitrust scrutiny as for-profit hospitals.

### *Providers*

The report criticizes "harmful" barriers erected by state legislatures that impede the entry of additional provider competition. Certificate of need (CON) laws require that providers obtain permission from the state to enter or expand and add an additional regulatory cost to new entrants. These CON laws also provide the opportunity for incumbent providers to weigh in on their potential competition. The report refers to evidence that CON laws have not improved quality of or access to care. To the contrary, these restrictions "impede entry, expansion, and innovation."[4] The report suggests that narrowing CON laws may reduce health care costs.

Similarly, certificate of public advantage (COPA) schemes are state regulations that serve to insulate agreements among providers that might otherwise violate antitrust laws. The report argues that limiting federal jurisdiction over these cooperatives increases the risk of harm to consumers for a variety of reasons. Market-based competition—and continued federal oversight—is a better alternative to state-run regulation.

### *Payers*

The report urges reform of state and federal laws relating to any-willing-provider (AWP) laws and network adequacy requirements, which it argues unnecessarily limit competition and stifle innovation of telehealth programs. The report calls for curtailing AWP laws or other legislation that may interfere with a health insurance payer's ability to contract freely. Absent AWP laws, the report argues, providers would compete to be included in a payer's network. Additionally, the report cites empirical evidence that being able to contract freely allows payers to steer members toward less expensive "(or otherwise more efficient)" services through tiering, resulting in lower plan pricing for consumers.[5]

Further, the report questions whether network adequacy requirements are functioning as designed, pointing to negative consequences including the proliferation of narrow networks and less investment in telehealth programs. Narrow networks, it states, may bring costs down, but they also may eliminate an important degree of consumer discretion in choosing providers.

The report's recommendations are not limited to government regulation though. The report also calls for changes affecting private payers in the context of site-neutral pricing, reimbursement for telehealth services, and a broader movement toward improved care coordination through value-based care models. The Centers for Medicare & Medicaid Services already has implemented the first two recommendations as they relate to Medicare and Medicaid patients, but the report argues that the current thinking on value-based care has resulted in some negative effects namely excessive provider consolidation (both vertical and horizontal) and decreased competition.

## Consumer Engagement

The report promotes the expansion of High Deductible Health Plans, Health Savings Accounts, and Health Reimbursement Arrangements, explaining how these types of financing arrangements align the incentives between payers and consumers by making consumers more aware of actual provider price and quality information. If consumers were responsible for more or even all of certain non-emergency health care services, the report explains, they would shop around for these services, which would result in additional price competition among providers. However, the report argues, the current system strips consumers of both the incentive and the ability to do so, resulting in decreased incentive on the part of providers to improve their offerings, as well as pricing disparity by different providers for similar—or even the same—services.

The report cites the California Public Employees' Retirement System (CalPERS) model as evidence of how price and quality transparency results in more efficient markets by allowing consumers to compare provider services and pricing.[6] The CalPERS PPO has employed reference pricing since 2011, limiting the amount the payer will reimburse for a particular service and placing any remaining financial liability on the member.[7] The report refers to studies showing that this practice resulted in reduced price variation across providers as a result of members' opting for lower-price services and argues that such incentive realignment has the effect of both reducing cost and improving quality.[8]

## Competition

Though the report addresses competitive issues at a high level, there are implications embedded in its recommendations for payers and providers alike. Stressing the importance of free market principles, the report cites recent economic literature concluding that increased payer concentration in a given area results in higher premiums and a reduced quality of care. Similarly, the report cites recent hospital concentration statistics and identifies a trend in provider consolidation that is *potentially* resulting in anticompetitive effects, including consumers paying "higher-than-competitive payment rates."[9] However, the report acknowledges the careful distinction between "competitively benign" concentration and concentration that reduces competition,[10] and is careful to state that the referenced research does not "definitively confirm that increased concentration has led to increased market power or increased payments."[11]

Additionally, the report reflects the Trump administration's support of decades-long federal antitrust policy employed by both the Department of Justice (DOJ) and the FTC with respect to state regulation of provider entry. The report echoes the FTC's position on CONs[12] and COPAs[13] and argues that removing such legislation can help keep lawful market power in check.

## Conclusion

The report's focus on the importance of increased competition is unlikely to create much of a debate; however, reasonable minds can disagree regarding the best approach to achieve that competition in the health care industry. Given a Democrat-controlled House of Representatives, it is unclear whether any of these recommendations might be brought to fruition, but we can be sure of increased discussion on both sides of the aisle.

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1 U.S. Dep't of Health & Human Servs. et al., *Reforming America's Healthcare System through Choice and Competition* (2018), https://www.hhs.gov/sites/default/files/Reforming-Americas-Healthcare-System-Through-Choice-and-Competition.pdf.

2 *Id.* at 1.

3 *Id.* at 5.

4 *Id.* at 55.

5 *Id.* at 63.

6 *Id.* at 96.

7 *Id.*

8 *Id.* at 96-97.

9 *Id.* at 21.

10 *Id.* at 24.

11 *Id.* at 29.

12 *See, e.g.*, Maureen K. Olhausen, *Certificate of Need Laws: A Prescription for Higher Costs*, 30 Antitrust at 50 (Fall 2015), https://www.ftc.gov/system/files/documents/public_statements/896453/1512fall15-ohlhausenc.pdf; FTC, Press Release, *FTC Staff Testifies in Favor of Effort to Repeal Alaska Laws That Limit Competition in the Health Care Sector* (Feb. 7, 2018) ("The Federal Trade Commission staff has recommended that Alaska repeal its certificate-of-need (CON) laws . . . ."), https://www.ftc.gov/news-events/press-releases/2018/02/ftc-staff-testifies-favor-effort-repeal-alaska-laws-limit; FTC, Press Release, *FTC Staff Supports Certificate of Need Application for Lee County, Georgia* (Oct. 24, 2017) (supporting a medical center's efforts to satisfy Georgia's CON requirements), https://www.ftc.gov/news-events/press-releases/2017/10/ftc-staff-supports-certificate-need-application-lee-county; FTC, Press Release, *FTC and DOJ Support Reform of Alaska Laws That Limit Competition in the Health Care Sector* (Apr. 12, 2017) ("The Federal Trade Commission and the Department of Justice's Antitrust Division have recommended that Alaska repeal its certificate-of-need (CON) laws . . . ."), https://www.ftc.gov/news-events/press-releases/2017/04/ftc-doj-support-reform-alaska-laws-limit-competition-health-care; FTC, Press Release, *Agencies Submit Joint Statement Regarding South Carolina Certificate-of-Need Laws for Health Care Facilities* (Jan. 11, 2016) ("[T]he [FTC and DOJ] historically have urged states to consider repeal or reform of their CON laws because they can prevent the efficient functioning of health care markets, and thus can harm consumers"), https://www.ftc.gov/news-events/press-releases/2016/01/agencies-submit-joint-statement-regarding-south-carolina; FTC, Press Release, *Agencies Submit Joint Statement Regarding Virginia Certificate-of-Need Laws for Health Care Facilities* (Oct. 26, 2015) ("[T]he [FTC and DOJ] historically have urged states to consider repeal or reform of their CON laws because they can prevent the efficient functioning of health care markets, and thus can harm consumers"), https://www.ftc.gov/news-events/press-releases/2015/10/agencies-submit-joint-statement-regarding-virginia-certificate; FTC, Press Release, *FTC Staff Supports North Carolina Legislative Proposal to Limit Certificate of Need Rules for Health Care Facilities* (July 13, 2015), https://www.ftc.gov/news-events/press-releases/2015/07/ftc-staff-supports-north-carolina-legislative-proposal-limit; FTC, Press Release, *Federal Trade Commission, Department of Justice Issue Joint Statement on Certificate-of-Need Laws in Illinois* (Sept. 12, 2008) ("[CON laws] undercut consumer choice, stifle innovation and weaken markets' ability to contain health care cost."), https://www.ftc.gov/news-events/press-releases/2008/09/federal-trade-commission-department-justice-issue-joint-statement; FTC, Press Release, *FTC Submits Testimony to Florida State Senate Regarding Bill That Would Amend States Certificate of Need Laws* (Apr. 17, 2008) ("CON laws . . . can be a barrier to entry, to the detriment of competition and health care consumers. The Commission therefore generally supports the repeal of such laws, and steps . . . to reduce significantly the scope of CON laws"), https://www.ftc.gov/news-events/press-releases/2008/04/ftc-submits-testimony-florida-state-senate-regarding-bill-would; FTC, Press Release, *FTC Submits Testimony to Alaska House of Representatives Regarding Bill That Would Amend States Certificate of Need Laws* (Feb. 19, 2008), https://www.ftc.gov/news-events/press-releases/2008/02/ftc-submits-testimony-alaska-house-representatives-regarding-bill; FTC, Press Release, *FTC and DOJ Issue Report on Competition and Health Care* (July 23, 2004) ("States should . . . [r]econsider whether Certificate of Need Programs best serve their citizens' health-care needs"), https://www.ftc.gov/news-events/press-releases/2004/07/ftc-and-doj-issue-report-competition-and-health-care.

13 *See, e.g.*, FTC, Press Release, *FTC Staff Provides Additional Comment and Testimony in Tennessee Opposing Mountain States' and Wellmont's Certificate of Public Advantage Application* (July 18, 2017), https://www.ftc.gov/news-events/press-releases/2017/07/ftc-staff-provides-additional-comment-testimony-tennessee; FTC, Press Release, *FTC Staff Provides Supplemental Public Comment in Tennessee Opposing Health Systems' Certificate of Public Advantage Application* (Jan. 6, 2017), https://www.ftc.gov/news-events/press-releases/2017/01/ftc-staff-provides-supplemental-public-comment-tennessee-opposing; FTC, Press Release, *FTC Staff Provides Public Comment and Testimony in Tennessee Opposing Certificate of Public Advantage Application* (Nov. 23, 2016), https://www.ftc.gov/news-events/press-releases/2016/11/ftc-staff-provides-public-comment-testimony-tennessee-opposing; FTC, Press Release, *FTC Staff Expresses Concern that New York's Certificate of Public Advantage Regulations Can Harm Competition* (Apr. 24, 2015), https://www.ftc.gov/news-events/press-releases/2015/04/ftc-staff-expresses-concern-new-yorks-certificate-public; Marina Lao et al., *Not Just An Opinion: Competition Really Is Key to Healthy Health Care Markets,* FTC Competition Matters Blog (July 8, 2015), https://www.ftc.gov/news-events/blogs/competition-matters/2015/07/not-just-opinion-competition-really-key-healthy-health ("Current evidence does not support special antitrust rules for health care collaboratives, including those formed via Certificates of Public Advantage (COPAs)"); *see also* FTC. Press Release, *FTC Staff Seeks Empirical Research and Public Comments Regarding Impact of Certificates of Public Advantage* (Nov. 1, 2017), https://www.ftc.gov/news-events/press-releases/2017/11/ftc-staff-seeks-empirical-research-public-comments-regarding ("FTC staff is not aware of any empirical evidence demonstrating that COPA statutes and regulations produce better results for consumers than market-based competition, but recognizes that more empirical work on the impact of COPAs could provide benefits to policymakers considering these important issues.").

# Editor's Note

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The Antitrust Practice Group (PG) is excited to announce several new developments for this year. The PG just recorded its first-ever health care antitrust podcast featuring **Alexis Gilman** (Crowell & Moring LLP) and **John Carroll** (King & Spalding LLP). Alexis and John discuss the biggest developments from 2018 and make some predictions about developments for 2019. Catch the podcast on AHLA's *Speaking of Health Law* channel, which is available on iTunes, Google Play, and AHLA's own platform (https://www.healthlawyers.org/news/podcasts/Pages/default.aspx). The Antitrust PG is also preparing toolkits on economic issues and topics relevant to antitrust analysis, which will also feature a segment on working with economic experts. We also want to remind everyone to use the Antitrust Topical Community to post information about interesting developments and/or ask questions of interest to your peers.

Sincerely,
**Dionne**

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