Litigation and Enforcement Highlights – April 2018

This month we saw increased activity in state and private antitrust litigation. Earlier in April, we blogged about an antitrust lawsuit brought by California's Attorney General against Sutter Health, accusing the health system of anticompetitive conduct that allegedly drove up healthcare prices across the state. In private antitrust litigation, Blue Cross/Blue Shield suffered a significant blow in a major lawsuit in Alabama federal court, while an Illinois judge ordered plaintiffs in a hospital class action suit to find new representatives. Meanwhile, on the regulatory front, merger mania continued as two additional proposed healthcare mergers passed state antitrust scrutiny.

Blue Cross/Blue Shield Faces "Per Se" Standard in Antitrust Litigation

In a major development in the Blue Cross/Blue Shield (BCBS) private antitrust Multi-District Litigation (MDL),[1] U.S. District Court Judge R. David Proctor of the Northern District of Alabama held that the insurer's alleged practice of creating exclusive territories is a "per se" violation of the Sherman Antitrust Act and would be evaluated using the highest legal standard. Judge Proctor wrote in a 59-page opinion on April 5 that "Defendants' aggregation of a market allocation scheme together with certain other output restrictions is due to be analyzed under the per se standard of review." This decision makes it difficult for BCBS to defend against antitrust liability. As long as the plaintiffs prove the insurers engaged in the alleged behavior, the "per se" basis assumes such action

hinders competition and makes BCBS liable without allowing evidence that shows benefits of the conduct as a defense. In other words, the higher standard eliminates the need for a lengthy trial to prove the conduct caused economic harm. Under the lower rule-of-reason standard, the court would have been required to balance the harm and benefits of the anti-competitive conduct based on evidence produced by both parties.

The case has been pending for over five years since its original filing in 2013. The putative class plaintiffs, consisting of healthcare providers and individual and small-employer subscribers, sued BCBS in two suits that have since been consolidated (put into MDL) in federal court. The plaintiffs accused BCBS of horizontal market allocation and conspiring to divvy up insurance markets across the country in violation of Section 1 of the Sherman Antitrust Act. Lead attorney for the provider plaintiffs, Joe Whatley of Whatley Kallas, LLP, believes the latest court ruling to be a great development in the case and would likely lead to settlement, as the only question that remains is damages.[2] BCBS said it would appeal the district court's decision.

Hospital Antitrust Suit Must Find New Representative to Keep Class Certification

In another private antitrust class action, an Illinois district court judge ruled on March 31 that plaintiffs did not warrant class certification in response to NorthShore University Health System's motion to decertify the class. Plaintiffs brought this class action in 2007 on behalf of all end-payers who purchased inpatient or outpatient healthcare services directly from NorthShore, alleging violations of Section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2, and Section 7 of the Clayton

Antitrust Act, 15 U.S.C. § 18.1. Specifically, plaintiffs accused NorthShore of illegally monopolizing the healthcare services market and using its resulting leverage to artificially inflate prices paid by the plaintiffs and the putative class.[3] The court denied NorthShore's motion to dismiss in September 2016.

In ruling on the class certification issue, the judge agreed that NorthShore presented a threshold argument, which is that "Plaintiffs have no evidence to support defining a market for hospital-based *outpatient* services and none of the Plaintiffs were direct purchasers of *inpatient* services from NorthShore." Therefore, "if hospital-based outpatient services are removed from the class definition, then there would be no adequate class representative, because none of the Plaintiffs purchased inpatient hospital services—the named Plaintiffs purchased only outpatient services." Rather than decertify the class in this 10-year-old case, however, the court believed the problem to be surmountable and gave the plaintiffs time to find another representative.

More Healthcare Mergers Gain Regulatory Approval

Two more mergers gained regulatory approval this month amidst a wave of health system consolidations across the country.

Massachusetts

On April 4, less than a month after the greenlight from the Massachusetts Department of Public Health, Massachusetts' Public Health Council voted to approve the proposed merger between Beth Israel Deaconess Medical Center and Lahey Health. This is the health systems' second attempt at consolidation, after initial mergers plans fell through in 2011. According to the preliminary

report by the state board, the merged entity would form the second-largest inpatient, outpatient, and primary-care market shares in Massachusetts. As such, the new entity would gain increased leverage to negotiate prices with healthcare providers, allowing it to better compete with Partners Healthcare, the state's largest health network.[4] In addition to Beth Israel and Lahey's facilities, other independent hospitals would join the $5.3 billion deal to form the new health entity that would significantly change the healthcare landscape of the region. The merger still requires approval from Massachusetts' Health Policy Commission, which began its review in December 2017, and the Massachusetts Attorney General before it can be finalized.

Wisconsin

Meanwhile, in Wisconsin, state regulators gave the final approval in the Advocate and Aurora merger deal that was first announced in December 2017. The proposed cross-state merger received approval from both the FTC and Illinois regulators in early February (see The Source blog post). The merged system, which will operate as Advocate Aurora Health, will combine 27 hospital systems spanning Illinois to Wisconsin to form the country's 10th largest not-for-profit hospital system.[5]

That's it for this month. Stay tuned for newest developments of these cases and check back next month for more litigation and enforcement actions on The Source blog. In the meantime, be sure to check out the Enforcement page of The Source for timeline and geographic trends of federal, state, and private enforcement actions.

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[1] In re: Blue Cross Blue Shield Antitrust Litigation, N.D. Ala., No. 2:13-CV-20000-RDP.

[2] Harris Meyer, *Blues plans suffer setback in major antitrust case*, Modern Healthcare, Apr. 6, 2018.

[3] In re: Evanston Northwestern Healthcare Corp. Antitrust Litigation, 1:07-cv-04446.

[4] *Beth Israel-Lahey merger scores Massachusetts approval*, Modern Healthcare, Apr. 5, 2018.

[5] Tara Bannow, *Federal, Illinois regulators approve Advocate-Aurora merger*, Modern Healthcare, Feb. 15, 2018.