

Litigation and Enforcement Highlights: January 2018

Beginning in the New Year, the Source will compile monthly litigation and enforcement highlights to keep our readers updated on developments in the area of healthcare mergers and acquisitions, antitrust actions, as well as other healthcare price and competition cases. This month, we discuss FTC's win in a North Dakota hospital merger, Louisiana AG's antitrust suit against GSK, and the review of a pair of Massachusetts healthcare mergers.

FTC Wins Temporary Injunction against Merger of North Dakota Hospitals

U.S. District for the District of North Dakota Magistrate Judge Alice Senechal issued a preliminary [injunction](#) at the request of the FTC on December 13, 2017 to block the merger of two competing hospitals in North Dakota. This decision adds to the FTC's string of victories in challenging hospital mergers. The FTC [sued](#) in June 2017 to stop Sanford Health, headquartered in Sioux Falls, South Dakota, from merging with Mid Dakota, a health system based in Bismarck, North Dakota.[\[1\]](#) The two systems are the closest hospitals located in a four-county region of North Dakota, with a population of only 125,000. In its complaint, the FTC cited concerns that the merger would substantially decrease competition for healthcare services in the region, resulting in higher prices and lower quality of health care services including adult primary care physician services, pediatric services, obstetric and gynecology services, and general surgery physician services.[\[2\]](#) An in-house administrative trial on competition will be held at the FTC, with proceedings set to begin on January 17, 2018. Follow the

case [here](#).

Louisiana AG's Antitrust Suit against GSK allowed to Go Forward

The U.S. Court of Appeals for the Third Circuit ruled on December 22, 2017, that an antitrust suit filed by Louisiana's Attorney General (AG) against GlaxoSmithKline (GSK) isn't barred by a settled class action.[\[3\]](#) GSK has already paid \$150 million to settle a class action alleging that it unlawfully delayed generic competition to its popular allergy drug Flonase, resulting in higher prices for the prescription drug. Although Louisiana technically qualified as a potential class member by virtue of being an indirect purchaser of Flonase when the class action was first filed in 2008, the state didn't receive notice of the settlement. GSK sought to block the state's suit on the grounds that the terms of the class settlement released class members' claims. However, Judge Joseph Greenaway Jr. held that the sovereign immunity provision of the 11th Amendment to the U.S. Constitution bars Louisiana's involuntary inclusion in the class settlement agreement. Although some of Louisiana's claims fall within the settlement, the state did not waive its sovereign immunity. Now that the state's action is allowed to proceed, GSK may face further liabilities for its anti-competitive practice. Read the court opinion [here](#).

Massachusetts Health Systems M&A Deals Under Scrutiny

Massachusetts state officials are reviewing a pair of proposed health system mergers in the state beginning January 2018. The Massachusetts Health Policy Commission is reviewing a proposed merger between Beth Israel Deaconess Medical Center, Lahey Health and several other hospital systems for its impact on healthcare costs, quality and access. If permitted to go forward, the deal would create the second largest healthcare network in the state, which would likely affect its leverage to

negotiate hospital and physician prices, according to the commission's preliminary report.[\[4\]](#) The merger is part of a recent wave of horizontal and vertical consolidation seen across the nation. Antitrust regulators seek to determine whether consumers will benefit from the potential savings that could result from the purported efficiencies gained by the mergers. The commission has 180 days to review the merger and send a report to the state attorney general. The state would then decide to approve or halt the merger.

Meanwhile, Partners HealthCare, the state's largest health network, plans to acquire Massachusetts Eye and Ear Infirmary, a specialty hospital. Massachusetts Attorney General Maura Healey (D) will review this deal for potential antitrust action after a recent probe by the Massachusetts Health Policy Commission found that the deal would increase the price of physician services and premiums by \$61 million a year.[\[5\]](#) In addition to the AG's review, the Massachusetts Department of Public Health will also weigh in and has the power to alter the deal. Professor Paul Hattis of Tufts University School of Medicine believes that the Department of Public Health would likely convince Partners to agree to limit price increases to avoid the a challenge under the state's antitrust or consumer protection laws.[\[6\]](#)

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.

[\[1\]](#) Federal Trade Commission et al v. Sanford Health, D.N.D., No. 1:17-cv-00133.

[2] FTC Bureau of Competition Director Bruce Hoffman, FTC Press Release, December 14, 2017: <https://www.ftc.gov/news-events/press-releases/2017/12/statement-federal-trade-commission-acting-bureau-competition>

[3] In re: Flonase Antitrust Litigation, No. 16-1124 (3d Cir. 2017)

[4] Alex Kacik, *Independent commission reviewing Beth Israel-Lahey Health merger*, Modern Healthcare, December 14, 2017: <http://www.modernhealthcare.com/article/20171214/NEWS/171219934>

[5] Massachusetts Health Policy Commission, *Review of Partners HealthCare System's Proposed Acquisition of Massachusetts Eye and Ear Infirmary, Massachusetts Eye and Ear Associates, and Affiliates (Final Report)*, January 3, 2018: https://www.mass.gov/files/documents/2018/01/03/PHS-MEE%20Final%20CMIR%20Report_0.pdf

[6] Adrienne Appel, *Mass. AG to Weigh In on Proposed Purchase of Specialty Hospital*, Bloomberg BNA, January 5, 2018. Available at:

<https://www.bloomberglaw.com/document/XB10FJN8000000?emc=bnahce>:
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