Cedars-Sinai/Huntington Cross-Market Affiliation Settle with Revised Competitive Impact Conditions

Healthcare entities have continued to actively pursue proposed mergers and affiliations during —and in part driven by— the coronavirus pandemic. Since the settlement of the Sutter Health antitrust lawsuit, the proposed affiliation of Cedars-Sinai Health System and Huntington Memorial Hospital in California has emerged as the leading case that has captured the attention of health policy experts as to its antitrust implications. The Source also weighed in on the case with an amicus brief filed with the Los Angeles County Superior Court. In this post, we further detail the background of the proposed cross-market merger, the conditional approval by the California attorney general, the ensuing lawsuit challenging the conditions imposed, and the final settlement terms to mitigate anticompetitive concerns.

Conditional Approval of Cross-Market Affiliation

Cedars-Sinai Health System (Cedars-Sinai) and Huntington Memorial Hospital (Huntington) announced their intended affiliation shortly before the onset of the COVID-19 pandemic in March 2020. Based in Los Angeles, Cedars-Sinai is a nonprofit, public benefit corporation that owns and operates several medical centers, including the 890-bed Cedars-Sinai Medical Center, the 145-bed Cedars-Sinai Marina del Rey Hospital, as well as a network of physicians and ambulatory services at more than 40 locations throughout Southern California. Huntington is a 619-bed not-for-profit hospital located in Pasadena, California.

In December 2020, then California Attorney General Xavier Becerra reviewed the proposal, as required for proposed transactions of nonprofit hospitals in the state,[1] and conditionally approved the affiliation. While the affiliation did not

trigger antitrust scrutiny or challenge from the Federal Trade Commission, the AG was concerned about potential anticompetitive effects of this type of "cross-market" merger, based on empirical evidence and theoretical foundations that have been increasingly raised and studied by many antitrust experts.[2] According to the state's competition impact analysis report, the providers have substantial market power and their affiliation could increase healthcare prices at Huntington by as much as 32 percent. The AG's expert analysis further indicates that Huntington and Cedars-Sinai might engage in "all-or-nothing" or tying negotiations with insurance companies that force insurers to accept some or all of the new entity's facilities in their network if they want certain "must have" facilities owned by or affiliated with Cedars-Sinai or Huntington.

To address competition concerns from the affiliation, the AG imposed several "competitive impact" conditions. The most notable conditions include:

1. Price caps on Huntington's rates to insurers (tied to the U.S. Hospital Index Price) for a period of at least ten years;
2. A firewall separating Huntington and Cedars-Sinai teams for insurer negotiations;
3. Arbitration on any rate or terms of contracts with Huntington or Cedars-Sinai to ensure fair rates and prevent higher prices not tied to quality.

Hospitals File Suit to Challenge Imposed Conditions

In March 2021, the hospitals jointly filed suit against the AG's office and the state Department of Justice in Los Angeles Superior Court to challenge the conditions imposed, calling them "unprecedented" and alleging that they would place Huntington at a disadvantage competitively. In the lawsuit, the healthcare entities allege that the price cap conditions primarily benefit the insurance companies, as the cost savings are not required to be passed on to consumers. Additionally, they protest that no other hospital in California is required to agree to "winner-take-all" arbitration in contract negotiations with insurance companies as imposed by the conditions to the affiliation. The hospitals claim that the "unlevel playing field jeopardizes Huntington's and Cedars-Sinai's future ability to provide access to

quality care" and promise that they will not engage in "all-or-nothing" negotiations for at least 10 years.

The Source Files Amicus Brief in Support of Conditions

As the outcome of the case may impact the ability of the AG to challenge and impose similar conditions on future cross-market healthcare transactions, The Source filed an amicus brief with the court in support of the AG's response to the allegations. In the brief, The Source provided context for the conditions in litigation by 1) documenting the harmful effects of healthcare mergers, including those that are cross market; 2) demonstrating that the AG's analysis and resulting conditions imposed are well-supported by economic evidence and legal doctrine; and 3) rebutting the hospitals' misleading arguments. Overall, the amicus brief concluded that "the competitive impact conditions imposed by the AG align with California legislation and regulation, historical antitrust law, and modern empirical evidence on the functioning of healthcare markets."

Parties Settle with Revised Conditions

Prior to the trial scheduled in July 2021, the hospitals and the AG's office came to a settlement agreement that replaced existing competitive impact conditions with a set of revised conditions to the affiliation. Most notably, the parties agreed to a 10-year prohibition of all-or-nothing contracting, and instead of a default firewall, the revised conditions allow a payer to request separate negotiating teams with firewalls to remedy any violations of the condition. Additionally, price caps are adjusted to annual increase of 4.8% per year for five years.

In summary, the revised competitive impact conditions include:

1. Prohibition of all-or-nothing contracting, expressly or impliedly, including conditioning the participation, pricing, or contract terms of a hospital on the participation, pricing, or contract terms of another hospital (for 10 years);
2. Prohibition of explicit or implicit financial penalties on payers that elect not to contract with all of the affiliated hospitals (for 10 years);

3. Prohibition of interference with narrow and tiered network design or tiering/steering practices (for 10 years);
4. By request of the payer/insurer, separate negotiating teams with firewall in contract negotiations to remedy violations of the conditions;
5. Annual price increases not to exceed 4.8% per year (for 5 years);
6. A monitor appointed by the AG's office to oversee compliance of contract negotiations for the next 10 years;
7. Potential 3-year extension of competitive impact conditions by application to court.

The entities finalized their affiliation on August 4. Overall, this case is a win for antitrust enforcers, with meaningful Implications that may reverberate across the country, particularly for cross-market mergers and affiliations which have previously flown under the radar of federal and state regulators.

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[1] California Corporations Code §§ 5914-5920 et seq.

[2] *See* Jaime S. King & Erin Fuse Brown, The Anti-Competitive Potential of Cross-Market Mergers in Health Care, 11 ST. LOUIS U. J. HEALTH L. & POL'Y 43 (2018); Dafny, Ho and Lee, The Price Effects of Cross-Market Mergers: Theory and Evidence from the Hospital Industry, RAND Journal of Economics (April 2019); Matthew S. Lewis & Kevin E. Pflum, Hospital systems and bargaining power: evidence from out-of-market acquisitions, Rand Journal of Economics (August 2017).