

**Average annual healthcare
cost in all 50 states**

**Midwest hospital M&A market
heats up, but faces policy
hurdles**

**Sanford Health, Fairview
Health Services call off
proposed merger**

**Why a new Minnesota law could
kill proposed Fairview-
Sanford merger**

HB 1087

Prohibit restrictive employment contracts for health care workers

HB 1185

Expands meaning of “practioner” to include more health care providers that are prohibited from having certain restrictions in employment contracts

Sanford, Fairview delay merger a second time

Healthcare Merger Watch Q1 2023: Nationwide Cross-Market Merger Mania

In this first healthcare merger watch of 2023, we highlight some consolidation activities from the first quarter in the healthcare industry. In a trend that has continued in recent years, healthcare entities in the latest proposed and pending

deals are increasingly exploring consolidation in new and innovative ways, across different geographic regions and involving different healthcare players in the industry. Even though federal and state antitrust enforcers often successfully challenge traditional, horizontal mergers and acquisitions, transactions involving cross-market consolidation are typically not challenged due to less straightforward legal and economic theories in proving potential anticompetitive effects. As healthcare entities continue to consolidate in non-horizontal ways by merging across geographic regions and entity types, antitrust enforcers and regulators must quickly adapt and effectively review these deals for potential anticompetitive effects.

1. Health System Mergers that Span Multiple Geographic Regions

▪ *Sanford Health and Fairview Health*

Antitrust experts and enforcers are paying close attention to the proposed merger of nonprofit systems Sanford Health and Fairview Health Services. First announced in November 2022, this is a mega cross-market merger in the Midwest region that would combine Sanford's 47 hospitals in South Dakota, North Dakota, and Minnesota with Fairview's 11 hospitals in Minnesota. Due to their different geographic regions, the two entities do not have overlapping service areas. Since its initial announcement, the proposed merger has raised concerns of potential anticompetitive effect, drawing opposition from stakeholders and the scrutiny of both federal and state regulators. The transaction is currently being reviewed by the Minnesota attorney general, who requested more information from the parties after conducting several public meetings. In response to the request, the parties have agreed to postpone closing the deal to May 31, 2023. Additionally, the South Dakota attorney general has also been [urged to review](#) the merger for antitrust concerns.

- *Presbyterian Healthcare and UnityPoint Health*

Another cross-market merger recently announced is the proposed merger of UnityPoint Health and Presbyterian Healthcare Services. Coincidentally, UnityPoint was involved in an attempted cross-market merger deal with Sanford Health in 2019, which was called off in the negotiation stage. Operating in Iowa and the Midwest region, UnityPoint does not have geographic overlap in service areas with Presbyterian's hospitals, which are located in New Mexico. In announcing the deal, [Unity indicated](#) that the proposed merger would help "lower administrative costs, improve affordability and access, and build new capabilities."

- *CommonSpirit Health and Steward Health Care*

Yet another recently proposed deal involves the consolidation of hospitals and health systems across different geographic regions. CommonSpirit Health, one of the top cross-market hospital systems in the country, has announced a deal to purchase five hospitals and 35 clinics in Utah from Steward Health Care. CommonSpirit Health is a non-profit, Catholic hospital system based in Chicago, Illinois, that formed in February 2019 from the merger of Catholic Health Initiatives and Dignity Health. According to a [research study on cross-market systems](#) conducted by The Source in partnership with economists at the UC Berkeley Petris Center, as of 2019, [this health system](#) owned 120 community hospitals located in 17 states, with the most in the West (53 hospitals), followed by the Midwest (37 hospitals) and South (30 hospitals). This latest deal will further expand its geographic footprint as this large cross-market system continues to grow.

2. Cross-market Mergers Between Different Types of Healthcare Entities

Besides major health systems' continued expansion across the country, other healthcare deals are increasingly seeing the combination of different players in the healthcare industry. Following UnitedHealth's successful acquisition of healthcare data company Change Healthcare, [despite opposition](#) from the Department of Justice (DOJ), the healthcare conglomerate continued to grow by completing the \$5.4 billion acquisition of home health provider [LHC Group](#) in February. Coincidentally, on the very same day, Amazon's [high-profile acquisition](#) of primary care provider One Medical also went through, despite investigation from the Federal Trade Commission (FTC).

- *CVS Health and Oak Street Health/Signify Health*

Similar to these deals, CVS Health is looking to dip its toes in both the home care and primary care business. After the announcement last year that it would acquire home healthcare provider [Signify Health](#) for \$8 billion, CVS is proposing to acquire primary care provider [Oak Street Health](#) for \$10.5 billion. As a company that owns and operates a retail pharmacy chain, a pharmacy benefit manager, and health insurer Aetna, these deals would further CVS Health's goal of becoming an integrated provider of medical services and enhance its presence in the healthcare industry.

Typically, cross-market transactions have flown under the radar of antitrust enforcers. In particular, the federal agencies have not had much success in challenging such mergers and may also be wary of bringing actions in fear of setting unfavorable legal precedents. Given that the FTC did not try to block the mega [cross-market merger](#) between Atrium Health and Advocate Aurora, which was consummated in December 2022, it is unclear whether the agency would challenge this latest wave of cross-market mergers. Nonetheless, there may be an opportunity for the FTC to join the Minnesota AG, who continues to investigate the proposed merger of Sanford and Fairview. Beginning with the California AG, who successfully

challenged and imposed competitive impact conditions on a number of cross-market affiliations, including [Cedars-Sinai and Huntington Memorial](#), other states like Minnesota may be stepping up to explore antitrust enforcement of these new rising forms of healthcare consolidation.

Stay tuned to The Source as we team up with UC Berkeley's Petris Center to further study the impacts and potential options to address these rising forms of healthcare consolidation. In the meantime, be sure to check out the [Market Consolidation](#) and [Cross-Market Systems](#) interactive key issue pages on The Source website for additional resources and the latest developments.

Union calls on South Dakota to intervene in Sanford-Fairview merger

Healthcare Consolidation Q4 2022: Cross-Market Mergers Continue Apace

2022 has been an active year in healthcare consolidation as well as for merger challenges and enforcement. As we approach the year end, healthcare deals continued as many entities seek to close the transactions before the new year. Increasingly,

as seen in the 4th quarter, healthcare deals are shifting to cross-market transactions, making review and enforcement efforts more challenging. In case you missed it, this final Litigation and Enforcement Highlights of the year will help you catch up on some of the cross-market deals in Q4 2022 that caught our attention.

Advocate Aurora and Atrium Health

One of the most scrutinized healthcare mergers this year received regulatory approval and was completed earlier this month. Announced in May, the megamerger of Advocate Aurora, headquartered in Wisconsin and Illinois, and Atrium Health of North Carolina, combines 67 hospitals across Alabama, Georgia, Illinois, North Carolina, South Carolina, and Wisconsin. The new regional health system is named Advocate Health and is now the fifth largest nonprofit health system in the country. The merger was initially paused when the Illinois Health Facilities and Services Review Board denied the transaction for lack of details on the controlling interests of the merged entity. The issue was resolved when the parties provided more information per the board's request. Notably, while North Carolina Attorney General Josh Stein expressed concerns about the merger's effect on healthcare access in North Carolina, neither the state attorneys general nor the Federal Trade Commission challenged the merger, likely due to the difficulty in proving competitive harms from a cross-market merger spanning different states.

Despite the fact that antitrust enforcers did not bring a merger challenge, the merger may impact price and competition. Both parties to this merger have been the subject of antitrust lawsuits arising from their respective market power. Advocate Aurora is the product of a 2018 merger between Advocate Health and Aurora Health and the resulting market power from that merger has already raised alarms in the Wisconsin area. Also

in May, a [private lawsuit](#) was filed in Wisconsin federal court alleging the health system leveraged its substantial market power forced insurers to enter all-or-nothing and anti-tiering and anti-steering contract terms, and used referral restraints, noncompetes and gag clauses to suppress competition from other healthcare providers and demand higher prices for its services. Coincidentally, [Atrium Health](#) was also the target of similar allegations in the landmark case brought by the Department of Justice and North Carolina AG over its use of anticompetitive contracting terms. That case settled in 2019 with terms that prohibits Atrium from enforcing the anticompetitive clauses in contracts with insurers. What will the combination of these two hospital systems bring? Antitrust experts and economists are no doubt watching with great interest.

Deaconess Health System and Quorum Health

Another cross-market transaction involving Illinois hospitals received approval this month from the Illinois Health Facilities and Services Review Board. Deaconess Health System is set to acquire four hospitals in southern Illinois from Quorum Health for \$146 million. Based in Indiana, Deaconess is a nonprofit health system that operates 12 hospitals in Illinois, Indiana, and Kentucky. Quorum Health, on the other hand, is a for-profit health system based in Tennessee with 21 hospitals across 13 states. Due to its financial struggles in recent years, Quorum had been selling off many of its hospitals to pay for its debts, including the ones being sold to Deaconess, with others to come. Given the cross-market nature of the transaction and the issue of solvency of the entity involved, this deal likely will not be challenged by antitrust enforcers and is expected to close by the end of the year.

Sanford Health and Fairview Health Services

In November, another cross-market merger was announced between Sanford Health and Fairview Health Services. Sanford operates 47 hospitals in South Dakota, North Dakota, and Minnesota. Fairview is based in Minnesota, where it operates 11 hospitals. The proposed merger will integrate the two nonprofit systems in the Midwest region under the Sanford Health brand. In this transaction, the two entities seemingly do not have overlapping service areas, and it remains to be seen whether the deal would be challenged by either federal or state regulators.

Notably, this is the third time Sanford Health has attempted at a cross-market merger deal in the past three years. In 2019, the proposed merger with UnityPoint in Iowa was called off in the negotiation stage. The following year, the deal with Intermountain Healthcare of Utah also fell through. Intermountain Healthcare, however, found its own cross-market deal with SCL Health, which closed earlier in April this year. Intermountain is a nonprofit system that operates in Utah, Idaho, and Nevada, while SCL Health is a Catholic health system with significant market shares in Colorado and Montana, as well as operations in Wyoming and Kansas. The combination of Intermountain and SCL Health formed a 33-hospital rural health system in the Rocky Mountain region and is now the 11th largest nonprofit system in the country. While that merger received extensive review from Colorado enforcers, it did not face regulatory hurdles given the lack of geographic overlap in the markets.

While the FTC and DOJ have successfully challenged and blocked several mergers this year, cross-market mergers have largely proceeded under the radar. Nonetheless, the rise of cross-market transactions in recent years warrant greater scrutiny on the market effects of these mergers. The Source researchers

partnered with economists at the UC Berkeley Petris Center to study this growing trend and its potential impact on competition. As recently published in *Health Affairs*, [the study](#) found that more than half of all hospital acquisitions between 2010 and 2019 qualified as cross-market, namely involving hospitals in a different geographic market. Additionally, there is increasing evidence that cross-market mergers may have potential anticompetitive effects because they enable health systems to tie their hospitals across markets and demand higher prices from insurers. Such anticompetitive behavior are the exact allegations in the antitrust lawsuits filed against Advocate Aurora and Atrium Health. More research and studies will come in the coming year as we dive deeper on the topic and examine the price and quality effects and how to address the cross-market phenomenon. In the meantime, be sure to check out the [Cross-Market Systems](#) interactive key issue page on The Source for additional resources and the latest developments.