

## **HB 210**

This bill requires the Health Data Committee to annually issue a report on primary care spending within the state, establish a plan for collecting data from data suppliers to determine measurements of cost and reimbursements for risk-adjusted episodes of health care; report on rate and price increases by health care providers; and publish an annual report on primary care spending within the state.

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## **HB 223**

This bill creates price caps for certain diabetic supplies: requires a health benefit plan to cap the price of the insulin pumps; requires a health benefit plan to cap the price of the continuous blood glucose monitors

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## **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.

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## **HCA, Steward abandon hospital deal in another win for FTC**

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**The FTC says it's getting tougher on hospital consolidation. Antitrust**

# experts aren't buying it

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## Q2 2022: Antitrust Enforcement Actions Flourish Against Healthcare Consolidation and Anticompetitive Contracting

It's been a busy month in healthcare antitrust land, both for federal regulators and private plaintiffs, as we saw an explosion of enforcement actions challenging both proposed mergers and anticompetitive conduct that stemmed from previous mergers. From New Jersey to Utah, large health systems such as HCA are being increasingly scrutinized and coming under fire for garnering and using their market power in anticompetitive ways.

### Merger Challenges

Fresh from its appeals court win in the [Hackensack Meridian and Englewood](#) merger challenge, the Federal Trade Commission (FTC) is continuing its momentum and kicking off the summer with a new pair of enforcement actions filed against proposed mergers.

[RWJBarnabas & Saint Peter's Healthcare System](#) (New Jersey)

New Jersey health systems are again in the spotlight following

the blocked Hackensack merger last month. RWJBarnabas Health (RWJBH) and Saint Peter's Healthcare System announced their plans to merge back in September 2020. Similar to the Hackensack case, the deal had obtained approval from the New Jersey attorney general and Superior Court Judge Lisa Vignuolo opined that the transaction "will serve in the public interest and the public good."[\[1\]](#) RWJBH is the largest academic health system in New Jersey with 12 hospitals and strong collaborations with Rutgers Robert Wood Johnson Medical Schools. Saint Peter's Healthcare System is a Catholic system that includes Saint Peter's University Hospital in New Brunswick, which is less than one mile from RWJBH.

In the [administrative complaint](#), the FTC alleges the acquisition will give RWJBH a 50% market share for general acute care services in Middlesex County and eliminate head-to-head competition between the entities, leading to higher insurance premiums, co-pays, deductibles, or other out-of-pocket costs. Additionally, due to the state's certificate of need law, entry of other providers will be limited and likely insufficient to counteract the anticompetitive effects of the acquisition. To halt the merger, the FTC plans to file a lawsuit in the New Jersey District Court for a preliminary injunction pending the administrative trial in November.

#### [HCA Healthcare & Steward Health Care \(Utah\)](#)

Also facing FTC challenge this month is HCA Healthcare's proposed acquisition of five hospitals in Utah from Steward Health Care. HCA and Steward are both for-profit systems and based in Tennessee and Texas, respectively. In Utah, HCA operates eight hospitals, six of which are in the Wasatch Front region around Salt Lake City, making it the second largest system in the region. Steward, on the other hand, is the fourth largest system in the same region with five hospitals. According to the FTC, the two rival hospital systems vigorously compete with each other to keep costs down. The agency argued that the proposed merger is likely to

substantially lessen competition for general acute care services in at least four counties with already highly concentrated healthcare markets. Specifically, the merger would increase the Herfindahl-Hirschman Index (“HHI”) by more 200 points to 2,500, which is presumptively unlawful. Additionally, the acquisition would eliminate Steward as a low-cost provider and give HCA greater bargaining power with insurers to demand higher reimbursement rates, which would be passed on to consumers in the form of increased premiums, deductibles, co-pay, and out-of-pocket expenses.

Along with the [administrative complaint](#), the FTC [filed suit](#) in the District Court of Utah for a preliminary injunction against the merger pending the administrative trial scheduled for December. The parties also stipulated to the court’s entry of a temporary restraining order that would prevent the entities from consummating the transaction until after the court rules on the motion for preliminary injunction.

## **Anticompetitive Conduct**

More and more studies and enforcement actions indicate that consolidation among healthcare providers gives rise to greater market and bargaining power, which providers leverage to their advantage to demand anticompetitive terms in insurer contracts that in turn impact prices. A pair of recent private actions stem from alleged abuse of market power that resulted from recent mergers.

### [\*HCA Healthcare\*](#) (North Carolina)

HCA Healthcare’s continued acquisitions and expansion around the nation are bringing not only merger challenges from federal regulators, but also lawsuits from private parties. Following [\*Davis v. HCA and Mission Health\*](#), a class action lawsuit filed in North Carolina state court last August, a very similar second lawsuit was filed this month against the



health system by the city of Brevard, North Carolina. Similar to *Davis*, the action seeks class action status and claims antitrust violations that stem from HCA's acquisition of Mission Health in 2019. While *Davis*, filed in Buncombe County Superior Court, specifically alleges the 2019 merger allowed HCA to use its monopoly power to inflate prices in Asheville, this new case claims similar allegations in seven North Carolina counties.

Filed in federal district court, the [complaint alleges](#) the 2019 merger allowed HCA to use its monopoly power to inflate prices in Asheville and seven surrounding counties in North Carolina. According to the complaint, even prior to the acquisition, Mission Health had used its monopoly power in the Asheville region to demand anticompetitive terms in insurer contracts since 1995. This market power was shielded from antitrust scrutiny due to a certificate of public advantage (COPA), which was repealed by state law in 2016. With the merger with HCA, the combined entities now have increased market power with control of more than 85% of general acute care (GAC) market in the Asheville region and over 70% of the market of surrounding counties. Using this increased leverage, the health system continued the anticompetitive scheme used by Mission Health, forcing insurers to enter contracts that include all-or-nothing, anti-tiering and anti-steering, and gag clauses. The complaint requests damages and an injunction against such anticompetitive practices.

#### [Advocate Aurora](#) (Wisconsin)

In Wisconsin, a similar class action was filed against Advocate Aurora, a nonprofit health system that operates in Wisconsin and Illinois. Brought by Uriel Pharmacy, a self-insured employer, the federal lawsuit alleges Advocate forced insurers to enter all-or-nothing and anti-tiering and anti-steering contract terms. In addition, the plaintiffs claim Advocate Aurora uses "a combination of acquisitions, referral restraints, noncompetes and gag clauses to suppress

competition from other healthcare providers” and expand its monopoly power. With its must-have hospitals, the health system was able to demand higher prices for its services compared to other providers. The [complaint cites](#) the example of the price of joint replacement surgery, which costs \$62,538 at Advocate Aurora hospitals, \$21,000 higher than the price at a competitor hospital just five minutes away.

The allegations of Advocate Aurora’s market power and resulting price increases are the latest illustration of the impact consolidation has on healthcare price and quality. Similar to the HCA and Mission Health merger which gave rise to the allegations in that lawsuit, Advocate Aurora’s antitrust case also followed its merger of Advocate Health Care and Aurora Health Care in 2018. The system also plans to further expand and merge with Atrium Health, a cross-market merger which was announced just last month and raising eyebrows of many antitrust experts.[\[2\]](#)

As seen in these recent cases, merger activity among healthcare providers contributes to greater market power and are thus closely connected with anticompetitive practices that result from such power and leverage. More legal actions are thus challenging healthcare systems both pre- and post-merger. Not only are federal regulators stepping up in response to Biden’s executive order last summer calling for greater antitrust scrutiny and enforcement, private parties and healthcare consumers across the country have taken notice following the high-profile antitrust actions against Sutter Health. This new wave of actions against large health systems like HCA and Advocate Aurora is a step in the right direction to rein in provider monopolies and rising healthcare prices.

For detailed information and the latest development on these new cases, stay tuned to our monthly [Litigation and Enforcement Highlights](#). Additionally, the [Major Cases page](#) on

The Source provides an overview of key decisions and pending cases in both [merger](#) and [anticompetitive conduct](#) challenges.

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[\[1\]](#) Dave Muoio, RWJBarnabas Health, *Saint Peter's integration deal wins NJ approval, awaits FTC signoff*, Fierce Healthcare (May 17, 2022).

[\[2\]](#) Tara Bannow, *Advocate Aurora-Atrium's mammoth merger: Experts split on whether federal regulators will challenge the deal*, Stat Plus (May 11, 2022).

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## FTC v. HCA Healthcare & Steward Health Care

HCA Healthcare, the second largest health system with six hospitals in the Wasatch Front region of Utah, proposed to acquire five hospitals from Steward Health Care, the fourth largest system in the region. According to the FTC, the two rival hospital systems vigorously compete with each other to keep costs down. The proposed merger is likely to substantially lessen competition for general acute care services in healthcare markets of at least four counties that are already high concentrated. Specifically, the merger would increase the Herfindahl-Hirschman Index ("HHI") by more 200 points to 2,500, which is presumptively unlawful. Additionally, the acquisition would eliminate Steward as a low-cost provider and give HCA greater bargaining power with insurers to demand higher reimbursement rates, which would be passed on to consumers in the form of increased premiums,

deductibles, co-pay, and out-of-pocket expenses.

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## HCA's Deal to Buy Steward's Utah Hospitals on Hold After Order

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### HB 400

Associate Physician License Amendments. This bill repeals a restriction that an associate physician may only practice primary care services; and amends provisions relating to the collaborative practice arrangement for an associate physician.

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**FTC sues to block hospital  
acquisitions in New Jersey,  
Utah**