

Litigation and Enforcement Highlights – December 2018

November brought both good and bad news to the realm of healthcare competition. In one of the biggest developments of the year in antitrust enforcement, the Justice Department successfully settled with Atrium Health to prohibit its anti-steering practice in North Carolina. Later in the month, despite anticompetitive concerns and the potential resulting impact on healthcare prices, key states approved three mega mergers, albeit with conditions.

Major North Carolina Hospital System Settles Anti-Steering Suit with DOJ, Encourages Antitrust Enforcement Efforts

In an ongoing anti-steering case in North Carolina, [\[1\]](#) the state's largest health system, Atrium Health (formerly Carolinas HealthCare System), has reached a settlement with the Department of Justice (DOJ) that includes various anticompetitive prohibitions. The case began in June 2016, when the DOJ and North Carolina attorney general [filed](#) a first-of-its-kind suit alleging that the provider used illegal anti-steering clauses in its contracts with major commercial insurers that included Aetna, Blue Cross, CIGNA, and United Healthcare. The contracts in question prohibited insurers from offering financial incentives to encourage, or steer, patients to use competing, lower-cost providers, and prevent insurers from publishing the providers' price and quality information for comparison. The proposed [settlement](#) filed in November prohibits Atrium from using or enforcing these anti-steering provisions in its contracts with insurers.

This final resolution came after a key development in the case in March 2017, when the North Carolina federal court ruled in favor of the DOJ in denying Atrium's motion for summary judgment on the pleadings. The court [found](#) that the DOJ plausibly alleged that the steering restrictions limited consumer choices and drove up insurance prices. Additionally, the ruling rejected Atrium's argument that the Second Circuit [decision](#) to uphold similar contract provisions in an anti-steering case involving American Express and the credit card industry[2] undermined the government's claims (see Source [blog post](#)). The federal judge gave little weight to the decision, opining that the Amex case "involved a different product and a different market." Interestingly, since then, the Supreme Court has [upheld](#) the Second Circuit's ruling, spurring a wave of [speculation](#) that the landmark decision could adversely impact healthcare price and competition when applied to the healthcare industry.

The settlement in this case gives hope that despite the unfavorable court decisions, federal enforcement efforts to promote competition and transparency in the healthcare industry may still make a meaningful impact. The settlement is especially promising when coupled with the recent attention on anti-steering practices initiated by Senate Judiciary Committee Chairman Chuck Grassley, who sent a [letter](#) urging the Federal Trade Commission (FTC) to investigate secret contracts between hospital systems and insurers to block competition. The outcome in this case should encourage federal antitrust regulators to afford more scrutiny of provider and insurer contracts that limit competition and drive up healthcare costs.

Healthcare Industry Ready for Shakeup As States Approve Three Mega Mergers In One Month

November was an unprecedented month for healthcare consolidation as we saw regulatory approval from three major states, California, Massachusetts, and New York, of mega mergers that promise to reshape the healthcare landscape nationwide.

Dignity Health and Catholic Health Initiatives

First, came a big step forward for the proposed merger between Dignity Health and Catholic Health Initiatives (CHI). Following approval from the FTC and the Vatican, the merger passed California regulatory review when Attorney General Xavier Becerra conditionally approved the health systems' plan to combine as CommonSpirit Health. We took a closer look at some of the conditions on the [Source Blog](#) and constructed an interactive map to illustrate how the merger may impact healthcare market concentration in California.

Beth Israel and Lahey Health

A week later in Massachusetts, Beth Israel-Lahey Health, another proposed merger we have been closely [following](#) on The Source, cleared state regulatory hurdles. Following months of rigorous review by state regulators and watchdog groups, Massachusetts Attorney General gave her approval of the proposal to create the second-largest healthcare system in the state. Similar to California AG's conditional approval, Massachusetts' AG also imposed conditions on the mega merger. The most notable restriction, in addition to over \$70 million in community investments for low-income populations, is a seven-year price cap to ensure the merged entity's price increases remain below the state's annual healthcare cost growth benchmark of 3.1%.[\[3\]](#) This unprecedented condition most likely derived from [reports](#) by the Massachusetts Health Policy Commission (HPC), which projected a \$1 billion potential cost increase from the merger. The HPC warned that the merged entity would gain greater market

power and leverage in negotiating with insurers, allowing it to inflate prices. The price safeguards imposed to mitigate these effects also seemed to satisfy the FTC, which issued a [statement](#) on the same day to close its investigation of the transaction.

CVS Health and Aetna

Last but not least, the previously [DOJ green-lighted](#) CVS-Aetna merger gained approval from all required 28 states, including California and New York. Again, the states imposed conditions that include significant investments into the states' healthcare systems (\$240 million in California[\[4\]](#) and \$40 million in New York[\[5\]](#)), as well as price protection for consumers, specifically prohibition of premium increases to pay for the acquisition. Furthermore, California required the merged entity to keep premium rate increases "to a minimum" for five years and to not unjustifiably increase premiums, but stopped short of imposing a cap. The New York Department of Financial Services restricted CVS from offering preferential pricing to Aetna.[\[6\]](#) Given CVS Health's pharmacy and pharmacy benefit manager (PBM) businesses, The Source took a [closer look](#) at what the merger could mean for the PBM and pharmaceutical market.

However, this seemingly done deal took on a rare, unexpected twist a week later when a federal judge in D.C. warned: not so fast. While the companies received the winning ticket to consolidate from all federal and state regulators, they neglected to wait for judicial sign-off of the antitrust settlement the DOJ reached with CVS-Aetna in October, and irritated U.S. District Judge Richard Leon. Judge Leon set a hearing for December 18 to rule on whether the companies should halt their integration and remain separate. As noted on the [Source Blog](#), however, unwinding the already underway integration may prove highly complex, making it unclear how far the court will go to potentially block the transaction.

This relentless wave of healthcare consolidation across different markets will no doubt transform the healthcare industry. Whether these proposed mergers can deliver on the promise of better managed and integrated care, greater healthcare access, and cost savings from administrative efficiencies, or simply harm competition and drive up costs for consumers remains to be seen. For now, consumer advocacy groups, antitrust experts, and stakeholder organizations, such as the [AMA](#), continue to scrutinize the newly combined entities with a watchful eye, as they urge regulators to closely monitor and enforce the conditions of the mergers, to keep potential negative impact to price and competition in the healthcare market to a minimum.

That's all for this month's Litigation and Enforcement Highlights. Stay tuned for the latest developments in 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.

[\[1\]](#) United States v. The Charlotte-Mecklenburg Hospital Auth., W.D.N.C., No. 3:16-cv-00311.

[\[2\]](#) United States v. American Express Co., 838 F.3d 179 (2d Cir. 2016).

[\[3\]](#) Alex Kacik, *Beth Israel-Lahey Health merger clears final approval with conditions*, *Modern Healthcare*, Nov. 29, 2018.

[\[4\]](#) Evan Sweeney, *California approves CVS-Aetna merger with a \$240M investment back to the state*, Fierce Healthcare, Nov. 15, 2018.

[\[5\]](#) Nick Lichtenberg, *CVS Wins N.Y. Regulator's Approval for Aetna Deal; Shares Gain*, Bloomberg Law, Nov. 26, 2018.

[\[6\]](#) Shelby Livingston, *CVS Health and Aetna close \$70 billion merger*, Modern Healthcare, Nov. 28, 2018.