

Litigation and Enforcement Highlights – February 2018

In this edition of the Source Litigation and Enforcement Highlights, we review 1) an action against Allergan's anticompetitive practice concerning its dry eye treatment Restasis, 2) the final conclusion to a highly contested West Virginia hospital merger, 3) an antitrust suit between Marion Healthcare and Southern Illinois Healthcare, and 4) another proposed Partners Healthcare merger.

Shire Defends Its Antitrust Suit Against Allergan

In response to Allergan's motion to dismiss an antitrust suit filed in New Jersey federal court, Shire filed a [brief](#) on January 24, 2018, blasting Allergan's claim that Medicare Part D is not a distinct market. In the original [complaint](#) filed in October 2017, [\[1\]](#) Shire accused Allergan of violating federal and state antitrust laws by improperly discounting various drugs, including its glaucoma drugs, to Medicare Part D plans as an incentive to discourage competition against its dry eye treatment, Restasis. The discounts given were contingent on denying or limiting coverage of Shire's rival dry eye drug and were so substantial that they would cover the cost of Shire's competing drug. Allergan moved to dismiss in December 2017, asserting that the plaintiff did not meet the claim requirements of monopolization under Section 2 of the Sherman Act, by failing to define a "relevant market" that Allergan was monopolizing. Allergan claimed that Shire artificially created an antitrust issue by narrowly looking at Part D and excluding the larger health insurance market. However, Shire fired back in its brief that Allergan's senior executives had previously acknowledged that Part D is a separate and distinct market. Shire further

argued that the different regulations, different pricing, and different contracting cycles required for Medicare Part D create a product market distinct from general health insurance. In addition, Shire cited the DOJ's recent antitrust challenge to the merger of Aetna and Humana to strengthen its claim. In that case, a D.C. federal judge held that Medicare Advantage, which often includes Part D coverage, is a separate market from traditional Medicare. Allergan also faces other legal actions for anti-competitive practice concerning Restasis, including class actions alleging sham infringement suits to delay competition. A ruling on Allergan's motion is expected by February 20, 2018.

West Virginia Hospital Merger Saga Finally Concludes

The highly controversial merger between two West Virginia hospitals is finally allowed to proceed after a challenge to the state law permitting the merger settled on January 23, 2018. In 2016, Cabell Huntington Hospital and St. Mary's Medical Center received the state's permission to merge based a certificate of need (CON) granted by the West Virginia Healthcare Authority (WVHA). Following a challenge by the FTC, the West Virginia state legislature [adopted](#) a certificate of public advantage (COPA) law ([SB 597](#)), which allows healthcare providers to enter into agreements that might otherwise be considered anticompetitive, thereby exempting those deals from antitrust scrutiny. The FTC dropped its challenge against the deal soon thereafter. The merger then stalled when Steel of West Virginia, a private, self-insured employer filed the current case to challenge the CON. [\[2\]](#) The challenge alleged that WVHA issued the CON without properly considering the merger's impact on price and competition in the Huntington area and incorrectly decided that the merged entity was needed to ensure sufficient access to healthcare. The parties settled the dispute just before the West Virginia Supreme Court of Appeal was scheduled

to hear oral arguments in the case. See the Source's discussion of the FTC challenge in this case in a [blog post](#) by Professor Tim Greaney in July 2016.

Antitrust Row Between Illinois Health Systems Heats Up

The antitrust suit filed by surgery center Marion Healthcare against Southern Illinois Healthcare (SIH) [\[3\]](#) saw increased action in recent months. In its original complaint filed in 2012, Marion accused SIH of unlawfully securing exclusive contracts with major insurers that severely discouraged competition in the local health care market. The third [amended](#) complaint filed in 2016 alleged that SIH offered discounted service rates to insurers, including BCBS and Health Alliance Medical Plans, that discouraged them from entering agreements with other local providers and gave SIH 85 percent of the insurance-reimbursed outpatient services market, thereby allowing the defendant to drive up prices. The plaintiff has been on the defensive since December 2017, when it filed its opposition to SIH's summary judgment. SIH argued that its agreements with large insurers are nonexclusive because they have short terms and out-of-network options. Marion fought back claiming that BCBS had to seek permission from SIH to contract with Marion for in-network coverage of outpatient services. On January 18, 2018, Marion Healthcare filed another brief in Illinois federal court fighting sanctions sought by SIH for alleged improper disclosure of confidential contract information, defending the disclosure as an inadvertent consequence from SIH's failure to follow protocol in exchanging information of the alleged exclusive contracts. [\[4\]](#) The case is heating up as a bench trial is tentatively scheduled for February 2018.

Another Massachusetts Health System Merger Moves Forward

Finally, we wrap up this edition with another proposed merger for Partners Healthcare, the largest health network in Massachusetts, on the horizon. Last month, we [reviewed](#) Partners Healthcare's planned acquisition of Massachusetts Eye and Ear Infirmary, a specialty hospital. On January 25, 2018, Partners announced that it will move forward with a merger deal with Rhode Island-based Care New England. The definitive merger agreement was made after 10 months of due-diligence and would include five Care New England facilities. This announcement comes just days after Brown University expressed interest in acquiring the Rhode Island health system if plans with Partners fell through. Brown University President Christina Paxson believes that Partners' acquisition of Care New England would shift specialty healthcare from Rhode Island to Massachusetts, reducing access for Rhode Island consumers and increasing the cost of care.[\[5\]](#) However, Care New England rejected Brown's alternative proposal to create an integrated academic health system designed to deliver affordable care through collaborations with other Rhode Island providers, stating that Brown would split up the Care New England Health System for its own interests.[\[6\]](#) We have our eye on this merger as it moves through the state regulatory approval process and review by the Massachusetts Health Policy Commission.

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.

[\[1\]](#) Shire U.S. Inc. v. Allergan Inc., et al., 2:17-cv-07716

(D.N.J. Oct 02, 2017)

[2] Steel of West Virginia, Inc. v. W. Va. Health Care Auth., W. Va., No. 17-406

[3] Marion HealthCare, LLC v. Southern Illinois Healthcare et al., 3:12-cv-00871

[4] Adam Rhodes, *Surgery Center Fights Sanctions Bid In Antitrust Row*, *Law360*, Jan. 18, 2018: <https://www.law360.com/articles/1003137/surgery-center-fights-sanctions-bid-in-antitrust-row>

[5] Ilene MacDonald, *Brown University throws wrench in Partners' plans to acquire Care New England Health System*, *Fierce Healthcare*, Jan. 15, 2018: <https://www.fiercehealthcare.com/finance/brown-university-throws-wrench-partners-plans-to-acquire-care-new-england-health-system>

[6] Alex Kacik, *Partners-Care New England deal moves forward*, *Modern Healthcare*, Jan. 25, 2018: <http://www.modernhealthcare.com/article/20180125/NEWS/180129931/partners-care-new-england-deal-moves-forward>