Litigation and Enforcement Highlights – January 2021

We kick off the new year with a handful of new developments in healthcare litigation and enforcement that transpired at the end of 2020. In price transparency, a pair of legal challenges intended to block transparency efforts in drug pricing and hospital pricing, respectively, were denied by the circuit courts. On the antitrust front, the Federal Trade Commission saw both victory and defeat in its challenges of proposed mergers that would lessen competition in the healthcare markets.

Judges Refuses to Block California's Drug Pricing Transparency Law SB 17

On December 30, Judge Morrison C. England Jr. of the District Court of California denied PhRMA's motion for summary judgment and permanent injunction to block SB 17, a landmark 2017 California law to promote drug pricing transparency. The law, among other provisions, requires drug companies to provide at least 60 days' notice in advance of price increases of more than 16% over a two-year period for drugs with wholesale prices above $40 for a course of therapy (see The Source's coverage on the Source Blog and Health Affairs for more details). In the action PhRMA v. David, the pharmaceutical trade group sought to invalidate the law for violating the dormant Commerce Clause and the First Amendment.

In a decision following oral arguments on December 17, the court noted that PhRMA must show SB 17 is invalid in all circumstances to succeed on a motion for summary judgment. However, there are "genuine disputes of material fact which prevent a finding that SB 17 is unconstitutional on its face."

Judge England held that the law does not regulate interstate commerce on its face as it "is a notice statute rather than a price control or price tying statute." As for the First Amendment claim that SB 17 improperly compels speech, the court ruled that PhRMA failed to show that the State lacked a compelling or legitimate interest in requiring the notice or that the notice is not "'reasonably related' to a substantial government interest."

The legal challenge will now proceed to the discovery phase before a trial takes place.

Hospital Price Transparency Federal Rule Upheld and Takes Effect

Another court decision issued at the end of 2020 upheld a federal price transparency rule related to hospital prices. The Price Transparency Requirements for Hospitals To Make Standard Charges Public Final Rule, effective on January 1, 2021, requires hospitals to publicly disclose the prices they negotiate with insurers for 300 common and "shoppable" services they provide, as well as cash price discounts they offer for those procedures. In American Hospital Association, et al v. Azar, the AHA sued the Trump administration to block the rule, arguing that the Department of Health and Human Services impermissibly expanded the definition of "standard charges", that it cannot mean the unlimited number of rates associated with different groups of patients. Plaintiffs also claimed the rule violates the First Amendment and would result in more confusion and do more harm than good.

In an opinion issued on December 29, 2020, however, the D.C. Court of Appeals denied the challenge. Judge David Tatel held with regard to the definition of "standard charges," that section 2718(e) of the Affordable Care Act of 2010 allows the broader interpretation of "regular rates set in advance for

identifiable groups of patients." Additionally, the court shot down the First Amendment argument, finding that "the benefits of easing the burden for consumers justified the added burdens imposed on hospitals." Regardless of the actual enforcement and effect of the new rule, it is a welcomed step towards increased transparency to introduce greater competition in the healthcare market.

Pennsylvania AG Withdraws Challenge After Injunction of Jefferson and Albert Einstein Merger Denied

Last month, The Source covered the status of the proposed merger between Jefferson Health and Albert Einstein Healthcare Network as the Federal Trade Commission (FTC) and Pennsylvania AG hit a roadblock in challenging the merger in federal district court. The Eastern District of Pennsylvania denied the preliminary injunction against the merger. The government immediately filed an emergency motion in the 3rd Circuit Court of Appeals for an injunction pending outcome of the appeal process, arguing it could be too late to "unscramble the egg" once the merger is consummated. At the same time, the FTC also reached a deal with the merging entities to halt the transaction and extend the temporary restraining order by ten days until the 3rd Circuit decides on the emergency motion. However, this appeared to be all for naught as the 3rd Circuit denied the emergency motion on December 22 in a one-page order without further explanation. With the road ahead appearing doomed, the Pennsylvania AG dropped his challenge against the merger this week after Jefferson and Einstein agreed to invest in North Philadelphia area facilities. How the FTC will proceed after this new development remains to be seen.

Methodist Le Bonheur and Tenet Abandons Challenged Merger

The FTC appears to be having better luck with another

enforcement challenge of a merger in Tennessee. The FTC jointly filed suit with the Tennessee AG for a preliminary injunction to block Methodist Le Bonheur’s proposed acquisition of two hospitals owned by Tenet Healthcare. While the hearing for the preliminary injunction will not take place until April, with an FTC administrative trial scheduled for May, the parties announced late last month that they had abandoned the merger. This is welcome news as the complaint filed by the FTC alleged that the proposed merger, if allowed to proceed, would substantially lessen competition and give Methodist control of close to 60% of the inpatient general acute care services in the Memphis area, potentially resulting in higher premiums and out-of-pocket costs for patients.