

Litigation and Enforcement Highlights – January 2022

In this first issue of Litigation and Enforcement Highlights of 2022, we bring you a digest of recent merger review activities in healthcare provider transactions and look ahead to important antitrust enforcement actions in consolidation and anticompetitive practices that are pending on the horizon.

Healthcare Merger Watch

Centene/Magellan

Although opposed by many antitrust experts, Centene completed its \$2.2 billion acquisition of Magellan Health last week. In California, Centene and Magellan both operate as sellers of behavioral-specific healthcare financing services, pharmacy benefit manager (PBM) services, specialty pharmacy services, and Employee Assistance Programs (EAPs). Furthermore, Magellan is the parent entity for two DMHC-licensed plans, Human Affairs International of California (HAI-CA) and Magellan Health Services of California – Employer Services (MHSC). Since DMHC must approve any sale or purchase of a DMHC-licensed health plan, the department held a public meeting and commissioned an independent evaluation of the merger.

While the [competitive effects analysis](#) indicated no competition concerns for most of the markets in which both entities operate, it concluded that the proposed acquisition is likely to substantially lessen competition among sellers of EAPs to some groups, particularly since Centene and Magellan are two of a very few number of EAP sellers with a state-wide provider network in California. Based on this analysis, [DMHC approved](#) the transaction with regard to HAI-CA and MHSC, the

two DMHC governed plans, but with a number of [conditions aimed at addressing competition concerns](#), including:

- The plans will continue Magellan's market presence in California and HAI-CA will continue its existing contracts to provide behavioral health services at the same rates for at least two years;
- The plans will help to control health care costs and keep premium rate increases to a minimum, including no increases in premiums as a result of acquisition costs. For any premium rate increase deemed unreasonable or unjustified, the parties subject to the rate review shall meet with by DMHC and make a good faith attempt to resolve any differences regarding the premium rate increase;
- A third-party monitor will be put in place to oversee the plans' compliance with competition related conditions, including holding the Magellan and Centene plans separate to ensure the Magellan plans are run as a separate business.

Lifespan/Care New England

In February 2021, Rhode Island's two largest nonprofit hospital systems Lifespan and Care New England announced their plan to merge into an integrated academic health system with Brown University's medical school. The entities submitted application to regulators including the Federal Trade Commission, Rhode Island Attorney General Peter Neronha, and the Rhode Island Department of Health, which the state regulators made public in December 2021. While the entities argue there could be significant positive economic impact from the merger, as claimed in an [independent economic report](#) commissioned by Brown, the merger would result in a combined entity that accounts for nearly 80% of the inpatient market and that would also largely control the physician market. Rhode Island's insurance commissioner [issued a 25-page report](#) warning of the risks to competition and urged strong

regulatory oversight, including proposing a model that includes comprehensive price caps, quality incentive requirements, adoption of advanced value-based purchasing, and health equity improvement requirements. Opinions from antitrust regulators are expected by March 2022.

UnitedHealth/Change Healthcare

Announced in January 2021, UnitedHealth Group (UHG)'s proposed acquisition of Change Healthcare—a healthcare technology company—into UHG's Optum subsidiary is now expected to close in April after been delayed repeatedly amidst continued investigation from the Department of Justice (DOJ). A number of industry stakeholders have spoken out against the deal. In a [letter to the DOJ](#), the American Medical Association warned the merger could lead to consolidation of healthcare data and reduce competition for the sale of health IT services to hospitals and providers, for which Optum is also a major competitor. The [National Community Pharmacists Association](#) urged the DOJ to block the transaction, saying independent pharmacies already struggle to compete and the merger would create an anticompetitive “corporate monster that will gobble up local pharmacies.” Separately, the American Antitrust Institute (AAI) also expressed concerns that the acquisition could harm competition and consumers. [AAI's letter to the DOJ](#) pointed out that “a larger and more powerful Optum could enhance UHG's incentives to favor its dominant health insurer, UnitedHealthcare, to the disadvantage of rivals.”

If the acquisition is approved, it would no doubt add to the behemoth power of United Health Group, as detailed in a pair of antitrust lawsuits filed in Colorado and Texas state courts by U.S. Anesthesia Partners (USAP), a physician practice group made of anesthesiologists who practice in nine states, alleging United Healthcare used its market power to “squeeze” the group out of its insurance network and the marketplace for its own financial gains (see the [Source Blog](#) for details).

Intermountain Healthcare/SCL Health

Following Intermountain Healthcare's failed plan to merge with Sanford Health in late 2020, the nonprofit system, which operates in Utah, Idaho, and Nevada, announced in September 2021 that it now plans to merge with Catholic health system SCL Health, which has significant market shares in both Colorado and Montana. The transaction is set to close in April and will form an \$11 billion rural health system. Given there is no geographic overlap, the merger does not expect to face regulatory hurdles. At the recent J.P. Morgan Healthcare Conference, executives of Intermountain promised that the merger "will not drive up healthcare costs,"[\[1\]](#) and will instead help its shift to value-based care arrangements.

Enforcement Actions Challenging Anticompetitive Practices

Linet v. Hill-Rom

At the close of 2021, Chicago-based medical technology provider Hill-Rom Holdings—a dominant supplier of hospital beds—was hit with a lawsuit by competitor, Linet, over anticompetitive practices and monopoly behavior in the market for hospital beds. Filed in federal district court of the Northern District of Illinois, the lawsuit alleges violation of the Sherman Act, specifically that Hill-Rom bundled contracts of multiple products together in multi-year exclusive contracts with large health systems that have integrated delivery networks, creating a "monopoly broth" that prevented Linet from gaining market share. The complaint claims that Hill-Rom has at least 70% market share for hospital beds across the nation.[\[2\]](#) With the increased consolidation of healthcare providers across the country, Linet argues it is increasingly difficult to compete and such practices could result in rising health care costs.

Sidibe v. Sutter Health

As the dust settles on the state antitrust action against Sutter Health in California, the federal lawsuit steps into the limelight this month in the tenth year since its filing but looks to be further delayed as a result of the COVID-19 pandemic. Brought by class action plaintiffs who purchased commercial health insurance from health plans that contracted with Sutter, the lawsuit alleges the same anticompetitive contracting practices that were the subject of the state action in [UEBT v. Sutter](#) and that the alleged practices inflated class plaintiffs' premiums and co-pays. A 4-week jury trial before Magistrate Judge Laurel Beeler was scheduled for January 6 after being continued from October 2021. Due to the Omicron-driven COVID-19 surge, however, the trial has been postponed after a moratorium on all criminal and civil jury trials in the Northern District of California until January 27. Sutter Health objected to a virtual jury trial and argued the case is too high stakes to argue remotely. Class plaintiffs, [in a letter to the judge](#), accuse Sutter Health of using the pandemic as an excuse to stall the trial and urge the trial to begin either in person or remotely soon thereafter because one of their attorneys will not be available again until July if the trial does not proceed by February. Follow the case on the [Source case page](#) and read the [case brief](#) for a refresher while we await a new trial date.

Stayed tuned to the Source Blog's monthly Litigation and Enforcement Highlights for developments and actions in these pending cases and more.

[\[1\]](#) Dave Muoio, *Intermountain Healthcare, SCL Health merger 'will not drive up healthcare costs,' execs promise*, Fierce Healthcare (January 10, 2022).

[\[2\]](#) Sarah Freishtat, *Chicago-based Hillrom faces antitrust lawsuit over hospital bed sales*, Chicago Tribune (December 29, 2021).