

# Litigation and Enforcement Highlights - July 2019: Mid-Year Merger Watch

It's been a flurry of activity in the past month in the realm of healthcare mergers and acquisitions. In this issue of Litigation and Enforcement Highlights, we take a look at both recent mergers that were approved and blocked, as well as a string of proposed deals coming down the pipeline.

## **8<sup>th</sup> Circuit Hands FTC Win in Blocking Sanford Health-Mid Dakota Clinic Merger**

The Federal Trade Commission (FTC) and the North Dakota Attorney General scored a win in antitrust enforcement when the 8<sup>th</sup> Circuit upheld a preliminary injunction that blocks Sanford Health from acquiring Mid Dakota Clinic.[\[1\]](#) The [FTC's administrative complaint](#) alleges that the two providers are the main competitors in a four-county region. The transaction would create a physician group with up to 85 percent share of the markets for primary care, pediatric, and OB/GYN services in the area, and that other providers would be unable to adequately compete with the merged entity. In [December 2017](#), the lower court sided with federal and state regulators, finding that acquisition would substantially lessen competition and give the hospital group a regional monopoly on four types of physician services in the Bismarck-Mandan area.

On appeal, the hospital groups argued that market concentration has no relationship to bargaining power because Blue Cross, which contracts with 99% of providers in the state, is such a dominant insurer that it would not be impacted by the consolidation. However, Judge Steven Colloton [agreed with](#) the district court that "despite the market power of Blue Cross, there was a relationship between market concentration after the merger and bargaining leverage." Testimony by Blue Cross

indicated that the merged entity would have the power to force Blue Cross to choose between raising prices or leaving the Bismarck-Mandan region, and that Blue Cross “was forced to modify contract terms with a near-monopoly provider in another area of the state.” Additionally, Judge Colloton also rejected arguments that efficiencies from the merger would offset any anticompetitive effects and that Mid Dakota’s financial condition warranted the acquisition.

Following the court decision, the companies abandoned the deal and the FTC dismissed its challenge, putting another successful circuit court appeal in the books.[\[2\]](#)

## **Federal and State Regulators Impose Conditions on UnitedHealth-DaVita Merger**

In another proposed merger, UnitedHealth Group and DaVita Medical Group received the greenlight from the FTC and state regulators, notably with conditions imposed in Nevada and Colorado, respectively. UnitedHealth Group operates UnitedHealthcare, which is the nation’s largest health insurer, as well as Optum, its medical practice division that operates in ten states. Its integration with DaVita, a physician practice group, raises both horizontal and vertical integration concerns.

In the Nevada market, the FTC cited concerns that UnitedHealth’s proposed \$4.3 billion acquisition of DaVita would eliminate competition between UnitedHealth’s OptumCare and DaVita’s HealthCare Partners of Nevada, creating a near monopoly in the Las Vegas area and resulting in higher costs. To alleviate such anticompetitive effects, the companies [reached a settlement](#) with the FTC that would require UnitedHealth Group to divest DaVita’s HealthCare Partners of Nevada to Intermountain Healthcare, a Utah-based healthcare provider and insurer.

Separately, Colorado Attorney General Phil Weiser also [imposed restrictions](#) on the merger to ensure competition in the state of Colorado. The AG was concerned that the deal “would create significant market power with the ability and incentive to raise DaVita Medical Group’s price to other insurance companies that serve Medicare Advantage patients in the Colorado Springs Area. If left unchecked, the

merger would result in reduced competition, higher health care costs, reduced benefits, and fewer choices for seniors.” The parties agreed to a [consent judgment](#) that requires 1) UnitedHealthcare, UnitedHealth’s insurance division, to lift its exclusive contract with Centura Health for at least 3 1/2 years, expanding the network of healthcare providers available to Medicare Advantage plan seniors, and 2) DaVita to extend its agreement with Medicare insurer Humana, UnitedHealthcare’s main competitor in Colorado Springs, through at least 2020.

The settlements reached in this case to restrict the proposed merger are significant given the nature of the integration. The combination of a health system and insurer with a physician group constitutes vertical integration, which is increasingly sparking [anticompetitive concerns](#). The Source Advisory Board Member Tim Greaney recently testified at a [congressional hearing](#), urging increased scrutiny and antitrust enforcement in cases of vertical integration. Additionally, recent trends of hospital acquisition of physician practices are raising concerns of provider market concentration. According to a [2018 study](#) by the Petris Center at the UC Berkeley School of Public Health, such integration has led to highly concentrated provider markets with higher healthcare prices. The actions of the FTC and the Colorado AG in this case no doubt represent a step in the right direction in regulating anticompetitive transactions at the federal and state level.

### **Sneak Peek at Proposed Deals as Merger Mania Continues**

Federal and state enforcement actions have hardly dampened merger mania as a string of proposed mergers continue to come down the pipeline. Here are a notable few:

*Sanford-UnityPoint:* South Dakota-based Sanford Health, on the heels of its failed merger with Mid Dakota Clinic, is in talks with Iowa-based UnityPoint Health to execute a cross-market merger. UnityPoint is one of Iowa’s two dominant hospital systems. The merger would create one of the biggest nonprofit healthcare systems in the country with hospitals across 26 states in the Midwest.[\[3\]](#) The merger is still subject to regulatory review, but the companies expect the deal to close by the end of 2019.

*Beaumont-Summa:* In another proposed cross-market merger, Michigan's largest hospital system, Beaumont Health, signed a letter of intent to acquire Ohio-based Summa Health, which also operates an insurance arm, SummaCare. Beaumont's acquisition of SummaCare would allow it to compete with other provider-insurer systems in the state like Henry Ford Health System. In addition, Beaumont CEO John Fox indicated the hospital system intends to continue its out-of-state expansion: "We look at everything going on within 300 miles of southeast Michigan... So we look at all the operators in northern Ohio, northern Indiana, everybody in Michigan, Illinois and beyond."[\[4\]](#)

*NorthShore-Swedish Covenant:* In Illinois, NorthShore University Health System is acquiring Swedish Covenant Hospital in Chicago. The Source previously followed NorthShore's plans to [acquire Advocate Health Care](#), which fell through in 2017 after FTC won its 7<sup>th</sup> Circuit appeal to block the merger. The entities hope the merger would allow them to better compete in an already concentrated market.[\[5\]](#)

*Centene-Wellcare:* Announced in March, this \$17 billion merger of two large health insurers would create one of the largest sponsors of government plans across the three main markets: Medicare, Medicaid and the Affordable Care Act (ACA) marketplace. The American Hospital Association, citing concerns of negative impact on competition, sent a [letter](#) to the Department of Justice (DOJ), urging the agency to scrutinize the deal. The DOJ Antitrust Division recently requested additional information from the companies, extending the review beyond the initial 30-day waiting period. The deal would also require approval from state insurance agencies and has already received the greenlight from Alabama, Arkansas, and Kentucky. Missouri gave its conditional approval contingent on the companies' divestiture of Medicaid assets.[\[6\]](#)

*Bristol-Myers Squibb-Celgene:* Hospital and insurers are not the only ones consolidating in the healthcare industry. In biopharma, cancer drugmakers Bristol-Myers Squibb and Celgene announced their plan to merge earlier this year. In a [letter](#) to the FTC and DOJ, congressional lawmakers expressed concerns that the \$74 billion deal would give Bristol-Myers additional leverage to negotiate formulary placement of their drugs. They were also concerned that the acquiring company would increase the cost of drugs of the merged entities to pay for the acquisition.[\[7\]](#)

To quell anticompetitive concerns in FTC's regulatory review, Celgene agreed last month to sell its arthritis drug, Otezla.

*AbbVie-Allergan*: The proposed merger of AbbVie, maker of best-selling drug Humira, and Allergan, known for its Botox and Restasis, is the latest biopharma deal making the headlines. AbbVie seeks to diversify its products in the face of increasing biosimilar competition to Humira, whose patent will expire soon. Allergan, on the other hand, was recently engrossed in a string of [patent litigation](#) aimed to block generic competition of Restasis. As two of the world's largest pharmaceutical companies, this merger is sure to create some ripple effects one way or another, should it go through.

With unrelenting healthcare consolidation across the provider, insurer, and pharmaceutical markets, federal and state regulators will be put to the test. As seen in the cases of Sanford-Mid Dakota and UnitedHealth DaVita, federal and state regulators are increasingly scrutinizing these consolidation efforts, as they become more keen on taking antitrust enforcement actions to ensure adequate competition in the respective healthcare markets. The Source will continue to bring the latest developments in these mergers on The Source Blog, as well as the [Enforcement page](#), with timeline and geographic trends of federal, state, and private enforcement actions.

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[1] *FTC v. Sanford Health*, 8<sup>th</sup> Cir., No. 17-3783, 6/13/19.

[2] In September 2016, the 3<sup>rd</sup> Circuit reversed a lower court decision and blocked the merger of [Penn State Hershey Medical Center and Pinnacle Health System](#). In October 2016, the 7<sup>th</sup> Circuit overruled the district court's decision to allow the merger of [Advocate Healthcare and NorthShore University Health System](#).

[3] Melanie Evans, *Midwest Hospital Systems to Merge Into 26-State Regional*

*Giant*, Wall Street Journal, Jun 28, 2019.

[4] Kristen Jordan Shamus, *Beaumont Health to acquire Ohio hospital system*, Detroit Free Press, Jul 9, 2019.

[5] Stephanie Goldberg, *NorthShore agrees to buy Swedish Covenant*, Crain's Chicago Business, Jun 27, 2019.

[6] Paige Minemyer, *Centene, WellCare shareholders OK merger deal*, FierceHealthcare, Jun 24, 2019.

[7] Ed Silverman, *Lawmakers want feds to look at how a Bristol-Celgene deal affects prices and competition*, Stat Plus, Jan 14, 2019.