Litigation and Enforcement Highlights – March 2019

It's been an eventful month in healthcare litigation and enforcement, as we saw the final conclusions to the legal challenges to Maryland's drug pricing law and the sale of nonprofit hospitals in California. In addition to reflecting on the Supreme Court's latest action, or lack thereof, we also bring updates on increased action in pending state antitrust enforcement in Pennsylvania and Washington.

Landmark Maryland Drug Pricing Law Officially Dead

The breaking litigation development in pharma last month was none other than Supreme Court's denial to review the constitutionality of Maryland's drug pricing law. The high court's decision effectively put the nail on the coffin on the 2017 law, which the 4th Circuit had found to be in violation of the dormant commerce clause in a 2-1 ruling in April 2018.

Following the appeals court decision, as The Source previously highlighted, there was much speculation and hope that the legal challenges and differing appeals court opinions surrounding similar laws, including a lengthy dissenting opinion from 4th Circuit Judge James Wynn, would prime the issue for a Supreme Court review. In fact, Judge James Wynn even laid out the counter legal argument based on the June 2018 Supreme court decision in South Dakota v. Wayfair.[1] A *Health Affairs* analysis also dissected the dormant commerce clause and argued against its applicability to this case. To the disappointment of proponents, and the relief of the pharmaceutical industry,

however, it appears now that it was all for naught.

Maryland's law (HB 631) was seen as a pioneering effort at the state level to contain rising prescription drug prices by punishing generic drug manufacturers for unconscionable price gouging. In the wake of the Supreme Court decision, state legislators across the country are forced to reexamine their strategies in new legislation targeting prescription drug prices. Given the fervent and unrelenting public attention on drug prices, states may find new innovative ways to tackle the problem. As the 4th Circuit voided Maryland's law on dormant commerce clause grounds, states efforts must now steer clear of regulations that could potentially interfere with commerce outside the state. Notably, Maryland has already bounced back with new legislation to rein in drug prices. HB 768/SB 759 proposes to create a watchdog agency called the Prescription Drug Affordability Board to review costs and cap drug prices. As the battle against rising drug prices rages on, stay tuned for the latest on The Source.

California AG Authority Limited, While Pennsylvania AG Authority Is Challenged

Last month also saw the resolution to the dispute of the sale of two nonprofit hospitals in California. U.S. District Judge R. Gary Klausner denied Attorney General Xavier Becerra's motion for an emergency stay to block the sale, despite Becerra's vehement opposition to the deal.[2] Both the bankruptcy court judge and Klausner ruled that the AG does not have authority to regulate the sale of the nonprofit hospitals to a public entity, in this case Santa Clara county, and failed to show that it would be in the public interest to block the sale. The sale closed on March 1 without further challenges.

In another follow up to state attorney general enforcement efforts, Pennsylvania's Attorney General Josh Shapiro is also facing opposition in his attempt to intervene in the provider market (see details in February Highlights). The AG's case against UPMC gets messy as the health system fights back with a motion to dismiss the AG's lawsuit,[3] in addition to a lawsuit of its own against the AG. In its motion to dismiss, UPMC argues that the AG does not have the authority to seek modification to extend the original consent decree, as the expiration date is "an unambiguous and material term of the consent decree" that could not be altered, and that Shapiro also failed to show how the proposed modifications would be in the public interest.

UPMC brings on its full attack in its countersuit,[4] alleging that by imposing "mandatory contracting requirements" and forcing "ratemaking arbitrations" with Highmark Health and other willing insurers, the AG unlawfully meddled in federal healthcare programs, in violation of four federal laws. Specifically, UPMC argues in its complaint that laws governing Medicare Advantage (MA) programs "explicitly favor competition [and] preserve healthcare entities' freedom of contract;" that the Affordable Care Act (ACA) "precludes states from regulating nonprofits… differently from… for-profit insurers;" that the Sherman Act "prohibits regulatory schemes that delegate unsupervised ratemaking;" and that the Employee Retirement Income Security Act (ERISA) "supersedes state health care initiatives that substantially impact employer-sponsored health plans." Additionally, UPMC puts forth arguments of administrative burdens, alleging that "insurers who can force a provider into a contract can market to consumers that the provider is 'in-network,' but then tier and steer through the benefit design in ways that are confusing and impenetrable to consumers so that there will be significant economic burdens in selecting that provider."

As this legal dispute escalates, we'll be paying close attention to the fallout that could affect healthcare prices and provider access for patients across Pennsylvania.

Washington Antitrust Action Against Franciscan Health System Set for Trial

In another state antitrust enforcement case, Washington's 2017 suit against Franciscan Health System heats up with a number of pretrial rulings as it hurls toward trial. As The Source previously covered, Washington Attorney General filed suit to unwind Franciscan's consummated 2016 acquisition of two physician practice groups, WestSound Orthopaedics and The Doctors Clinic (TDC).[5] The complaint alleges horizontal price-fixing agreements that raised prices and decreased competition in violation of both state and federal antitrust laws, and seeks equitable disgorgement of the system's financial gains from the transactions.

Leading up to the trial, on March 1, the court granted Franciscan's partial summary judgment on the issue of WestSound acquisition's alleged violation of Section 7 of the Clayton Act, ruling that the state did not sufficiently plead that the acquisition alone increased prices in the region. However, the issue of the TDC transaction's alleged violation of Section 1 of the Sherman Act will proceed to trial, which the court had declined to rule on whether it would apply a "per se" or "rule of reason" standard. The court did give the state a partial win on this claim in February when Franciscan raised the "weakened competitor" defense, claiming that TDC would've been in financial trouble without making the alleged anticompetitive deal. The court held that this defense does not absolve defendants from liability for restraint of trade under the

Sherman Act. The trial in this case is set to take place on March 19.

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.

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[1] In South Dakota v. Wayfair, Inc. 138 S. Ct. 2080, the Supreme Court reversed the lower court decision and held that South Dakota can require internet retailers to collect taxes even if they have no physical presence in the state, because the dormant commerce clause should not be used to stop a state from "exercising their lawful sovereign powers."

[2] In re Verity Health Sys. of Cal., Inc., C.D. Cal., No. 19-cv-133, 2/22/19.

[3] Pennsylvania v. UPMC, Pa. Commw. Ct., No. 334 M.D. 2014.

[4] UPMC Pinnacle v. Shapiro, M.D. Pa., No. 19-cv-298, filed 2/21/19.

[5] Washington v. Franciscan Health Sys., W.D. Wash., No. 17-cv5690.