Q2 2022: Antitrust Enforcement Actions Flourish Against Healthcare Consolidation and Anticompetitive Contracting

It's been a busy month in healthcare antitrust land, both for federal regulators and private plaintiffs, as we saw an explosion of enforcement actions challenging both proposed mergers and anticompetitive conduct that stemmed from previous mergers. From New Jersey to Utah, large health systems such as HCA are being increasingly scrutinized and coming under fire for garnering and using their market power in anticompetitive ways.

Merger Challenges

Fresh from its appeals court win in the Hackensack Meridian and Englewood merger challenge, the Federal Trade Commission (FTC) is continuing its momentum and kicking off the summer with a new pair of enforcement actions filed against proposed mergers.

RWJBarnabas & Saint Peter's Healthcare System (New Jersey)

New Jersey health systems are again in the spotlight following the blocked Hackensack merger last month. RWJBarnabas Health (RWJBH) and Saint Peter's Healthcare System announced their plans to merge back in September 2020. Similar to the Hackensack case, the deal had obtained approval from the New Jersey attorney general and Superior Court Judge Lisa Vignuolo opined that the transaction "will serve in the public interest and the public good."[1] RWJBH is the largest academic health system in New Jersey with 12 hospitals and strong collaborations with

Rutgers Robert Wood Johnson Medical Schools. Saint Peter's Healthcare System is a Catholic system that includes Saint Peter's University Hospital in New Brunswick, which is less than one mile from RWJBH.

In the administrative complaint, the FTC alleges the acquisition will give RWJBH a 50% market share for general acute care services in Middlesex County and eliminate head-to-head competition between the entities, leading to higher insurance premiums, co-pays, deductibles, or other out-of-pocket costs. Additionally, due to the state's certificate of need law, entry of other providers will be limited and likely insufficient to counteract the anticompetitive effects of the acquisition. To halt the merger, the FTC plans to file a lawsuit in the New Jersey District Court for a preliminary injunction pending the administrative trial in November.

HCA Healthcare & Steward Health Care (Utah)

Also facing FTC challenge this month is HCA Healthcare's proposed acquisition of five hospitals in Utah from Steward Health Care. HCA and Steward are both for-profit systems and based in Tennessee and Texas, respectively. In Utah, HCA operates eight hospitals, six of which are in the Wasatch Front region around Salt Lake City, making it the second largest system in the region. Steward, on the other hand, is the fourth largest system in the same region with five hospitals. According to the FTC, the two rival hospital systems vigorously compete with each other to keep costs down. The agency argued that the proposed merger is likely to substantially lessen competition for general acute care services in at least four counties with already highly concentrated healthcare markets. Specifically, the merger would increase the Herfindahl-Hirschman Index ("HHI") by more 200 points to 2,500, which is presumptively unlawful. Additionally, the acquisition would eliminate Steward as a low-

cost provider and give HCA greater bargaining power with insurers to demand higher reimbursement rates, which would be passed on to consumers in the form of increased premiums, deductibles, co-pay, and out-of-pocket expenses.

Along with the administrative complaint, the FTC filed suit in the District Court of Utah for a preliminary injunction against the merger pending the administrative trial scheduled for December. The parties also stipulated to the court's entry of a temporary restraining order that would prevent the entities from consummating the transaction until after the court rules on the motion for preliminary injunction.

Anticompetitive Conduct

More and more studies and enforcement actions indicate that consolidation among healthcare providers gives rise to greater market and bargaining power, which providers leverage to their advantage to demand anticompetitive terms in insurer contracts that in turn impact prices. A pair of recent private actions stem from alleged abuse of market power that resulted from recent mergers.

HCA Healthcare (North Carolina)

HCA Healthcare's continued acquisitions and expansion around the nation are bringing not only merger challenges from federal regulators, but also lawsuits from private parties. Following *Davis v. HCA and Mission Health*, a class action lawsuit filed in North Carolina state court last August, a very similar second lawsuit was filed this month against the health system by the city of Brevard, North Carolina. Similar to *Davis*, the action seeks class action status and claims antitrust violations that stem from HCA's acquisition of Mission Health in 2019. While

Davis, filed in Buncombe County Superior Court, specifically alleges the 2019 merger allowed HCA to use its monopoly power to inflate prices in Asheville, this new case claims similar allegations in seven North Carolina counties.

Filed in federal district court, the complaint alleges the 2019 merger allowed HCA to use its monopoly power to inflate prices in Asheville and seven surrounding counties in North Carolina. According to the complaint, even prior to the acquisition, Mission Health had used its monopoly power in the Asheville region to demand anticompetitive terms in insurer contracts since 1995. This market power was shielded from antitrust scrutiny due to a certificate of public advantage (COPA), which was repealed by state law in 2016. With the merger with HCA, the combined entities now have increased market power with control of more than 85% of general acute care (GAC) market in the Asheville region and over 70% of the market of surrounding counties. Using this increased leverage, the health system continued the anticompetitive scheme used by Mission Health, forcing insurers to enter contracts that include all-or-nothing, anti-tiering and anti-steering, and gag clauses. The complaint requests damages and an injunction against such anticompetitive practices.

Advocate Aurora (Wisconsin)

In Wisconsin, a similar class action was filed against Advocate Aurora, a nonprofit health system that operates in Wisconsin and Illinois. Brought by Uriel Pharmacy, a self-insured employer, the federal lawsuit alleges Advocate forced insurers to enter all-or-nothing and anti-tiering and anti-steering contract terms. In addition, the plaintiffs claim Advocate Aurora uses “a combination of acquisitions, referral restraints, noncompetes and gag clauses to suppress competition from other healthcare providers” and expand its monopoly power. With its must-have

hospitals, the health system was able to demand higher prices for its services compared to other providers. The complaint cites the example of the price of joint replacement surgery, which costs $62,538 at Advocate Aurora hospitals, $21,000 higher than the price at a competitor hospital just five minutes away.

The allegations of Advocate Aurora's market power and resulting price increases are the latest illustration of the impact consolidation has on healthcare price and quality. Similar to the HCA and Mission Health merger which gave rise to the allegations in that lawsuit, Advocate Aurora's antitrust case also followed its merger of Advocate Health Care and Aurora Health Care in 2018. The system also plans to further expand and merge with Atrium Health, a cross-market merger which was announced just last month and raising eyebrows of many antitrust experts.[2]

As seen in these recent cases, merger activity among healthcare providers contributes to greater market power and are thus closely connected with anticompetitive practices that result from such power and leverage. More legal actions are thus challenging healthcare systems both pre- and post-merger. Not only are federal regulators stepping up in response to Biden's executive order last summer calling for greater antitrust scrutiny and enforcement, private parties and healthcare consumers across the country have taken notice following the high-profile antitrust actions against Sutter Health. This new wave of actions against large health systems like HCA and Advocate Aurora is a step in the right direction to rein in provider monopolies and rising healthcare prices.

For detailed information and the latest development on these new cases, stay tuned to our monthly Litigation and Enforcement

Highlights. Additionally, the Major Cases page on The Source provides an overview of key decisions and pending cases in both merger and anticompetitive conduct challenges.

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[1] Dave Muoio, RWJBarnabas Health, *Saint Peter's integration deal wins NJ approval, awaits FTC signoff*, Fierce Healthcare (May 17, 2022).

[2] Tara Bannow, *Advocate Aurora-Atrium's mammoth merger: Experts split on whether federal regulators will challenge the deal*, Stat Plus (May 11, 2022).