Updated Jan. 30: In the World of Healthcare Mergers, All Eyes Should be on Massachusetts

UPDATE (Jan. 30, 2015):

Today, in a 48-page decision, Suffolk Superior Court Judge Sanders declined to enter the consent judgment reflecting the deal negotiated between former Massachusetts Attorney General Martha Coakley and Partners Healthcare, the Boston Globe reported today. The decision comes three days after new Attorney General filed a Notice of her office's position on the deal, at the request of the court. That Notice raised concerns about terms of the deal, and indicated that if the court rejected the consent judgment, the A.G.'s office would void its agreement with Partners and litigate to enjoin Partners' proposed acquisition of South Shore Hospital, and would take more time to further evaluate the potential acquisition of Hallmark Hospital. In declining to enter the judgment, Judge Sanders expressed concerns about the provider's market power, and both the inadequacy and difficulty of enforcing the remedies proposed by the parties. The agreement between former A.G. Coakley and Partners was the result of five years of investigation and negotiation.

UPDATE (Nov. 12, 2014):

The Source's concerns about political motivations being at play in the case were echoed by Judge Sanders at Monday's hearing. As the Boston Globe explains: "A Suffolk Superior Court judge on Monday suggested that Attorney General Martha Coakley's gubernatorial ambitions may have played a role in the expansion plan negotiated with Partners HealthCare, and

said she might consult with the incoming attorney general, Maura Healey, before ruling." We anxiously anticipate Judge Sanders' ruling!

The Backstory:

On June 24th, Martha Coakley, the Massachusetts Attorney General, issued a *press release* stating that she had reached a *settlement agreement* with Partners Healthcare that would permit the healthcare conglomerate to acquire three other Boston area facilities, including South Shore Hospital in Weymouth and two Hallmark Hospitals in Medford and Melrose, officially concluding the A.G.'s antitrust action against Partners. Although the settlement agreement has been strongly criticized by other providers in the area, citizens of Massachusetts, the *New York Times* Editorial Board, a group of twenty-one nationally renowned antitrust experts and health economists, American Antitrust Institute, MassPIRG, and Health Care for All, Coakley's use of conduct remedies to monitor and regulate consolidation in the healthcare market may be a sign of things to come in terms of antitrust enforcement. As a result, all eyes should be on Massachusetts.

Massachusetts is somewhat of a unique state in terms of healthcare. Following the passage of its massive health reform law in 2006, which required all citizens of the state to obtain health insurance, the Massachusetts uninsured rate has dropped precipitously and is predicted to be as low as 2 percent this year. However, Massachusetts also has the highest per capita healthcare costs in the country, making the stakes high for allowing any kind of merger that might lead to increased healthcare costs in the state.

In terms of mergers, this is not Partners' first rodeo. In 1994, the Massachusetts A.G. permitted the merger of the two most prestigious hospitals in Boston – Massachusetts General Hospital (MGH) and Brigham and Womens' Hospital – to create what we now know as Partners Healthcare. The merger was

permitted in an attempt to level the playing field between provider organizations and Blue Cross/Blue Shield of MA, the dominant insurer. Twenty years later, the very dominant Partners Healthcare charges the highest prices in the state and is a "must have" provider for any insurer covering individuals in the Boston area. Last year, spending at Partners jumped 4 percent, well over inflation (1.4 percent) and the average increase in health care costs (2.3 percent).

In exchange for allowing Partners, one of the largest healthcare providers in Massachusetts, to acquire three new hospitals outside the Boston area, Attorney General Coakley conditioned the merger on several significant conduct remedies to address Partners' substantial market leverage, which has enabled them to obtain yearly price increases. The consent decree requires: 1) caps on price increases and total healthcare expenditures|2) component contracting, which permits health plans to contract with all or some of Partners' four major components|3) limitations on Partners' ability to contract with payors on behalf of affiliated providers|4) preservation of existing services|and 5) A.G. approval for any further acquisitions. The agreement limits Partners' ability to acquire any additional facilities for seven years and requires rate increases to be below the rate of inflation. Independent monitoring of these factors will continue for a decade. Further, in late September Coakley, announced that her office had amended the consent decree in late September to place limits on price increases for patients at Hallmark hospitals, similar to those already in place for South Shore Hospital. By permitting the merger to go forward, Coakley argues that the state gains the ability to monitor and limit Partners' ever-increasing healthcare prices. And, the settlement offers more certainty and control over Partners' activities than pursuing an expensive litigation strategy with an unpredictable outcome.

The deal was hard fought and Coakley is definitely out on a

limb. The Health Policy Commission (HPC) (an independent state agency created in the Commonwealth's landmark healthcare cost containment law[1] to monitor health care costs, develop policies to reduce overall healthcare costs while maintaining quality, and provide objective, data driven analyses of specific provider transactions) came out strongly against the consent decree. HPC estimated that if the Partners merger is permitted, the health system will have more discharges than the next four largest systems in the state combined. Further, HPC found that the merger would increase total healthcare spending by $38.5 million to $49 million per year as a result of unit price increases, and those costs do not include the price impact of Partners' increased leverage with payers. The Commission acknowledged that the caps put on price increases as a result of the consent decree would mitigate some of these effects, but warned they would not prevent Partners from increasing the costs at the acquired hospitals to Partners' already elevated prices (which could be done without raising the overall cost averages). Such a result could raise baseline costs substantially in areas that have not yet experienced Partners' prices.

Other questions arise. Can the A.G.'s office effectively monitor and enforce the terms of the consent decree? What happens after the specified monitoring period ends? Will the A.G.'s office have to renegotiate terms? Conclude monitoring? If so, it may be worth it for Partners to accept limited price increases for a limited period of time, in exchange for greater leverage thereafter. After all, it's been shown time and again that once a merger has gone through it is exceptionally hard to divide the merged entity.

But Coakley's high-risk, high-reward gamble could pay off in her gubernatorial race this fall, before the verdict is in on how well the consent decree worked out. She has wrestled with the giant and come out with a potentially viable solution. Plus, she may have set up a system where health care entities

that want to merge go to the A.G.'s office to obtain a favorable conduct agreement first, thereby limiting the risk of A.G. action to prevent the merger and potential enforcement actions down the line. This may be a pattern we start to see in other mergers going forward.

Interestingly, Judge Janet L. Sanders, while voicing substantial concerns about the terms of the settlement, has postponed her decision on the Partners Consent Decree until November 10th, after the election. Judge Sanders noted that given the significant implications for the entire health care system in the state and the sheer volume of material, she did not want to rush to a decision. She will be accepting comments on the A.G.'s amended consent decree until October 21st.

[1] *An Act Improving the Quality of Health Care and Reducing Costs through Increased Transparency, Efficiency, and Innovation*, (Ch. 224 of the Acts of 2012).