

# Client Alert

Antitrust & Litigation Practice Group

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## Partners Healthcare's Settlement with Massachusetts Attorney General Put on Hold

On July 1, 2014, Massachusetts Suffolk Superior Court Judge Janet L. Sanders ruled that the tentative settlement reached between the state of Massachusetts and Partners Healthcare System ("Partners") would be delayed. The judge's ruling subjects the settlement to a public comment period of three weeks, with responses from the Massachusetts Attorney General's office due by August 1, and a hearing before the court on August 5, prior to the settlement's being finalized by the court.

The settlement, reached between the state of Massachusetts and Partners in June, would allow Partners to complete its acquisition of South Shore Hospital ("South Shore"), subject to a number of price restrictions, as well as caps on Partners' growth. Interestingly, the settlement does not allow Partners to complete its acquisition of Hallmark Health Corp. ("Hallmark"), as that acquisition is still under review by the Massachusetts Health Policy Commission. That said, Hallmark is a party to the settlement, and the settlement contains a number of provisions that address competitive concerns associated with Partners' acquisition of Hallmark.

Partners is a not-for-profit healthcare system that includes community and specialty hospitals, a managed care organization, a physician network, community health centers, home care and other health-related entities. Partners sought to acquire South Shore, an acute care hospital located in Weymouth, MA, in June 2012, and Hallmark, the parent corporation of Wakefield Hospital and Lawrence Memorial in Medford, MA in 2013.

In addition to the Massachusetts Attorney General's office, the Department of Justice, Antitrust Division (the "DOJ") investigated Partners' proposed acquisitions of South Shore and Hallmark. Usually, the Federal Trade Commission (FTC) investigates transactions involving healthcare providers; however, the DOJ had been investigating alleged anticompetitive behavior by Partners as well as several Massachusetts payors in Eastern Massachusetts since at least 2010. Although the DOJ has not stated officially that their investigation into the acquisition has been closed, the DOJ is not a party to the settlement, and Partners has announced the parties intend to consummate the transactions with South Shore and Hallmark.

As opposed to a "structural" settlement typically favored by the DOJ and FTC, the Massachusetts and Partners entered into a "conduct" settlement that seeks to resolve the Attorney General's competitive concerns. Structural settlements involve one or both of the merging parties' selling certain business units or products to a third party, while conduct settlements

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restrict the parties' behavior post-transaction, by, for example, placing certain limitations on pricing.

The settlement prohibits Partners from increasing prices above the lower of the general inflation and medical inflation indexes for all of its commercial business through 2020. This price restriction seeks to limit Partners' ability to raise its reimbursement rates and includes all of Partners' hospitals, outpatient facilities, physicians, health care professionals and all other services billed to commercial payors. South Shore Hospital's prices will independently be limited to the rate of general inflation.

The settlement also substantially limits Partners' joint contracting with commercial payors. For one, payors will be able to contract separately with different components of Partners' organization, a restriction that seeks to reduce Partners' bargaining power with payors post-transaction. Specifically, for ten years, payors will be able to negotiate separately with four different categories of Partners' providers: (1) academic medical centers; (2) community hospitals and physicians; (3) South Shore Hospital; and (4) the Hallmark hospitals. South Shore Hospital and the Hallmark hospitals will remain separate components for seven years and then become part of the community hospitals group. Moreover, for ten years, Partners may no longer engage in joint contracting with certain affiliated providers, which are certain providers that are not owned or employed by Partners, but with whom Partners engages in joint contracting pursuant to various joint ventures.

The settlement also restricts Partners' future growth by capping the number of community physicians in Partners' network for five years, and by barring Partners from acquiring *any* hospitals in eastern Massachusetts—defined as Worcester County and nine other counties further east—without approval by the Massachusetts Health Policy Commission for the next seven years.

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Assuming it is ultimately finalized, the Partners settlement is noteworthy. For one, it is part of an emerging trend of more active state involvement in antitrust healthcare matters, particularly provider combinations. Another recent enforcement action includes Pennsylvania's 2013 conduct settlement (which also did not include the FTC or DOJ) with Geisinger Health System regarding that system's acquisition of a competing hospital. Furthermore, the restrictions, though not unprecedented—for example, the FTC agreed to some similar separate contracting restrictions in its settlement with Evanston Northwestern Healthcare in 2005 and many DOJ and FTC Consent Decrees contain prior notification provisions—are fairly novel (for example, freezing prices), especially when viewed in total. Finally, though an independent monitor will oversee Partners' compliance with the settlement, the settlement's complexity will likely require substantial time and effort from both Partners and the Massachusetts Attorney General's office to ensure compliance.

## *Documents*

The Massachusetts Office of the Attorney General's press release, complaint, consent judgment, and supporting memorandum, are available at <http://www.mass.gov/ago/news-and-updates/press-releases/2014/2014-06-24-partners-settlement.html>

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