The American Antitrust Institute

October 21, 2014

Hon. Janet L. Sanders
c/o Antitrust Division
Office of the Attorney General
One Ashburton Place
Boston, Massachusetts 02108

Re: Additional Comments of the American Antitrust Institute on the Proposed Final Judgment in Massachusetts v. Partners HealthCare System, Inc. et al., Civ. No. 14-2033 (BLS)

Dear Judge Sanders:

Pursuant to the Court's September 30, 2014 Order, the American Antitrust Institute (AAI) submits these additional comments to reply briefly to certain points made by the Plaintiff Commonwealth of Massachusetts's Response to Public Comments ("AG Response") and Plaintiff Commonwealth of Massachusetts's Further Memorandum of Law in Support of the Entry of Final Judgment ("AG Further Brief"), both of which were filed Sept. 25, 2014. While the AG's efforts in this matter are laudable, the new filings and additional relief for the Hallmark acquisition fall short of establishing that the Amended Proposed Final Judgment is in the public interest. We address the standard of review, price caps, and component contracting. We ultimately conclude, as we did in our original comments, that the proposed consent should be rejected as not in the public interest because it does not adequately remedy the competitive harms alleged in the complaint and it will be difficult and costly for the judiciary to enforce. This court lacks the institutional competence to serve as the de facto regulator of the Commonwealth's most important market.

As a preface to our reply comments, we urge the court to give particular credence to the critiques of the proposed remedy by the Health Policy Commission (HPC) and the Massachusetts Association of Health Plans (MAHP). That substantial weight should be given to the views of the HPC is self-evident. Not only has the Legislature directed that its final reports may be evidence in the underlying case, but the HPC's expertise and independence cannot be questioned.[1] As for the health plans, they are the direct intended beneficiaries of the remedy, their ability to use the order is critical to its success, and they have the expertise and experience to know whether it is likely to work. Indeed, the AG is counting on health plans to help enforce

[1] The MAHP recommends that the court appoint the Health Policy Commission as a special master. We agree. Or the court could appoint the HPC as an expert to assist it. *See* Mass. R. Evid. § 706; *cf.* 15 U.S.C. § 16(f). The AG objects to appointing the HPC on the ground that it would infringe upon the authority of the Attorney General. But the HPC's role would simply be to aid the court in assessing the effectiveness of the proposed judgment, not deciding the merits of the matter. The HPC's involvement is entirely consistent with the rationale cited by the Justice Department for supporting the Attorney General's conclusions "with respect to the consent judgment" here, and the AG's own intent to "call upon the expertise" of the HPC "while enforcing the Proposed Consent Judgment." AG Response at 34-35.

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the decree. *See* AG Response at 38; *cf. DOJ and FTC Horizontal Merger Guidelines* at 5 (2010) ("The conclusions of well-informed and sophisticated customers on the likely impact of the merger itself can also help the Agencies investigate competitive effects, because customers typically feel the consequences of both competitively beneficial and competitively harmful mergers.").

1. *Standard of review*. While the Attorney General argues for an extremely deferential standard of review, the AG recognizes that the proposed consent judgment must "sufficiently address[] the potential anticompetitive harms that would be likely to occur as a result of the loss of competition alleged in the Complaint." AG Response at 5. We agree that one element in the public interest standard is captured by the requirement in Tunney Act cases that the government must establish "a reasonable basis upon which to conclude that the [settlement] will adequately remedy the competitive harms alleged in the government's complaint." *United States v. Republic Servs., Inc.*, 723 F. Supp. 2d 157, 161 (D.D.C. 2010); *United States v. Abitibi—Consolidated Inc.*, 584 F. Supp. 2d 162, 165 (D.D.C. 2008) ("settlement should be rejected" if there is no factual basis for concluding that it provides "reasonably adequate remedy for the harm predicted in the Complaint"); *United States v. SBC Commc'ns, Inc*., 489 F. Supp. 2d 1, 17 (D.D.C. 2007) (must be "factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms"). Insofar as litigation risk is relevant,[2] it is not a separate factor but is reflected in the fact that the standard requires that the proposed judgment *adequately* remedies the alleged harms, not perfectly remedies them. *See SBC Commc'ns*, 489 F. Supp. 2d at 17.

The AG also recognizes that the settlement must contain "clear enforcement mechanisms." AG Response at 12, 36-41. This is consistent with the Tunney Act requirement that courts consider whether a proposed judgment's "terms are ambiguous," 15 U.S.C. § 16(e)(1)(A), and that court must be mindful of "difficulties in implementation." *United States v. Microsoft Corp*., 56 F.3d 1448, 1462 (D.C. Cir. 1995); *see also United States v. Inbev N.V./S.A.*, 2009 U.S. Dist. LEXIS 84787, at *3 (D.D.C. 2009) ("The 'public interest' examination prescribed by 15 U.S.C. § 16(e) can be described generally as inquiries into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanisms to enforce the final judgment are clear and manageable.").

The AG cites *United States v. AT&T*, 552 F. Supp. 131, 151 (D.D.C. 1982), in support of a deferential standard of review, AG Further Br. at 11, even though Judge Greene made it clear that, "[i]t does not follow . . . that courts must unquestioningly accept a proffered decree as long as it somehow, and however inadequately, deals with the antitrust and other public policy

[2] *But see* AAI Initial Comments at 6 n.7. On the one hand, the AG repeatedly refers to litigation risk as a justification for the limited nature of the remedy. On the other hand, the AG maintains that the court may not make any independent assessment of the strengths of the government's underlying case. AG Response at 25. The AG also seeks to distinguish the case law favoring structural relief by noting that the cases involved litigated judgments. *See id.* at 31-32. As noted below, *United States v. AT&T* is to the contrary. Moreover, the Tunney Act itself makes consideration of "the competitive impact of [the proposed] judgment, including *termination* of alleged violations" front and center. 15 U.S.C. § 16(e)(1)(A) (emphasis added). A temporary price cap hardly terminates the alleged violations.

problems implicated in the lawsuit," *id.* To be sure, as Partners points out, Judge Greene had heard most of the evidence in the case, and so was particularly well suited "to evaluate the specific details of the settlement." *Id.* at 152. But, there is no reason this court cannot become equally educated to make a sound judgment[3] and, as Judge Greene noted, because of the importance of the matter, "the Court would be derelict in its duty if it adopted a narrow approach to its public interest review responsibilities." *Id.*

2. *Price caps.* We address here the AG's response (or failure to respond) to several problems with the price cap remedy. First, the effectiveness of the price caps is bound up in the ability of this court to enforce the decree. In response to the arguments of AAI and other commenters that proposed consent in general, and the price caps in particular, raise significant concerns as to institutional competence, the AG argues that the "detailed and technical" price cap Appendix "cannot fairly be described as ambiguous, and the method for enforcement is clearly spelled out." AG Response at 37; *see id.* at 39 ("The terms of the proposed Consent Judgment are largely self-executing and will not require excessive court involvement to enforce."). We disagree. *See* AAI Initial Comments at 11-12. In any case, the AG should establish these points to the court's satisfaction at least by providing a tutorial on how pricing works in the industry and offering a step-by-step guide how the price caps will work in practice. While the AG argues that the proposed consent is no more complex than other consent decrees containing ongoing compliance obligations, the cited banking consents are much more straightforward. *See* AG Response at 40.[4]

Second, many commenters, including AAI, have objected to the price caps because they provide, at best, only temporary relief. The AG does not argue that the market will become more competitive while the relief is in place so that price caps will be unnecessary, or that, contrary to the few instances where caps have been tried, prices will not go up when the caps are lifted. Rather, the AG's only argument is to invoke "litigation risk," and argue that some relief is better than none. AG Response at 19-20. But the short-term nature of the relief makes the remedy entirely inadequate. If, after the price caps are lifted in six and a half years, prices increase annually by the same amount they are prevented from increasing in the first six and a half years, a simple mathematical calculation shows that the price caps—even if they worked perfectly—would prevent only a small fraction of future price increases.[5]

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[3] The court could appoint the HPC or an academic health care economist to assist it. *See supra* note 1.

[4] The AG relies upon two consent decrees that involved mortgage modification and foreclosure relief programs to for distressed borrowers. In both cases, defendants were required to utilize quarterly reports indicating that payments and loan restructuring was carried out under predetermined monetary amounts and conditions. The role of the monitors was to ensure that the banks made payments and properly restructured a sufficient number of mortgages. These decrees did not involve, as here, ongoing rate regulation in a market where price setting is complex, many ambiguous terms with room for evasion, and many issues expressly left open for the parties to seek resolution by the court. *See* AAI Initial Comments at 11-12.

[5] For example, over the next 30 years, the present discounted value of the price increases after the caps are lifted is more than three times greater than the value of those avoided during the 6.5 years the caps are in place, assuming a real interest rate of 1%. And this is likely too generous an estimate of the temporary benefits of a perfectly functioning price cap because when Partners' enhanced market power is unshackled in 6.5 years, the price increases may be more severe than those prevented in earlier years if Partners seeks to recoup some of its lost gains.

Third, MAHP, like AAI and other commenters, has pointed out the problem that the unit price growth cap (UPGC) does nothing to prevent price increases due to changes in utilization and mix of services resulting from the merger. *See* MAHP Comments at 4. Indeed, the price cap may *cause* such changes, as Partners seeks to make up for "reduced rates" by increasing services. *See id.* The AG essentially concedes the point, and while acknowledging that total expense measurement (TME) could address this issue, *see* AG Response at 43-44, fails to explain why the TME growth cap should not apply beyond the 11% of Partners' total commercial business that involves risk arrangement contracts.[6]

Fourth, the MAHP has also pointed out that the settlement may "aggravate, rather than alleviate, the disparity in reimbursement rates between Partners and other providers, which are both a symptom and an enabler of Partners' market power." MAHP Comments at 5. This echoes the contention of the hospital coalition and the HPC, and it is significant that payers see anticompetitive consequences of the rate disparities. It is no answer to say, as the AG does, that a remedy addressing rate disparities would go beyond the complaint, *see* AG Response at 46-47, when the claim is that the mergers themselves make the rate disparities worse because, as payers incur higher total medical expenditures for Partners, "they may feel pressured to reduce the rates they pay to non-Partners providers that do not have the market clout that Partners has." MAHP Comments at 5; *see also* HPC Final Hallmark Report, Ex. B, at 2 (anticipating that transaction will lead to "exacerbation of supra-competitive rate differences").

Finally, the AG does not address the concerns that the price caps do not apply to Medicaid Managed Care or Medicare Advantage, the remedy does nothing about (or may cause) quality reduction from reduced competition, and that ultimate health care consumers may not benefit from the retroactive refunds to payers.

2. *Component contracting*. The Attorney General has described the component contracting option as a "fundamental change to Partners' current way of contracting with payers [which] secures substantial benefits for consumers and advances a more competitive marketplace with relief not otherwise available through a challenge to the South Shore or Hallmark acquisitions." Mem. of the Commonwealth of Massachusetts in Support of the Entry of Final Judgment at 10 (June 24, 2014). As we pointed out in our initial comments, the component contracting remedy does not address the complaint's allegation that "Partners' proposed acquisitions of South Shore and Hallmark would substantially reduce the existing competition between Partners and those hospitals leading to increased prices." Complaint for Injunctive Relief ¶19. In the Attorney General's response, the AG essentially concedes that the component contracting remedy independently does not alter Partner's ability and incentives to increase prices post-merger. *See* AG Response at 52.[7]

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[6] To the extent the AG contends that the volume and mix of service changes resulting from a merger are "outside the scope of this antitrust action," AG Response at 43, the AG is mistaken. The complaint incorporates the HPC reports, including the HPC findings that the mergers would increase health-care spending (not just prices), which will result in increased premiums for employers and consumers. *See* Complaint for Injunctive Relief ¶ 25.

[7] While component contracting, in theory, may prevent a price increase resulting from Partners' additional leverage obtained by adding South Shore and Hallmark, it does nothing to address a price increase caused by the loss of competition between Partners and the acquired hospitals.

In addition, we argued that the remedy was flawed because, among other reasons, it does not provide sufficient protection from actions Partners can take to make component contracting unattractive. In particular, while the remedy bars Partners from making "all or nothing" demands on payers, we raised the obvious problem that Partners may evade the anti-tying relief by offering pricing incentives to ensure that payers continue to take all of Partners' components.[8] *See also* MAHP Comments at 13 ("The current language may permit Partners to try to defeat the purposes of the separate Component contracting requirement by claiming that differentials between the terms it would accept in an all-inclusive contract or in a separate Component contract were justified by efficiencies or other considerations, or were permissible 'discounts' and did not constitute discrimination, retaliation or punishment.").

In the Attorney General's response, the AG confirms that price incentives for bundling are permitted because "the Attorney General also does not want to bar Partners from potentially offering discounts to payers for using the entire Partners network." AG Response at 55. The AG explains that, with the price cap in place, "this discount by definition would have to be, at worst, at a price lower than the maximum allowed by the [unit price growth cap], which will allow a payer to make a decision of what offer from Partners provides its members the best value." *Id.* This is problematic for several reasons.

First, it will be virtually impossible to determine whether a "discount" for taking the full package is a real discount (and hence permitted) or a penalty for taking less (and considered discrimination). The unit price growth cap operates on a retroactive basis; one cannot determine whether prices are within the cap until after the measurement period. If prices turn out to be higher than the cap, then a refund is made. Moreover, the cap does not apply on a service-by-service basis; it applies to a basket of services. And, except for the separate South Shore and Hallmark components, it does not apply on a hospital-by-hospital basis. Finally, the cap will be different for each payer.

Suppose Partners charges "Payer A" $10,000 for a particular popular procedure at MGH during the baseline period. During the measurement period, Partners says it is increasing the price for the procedure by 5%, but will waive the price increase if Payer A agrees to take all the components, including South Shore and Hallmark. Is this a permissible discount? If Payer A accepts the bundled offer then, looked at retroactively, the price paid ($10,000) will not exceed the baseline price. But even if Payer A declines the offer, the increase in price for a particular service at a particular hospital will not necessarily result in exceeding the AMC cap. And how would Payer A know at the time the unbundled price is offered whether it would exceed the cap?

[8] More generally, the component contracting remedy is unduly vague. It requires Partners to offer component contracting on a "fair and non-discriminatory basis," prohibits Partners from taking "any actions to discriminate against, retaliate or punish any Payer because that Payer elects to negotiate" for separate components, and provides that Partners' right to opt out of a Payer's limited or tiered network products be "consistent with the [non-discrimination] principles. Proposed Final Judgment ¶ 68. *See* MAHP Comments at 17 (seeking more detail). The AG responds, "Rather than attempt to anticipate and articulate all the activities that might discourage a payer's use of Component Contracting, the Attorney General instead incorporated broad but clear principles that will allow it to police Partners' actions." AG Response at 55. With all due respect, there is nothing clear about these principles, and no reason that the consent could not provide more detail by having a non-exclusive list of conduct that would be prohibited under the principles.

Second, even if the bundled offer is a "true" discount, there is a reason that tying law often prohibits ties or bundles obtained by discounts. *See, e.g.,* Clayton Act, § 3, 15 U.S.C. § 14 (unlawful to offer discount in exchange for agreement not to purchase rival goods, where effect may be to substantially lessen competition). And that is because "[t]ying arrangements are forbidden on the theory that, if the seller has market power over the tying product, the seller can leverage this market power through tying arrangements to exclude other sellers of the tied product." *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 912, 914 (9th Cir. 2008); *see* Einer Elhauge, *United States Antitrust Law and Economics* 410 (2d ed. 2011) (even bundled discounts that offer lower "but for" prices can increase the degree of tied or tying market power when they create a substantial foreclosure share); *see also PeaceHealth*, 515 F.3d at 914 ("PeaceHealth's practice of giving a larger discount to insurers who dealt with it as an exclusive preferred provider may have coerced some insurers to purchase primary and secondary services from PeaceHealth rather than from [its rival]"); FTC and DOJ, *Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program* 11 (2011) (identifying conduct that may raise competitive concerns, including "Tying sales (either explicitly *or implicitly through pricing policies*)") (emphasis added).

Because of the obvious potential for evasion, and the fact that bundled discounts can exclude rivals, consent decrees in cases involving tying or bundling not only prohibit mandatory bundling, but also bundling obtained by price conditions. *See, e.g.,* In re Time Warner Inc., FTC File No. 961-0004, 1996 FTC LEXIS 389, *48, *84-85 (Aug. 14, 1996) (merger remedy designed to prevent increase in negotiating leverage resulting from combining marquee cable programming channels prohibited Time Warner/Turner from "expressly or impliedly" refusing to make such channels available separately and also from conditioning the carriage terms for those channels on a distributors' agreement to carry other channels); United States v. Electronic Payment Services, Inc.; Proposed Final Judgment and Competitive Impact Statement, 59 FR 24711, 24716, 24720 (May 12, 1994) (relief against tying of access to ATM network with ATM processing included prohibition on conditioning the price or other terms access on the use or non-use of third party processors). For the component contracting to be at all effective, similar constraints should be included here.

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The *AT&T* case offers an important cautionary tale. Judge Greene recognized that the proposed divestiture remedy was superior to a behavioral remedy because "it is unlikely that, realistically, an injunction could be drafted that would be both sufficiently detailed to bar specific anticompetitive conduct yet sufficiently broad to prevent the various conceivable kinds of behavior that AT&T might employ in the future. 552 F. Supp. at 168 & n.155 (noting that for these reasons, and others, "courts have generally rejected this type of detailed injunction in favor of the 'surer, cleaner remedy of divestiture'" (quoting *United States v. E.I. duPont de Nemours & Co.*, 366 U.S. 316, 334 (1961))). "Judge Greene failed to anticipate, however, that the AT&T consent decree's provision for waivers from the line-of-business restrictions that accompanied the mandated divestiture would create an ongoing set of messy questions for him to address," Philip J. Weiser, *Reexamining the Legacy of Dual Regulation: Reforming Dual Merger Review by the DOJ and the FCC*, 61 Fed. Comm. L.J. 167, 178 (2008), making him, in effect, "the

telecommunications czar of the nation," *Covad Commc'ns Co. v. Bellsouth Corp.*, 314 F.3d 1282, 1283 (11th Cir. 2002).

This court should think twice about becoming the health care czar of Massachusetts, and reject the proposed consent as not in the public interest.

Respectfully submitted,

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