

**Remedying Hospital Antitrust Threats with Market-Based Solutions:
The Real Significance of Partners' Failed Expansion**

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Health care consumers had a significant triumph when Massachusetts Suffolk County Superior Court Judge Janet Sanders blocked a settlement that would have allowed Partners HealthCare, the health care system that dominates Boston and its surroundings, to acquire three additional health care providers in eastern Massachusetts. Judge Sanders concluded that the acquisitions “would cement Partners’ already strong position in the healthcare market and give it the ability, because of this market muscle, to exact higher prices from insurers for the services its providers render.”

Consumers will now be spared those projected price increases, unless Partners contests the Judge’s ruling .But there is an even bigger reason for New Englanders to celebrate the Judge’s ruling. Although many policy experts urged the Judge to reject the settlement, few warned that the true danger lay not in Partners’ expanded dominance, but in the degree to which the settlement would have shut out other innovative competitors.

The judge’s ruling closes the latest chapter in the saga of Partners HealthCare, a world-famous system formed in 1994 as a merger between the Massachusetts General and Brigham and Women's Hospitals. Beginning in 2010, then-Massachusetts Attorney General Martha Coakley presciently warned of Partners’ growing pricing power, and her office issued several reports revealing that the merged entity often charged two to three times as much as other equal-quality systems treating patients with equally complex conditions.¹ According to an independent agency created to control Massachusetts health care costs — the highest per capita health care costs among U.S. states — Partners was able to leverage its dominant hospital and physician network to extract favorable pricing from private health insurers. The

agency opined that Partners' expansion plans were likely to continue increasing costs in these markets with no impact on quality.

When Partners initiated its most recent expansion effort in 2012 Attorney General Coakley sued to curb Partners' plan. However, Partners and the Attorney General reached a settlement that would have allowed Partners to consummate its acquisitions in exchange for capping certain prices, containing expenditure growth in some segments, and limiting its expansion into ancillary markets. The policy world calls this a "conduct remedy", which absolves a wrongdoer of its past or planned misconduct in exchange for pledges of good future conduct. Because settlements like this have widespread policy consequences, a judge must approve them before they are implemented. And to ensure that the settlements advance the public interest, judges may solicit the input of a wider world.

In a remarkable response, policy and antitrust experts throughout the country joined state consumer advocates to urge the judge to reject the settlement. Some academic economists claimed that Partners' two decades of expansion had generated little efficiency and that it is "consistently identified as having higher prices and higher medical expenses than other, less integrated systems."² Many observers worried that the settlement inadequately contained Partners' power, which would expand with the additional providers. Others noted that health care costs would increase because Partners enjoys high reimbursement rates, and they doubted the feasibility of enforcing the 92-page settlement. When Maura Healey, the current Massachusetts Attorney General who succeeded Coakley, voiced her own opposition to the settlement, it became much easier for Judge Sanders to reject the agreement before her.

The chapter on Partners' recent expansion is now closed, but the saga continues, as Partners still enjoys monopoly power. Massachusetts is not alone. Hospital markets in more than 80% of U.S. metropolitan areas are "highly concentrated," according to federal guidelines, and dominant hospitals continue to expand rapidly — in 2013, 98 hospital and health system combinations were announced, an increase of 51% over 2010.³ Although hospital mergers have led to estimated price increases of 40% in some local markets,⁴ the policy response has been slow. Fortunately, attorneys general are taking greater notice. In addition to Attorney Generals

Coakley and Healey, Idaho's attorney general, for example, played a leading role in challenging an expansion of Boise's dominant hospital system, an effort that culminated in an important court decision.

However, like Attorney General Coakley, many attorneys general are tempted to seek conduct remedies as settlements, preferring to permit an expansion after extracting pledges for good behavior rather than fighting to prevent an acquisition. But we have healthy skepticism over whether they are effective, and those designed to contain bad behavior by expansionary hospitals have almost no evidence of success.

Conduct remedies in hospital acquisitions are especially dangerous because they apply a utility regulatory model, treating hospitals them as if they were a natural monopoly whose continued existence is essential and whose services are most efficiently provided through a consolidated entity. Hospitals, however, are not natural monopolies, like electricity companies and other organizations that perform essential public services with massive fixed costs that obviate duplication. Health care delivery does not rely on fixed assets whose returns should be guaranteed. Rather, it relies on services and interactions between caring clinicians and patients in need. This concept is lost when public policy focuses on regulating returns on invested capital rather than on promoting the provision of high-quality, innovative, efficient clinical services.

Moreover, innovative, low cost competitors to most hospital services abound, for example via telemedicine and community based urgent care centers. These innovations represent the public's best hope for sustainable health. Treating dominant hospital systems like a utility would give them priority over other providers and would compromise the ability for innovative entrants to succeed.

Don't get us wrong: it's not that Partners lacks innovative people. Just last year, for example, the Food and Drug Administration (FDA) approved two new breakthrough therapies for hemophilia developed by scientists in Partners HealthCare. And the leaders of organizations as diverse as CVS Pharmacy and One Medical Group emerged from Partners. But allowing Partners to control additional networks of providers would make it much harder for lower-cost systems and other providers — those most likely to introduce innovative business models and

bring dynamic competition — to break into the market. Partners already has a history of agreements with the state’s largest insurer that caused patients to remain at Partners’ expensive facilities instead of at lower-cost providers.⁵

Massachusetts is fortunate that Judge Sanders rejected the settlement. But because the Commonwealth, like the rest of the nation, will continue to have unsustainable health care costs, it is not enough to stop dominant hospital systems from acquiring more power. We also need policies that will encourage real innovation in the price and quality of care. We have our own list: encouraging payment reform that rewards quality and cost-effectiveness; liberalizing scope-of-practice regulations, licensing rules, and other prohibitions to allow more efficient use of human resources; ensuring that professional regulations, state boundaries, and FDA rules do not impede telemedicine and digital products that enable mobile health management; and refining antikickback rules and reimbursement restrictions to enable providers to pursue creative, integrated ventures that could revolutionize the delivery of care.

Policies like these would encourage and facilitate the entry of new competitors with innovative strategies. The proposed settlement might well have done the opposite, since it conceded Partners’ dominance and tried only to contain it. It would have made Partners the region’s Bell Telephone of health care delivery.

And therein lies the real danger to health care as attorneys general may be tempted to reach the settlements they frequently use to implement policy to halt the expansion of dominant hospital systems. Judges rarely scrutinize such settlements, preferring to defer to attorneys general, so such agreements usually escape public debate. Thus, negotiated conduct remedies often amount to tacit cooperation between dominant hospitals and policymakers. They can do as much to entrench a hospital system’s dominance as to stem its expansion.

Massachusetts is extremely fortunate that opposition to this settlement caught Judge Sanders’ attention, but such vocal opposition is rare. We need a political system that challenges expansions and preserves competition, not one that assists the dominant player.

Instead of focusing on how to regulate dominant hospital systems, we should pursue policies that can foster real competition and innovation in the delivery of care.

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