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CLIENT ALERT

DOJ Imposes Statutory Maximum $100M Antitrust Penalty Against Florida Oncology Provider

MAY 5, 2020

As news related to COVID-19 continues to dominate headlines in the health care industry, the Department of Justice Antitrust Division ("DOJ") announced that it charged Florida Cancer Specialists & Research Institute LLC ("FCS") with conspiring to allocate medical and radiation oncology treatments for cancer patients in Southwest Florida. This is the first charge in the DOJ's ongoing antitrust investigation into market allocation and other anticompetitive behavior in the oncology industry. The action against FCS also marks the first major criminal antitrust action related to a health care service provider in several years.

In connection with the federal charge, the DOJ announced that it entered into a deferred prosecution agreement ("DPA") with FCS, wherein FCS admitted to allocating chemotherapy and radiation treatments for cancer patients, and agreed to pay a $100 million criminal penalty—the statutory maximum for a violation of § 1 of the Sherman Act. Similarly, the Florida Office of the Attorney General announced a civil settlement with FCS, requiring it to pay more than $20 million in disgorgement of profits for violating Florida's antitrust and unfair trade practices laws.

Based on publicly available information, the federal investigation into FCS likely dates back to 2016, when a whistleblower lawsuit alleged that FCS engaged in Medicare fraud along with a South Florida oncology competitor, 21 Century Oncology. The DOJ's charge alleges that, since at least 1999 and continuing until at least 2016, FCS and another oncology company agreed to not compete to provide chemotherapy and radiation treatments to cancer patients in three counties in Southwest Florida. Under the agreement, chemotherapy treatments were allocated to FCS and radiation treatments were allocated to the other oncology company, allowing FCS to operate with reduced competition in Southwest Florida and leading to limited care options and choices for cancer patients.

While the penalty ($100 million criminal fine) is in of itself significant, the settlement is also noteworthy because the DOJ agreed to a DPA rather than requiring a guilty plea by FCS. The DPA makes clear, though, that the DOJ considered the collateral consequences of a criminal conviction for FCS, the most severe of which would be debarment from all federal health care programs for a period of at least five years. The DOJ recognized that debarment would have substantial consequences for both patients covered by federal health care programs and those with private insurance, as the resulting loss of revenue from disbarment would likely be fatal to the company, forcing its entire patient population to find an alternative treatment provider in the community. Thus, the DOJ, through a DPA, was trying to avoid placing cancer patients in the challenging situation of trying to find a new provider in a potentially capacity-constrained market.

One unique feature of this DPA is that FCS agreed to waive all non-compete agreements related to potentially illegal agreements to not hire or solicit radiation or medical oncologists. Although DPAs generally do not extend to cover non-competes with employees, the DOJ likely included the non-compete waiver provision to remedy the potential unlawful hiring practices FCS was engaged in, but were ancillary to the core market allocation conspiracy.

Another unique aspect of this case is that FCS and the other oncology company specialized in different types of oncology treatments—radiation treatments and chemotherapy treatments – i.e., they were not direct competitors. For purposes of assessing antitrust liability, however, the issue is whether the parties agreed to refrain from engaging in each other's specialties, thereby allocating patients amongst themselves. **A key takeaway from this action is that specialization in a particular field or service is entirely appropriate, so long as the decision to specialize is made independently, and not in collaboration with a competitor to eliminate actual or potential competition.** Health care providers attempting to specialize or maximize the utilization of assets must be aware of this distinction to ensure that they are engaging in appropriate independent specialization.

This case is yet another example of DOJ uncovering anticompetitive conduct ancillary to qui tam actions alleging fraud. It is therefore important that companies consider whether a False Claims Act allegation may also involve price fixing, bid rigging, or market allocations. Failure to quickly make that assessment may cost companies millions of dollars or even disbarment from federal programs.

Accordingly, both this matter and DOJ's stated commitment to rooting out anticompetitive practices arising from the COVID-19 pandemic make it clear that health care providers should proactively implement effective antitrust compliance programs and consult with antitrust counsel prior to collaborating with a competitor. Further, because antitrust investigations often expand to other companies and markets through leniency (and leniency plus) applications and whistleblower tips, health care providers should consider reviewing their current arrangements with competitors and actively monitoring their antitrust compliance programs.

If you have further questions, contact your usual Winston relationship attorney for more information.

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