A popular weapon used to contain health care expenditures is the creation by payors and employers of tiered provider networks, which by differentiated co-pays attempt to steer insureds to less expensive choices. In connection with such networks, providers will often provide better pricing in order to be placed on more favorable tiers. In a new antitrust suit, the Antitrust Division of the Department of Justice ("DOJ") and State of North Carolina have challenged the attempt by the dominant health care system in North Carolina to use contractual anti-steering provisions to avoid being disfavored.

On June 9, 2016, DOJ and the North Carolina Attorney General filed an antitrust lawsuit challenging the use of anti-steering restrictions by Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas HealthCare System ("CHS"). The Complaint alleges that CHS prevents insurers from offering tiered networks that feature hospitals that compete with CHS in the top tiers, and prevents insurers from offering narrow networks that include only CHS's competitors. According to the Complaint, "[b]y restricting its competitors from competing for—and benefitting from—steered arrangements, CHS uses its market power to impede insurers from negotiating lower prices with its competitors and offering lower-premium plans.” The plaintiffs contend that the contracts containing the steering restrictions violate Section 1 of the Sherman Act and result in anticompetitive harm to Charlotte area consumers and employers, who “pay higher prices for health insurance coverage, have fewer insurance plans from which to choose, and are denied access to consumer comparison shopping and other cost-saving innovative and more efficient health plans” as a result of CHS’s anticompetitive conduct.

The U.S. health system as a whole continues to confront the challenge of controlling costs, improving quality, and increasing or maintaining patient access to care. Narrow networks limit patient choice in an effort to control costs and increase quality. Since the passage of the Affordable Care Act, the health care industry has seen an increased use of narrow and tiered networks by health plans as well as providers. Health plans, in particular, have made concerted efforts to redesign their health plan offerings to incentivize efficiency while also seeking to ensure high-quality care. Just last year at the FTC/DOJ Healthcare Workshops, then Assistant Attorney General for the DOJ Antitrust Division, William Baer, stated that the DOJ would “challenge provider conduct that enhances market power, stifles pro-competitive innovations, and leads to lower quality, higher cost care.” He noted that the Division pays close attention to the abuse of market power and closely scrutinizes contracting practices such as anti-tiering and anti-steering clauses that threaten competitive harm.

As the first antitrust challenge to the use of anti-steering clauses, this case highlights the importance of evaluating the risk of providers — particularly providers with significant market share — imposing restrictions on payors who seek to implement more cost-effective tiered or narrow networks.

According to the plaintiffs, CHS is a dominant hospital system (with approximately 50% market share in the Charlotte area) that exerts market power in its dealings with health insurers. This market power is evidenced by CHS’s ability to profitably charge prices to insurers that are higher than competitive levels across a range of services, and its ability to impose restrictions on every major insurer that provides coverage in the Charlotte area. CHS’s contracts allegedly prohibit steering outright, or gives CHS the right to terminate its agreement with the insurer if the insurer engages in steering. According to the agencies, a health insurer must have CHS as a participant in at least some of its provider networks in order to market a viable plan in the Charlotte area. The Complaint states that insurers have sought to negotiate the removal of steering restrictions from their contracts with CHS, but have been unable to do so due to CHS’s market power.

The plaintiffs highlight a number of substantial competitive effects stemming from CHS’s conduct, including:

- Protecting CHS’s market power and enabling CHS to maintain at supracompetitive levels the prices of acute inpatient hospital services;
- Substantially lessening competition among providers in their sale of acute inpatient hospital services;
- Restricting the introduction of innovative insurance products that are designed to achieve lower prices and improved quality for acute inpatient hospital services;
- Reducing consumers’ incentives to seek acute inpatient hospital services from more cost-effective providers; and
- Depriving insurers and their enrollees of the benefits of a competitive market for their purchase of acute inpatient hospital services.

The DOJ and NC seek to enjoin CHS from: (a) enforcing anti-steering provisions in its insurance contracts, and (b) retaliating or threatening to retaliate against any insurer for engaging or attempting to engage in steering.
If the case proceeds to trial, CHS will presumably argue that these provisions are part of complicated give-and-take negotiations between CHS and the payors. The complaint emphasizes that CHS was the dominant provider in the Charlotte area that has allowed CHS to charge prices to insurers that are higher than competitive levels across a range of services. The complaint asserts that the restrictions have no procompetitive purpose and quotes a high-ranking CHS executive’s testimony that it would be okay if they were eliminated.

The underlying theory to this case is similar to the DOJ’s long-standing distaste to most favored nation clauses involving a dominant health care market participant. More generally, in connection with players with alleged market power, the DOJ views contractual terms that reference competitors with some skepticism. No such case has actually gone to a merits decision, and the final result in this matter will be closely watched.