DOJ Reaches Settlement with Michigan Hospital on Allegedly Unlawful Marketing Agreement

02.12.2018

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On Friday, the U.S. Department of Justice (“DOJ”) Antitrust Division announced a settlement with Henry Ford Allegiance Health (“Allegiance”) of claims that Allegiance and certain other hospitals unlawfully agreed not to market to each other’s healthcare customers in central Michigan. Under the alleged conspiracy, Allegiance and three other health systems agreed not to market their services or to conduct patient outreach in each other’s counties. See our alert on the Complaint here.

Three of the four hospitals named in the original suit reached settlements with the DOJ and the Michigan Attorney General (“AG”) in 2015. Allegiance was the final defendant standing, and after motions for summary judgment were denied in May 2017, a bench trial was set to begin March 6, 2018. As often happens in litigation, the looming prospect of trial brought the parties to the settlement table.

Under the terms of the proposed settlement, Allegiance is prohibited from entering into any agreements with competing healthcare providers to restrict its marketing practices or to allocate services, customers, or geographic markets among competitors. Allegiance is also prohibited more generally from communicating with competing healthcare providers in its geographic market, except as may relate to the joint provision of services or in the process of potential mergers/acquisitions.

The settlement also requires Allegiance to undertake affirmative compliance duties, such as the hiring of an Antitrust Compliance Officer to monitor for potential antitrust violations and to report to the DOJ. Allegiance must submit to periodic records inspections by the DOJ or the Michigan AG and is required to pay $40,000 for litigation costs to the United States and the State of Michigan. Under the Tunney Act, the proposed settlement will be open for public comment for 60 days once it is published in the Federal Register.

Many interested parties had hoped that a trial would provide much-needed guidance regarding the limits of marketing and referral agreements and their potential interpretation as market allocation agreements. Instead, marketing and referral arrangements still constitute a grey area of antitrust law and must be designed with antitrust compliance in mind.

Our lawyers have many years of experience helping to design effective compliance policies for healthcare providers that meet business needs while mitigating antitrust risk. We would be happy to discuss this case, or any other antitrust matter, with you.