



Portfolio Media, Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

5 Questions To Watch As DOJ Targets Carolinas HealthCare

By **Jeff Overley**

Law360, New York (June 10, 2016, 9:47 PM ET) -- The U.S. Department of Justice's antitrust suit against Carolinas HealthCare System will test the extent to which dominant hospital chains can control where patients get treatment, an issue with major implications for cost-cutting efforts, experts say.

The complaint **filed on Thursday** in North Carolina federal court says that CHS has gained control of 50 percent of the Charlotte-area market for hospital services covered by private insurers. According to the complaint, the hospital system has threatened insurers that offer cheaper policies with narrow networks that steer patients to lower-cost rivals of CHS.

No matter the outcome, cost-cutting efforts will be affected. A win for CHS would allow tremendous leeway for large providers to charge premium rates, and a loss would boost narrow networks that have **rapidly gained popularity** as a money-saving approach to health insurance coverage.

Here are five key questions to watch as the case proceeds:

Are the DOJ's Facts Correct?

In a written statement, the hospital chain didn't deny any of the basic allegations about anti-steering practices, and five experts on Friday told Law360 that the case doesn't look good for CHS if the allegations are true.

"The hospital looks to me like it got caught with its hand in the cookie jar, and I'm not sure exactly what their [justification] is going to be," Nelson Hardiman LLP partner Rob Fuller said.

Barak D. Richman, an antitrust professor at the Duke University School of Law, went even further and predicted that CHS is facing a court defeat.

"This is a fairly blatant contractual device to keep out competition," Richman said. "I would be very surprised if this ends in a loss for the Department of Justice."

Are Anti-Steering Practices Common?

CHS signaled that it will put up a fight, contending that its arrangements with insurers "are similar to those in place between insurers and health care systems across the country."

It would be helpful to CHS if it can show that hospitals frequently threaten insurers that steer patients to cheaper hospitals. But such a showing would be a surprise to some observers.

"I can tell you that we've never advised our clients ... of anything like this," Fuller said. "We think telling an insurer who they can and can't play with is very difficult."

According to the complaint, CHS secured contractual language letting it terminate contracts with insurers that steer patients toward less-expensive hospitals. Experts said it would be surprising if

lots of other hospitals have put comparable terms in writing, but that anecdotal evidence of similar restrictions may be more abundant.

"My guess is that they are certainly not explicit in most contracts," said Thomas L. Greaney, an antitrust expert at Saint Louis University. "But these understandings can be sort of negotiated, I suppose, outside of the contract when the parties are talking about them."

Are There Benefits to Steering Restrictions?

Regardless of whether steering restrictions are common, experts said that CHS might accuse government attorneys of taking things out of context by isolating one aspect of large, complex contracts that reflect delicate balances.

"What I surmise CHS will be arguing is these are complicated, give-and-take types of negotiations," said Bruce D. Sokler, the antitrust chairman at Mintz Levin Cohn Ferris Glovsky & Popeo PC. "We make concessions to get this provision, and insurers get something in turn, and the government shouldn't be cherry-picking and getting in the middle of these negotiations."

In addition, the hospital chain might contend that restrictions on where patients get services are essential to its ability to deliver coordinated care that improves outcomes and ultimately saves money. But observers are skeptical about the merits of such a position.

"I'd love to hear what the alleged pro-competitive efficiencies are," said Leemore Dafny, a Northwestern University professor who studies payor-provider interactions. "Are they engaging in risk-based contracts for which keeping patients in-network could plausibly be necessary to achieve clinical integration? It will be a tough case to make."

Is the DOJ's Geographic Market Fair?

CHS may also attack the government's definition of the relevant geographic market. According to the complaint, the market is the 12-county area surrounding Charlotte, a region that includes 2.6 million people and has defined boundaries as a government statistical area.

Just last month, hospitals in Pennsylvania **beat back** a Federal Trade Commission antitrust challenge by convincing a federal judge that the agency's geographic market was too narrow, and CHS will probably take that case to heart.

"My guess is CHS will have a slightly different view of the market," Sokler said. "The government isn't always consistent in their approach, and of course geographic market definition in health care has been the tipping issue in many cases."

Are Additional Cases Looming?

The DOJ previously targeted anti-steering conduct in the context of credit card companies, including American Express, which is **hoping to escape** a district court loss on appeal at the Second Circuit. In addition, the department previously signaled that its legal theory would transfer **to the health care industry** and **to other sectors more generally**, meaning that the CHS case was not entirely a surprise.

Now the question is whether the DOJ had multiple investigations in mind when it sent those signals. Regardless, the CHS complaint may represent a testing of the legal waters and a taste of things to come for health care providers.

"I don't know how many they've looked at," Sokler said. "But my guess is this is the most persuasive set of facts they had before them."

The U.S. is represented by Renata B. Hesse, David I. Gelfand, Patricia A. Brink, Peter J. Mucchetti, Paul Torzilli, Karl D. Knutsen, Jill Westmoreland Rose, Richard Martin and John R. Read of the DOJ. North Carolina is represented by Roy Cooper and K.D. Sturgis of the North Carolina Department of Justice.

CHS is represented by Womble Carlyle Sandridge & Rice LLP.

The case is United States of America et al. v. The Charlotte-Mecklenburg Hospital Authority, case number 3:16-cv-00311, in the U.S. District Court for the Western District of North Carolina.

--Editing by Katherine Rautenberg and Catherine Sum.

All Content © 2003-2016, Portfolio Media, Inc.