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DOJ's First Antitrust Criminal Prosecution of a Health Care Provider in 25 Years May Signal a New Era for Health Care Antitrust

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Antitrust enforcement against physicians and hospitals is common, but *criminal* antitrust prosecutions of health care providers are very rare. There were none for over 50 years, between 1940 and 1990. The Antitrust Division of the US Department of Justice brought two criminal cases in 1990 and 1995, charging dentists and optometrists with price-fixing. Then for 25 years, DOJ did not charge a provider with an antitrust crime. Until now.

On April 30, 2020, DOJ charged a Florida oncology clinic with a criminal antitrust conspiracy. The one-count criminal information in *US v. Florida Cancer Specialists & Research Institute LLC* ("FCS") alleges that FCS conspired with another oncology clinic, 21st Century Oncology, and other unnamed co-conspirators, to allocate markets in southwest Florida. They agreed that FCS would do medical oncology and 21st Century Oncology would do radiation oncology, and the two would not compete against each other. This conspiracy continued for 17 years, from 1999 to 2016.

The case settled with a deferred prosecution agreement, in which FCS agreed to pay $100 million (the maximum criminal fine for a corporation convicted of a single antitrust violation) and to cooperate in DOJ's prosecution of others involved in the conspiracy. In a separate settlement with the State of Florida, FCS agreed to pay Florida another $20 million.

The case began with a 2016 whistleblower complaint, alleging that 21st Century agreed to refer medical oncology patients exclusively to FCS and, in return, FCS agreed to refer radiation oncology patients exclusively to 21st Century. The DOJ says this case "is the first in the department's ongoing investigation into market allocation in the oncology industry." That ongoing investigation may include prosecutions of the individuals responsible for the FCS conspiracy. It is not clear whether DOJ's investigation extends beyond southwest Florida.

This case is not typical of government antitrust enforcement in health care. For years, DOJ and FTC have challenged antitrust violations by health care providers only in civil cases, generally seeking only injunctive relief. Most such cases settle, and the most common result is a consent decree with a negotiated injunction. This custom has shielded health care providers from criminal prosecution even

for conduct – like price-fixing and market allocation – that DOJ would prosecute as a hard-core antitrust crime in other industries. The *Florida Cancer Specialists* case may signal a change in DOJ's long-standing deference to providers.

What providers should know:

- The *Florida Cancer Specialists* case shows that antitrust violations by health care providers may lead to criminal charges, not just civil lawsuits seeking cease and desist orders.
- Conduct that is *per se* illegal, such as price-fixing and market allocation, may lead to criminal charges.
- A provider with a felony antitrust conviction may be subject to a mandatory 5-year exclusion from participation in Medicare and state health care programs under 42 U.S.C. § 1320a-7. FCS was not excluded, because it entered into a deferred prosecution agreement that avoided a felony conviction. Providers should be aware that exclusion from government health care programs is a possible consequence of a criminal antitrust violation.
- Legitimate competitor collaboration, such as a joint venture with substantial clinical or financial integration, is not *per se* illegal and would not be treated as criminal even if it were found to violate antitrust law. Antitrust counsel can help to ensure that such collaboration is properly structured.
- Now is a good time for health care companies to refresh their antitrust compliance program, if they have one, or work with counsel to develop and roll out such a program if they do not. At a minimum, health care companies should consider providing regular antitrust compliance training to employees in high-risk positions, such as those responsible for setting prices or making decisions about how and where the company competes. Companies should also ensure that their compliance program includes a clear reporting mechanism that allows employees to bring issues to the attention of company leadership.
- A robust antitrust compliance program has two primary benefits. *First*, it may prevent problematic conduct from occurring. *Second*, if a violation occurs, a robust program that detects the violation early will increase the likelihood that prosecutors may decline criminal charges. Last summer, DOJ announced a new policy under which it would consider not pursuing criminal antitrust charges against companies that "invest significantly in robust antitrust compliance programs."

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