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Hospitals Settle DOJ Suit Alleging Illegal Division of Marketing Territories

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Two West Virginia hospital systems settled a lawsuit filed yesterday by the Department of Justice ("DOJ" or "Department") alleging that they agreed to allocate territories for marketing health care services in violation of Section 1 of the Sherman Act. The DOJ alleged that Charleston Area Medical Center ("CAMC") and St. Mary's Medical Center ("St. Mary's") agreed not to advertise in each other's geographic territories, which the Department said deprived customers of useful information about competing health care providers. *U.S. v. CAMC*, Case No. 2:16-cv-03664 (S.D. W.VA. Apr. 14, 2016).

Certain types of agreements between competitors (e.g., market allocation, price fixing) are strictly prohibited under Section 1 of the Sherman Act. These types of agreements are considered per se illegal and are presumed as harmful because they deprive consumers of the benefits of competition and provide no offsetting benefit to consumers. This case is a reminder that the antitrust authorities can, and do, challenge market allocation arrangements and other naked restraints of trade that violate Section 1 of the Sherman Act.

CAMC runs four general acute care hospitals with 908 beds and more than 120 physicians. St. Mary's is located just outside the Charleston metropolitan area, and has 393 beds and more than 50 physicians. According to the complaint, the hospitals compete with each other through price, quality, and other factors to provide hospital and physician services to patients. Assistant Attorney General Bill Baer said that "[m]arketing is an important tool that hospitals use to compete for patients."

The DOJ accused the hospitals of reaching explicit agreements not to compete through marketing since at least 2012. Specifically, CAMC agreed not to place print or outdoor advertisements in Cabell County, where St. Mary's is located. And St. Mary's likewise agreed not to place advertisements in Kanawha County, where CAMC is located. The DOJ cited multiple emails from the hospitals' marketing departments that suggested monitoring and enforcement of the agreement, which hospital executives referred to as a "gentleman's agreement" and a "handshake agreement."

The proposed settlement prohibits CAMC and St. Mary's from agreeing with other healthcare providers to limit marketing or to divide any service, customer, or geographic territory. It also generally prohibits communications between the hospitals about their marketing activities. The hospitals are also required in the proposed settlement to implement an antitrust compliance program and to permit compliance inspections by the DOJ. The proposed settlement would expire after five years.

Pursuant to the Antitrust Procedures and Penalties Act (also known as the "Tunney Act"), the DOJ must publish the proposed settlement and a Competitive Impact Statement in the *Federal Register* at least 60 days prior to entry of the settlement. This provides an opportunity for comments to be filed by the public. At the end of the 60-day period, the court may enter the settlement as the final judgment upon a finding that it serves the public interest.

St. Mary's is also separately involved in an antitrust challenge by the Federal Trade Commission ("FTC") of its proposed acquisition by Cabell Huntington Hospital. Read more about this merger challenge here. However, just last month the FTC issued an Order delaying its administrative law proceedings for 30 days while it analyzed a new state law that seeks to provide the transaction with immunity from federal antitrust law.

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