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When Referrals Are Felonies: Health Care Providers Should Review Their Referral Practices to Avoid the DOJ's Wrath

ANTITRUST AND TRADE REGULATION | HEALTH CARE | LABOR & EMPLOYMENT | WHITE COLLAR CRIME & GOVERNMENT INVESTIGATIONS | MAY 15, 2020

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The medical "referral" is, of course, part and parcel of the everyday work of our nation of specialized health care providers. Exclusive referral arrangements in which, for example, a group specializing in internal medicine formally or informally agrees to exclusively recommend a particular psychotherapy practice to patients in need, and vice versa, will seldom if ever raise scrutiny from agencies charged with enforcing antitrust laws, the Department of Justice (DOJ) and the Federal Trade Commission. Indeed, from a competition standpoint, the garden-variety exclusive medical referral is at worst competitively neutral and may be pro-competitive, as it can dramatically reduce a consumer's (here, a patient's) "search costs" and incentivize "competition for the contract" through the higher quality, better service, and lower prices that competition to be an exclusive provider tends to entice.

But let's imagine a different referral scheme, featuring not only an exclusive referral arrangement but also the following additional alleged facts, and ask what sort of antitrust scrutiny one might reasonably expect to follow:

- The two groups with reciprocal referrals are alleged to be actual or *potential* competitors in the specialties subject to the referrals.
- The two groups allegedly agree not to enter the other's specialty.
- The two groups allegedly agree not to hire, or "poach," health care providers from one another.
- The two groups allegedly assist one another in stamping out nascent competition from potential entrants in either group's agreed-upon "turf."

Florida Cancer Specialists & Research Institute LLC (FCS), a Fort Myers-based oncology group, found out what scrutiny to expect the hard way. On April 30, 2020, the DOJ announced that it had charged FCS with a criminal violation of the Sherman Act, and at the same time entered into a deferred prosecution agreement with FCS to resolve those charges. Under the agreement, FCS agreed to pay the Sherman Act statutory *maximum* fine of $100 million, expressly acknowledged its participation in a criminal conspiracy, agreed to cooperate fully in the ongoing probe, and waived any and all nonsolicitation and noncompete clauses in contracts signed with current or former members and employees. The deferred prosecution agreement gives the DOJ the right to prosecute FCS for the confessed crime if FCS fails to comply with its obligations.

According to reports, the investigation into the market for oncology services in southwest Florida — an alleged relevant market that FCS and its alleged co-conspirator were said to dominate — began with a whistleblower complaint filed by two former FCS officers. According to an information filed with the deferred prosecution agreement, the scheme involved FCS, which specializes in medical oncology treatments (like chemotherapy), allegedly agreeing to refer all radiology patients to a medical group specializing in radiology oncology. The radiology group, in exchange, purportedly agreed to refer all patients for medical oncology treatments to FCS. Moreover, each firm allegedly agreed not to compete in the other's specialty or hire one another's specialists. These arrangements purportedly depressed competition in both alleged sub-markets — medical oncology and radiology oncology — limiting choice for patients and raising prices for payers (whether the patients themselves, insurance providers, or public sources). According to the DOJ, the agreement spanned from "at least as early"

as 1999, and through “at least as late” as 2016, and impacted more than $950 million in FCS revenue.

There are two tiers of antitrust offenses: (1) so-called hard-core offenses, which may be charged criminally or civilly, such as price fixing, bid rigging, and market allocation, that are illegal per se and draw the harshest penalties for violators (including potential prison terms for individual conspirators); and (2) other offenses, typically charged civilly, such as refusals to deal, exclusive dealing, price discrimination, and monopolization of markets. The DOJ hammered FCS with a criminal charge, the maximum fine, and conduct conditions because it confessed to engaging in a “hard-core” offense — market allocation — and a second offense, a “no poach” agreement supposedly depressing competition in the oncology labor market, which the agencies announced several years ago may also be prosecuted criminally by the DOJ. The unusual length of the conspiracy alleged (at least 17 years), the volume of commerce impacted (at least $950 million in FCS revenues alone), and the manner in which the conspiracy was exposed (through whistleblowers, and not through the DOJ’s leniency program) were also likely factors in the punishing remedy structured by the DOJ.

On the other hand, FCS may count itself “lucky” because the DOJ agreed to defer prosecution, versus taking FCS to court now, seeking a potentially higher fine under the Alternative Fines Act (the DOJ claims the right to obtain twice the gain or loss caused by the offense under this act, regardless of the Sherman Act maximum), and even pursuing jail time for FCS executives. The DOJ made clear that this was not an act of charity. Instead, the DOJ agreed to a deferred prosecution agreement in light of the potential collateral consequences of a future criminal conviction of FCS, which it explained would likely result in its mandatory exclusion from the U.S. Department of Health and Human Services’ federal health care programs for five years, to the detriment of vulnerable cancer patients.

The scrutiny and heavy penalties are consistent with numerous recent statements, and actions, from federal antitrust officials indicating that they are keenly focused on competitive conditions in health care markets and snuffing out anti-competitive conduct where they find it. Those actions span nearly every aspect of antitrust practice, from mergers and acquisitions, to the formation of joint ventures, to joint contracting, clinical integration, sales and distribution practices by medical supply companies, and a new focus on patrolling exploitation by those who might seek to benefit unfairly from the COVID-19 crisis.

Health care providers should naturally and intuitively be vigilant about staying on the right side of the law regarding the *practice* of their craft, which other bodies of law regulate. But they should too be vigilant when it comes to the formation of their groups, the alliances they strike, and the sales and marketing techniques they employ, which may implicate the antitrust laws. Updated compliance programs, with appropriate enforcement, are typically the best way to avoid trouble. Carlton Fields’ leading health care and antitrust practices are here to assist health care providers with all aspects of their compliance needs.