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THE LATEST: DOJ Announces Settlement with Carolinas Health System (Atrium Health) After Two Years of Litigation

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The Department of Justice (DOJ) announced last week that it and the State of North Carolina have reached a settlement with Carolinas Healthcare System / Atrium Health relating to provisions in contracts between the health system and commercial insurers that allegedly restrict payors from "steering" their enrollees to lower-cost hospitals. The settlement comes after two years of civil litigation, and serves as an important reminder to hospital systems and health insurers of DOJ's continued interest in and enforcement against anti-steering practices.

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WHAT HAPPENED:

- On June 9, 2016, the DOJ and the State of North Carolina filed a complaint in the Western District of North Carolina against the Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Healthcare System, now Atrium Health (Atrium).
- In its complaint, DOJ accused Atrium of "using unlawful contract restrictions that prohibit commercial health insurers in the Charlotte area from offering patients financial benefits to use less-expensive health care services offered by [Atrium's] competitors."
- DOJ alleged that Atrium held approximately a 50 percent share of the relevant market and was the dominant hospital system in the Charlotte area. DOJ defined the relevant product market as the sale of general acute care inpatient hospital services to insurers in the Charlotte area.
- DOJ alleged that Atrium used market power to negotiate high rates and impose steering restrictions in contracts with insurers that restrict insurers from providing financial incentives to encourage patients to use comparable lower-cost or higher-quality providers. Such financial incentives include health plan designs that charge consumers lower out-of-pocket costs (such as copays and premiums) for using top-tier providers that offer better value, or for subscribing to a narrow network of providers.
- Atrium also allegedly prevented insurers from offering tiered networks with hospitals that competed with Atrium in the top tiers, and imposed restrictions on insurers' sharing of value information with consumers about the cost and quality of Atrium's health care services compared to its competitors. These "steering restrictions" allegedly reduced competition and resulted in harm to consumers, employers, and insurers in the Charlotte area.
- Atrium allegedly included these steering restrictions in its contracts with the four largest insurers who in turn provide coverage to more than 85 percent of commercially insured residents in the Charlotte area.
- On March 30, 2017, the court denied Atrium's motion for judgment on the pleadings, finding that the government met its initial pleading burden. Atrium had argued that the complaint failed to properly allege that the contract provisions actually lessened competition or lacked procompetitive effects.
- More than a year later, on November 15, 2018, DOJ announced that the State of North Carolina and DOJ had

reached a settlement with Atrium, which prohibits Atrium from continuing its practices of using alleged steering restrictions in contracts with commercial health insurers. The proposed settlement also prevents Atrium from "taking actions that would prohibit, prevent, or penalize steering by insurers in the future." The agreement lists certain prohibitions and permissions for Atrium; for example, that Atrium may not enforce existing alleged anti-steering provisions, and must allow payors to be transparent with consumers about price, cost and quality information. However, Atrium is permitted to enforce other contract provisions that protect against carve outs (where an insurer unilaterally removes a health care service from coverage in a health plan), and may restrict payor steering for any co-branded plan or narrow network in which Atrium is the most prominently-featured provider.

WHAT THIS MEANS:

- Going forward, both DOJ and the Federal Trade Commission (FTC) are likely to investigate similar contract provisions by health systems susceptible to allegations of market power. The resolution of the Atrium matter comes just one month after Senator Chuck Grassley sent a letter to FTC Chairman Joseph Simons, asking FTC to investigate certain allegedly anticompetitive hospital system managed care contracting practices and to assess how prevalent they are in the marketplace. Senator Grassley's October 10 letter cited to a recent *Wall Street Journal* article detailing various provisions said to increase health care costs and restrict patient choice, including anti-steering provisions. The letter cited to the then-pending *Atrium* case specifically. In the wake of the Grassley letter and the *Atrium* settlement, hospital systems that have entered into alleged anti-steering provisions with payors may need to expect inquiry from the FTC or DOJ.

- The Atrium settlement follows the resolution of another DOJ challenge to anti-steering provisions. Earlier this year, in *American Express*, the Supreme Court rejected DOJ's challenge to the anti-steering rules that the credit card company imposed on merchants. The cases are distinguishable in part due to the difference in market share of defendants. American Express held 26.4 percent of the credit card market, whereas Atrium allegedly holds 50 percent of the relevant market asserted by DOJ.

- Many watched the *Atrium* case as an opportunity for further guidance from the courts on the competitive implications of anti-steering practices, but the settlement means practitioners and industry members must continue to wait for judicial consideration of these types of provisions in the health care industry.

- The *Atrium* matter serves as a reminder of the agencies' interest in alleged anti-steering and other restrictive contracting practices. Now is an opportune time for hospital systems to review their managed care contracting practices for potential antitrust risk under the rule of reason, particularly hospital systems with relatively high shares within concentrated service areas or that have contracting provisions with payors representing a majority of the local patient population that could be characterized as allegedly restrictive.

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