King & Spalding
Client Alert

MAY 4, 2020

For more information, contact:

Norm Armstrong, Jr.
+ 1 202 626 8979
narmstrong@kslaw.com

Jeffrey S. Spigel
+1 202 626 2626
jspigel@kslaw.com

John D. Carroll
+1 202 626 2993
jdcarroll@kslaw.com

Christopher Yook
+1 202 626 3747
cyook@kslaw.com

Mary K. Longenbaker
+1 202 626 2916
mlongenbaker@kslaw.com

King & Spalding

Washington, D.C.
1700 Pennsylvania Avenue, NW
Washington, D.C. 20006-4707
Tel: +1 202 737 0500

Florida Oncology Provider to Pay $100 Million Fine in DOJ Criminal Antitrust Investigation

On Thursday, April 30, 2020, Florida Cancer Specialists & Research Institute LLC ("FCS"), the largest independent medical oncology/hematology practice in the U.S., agreed to pay a $100 million fine to resolve a criminal antitrust investigation brought by the Antitrust Division of the U.S. Department of Justice ("DOJ"). DOJ charged FCS with antitrust violations under Section 1 of the Sherman Act, stemming from FCS' alleged involvement in a conspiracy to restrict competition for the care of cancer patients.[1] FCS also entered into a deferred prosecution agreement ("DPA") with DOJ to resolve the charges.[2] This marks the first time in decades that DOJ has pursued a criminal antitrust enforcement action against a healthcare provider, and one of only a few that have ever been brought against a provider.[3] FCS had also agreed to pay an additional $20 million in disgorgement as part of a parallel settlement with the Florida Attorney General's Office.[4]

According to the information filed by DOJ, beginning in 1999 and continuing until at least September 2016, FCS conspired with an unnamed competing network of integrated oncology centers to limit competition in southwest Florida by allocating the market for cancer patients.[5] Specifically, FCS agreed not to provide radiation oncology treatments in southwest Florida; in exchange, its co-conspirator agreed not to provide medical oncology services in the same region.[6] As part of their conspiracy, FCS and its competitor further agreed not to hire oncologists specializing in treatment options allocated to the other, cooperated to prevent competition from third-party oncology practices, and engaged in ongoing information exchanges regarding the division of treatment services.[7]

Section 1 of the Sherman Act prohibits agreements between competitors to fix prices and allocate markets, conduct that is treated as per se unlawful.[8] Violations of Section 1 are subject to substantial criminal fines and imprisonment for individuals.[9] Under the DPA, FCS admitted to its role in the conspiracy and agreed to pay a $100 million fine—the

maximum permitted under the Sherman Act.[10] FCS further agreed to waive and refrain from enforcing any non-compete, non-solicitation or non-interference agreements that might otherwise prevent current or former employees from opening or joining competing oncology practices in southwest Florida.[11] FCS also agreed to implement and maintain a compliance program to prevent future criminal antitrust violations, and to continue cooperating fully with DOJ in its investigation of the conspiracy.[12] In consideration of FCS' compliance with these terms, DOJ agreed to defer its prosecution of FCS until 2023.[13] According to DOJ, its decision to agree to the DPA was due to the significant collateral consequences that likely would result from a criminal conviction, especially to FCS's current and future patients, including patients enrolled in clinical trials.

KEY TAKEAWAYS

- Although DOJ rarely pursues criminal antitrust enforcement actions against healthcare providers—possibly due to the potential for sympathy in the juror pool for local physicians—DOJ's decision now to bring a criminal enforcement action (and the size of the fine) makes clear that the government is focused on the healthcare industry and is actively conducting investigations, despite the COVID-19 pandemic. Healthcare providers should be on alert that they will likely face stiff penalties for similar anticompetitive conduct.
- The case against FCS is the first charge filed in by DOJ in its ongoing investigation into market allocation in the oncology industry. DOJ's investigation of FCS also exemplifies a broader focus on antitrust enforcement actions involving in the healthcare industry.[14] In 2015 and 2016, DOJ filed similar civil suits alleging per se violations of Section 1 against hospital systems in Michigan and West Virginia respectively.[15] Prior to the entry of the DPA, FCS settled a class action brought by the County of Monmouth, New Jersey. In fact, DOJ specifically cited both the class action and the availability of civil actions as the rationale for not including monetary restitution provisions in the DPA.[16]
- Health systems and provider groups employing non-competes could see cases brought by the federal antitrust agencies, state and local governments, and private parties. For example, a Michigan hospital system filed suit in July 2019 against an anesthesiology group also involving alleged anticompetitive abuses of non-competes.[17]
- Providers should be mindful that so-called "no-poach agreements" may be considered a type of allocation agreement applied specifically to the labor market. DOJ has stated that it views such no-poach agreements, absent independent business justifications, as per se unlawful and would pursue criminal liability under the antitrust laws.[18] Providers should also take note that discussions involving clinical topics—even though they may not be obviously competitively sensitive—are susceptible to antitrust scrutiny.

ABOUT KING & SPALDING

Celebrating more than 130 years of service, King & Spalding is an international law firm that represents a broad array of clients, including half of the Fortune Global 100, with 1,100 lawyers in 21 offices in the United States, Europe, the Middle East and Asia. The firm has handled matters in over 160 countries on six continents and is consistently recognized for the results it obtains, uncompromising commitment to quality, and dedication to understanding the business and culture of its clients.

ABU DHABI	BRUSSELS	DUBAI	HOUSTON	MOSCOW	RIYADH	SINGAPORE
ATLANTA	CHARLOTTE	FRANKFURT	LONDON	NEW YORK	SAN FRANCISCO	TOKYO
AUSTIN	CHICAGO	GENEVA	LOS ANGELES	PARIS	SILICON VALLEY	WASHINGTON, D.C.

[1] *Leading Cancer Treatment Center Admits to Antitrust Crime and Agrees to Pay $100 Million Criminal Penalty*, DOJ (Apr. 30, 2020) [hereinafter DOJ Press Release], https://www.justice.gov/opa/pr/leading-cancer-treatment-center-admits-antitrust-crime-and-agrees-pay-100-million-criminal.
[2] *Id.*
[3] The DOJ last filed criminal charges against health care providers in the 1990s. *See, e.g.*, *U.S. v. Lake Country Optometric Soc'y*, 6 Trade Reg. Rep. (CCH) ¶ 45,095 at 44,781 (W.D. Tex., Dec. 15, 1995); *U.S. v. Alston*, CR 90-042-TUC (D. Ariz. Feb. 7, 1990).
[4] *Attorney General Moody Announces Multimillion-Dollar Agreement with Statewide Florida Oncology Practice*, FLA. OFFICE OF THE ATTY. GEN. (Apr. 30, 2020), http://www.myfloridalegal.com/newsrel.nsf/newsreleases/7EE08CD3BEBCB55A8525855A00735AFB.
[5] Information at *3-4, *U.S. v. Fla. Cancer Specialists & Research Inst., LLC*, No. 2:20-cr-78 (M.D. Fla. Apr. 30, 2020). The region at issue consists of Collier, Lee, and Charlotte counties. *Id.*
[6] *Id.*
[7] *Id.* at *4-5
[8] 15 U.S.C. § 1.
[9] *Id.*
[10] Deferred Prosecution Agreement at *7, *U.S. v. Fla. Cancer Specialists & Research Inst., LLC*, No. 2:20-cr-78 (M.D. Fla. Apr. 30, 2020). Under alternative sentencing provisions, the maximum fine for a violation of the Sherman Act can be higher than the $100 million statutory maximum to twice the gain or loss involved. 15 U.S.C. § 1.
[11] Deferred Prosecution Agreement, *supra* note 10, at *9.
[12] *Id.* at *5-7, 11.
[13] *Id.* at *10.
[14] DOJ Press Release, *supra* note 1.
[15] Complaint, *U.S. v. Charleston Area Med. Ctr., Inc.*, No. 2:16-cv-0364 (S.D. W. Va. Apr. 14, 2016); Complaint, *U.S. v. Hillsdale Cmty. Health Ctr.*, No. 2:15-cv-12311 (E.D. Mich. June 25, 2015).
[16] Deferred Prosecution Agreement, *supra* note 6, at *9.
[17] Complaint, *Trinity Health Corp. v. Anesthesia Assocs. of Ann Arbor, PLLC*, No. 2:19-cv-12145 (E.D. Mich. July 23, 2019). The case was settled two months later. Order of Dismissal, *Trinity Health Corp. v. Anesthesia Assocs. of Ann Arbor, PLLC*, No. 2:19-cv-12145 (E.D. Mich. Aug. 1, 2019).
[18] Statement of Interest of the United States of America at *25, *Seaman v. Duke Univ.*, No. 1:15-cv-462 (M.D.N.C. Mar. 7, 2019) ("Like other types of allocation agreements, such no-poach agreements between competing employers are *per se* unlawful unless they are reasonably necessary to a separate legitimate business transaction or collaboration between the employers, in which case the rule of reason applies.").