

Court upholds DOJ antitrust lawsuit challenging Carolinas HealthCare System's anti-steering provisions

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Antitrust and Competition Alert

Despite a recent decision by the Second Circuit suggesting that anti-steering contractual provisions in other industries may not be anticompetitive, DOJ's lawsuit (*United States v. Carolinas HealthCare System*) against Carolinas HealthCare System's (CHS's) contracting practices continues forward after surviving a motion for judgment on the pleadings. On March 30, a North Carolina federal judge found that DOJ's lawsuit targeting CHS's direct and indirect anti-steering provisions preventing insurers from steering patients to lower-cost providers alleged plausible antitrust violations and should continue to discovery.

DOJ's complaint, discussed more fully in our previous [client alert](#), alleges that the anti-steering provisions in the contracts of CHS violate Section 1 of the Sherman Act. According to the complaint, CHS, a hospital system with an alleged 50 percent market share in the Charlotte area, includes provisions in its contracts with Aetna, Blue Cross Blue Shield, Cigna, and United that make it difficult for insurers to steer patients to lower priced hospitals. These provisions do so directly by preventing insurers from offering either narrow networks that exclude CHS or tiered networks that incentivize patients to use CHS' competitors. The provisions also indirectly restrict steering by preventing the insurers from providing information to their enrollees about where they can obtain lower cost or higher quality healthcare services. DOJ alleges these provisions insulate CHS from competition, allowing CHS to maintain higher prices.

Last year CHS filed a motion for judgment on the pleadings arguing that its anti-steering provisions do not abuse its market power, but rather allow CHS to offer lower rates by ensuring access to a larger patient population. CHS also argued that there is no evidence of harm from these provisions. While the motion was pending, the Second Circuit issued an opinion in *United States et. al. v. American Express Co.* finding that American Express's use of "nondiscriminatory provisions" – akin to the anti-steering provisions in the CHS case – did not harm competition by preventing merchants from encouraging customers to use credit cards that charge lower fees. In its supplemental brief before Judge Conrad, CHS called the decision a "major blow" to DOJ's case.

Similar to *American Express*, CHS argued that health insurers should not be permitted to attract subscribers seeking access to CHS and then steer those subscribers to other hospitals. Judge Conrad disagreed, however, giving little weight to the Second Circuit's decision. He found that

credit cards are an entirely "different product and a different market" than healthcare and, moreover, that the Second Circuit reached its decision only after extensive discovery and a 7-day bench trial and not on a motion on the pleadings.

Despite Judge Conrad's ruling, DOJ's path to victory remains uncertain. Indeed Judge Conrad found that "CHS has raised serious and robust questions about the purposes, effects, and legality of its contractual steering restrictions and steering restrictions generally, but those questions are best resolved after the benefit of discovery."

The lawsuit continues to have major potential implications for both health insurers and healthcare providers:

- While the *American Express* case upholds anti-steering provisions in the credit card industry, companies should not take the opinion as carte blanche for such provisions in other contexts or industries.
- The case continues to affirm DOJ's view that selective contracting plays a key role in assuring competitive healthcare markets and that DOJ is willing to fight aggressively to remove impediments to steering patients to low cost or high quality providers through narrow or tiered provider networks.
- As noted above, although this was an important DOJ victory, the case is still at a very early stage, and there are significant hurdles it will have to overcome to prevail once the full factual record is developed.
- Healthcare providers contemplating contractual restrictions on insurer steering should consult with counsel and ensure that such restrictions are reasonably necessary to achieve legitimate business objectives.

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