EPSTEIN BECKER GREEN
health care & life sciences
CLIENT ALERT

Department of Justice Sues Four Michigan Hospitals for Allocating Marketing Territories

by Patricia M. Wagner, Daniel C. Fundakowski, and M. Brian Hall, IV

July 2015

On June 25, 2015, the U.S. Department of Justice ("DOJ") and the Michigan Attorney General jointly filed a lawsuit against four Michigan hospital systems, alleging that they orchestrated agreements not to compete with each other in violation of Section 1 of the Sherman Act and Section 2 of the Michigan Antitrust Reform Act.

Specifically, the complaint alleges that the four hospital systems, Hillsdale Community Health Center ("Hillsdale"); W.A. Foote Memorial Hospital, d/b/a Allegiance Health ("Allegiance"); Community Health Center of Branch County ("Branch"); and ProMedica Health System, Inc. ("ProMedica") (collectively, "defendants"), agreed to not advertise in each other's territories for competing health care services.[1] This is a significant development insofar as it illustrates how antitrust enforcers continue to vigorously prosecute naked restraints of trade, such as price-fixing and market allocation agreements among competitors, as per se unlawful.

The Alleged Anticompetitive Conduct

The four defendants in this case are general acute care hospitals in adjacent counties in southern Michigan. Each operates the sole hospital in its respective county and competes with the other hospitals on a wide range of health care services.[2] The complaint alleges that Hillsdale entered into agreements with these three competitors to unlawfully allocate territories for the marketing of competing health care services and to limit competition between them—thereby eliminating a significant form of competition to attract patients.[3] According to the complaint, Hillsdale initiated a conspiracy, as early as 1999, with each of the other hospitals to limit marketing in each other's county of

---

[1] Complaint at 10–13, United States v. Hillsdale Cmty. Health Ctr., No. 2:15-cv-12311 (E.D. Mich. filed 2015), *available at* http://www.justice.gov/opa/file/623421/download (identifying that Hillsdale, Branch, and ProMedica vary in size from 25 to 88 beds, while the fourth defendant, Allegiance, has 480 beds).
[2] *Id.* at para. 1.
[3] *Id.* at para. 2.

operation.[4] The three advertising agreements, each described below, are alleged to be per se unlawful under federal and state antitrust laws.[5]

Alleged Agreement Between Hillsdale and Branch

In the fall of 1999, Hillsdale's then-CEO and Branch's CEO allegedly reached an agreement whereby each hospital agreed not to market anything but new services in the other hospital's county.[6] Branch's CEO testified in a recent deposition that "[t]here's a gentlemen's agreement not to market services other than new services."[7] Branch also allegedly monitored Hillsdale's compliance with the agreement and directed Hillsdale's marketing employees to abide by the agreement. For example, in November 2004, when Hillsdale promoted a physician in a Branch County newspaper advertisement, Branch's CEO faxed Hillsdale's then-CEO a copy of the advertisement to alert him to the violation of the agreement.[8]

Alleged Agreement Between Hillsdale and ProMedica

Since at least 2012, Hillsdale and ProMedica allegedly agreed to limit their marketing for competing services in one another's county.[9] For example, in June 2012, Hillsdale's CEO allegedly refused to allow ProMedica to market competing oncology services in Hillsdale County.[10] As one ProMedica communications specialist later described, "[t]he agreement is that they stay our [sic] of our market and we stay out of theirs unless we decide to collaborate with them on a particular project."[11]

Alleged Agreement Between Hillsdale and Allegiance

Since at least 2009, Hillsdale and Allegiance allegedly had an agreement that limits Allegiance's marketing for competing services in Hillsdale County.[12] According to the complaint, Allegiance explained in a 2013 oncology marketing plan that "an agreement exists with the CEO of Hillsdale Community Health Center . . . to not conduct marketing activity in Hillsdale County."[13] Allegiance has allegedly apologized to Hillsdale in the past for violating the agreement and assured Hillsdale that Allegiance would prospectively honor the previously agreed upon agreement.[14] Allegiance also allegedly

---

[4] *Id.* at para. 2, 29.
[5] *Id.* at para. 5 (citing Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 2 of the Michigan Antitrust Reform Act, MCL 445.772).
[6] *Id.* at para. 29.
[7] *Id.*
[8] *Id.* at para. 30–31 (identifying that Branch's 2013 guidelines for media releases also noted how Branch had a "gentleman's agreement" with Hillsdale and thus Branch should not send media releases to the *Hillsdale Daily News*).
[9] *Id.* at para. 24.
[10] *Id.* at para. 25.
[11] *Id.* at para. 27.
[12] *Id.* at para. 17.
[13] *Id.*
[14] *Id.* at para. 19.

avoided giving free health benefits to Hillsdale patients, such as free vascular health screenings or physician seminars, since Hillsdale would charge for these services.[15]

Proposed Settlement

With the complaint, the DOJ and State of Michigan filed a Stipulation and Proposed Final Judgment with respect to Hillsdale, Branch, and ProMedica.[16] The fourth defendant, Allegiance, will proceed with defending the matter.

The proposed settlement would, among other things, require the defendants to initiate a comprehensive antitrust compliance program and would prohibit the hospitals from entering into any agreements with other health care providers to limit marketing or promotional activity or to divide any geographic area.[17] The proposed settlement also prohibits the defendants from communicating with each other about marketing activity, unless the communication is related to "joint marketing" and the joint provision of services, or is part of "customary due diligence" in connection with a merger, acquisition, joint venture, investment, or divestiture.[18] The proposed settlement does not call for monetary damages aside from the $5,000 payable to the State of Michigan to defray the costs of investigation and litigation.[19]

Conclusion

The complaint alleges specific circumstances where the agreements constrained competition by preventing Hillsdale's competitors from advertising services to residents of Hillsdale County through billboards, newspaper ads, or any other avenue. The complaint also alleges that the marketing agreements deprived patients of free medical services, such as health screenings or seminars, because they were considered promotional under the market allocation agreements. Hospitals and other health care providers should be advised that any type of agreement with a competitor to allocate markets or otherwise refrain from competing is likely to be subject to per se scrutiny under the antitrust laws.

* * *

This Client Alert was authored by **Patricia M. Wagner, Daniel C. Fundakowski, and M. Brian Hall, IV**. **Kevin J. Malone,** *a Summer Associate (not admitted to the practice of law) in Epstein Becker Green's Washington, DC, office, contributed significantly to the preparation of this Client Alert.* ***For additional information about the issues discussed in this Client Alert, please contact one of the authors or the Epstein Becker Green attorney who regularly handles your legal matters.***

---

[15] *Id.* at para. 21.
[16] Stipulation and Order at 14–15, United States v. Hillsdale Cmty. Health Ctr., No. 2:15-cv-12311 (E.D. Mich. filed 2015), *available at* http://www.justice.gov/opa/file/623431/download.
[17] *Id.*
[18] *Id.* at 8.
[19] *Id.* at 23.

About Epstein Becker Green

Epstein Becker & Green, P.C., is a national law firm with a primary focus on health care and life sciences; employment, labor, and workforce management; and litigation and business disputes. Founded in 1973 as an industry-focused firm, Epstein Becker Green has decades of experience serving clients in health care, financial services, retail, hospitality, and technology, among other industries, representing entities from startups to Fortune 100 companies. Operating in offices throughout the U.S. and supporting clients in the U.S. and abroad, the firm's attorneys are committed to uncompromising client service and legal excellence. For more information, visit www.ebglaw.com.

If you would like to be added to our mailing list or need to update your contact information, please contact Lisa C. Blackburn at lblackburn@ebglaw.com or 202-861-1887.