



US DoJ's first hospital steering case heads for showdown in North Carolina —analysis

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- Carolinas HealthCare cites Second Circuit reversal of AmEx ruling in motion for judgment
- DoJ draws sharp distinction between Carolinas and American Express steering cases
- A dominant hospital and smaller competitors look good as an antitrust story — academic

Carolinas HealthCare System is unlikely to beat the US Department of Justice's (DoJ) steering case against it with an attempted backboard-shattering slam dunk in the first period, lawyers say.

In this case, the DoJ alleges that the Charlotte, North Carolina hospital system's practice of contractually preventing commercial health insurers from "steering" — offering their insureds financial incentives to use less-expensive healthcare services — reduces competition for those services and harms area consumers, employers and insurers.

Antitrust lawyers are watching the case because it is the first instance in which the DoJ has targeted anti-steering contract provisions in the healthcare field. It also follows a controversial defense-friendly opinion from the US Second Circuit Court of Appeals in a DoJ steering case that plaintiffs and the government have said stands US antitrust law on its head.

The DoJ won a bench verdict in 2014 in its only other steering case. That case targeted so-called non-discrimination rules that American Express (AmEx) puts in contracts which prevent merchants who accept its cards from steering consumers to lower-cost payment options. However, the Second Circuit summarily reversed that win in a decision issued last fall. The DoJ has not yet decided whether to appeal the decision to the US Supreme Court.

A spokesperson for the DoJ Antitrust Division declined to comment on the case.

But an antitrust plaintiffs' lawyer voiced the view of several when he told *PaRR* that having watched antitrust law evolve over the years, when a decision comes along with a pro-defense application, this is sure to turn up in defense pleadings across the board.

"There is going to be an attempt to confuse judges and bastardize this opinion, you can absolutely take that to the bank," the lawyer said.



Sector: Healthcare
Topics: Agencies, Vertical Restraints

Grade: Strong Evidence

Companies

American Express Company
Carolinas HealthCare System
Lawyer
Womble Carlyle Sandridge & Rice, LLP
Boies Schiller & Flexner, LLP

Agencies

US Department Of Justice (DoJ)
US Federal Trade Commission (FTC)

Case Files

US Federal Government Investigation Into
Anticompetitive Steering Restrictions In
Contracts With Commercial Health Insurers In
North Carolina (2016)

Carolinas' attempted slam-dunk — a motion for judgment out of the gates, before filing a motion to dismiss — is to use that Second Circuit decision to convince a federal judge in Charlotte that he should follow the appeals court's reasoning in the AmEx case and likewise toss this case out.

Not so fast, the DOJ replied. The Second Circuit said the government failed to prove that AmEx's anti-steering provisions are anticompetitive because it took into account only one side of what AmEx had argued to be a two-sided market of merchants on one side and cardholders on the other. This case poses an entirely different set of circumstances, the DOJ argues.

In a statement, Carolinas emphasized its commitment to fair competition and said it looks forward to its day in court. It said its arrangements with insurers are similar to those in place between insurers and healthcare systems across the country. "We have neither violated any law nor deviated from accepted healthcare industry practices for contracting and negotiation," the statement said. Carolinas noted US government recognition "for the quality care and cost-reduction programs we've implemented, programs it hopes to model in other parts of the country."

Antitrust attorneys that represent healthcare sector companies said they are actively monitoring the case on behalf of clients but declined to elaborate. The case could have clear implications for other players in the healthcare industry, especially given that the government has sounded warnings about anti-steering provisions in the sector before, *PaRR* was told.

John Kirkwood, a former official with the Federal Trade Commission (FTC) Bureau of Competition who writes about antitrust issues and teaches at Seattle University School of Law, said he was unsure how prevalent the situation alleged in the DOJ complaint may be in other parts of the US.

"The DOJ may have looked at several hospital systems and picked this one because a dominant hospital and smaller competitors looks good as an antitrust story," Kirkwood said.

He noted that the DOJ complaint does not raise potential efficiencies that Carolinas could cite as pro-competitive effects. For instance, Carolinas might argue that the anti-steering provisions mean more patient volume, allowing it to lower prices or to give better discounts to insurers. It might argue that anti-steering is a watered-down form of exclusivity that can have price benefits for the insurer, Kirkwood said.

But then the DOJ would say, yes there are discounts, but the discounts do not offset the harms created by the anti-steering provisions, he said, adding that if the anti-steering provisions were better on balance, the insurers would want them. Yet the DOJ alleges that insurers have been trying to get rid of the anti-steering provisions, Kirkwood said.

And maybe Carolinas would try echoing AmEx — the provisions mean higher costs to insurers, but we invest that money in higher-quality care for patients. But the classic antitrust response

is that you cannot preclude the market participation of low-cost providers to increase quality, he said.

The case is *United States of America et al v. The Charlotte-Mecklenburg Hospital Authority*, no. 16cv311, in the US District Court for the Western District of North Carolina (Charlotte).

by Peter Geier in Washington DC and Kathryn Leger in San Francisco.

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