

## Updates

November 19, 2018

### DOJ Announces Settlement of Anti-Steering Antitrust Case Against Atrium Health

The U.S. Department of Justice (DOJ) and the Attorney General of North Carolina [announced a settlement](#) last week in their civil antitrust case against Atrium Health, the largest hospital system in the state of North Carolina. Atrium operates more than 40 hospitals in the Carolinas, including Carolinas Medical Center, the largest hospital in Charlotte.

In 2016, the DOJ and the state sued Atrium, then known as Carolinas Healthcare System, for using anti-steering provisions in its contracts with four large health insurers that effectively prevented those insurers from encouraging their insureds to use lower-cost providers. Specifically, these provisions allegedly prevented insurers from offering health plans ostensibly designed to lower prices and improve quality, such as those with tiered or narrow networks, that would effectively discourage or prohibit the use of Atrium hospitals.

Under the Proposed Final Judgment, which has not yet been entered by the court, Atrium is prohibited from enforcing its current anti-steering clauses. In the future, it will be prevented from seeking or obtaining any contract provision with a health plan that would "prohibit, prevent or penalize" any narrow network plans or tiered benefit plans.

On the other hand, Atrium is allowed to continue using its anti-steering provisions "for protection against carve outs," which are defined by the Proposed Final Judgment as arrangements in which an insurer unilaterally removes a particular healthcare service from coverage under a benefit plan. It can also prevent steering when it is the "most-prominently featured provider" in a co-branded plan or narrow network plan. For example, the local Blue Cross plan currently markets a plan called "Blue Local with Carolinas HealthCare System" that would fall under this provision. Under that plan, Atrium can prevent Blue Cross from including or adding other providers to that plan's network.

Atrium is also allowed to enter into contracts that give it the right to participate in the most-preferred tier of a benefit plan under the same terms and conditions as any other healthcare provider in the Charlotte area. But if it declines to participate in the top tier under those terms, it will not be able to refuse to participate in that plan altogether. Instead, it must participate on "terms and conditions that are substantially the same as any terms and conditions of any then-existing broad-network Benefit Plan (e.g., PPO plan) in which [Atrium] participates with that Insurer."

This case was the first antitrust challenge of anti-steering contract clauses in the healthcare industry, and the settlement means that more such cases could be filed in the future. Hospital systems can limit their risk in the following ways:

- Hospitals with a substantial share of the inpatient hospital market in their Metropolitan Statistical Area (MSA) should be cautious about using any such anti-steering provisions in their contracts with health plans. In the Charlotte area, Atrium was alleged to have a 50% share of the inpatient market. In general, shares below 30% are not viewed with great concern by the DOJ and Federal Trade Commission.
- Hospitals should carefully evaluate using anti-steering provisions in contracts with health plans that collectively represent a significant percentage of the commercially insured residents in their MSA. Atrium allegedly used its provisions, in one form or another, with four large plans comprising 85% of the commercial market in Charlotte. Again, contract practices that effectively foreclose competitors from less than 30% of the market are usually not viewed with concern by the agencies.
- One reason a hospital may seek to discourage steering is to prevent the erosion of primary and secondary service rates that cross-subsidize low- or negative-yield trauma care or tertiary care services. Instead, a

hospital should consider restructuring its charges for their less remunerative/higher cost services. After all, it is not illegal to charge higher prices on services for which hospitals have market power.

- Hospitals should try to avoid denying their competitors the benefits of steering if they enjoy those benefits themselves. DOJ emphasized in its complaint that Atrium had actually gained patient volume and revenue from encouraging insurers to steer towards it, while at the same time preventing insurers from steering away from it.

For a more in-depth description of this litigation, please see our article "[Five Things to Watch for in DOJ's Carolinas HealthCare System Case](#)" published in *Bloomberg BNA*.

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