

May 1, 2020

DOJ Resolves Criminal Product Market Allocation Charge with \$100 Million Penalty and Deferred Prosecution Agreement

On April 30, the Department of Justice (DOJ) [announced](#) that a Florida oncology group has agreed to pay a criminal penalty of \$100 million, which is the statutory maximum amount,¹ to resolve a charge that it conspired with a competing group to enter into a product allocation scheme involving types of cancer treatments. In addition to the monetary penalty, the defendant, Florida Cancer Specialists and Research Institute LLC (FCS), agreed to enter into a [deferred prosecution agreement](#) (DPA), cooperate with the DOJ's ongoing investigation and not enforce non-compete agreements with current or former employees. FCS also [agreed](#) to pay \$20 million to settle Florida state antitrust and consumer protection claims.

The DOJ's action is significant for three reasons:

- First, the use of a DPA is notable. Typically, companies are required to plead guilty when settling criminal antitrust charges with the DOJ. However, because a criminal conviction would cause FCS to be debarred from certain federal programs, and in view of the defendant's "substantial cooperation" in the investigation, the DOJ agreed to accept a DPA. The DOJ explained that the defendants' exclusion "would result in substantial consequences to patients covered by the federal healthcare programs, patients outside the federal healthcare programs, patients involved in ongoing clinical trials, and to the Company's employees." The DOJ has similarly agreed to accept DPAs rather than guilty pleas from defendants in its ongoing generic pharmaceuticals investigation.
- Second, the DOJ required that FCS agree "to waive and not enforce any and all non-compete, non-solicitation, and/or non-interference provisions restricting competition with FCS in the provision of oncology services or solicitation of FCS' employees" in agreements with current or former employees who join or open an oncology practice in Southwest Florida. This provision appears to be designed to both remedy the lack of competition resulting from the charged conspiracy and to facilitate additional competition in the area.

¹ An alternative provision of federal law provides for fines of up to twice the gross amount the co-conspirators gained from the violation or twice the gross amount that the victims lost because of the violation, whichever is greater. This may increase a fine above \$100 million where circumstances warrant.

- Third, the DOJ's action demonstrates that it continues to be active in prosecuting criminal activity, especially in the healthcare sector, as it said it would be in its recent [guidance](#) regarding collaborations to combat the COVID-19 pandemic, which it issued along with the FTC.

According to the DOJ, the defendant in this case conspired with a competitor "to allocate medical and radiation oncology treatments for cancer patients in Southwest Florida." The conspiracy allegedly covered three counties. The [Information](#), filed in the United States District Court for the Middle District of Florida, charges that since at least 1999, "FCS and Oncology Company A agreed that FCS would not offer radiation oncology treatments within Southwest Florida, and that Oncology Company A would not offer medical oncology treatments within Southwest Florida." As part of the conspiracy, the companies allegedly agreed "that FCS would not employ radiation oncologists and Oncology Company A would not employ medical oncologists in Southwest Florida" and also allegedly agreed to "work[] together to prevent competition from third-party oncology treatment providers."

The charge here involves product allocation, a type of per se illegal market allocation. Other types of market allocation include territorial allocation and customer allocation. The DOJ has a history of enforcement against market allocation schemes in the healthcare industry. For example, in 2016 the DOJ [settled](#) a civil claim against two hospital systems in West Virginia for agreeing to allocate marketing territories. There, the DOJ alleged that the defendants agreed to not place print or outdoor advertisements in each other's county. The DOJ [settled](#) similar claims against a group of hospital systems in Michigan in 2015. The DOJ's [ongoing](#) criminal investigation in the generic pharmaceutical industry involves allegations of customer allocation.

The large penalty announced yesterday serves as an important reminder of the significant consequences that can arise from antitrust violations. It also serves as a reminder that companies should ensure that they have in place robust antitrust compliance programs which can, as we have [previously written](#), help companies to detect violations and avoid the serious consequences faced by the defendant in this case.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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