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What Not To Do When Your Competitor's CEO Calls

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Apparently when the CEO of Hillsdale Community Health Center, Hillsdale, Michigan (Hillsdale), called his counterparts at neighboring general acute care hospitals, all of the antitrust advice they had received was left in the file cabinet. Not only were his calls returned but, according to the Antitrust Division of the U.S. Department of Justice, his offers to enter into non-compete agreements were warmly received.

On June 25, 2015, attorneys for the Antitrust Division and for the State of Michigan filed a complaint, stipulation and order and competitive impact statement bringing an end to agreements of many years standing (some as early as 1999) between Hillsdale and three hospitals in adjoining counties. *United States and State of Michigan v. Hillsdale Community Health Center, W.A. Foote Memorial Hospital, d/b/a Allegiance Health, Community Health Center of Branch County and ProMedica Health Systems, Inc.*, Case No.: 2:15-CV-12311 (E.D. Mich. Filed 6/25/2015). The agreements were allegedly initiated by Hillsdale's CEO and required the hospitals to forego marketing activity in the hospitals' respective counties. The hospitals allegedly closely monitored each other's compliance. On a number of occasions one or more of the conspirators allegedly violated the agreements. In response the violating hospital would provide assurances to the others, oft times with written apologies, that the agreed upon marketing allocation agreement would continue as before.

In a 2013 oncology marketing plan, Allegiance reported that "an agreement exists with the CEO of Hillsdale Community Health Center to not conduct marketing activity in Hillsdale County." ProMedica explained the agreement as follows: "The 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." Branch's CEO wrote that his agreement with Hillsdale's CEO was a "gentlemen's agreement not to market services." In a 2014 board report, Allegiance excluded Hillsdale from marketing campaigns for orthopedic and cardiovascular services. Allegiance's CEO illustrated how Allegiance was taking a Switzerland approach by sending the Hillsdale CEO a Swiss flag.

The Antitrust Division conducted deposition of senior executives of each hospital where it was repeated that marketing was critical for increasing patient volume and market share. Such marketing

included advertisements in mailings, local media and free medical services, "such as health screenings, physician seminars, and health fairs." The agreement between Allegiance and Hillsdale allegedly deprived Hillsdale County residents of these free medical services from Allegiance.

Because the hospitals were horizontal competitors engaged in a geographic market allocation, the Antitrust Division and the State of Michigan charged them with *per se* violations of Section 1 of the Sherman Act, 15 U.S.C. Sec. 1. As such no defenses and no economic efficiencies are available to explain why the conduct was pro-competitive.

Allegiance disputes these allegations and demands its day in court. All of the other hospitals, while equally denying liability, have entered into proposed settlements with the Antitrust Division and the State of Michigan. The proposed Final Judgment would enjoin the hospitals from any further agreements "to prohibit or limit marketing or to allocate markets or territories, and …to communicate with any other Defendant about any Defendant's marketing …."

As a general rule, once the government has written evidence of a market allocation agreement among direct competitors, taking the case to trial is extremely risky, and settlement is usually the only practical option. It will be very interesting to watch the Allegiance case as it unfolds.

So what should executives do when the CEO of a competitor calls about protecting their respective markets from competition? First of all, once the nature of the call is ascertained then the executives should decline further involvement and immediately seek legal counsel. If the agreement is already in place, they can take steps to mitigate their risks. The Antitrust Division's Leniency program provides the first supplicant company with substantial benefits and should be considered as soon as the unlawful conduct is discovered.

For more information on the matters discussed in this *Locke Lord QuickStudy*, please contact the authors:

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