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Sixth Circuit Decision Affirms Summary Judgment Against Antitrust Challenge to Hospital Joint Operating Company's Contracting Conduct

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A recent decision by the US Court of Appeals for the Sixth Circuit is important for competitors involved in joint ventures because it states what mode of antitrust analysis—the *per se* rule or the rule of reason—applies to the conduct of joint ventures when it is challenged as anticompetitive. The decision is also significant because the court describes some steps joint venturers can take to improve the odds that their conduct will be analyzed under the more lenient rule of reason.

Article By Jeffrey W. Brennan
Stephen WuAshley McKinney Fischer
Ashley McMahonMcDermott Will & Emery

On the Subject

Antitrust & Trade Regulation
Health Law & Managed Care
Litigation / Trial Practice
6th Circuit (incl. bankruptcy)

In Depth

Introduction

Last month, in *The Medical Center at Elizabeth Place, LLC v. Atrium Health System, et al.*, a three-judge panel of the US Court of Appeals for the Sixth Circuit affirmed 2-1 the district court's grant of summary judgment dismissing plaintiff The Medical Center at Elizabeth Place's (MCEP) federal antitrust conspiracy claims against four defendant hospital systems and the company under which they operate. *Med. Ctr. at Elizabeth Place, LLC v. Atrium Health Sys.*, No. 17-3863, 2019 WL 1848532 (6th Cir. Apr. 25, 2019).

In affirming the district court, the Sixth Circuit held that defendants' conduct was ancillary to a joint venture, meaning it was plausibly related to the efficiency-enhancing purpose of the joint venture and thus properly analyzed under the rule of reason, which evaluates and balances the conduct's anticompetitive harms and procompetitive benefits. The plaintiff argued that the joint venture's conduct should have been analyzed under the stricter rule of *per se* illegality, which would have only required plaintiff to establish that defendants entered into the challenged conspiracy, without having to show the challenged conduct had an actual anticompetitive effect.

The Sixth Circuit's decision caps a lengthy seven-year battle between the parties that has included two decisions on dispositive motions from the district court and one prior appellate opinion from the Sixth Circuit. The Sixth Circuit's latest decision is important because it illustrates the appropriate legal framework to analyze joint venture conduct and how joint venture conduct potentially raises many issues of fact during litigation, so involving antitrust counsel during the formation and operation of a joint venture involving competitors is a prudent step to minimize legal risk and protracted litigation. For competitors who engage in joint ventures, the decision also highlights the importance of:

- Contemporaneously documenting the pro-competitive goals of their joint ventures, and
- Plausibly linking any conduct that might be challenged as restraining competition to a pro-competitive goal of the joint venture.

These points are particularly applicable when, as here, the members of the joint venture agree to enter into contracts with third parties that can be perceived as excluding competitors.

Background

Plaintiff MCEP is a physician-owned, 26-bed surgical hospital located in Dayton, Ohio, that opened in 2006. *Med. Ctr. at Elizabeth Place, LLC v. Atrium Health Sys.*, 817 F.3d 934, 936 (6th Cir. 2016). The defendants are comprised of four area general acute care hospitals—Miami Valley Hospital (owned by MedAmerica Health), Good Samaritan Hospital (owned by Catholic Health Initiatives), Atrium Medical Center (owned by Atrium Health Systems) and Upper Valley Medical Center—who chose to combine their operations under a joint operating company called Premier Health Partners (Premier), which was initially formed in 1995. *Med. Ctr. at Elizabeth Place*, 817 F.3d at 936. A joint operating company is the product of a joint operating agreement in which competing hospitals contractually collaborate with one another, but allow participants to retain separate identities, boards of directors and limited autonomy, even while management and operational authority is transferred to the joint operating company.

Procedural History

MCEP alleged that, after it opened and entered the market, defendants engaged in an unlawful restraint of trade by conspiring among themselves to exclude MCEP from participating as an in-network provider with area health plans by making defendants' hospitals more expensive for health plans if they chose to add MCEP as an in-network provider. MCEP also alleged that the litigation revealed that defendants engaged in "hub and spoke" conspiracies with third-party health plans and separately with physicians to boycott MCEP. According to MCEP, defendants formed the "hub" while the health plans and physicians formed "rims," with the agreements between them and the defendants constituting the "spokes," by inducing the health plans not to offer MCEP contracts and by agreeing with the physicians not to do business with MCEP, respectively.

After discovery, the district court granted defendants' summary judgment motion, holding that the defendants were incapable of conspiring for antitrust purposes because, despite their separate legal existences, they were acting as a single entity through Premier in accordance with the Supreme Court's decision in *Copperweld Corp. v. Independence Tube Corp*., 467 US 752 (1984). *Med. Ctr. at Elizabeth Place, LLC v. Premier Health Partners*, No. 3:12-cv-26, 2014 WL 7739356, at *9-10 (S.D. Ohio Oct. 20, 2014). MCEP appealed and the Sixth Circuit reversed and remanded in a 2-1 decision, because MCEP had raised "a genuine issue of material fact as to whether defendant hospitals have 'separate' corporate consciences or whether they should be considered a single entity for purpose of the antitrust laws." *Med. Ctr. at Elizabeth Place*, 817 F.3d at 945.

On remand, defendants again moved for summary judgment, this time on the basis that MCEP's allegation that defendants' conduct was a *per se* violation of the antitrust laws failed as a matter of law. The district court denied defendants' renewed motion for summary judgment for two reasons. First, the district court ruled that the claimed procompetitive benefits of defendants' conduct were subject to dispute, and thus inappropriate for adjudication on a motion for summary judgment. Second, the district court was unpersuaded that the defendants had put forward any "any efficiency-enhancing purpose" to which defendants' conduct was reasonably necessary to achieve.

Prior to trial, the district court judge recused himself and the defendants then moved "to clarify" the issues, which had the effect of asking the new district court judge to reconsider the prior ruling denying summary judgment. The new district court judge did so and granted defendants' summary judgment motion, holding that the prior ruling was clearly erroneous because the record did contain evidence that defendants' challenged conduct had plausible procompetitive benefits. The new district court judge also ruled that MCEP's "hub and spoke" conspiracy claims were not previously pled and that it would be severely prejudicial to allow MCEP to amend its complaint to add them at this stage of the litigation. MCEP then appealed a second time.

The Sixth Circuit's Analysis of Challenges to Joint Venture Conduct

This time, the Sixth Circuit considered whether the district court properly ruled that MCEP's claims of conspiracy among the defendants were to be analyzed under the *per se* rule or under the rule of reason and whether MCEP had timely pled its "hub and spoke" conspiracy claims. *Med. Ctr. at Elizabeth Place*, 2019 WL 1848532 at *6-14. To answer these questions, the court began by stating that the proper mode of analysis for a joint venture's conduct, which it viewed as a question of law, turns on the relationship of the conduct to the joint venture.

If a plaintiff challenges a restraint that is "core" to the joint venture itself, then those claims would be analyzed under the rule of reason. The court explained that "core activity is activity that is 'integral to the running' of the venture." The defendants had argued that their contracts with payors limiting their ability to contract with MCEP affected the reimbursement to member hospitals and were, thus, "core activity." The court disagreed, noting that defendants had continued operating as a joint venture despite removing the exclusive aspects of their contracts with the health plans.

The court next turned to analyzing whether the restraints MCEP challenged were "ancillary" to the joint venture's "efficiency-enhancing purpose." The court held that a joint venture's restraint is ancillary, and thus inappropriate for *per se* condemnation, when, at the time it is adopted, the restraint "may contribute to the success of a cooperative venture." In contrast, restraints that are "nakedly unrelated to the purpose of the joint venture" are analyzed under the *per se* rule.

The court then turned to the record to examine whether there was any evidence that revealed "a plausible way in which the challenged restraints contribute to the procompetitive efficiencies of the joint venture." Within the record, the court cited to Premier's joint operating agreement as articulating the goals of defendants' joint venture. Among them were goals relating to:

- Providing a broad scope of health care services;
- Improving the cost effectiveness and efficiency of care;
- Increasing the quality of care;
- Integrating physicians and other providers within Premier's network;
- Assuming and managing financial risk; and
- Improving the health of the local population.

The court then analyzed the defendants' challenged conduct in light of these goals.

For defendants' alleged conspiracy to exclude MCEP from participating in health plan networks as an in-network provider (which the court characterized as a "panel limitation"), the court noted that other circuits have found them to be supported by procompetitive justifications. The court then found it plausible that, by lowering the costs of defendants' services to participating health plan members, the challenged panel limitation furthered the efficiency enhancing goals of the joint venture, specifically its goal of improving the cost effectiveness and efficiency of care.

Turning next to MCEP's allegations that defendants engaged in "hub and spoke" conspiracies with third-party health plans and physicians not to do business with MCEP, the court noted that because MCEP argued they were separate conspiracies from the one among the defendants themselves, those conspiracies would be subject to *per se* analysis as defendants conceded. However, the court concluded that MCEP had not pled its "hub and spoke" conspiracy claims in its amended complaint and that the district court had not abused its discretion in declining to allow MCEP to amend its complaint once more.

The Concurrence and the Dissent

One member of the three-judge panel, Judge Sutton, issued a concurrence re-visiting—which the majority did not do—the prior Sixth Circuit ruling that Premier was not a single entity and, thus, incapable of conspiring. *Id.* at *15. Judge Sutton wrote that the dissent in the prior decision "got it right" and that "Premier qualified as a single entity." This is because Premier and its member hospitals showed "complete unity of interest" by virtue of sharing profits and losses that did not change based on any one hospital's performance. Judge Sutton also found persuasive that Premier acted as a single decision-maker for the defendants by serving as the "operator" for all of the joint venture's health system activities, including negotiating managed care contracts, firing executives, and setting budgets and strategic plans. However, Judge Sutton ultimately concluded that reviewing the prior panel's ruling on Premier's single-entity status was unnecessary because defendants would prevail regardless, in light of the majority opinion.

In her dissent, Judge White concluded that MCEP's rim conspiracy claims were timely pled and that it should be able to proceed with them.

Conclusion

The Sixth Circuit's decision is important for competitors entering into joint ventures because it states what mode of antitrust analysis—*per se* or rule of reason—applies to the entities they create and to their conduct. So long as joint venturers can plausibly link their challenged conduct to a procompetitive purpose of their collaboration, then they will be able to avoid *per se* condemnation and put on evidence of the procompetitive benefits of their conduct to counter any claims of anticompetitive harm under the rule of reason. Thus, it is important for competitors participating in joint ventures to:

- Contemporaneously document the pro-competitive goals of their joint ventures, and

- Plausibly link any conduct that might be challenged as restraining competition to a pro-competitive goal of the joint venture.

The decision is also an important reminder of the many issues of fact that can arise during litigation and can prevent a quick resolution. While avoiding litigation can never be guaranteed, prior and ongoing antitrust counseling can help spot issues and potentially resolve them in ways that reduce litigation risk.

Lastly, the decision represents a missed opportunity for the Sixth Circuit to make clear when a joint venture might qualify as a single entity for antitrust purposes and, thus, be incapable of conspiring because the concurrence's analysis of Premier is non-precedential *dicta*. Consequently, joint venturers, at least within the Sixth Circuit, must rely on the initial appellate decision in this case for guidance on whether they will be treated as a single entity. The implications for not being deemed a single entity is exposure to potential treble damages liability for "conspiring" in restraint of trade within their collaborations.