THE

NATIONAL LAW REVIEW

Dayton Hospital Antitrust Case Comes to an End: Joint Venture Activities Not “Per Se” Unlawful

Wednesday, August 16, 2017

On the eve of trial, and after years of litigation (including an appeal to the Sixth Circuit), all claims by Dayton, Ohio hospital The Medical Center at Elizabeth Place against Premier Health Partners have been dismissed with prejudice. After the case was reassigned to a new judge, the court reconsidered an earlier order on defendants’ “untimely” but “very substantial” question about whether the plaintiff’s group boycott allegations should be analyzed under the *per se* rule or the rule of reason. Finding that “the challenged restraints at issue in this case do not have such a clear lack of any redeeming virtue that they should be conclusively presumed to be unreasonable,” the court held that the *per se* standard was inapplicable and dismissed the case—with prejudice—because the plaintiff had disavowed any reliance on a rule of reason analysis. *The Medical Ctr. At Elizabeth Place, LLC v. Premier Health Partners, et al.*, No. 3:12-cv-26 (S.D. Ohio Aug. 9, 2017)

Article By Robert G. Kidwell
Bruce D. SoklerFarrah ShortMintzAlert!

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

Background

This case, which had been set to go to trial on August 14, 2017, has a lengthy procedural history. In 2012, plaintiff The Medical Center at Elizabeth Place (“MCEP”) filed a complaint against Premier Health Partners (“Premier”) and its hospital affiliates alleging that they had conspired to orchestrate a *per se* illegal group boycott against MCEP. MCEP is a 26-bed physician-owned hospital in Dayton, Ohio. Premier operates four hospitals through a joint operating agreement in the Dayton area. Premier does not provide health care services, but it handles some of the financial business of the defendant hospitals, including negotiating their managed-care contracts. The defendant hospitals maintain separate ownership of their assets and largely manage their own affairs. MCEP claimed that the defendant coerced payors into denying MCEP full access to insurance networks, and that the defendants threatened financial consequences for physicians affiliated with MCEP.

In 2014, the district court granted summary judgment to the defendants, finding that the Premier hospitals functioned as a single entity and thus were incapable of conspiring under the antitrust laws. The Sixth Circuit reversed and remanded for further proceedings after finding that the evidence raised at least the possibility of concerted action under the Supreme Court’s precedent in *American Needle Inc. v. Nat’l Football League*, 500 U.S. 182 (2010). For a discussion of the Sixth Circuit’s decision, please see our other prior alert . On remand, the district court issued a sealed order on October 6, 2016, holding that the *per se* rule would apply at trial to MCEP’s claims against defendants. On June 16, 2017, the case was reassigned to a new judge.

At issue in the present decision is Defendants’ Motion to Clarify Issues for Trial, which the district court construed as a motion for reconsideration of the October 6, 2016 order.

Why the Case was Dismissed

A threshold matter of law in a Sherman Act Section One trial is whether the challenged conduct would be *per se* unreasonable if proven, or whether it should be evaluated under the rule of reason. In a *per se* case, the plaintiff need not prove the challenged restraint's effects on the market because the anticompetitive effects are assumed to be inherent in the conduct. There are only a small number of alleged violations that are so clearly anticompetitive as to justify *per se* treatment, such as bid rigging, naked price fixing, or simple group boycotts. However, the vast majority of restraints are subject to the rule of reason—particularly when the alleged violation has vertical aspects or implicates members of an otherwise lawful joint venture.

The Supreme Court set forth the analytical framework for reviewing restraints of trade by a legitimate joint venture in *Texaco, Inc. v. Dagher*, 547 U.S. 1 (2006). Under *Dagher*, a joint venture's core activities and restraints that are ancillary to the legitimate purpose of the joint venture are subject to a rule of reason analysis, whereas non-core activities that are naked restraints on trade are *per se* unreasonable.

On the motion for reconsideration, the district court started with the undisputed premise that Premier is a legitimate joint venture. The district court observed that although joint ventures are not automatically insulated from potential *per se* liability, the rule of reason analysis is favored to protect their efficiency-enhancing potential.

MCEP's claims focused on the "rate-for-volume" pricing provisions in Premier's payor contracts. These provisions link the price at which Premier's hospitals would sell their services to the volume of patients that a payor directs to those hospitals. MCEP acknowledged that, as a general matter, no court has ever held these types of provisions to be *per se* illegal. However, MCEP argued that another clause used by Premier in conjunction with the rate-for-volume term—referred to as the "Panel Limitations" clause—discouraged payors from adding other hospitals to its networks.

The "Panel Limitations" clause in Premier's contracts gave Premier the right to terminate or renegotiate the contract if the payor added a hospital to its network that diluted Premier's expected patient volume. MCEP acknowledged that the "Panel Limitations" clause was a vertical restraint of the type typically analyzed under the rule of reason. Nevertheless, MCEP argued that the *per se* standard was appropriate because the "Panel Limitations" clause prevented it from contracting with payors, thereby excluding MCEP from the market, and was in effect a horizontal restraint. The district court disagreed, finding that the provision was a vertical restraint between Premier and the payors—regardless of potential horizontal effects on MCEP—and thus subject to the rule of reason.

MCEP further argued that Premier's "Panel Limitations" clause amounted to an unlawful group boycott among the Premier hospitals. As mentioned above, a simple group boycott is a *per se* unlawful restraint of trade. However, the court noted that restraints imposed by members of a joint venture are frequently analyzed differently than they would be if undertaken by unaffiliated competitors. Because an otherwise lawful joint venture presumably has pro-competitive benefits, some conduct that might otherwise be *per se* unlawful will be balanced against the pro-competitive benefits of the overall joint venture—in other words, it will be analyzed under the rule of reason. Thus, the court held that because the defendants presented *plausible* pro-competitive justifications flowing from their joint venture, the rule of reason is the applicable standard to analyze the restraint.

Importantly, the district court here did not reach any decision about the actual legality of defendants' alleged conduct. It merely dismissed the case because plaintiff pled only a *per se* case when the appropriate standard was the rule of reason.