Antitrust Law Blog

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No Single Entity Here: California Federal District Court Holds Hospital and Independent Physician Practice Association Can Conspire For Antitrust Purposes

The U.S. District Court for the Eastern District of California recently held that a hospital and a physicians practice association, and a hospital and the physicians that provide services to it under contract, may be sufficiently distinct separate economic actors capable of conspiring with each other under Section 1 of the Sherman Act. *Perinatal Medical Group, Inc. et al. v. Children's Hospital Central California et al*, Case No. CV F 09-1273 LIO GSA (April 15, 2010). There are few Ninth Circuit cases addressing these issues and other circuits have come to different conclusions. More particularly, the Eastern District of California denied a motion to dismiss a complaint that alleged that a hospital and two independent physician practice associations conspired to restrain trade in violation of Section 1 of the Sherman Act by prohibiting neonatologists who did not agree to practice exclusively at the hospital or refer cases to doctors practicing exclusively neonatology at the hospital, from using the hospital's neonatal intensive care unit.

Background

The plaintiffs are neonatologists who practice together in a medical corporation named Perinatal Medical Group, Inc. ("PMG"). PMG's physicians have provided services in and for various Fresno and Madera county hospitals since 1980. Defendant Children's Hospital Central California ("Children's") owns and operates a NICU that has a "regional" designation. Under California law, certain critically ill infants must be treated at a "regional" facility. Through February 2009, PMG had a contract with Children's to provide coverage at and administrative services for Children's NICU. The contract provided plaintiffs with staff privileges at Children's NICU as well.

In December 2008, members of PMG helped another hospital, Community Medical Center ("Community") open its own NICU. Community's NICU does not have a "regional" designation. Thus, certain critically ill infants must be transferred from Community's NICU to Children's NICU for treatment. When this was happening, according to the complaint, Children's, and an independent physicians practice association, co-defendant Specialty Medical Group Central California, Inc. ("SMG"), complained to PMG about two PMG doctors who were referring cases to a doctor who had left SMG. SMG lost business when referrals were made to this former

member. Children's asked one of the PMG doctors to restrict referrals to doctors affiliated with it. In addition, the complaint alleges that Children's was concerned that Community's NICU would compete with its NICU and for this reason, conspired to foreclose neonatologists not affiliated with either SMG or co-defendant, Central California Neonatology Group ("CCNG"), from admitting or treating their patients at Children's NICU.

Soon after, Children's approached one of the members of PMG and told him that if he did not agree to practice exclusively at Children's, and in particular, not at Community, then Children's would not renew PMG's contract. Children's also demanded that PMG sign an amendment to their contract to prohibit PMG physicians from admitting or treating patients at competing hospitals and from referring patients to any specialist who is not a member of SMG. PMG refused to sign the amendment and Children's terminated the contract. However, several of PMG's members agreed to the amendment and left PMG to form CCNG. PMG's remaining members were unable to admit and care for patients at Children's NICU. When they attempted to, they were told they could not admit patients unless they or another physician was present in Children's NICU 24 hours a day, 7 days a week, during a patient's stay. This 24/7 rule was adopted in a regulation of Children's. PMG filed suit and in its amended complaint, asserted violations of Sections 1 and 2 of the Sherman Act, violation of the Cartwright Act, unfair competition and other business torts.

Arguments and Holdings

In its motion to dismiss, CCNG argued that PMG's Section 1 claim fails because defendants are not "separate entities pursuing different economic goals capable of conspiring for Sherman Act purposes." CCNG also argued that Children's has no duty under antitrust law to make its facilities available to PMG and antitrust law "is not concerned with the kind of injury that plaintiff PMG is claiming." The court began its consideration of the issue with the principle that that it takes two separate economic entities to conspire under Section 1 of the Sherman Act. *Copperweld Co v. Independence Tube Co.*, 467 U.S. 752 (1984). In *Copperweld*, the United States Supreme Court held that a parent corporation and its wholly-owned subsidiary are incapable of conspiring for antitrust purposes because the two entities "are not separate economic actors pursuing separate economic interests." Next, applying a Ninth Circuit decision that interprets *Copperweld*, the court observed that in considering whether defendants are a "single entity" or capable of conspiring for Section 1 purposes, the "crucial question" is "whether the entities alleged to have conspired to maintain an 'economic unity,' and whether the entities were either actual or potential competitors. *See Jack Russell Terrier Network v. Am. Kennel Club, Inc.*, 407 F.3d 1027, 1035 (9th Cir. 2005).

Applying other circuit decisions, the court found that physicians, including members of an independent practice association, are independent entities that can conspire with each other and others for antitrust purposes. Citing a Third Circuit decision, the court noted that each member practices medicine in his individual capacity and each is a separate economic unit potentially in competition with other physicians. The court thus found that CCNG can conspire within the group and with co-defendant SMG.

As to whether physicians can conspire with a hospital for antitrust purposes, the court observed

this question is unresolved among circuit courts. With one Ninth Circuit precedent determining that this is a question of fact and with other circuits differing on the question, the court rejected CCNG's argument that CCNG is unable to conspire with Children's as a matter of law. The court determined this is a question of fact. In this instance, plaintiffs alleged that Children's and CCNG have different economic interests. Children's interest, plaintiffs alleged, is to protect the market share of its NICU, whereas CCNG's interest is to benefit from exclusive and restrictive neonatology referrals to its members. As well, the court observed, as an organization independent of Children's, CCNG contracts its services to Children's and its members are thus independent contractors to Children's, not employees or officers of the hospital. Without actually determining whether a hospital and physicians can conspire as a matter of law, the court held that it could not decide, as a matter of law, that a hospital and physicians are incapable for conspiring for Section 1 purposes. The court thus denied CCNG's motion to dismiss on these grounds.

The court's analysis appears consistent the Supreme Court's more recent decision in *American Needle, Inc. v. National Football League, et al.*, 500 U.S. ___ (2010). In *American Needle*, the Court applied *Copperweld* and held that the relevant inquiry in determining whether entities are sufficiently separate to be capable of conspiring for antitrust purposes is whether the alleged combination is among "separate economic actors pursing separate economic interests such that the agreement deprives the marketplace of independent centers of decision-making and therefore of diversity of entrepreneurial interests." 500 U.S. ____, at *10

The court also denied CCNG's motion to dismiss on the ground that plaintiffs failed to allege antitrust injury. CCNG argued that Children's has no duty to share its facilities with PMG or its members. PMG argued that Children's was subject to such a duty under state law. The court rejected this, observing that a duty to deal arising from state law does not establish a duty to deal for antitrust purposes. However, the court also found that a key authority on which CCNG relied, *Four Corners Nephrology Assocs. v. Mercy Medican Center of Durango*, 582 F.3d 1216 (10th Cir. 2009) was distinguishable because in that instance, the parties were direct competitors and in this instance, Children's and PMG are not direct competitors. Exclusive agreements between a hospital and specialty groups of physicians may violate the Sherman Act, just as group boycotts of individual physicians. PMG's complaint sufficiently and plausibly alleged both.

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