

ALERTS AND UPDATES

When Does the Payment of Low Reimbursement Rates or Other Conduct by an Insurer Violate the Antitrust Laws?

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Healthcare providers and insurers should be aware of a recent decision by the U.S. Court of Appeals for the Third Circuit—*West Penn Allegheny Health System, Inc. v. UPMC*¹—in which the court reinstated an antitrust challenge brought by a hospital system against another hospital system and the area's largest insurer. The opinion is noteworthy because among the court's findings is the conclusion that a healthcare provider may have a viable antitrust claim when it is forced to accept low reimbursement rates as a result of an alleged conspiracy between an insurer and another hospital or when it loses key employees to another dominant competitor.

The Alleged Conspiracy Between an Insurer and a Hospital to Weaken a Competitor Hospital

Plaintiff West Penn Allegheny Health System, Inc. ("West Penn"), Pittsburgh's second-largest hospital system, sued the University of Pittsburgh Medical Center ("UPMC"), the city's largest hospital system, and Highmark, Inc., the largest health insurer in the Allegheny County market, for violations of the antitrust laws and state laws. West Penn contended that UPMC and Highmark had entered into a conspiracy, in violation of section 1 of the Sherman Act, pursuant to which UPMC used its power in the provider market to insulate Highmark from competition in the insurance market; and in exchange, Highmark used its power in the insurance market to strengthen UPMC and weaken West Penn. West Penn also maintained that UPMC attempted to monopolize the Pittsburgh-area market for specialized hospital services in violation of section 2 of the Sherman Act.

As part of this alleged conspiracy, West Penn contended that UPMC: (1) refused to enter into competitive provider agreements with Highmark's rivals, preventing them from entering the health insurance market in Allegheny County; and (2) shrunk its own health insurance plan—which was Highmark's main competitor in the market—as the result of negotiations with Highmark, where Highmark agreed to take its own low-cost health plan off the market.

Highmark was alleged to have: (1) paid UPMC supracompetitive reimbursement rates; (2) agreed not to offer any health plan for which UPMC was not an in-network provider; (3) publicly supported UPMC's acquisition of a hospital, which other than West Penn, was UPMC's only competition in the market for specialized hospital services; (4) leaked confidential financial information about West Penn, which negatively impacted its credit rating and ability to obtain financing; (5) refused to refinance an earlier loan it had made to West Penn, even though it made business sense to do so because Highmark feared UPMC would retaliate; (6) maintained West Penn's reimbursement rates at artificially depressed levels; and (7) discriminated against West Penn in the awarding of grants.

The Court's Key Rulings

The Payment of Low Reimbursement Rates

A key issue in the case was whether West Penn had sufficiently alleged that it suffered antitrust injury; meaning an injury of the type that the antitrust laws are intended to prevent. The Third Circuit ruled that West Penn had not suffered antitrust injury from Highmark's decision to eliminate its low-cost plan because West Penn was not a competitor or consumer of the health plan, and also that West Penn had not suffered antitrust injury from Highmark's refusal to refinance its loan. However, the Third Circuit ruled that West Penn sufficiently alleged that it suffered antitrust injury as a result of the low reimbursement rates it was paid. The court noted that there might not have been a basis for West Penn to challenge the rates had Highmark been acting alone because a firm with strong buying power is generally free to bargain aggressively, but the insurer's conduct was potentially actionable under the antitrust laws since it was allegedly acting pursuant to a conspiracy with another hospital. The defendants maintained that the payment of low reimbursement rates to West Penn could not present antitrust problems because low rates benefit consumers in the form of lower premiums. The court disagreed and explained that low rates could diminish the quality and availability of hospital services. Moreover, the complaint alleged that Highmark did not actually pass on the savings to consumers, but pocketed the profits while increasing premiums. The court further explained that the central purpose of the antitrust laws was to preserve competition and stated that anticompetitive conduct could not be justified solely on the grounds that it may have enabled Highmark to set lower premiums.

Raiding Key Employees

West Penn also contended that UPMC attempted to monopolize the market for specialized hospital services. In furtherance of this goal, UPMC allegedly "raided" key physicians from West Penn by paying them above-market salaries in excess of the money they generated, which was done for the purpose of weakening West Penn. UPMC also allegedly compelled community hospitals to enter joint ventures with UPMC to provide oncology services by warning it would open competing satellite facilities, which caused them to stop referring patients to West Penn. Additionally, UPMC allegedly made false statements about West Penn's financial health in order to discourage investors from purchasing its bonds.

The Third Circuit ruled that anticompetitive conduct can take a number of different forms, and it can include "a conspiracy to exclude a rival," "hiring a rival's employees not to use them but to deny them to the rival," "a hospital's coercing providers not to refer patients to a rival" and "making false statements about a rival to potential investors and customers," all of which were alleged by West Penn.

For Further Information

If you have any questions regarding this *Alert*, please contact [Wayne A. Mack](#), co-chair of the [Commercial](#), [Securities](#) and [Antitrust](#) division of the [Trial Practice Group](#); [David E. Loder](#), chair of the [Health Law Practice Group](#); or the attorney with whom you are regularly in contact.

Note

1. *West Penn Allegheny Health System, Inc. v. UPMC*, No. 09-4468 (3d Cir. Nov. 29, 2010).

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