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Antitrust Alert

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Third Circuit Revives Conspiracy Claims against Hospital and Insurer

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The proper role of antitrust enforcement in health care reform is currently a hot topic in Washington and elsewhere. The courts, of course, do not engage in such debates, but only resolve cases brought before them. In a closely watched case, on November 29, 2010, the U.S. Court of Appeals for the Third Circuit reinstated a Pittsburgh hospital's antitrust lawsuit against a competing hospital and the area's largest health insurer. *West Penn Allegheny Health System, Inc. v. UPMC; Highmark, Inc.*, 3d Cir., No. 09-4468 (Nov. 29, 2010). Reversing the lower court's dismissal under *Twombly*, the Third Circuit found that the plaintiff had sufficiently alleged a mutual protection conspiracy and an attempt to monopolize. Importantly, the court's decision hinged in part on a finding of a plausible antitrust injury suffered by the plaintiff, a competing hospital, and rejected the idea that *Twombly* requires a heightened probability standard for an antitrust claim to survive a motion to dismiss. Also of note, the Supreme Court's decision earlier this year in *American Needle*—the first antitrust Supreme Court ruling for a plaintiff in approximately 15 years—was an important tool in the Third Circuit's analysis.

Background

In 2009, West Penn Allegheny Health System, Inc. (West Penn) filed a lawsuit against the University of Pittsburgh Medical Center (UPMC) and Highmark Inc. (Highmark), alleging that they had violated Sections 1 and 2 of the Sherman Act by forming a conspiracy to protect one another from competition. West Penn also alleged that UPMC had violated Section 2 by attempting to monopolize the market for specialized hospital services in the region.

Highmark is the dominant insurer in Allegheny County, Pennsylvania, which includes Pittsburgh. UPMC is Pittsburgh's largest hospital system, and West Penn ranks second. Funded by a $125 million loan from Highmark, West Penn was formed in 2000 by the merger of several financially distressed medical providers. Plaintiff West Penn argued that Highmark supported the creation of West Penn in order to preserve competition in the region's provider market and to counter UPMC's demands for excessive reimbursement rates. Also to hinder UPMC's market leverage, according to Plaintiff, Highmark created Community Blue, a low-cost insurance plan which hospitals could only participate in if they accepted reduced reimbursement rates from Highmark. West Penn participated in Community Blue; UPMC did not. Instead, UPMC formed its own health insurance plan, UPMC Health Plan, which became Highmark's main competitor in the region.

The complaint alleged that in 2002, UPMC and Highmark reached an agreement under which UPMC agreed to use its power in the provider market to prevent Highmark's competitors from gaining market share, and in return Highmark agreed to help weaken West Penn.

The district court dismissed the case, finding that West Penn had failed to allege "enough facts to state a claim to relief that is plausible on its face," as required by the Supreme Court's ruling in *Bell Atlantic Corp. v. Twombly,*

550 U.S. 544 (2007). Plaintiff appealed.

For more information on the lower court's ruling, please see Mintz Levin's November 4, 2009 advisory.

The Third Circuit's Decision

The federal court of appeals reversed the district court's dismissal and remanded the case.

Pleading Standard

As an initial point, the Third Circuit expressly rejected the district court's interpretation of *Twombly*, holding that the Supreme Court case did not create a probability requirement for antitrust complaints to survive a motion to dismiss. The Third Circuit found that the heightened scrutiny employed by the district court was "squarely at odds with Supreme Court precedent."

Conspiracy Claim

To prevail on a conspiracy claim under the Sherman Act, a plaintiff must establish the existence of an agreement[1] that unreasonably restrains trade[2] and causes an antitrust injury.[3]

Agreement

The Third Circuit held that, "[i]f a complaint includes non-conclusory allegations of direct evidence of an agreement, a court need go no further on the question of whether an agreement has been adequately pled." (Citing *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 323 [3d Cir. 2010]). The court found direct evidence of an agreement to protect one another from competition by citing allegations that West Penn had been unable to refinance its loan from Highmark because Highmark believed that UPMC, who was "obsessed" with driving West Penn out of the market, would retaliate against it. Similarly, West Penn alleged that while Highmark acknowledged its reimbursement rates to West Penn were too low, it did not raise them because of fears that UPMC would retaliate. Additionally, as further direct evidence of a conspiracy, the court cited the complaint's allegation that UPMC's CEO admitted that it shrunk UPMC Health Plan as a result of negotiations with Highmark, who in turn took Community Blue off the market.

Restraint on Trade

The Third Circuit also held that at the pleading stage, a plaintiff can satisfy the unreasonable restraint element by alleging anticompetitive effects, such as increased prices, reduced output, and reduced quality. The court found that West Penn had alleged increased insurance premiums, as a result of shielding Highmark from competition, and reduced output, as a result of weakening West Penn.

Antitrust Injury

The court found that Plaintiff met its burden of alleging an antitrust injury, injury that is "of the type the antitrust laws were intended to prevent." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). West Penn alleged that it was injured by the artificially low reimbursement rates from Highmark, arguing that the difference between the reimbursements it would have received in a competitive market and those it actually received constituted an antitrust injury. The court agreed.

Defendants had argued that depressed reimbursement rates did not create an antitrust injury because the lower rates translated into lower premiums for subscribers. The court disagreed. Stating that, "the central purpose of the antitrust laws… is to preserve competition," (quoting *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 988 [9th Cir. 2000]), the Third Circuit noted that lower premiums do not necessarily translate into consumer benefits, since reduced premiums can also result in reduced quality of services. Moreover, the complaint alleged that Highmark did not reduce its premiums to consumers.

The court also distinguished Highmark's decision in this case, allegedly the result of a conspiracy with UPMC, from the same action should Highmark have instead acted alone. The Third Circuit held that, "a firm that has substantial power on the buy side of the market is generally free to bargain aggressively when negotiating prices it

will pay for goods and services… [b]ut when a firm exercises monopsony power pursuant to a conspiracy, its conduct is subject to more rigorous scrutiny," (citing *Am. Needle, Inc. v. NFL*, 130 S.Ct. 2201 [2010]). The complaint alleged that Highmark has a 60-80% share of the Allegheny County market for health insurance.

The court, however, rejected Plaintiff's two other claims of antitrust injury. West Penn argued that it was injured by the loss of Community Blue from the market, which resulted in a loss of patients treated at West Penn. The Third Circuit held that the mere loss of business does not amount to an antitrust injury. Additionally, West Penn alleged that it was injured by Highmark's refusal to refinance its loan. Again, the court held that this did not constitute an antitrust injury because West Penn had other possible sources of financing.

Attempted Monopolization Claim

To prevail on an attempted monopolization claim under Section 2 of the Sherman Act, a plaintiff must allege that the defendant has a specific intent to monopolize, and that the defendant has engaged in anticompetitive conduct that creates a dangerous probability of achieving monopoly power. [4]

Citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985), the Third Circuit held that, "a firm engages in anticompetitive conduct when it attempts 'to exclude rivals on some basis other than efficiency.'" Noting the complaint's allegations of UPMC's hiring of West Penn's employees at bloated salaries and at a loss to itself, UPMC's false statements to the public about West Penn's finances, and UPMC's threats to community hospitals who sent patients to West Penn, the court found that the complaint plausibly suggested that UPMC had engaged in anticompetitive activity to exclude West Penn from the market.

* * *

Please let us know if we may provide you with a copy of the decision, or if you would care to discuss the impact of this case on your business. Mintz Levin lawyers have significant experience litigating antitrust cases and providing business counseling in order to avoid litigation at the outset. We would be pleased to help you guide your business toward successful avoidance of antitrust concerns.

Endnotes

1 *See Twombly*, 550 U.S. at 553.

2 *See Standard Oil Co. v. United States*, 221 U.S. 1, 58 (1911).

3 *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

4 *See Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993).

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