Health Care Antitrust Advisory: District Court Dismisses Antitrust Complaint Alleging Mutual Protection Conspiracy Between Dominant Provider and Dominant Insurer

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On October 29, 2009, the U.S. District Court for the Western District of Pennsylvania dismissed 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 and Highmark, Inc.*, No. 09-0480 (W.D. Pa., Oct. 29, 2009). The court found the Plaintiff's allegation of a mutual protection conspiracy less than plausible on its face, as required by the Supreme Court's holding in *Bell Atlantic Corp. v. Twombly*.

Background

In the 1990s, the University of Pittsburgh Medical Center (UPMC) began to acquire small independent hospitals. As a result, it is now arguably the dominant hospital system in the Pittsburgh metropolitan area. West Penn Allegheny Health System, Inc. (West Penn) is a competing hospital in the area. Highmark Inc. (Highmark) is arguably the dominant health insurer in Western Pennsylvania. The second largest competitor to Highmark is UPMC's health insurance affiliate.

On April 21, 2009, Plaintiff West Penn filed a complaint against Defendants UPMC and Highmark, alleging that they had conspired to eliminate competition in their respective markets, in order to create a "super monopoly" in violation of Sections 1 and 2 of the Sherman Act and state law.

Defendants moved to dismiss the complaint.

Plaintiff's Antitrust Allegations

West Penn alleged that, in 2002, "UPMC offered a secret deal to Highmark [under which] UPMC agreed to ensure Highmark's continued dominance in the health insurance sector… In exchange, UPMC not only demanded and received high lump sum capital injections and substantially higher payment rates, but it also demanded that Highmark join in the campaign to hobble… West Penn."

Specifically, Plaintiff claimed that the alleged mutual protection conspiracy was evidenced by the exclusion of United Health Care (United), a potential competitor to Highmark, from the

Pittsburgh market as a result of UPMC's refusal to contract with United on competitive terms. Plaintiff also alleged that UPMC further "engaged in a relentless campaign of anticompetitive, predatory conduct," by raiding physicians from West Penn and interfering with West Penn's bond offerings.

The complaint also alleged that Highmark restricted West Penn's ability to compete against UPMC by discontinuing Community Blue (Highmark's low-cost insurance product that had directed care to West Penn), discriminating against West Penn through lower reimbursement rates, and refusing to refinance Highmark's loan to West Penn.

As a result of these alleged actions, Plaintiff claimed that competition in the relevant market was harmed and that costs to consumers increased. Plaintiff's damage allegations included a claim that it suffered stunted market share growth in contrast to UPMC's high "profits that [were] dramatically disproportionate to its size."

The District Court's Decision

The court dismissed the case with prejudice under the Supreme Court's standard set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), which requires a plaintiff to allege "enough facts to state a claim to relief that is plausible on its face" in order to survive a motion to dismiss. The court also cited the Supreme Court's recent holding in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), which expanded on *Twombly* and requires a plaintiff to aver sufficient factual allegations to "nudge" its claims "across the line from conceivable to plausible" to meet the pleading standard set by the federal rules of civil procedure.

Analysis of Antitrust Claims

Sherman Act Claims of Conspiracy and Attempted Monopolization

The court noted that any conspiracy claim must allege the existence of an agreement supported by facts that evidence a "meeting of the minds" or a "conscious commitment to a common scheme." The court held that Plaintiff's "statements of conclusory allegations of agreement without some degree of factual specificity amounts to nothing more than statements of suspicion which do not advance or 'nudge' plaintiff's claims 'across the line from conceivable to plausible'" as required under *Twombly* and *Iqbal*. The court stated that "a bare assertion that UPMC had the 'intent to cripple' West Penn" is insufficient to plead an antitrust claim.

Antitrust Injury

The court also noted that "a plaintiff's injury must be an antitrust injury, or 'an injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.'" The court held that Plaintiff failed to allege an antitrust injury absent allegations of any injury-in-fact or allegations of any reduction to competition in the health care services market as a whole, stating that "merely alleging that [Plaintiff] would have been more profitable

during the alleged period of conspiracy does not amount to an injury that antitrust laws were designed to protect." The court also commented that "Plaintiff cannot act as 'private attorney general' for…consumers of health insurance products."

Prayer for Relief

In additional to the typical request for recovery of damages, West Penn asked the court to enjoin Defendants' alleged anticompetitive conduct, to order Highmark to end its alleged discriminatory reimbursement rates, to order UPMC to divest its health insurance affiliate, and to order UPMC to cease its alleged interference with West Penn's business. The court held that these requests were "incongruent with the interests of the consumers, the true benefactors of the antitrust laws… [and that] when analyzed for their practical effect, further demonstrate that the alleged 'antitrust injuries' are not cognizable 'antitrust' injuries."

The court also noted that Plaintiff's requests would require the court "to improperly play the role of price regulator and to act as a 'central planner,' by 'identifying the proper price, quantity, and other terms of dealing'" in violation of the Supreme Court's holding in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

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Mintz Levin has a long history of representing businesses of all types—including hospitals and insurance groups—in antitrust litigation and regulatory matters. Please feel free to contact any of our practitioners if you would care to discuss this decision or the relationship of the antitrust laws to your business.

For assistance in this area, please contact one of the attorneys listed below or any member of your Mintz Levin client service team.

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