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Antitrust & Federal Regulation Advisory: Hospital's Refusal To Deal Is Good Medicine under the Antitrust Laws

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On September 29, 2009, the U.S. Court of Appeals for the Tenth Circuit upheld the Colorado District Court's holding that a hospital has no antitrust duty to share its facilities, and thereby affirmed the grant of summary judgment for the hospital against a complaining physician. *Four Corners Nephrology Assocs. v. Mercy Med. Ctr. of Durango*, No. 08-1231 (10th Cir., Sept. 29, 2009). The physician-plaintiff had alleged that the defendant-hospital's decision to deal exclusively with its in-house nephrologist amounted to illegal monopolization of the nephrology services market.

Background

In 2005, Dr. Bevan, a nephrologist at Four Corners Nephrology Associates in Farmington, New Mexico, sued Mercy Medical Center in Durango, Colorado, alleging that the hospital was attempting to create a monopoly in dialysis services by entering into an exclusive contract with another nephrology practice.

Durango and Farmington are both located in the Four Corners area, which includes parts of Colorado, New Mexico, Utah and Arizona. Dr. Bevan's nephrology practice in Farmington was for years the only option for outpatient dialysis services for patients in the area; as a consequence, Dr. Bevan's practice was thriving, with patients traveling from throughout the Four Corners region to receive outpatient dialysis services.

Kidney disease was prevalent in the Durango area and the nearby Southern Ute Indian Reservation, and patients' only option for dialysis treatment was to make the 90-minute round-trip drive from Durango to Farmington. Dr. Bevan had been a consulting staff member at Mercy Medical Center in Durango since 1982, with privileges for inpatient treatment at the hospital, but had not actually entered the hospital to treat a patient since at least 1995. Because of the distance that Durango and Ute Indian Reservation patients had to travel to undergo dialysis at Dr. Bevan's clinic in Farmington, a group of interested parties in the Durango area that included Mercy, the Southern Ute tribe, and the Durango Rotary Club, attempted to convince Dr. Bevan to begin providing outpatient nephrology services in Durango. Dr. Bevan declined.

In 2005, Mercy hired its own in-house nephrologist, Dr. Saddler. Because it was anticipated that the new nephrology practice would initially lose money, the hospital and the Southern Ute tribe agreed to underwrite a portion of those losses. Additionally, Dr. Saddler became the director of Durango Nephrology Associates, a new, independently owned outpatient dialysis center in Durango. The employment of Dr. Saddler as a full-time, active nephrologist at Mercy

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automatically terminated Dr. Bevan's consulting privileges under Mercy's preexisting bylaws. Ultimately, the hospital designated Dr. Saddler as the sole provider of nephrology services at Mercy, excluding Dr. Bevan from further inpatient use of the hospital.

Dr. Bevan claimed that Mercy's actions amounted to unlawful monopolization, or attempted monopolization, of the market for "nephrology physician services" in the "Durango area."

In 2008, the U.S. District Court for the District of Colorado ruled that Dr. Bevan failed to prove that Mercy had violated either Colorado antitrust laws or the federal Sherman Act. The district court based its decision on a finding that Mercy lacked monopoly power in the relevant market.

The Tenth Circuit's Decision

On appeal, the Tenth Circuit affirmed, but on different grounds.

The Tenth Circuit summarized the substance of Dr. Bevan's claims as "Mercy, after having entered the inpatient nephrology business by hiring Dr. Saddler and investing considerable sums to ensure the success of its practice, engaged in anticompetitive conduct by refusing to share its facilities with a potential rival for inpatient nephrology services."

In reaching its decision, the Tenth Circuit did not address the market power issue that the lower court had found dispositive. Instead, the Tenth Circuit held that Mercy had no antitrust duty to deal with Dr. Bevan, and whatever injury Dr. Bevan may have suffered was not one that the antitrust laws were designed to remedy.

In its decision, the Tenth Circuit relied upon recent Supreme Court cases that emphasize the general rule that a business, even a putative monopolist, has "no antitrust duty to deal with its rivals." *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 129 S. Ct. 1109, 1115 (2009). Similarly, the Tenth Circuit noted that the Supreme Court has also held that, "[a]s a general rule, businesses are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing." *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004).

The Tenth Circuit acknowledged that the Supreme Court has previously held that the right to refuse to deal is not unqualified. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601 (1985). However, the Supreme Court has also noted that *Aspen Skiing* is "at or near the outer boundaries of [Sherman Act] liability." *Trinko*, 540 U.S. at 409. The Tenth Circuit determined that the circumstances in *Aspen Skiing* (where "the defendant terminated a profitable relationship without any economic justification" other than an anticompetitive one, *Christy Sports, LLC v. Deer Valley Resort Co., Ltd.*, 555 F.3d 1188, 1197 (10th Cir. 2009)) were not present in Mercy's actions. Instead, Mercy's only goal—one permissible under the antitrust laws—was "to make more money for itself."

Furthermore, the Tenth Circuit noted that Dr. Bevan failed to show an antitrust injury, as required to succeed in a claim of monopolization, because the antitrust laws are designed to

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"protect consumers from suppliers rather than suppliers from each other." *Stamatakis Indus., Inc., v. King*, 965 F.2d 469, 471 (7th Cir. 1992). The Tenth Circuit found that "[i]nstead, what [Dr. Bevan sought was] the chance to *share* in Mercy's putative monopoly."

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Mintz Levin has a long history of representing businesses of all types—including hospitals and physician 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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