Antitrust Alert

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Eleventh Circuit Expands Hospital Antitrust Exposure

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On April 29, 2010, the Eleventh Circuit Court of Appeals decided *Palmyra Park Hospital v. Phoebe Putney Memorial Hospital*, No. 09-11818. In this antitrust case, the question before the Court was whether the plaintiff hospital had antitrust standing to pursue its claims. The Court of Appeals reversed the district court's dismissal of the plaintiff's claim, and held that Palmyra Park had antitrust standing. As a result, antitrust defendants, particularly in the health care arena, may face greater challenges in private antitrust litigation, with the attendant voluminous discovery typical of antitrust cases that are not dismissed at the outset.

The plaintiff in *Palmyra* was an acute care hospital based in Albany, Georgia. Palmyra Park Hospital was the chief competitor to the defendant, Phoebe Putney Memorial Hospital, a larger, acute care hospital also operating in Albany. Both hospitals offered a number of the same acute-care services – cardiology, gastroenterology, general surgery, gynecology, medicine, oncology, pulmonary care, and urology. They were authorized to offer those services pursuant to a Certificate of Need ("CON") granted by the state. In addition, Phoebe Putney Hospital had a CON for three other services: acute-care obstetrics, neonatology, and a cardiac catherization laboratory. Palmyra did not have those CONs and did not provide those services.

Both hospitals derive a large amount of their revenue from reimbursements by private insurers like Blue Cross-Blue Shield. Palymra claimed that because of its CONs, Phoebe Putney had monopoly power for the providing of acute-care obstetrics and neonatology services and for the operation of a cardiac catherization laboratory. Palmyra additionally claimed that Phoebe Putney had leveraged its monopoly power over those medical services to force Blue Cross and other insurers to exclude Palmyra from their provider networks. According to Palmyra, Phoebe Putney was the only hospital in the geographic region with the CONs necessary to provide obstetrics, neonatology, and cardiovascular services. Palymra claimed that in violation of Sections 1 and 2 of the Sherman Act, Phoebe Putney illegally tied its market power in those markets to the markets for cardiology, gastroenterology, general surgery, gynecology, medicine, oncology, pulmonary care, and urology provided to privately insured patients.

The district court had dismissed Palmyra's claims on the basis that it lacked "antitrust standing" to sue Phoebe Putney. Antitrust standing requires that the plaintiff show that it satisfies a number of "practical considerations aimed at preserving the effective enforcement of the antitrust laws." The two prongs of antitrust standing are that the plaintiff must have alleged an antitrust injury (an injury to competition, and not just an injury to a competitor) and that the plaintiff "must be an efficient enforcer of the antitrust laws." The district court had held that while Palmyra had alleged antitrust injury, it was not an efficient enforcer of the antitrust laws.

Author

Michael S. Denniston
205.521.8244
mdenniston@babc.com

Related Attorneys

Edward J. Beder, Jr.
202.719.8290
ebeder@babc.com

Kyle C. Hankey
205.521.8334
khankey@babc.com

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The Court of Appeals engaged in a detailed discussion of the health care market to determine who would bear the costs of an alleged tying arrangement. The Court explored the dynamics between health care providers, insurers, and patients (policy holders), and the incentives guiding each stakeholder. In short, the court noted that policy holders prefer that their insurers offer in-network providers for the full range of medical services; an insurer negotiates reimbursement rates so as to minimize reimbursement to hospitals while still enticing hospitals to join its network; and hospitals seek to increase revenue by increasing the number of patients it serves (by being "in-network" to a greater number of insurers) or by increasing reimbursement rates with insurers.

Against that backdrop, the Court determined that where one hospital is the only provider of services that an insurer considers indispensible, then insurers would be captive to that hospital and at a significant disadvantage in reimbursement rate negotiations. The hospital could exercise that market power by either demanding a higher, monopoly reimbursement rate for the services over which it has market power, or it could leverage its market power over the monopolized services (the "tying products") to demand more favorable terms from insurers for the other medical services (the "tied products"). Palmyra sufficiently had alleged that Phoebe Putney had forced exclusive relationships with a number of insurers that prevented Palmyra from competing in the marked for the tied products, resulting in less competition for the tied products.

The Court held that in light of the incentives at play, a competitor like Palmyra is "perhaps best suited to efficiently enforce the antitrust laws," satisfying the second prong of antitrust standing. In reaching that conclusion, the Court found that competitors like Palmyra would be likely to suffer the alleged injury of lost revenue, and that it has a greater incentive to challenge the alleged behavior than insurers or policy holders.

Palmyra is likely to make it easier for antitrust plaintiffs that are competitors of the defendant to allege antitrust standing and to survive a motion to dismiss the claim. Some courts have shown a reluctance to confer antitrust standing on competitors, preferring to exercise prudential standing standards to defer suits by competitors in favor of possible suits by direct purchasers allegedly injured by the defendant's alleged conduct. *Palmyra* signals a relaxation of that standard. In this case, the court of appeals showed a willingness to undertake a detailed analysis of the economic dynamics at play in the relationship between providers, insurers, and patients. It is likely that trial courts will follow a similar approach in health care antitrust cases (and antitrust cases in general) to explore the fact-intensive factors involved in determining whether antitrust standing exists. Therefore, it is likely that trial courts will be less inclined to dismiss such suits on the face of the pleadings in the face of unsettled questions of fact.

As a practical matter, *Palmyra* exposes to greater antitrust scrutiny the conduct of hospital systems with the ability to provide unique services due to CON requirements. While the CON is a state-granted authorization that the state may withhold from some competitors, the beneficiary of a broad CON must remain aware of the implications of the competitive edge the CON may confer. Use of state granted authority that the state has withheld from competitors now is more likely to antitrust challenge if competitors can claim it has an adverse effect on competition.