Joint Ventures, Group Boycotts, and Volume Discounts

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On August 9, 2017, an Ohio District Court dismissed a case brought by a small Ohio hospital alleging a *per se* violation of Section 1 of the Sherman Act. The hospital alleged that a joint venture of hospitals had organized a group boycott and restricted its access to patients and physicians.[1] This article offers a description of the case background, a review of the legal and economic concepts most relevant to the case, and a summary of the Court's decision. This decision sheds light on the antitrust treatment of joint ventures, group boycotts, and volume discounts, particularly in the managed care industry.

Case Background and Previous Decisions

Parties

The plaintiff, the Medical Center at Elizabeth Place LLC ("MCEP"), is a small, acute-care hospital in the Dayton, Ohio area. The defendant, Premier Health Partners ("Premier Health"), is a joint venture of four healthcare provider corporations (collectively, the Defendants). Premier Health manages many of the four corporations' business functions, including the negotiation of managed care contracts with insurers. The income streams of those business functions are consolidated.

Allegations

MCEP sued Premier Health, alleging a *per se* violation of Section 1 of the Sherman Act. It claimed that Premier Health, with insurers, orchestrated a group boycott that prevented or delayed MCEP's access to managed care contracts (and thus to patients) and access to physicians.

Relevant provisions are listed below.

- Premier Health's contracts with insurers included the following restraint: were an insurer to add an additional hospital to its networks, Premier Health could terminate or renegotiate its contract with that insurer (hereafter "Panel Limitations").
- Premier Health's physicians' contracts included lease and employment non-compete provisions related to MCEP. For instance, they prevented Premier Health's physicians from affiliating with MCEP, admitting patients to MCEP, or referring them to other physicians at MCEP.[2]

Previous Decisions

In 2014, District Court Judge Black granted the Defendants' motion for summary judgment, on the grounds that the Defendants were acting as one entity, thus making them unable to conspire.[3] He found that Premier Health controlled the operations of the four healthcare corporations. He thus concluded that MCEP had failed to show the plurality of actors necessary for a violation under Section 1 of the Sherman Act.[4]

However, in 2016, the U.S. Court of Appeals for the Sixth District reversed Judge Black's judgment and remanded the case,[5] basing its decision on *American Needle, Inc. v. National Football League.*[6] The Court found that the Defendants were actual competitors and thus could not be considered one entity.

Because MCEP only alleged a *per se* violation, the Defendants then moved for summary judgment, on the grounds that the *per se* rule did not apply. First, they argued, that in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*,[7] the Supreme Court established that not all group boycotts are *per se* illegal; second, they argued that the conduct at stake is a core function of the joint venture, thus making it subject to the rule of reason under *Texaco, Inc. v. Dagher.*[8] Judge Black rejected the motion and asserted that the conduct should be evaluated by the *per se* rule.

Judge Black subsequently recused himself from the case, whereupon Premier Health filed a motion for reconsideration as to the applicable legal standard. The case was reassigned to Judge Rice, who found the *per se* rule did not apply, reversing Judge Black's ruling, and dismissed the case in August 2017.

Legal and Economic Concepts

The Per Se Standard

The Supreme Court and the Sixth Circuit have both established that the *per se* rule should be used stringently and sparingly. It must be restricted to cases where it is almost certain that the behavior will be found unreasonable under the rule of reason.[9]

The Antitrust Treatment of Joint Ventures

Because joint ventures can enhance the combined firms' efficiency, Courts have established that, in the context of joint ventures, otherwise *per se* illegal conduct is more likely to be judged under the rule of reason.[10]

Whether trade restraints by joint ventures are judged under the *per se* rule or the rule of reason has been laid out by *Texaco, Inc. v. Dagher*.[11] To be subject to the *per se* rule, a restraint must have the following characteristics: 1) the restraint should not be related to a "core activity" of the joint venture; 2) the restraint should be potentially subject to *per se* condemnation; and 3) the restraint is not plausibly necessary to achieve the procompetitive objective of the joint venture (i.e., it is a naked restraint on trade).

The rule of reason applies in all other cases. The Court found that pricing decisions were part of the core activity of a joint-venture, and thus must be judged under the rule of reason.

Rate-for-Volume Pricing in the Managed Care Industry

Rate-for-volume pricing, also called volume discounts, corresponds to the practice of offering discounts or lower prices to customers with higher volume. This pricing practice is standard in the managed care industry: healthcare providers typically offer lower rates to insurers expected to bring them a higher volume of patients. This pricing practice has never been held to be *per se* illegal.

An insurer will be expected to bring a higher volume of patients to a provider if it has a larger number of members, but it can also "steer" its members to some providers, thus increasing the number of patients received by the chosen providers. Such steering can be accomplished, for instance, by the use of narrow networks. By using narrow networks (also called selective contracting), an insurer limits the number of in-network providers its members can access. The insurer can thus channel, or steer, more members to the in-network providers compared to a situation where more providers would be in-network.[12] In exchange, it gets lower prices from healthcare providers. The volume discounts are thus tied to the size and nature of the network. If an insurer adds an additional hospital to its network, the network then becomes less narrow, thus diverting patients from the original in-network hospitals. Under rate-for-volume pricing, the original hospitals would then be expected to increase the rates charged to the insurer. For this economic reason, rate-for-volume pricing contracts are sometimes contingent on the contours of the insurer's network, and thus include clauses that allow for renegotiation if the insurer's network changed in breadth, such as the Panel Limitations.

Non-Compete Clauses in the Managed Care Industry

Non-compete clauses are also commonplace in the healthcare industry. For example, hospitals may prevent affiliated or employed physicians from investing in, or referring patients to, other hospitals. A justification for these non-compete contractual provisions is that they prevent physicians from freeriding on investments made by hospitals (e.g., physicians' training or provision of convenient office space) by joining or affiliating with another hospital, therefore making those investments more likely to happen.

The Antitrust Treatment of Group Boycotts

While group boycotts were historically considered *per se* illegal, the Supreme Court, in *Northwest Wholesale Stationers*,[13] clarified the conditions under which a group boycott would be considered *per se* illegal. Three characteristics are sufficient to find a group boycott *per se* illegal: 1) the boycott uses joint effort to disadvantage competitors by cutting off their access to consumers or suppliers; 2) its instigators have market power; and 3) there is no plausible procompetitive justification for the boycott. While those three characteristics are not necessary to establish *per se* treatment, the plausibility of a procompetitive effect of a group boycott needs to be considered.

The Panel Limitations are not Per Se Illegal

The Panel Limitations are Vertical Restraints

Discussing the Panel Limitations included in Premier Health's contracts with insurers, which allow Premier Health to terminate or renegotiate their contracts if the insurer's hospital network were to change, Judge Rice described these restrictions as vertical restraints. The restrictions stem from the joint venture of hospitals and applies downstream, to the insurers. While the restrictions may have an impact on horizontal competitors, as argued by MCEP,[14] Judge Rice noted that the Supreme Court has established that an agreement is horizontal if the relationship between the agreeing parties is horizontal, rather than if the effects of the agreement are horizontal.[15] As vertical restraints are typically analyzed under rule of reason, Judge Rice concluded the Panel Limitations should not be judged under the *per se* standard.

The Panel Limitations Belong to the Joint Venture's Core Activity

For the sake of argument, Judge Rice addressed the argument as if the Panel Limitations had been found to be, in general, *per se* illegal. As the case involved a joint venture, under *Dagher*, one would need to establish whether the Panel Limitations are part of the joint venture's "core activity." Judge Rice noted that since the Panel Limitations are intrinsically linked to the volume discounts given by Premier Health, they are part of the joint venture's pricing decisions, a joint venture's core activity. The restraint should thus be analyzed under rule of reason.

The Panel Limitations are not Subject to Per Se Condemnation

Further assuming, for the sake of argument, that the Panel Limitations had not been found to be part of the joint venture's core activity, one should next ascertain whether those limitations are potentially subject to *per se* condemnation. There, Judge Rice disagreed with the Sixth Circuit's opinion, which had opined that "explicitly exclud[ing] the insurers' ability to contract with other partiers" was "anticompetitive on its face" and "serves no proper business function," thus subject to the *per se* rule. He found that the opinion was dicta and not based on facts,[16] and that short-term exclusive contracts between healthcare providers and insurers have repeatedly survived antitrust challenges.[17]

The Panel Limitations are Plausibly Procompetitive

Were the Panel Limitations potentially subject to the *per se* rule, one next inquires as to whether they plausibly served a procompetitive objective. Judge Rice opined that the Panel Limitations served a plausible efficiency goal. The Panel Limitations were a quid pro quo for the volume discounts granted by Premier Health to insurers, and thus, allowed for rate-for-volume pricing, which can result in lower premiums and more consumer choice.[18]

The Non-Compete Clauses are not Per Se Illegal

Judge Rice also finds that the non-compete clauses included in Premier Health's physician contracts were not subject to the *per se* rule. First, he opined that, generally, the clauses are vertical restraints. However, even if they were, for the sake of argument, viewed as horizontal, Judge Rice ruled that *Dagher* would apply and the restraint 1) belongs to the joint venture's "core activity"; 2) was not typically subject to *per se*; and 3) was plausibly procompetitive. Indeed, when Premier Health invested in its physicians, it did not want them to confer the benefits of those investments on MCEP.

The Group Boycott is not Per Se Illegal

Judge Rice also found that the group boycott alleged by MCEP had plausible procompetitive benefits, thus making it subject to the rule of reason under *Northwest Wholesale Stationers*. He cited two analogous cases.[19] In *Stop & Shop Supermarket*, the First Circuit court established that the exclusive contracts that prevented an insurer from adding pharmacies to its network were not *per se* illegal, as the exclusive dealing arrangement was part of a rate-for-volume contract. In *Levine*, the Eleventh Circuit found that panel limitations that excluded some providers from a multiprovider network were not *per se* illegal.

Additional Reasons for a Per Se Treatment

Judge Rice noted that Premier Health's stated intent to drive MCEP out of the market is not enough to bring a *per se* challenge.[20]

Judge Rice also opined that because 1) rate-for-volume pricing and non-compete provisions are common in the healthcare industry and were used by Premier Health in contracts predating MCEP, and 2) courts are not experienced enough to judge complicated healthcare pricing, it would be inappropriate to judge the restraints under the *per se* rule.

Conclusion

Judge Rice's opinion on *Med. Center at Elizabeth Place* provides guidance on the use of *per se* rule vs. rule of reason in the context of joint ventures, in particular regarding vertical restraints and group boycotts in the managed care industry.

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Endnotes

1 Med. Ctr. at Elizabeth Place, LLC v. Premier Health Partners, No. 3:12-cv-26, 2017 WL 3433131 (S.D. Ohio Aug. 9, 2017).

2 Whether affiliated with or employed by Premier Health.

3 Med. Ctr. at Elizabeth Place, LLC v. Premier Health Partners, No. 3:12-cv-26, 2017 WL 7739356 (S.D. Ohio Oct. 20, 2014), *rev'd sub nom.* Med. Ctr. at Elizabeth Place, LLC v. Atrium Health Sys., 817 F.3d 934 (6th Cir. 2016).

4 *See* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767-68 (1984).

5 Atrium Health Sys., 817 F.3d 935.

6 560 U.S. 183, 195 (2010).

7 472 U.S. 284, 293-94 (1985).

8 574 U.S. 1, 7 (2006).

9 *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886-87 (2007); In re Southeastern Milk Antitrust Litig., 739 F.3d 262, 271 (6th Cir. 2014).

10 *See* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768 (1984); In re New Energy Corp. 739 F. 3d 1077, 1079 (7th Cir. 2014); Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 338 (2nd Cir. 2008); Polk Bros., Inc. v. Forest City Enter., Inc., 776 F.2d 185, 188 (7th Cir. 1985); In re ATM Fee Antitrust Litig., 554 F. Supp. 2d 1003, 1011-12 (N.D. Cal. 2008).

11 574 U.S. 1.

12 Consider the following simplified example. If an insurer has one hundred mem-bers who visit the hospital once a year, and if it has ten identical hospitals in its network, each hospital expects to treat ten patients per year. However, if the insur-er uses a narrow network and contracts with only five hospitals, those hospitals expect to treat twenty patients per year. By using a narrow network, the insurer thereby brings twice as much volume to those five in-network hospitals and can therefore obtain lower rates under rate-for-volume pricing.

13 472 U.S. 284, 294 (1985).

14 Based on Com-Tel, Inc. v. DuKane Corp., 669 F.2d 404, 409 (6th Cir. 1982).

15 *See* Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 730 n.4 (1988).

16 Indeed, the Panel Limitations do not actually prevent insurers from adding hospi-tals to their networks. Rather they allow for contract termination or renegotiation.

17 *See, e.g.,* Methodist Health Servs. Corp. v. OSF Healthcare Sys., 859 F.3d 408, 410 (7th Cir. 2017).

18 *See* Abraham v. Intermountain Health Care Inc., 461 F.3d 1249, 1261 (10th Cir. 2006).

19 Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield, 373 F.3d 57 (1st Cir. 2004); Levine v. Cent. Fla. Med. Affiliates, Inc., 72 F.3d 1538 (11th Cir. 1996).

20 *See* NYNEX Corp. v. Discon, Inc., 525 U.S. 128 (1998).