Loyola Consumer Law Review

Volume 10 | Issue 1 Article 6

1998

PPO Did Not Violate Antitrust Laws by Canceling Contract with Area Hospital

Thomas O'Connor

claim because the record did not reflect when her attorneys received the notification from TUC. Therefore, the court reversed and remanded this issue to the district court.

Cushman next claimed that, under the VFCRA, TUC did not provide her with a description of its reinvestigation procedures as required by Vt. Stat. Ann. Tit. 9 § 2480d(g)(5). The court found that the evidence in the record supported Cushman's claim and ruled that this claim should stand.

Court Remanded Defamation Claim

Cushman's final claim against TUC was a state law claim for defamation. The district court had dismissed this claim because Cushman had not produced the required evidence of malice, and because the FCRA preempted her state law claim for defamation except where "malice with willful intent to injure" is proven. 15 U.S.C. § 1681h(e). The court stated that the district court failed to address this issue. Accordingly, the court remanded Cushman's defamation claim, reasoning that, since it had remanded the issue of whether Cushman was entitled to punitive damages for her claim of willful noncompliance with § 1681i(a), it would also remand this issue to the district court to make another finding of "willfulness" with respect to her defamation claim.

Finally, the court considered the district court's alternate basis of dismissal of Cushman's defamation claim. The district court had dismissed Cushman's defamation claim on the alternate basis that she had not produced any evidence of publication. The court used the law of the forum state, Pennsylvania, when considering this issue because neither party had argued that Vermont law applied. Under Pennsylvania law, a claim for defamation must be supported by evidence that the information was communicated to at least one person other than the person defamed. Disagreeing with the district court, the appellate court determined that a jury could find that the information had been published for two reasons. First, a TUC employee testified at trial that the allegedly defamatory information was communicated to Citibank and Chase. Second, Cushman was originally informed of the allegedly defamatory information through a bill collector and the jury could find that this information had been published to him. Consequently, the court also reversed and remanded the district court's alternate ruling on Cushman's defamation claim. ***CLR***

PPO Did Not Violate Antitrust Laws by Canceling Contract with Area Hospital

By Thomas O'Connor

In ***Doctor's Hospital of Jefferson, Inc. v. Southeast Medical Alliance, Inc.*, 123 F.3d 301 (5th Cir. 1997),** the United States Court of Appeals for the Fifth Circuit affirmed a district court decision granting the motion for summary judgment made by Defendant preferred provider organization ("PPO"), Southwest Medical Alliance, Inc. ("SMA"), and Defendant hospital, Jefferson Parish Hospital Service District No. 2 ("East Jefferson"). Plaintiff, Doctor's Hospital of Jefferson, Inc. ("DHJ"), claimed that Defendants violated 15 U.S.C. §§ 1-2 of the Sherman Act when SMA accepted East Jefferson into its PPO and contemporaneously dropped DHJ from its PPO. The district court granted the motion after finding that Plaintiff did not have proper standing to bring an antitrust suit; the appellate court affirmed, but on alternate grounds. The appellate court found that although Plaintiff had standing to bring an antitrust claim by alleging that Defendants had injured Plaintiff's position in the marketplace, Plaintiff was unable to show that it suffered an antitrust injury, and therefore summary judgment was proper.

East Jefferson Joined SMA, and DHJ's Membership Was Simultaneously Terminated

DHJ and East Jefferson are located next door to each other in suburban New Orleans and shared a number of the same doctors. East Jefferson was the more established of the two hospitals as it opened in 1968, 16 years earlier than DHJ, and had more than four times the bed space of DHJ. In 1988, DHJ and a number of other hospitals established SMA, a not-for-profit PPO. SMA was organized by dividing its member hospitals into two tiers: (1) member hospitals which receive seats on SMA's board of directors and (2) hospitals on contract to provide services which retain no ownership of SMA. At the time SMA was established, DHJ began in the more prestigious of the two tiers, as a member hospital. However by 1991, after briefly dropping out of SMA, DHJ was reaffiliated as a member in the second tier.

As the number of patients served by SMA and the revenues earned by SMA members grew, DHJ attempted to get back into the potentially more profitable first tier. However, SMA

was more interested in having East Jefferson join the PPO. When East Jefferson was finally admitted to the PPO, SMA dropped DHJ pursuant to an escape clause in their contract. When SMA dropped DHJ, DHJ was associated with six other PPOs.

In response to being dropped, DHJ sued both SMA and East Jefferson, claiming that the Defendants conspired to restrict competition by excluding DHJ from SMA and violated § 1 of the Sherman Act. DHJ also claimed that East Jefferson attempted to monopolize hospital services in its neighborhood in violation of § 2 of the Sherman Act. DHJ asserted that East Jefferson used its market power in the immediate area to base its entrance in SMA on DHJ's exclusion from SMA. DHJ asked for damages for its lost profits of SMA revenues and damage to DHJ's ability to compete because of its exclusion from SMA.

District Court Erroneously Granted Summary Judgment Based on Lack of Standing

Standing is a prerequisite to bringing a suit under either § 1 or § 2 of the Sherman Act. Standing to bring an antitrust suit exists only when three conditions are met: (1) plaintiff suffered an injury-in-fact proximately caused by defendant; (2) the injury was an antitrust injury; and (3) there is not a party better suited to bring the suit than the plaintiff." (citing McCormack v. National Collegiate Athletic Ass'n, 845 F.2d 1338, 1341 (5th Cir. 1988)). The district court found that to satisfy the second prong of the test, a plaintiff must allege both individual and market-wide injury to competition. The district court held that since DHJ did not properly allege a market-wide antitrust injury in this case, it did not have standing to bring suit.

On appeal, the Fifth Circuit found that a plaintiff need not allege a market-wide injury to competition to have standing, only that a plaintiff must allege a plaintiff-specific injury in relation to its position in the marketplace. In this case, DHJ alleged that its injury resulted from SMA and East Jefferson's exclusionary practices. The court held that the district court's interpretation of standing was too restrictive, and that DHJ had showed enough of a potential antitrust injury to establish standing. Moreover, the purpose of the antitrust legislation would be served by considering the legal aspects of the claim. Because DHJ established standing for an antitrust claim, the only question at issue was whether the injury constituted an antitrust injury.

Fifth Circuit Affirmed Grant of Summary Judgment on Alternative Grounds

Despite its rejection of the district court's finding regarding standing, the appellate court held that the district court's grant of summary judgment was proper. DHJ brought two types of claims under the Sherman Act. The court ruled that to prove a § 1 claim, under the reason-of-rule analysis, a plaintiff must show that Defendants' actions caused an injury to competition. To show a § 2 violation, a plaintiff must show that Defendant attempted to monopolize a defined market. The court analyzed both of DHJ's contentions and found that both claims failed to present genuine issues of material fact.

DHJ Failed to Show That Its Exclusion from SMA Harmed Competition

Because DHJ did not allege on appeal that Defendants' action were unlawful per se, DHJ had to show that those actions unreasonably restrained trade. Specifically, DHJ had to show that Defendants' activities, on balance, did more harm to market competition than good. To each harm Plaintiff alleged, Defendants responded that their behavior was justified for the same reasons that a manufacturer has the absolute right to choose its distributors. DHJ responded that unlike a manufacturer-distributor relationship, which involves the manufacturer acting unilaterally or pursuant to a vertical agreement with a supplier, SMA actually facilitated East Jefferson's horizontal action to restrict trade by removing DHJ as a competitor.

The court held that no adverse antitrust consequences result from a PPO which "prefers" certain providers. While the manufacturer-distributor analogy provided useful insight, the substitution of one distributor for another should not be expected to injure competition. Unless the arrangement between DHJ and SMA was necessary for DHJ to compete, there was no antitrust violation by substituting East Jefferson for DHJ.

The effect of the substitution is only important when viewed from DHJ's overall ability to compete, not when viewed with regard to its relationship with SMA. The court found it irrelevant that DHJ was possibly injured by its exclusion from SMA, that the revenues DHJ would have received from SMA were potentially attractive, or that East Jefferson may have intended to hurt DHJ. The court referred to the Department of Justice guidelines that insisted that the focus of an antitrust analysis when PPOs are involved should not be on whether a particular provider was injured, but whether the consumer was harmed by a reduction in competition. The court expanded this focus to include an analysis of whether the provider was completely barred from competition by its exclusion or only in regard to its

relationship with the excluding PPO. In this case, the court found that DHJ was not injured in the aggregate by its exclusion from SMA since DHJ soon affiliated with a larger PPO after leaving SMA. Furthermore, the court found that consumers were not injured because the availability of health care providers to consumers in the neighborhood was not reduced.

Court Found Each § 1 Allegation Lacked Genuine Issues of Material Fact

Next, DHJ claimed that prices for hospital services in the market increased because of Defendants' antitrust activities. DHJ's expert economist testified that East Jefferson's prices were higher than DHJ's which indicated an antitrust violation. The court, however, reasoned that DHJ's expert did not adequately define East Jefferson's market power in a meaningful geographic market. Furthermore, the court reasoned that price increases may be indicative of positive aspects of East Jefferson, such as better quality services; therefore, DHJ failed to show that the higher prices were a direct result of a lack of competition.

DHJ's second § 1 claim was also rejected by the court. DHJ alleged that its exclusion from SMA reduced consumer choice for consumers who used SMA. The court, however, found that the number of hospitals available to patients in general, and users of SMA in particular, had not been reduced. The availability of the hospitals to various customers might have changed, but any reduction in hospital availability was insufficient to decrease market competition. Furthermore, any price increase that DHJ was forced to incur due to its realignment would not eliminate DHJ as a potential provider to most of its former SMA patients.

Finally, DHJ's last § 1 complaint was that it was substantially weakened as a competitor because its exclusion from SMA caused it to lose profits and to lose its membership in a premiere PPO. The court held that, while injury to a competitor may be evidence of an injury to market competition, the specific injury to DHJ was insufficient to create a factual issue regarding damage to competition. In fact, DHJ's own injury was insignificant enough that its long term viability as a market competitor was unaffected as it maintained membership in numerous managed care plans. Thus, DHJ showed that it could not compete without an affiliation with SMA.

Court Rejected the § 2 Claim for Failure to Properly Define a Market

Next, DHJ claimed damage resulting from a violation of § 2 of the Sherman Act, but this claim also failed because it did not present a genuine issue of material fact. Section 2 of the Sherman Act prevents parties from engaging in conspiracies to monopolize relevant markets. To maintain a § 2 claim, DHJ had to properly define a market that East Jefferson allegedly was trying to monopolize. The appellate court found that DHJ defined its geographic market too narrowly because there was too much PPO patient migration to and from the market DHJ defined. Thus, the court concluded that DHJ's § 2 claim should fail.

In conclusion, although DHJ was able to establish standing to bring an antitrust suit, it failed to establish that there were grounds for such a suit. Therefore, the Fifth Circuit affirmed the lower court's decision to grant Defendants' motion for summary judgment because Plaintiff could not present a genuine issue of material fact to support either its § 1 or § 2 claims.

CLR

Medical Device Amendments Act Does Not Preempt All State Law Claims

by Brad Kenneth Lindow

In ***Mitchell v. Collagen Corp.*, 126 F.3d 902 (7th Cir. 1997)**, the United States Court of Appeals for the Seventh Circuit, on remand from the Supreme Court of the United States, reconsidered its prior holding in *Mitchell v. Collagen Corp.*, 67 F.3d 1268 (7th Cir. 1995), that the Medical Device Amendments ("MDA"), 21 U.S.C. §§ 360c-k, to the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301-95, preempted some of Plaintiffs' state law claims. The Supreme Court remanded the Mitchells' case and instructed the Seventh Circuit to reconsider its prior ruling in light of the ruling in *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996). Upon doing so, the Seventh Circuit reaffirmed the judgment of the district court