

Antitrust Advisory: Eleventh Circuit Finds Competitor Hospital Is "Efficient Enforcer" for Tying Claim under Federal Antitrust Laws

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On April 29, 2010, the U.S. Court of Appeals for the Eleventh Circuit, reversing a district court's dismissal, found that a competitor hospital, plaintiff Palmyra Park Hospital, Inc. ("Palmyra"), was an "efficient enforcer" of the antitrust laws, and could therefore have antitrust standing to pursue its antitrust tying claims against defendant Phoebe Putney Memorial Hospital ("Phoebe Putney").

Palmyra Park Hosp. v. Phoebe Putney Mem'l Hosp. et al., No. 09-11818 (11th Cir., Apr. 29, 2010). In a fast-changing health care market, with significant revenue pressures on many providers, the court's providing a "green light" to a competitor's attempt to pursue antitrust claims may lead to an increase in such suits.

Background

Palmyra and Phoebe Putney operate acute-care hospitals in the Albany, Georgia region. The two hospitals offer a number of the same acute-care services; Palmyra is Phoebe Putney's chief competitor for acute-care medical services. Phoebe Putney has a state-issued Certificate of Need (CON) for three acute-care services, which Palmyra does not possess. In 2008, Palmyra claimed that it lost its in-network status with Blue Cross Blue Shield of Georgia ("Blue Cross"), among other insurers. Palmyra maintained that this was because Phoebe Putney leveraged its monopoly power over the three medical services, which only it had the ability to offer, to force Blue Cross to exclude Palmyra from their provider networks. Specifically, Phoebe Putney allegedly threatened to demand significantly higher reimbursement rates for those services in its contracts with Blue Cross if Blue Cross included Palmyra in its provider network. Palmyra alleged in its Complaint that Phoebe Putney has illegal tying agreements with Blue Cross in violation of Sections 1 and 2 of the Sherman Act (the three separate service markets constitute the tying products markets and the eight separate markets in which the two hospitals compete constitute the tied products markets), as well as unlawful monopolization theories, business torts, and state law claims.

On March 31, 2009, the district court granted Defendants' motion to dismiss because it held that Palmyra lacked antitrust standing to sue Phoebe Putney because it was not an efficient enforcer.

The Eleventh Circuit's Decision

The Eleventh Circuit reversed and held that Palmyra had antitrust standing to pursue its claims against Phoebe Putney.

Citing *Todorov v. DCH Healthcare Auth.*, 921 F. 2d 1438, 1449 (11th Cir. 1991), the court applied a two-prong test for antitrust standing under Section 4 of the Clayton Act. The plaintiff must (1) have alleged an antitrust injury; and (2) be an efficient enforcer of the antitrust laws.

Since the district court properly found that Palmyra's tying claims are antitrust injuries, *i.e.*, the type of injuries that the antitrust laws are designed to remedy, the court focused its analysis on the second prong. The court considered a number of factors, including:

1. the directness of the injury,
2. the remoteness of the injury,
3. whether other potential plaintiffs were better suited to vindicate the harm,
4. whether the damages were highly speculative,
5. the extent to which the apportionment of damages was highly likely and would risk duplicative recoveries, and
6. whether the plaintiff would be able to efficiently and effectively enforce the judgment.

The court held that Palmyra is "perhaps the best suited to efficiently enforce the antitrust laws":

- Although Palmyra's injury occurs several steps down the causal chain, once Phoebe Putney "starts the ball rolling with its tying arrangement," Palmyra's injury will inevitably follow.
- Other potential plaintiffs, such as insurers, policy-holders, and even the government, were not better suited to vindicate the harm as these parties would not likely bring suit.
- Palmyra's damages were not highly speculative as most of Phoebe Putney's new patients would be diverted from Palmyra, depriving the hospital of revenue.
- Palmyra's damages flow directly from the diverted patients and it alone would suffer the damages. Therefore, allowing Palmyra to sue does not create problems apportioning damages or risk duplicative recoveries.
- Palmyra would certainly be able to efficiently and effectively enforce any judgment it obtained, as it is a large hospital with significant financial and legal resources, as well as strong incentive to recoup its allegedly lost profits.

Conclusion

Any health care competitor trying to get into court to pursue antitrust claims will now likely invoke *Palmyra* to stay there.

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