Articles + Publications | August 30, 2021

Sixth Circuit Reverses Antitrust Preliminary Injunction Ordering Health Insurer to Keep Hospital in Its Network

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Introduction

On August 10, the Sixth Circuit issued its opinion in *St. Luke's Hospital et al. v. ProMedica Health System, Inc.*, reversing an unusual preliminary injunction under Section 2 of the Sherman Act that ordered health insurance carrier Paramount to continue its network participation contract with St. Luke's Hospital.[1]

The Sixth Circuit found that Paramount had properly invoked a contract termination clause triggered by St. Lukes' change in control and acquisition by a larger competitor. The Sixth Circuit stressed that Supreme Court precedents finding a Section 2 violation for a unilateral refusal to deal, such as *Aspen Skiing v. Aspen Highlands Skiing*,[2] did not apply where the contract establishing the parties' relationship included a provision that would end the terms of their dealing and that resulted from the contract counter party being transformed into a fundamentally different type of entity. The Sixth Circuit also held that there was no irreparable harm, as injuries from lost volume and market share are compensable by money damages.

Background

Defendant health insurance carrier Paramount is a subsidiary of a hospital system called ProMedica, which is the largest hospital services provider in Lucas County, Ohio. When ProMedica attempted to merge with its smaller rival St. Luke's in 2010, the Federal Trade Commission (FTC) objected to the merger and required ProMedica to divest St. Luke's. The FTC approved a divestiture agreement, permitting Paramount to contract with St. Luke's as an in-network health care provider for Paramount's health insurance products. However, as a condition of the health insurance contract, Paramount obtained an "out" such that if "St. Luke's underwent 'a Change in Control,' Paramount could 'immediately terminate' its contracts with the hospital and its physician group."[3]

After the divesture, McLaren Health Systems agreed to acquire St. Luke's.[4] In response, Paramount exercised its contractual option to end its relationship with St. Luke's.

St. Luke's then brought suit against Paramount and ProMedica, alleging a violation of Section 2 of the Sherman Act and moved for a preliminary injunction.[5] St. Luke's argued that the termination had ended a prior, highly profitable course of dealing between the parties and had no legitimate basis other than to cripple St. Luke's as a competitor.

The district court granted St. Luke's motion for a preliminary injunction and ordered the contract between the parties to continue. The Sixth Circuit reversed.

Sixth Circuit Decision

Section 2 of the Sherman Act provides that it is illegal to "monopolize, or attempt to monopolize, … any part of the trade or commerce among the several States, or with foreign nations."[6] In some limited situations, Section 2 of the Sherman Act prohibits a company from "refusing to deal" with another company. But "[c]ourts start with the liberty-based assumption that individuals and companies may do business with whomever they please."[7]

In order to determine whether Paramount had engaged in an unlawful refusal to deal, the Sixth Circuit posed three questions to guide its analysis:

1. "Did the monopolist enter a 'voluntary … course of dealing' with its rival"?;[8]
2. "Did the monopolist willingly sacrifice 'shortrun benefits … in exchange for a perceived long-run impact on its smaller rival'?";[9] and
3. "If so, did the monopolist ignore 'efficiency concerns,' or act without 'valid business reasons.'"[10]

Taking the questions in order, first, while there was a prior course of dealing between the parties, that course of dealing was conditioned expressly in the contract on there being no change in control of St. Luke's. Simply put, "[t]he two firms may have entered a 'voluntary … course of dealing' in one sense, but it included a voluntary, mutually agreed, and government-approved basis for ending that course of dealing. In other words, ProMedica had a legitimate business reason from the outset to end this arrangement, as evidenced by the 'Change in Control' clause."[11]

Moreover, the court found that Paramount had valid business reasons for the contract termination. "ProMedica could benefit from encouraging patients to seek care at ProMedica hospitals and from ProMedica's doctors rather than at St. Luke's and by extension at McLaren."[12] Indeed, ProMedica's CFO explained that as a result of the change of control, St. Luke's was now offering advanced care at McLaren hospitals by hundreds of specialists and primary care physicians, which made St. Luke's a "completely different type of competitor." Additionally, nothing in the record suggested that Paramount would suffer serious losses by stopping its relationship with St. Luke's. In fact, the only customer Paramount seemed to have lost was St. Luke's own employee health plan. The court noted that ProMedica anticipated any loss would be offset by winning greater advanced-care volume.

Notably, the court added that "[f]orcing rivals to share — to continue doing business together — pushes the bounds of [the court's] expertise, and 'when it comes to fashioning a remedy' in this area, 'caution is key.'"***[13]*** Further, the court made clear that any market share or market power analysis should focus on the medical insurance market, where Paramount has only a 17% share, not the market for medical services.

The court also found that an injunction was not warranted because there was no irreparable harm, and any injury was compensable by monetary damages.[14]

Takeaways

- Courts remain reluctant to compel parties to deal with each other against their will, especially in the face of clear contractual clauses permitting termination under certain contingencies.

- Harm to a competitor, without more, is typically not enough to succeed on an antitrust theory.
- The Sixth Circuit viewed protecting the competitive position of the terminating party as a legitimate reason to refuse to deal, especially in light of changed circumstances between the parties.
- The court's focus on a defendant's business reason for its conduct makes clear the value of parties documenting their legitimate business reasons for conduct that could adversely affect a competitor.
- Irreparable harm is difficult to establish in a private antitrust action based upon lost market share and lost volume.

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[1] The Sixth Circuit in this case previously affirmed a decision by the Federal Trade Commission to block a merger of ProMedica Health System and St. Luke's Hospital in Lucas Country, Ohio.

[2] *Aspen Skiing v. Aspen Highlands Skiing, 472 U.S. 585 (1985).*

[3] *Id.* at *7.

[4] *Id.* at *8-9.

[5] St. Luke's also claims that Paramount's conduct violates Section 1 of the Sherman Act. The focus of the Sixth Circuit's decision and this article, however, is the Section 2 claim.

[6] *See* 15 U.S.C. § 2.

[7] 2021 U.S. App. LEXIS 23728, *11.

[8] *Id.* at *12 (citing *Verizon Communs., Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 409 (2004)).

[9] *Id.* (citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 611 (1985); *see also* 3 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law P 651 (4th ed. 2015)).

[10] *Id.* (citing *Aspen Skiing*, 472 U.S. at 605, 610).

[11] *Id.* at *14.

[12] *Id.*

[13] *Id.* at *19 (citing *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141, 2166 (2021)).

[14] *Id.* at *19.

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