Second Circuit Finally Puts an End to New York City's Challenge to the Merger that Created EmblemHealth

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On August 18, the Second Circuit Court of Appeals brought an end to a long-running antitrust case filed by the City of New York against health insurer EmblemHealth. The action stemmed from the merger of two New York-based insurers, Group Health Incorporated ("GHI") and Health Insurance Plan of New York ("HIP"), which joined together in 2005 to create EmblemHealth.

In November of 2006, shortly before GHI and HIP were set to consummate their merger -- federal and state antitrust regulators already having granted approval of the transaction -- the City of New York filed an action seeking to derail the merger. The City alleged, that because GHI and HIP covered the vast majority of the employees in the City's health benefits program, the merger would substantially reduce competition and increase the City's insurance premiums. The City moved for a temporary restraining order in the United States District Court for the Southern District of New York seeking to block the merger. The District Court, however, denied the City's motion, stating that it had "substantial questions about the market definition that [the City] has adopted. It appears to be focused on what the City is paying for, and not so much on the market for insurance coverage." The Court continued: "I think the products are the same, whether they're offered to the City or they're offered to a private large employer."

Frequently, when a party challenging a merger fails to obtain injunctive relief to stop its consummation the challenge is discontinued. Despite losing its request for a temporary restraining order, however, the City choose to continue to litigate its case. After several years of discovery, the defendants moved for summary judgment on the City's claims. The defendants argued that the market alleged in the City's complaint was insufficient, because it was defined by the City's insurance preferences and ignored all other insurance providers that compete for the City's business. In May of 2010, the District Court granted the defendants' motion for summary judgment and, at the same time, denied the City's motion to amend its complaint to broaden its market definition allegations. The District Court reaffirmed the earlier decision that the market the City alleged in the complaint was insufficient, and held that the City's motion to amend came too late - three years after the City had been put on notice of the insufficiency of its market allegations and

after three years of discovery on its claims.

The City appealed the District Court ruling to the Second Circuit. The Second Circuit, however, affirmed the lower court decision in all respects. On the substantive claim, the Second Circuit echoed the District Court's analysis, stating that "The market alleged in the City's complaint ignores the competition existing among insurance providers for the City's business, as well as the health insurance market for other large employers in the region." The Court also noted that "The City does not allege any factor that would prevent insurance companies other than those it selects for the health benefits program from proposing competitive products should the merged firm raise its premiums to supracompetitive prices." Finally, the Court simply noted that "a single purchaser's preferences cannot define a market," citing its earlier decision in *Hack v. President and Fellows of Yale College*, 237 F.3d 81 (2d Cir. 2000) *abrogated on other grounds, Swierkiewicz v. Sorema N.A.* , 534 U.S. 506 (2002).

The City fared no better on the amendment issue. While the Second Circuit acknowledged that, under Rule 15 of the Federal Rules of Civil Procedure, leave to amend is, in most cases, "freely granted," that is not the case where the nonmovant demonstrates prejudice or bad faith. *AEP Energy Servs. Gas Holding Co v. Bank of America*, 626 F.3d 699 (2d Cir. 2010). Because the City was on notice of the Court's concerns about the market definition issue for three years prior to seeking to amend the complaint, the Second Circuit held that it would be unduly prejudicial to the defendants to subject them to the additional discovery that would be required if the complaint were to be amended at this late date. Accordingly, the District Court decision was affirmed in all respects, finally bringing the City's action to a close over five years after it had begun.

Louisiana Appeals Court Derails Agent's Antitrust Case Against State Farm

On July 7, the Louisiana First Circuit Court of Appeals awarded judgment for State Farm on an agent's antitrust claims against the insurer, reversing the lower court's refusal to dismiss the claims. The action, *Van Hoose v. State Farm*, provides another example that "vertical" antitrust claims by agents against the insurers they represent, while not uncommon, are often unsuccessful because the plaintiff often cannot establish "antitrust injury."

In *Van Hoose v. State Farm*, the plaintiff, a State Farm insurance agent, claimed that his regional State Farm field representative unlawfully blocked the transfer of State Farm policies to him, allegedly to benefit a favored agent who previously had been a State Farm employee. Van Hoose alleged that this conduct violated both the Louisiana antitrust statute (La. R.S. 51:122) and the Louisiana Unfair Trade Practices Act (La. R.S. 51:1401 *et seq*.). State Farm filed exceptions to the complaint (the Louisiana equivalent of a motion to dismiss in federal court), contending that the claims failed as a matter of law. In May, the trial court heard oral argument on the issue and subsequently denied State Farm's motion.

Unlike in federal court, where the denial of a motion to dismiss typically is not immediately appealable, Louisiana state procedure provides a right to appeal all adverse rulings in antitrust cases. Taking advantage of this opportunity, State Farm appealed the decision to Louisiana's First Circuit Court of Appeals, arguing that plaintiff's allegations failed as a matter of law because they

plainly demonstrated an absence of harm to competition (*i.e.,* no allegation of "antitrust injury.") The First Circuit agreed with State Farm, noting that "There are no allegations that the State Farm policyholders in question were not allowed to transfer their policies to any other State Farm agency or any other insurance company. Therefore, the allegations of injury to competition in the petition are insufficient to state a valid antitrust claim under La. Revised Statute 51:122." In addition, because the Louisiana Unfair Trade Practices Act is "patterned after" the Federal Trade Commission Act, which has a similar "harm to competition" component, plaintiff's unfair trade practices claim also was deficient as a matter of law. Accordingly, the trial court's ruling on the antitrust and unfair trade practices claims was reversed, providing a victory for State Farm.

Connecticut Governor Signs Most Favored Nation Clause Ban into Law

On July 8, Connecticut Governor Daniel Malloy signed legislation into law that prohibits health insurers from including "most favored nation" clauses in provider contracts in the state. Specifically, the new law prohibits health insurers from requiring a provider, dentist or hospital to (a) provide services to the insurer at a rate equal to or lower than its lowest contracted rate; (b) disclose the rates at which the provider, dentist or hospital has contracted with any other insurer; or (c) certify that the insurer has received the lowest contracted rate. The law also bars an insurer from terminating or renegotiating its contract with a provider, dentist or hospital prior to the contracted renewal date upon discovering that the provider has contracted with another insurer at a more favorable reimbursement rate.

In enacting the new law, Connecticut joins a growing minority of states that have banned most favored nation clauses in health insurer/provider contracts. The use of the provisions, however, remains highly controversial. Advocates of most favored nation clauses maintain that they reduce an insurer's costs, thus permitting the insurer to offer consumers insurance at lower premiums, and therefore should not be prohibited. Proponents of the ban on such provisions, on the other hand, argue that the clauses impede the ability of smaller insurers to compete with insurers utilizing the clauses, thus ultimately harming consumers. Notably, similar legislation was proposed, but not enacted, in several other states earlier this year, including Maine and North Carolina. In Maine, a similar bill was passed by the Maine legislature, but vetoed by Maine Governor Paul LePage. In North Carolina, similar legislation was passed by the North Carolina General Assembly, but failed in the North Carolina Senate.

Despite the continuing controversy over such provision, in Connecticut the debate is now over (at least for now). Public Law 11-132 becomes effective on October 1, and from that date forward all clauses of the sort barred by the law are declared void and unenforceable. Existing contracts containing such provisions will, however, remain in effect until January 2014 or until their renewal date, whichever comes first, providing ample opportunity for the law on this issue to develop further before many contracts in Connecticut are affected. Stay tuned.

Elliot Spitzer Sued for Defamation by Former Marsh Executives

In 2004, Elliot Spitzer, then New York's Attorney General, rocked the insurance industry when he announced that he was filing an action against insurance broker Marsh & McLennan, accusing it of

violating the antitrust laws by illegally "steering" insurance business to preferred insurers. The investigation, which has become known as the "Contingent Commission Investigation," ultimately resulted in dramatic changes to certain broker practices and the payment of significant fines by several brokers and insurers. While the investigation has long since been concluded, and even the follow-on civil action (*In re Insurance Brokerage Antitrust Litigation*) has been settled, the matter now lives on through a new defamation action brought against Spitzer by a former Marsh executive who was swept up in the probe.

When the investigation was commenced by the New York Attorney General's office, it focused not only on corporate entities, but also on individual defendants, including Marsh executive William Gilman. Gilman denied the allegations against him, and his case was tried to a verdict in February of 2008. Gilman was exonerated on a host of charges, but found guilty of violating the Donnelly Act, New York's antitrust law. That verdict, however, was subsequently vacated by the Court in July of 2010, after the Court announced that "newly discovered evidence undermines the Court's confidence in the verdict."

In the wake of the Court's decision to vacate Gilman's conviction, the *Wall Street Journal* published an editorial questioning Spitzer's initial decision to prosecute Gilman. On August 22, 2010, Spitzer responded to the editorial with an article published by *Slate.com* entitled, "They Still Don't Get It," in which he defended his decision to bring the action. Gilman contends that he was defamed by several of Spitzer's statements in the article, and , on August 19. he filed an action for defamation against Spitzer seeking $60 million in compensatory damages and another $30 million in punitive damages. The case is *Gilman v. Spitzer,* Case No. 11-05843, U.S.D.C. for the Southern District of New York.

Blue Cross of Michigan Appeals Denial of its Motion to Dismiss the DOJ's Most Favored Nation Clause Case

On August 5, Blue Cross of Michigan ("BCM") filed a notice seeking to have the Sixth Circuit Court of Appeals review the recent decision by Judge Denise Hood (U.S.D.C., Eastern District of Michigan) denying BCM's motion to dismiss the antitrust case filed against it by the Department of Justice Antitrust Division. The Justice Department's action, filed in October of 2010, challenges BCM's use of "most favored nation" clauses in its provider contracts. In denying BCM's motion, Judge Hood ruled that the DOJ's claims satisfied the pleading requirements of *Twombly*, that the Burford Abstention Doctrine was not applicable to DOJ's claim, and that BCM's conduct was not immune from challenge under the State Action Doctrine.

While an appeal from the denial of a motion to dismiss a complaint is generally not allowed because it does not constitute a final order by the District Court, BCM contends that, because the District Court's decision was based, at least in part, upon the Court's denial of BCM's state action argument, the appellate court has jurisdiction to hear its appeal under the "collateral order doctrine." As the Supreme Court has explained, this doctrine permits "a small set of prejudgment orders that are 'collateral to' the merits of an action and 'too important' to be denied immediate review" to be heard prior to a final decision by the lower court. *Mohawk Industries v. Carpenter*, 130 S. Ct. 599 (2009). The prerequisites to the application of the doctrine are that the District

Court order must (1) conclusively determine the disputed question; (2) resolve an important issue completely separate from the merits of the action; and (3) be effectively unreviewable on appeal from a final judgment." *Cohen v. Beneficial Indus. Loan Corp.,* 337 U.S. 541 (1949).

Significantly, BCM acknowledges in its Notice of Appeal that the Sixth Circuit has previously held that the denial of a motion to dismiss on state action immunity grounds is not immediately appealable, *Huron Valley Hospital v. City of Pontiac*, 972 F.2d 563 (6th Cir. 1986). BCM argues, however, that "the *Huron Valley* decision is distinguishable and, in light of subsequent case law in other circuits should be overruled." Briefing on this issue has not yet begun, but will without question constitute a threshold issue for BCM's appeal.

In the meantime, Judge Hood has issued a Scheduling Order in the case, directing that the parties move forward with discovery, which has reportedly included plans for well over 100 depositions. The Court has also set a trial date of February of 2013. Whether BCM's appeal will affect this timetable is unclear at this time.

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