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SHOULD A HOSPITAL BE IMMUNE TO ANTITRUST CLAIMS WHEN IT REFUSES TO ALLOW INCOMPETENT DOCTORS FROM USING ITS FACILITIES?

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INTRODUCTION

Does preventing a doctor who has a record of performing substandard work from working within a specific market constitute a violation of antitrust laws? While society might want such a professional to be barred from working in order to prevent further harm from being done, that professional, at least on the surface, might have a valid antitrust claim. At least that is what Dr. George S. Cohlmia, Jr., a cardiovascular and thoracic surgeon from Tulsa, Oklahoma believed.

Dr. Cohlmia had his medical privileges suspended by St. John Medical Center ("SJMC") after he performed two surgeries: one resulting in the death of the patient, and the other resulting in permanent disfigurement.[2] In order for a surgeon to have access to a hospital to perform surgeries, he must gain credentials and privileges at the hospital.[3] Dr. Cohlmia held privileges with four hospitals in the Tulsa area: SJMC, Hillcrest Medical Center ("HMC"), Saint Francis Hospital, and SouthCrest Hospital.[4] After Dr. Cohlmia's two failed surgeries in June 2003, SJMC reviewed Dr. Cohlmia's actions to determine "whether any physician error was involved."[5] Ultimately, the review concluded that Dr. Cohlmia's actions demonstrated "significant error in clinical judgment," and declared that Dr. Cohlmia's "continued practice at SJMC posed potential harm to patients."[6] This led to Dr. Cohlmia's privileges being suspended by SJMC.[7]

DR. COHLMIA'S ANTITRUST CLAIM

Dr. Cohlmia had engaged in cardiovascular, thoracic, vascular, and endovascular surgeries in the Tulsa, Oklahoma market since 1984.[8] He served "a significant percentage of the [relevant] patients in the relevant market[,]" including a significant portion of "high risk" patients that

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1. J.D. Candidate, 2014, University of Denver Sturm College of Law.
2. Cohlmia v. St. John Med. Ctr., 693 F.3d 1269, 1274 (10th Cir. 2012).
3. Cohlmia v. Ardent Health Servs., LLC, 448 F. Supp. 2d 1253, 1260 (N.D. Okla. 2006).
4. *Cohlmia*, 693 F.3d at 1275.
5. *Id.* at 1274.
6. *Id.*
7. *Id.*
8. *Cohlmia*, 488 F. Supp. 2d at 1260.

would be turned away from other surgeons and facilities in the area.[9] In 2003, HMC decided that it would no longer host certain high-risk surgeries that Dr. Cohlmia frequently performed.[10] After HMC learned about Dr. Cohlmia's suspension at SJMC, HMC decided to restrict Dr. Cohlmia's privileges at HMC.[11] Ultimately HMC decided to allow all of Dr. Cohlmia's privileges to expire, and Dr. Cohlmia's privileges at Saint Francis Hospital and SouthCrest Hospital were "voluntarily relinquished."[12]

Dr. Cohlmia alleged antitrust violations under sections 1 and 2 of the Sherman Antitrust Act[13] by the Tulsa hospitals for revoking his privileges to operate.[14] All of the defendants but SJMC chose to settle with Dr. Cohlmia.[15] The federal courts have jurisdiction to hear violations of sections 1 and 2 of the Sherman Antitrust Act through section 4 of the Clayton Antitrust Act.[16] In order to demonstrate a violation of section 1, Dr. Cohlmia would need to show a "corruption of the competitive process," and that the SJMC "wield[ed] market power."[17] Additionally, Dr. Cohlmia would need to demonstrate "evidence of conspiracy" in order to succeed on a section 2 claim.[18]

The District Court for the Northern District of Oklahoma granted summary judgment to SJMC on the antitrust claims.[19] Dr. Cohlmia appealed the grant of summary judgment to the United States Court of Appeals for the Tenth Circuit.[20] The Tenth Circuit began its review of the antitrust claims by first looking to establish an antitrust injury.[21] Dr. Cohlmia argued that he was excluded from the cardiology market in Tulsa because SJMC prohibited him from working in the hospital.[22] The court of appeals agreed with the district court in finding that "[Dr.] Cohlmia's loss of privileges at [SJMC] [did not have the] market wide impact . . . [on services] he claims to [have] provide[d]."[23] The court then looked at SJMC's market power and concluded that "a market share of less than 20% is woefully short under any metric from which to infer market power."[24] Finally the court looked to see if there was any evi-

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9. *Id.*
10. *Cohlmia*, 693 F.3d at 1275.
11. *Id.* at 1276.
12. *Id.*
13. *Id.* at 1279-80. *See also* Sherman Antitrust Act, 15 U.S.C. §§ 1, 2 (2012).
14. *See Cohlmia*, 693 F.3d at 1275-76.
15. *Id.* at 1288.
16. *See id.* at 1280. *See also* Clayton Antitrust Act, 15 U.S.C. § 4 (2012).
17. *Cohlmia*, 693 F.3d at 1280, 1282.
18. See *id.* at 1284.
19. *Id.* at 1276.
20. *Id.*
21. *Id.* at 1280.
22. *Id.* at 1281.
23. *Id.*
24. *Id.* at 1283.

dence of a conspiracy to monopolize the market.[25] The court found no evidence of a conspiracy, and therefore upheld the district court's grant of summary judgment in favor of SJMC on the antitrust claims.[26]

ANTITRUST CONSIDERATIONS AND JUDGMENTS OF COMPETENCY

As *Cohlmia v. St. John Medical Center* shows, there are potentially conflicting issues when determining if a professional is competent to work in a specific market. On one side is the hospital's interest in only providing access to its facilities to the best surgeons. The hospital wants to look out for the safety of its patients, and wants to limit its exposure to the risk of a surgery going wrong. Potentially opposing this interest is a doctor's interest in accessing the hospital facilities in order to provide his services to the relevant market.

Cohlmia was decided purely on legal grounds without considering any underlying policy reasons for finding that SJMC did not violate antitrust law.[27] Imagine if SJMC was the only hospital in Tulsa capable of hosting cardiovascular surgeries, such as those Dr. Cohlmia performed. In this situation, it would be tempting to say that SJMC did violate antitrust law when it revoked Dr. Cohlmia's privileges because of its strong market power[28] and clear injury to competition.[29] If in this hypothetical situation SJMC were to be found to have violated antitrust law, would society be willing to accept that SJMC must be punished for prohibiting an incompetent doctor from operating within the hospital? Surely society would want a doctor who has been deemed incompetent by his peers to be prevented from operating on patients, regardless of the antitrust implications.

The Healthcare Quality Improvement Act ("HCQIA")[30] of 1986 offers some protections that should have applied to protect SJMC from Dr. Cohlmia's antitrust claims. The act provides immunity for any damages "under any law of the United States" for any person participating in a professional review.[31] The HCQIA immunity applies to hospitals acting on the recommendations of professional reviews as well.[32] Since the hospital was immune to damages anyway under the HCQIA for its actions regarding the professional review, the Tenth Circuit should have declared that the HCQIA immunity applies to Dr. Cohlmia's antitrust claims. By doing this, the Tenth Circuit would have reinforced the protections af-

25. *Id.* at 1284.
26. *Id.*
27. *See id.* at 1279-84.
28. *See* Reazin v. Blue Cross & Blue Shield, Inc., 899 F.2d 951, 968 (10th Cir. 1990) ("[M]arket share percentages may give rise to presumptions . . . [of] monopoly power.").
29. *See* Brader v. Allegheny Gen. Hosp., 64 F.3d 869, 874 (3d Cir. 1995) ("[T]he mere exclusion of a single physician from a market is sufficient.").
30. Healthcare Quality Improvement Act, 42 U.S.C. §§ 11111-52 (2012).
31. *Id.* at §11111(a)(1)(D).
32. Cohlmia v. St. John Med. Ctr., 693 F.3d 1269, 1276-77 (10th Cir. 2012).

forded by the HCQIA, while assuring hospitals that they would not violate antitrust laws by prohibiting incompetent doctors from using their facilities.

CONCLUSION

Cohlmia v. St. John Medical Center shows that under one specific set of circumstances, a hospital is not liable under antitrust law for preventing an incompetent doctor from using its facilities. In this case, Dr. Cohlmia did not succeed on his antitrust claims because there was no market impact when he lost his privileges at SJMC, and the hospital controlled less than 20% of the Tulsa market for cardiovascular surgeries.[33] This case does not make it clear to hospitals that they will not be liable for antitrust claims when they revoke privileges for incompetent doctors, even though this is clearly in society's best interest. The Tenth Circuit should have used this case as an opportunity to clearly indicate that the immunities given to hospitals under the HCQIA for acts based on professional reviews includes immunity from antitrust claims. As the law stands now, a future case will be needed to decide more generally whether or not immunity from antitrust claims outweighs an incompetent doctor's interest in maintaining access to his market.

33. *Id.* at 1281, 1283.