



HEALTH LAW REPORTER



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Passing Offense by Supreme Court Hits Health Care Provider Post-Reform Collaboration



By ROBERT M. WOLIN

The Patient Protection and Affordable Care Act (PPACA) encourages providers to consider many collaborative ventures. For example, PPACA's push to replace fee-for-service health care payments with accountable care organizations, medical homes, and value based purchasing, will necessitate integration and continuing collaboration among providers to address the distribution and management of payments on a per episode of care or more holistic manner across many different types of providers and levels of care.

However, health care joint ventures formed by competing providers are likely to come under increased scrutiny following the U.S. Supreme Court's recent rare

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unanimous decision in the *American Needle v. National Football League* case.¹ The court in the NFL case held that joint venture collaborators are not categorically immune from antitrust scrutiny under Section 1 of the Sherman Act if they form a single entity to engage in collective action. Section 1 of the Sherman Act prohibits contracts or combinations in the form of a trust or otherwise, or a conspiracy in restraint of trade, if more than a single entity is involved. Joint ventures typically have sought to be treated as a single entity under antitrust law, whenever possible, as the conduct of a single entity is unlawful under Sherman Act only when it threatens actual monopolization. Collaborative or concerted activities are more strictly governed under Sherman Act § 1 than are unilateral actions under Section 2 of the Sherman Act as Congress believes that concerted activity poses a greater anti-competitive risk.

The NFL case, which involved the licensure of NFL team logos to Reebok by an NFL joint venture company, National Football League Properties (NFLP), suggests that many health care provider joint ventures will be subject to Sherman Act § 1. The NFL case held that when a joint venture brings separate economic actors pursuing their own distinct economic interests through the collaboration, it is unlikely that the action will be deemed to be concerted action rather than the action of a single entity. The Supreme Court found that the independently owned NFL teams, as participants in the NFLP joint venture, did not possess the characteristics of a single entity. Each team, with respect to the licensing of their logos, was a substantial, independently owned, independently managed business and each team's actions were guided by their separate motives

¹ No. 08-661, 2010 WL 2025207 (S. Ct. May 24, 2010), 560 U.S. ___ (2010).

and their objectives were not fully common, despite the fact that the royalties from logo wear sales were shared on an equal basis among the teams.

Whether parties are engaging in concerted action for antitrust purposes is not, however, determined simply based on the number of legal entities involved in a collaboration. The NFL argued to the Supreme Court that, because the NFLP was a single legal entity, the joint venture should not be subject to scrutiny under Sherman Act § 1 as concerted action. However, as the government argued in its brief, the NFL teams were not mere servants of the joint venture entity NFLP; rather, the teams effectively controlled the NFLP, raising the prospect of concerted action by the venture in violation of Section 1 of the Sherman Act.

A similar argument was raised by a group of physicians a few years ago when they attempted to treat a memberless nonprofit organization controlled by competing physicians in a joint venture arrangement as a single entity.² That court, however, found that despite the physician's use of a single joint venture entity, the physicians engaged in concerted action through the entity. Funneling concerted activities through a single entity will not change the character of the competitors' conduct and allow an end run around the antitrust laws.

While the NFLP may appear to be similar to a single entity that licenses logos, the NFL, NFLP, and the teams are not similar in the relevant functional sense because the teams still have distinct, potentially competing interests. Consequently, even though the NFLP was a single legal entity, the NFLP may violate Sherman Act § 1 because the joint venture entity was controlled by a group of competitors and could be used as a vehicle or instrumentality for on-going concerted activity. Many health care joint ventures are organized as entities owned by competitors or potential competitors and thus also may be subject to scrutiny under Sherman Act § 1. Although competitors may engage in concerted action through a single entity, the finding does not mean that a violation of the Sherman Act has occurred. For concerted action to rise to a violation, the restraint must be an unreasonable restraint of trade.

Whether more than one legal entity is involved in a joint venture is not talismanic; rather, the question is whether separate centers of decisionmaking are being brought together to act in concert. If independent centers of decisionmaking are not being combined, there can be no contract, combination or conspiracy. If independent centers of decisionmaking are joining together, then a jointly owned entity or entities are capable of conspiring under Sherman Act § 1.

Conversely, even if more than one legal entity is involved in an activity does not automatically lead to scrutiny

under Sherman Act § 1. For example, agreements between a parent corporation and its wholly owned subsidiaries are not subject to scrutiny under Sherman Act § 1 because such arrangements do not raise the antitrust dangers that Section 1 was designed to prevent. The courts have concluded that joint conduct by entities under common control do not deprive the market of competitors or potential competitors and should not be treated as concerted action.

The NFL also argued that the NFLP joint venture should be deemed to be a single entity because NFL football could not exist without significant cooperation and collaboration. The court, however, held that the justification for the cooperation was not relevant to determining if there was concerted or independent action. The justification, the court stated, could be used to determine if the restraint was permissible under Section 1, if concerted action was found. Consequently, even if bundled payment or accountable care service offerings could not be provided by a single entity, it will not immunize the collaboration from scrutiny under Sherman Act § 1.

If a joint venture is not deemed to be a single entity, the venture will be analyzed under the per se rule or the rule of reason to determine whether the joint venture's actions unreasonably restrain competition for purposes of Sherman Act § 1. When collaborations incorporate anticompetitive aspects as well as pro-competitive aspects, courts typically use the rule of reason test. Thus, most restraints are analyzed under the rule of reason. Under the rule of reason, courts will examine a challenged practice and evaluate the totality of the circumstances to determine whether the challenged practice promotes or suppresses market competition. Many joint venture arrangements, while subject to scrutiny under Sherman Act § 1, ultimately are judged under the rule of reason to be lawful. Per se violations typically are found where the concerted action lacks any redeeming features (e.g., horizontal price fixing or market-allocation agreements) and always or almost always tend to restrict competition or decrease output.

Simply forming a joint venture or arrangement will not preclude a finding of concerted action under antitrust law, regardless of whether the joint venture claims to represent a form of clinical integration, or one of the new types of bundled payment/integrated care entities under PPACA, such as accountable care organizations, if the joint venture involves action among separate economic decisionmakers with separate interests who represent actual or potential competitors. Careful evaluation of the interrelationships of the venture's participants and the impact of the collaboration on the marketplace must be undertaken along with the other potential legal hurdles to PPACA collaborations such as Stark, civil monetary penalties, anti-kickback, and corporate practice of medicine laws.

² *N. Tex. Specialty Physicians v. FTC*, 528 F.3d 346, 356 (5th Cir. 2008), cert. denied, 129 S. Ct. 1313 (2009).