

FILED

United States Court of Appeals
Tenth Circuit

PUBLISH

UNITED STATES COURT OF APPEALS

April 5, 2021

FOR THE TENTH CIRCUIT

Christopher M. Wolpert
Clerk of Court

NEW MEXICO ONCOLOGY AND
HEMATOLOGY CONSULTANTS, LTD.,

Plaintiff - Appellant/Cross-
Appellee,

v.

PRESBYTERIAN HEALTHCARE
SERVICES; PRESBYTERIAN
NETWORK, INC.; PRESBYTERIAN
HEALTH PLANS, INC.;
PRESBYTERIAN INSURANCE, CO.,
INC.,

Defendants - Appellees/Cross-
Appellants.

COMMUNITY ONCOLOGY
ALLIANCE; AMERICAN MEDICAL
ASSOCIATION; AMERICAN
HOSPITAL ASSOCIATION,

Amici Curiae.

No. 19-2210 & 20-2024

**Appeal from the United States District Court
for the District of New Mexico
(D.C. No. 1:12-CV-00526-MV-GBW)**

George M. Sanders, Law Offices of George M. Sanders, Chicago, Illinois (Thomas
Bacon, Law Offices of George M. Sanders, Chicago, Illinois, and Alice Lorenz, Lorenz

Law, Albuquerque, New Mexico, with him on the briefs), for Plaintiff - Appellant/Cross - Appellee.

Jeffrey A. LeVee, Jones Day, Los Angeles, California (Kelly M. Ozurovich, Jones Day, Los Angeles, California, Kate Wallace, Jones Day, Boston, Massachusetts, Edward Ricco, Charles K. Purcell and Bruce D. Hall, Rodey, Dickason, Sloan, Akin & Robb, P.A., Albuquerque, New Mexico, with him on the briefs), for Defendants - Appellees/Cross - Appellants.

Leonard A. Nelson and Kyle A. Palazzolo, American Medical Association, Chicago, Illinois, file an Amici Curiae brief for American Medical Association.

Jeremy A Rist, Blank Rome LLP, Philadelphia, Pennsylvania, filed an Amici Curiae brief for Community Oncology Alliance, Inc.

Douglas Ross and David Maas, Davis Wright Tremaine LLP, filed an Amici Curiae brief for American Hospital Association.

Before **MATHESON, KELLY**, and **EID**, Circuit Judges.

KELLY, Circuit Judge.

Plaintiff-Appellant New Mexico Oncology Hematology Consultants Ltd. (NMOHC) appeals from the district court's grant of summary judgment to Defendants-Appellees Presbyterian Healthcare Services (PHS), Presbyterian Network, Inc., Presbyterian Insurance Co., and Presbyterian Health Plans, Inc. (PHP) (collectively, Defendants) on NMOHC's Sherman Act, Section 2, monopolization and attempted monopolization claims. N.M. Oncology v. Presbyterian Healthcare Servs., 418 F. Supp. 3d 826 (D.N.M. 2019). Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

Background

NMOHC is a physician practice that owns and operates the New Mexico Cancer Center (NMCC) in Albuquerque. PHS is a not-for-profit integrated healthcare system that participates in multiple markets, including the private health insurance market, the oncology market, and the inpatient hospital services market. PHS employs many physicians, who are referred to collectively as the Presbyterian Medical Group (PMG). PHS also controls PHP which operates, on a for-profit basis, and sells health insurance products, including commercial health insurance to employers and individuals, Medicare Advantage plans to seniors, and Medicaid plans. NMOHC is an in-network provider for PHP.

The NMCC opened in 2002 and NMOHC and PHP entered into a five-year provider agreement. At the expiration of the five-year term, the agreement would move into evergreen status and renew on an annual basis if PHP and NMOHC did not enter into a new agreement. In 2007, PHS opened its own oncology program and began to compete with NMOHC. Around the same time, NMOHC and PHP began negotiating a new provider agreement, however, the negotiations stalled as PHP demanded a \$3 million reduction in PHP's payments. NMOHC and PHP remain under the terms of the original provider agreement.

NMOHC's claims on appeal center around three alleged anticompetitive practices that PHS implemented: (1) the "Mandate;" (2) an alleged joint venture between PHP and Radiology Associates of Albuquerque (RAA); and (3) PHS's

policies concerning physician referrals.¹ The Mandate was a benefit change that PHP implemented on its Medicare Advantage plans. Pursuant to the Mandate, PHP would cover certain chemotherapy support drugs covered under Medicare Part B — drugs administered to address side effects from chemotherapy agents, such as nausea — only if they were purchased from the Presbyterian Specialty Care Pharmacy. To administer the drugs at the NMCC, NMOHC would have to accept shipments of the drugs from the Presbyterian Pharmacy at the NMCC, a process NMOHC calls “white bagging,” which it refused to do. NMOHC refused to accept these drugs on the grounds that its doctors did not know the sources of the medication, did not know if the Presbyterian pharmacy was appropriately handling the drugs, and did not know the timing of when the Presbyterian pharmacy would make any shipment.

NMOHC also alleges that a joint venture between RAA and PHP existed in which PHP enrollees needing breast imaging services were forced to use RAA under their PHP plan. RAA shared office space with PHS-employed breast surgeons and nurse navigators. NMOHC alleges that once a PHP patient was diagnosed with breast cancer, RAA would refer the patient to a PHS breast surgeon and a nurse-navigator would then schedule an appointment for the patient with a PHS oncologist

¹ NMOHC also asserted below: (1) that in its negotiations for a new provider agreement with PHP, PHP attempted to lower reimbursement rates below competitive levels in an attempt to eliminate NMOHC from the oncology market; and (2) that PHP and United Healthcare colluded to constrain competition in the private health insurance market. N.M. Oncology, 418 F. Supp. 3d at 841. NMOHC briefly mentions this conduct in its facts section but does not sufficiently raise it on appeal as anticompetitive conduct, thereby waiving any argument on this ground. See Exum v. U.S. Olympic Comm., 389 F.3d 1130, 1133 n.4 (10th Cir. 2004).

without consulting the patient's physician. Separately, the enhanced referral management program was a PHS program to track PMG physician referrals and encourage internal referrals.

NMOHC filed suit against Defendants in 2012. In its Third Amended Complaint (TAC), it asserted claims under Section 2 of the Sherman Act for monopolization and attempted monopolization. NMOHC also asserted a parallel claim under New Mexico antitrust law,² a RICO claim, and other non-antitrust state law claims. Defendants moved to dismiss NMOHC's Second Amended Complaint at the time under Rule 12(b)(6), but the district court denied the motion. However, the district court has dismissed NMOHC's RICO claim and claim for monopolization of the inpatient hospital services market. See N.M. Oncology & Hematology Consultants, Ltd. v. Presbyterian Healthcare Servs., 169 F. Supp. 3d 1204 (D.N.M. 2016); N.M. Oncology & Hematology Consultants, Ltd. v. Presbyterian Healthcare Servs., 54 F. Supp. 3d 1189 (D.N.M. 2014). NMOHC has not appealed either ruling.

In March 2017, Defendants moved for summary judgment on the remaining claims, which the district court granted. N.M. Oncology, 418 F. Supp. 3d at 866. The district court examined whether Defendants possessed monopoly power as regards the monopolization claim or whether there was a dangerous probability of achieving monopoly power insofar as attempted monopolization. It concluded that

² In evaluating New Mexico Antitrust Act claims, the court generally follows authority interpreting claims under Section 2 of the Sherman Act. N.M. Stat. Ann. § 57-1-15.

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