No. 09-1183

IN THE

Supreme Court of the United States

LITTLE ROCK CARDIOLOGY CLINIC, P.A., ET AL.
Petitioners,

v.

BAPTIST HEALTH, ET AL.
Respondents.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY TO OPPOSITION BRIEF

This case presents important antitrust issues that the respondents try to trivialize by misstating the antitrust issues raised by the Eighth Circuit's decision. The Eighth Circuit's decision announces a sweeping rule that insulates health insurer and hospital market power from meaningful review. The Eighth Circuit's market definition analysis disregards accepted market definition principles announced by this Court and other Circuits. The width of the gap between the Eighth Circuit's analysis and current antitrust thinking is highlighted by the Horizontal Merger Guidelines.[1] The Eighth Circuit's decision would prohibit effective antitrust enforcement in many health care cases and insulate the exercise of market power by health insurers and hospitals.

Respondents do not deny that a conflict exists between the Eighth Circuit and the Seventh Circuit on whether an antitrust complaint may state a claim by alleging actual injury to competition without alleging relevant markets. The decision below should be reviewed on certiorari to resolve the conflicts and confusion that it creates for antitrust analysis and enforcement.

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[1] On April 20, 2010, the Department of Justice and Federal Trade Commission released proposed revisions to these Guidelines that maintain all rules and guidelines important to this petition.

I. THE ANTITRUST ISSUES ARE IMPORTANT TO MAINTAIN UNIFORMITY AND EFFECTIVENESS IN ANTITRUST REGULATION.

Petitioners and respondents agree that any sound antitrust analysis cannot ignore the actual market realities raised in a complaint. Respondents, however, ignore what petitioners actually alleged and try to force this case into an analytical framework that has no application here.

The Product Market

The starting point for defining any relevant market is identifying the type of anticompetitive harm alleged in the complaint. Here, the anticompetitive harm is the destruction of competition in the market for cardiology services provided in a hospital in order to further injure competition in the market for hospital services. The complaint alleges that, pursuant to the conspiracy to maintain a bilateral monopoly, insured patients were prevented from seeking treatment from petitioners or Arkansas Heart Hospital ("AHH") and were forced to pay higher costs and obtain lower quality health care at Baptist Health:

> For a patient with congestive heart failure, all else being equal, the chance of death or other adverse outcome within 30 days of being admitted to the hospital is 35% higher at Baptist-Little Rock than at AHH. For patients with

> acute myocardial infarction, the odds of death are 50% greater at Baptist-Little Rock than at AHH, and the odds of adverse outcome are 33% greater. For patients who receive percutaneous coronary intervention, the chance of death is 50% higher at Baptist-Little Rock than at AHH. See attached Exhibit D.

(Pet. App. at 140a).

Almost 30 years ago, in a health care case, this Court recognized that sometimes competitors in one market are injured in order to restrain competition in a different market. *See Blue Shield v. McCready*, 457 U.S. 465 (1982), and its companion case filed by the excluded psychologists, *Va. Academy of Clinical Psychologists v. Blue Shield of Virginia*, 624 F.2d (4th Cir. 1980); *see also Jefferson Parish Hosp. Dist. No. 2 v. Hyde,* 466 U.S. 2, 19 (1984) (anesthesia/hospital tying reviewed for impact on patients); *Blue Cross and Blue Shield v. Marshfield Clinic*, 65 F.3d 1406 (7th Cir. 1995); *Reazin v. Blue Cross & Blue Shield*, 899 F.3d 951 (10th Cir. 1990); *Palmyra Park Hospital, Inc. v. Phoebe Putney Memorial Hospital*, ___ F.3d ___, 2010 U.S. App. LEXIS 8882 (11th Cir. April 29, 2010). The respondents' argument that these cases are irrelevant because they only address standing entirely misses the mark. Of course *McCready* is a standing case. But *McCready* recognized that the ultimate harm to patients in the end market can be caused by injuring physician providers in an intermediate market.

Here, patients were injured when Blue Cross and Baptist Health used their exclusive dealing arrangement to prevent or hobble the successful operation of the heart hospital by denying Blue Cross policyholders the ability to use the heart hospital or the services of any physician that supported the heart hospital. The market question in this case, therefore, is whether Blue Cross and Baptist Health had the market power needed to injure competition in either the market for hospital services or the market for cardiology services provided in a hospital. The only way to answer this question is to look at the options available to patients, rather than the options open to cardiologists.

Respondents try to obscure this point by intoning the phrase "vertical foreclosure." According to the respondents, once "vertical foreclosure" is invoked, a court must ignore the options available to patients, and instead look at only the options available to physicians.

Specifically, respondents seek to support the Eighth Circuit's decision by forcing onto this case an analytical framework developed for distributer termination cases. Antitrust law generally is not concerned with whether a product sold by a manufacturer goes to one distributor or another. Antitrust law only comes into play if the manufacturer has market power and its distribution agreements adversely affect the ultimate consumer of its products.

Privately insured patients are not products that are working their way down a distribution channel towards an actual consumer. More importantly, the antitrust laws are a consumer welfare prescription, *Reiter v. Sonitone Corp.*, 442 U.S. 330 (1979), and are concerned about whether a patient with private insurance is forced to purchase medical services from a provider that he or she does not want to use. *See Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 480-86 (1992); *Jefferson Parish*, 466 U.S. at 19.

The Eighth Circuit created a profoundly erroneous product market rule because it effectively equated privately insured patients with products sold by manufacturers to distributors. The Eighth Circuit held that the only relevant issue in a conspiracy affecting the delivery of health care services is whether the targeted physicians can sell their services to someone else. By doing this, the Eighth Circuit essentially held that insured patients are just like the products sold by a manufacturer to a distributer in a true vertical foreclosure case: indifferent to whether they end up with Dr. A or Dr. B, or Hospital A or Hospital B.

When the market definition focuses on patients, the primary question is whether the defendant has market power over those consumers. The ability of physicians to provide medical services to a different group of patients does not protect the privately insured patients who are controlled by the conspiracy.

In what respondents call the Eighth Circuit's "decisional principle of law," Opposition Br. at 23, the Court accepted respondents' erroneous "vertical foreclosure" premise and excluded from the market the very consumers whose demand substitution responses must define the market. Even though it agreed that patients cannot reasonably interchange private insurance with Medicare or Medicaid, the Eighth Circuit declared that "this lawsuit is not about the options available to patients, it is about the options available to shut-out cardiologists." *Id.* This was fundamentally wrong as a matter of antitrust doctrine: whether physicians such as petitioners can sell their services to patients covered by Medicare and Medicaid does nothing to protect the patients covered by private insurance.

The Geographic Market

With respect to the geographic market question, respondents never confront the Eighth Circuit's radical new legal rule that "where, as here, an antitrust plaintiff alleges that a firm competes in and draws its customers from a specified geographic area, it cannot then limit the relevant geographic market to a location smaller than that based solely on the fact that consumers must travel to that smaller area to obtain the relevant service or product." (Pet. App. at 17a). In its new rule, the Eighth Circuit has established that a geographic market must always equal or exceed the defendant's trade area, which is contrary to precedents of this Court, holdings of the First, Eleventh and District of Columbia Circuits, and the Department of Justice and Federal Trade Commission Horizontal Merger

Guidelines, which provide that a single firm may operate in a number of different geographic markets.

Rather than confront this startling rule, respondents assert that the complaint fails to allege "the provider choices" available to cardiology patients who live outside of Little Rock and travel to Little Rock for cardiology services. This ignores the complaint's allegations at Pet. App. 90a-93a, which allege, among other things:

> The hospitals in surrounding areas that offer cardiology services, such as Conway Regional Medical Center and hospitals in Searcy, are not equipped to receive significant numbers of cardiology patients from Little Rock, and some of the more sophisticated cardiology procedures are available only at Little Rock hospitals. For this reason, Little Rock hospitals attract patients in large numbers from outside of Little Rock for cardiology procedures, but Little Rock cardiology patients rarely go outside of the Little Rock market for these services.
>
> In addition, employers located in and around Little Rock offer health plans that include Little Rock hospitals. Cardiology patients as a rule do not travel more than a few miles for the acute medical procedures involved in this case if they have a choice, and those who do have a choice and the means

> and desire to travel for these procedures are far more likely to choose to go to major cardiology centers outside of Arkansas, such as the Cleveland Clinic or hospitals in Houston, New York or Chicago, than to places such as Russellville, Pine Bluff, or Hot Springs.

(Pet. App. 90a, ¶¶43 and 44). The complaint also alleges:

> Because interventional cardiology procedures can result in the dissection of a vein or artery, they must be performed in a facility that has a cardiac surgery facility. This implies an acute care hospital, the type typically found only in larger towns and cities.
>
> Most of the hospitals outside of [Little Rock] are primary and secondary care hospitals that do not provide acute care. The 722 zip-code-area hospitals serve not only 99.5% of residents in Little Rock, but also a large percentage of residents from around the state who need cardiology services in hospitals.

(Pet. App. 93a, ¶49, n.2 and ¶51).

Thus, the complaint does indeed contain allegations concerning the choices available to patients outside of Little Rock. These allegations make quite clear that the local hospitals available to those patients do not have the facilities necessary to provide the cardiology procedures at issue and included in the relevant market. They are not substitutes for the sophisticated, acute-care hospitals in Little Rock. The outlying hospitals cannot constrain pricing for in-hospital interventional cardiology. This defeats respondents' contention that the Eighth Circuit's ruling can be supported by a pleading failure. This "patient inflow" information, along with the market structure alleged in the complaint, supports the geographic market as pleaded.

The Eighth Circuit's geographic market decision rests solely on its new rule that the geographic market must equal or exceed the service area of the defendant. Respondents offer no justification for this new rule, which contradicts decades of settled precedent and the Horizontal Merger Guidelines used by the Department of Justice and the Federal Trade Commission.

Respondents contend that the criticisms of the *amici* economists should be aired "in the lower courts, not here," Opposition Br. at 32, and that the record here is "almost non-existent." *Id.* at 34. But they do not explain how litigants in the Eighth Circuit can overcome the new legal rule imposed in this case so that litigants can survive dismissal and develop a record. The Eighth Circuit's new rule would require Copernicus to allege the world is flat in order to have an opportunity to prove it is round. Contrary to respondents' contention, the complaint below contains well-pleaded facts that support the alleged geographic market and the criticisms that *amici* direct towards the Eighth Circuit's new rule.

II. RESPONDENTS DO NOT DISPUTE THE DIRECT CONFLICT BETWEEN THE CIRCUITS ON ANTICOMPETITIVE EFFECTS, AND THE QUESTION IS PROPERLY PRESENTED TO THIS COURT.

The Eighth Circuit raised and addressed the question of whether it is necessary to allege a relevant market in order to state an antitrust claim. The Court ruled:

> The parties agree that LRCC has not alleged a per se violation. LRCC therefore has the burden of alleging a relevant market in order to state a plausible antitrust claim. *Double D. Spotting Servs., Inc. v. Supervalu, Inc.*, 136 F.3d 554, 560 (8th Cir. 1998). Without a well-defined relevant market, a court cannot determine the effect that an allegedly illegal act has on competition. See *FTC v. Freeman Hospital*, 69 F.3d 260, 270-71 (8th Cir. 1995).

(Pet. App. at 6a-7a).

As shown in the opinion below, the Eighth Circuit's rule that an antitrust complaint that does not assert a per se violation must allege a relevant market is a rule of long standing within that Circuit, and the rule therefore was binding on both the District Court and the panel below according to

Circuit precedent. *Solis v. Summit Contractors, Inc.*, 558 F.3d 815, 828 (8th Cir. 2009). Under the law of the Eighth Circuit, only the court sitting en banc may change a legal rule that has been announced by a panel. *Id.*

Thus petitioners did not argue against Circuit precedent before the panel, but petitioners did not concede the correctness of the Eighth Circuit's rule. In addition, the complaint contains express allegations of injuries to competition in the section entitled "Harmful Effects on Competition" appearing at Pet. App. 140a through 151a. The complaint therefore alleges injury to competition from the unlawful monopoly and conspiracy, and the Eighth Circuit addressed the question in its decision below.

By addressing the question below and holding that petitioners must allege a relevant market in order to state a claim, the Eighth Circuit reaffirmed its commitment to the rule of law that conflicts with the Seventh Circuit's decision in *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 937 (7th Cir. 2000) (Wood, J.) (plaintiff may allege an unreasonable restraint of trade under Section 1 of the Sherman Act by alleging anticompetitive effects of the challenged conduct rather than market power in a relevant market). The Second Circuit takes the same view as the Seventh Circuit, *Todd v. Exxon Corp.*, 275 F.3d 191, 206-07 (2d Cir. 2001) (Sotomayor, J.) (citing *Toys "R" Us* with approval) ("If a plaintiff can show that a defendant's conduct exerted an actual adverse effect on competition, this is a strong indicator of market power. In fact, this arguably is more direct evidence of market power than calculations of elusive market share figures.").

This issue is properly presented to this Court. "It suffices for our purposes that the court below passed on the issue presented, particularly where the issue is, we believe, in a state of evolving definition and uncertainty, and one of importance to the administration of federal law." *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099, n.8 (1991) (citations and internal quotations omitted). "Our practice permits review of an issue not pressed so long as it has been passed upon." *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 379 (1995) (internal quotation and citations omitted).

Respondents do not deny the split of authority between the Eighth Circuit and the Seventh and Second Circuits on whether an antitrust complaint may state a Section 1 violation by alleging anticompetitive effects rather than market power in a relevant market. In fact the conflict is stark and real; in the Seventh and Second Circuits, the eleven pages of allegations of anticompetitive effects upon patients in this complaint would have mooted any issue of market definition, and the petitioners' complaint would have survived the respondents' challenge based on "appropriate methodologies."

Conclusion

The questions presented are important to the uniform administration and enforcement of the antitrust laws and are properly presented in this petition. Respondents' arguments help focus the reasons why certiorari should be granted: the Eighth Circuit's product market rule examines the market from the wrong perspective and inconsistently with decades of antitrust precedents from this Court, other Circuits, and the Horizontal Merger Guidelines. The new geographic market rule that a market must be at least as large as the defendant's trade area is contrary to every relevant precedent and the Horizontal Merger Guidelines.

The American Medical Association believes this case warrants review. If there is any further question concerning the importance of this case, petitioners respectfully suggest that this Court ask for the views of the Antitrust Division of the Department of Justice and the Federal Trade Commission.

This Court should grant certiorari to resolve the conflicts and confusion created by the Eighth Circuit below.

Respectfully submitted,

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