NORTH CAROLINA
LAWYERS WEEKLY

MAY 8, 2017 | VOL. 30, NO. 9 | NCLAWYERSWEEKLY.COM | $9.00 PER COPY

Business Court seeks high court guidance in antitrust case

■ JEFF JEFFREY
jeff.jeffrey@nclawyersweekly.com

Judge Michael Robinson

Citing the significant financial stakes involved in an antitrust lawsuit against the Charlotte-Mecklenburg Hospital Authority, Judge Michael Robinson of the North Carolina Business Court has called on the state Supreme Court to weigh in on the case.

Robinson said in an April 11 opinion in *DiCesare v. Charlotte-Mecklenburg Hospital Authority* that the state's highest court should consider the "complicated" question of whether any so-called indirect purchasers have standing to file an antitrust action.

The Supreme Court said in a 2007 decision that it agreed with a lower court's ruling that those who do not buy directly from the alleged conspirators do, in fact, have standing to bring an antitrust claim. But the Supreme Court has never addressed where the line is between indirect purchasers with standing and those who have sustained injuries that are too remote to warrant relief, Robinson said.

Robinson's opinion in *DiCesare* laid out just how beneficial Supreme Court guidance on the question would be, given the significant impact the case could have in North Carolina.

"In light of the heavy burdens imposed by the inevitable, complicated issues indirect purchasers must confront in establishing standing, the significant costs and expenses incurred by all sides should this case proceed through discovery, the unavoidable recurrence of this issue in future cases, and the impact this case could have beyond the parties to this litigation, a ruling from the Supreme Court on this issue would be of great benefit to the parties, the business community, the consuming public, and the lower courts of this State," Robinson said.

Stephen Feldman, an antitrust and appellate attorney with Ellis & Winters in Raleigh, said Robinson "couldn't be more clear" in his request for the Supreme Court to address the issue.

"Judge Robinson teed it up for an appeal just about as well as the defendants could hope for," Feldman said.

Steering violation?

Robinson's ruling in *DiCesare* came after CMH moved to have an antitrust lawsuit filed by three former patients dismissed. CMH also asked for a judgment on the pleadings stating that the plaintiffs, who are seeking class certification, had failed to allege a violation of Chapter 75, the state law dealing with monopolies, trusts and consumer protections.

Robinson ultimately ruled that the plaintiffs' claims should be allowed to proceed.

The complaint filed by Christopher DiCesare, James Little and Johanna MacArthur alleges that CMH has used its control of the health care market in the Charlotte area to block insurers from offering policyholders financial incentives to use a lower-cost provider or a lower-cost provider network. Those incentives are designed to "steer" policyholders toward medical providers that cost the insurance companies less in the long run.

But by allegedly pressuring insurers to accept contracts that include "anti-steering provisions," the plaintiffs claim CMH has been able to impede competition and charge more than they could if the provisions were not in place.

Meanwhile, the complaint alleges that CMH has also been encouraging insurers to steer policyholders to its hospitals by offering insurers "moderate concessions on its market-power driven, premium prices."

The plaintiffs claim that since 2013, CMH has been able to force the insurance companies to go along with the alleged scheme because it is the second-largest public hospital system in the United States and the dominant hospital system in the Charlotte area. The complaint says CMH controls approximately 50 percent of Charlotte's health care market by way of 10 acute-care hospitals in the Charlotte area—twice the number owned by Novant Health Inc., the No. 2 player in the Charlotte market.

As a result, the plaintiffs allege they "pay more for health insurance, incur higher out-of-pocket costs, have fewer insurance plans to choose from and are denied access to truthful information that would enable Plaintiffs to comparison-shop based on cost and quality."

Standing precedent

CMH has denied the plaintiffs' allegations and has sought to have the case thrown out for lack of standing.

However, Robinson determined that the plaintiffs' Oct. 18, 2016,amended complaint sufficiently pleaded a case that withstood CMH's standing claims.

Robinson's opinion sketched out the lengthy back-and-forth over whether indirect purchasers have standing to bring antitrust lawsuits, which has seen the U.S. Supreme Court come down on both sides of the question. Most recently, the U.S. Supreme Court left it up to the states to decide whether indirect purchasers have standing.

North Carolina first addressed the issue in *Hyde v. Abbott Labs,* a Court of Appeals case that held that indirect purchasers do have standing. The Court of Appeals built on that finding in its 2009 opinion in *Teague v. Bayer,* Robinson said.

"The Court concludes that, until the Supreme Court of North Carolina rules otherwise, *Teague* is controlling and, as in that case, 'at the Rule 12(b)(6) stage in this action, Plaintiffs have alleged sufficient facts in the First Amended Complaint to show a right of recovery.'"

That said, Robinson said that if the North Carolina Supreme Court decided to accept the case, he would exercise his discretion to stay all further proceedings until the high court issued a ruling.

The plaintiffs were represented on appeal by attorneys from Elliott Morgan Parsonage; Lieff Cabraser Heimann & Bernstein; and Pearson, Simon & Warshaw.

Attorneys for the plaintiffs did not respond to requests for comment.

CMH was represented by a team from Womble Carlyle Sandridge & Rice and from Boies, Schiller & Flexner. The defense team also did not respond to requests for comment.

Not unprecedented

Ellis & Winters' Feldman said it's not unprecedented for a Business Court judge to explicitly ask the Supreme Court to take on a case. Chief Judge James Gale made a similar appeal last year in *Kornegay Family Farms v. Cross Creek Seed Inc.*, which pitted the N.C. Uniform Commercial Code against the state's Seed Law on the question of how much farmers can collect if they purchase mislabeled seeds that do not grow crops as expected.

But such a move is typically reserved for cases that raise issues that could have far-reaching effects on North Carolina law.

"Part of the issue is that most antitrust cases occur in federal court," Feldman said. "There's just not a lot of literature on this particular issue coming out of the state courts."

Feldman added that the plaintiffs likely benefitted from having filed such an in-depth amended complaint. Feldman said that in state court, there is a temptation to include fewer details because North Carolina is a notice pleading jurisdiction, which has lower standards for initial pleadings than what federal court requires.

"Judge Robinson pointed out that the complaint filed by the plaintiffs in this case included meaningful allegations that guided his thinking because at the Rule 12 stage, all of the allegations have to be treated as true," Feldman said. "However, the judge also acknowledged the need for a more complete record, which carries an overall massive cost in antitrust cases."

The 47-page opinion is *DiCesare v. Charlotte-Mecklenburg Hospital Authority* (Lawyers Weekly No. 020-041-17). An opinion digest is available at nclawyersweekly.com.

Follow Jeff Jeffrey on Twitter @NCLWJeffrey