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Sixth Circuit Fails to Clarify Section One Analysis for Hospital Joint Operating Agreements

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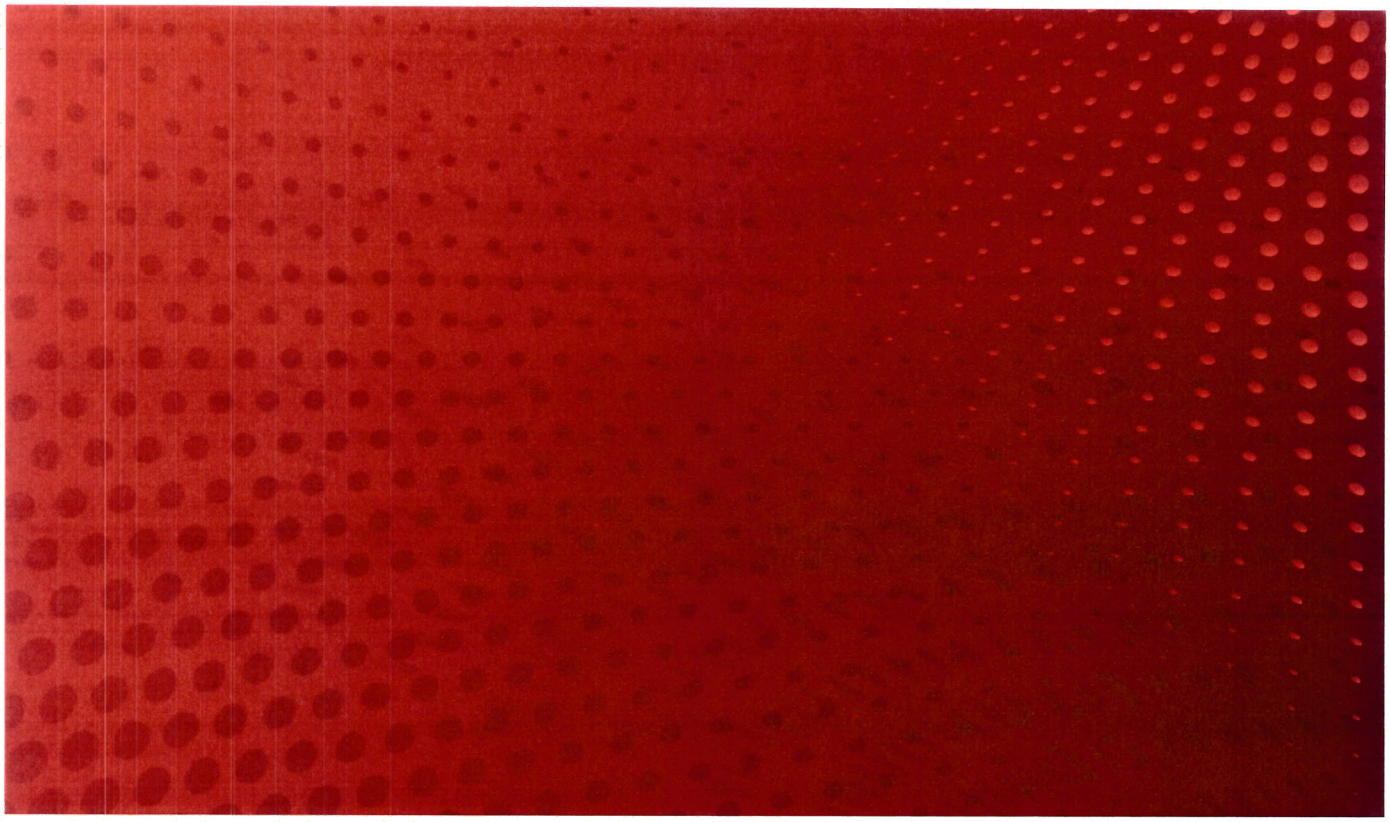

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Exactly one year after hearing oral argument, a Sixth Circuit panel finally issued its second opinion in a lengthy antitrust case involving a large hospital system in the Dayton, OH area, leaving in place a previous Sixth Circuit opinion in the same action that has created some confusion about the application of Section One of the Sherman Act to integrated joint ventures, and particularly to hospital collaborations formed under a joint operating agreement (JOA). In *Medical Center at Elizabeth Place, LLC. v. Atrium Health System*, 922 F.3d 713 (6th Cir. 2019) (*MCEP II*), the Sixth Circuit ruled that contractual restraints imposed by Premier Health Partners (Premier) are to be evaluated under the rule of reason, and affirmed a summary judgment that had been granted in favor of Premier, because the plaintiff had only challenged Premier's conduct as a *per se* unlawful group boycott. Left standing was a prior decision by a different Sixth Circuit panel, which had reversed the district court's ruling that Premier and its members functioned as a single entity. *Medical Center at Elizabeth Place, LLC v. Atrium Health Center*, 817 F.3d 934 (6th Cir. 2016) (*MCEP I*). The Premier JOA established a highly integrated joint venture in which Premier controlled most business decisions involving the hospitals, and the hospitals shared all financial risk from the joint venture's operations, but the panel in *MCEP I* concluded that substantial financial and management consolidation may not be sufficient to insulate a joint venture from a Section One challenge. The Sixth Circuit's recent decision in *MCEP II* likely will be the last word in this long and hard-fought litigation, leaving antitrust and health care counsel with the challenging task of advising clients about the application of *MCEP I* to contractually integrated joint ventures involving competitors.

Factual Background

Premier was formed in 1995 when two of the three largest hospitals in Dayton, Miami Valley and Good Samaritan, entered a JOA. The parties did not merge because Good Samaritan was required to maintain its separate Catholic identity and retain ownership of its assets. Atrium Medical Center and Upper Valley Medical Center, both located about 20 miles from Dayton, joined Premier in 2005 and 2008. Under the JOA, each of the hospitals delegated operational, strategic, and financial control to Premier. While the

four members of Premier continued to own their hospitals separately, the JOA placed responsibility for major financial decisions in the hands of Premier; Premier negotiated and entered into payer contracts on its members' behalf; and all income or loss from the participants' activities was combined into a single net income, which was shared among the members in accordance with a pre-determined formula in the JOA.

Medical Center at Elizabeth Place (MCEP) is a 26-bed hospital located in Dayton that was established by a group of physicians in 2006. MCEP claimed that Premier and its members engaged in conduct that was intended to restrict MCEP's participation in the market by:

- Entering managed care contracts with each major payer in Dayton that prevented the payer from including any additional hospital in its network, unless another significant payer added that hospital to its network (the "Panel Limitations")
- Using employment contracts, non-compete agreements and lease agreements to pressure physicians affiliated with MCEP or considering such an affiliation to not refer patients to MCEP (the "Physician Limitations")

Premier asserted that the Panel Limitations were intended to induce additional referrals to Premier hospitals in exchange for lower prices (*i.e.*, rate for volume incentives), and that the Physician Limitations were vertically imposed and promoted interbrand competition. The defendants also claimed that Premier and its members functioned as a single entity, while MCEP asserted that the individual hospitals continued to think of themselves as independent competitors. MCEP contended that Premier and its members were separate entities that owned their own assets and made their own business decisions, because some Premier executives felt that Premier members did not act as a single system and competed with each other for market share. MCEP also

pointed to certain statements made in public disclosures that suggested that the members of Premier continued to operate as separate hospital systems.[1]

MCEP filed its complaint against Premier and its members in 2012 alleging that the four hospitals, acting through Premier, had engaged in a *per se* illegal group boycott. Significantly, MCEP's complaint did not allege that the defendants had restrained competition under the rule of reason.

The *MCEP I* Decision

The two appeals addressed two issues that frequently arise in Section One cases involving collaborations among competitors: (1) whether the collaboration involved unilateral or concerted action, and (2) whether the challenged restraints should be evaluated under the rule of reason or *per se* standard.

MCEP I focused upon the threshold issue of whether Premier and its constituent hospitals are considered a single entity under the federal antitrust laws. Section One of the Sherman Act only applies to the actions of two or more persons, and not to unilateral conduct.[2] In *Copperweld*, the Supreme Court ruled that a wholly-owned subsidiary could not conspire with its parent because the two companies shared a single economic interest and were controlled by a single center of decision making.[3] While *Copperweld* involved a parent that exercised control over its subsidiary through its ownership, some courts have extended *Copperweld* to joint ventures consisting of two or more competitors that cease competing by contractually delegating substantial operational, management, and financial control to the joint venture.[4] And in *dicta* in both

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[1] MCEP also claimed that after filing its complaint, MCEP learned of two additional agreements that had been induced by the Premier hospitals: (1) an agreement among insurers not to offer managed care contracts to MCEP, and (2) an agreement among primary care physicians not to do business with physicians who invested in MCEP. MCEP referred to the conspiracy among Premier and its hospitals as the "Hub" conspiracy, and the two conspiracies among the insurers and the PCPs as the "Rim" conspiracies. MCEP never amended its complaint to allege the "Rim" conspiracies, a decision that factored in *MCEP II*.

[2] *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 773 n. 21 (1984).

[3] *Id.* at 769.

[4] *See, e.g., Healthamerica Pennsylvania, Inc., v. Susquehanna Health System*, 278 F. Supp. 2d 423 (M.D. Pa. 2003) (joint venture formed under JOA between hospitals is a single entity).

Texaco, Inc. v. Dagher,[5] and *Arizona v. Maricopa County Medical Society*,[6] the Supreme Court has suggested that joint ventures "in which competitors pool their capital and share the risks of loss as well as the opportunities for profits" may be regarded as single entities.

On the other hand, when a joint venture brings together "separate economic actors pursuing separate economic interests," it "deprives the market place of independent centers of decision making," and therefore involves concerted activity.[7] In *American Needle*, the Supreme Court ruled that National Football League Properties (NFLP), a joint venture formed by the NFL and its member teams to market rights to the teams' intellectual property, was engaged in concerted action under Section One. The Court recognized that in some circumstances a joint venture might be considered a single entity, but concluded that the teams' decisions to license their trademarks collectively, as well as NFLP's licensing decisions involved concerted action because the teams continued to own their own intellectual property and remained as independently owned and managed businesses that continued to make corporate decisions guided by their "separate corporate consciousnesses."[8]

In October of 2014, Judge Timothy Black granted summary judgment in favor of the defendants, ruling that Premier and its members were a single economic entity and therefore incapable of engaging in concerted action as required under Section One.[9] Judge Black noted that even though the defendants each owned their own health care assets, that fact alone was not determinative as to whether Premier functioned as a single entity. Judge Black ruled that the contractual control delegated to Premier under the JOA was sufficient to conclude that the Premier hospitals are "controlled by a single center of decision making," such that Premier was a single entity not subject to Section One.[10] Judge Black also concluded that the Premier hospitals did not compete against

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[5] 547 U.S. 1, 6 (2002).
[6] 457 U.S. 332, 356 (1982).
[7] *American Needle, Inc. v. National Football League*, 560 U.S. 183, 195 (2010).
[8] *Id.* at 196-97.
[9] *Medical Center at Elizabeth Place, LLC v. Premier Health Partners*, 2014 WL 7739356, * 5 (S.D. Ohio Oct. 20, 2014).
[10] *Id.* at * 3. Judge Black relied extensively upon *Susquehana Health*, which also involved a JOA under which the participants were contractually integrated, but continued to own their assets separately.

each other because all of Premier's income "goes to the same bottom line," given that under the JOA, they "agreed to pool their resources and share their risks of and from [the system's] activities."[11]

The Sixth Circuit reversed Judge Black's decision in a 2-1 opinion in *MCEP I*. The majority observed that the Supreme Court in *American Needle* "relied on Justice Brandeis's multi-factored test in *Board of Trade of Chicago v. U.S.*,[12] to determine whether a joint venture constitutes a 'combination' under Section 1."[13] That test is the classic statement of the rule of reason, and includes consideration of the reasons for the challenged restraint and the defendants' intent. The majority concluded:

> Based on defendants' stated intent to keep plaintiff out of the Dayton market, the evidence of coercive conduct threatening both physicians and insurance companies with financial loss if they did business with plaintiff, evidence of continued actual and self-proclaimed competition among the defendant hospitals, and evidence that the defendant hospitals' business operations are not entirely unitary, we conclude that there is a genuine issue of material fact as to whether the defendant hospitals' network constitutes a single entity or concerted action among competitors for purposes of Section 1 of the Sherman Act.[14]

The fallacy in the majority's analysis is that the rule of reason test in *Board of Trade* is not applicable to the issue of whether the defendants engaged in unilateral or concerted conduct, and *American Needle* did not rely on the rule of reason in determining that NFLP's decisions involved concerted activity. Instead, when the Supreme Court concluded that NFLP was engaged in joint conduct, the Court referred to the *Board of Trade* analysis in *dicta* that explained that NFLP's joint conduct would likely be analyzed under the rule of reason, and not the *per se* standard.[15] The issue of whether

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[11] *Id.* at 9 *citing Dagher*, 547 U.S. at 6 ("the pricing policy challenged here amounts to little more than price setting by a single entity – albeit within the context of a joint venture – and not a pricing agreement between competing entities with respect to their competing products.").
[12] 246 U.S. 231, 238 (1918).
[13] 817 F.3d at 937.
[14] *Id.* at 938.
[15] 560 U.S. at 203 n. 10.

defendants engaged in concerted action is totally separate from the question of whether defendants unreasonably restrained trade.[16]

The majority gave little weight to the decision-making structure of Premier established by the JOA and to the fact that Premier's income and losses were shared by all members. Instead, the majority ruled that Premier's intent to stifle MCEP's competitive presence, combined with evidence that the hospitals continued to hold their own assets, compete for physicians and patients, and think of themselves as independent was sufficient to create a disputed issue of fact as to whether Premier and its members were a single entity.[17]

In his dissent, Judge Richard Griffin wrote that whether two legally separate entities are capable of conspiring depends upon "commonality of interests, not corporate formality."[18] Judge Griffin criticized the majority for focusing on whether the defendants wished to avoid competing with MCEP, rather than whether they competed among themselves, and concluded that Premier was a single entity because the hospitals shared a unity of interest by sharing net income and losses and because Premier exercised significant operational and management control over all aspects of the hospitals' health system activities.[19] While each of the hospitals continued to own their assets, they had contractually ceded to Premier the authority to independently manage those assets.[20] This, according to Judge Griffin, established Premier as the single center of decision making.

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[16] After all, a corporation may bear an anticompetitive animus toward a competitor, but that does not mean the corporation can conspire with its officers. *Copperweld*, 467 U.S. at 769. For this reason, the Sixth Circuit's decision in *MCEP I* has been questioned by antitrust health care commentators. *See e.g.*, John J. Miles, *Health Care and Antitrust Law,* § 12:4 (Dec. 2018 Update) ("The opinion is not a model of clarity or settled antitrust principles."); Christine L. White, Saralisa C. Brau, David Marx, Jr., *Antitrust and Health Care: A Comprehensive Guide,* § 5-4(b) (2d ed. 2017) (the majority's "analytical approach is in tension with other antitrust cases").

[17] 817 F.3d at 942-45.

[18] *Id.* at 947.

[19] *Id.* at 949-52.

[20] *Id.* at 952.

The *MCEP II* Decision

MCEP II turned on the question of whether the challenged actions of the joint venture were subject to *per se* or rule of reason analysis. Under Section One, once the requisite concerted activity is established, the plaintiff also must prove that the defendants created an "unreasonable" restraint on competition.[21] Typically, that requires a thorough examination of the competitive effects of the restraint under the "rule of reason," which is the prevailing standard of analysis in antitrust cases.[22] If there is a plausible argument that the challenged restraint has a legitimate efficiency justification, then the rule of reason will apply.[23] A narrow set of restraints are considered so likely to be anticompetitive and lacking in potential benefit that they are deemed *per se* unreasonable. Normally, if the challenged conduct falls within the category of behavior that always or nearly always restricts competition without any redeeming competitive benefits (typically horizontal price fixing, market allocations, and output restrictions), it is considered *per se* unreasonable.[24] However, that is not the end of the inquiry in the case of joint ventures, because cooperation between competitors has the potential to create efficiencies or other procompetitive effects that might enhance competition.[25] Therefore, conduct that otherwise would be deemed as *per se* unlawful will be analyzed under the rule of reason when it is undertaken by a joint venture and the restraint is "core" to the joint venture or "ancillary" to the joint venture's efficiency enhancing purpose.[26]

Following the Sixth Circuit's decision in *MCEP I*, Judge Black denied the defendants' remaining motions for summary judgment, and determined that MCEP's group boycott claims against Premier and its members would be evaluated under the *per se* rule.[27] In

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[21] *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).
[22] *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977).
[23] *Northwest Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 293-94 (1985).
[24] *GTE Sylvania*, 433 U.S. at 50.
[25] *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 21-23 (1979).
[26] *Dagher*, 547 U.S. at 7. A restraint is a "core" activity when it is "integral to the running" of the joint venture. *Id.* at 7. A restraint is "ancillary" if there is "a reasonable pro-competitive justification relating to the efficiency-enhancing purposes of the joint venture." *Major League Properties, Inc. v. Salvino*, 542 F.3d 290, 339 (2d Cir. 2008) (Sotomayor, J., concurring).
[27] *Medical Center at Elizabeth Place v. Premier Health Partners*, 2016 WL 9460026, * 6 (S.D. Ohio Oct. 6, 2016).

reaching that conclusion, Judge Black repeated a number of the general rules that apply to the determination of whether a restraint is to be analyzed under the rule of reason or the *per se* rule:

- The choice of the proper standard (rule of reason or *per se*) is a question of law
- The *per se* rule only applies to "manifestly anticompetitive" conduct that serves no purpose other than stifling competition
- The rule of reason must be applied if the defendant "offers" a plausible competitive justification for the restraint[28]

The defendants asserted that the Panel Limitations were adopted to provide lower rates for volume, which would appear to constitute a plausible competitive justification. However, Judge Black determined that the legitimacy of this rationale was the subject of a genuine dispute. Citing § 3.36 of the FTC and DOJ's *Antitrust Guidelines for Collaborations Among Competitors,* Judge Black placed upon the defendants the burden of establishing by undisputed evidence that the challenged restraint was necessary for the defendants to achieve their efficiency-enhancing purpose, and concluded that the defendants had "failed to evidence that their joint-contracting had any efficiency-enhancing purpose."[29] While the Sixth Circuit in *MCEP I* had stated that it was only addressing Judge Black's earlier decision that MCEP was a single entity,[30] Judge Black accepted what he characterized as a "finding" by the Sixth Circuit that Premier's limitation on insurers' ability to contract with other hospitals served no proper business function,[31] and ruled that the Panel Limitations and the Physician Limitations would be evaluated under the *per se* standard.[32]

Unfortunately for MCEP, shortly after issuing this opinion, Judge Black recused himself from the case, and the action was reassigned to Judge Walter H. Rice. The defendants filed a motion seeking clarification of the issues for trial, which in essence sought

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[28] *Id.* at * 3.
[29] *Id.* at * 5, n. 8.
[30] 817 F.3d at 939.
[31] 2016 WL 9460026, at * 2.
[32] *Id.* at * 9.

reconsideration of Judge Black's decision. Less than a week before trial was to begin, Judge Rice issued a lengthy opinion that concluded that Judge Black's determination that the defendants' challenged conduct was *per se* unlawful was "clearly erroneous" and ruled that MCEP's claims were subject to the rule of reason. Because MCEP had only pled a *per se* violation of Section One, Judge Rice granted summary judgment against MCEP's Section One claims against Premier.[33]

Judge Rice adhered to the same general rules governing the narrow application of the *per se* rule that Judge Black had acknowledged but then appeared to ignore. Judge Rice recognized that the *per se* rule should be applied to challenged conduct only if the court "can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason."[34] Judge Rice noted that while joint ventures are not insulated from *per se* analysis, "their conduct is much more likely to be judged under the rule of reason" because joint ventures present opportunities for increasing efficiencies.[35] Judge Rice applied a three-step analysis based upon *Dagher* to determine whether the joint venture activities challenged by MCEP were subject to the rule of reason:

1. If the challenged conduct involves a "core activity" of the joint venture (such as setting prices for its products or services), then it is subject to the rule of reason.

2. If the challenged conduct is not a "core activity," but it is not conduct that is so pernicious that it ordinarily would be subject to *per se* condemnation, the rule of reason applies.

3. Challenged conduct that is not a "core activity" and that ordinarily would be subject to the *per se* rule, is nevertheless analyzed under the rule of reason if it is an "ancillary" restraint, *i.e.*, it is "plausibly necessary" to achieve a procompetitive objective of the joint venture.[36]

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[33] *Medical Center at Elizabeth Place v. Premier Health Partners*, 2017 WL 3433131, * 1 (S.D. Ohio Aug. 9, 2017).
[34] *Id.* at * 12, *quoting Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 886-87 (2007).
[35] *Id.* at * 13.
[36] *Id.* at * 14.

Judge Rice concluded that the Panel Limitations in Premier's contracts with managed care networks were subject to the rule of reason because (1) they involved a core activity; (2) rate for volume arrangements are common and are not naked restraints, and (3) the Panel Limitations were plausibly necessary to achieve a procompetitive objective of the joint venture. Judge Rice also ruled that the Physician Limitations were subject to the rule of reason because they were vertically imposed and plausibly intended to increase interbrand competition.[37]

On appeal, all of the members of the panel in *MCEP II* joined in Judge Alice Batchelder's majority opinion to the extent that it affirmed Judge Rice's determination that MCEP's Section One claim against Premier and its hospitals should be evaluated under the rule of reason.[38] Judge Helene Wright dissented in part, urging that the case should be remanded to permit MCEP to pursue its "Rim" conspiracy claims.[39] Judge Jeffrey Sutton joined in Judge Batchelder's decision that MCEP's failure to amend its complaint to allege the "Rim" conspiracies prevented it from proceeding on those claims, and wrote a concurring opinion in which he criticized the decision in *MCEP I* and endorsed Judge Griffin's dissenting opinion that Premier and its member hospitals were a single entity.[40]

In her majority opinion, Judge Batchelder observed that there is a presumption against *per se* illegality, particularly when joint ventures are involved. Because joint ventures often have procompetitive effects, a direct challenge to the joint venture itself is subject to the rule of reason. When the conduct of a joint venture is challenged, the rule of reason applies to conduct that is "reasonably related to the joint venture's procompetitive features," and the *per se* rule applies to a "naked restraint lurking beneath the veneer of a legitimate joint venture."[41] Within the category of conduct

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[37] *Id.* at * 15-17. Judge Rice also refused to consider MCEP's two "Rim" conspiracy claims, holding that they had been raised too late in the case and would prejudice the defendants. *Id.* at * 21-23.
[38] 922 F.3d at 724-31.
[39] *Id.* at 735-37.
[40] *Id.* at 733-35.
[41] *Id.* at 724-25.

reasonably related to the joint venture's procompetitive features are (1) "core" activity that is "integral to the running of the joint venture" and (2) an "ancillary" restraint that is not integral but "may contribute to the success of a cooperative venture."[42]

> If the record in [a] case reveals a plausible way in which the challenged restraints contribute to the procompetitive efficiencies of the joint venture, then "the possibility of countervailing procompetitive effects" is not remote and *per se* treatment is improper.[43]

As Judge Batchelder noted, the allegations in the complaint did not require the court to determine whether Premier's conduct was procompetitive or anticompetitive. The only issue was whether the challenged restraints were *per se* illegal. Even if the challenged restraints were adopted with the intent to restrain MCEP's competition and even if they unreasonably restrained competition, the court concluded that the restraints were not of a type where illegality would be presumed. Panel limitations and non-compete agreements have traditionally been evaluated under the rule of reason, and therefore do not fall within the narrow category of behavior subject to *per se* condemnation.[44]

Judge Sutton was the lone member of the panel who addressed the principal holding in *MCEP I*. Judge Sutton would have affirmed Judge Black's original determination that Premier qualified as a single entity in *MCEP I*, as he concluded that the JOA created:

- A complete unity of interest, because "the hospitals shared profits and losses according to a distribution schedule that did not change based on any one hospital's performance," and
- A single decision making center, because "Premier served as the 'operator' for all the joint venture's health system activities and had the power to negotiate managed care contracts, fire hospital executives, dictate their budgets, and plot

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[42] *Id.* (citations omitted).
[43] *Id.* at 728 *quoting Northwest Stationers*, 472 U.S. at 294. Judge Batchelder also found that Judge Black had improperly placed the burden on the defendants to provide "undisputed proof" of the necessity of the alleged restraints, and observed that the section of the Competitor Collaboration Guidelines on which Judge Black had relied was of "dubious relevance." *Id.* at 725-26.
[44] *Id.* at 728-31.

the strategic course each hospital took."[45]

Conclusion

The Sixth Circuit's decision in *MCEP II* is not surprising. The court simply followed long-accepted precedent that recognizes that properly structured competitor collaborations have the potential to create pro-competitive benefits, and therefore are rarely if ever appropriate for *per se* condemnation. Since MCEP opted not to allege a claim under the rule of reason, its Section One claims were properly dismissed. As Judge Batchelder put it, "MCEP pushed all its chips to the center of the table on one hand of cards," and lost.[46]

Of the six Sixth Circuit judges who have now reviewed the Premier JOA, two have concluded that Premier is a single entity, two have concluded that Premier might not be a single entity, and two have not expressed an opinion. Unfortunately, among the panel in *MCEP II*, Judge Sutton alone questioned the outcome in *MCEP I*, so *MCEP I* remains the only appellate decision that has addressed whether a "virtual merger" of hospitals under a JOA is a single entity. This leaves open the possibility that normal business conduct undertaken by a highly integrated joint venture that has substantial financial and management control (but not ownership) of its members' assets may constitute concerted action under Section One,[47] while providing practitioners and market participants with confusing guidance on how that determination will be made.

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[45] *Id.* at 734. The opinions in *MCEP II* also address some interesting procedural issues, including "law of the case" issues with regard to both Judge Rice's reconsideration of Judge Black's decision and Judge Sutton's reconsideration of the decision in *MCEP I*, as well as Judge Batchelder's and Judge White's differing opinions on the propriety of permitting MCEP to pursue its unpled Rim claims.

[46] *Id.* at 718.

[47] *See Washington v. Franciscan Health System*, 2018 WL 3546802, * 3 (W.D. Wash. July 24, 2018).