RENDERED: October 29, 2004; 10:00 a.m.
TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000752-MR

ANTHEM HEALTH PLANS OF KENTUCKY, INC.,
d/b/a ANTHEM BLUE CROSS AND BLUE SHIELD — APPELLANT

APPEAL FROM BOONE CIRCUIT COURT
v. HONORABLE JOSEPH F. BAMBERGER, JUDGE
ACTION NO. 02-CI-00903

ACADEMY OF MEDICINE OF CINCINNATI;
A. LEE GREINER, M.D.; RAYMOND WILL,
M.D.; VICTOR SCHMELZER, M.D.; KARL S.
ULICNY, JR., M.D.; E. DOUGLAS BALDRIDGE,
M.D.; P. SCOTT BECKER, M.D.; AND NORTHERN
KENTUCKY MEDICAL SOCIETY — APPELLEES

AND: NO. 2003-CA-000753-MR

UNITED HEALTH CARE OF OHIO, INC. — APPELLANT

APPEAL FROM BOONE CIRCUIT COURT
v. HONORABLE JOSEPH F. BAMBERGER, JUDGE
ACTION NO. 02-CI-00903

ACADEMY OF MEDICINE OF CINCINNATI;
A. LEE GREINER, M.D.; RAYMOND WILL,
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AETNA HEALTH, INC. APPELLANT

APPEAL FROM BOONE CIRCUIT COURT
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ACADEMY OF MEDICINE OF CINCINNATI; A. LEE GREINER, M.D.; RAYMOND WILL, M.D.; VICTOR SCHMELZER, M.D.; CARL S. ULICNY, JR., M.D.; E. DOUGLAS BALDRIDGE, M.D.; P. SCOTT BECKER, M.D.; AND NORTHERN KENTUCKY MEDICAL SOCIETY APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI, JUDGE; EMBERTON, SENIOR JUDGE[1] AND MILLER, SENIOR JUDGE.[2]

EMBERTON, SENIOR JUDGE. The appellees are physicians and nonprofit medical societies who filed this action against the appellants, Anthem Health Plans of Kentucky, Inc., United Health Care of Ohio, Inc., Aetna Health, Inc., and Humana Health Plans

[1] Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

[2] Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

of Ohio, Inc.,[3] alleging that appellants conspired to fix and lower the insurance reimbursement rates paid to hospitals and physicians in violation of Kentucky's antitrust statute, KRS[4] 367.175. The issue presented is whether the antitrust claims fall within the scope of the arbitration clauses in the contracts between the appellants and appellees. We agree with the trial court that the antitrust claims are not subject to arbitration and affirm its refusal to compel arbitration.

Appellants are the primary providers of group health insurance policies in the Northern Kentucky region. Appellees allege that appellants agreed among themselves to set reimbursement rates paid to doctors and hospitals below the reasonable cost of those services. There can be no dispute that the provider contracts contain clauses stating that "any disputes arising out of or relating to" the provider agreement or "business relationship is to be resolved through arbitration, mediation, or some form of alternative dispute resolution."

Whether an antitrust claim is subject to arbitration is a question of law, and therefore, our standard of review is de novo.[5] Both the federal law, The Federal Arbitration Act codified at 9 U.S.C.A. § 1, et seq., and the state law codified

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[3] Humana Health Plans of Ohio, Inc., was dismissed as a party to the appeal.

[4] Kentucky Revised Statutes.

[5] Conseco Finance Servicing Corp. v. Wilder, Ky. App., 47 S.W.3d 335, 340 (2001).

at KRS 417.045, et seq., provide that arbitration is to be favored by the law and "arbitration agreements are enforced to the standards applied to other contracts."[6] There has been, however, reluctance by the federal and state courts to compel arbitration of antitrust claims.[7] The Florida appellate court summarized the reasoning of these courts:

> The oft-cited reasons underlying these uniform holdings are (1) because a wide range of public interests are affected by private antitrust claims, a "claim under the antitrust laws is not merely a private matter,"; (2) the complexity of the issues and extensiveness of the evidence generally involved in antitrust litigation make resolution of these claims more appropriate for the judicial forum; (3) it is unwise to allow commercial arbitrators, "frequently men drawn for their business expertise . . . to determine these issues of great public interest,"; and (4) because arbitrators are not bound by rules of law and need not give reasons for their rulings, there is no way to insure consistency of interpretation of statutory law or application of arbitration awards.[8] (Citations omitted.)

Despite the precedent refusing to compel arbitration in antitrust claims, in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,[9] the Supreme Court held that there is no

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[6] Id. at 339.

[7] See e.g., Applied Digital Technology, Inc. v. Continental Casualty Co., 576 F.2d 116 (7th Cir. 1978); Cobb v. Lewis, 488 F.2d 41 (5th Cir. 1974); American Safety Equipment Corp v. J. P. Maguire & Co., 391 F.2d 821 (2nd Cir. 1968).

[8] Sabates v. International Medical Centers, Inc., 450 So.2d 514, 517 (1984).

[9] 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985).

prohibition to arbitration in cases involving international transactions. Although not overruling federal cases holding otherwise in domestic cases, the court questioned the reasoning of those courts and opened the door for federal courts to hold that such claims can be arbitrated.[10]

There is no Kentucky case specifically addressing whether such claims can be arbitrated. Although we believe there is soundness in the reasoning that public policy considerations favor judicial resolution, we decide this case on the basis that the antitrust claims alleged are simply outside the scope of the arbitration agreements.

A party cannot be required to submit to arbitration unless both parties have agreed that the dispute be arbitrated.[11] Where the alleged injurious conduct does not arise from the employment relationship and is independent from it, the courts will not expand the arbitration agreement merely for the purpose of efficiency.[12] The alleged antitrust violations do not arise from or relate to the service provider contracts. This was the result reached by the Ohio court in a proceeding parallel to the case before us alleging the precise antitrust claims against the

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[10] See Nghiem v. NEC Elec., Inc., 25 F.3d 1437 (9th Cir. 1994); Hough v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 757 F.Supp. 283 (S.D.N.Y. 1991).

[11] Oakwood Mobile Homes v. Sprowls, Ky., 82 S.W.3d 193, 195 (2002).

[12] Hill v. Hilliard, Ky. App., 945 S.W.2d 948 (1996).

same parties under Ohio law. We adopt the reasoning of our sister state:

> Here, the parties' dispute centers on whether the HMOs conspired and/or colluded to set reimbursement rates in this region that were lower than the "prevailing reimbursement rates in other comparable Ohio health care markets such as Dayton, Columbus and Cleveland." In determining whether this claim was within the scope of the arbitration agreements, "[a] proper method of analysis here is to ask [whether this] action could be maintained without reference to the [provider agreement] or [business] relationship at issue. If it could, it is likely outside the scope of the arbitration agreement." (Footnote omitted.)
>
> After reviewing the complaint and the remainder of the record, we conclude that the doctors' antitrust claim could be maintained without reference to their individual provider agreements. To maintain an antitrust claim pursuant to R.C. Chapter 1331, the doctors have to prove that two or more persons came together to illegally concentrate a particular business in the hands of a few for the purpose of controlling prices and that injury resulted from that restraint of trade. (Footnote omitted.) The express elements of an antitrust claim do not depend, as a matter of law, on the provider agreements between the individual doctors and HMOs.
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> The doctors' allegations in their complaint (1) that the HMOs conspired and/or colluded with one another to illegally lower and fix the reimbursement rates for medical procedures to medical practitioners in the region; (2) that the anticompetitive behavior caused a decline in the number of doctors willing to practice medicine here, which resulted in the number of hospitals and hospital beds available for patient care

> dropping by nearly 50 percent and a decline in the quality of health care available for the consumer; and (3) that the HMOs' anticompetitive behavior precipitated a drop in physicians' salaries in the area neither relied on nor referred to a contract or a provider agreement between the doctors and the HMOs. Instead, the antitrust claim was based upon a statutory remedy the legislature has provided to persons harmed by illegal price fixing. . . .[13]

The order denying the motion to compel arbitration is affirmed.

ALL CONCUR.

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[13] Academy of Medicine of Cincinnati v. Aetna Health, Inc., 155 Ohio App.3d 310, 312, 800 N.E.2d 1185, 1187 (2003).

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