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ANTITRUST LAW

SUMMARY

BHAN v. NME HOSPITALS, INC.: WHEN A NURSE IS MORE THAN A NURSE

I. INTRODUCTION

In *Bhan v. NME Hospitals, Inc.*,[1] the Ninth Circuit overturned a district court decision which held that, as a matter of law, a nurse anesthesist did not compete in the same market as an M.D. anesthesiologist.[2] The Ninth Circuit ruled that a nurse anesthesist was a proper party to bring an antitrust action challenging defendant's new policy of allowing only M.D. anesthesiologists to work in Manteca Hospital.[3] The district court's dismissal of the plaintiff's suit under Federal Rule of Civil Procedure 12(b)(6)[4] was reversed and the case was remanded for further proceedings.[5]

As a registered nurse anesthesist,[6] plaintiff Vinod C. Bhan

1. 772 F.2d 1467 (9th Cir. 1985) (per Merrill, J.; the other panel members were Goodwin, J. and Williams, D.J., Senior United States District Judge, Central District of California, sitting by designation).

2. *Id.* at 1471.

3. *Id.*

4. Federal Rule of Civil Procedure 12(b)(6) is a defensive motion to dismiss the plaintiff's pleading because of its "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6).

5. 772 F.2d at 1471.

6. California Business and Professions Code, section 2826(a) defines a nurse anesthesist as "a person who is a registered nurse, licensed by the board and who has met standards for certification from the board." CAL. BUS. & PROF. CODE § 2826(a) (West Supp. 1986). The "board" refers to the Division of Allied Health Professions of the Board of Medical Quality Assurance of the State of California.

had engaged in the bulk of his practice at Manteca Hospital under the hospital's contract with Associated Anesthesia Services. But when that contract expired on March 31, 1983, the hospital established a new policy allowing only M.D. anesthesiologists to practice in its operating rooms.[7] As a result, Bhan was effectively prevented from practicing at Manteca Hospital and most of his practice was destroyed.[8]

Plaintiff sued under sections 1 and 2 of the Sherman Act[9] claiming that the new policy constituted a combination in restraint of trade.[10] The district court granted defendant's motion

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7. 772 F. 2d at 1468. The new policy was arrived at by the hospital board on the recommendation of defendant Menaugh (the hospital administrator), and defendant Yong Suk, M.D., as an inducement to Suk to relocate from Michigan to Manteca. Plaintiff Bhan alleged that the new policy was motivated by the fact that because nurse anesthesists' services are often more attractive to consumers due to their lower cost and their more flexible scheduling, an exclusive contract would be necessary to make it financially worthwhile for Suk to relocate. *Id.* at 1469.

8. *Id.* at 1469.

9. Section 1 of the Sherman Act provides that:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony. . . .

Sherman Act § 1, 15 U.S.C. § 1 (1985).

Section 2 of the Sherman Act provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. . . ." Sherman Act § 2, 15 U.S.C. § 2 (1985).

Section 4 of the Clayton Act states: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . ." Clayton Act § 4, 15 U.S.C. §15(a) (1985).

10. 765 F.2d at 1469. In *Blue Shield of Virginia v. McCready*, the Court stated that the broad language of section 4, coupled with the lack of words of restriction, reflected an intent by Congress to give the statute an expansive remedial purpose. This expansive reading would effectively create a private enforcement mechanism, deter violators, and provide ample compensation to victims. 457 U.S. 465, 472 (1982).

In *McCready*, defendants entered into an arrangement whereby Blue Shield would reimburse its subscribers for treatment by psychiatrists but not for the services of psychologists unless the treatment was supervised by and billed through a physician. *Id.* at 468. The Court stated:

> Although McCready was not a competitor of the conspirators, the injury she suffered was inextricably intertwined with the injury the conspirators sought to inflict on psychologists and the psychology market . . . . [W]e think that McCready's injury flows from that which makes the defendant's act unlawful . . . and falls squarely within the area of Congressional concern.

to dismiss under Federal Rule of Civil Procedure 12(b)(6). It reasoned that even if the hospital's new policy constituted an illegal combination in restraint of trade, the plaintiff was not a proper party to bring the antitrust action against the defendants because California law precluded nurse anesthesists from competing in the same market as M.D. anesthesiologists.[11]

II. THE COURT'S ANALYSIS

In *Associated General Contractors of California v. California State Council of Carpenters*,[12] the United States Supreme Court stated that because of the infinite variety of claims that could arise, a universally applicable black-letter rule could not be announced as to when an antitrust suit could be brought.[13] Instead, a case by case determination would be required, using a variety of factors.[14] The only one of these factors at issue in *Bhan* was the requirement that the alleged injury be the type of injury that the antitrust laws were designed to prevent.[15] This requirement is twofold. First, there must be a sufficient physical and economic nexus between the alleged violation and the harm to plaintiff.[16] Second, the plaintiff must participate in the same relevant market as the defendants.[17]

Id. at 483-84.

But the *McCready* Court also set limits on who may be a proper party to sue under the antitrust laws. It found that not every party who has suffered an injury in fact is entitled to recover. Certain injuries due to antitrust violations are too remote and there is a point beyond which liability should not extend. *Id.* at 477.

In *Brown Shoe Co. v. United States*, the Supreme Court further narrowed and delineated this scope when it stated that the antitrust laws were enacted for "the protection of competition, not competitors." 370 U.S. 294, 320 (1962).

11. 765 F.2d at 1469. The legislature defined the practice of nursing to include the administration of medications and therapeutic agents but it also mandated that this must be ordered by and administered under the direction of a physician. CAL. BUS. & PROF. CODE § 2725(b) (West Supp. 1986).

12. 459 U.S. 519 (1983).

13. *Id.* at 535-36.

14. *Id.* at 536-37. The factors identified by the Court included the nature of the alleged injury, whether the plaintiff is a consumer or a competitor in the relevant market, the causal relationship between the alleged injury and the alleged restraint, the potential for duplicative recovery, and the existence of more direct victims of the alleged conspiracy. *Id.* at 537-45.

15. 772 F.2d at 1470.

16. Blue Shield of Virginia v. McCready, 457 U.S. 465, 478 (1982).

17. *Id.* at 478. In considering the relevant market, the *Bhan* court focused on whether there was a "reasonable interchangeability of use" or "cross-elasticity of demand" between the services offered by the plaintiff and those offered by the defendant.

Using the test enunciated in *Associated General Contractors*, the Ninth Circuit found Bhan had demonstrated a sufficient nexus between the alleged violation and his economic harm. The hospital's new policy had resulted in the loss of eighty-percent of his practice. This loss was not fortuitous, remote, or incidental to the alleged violations, but flowed directly from the new policy banning the use of nurse anesthesists in the hospital.[18]

The key factor thus became whether anesthesists and anesthesiologists competed in the same market.[19] The court noted that the legislature had placed legal restrictions on nurse anesthesists which require any medications administered by a nurse to be ordered by and given under the direction of a physician.[20] But rather than ending its inquiry here, as the district court had done, the Ninth Circuit determined that a nurse anesthesist can still perform many of the functions of an M.D. anesthesiologist.[21] Thus, the issue came down to whether the need for an additional input, due to the supervision requirement, prevented the two "products" from being interchangeable. The Ninth Circuit concluded that it did not, as a matter of law, and that Bhan's allegations were sufficient to establish that he was a proper party to bring the action.[22]

To reach this conclusion, the court drew an analogy between the instant case and the situations in *Telex Corp. v. International Business Machines Corp.*[23] and *Calnetics Corp. v. Volkswagen of America, Inc.*[24] In those cases the courts held that two products could be considered part of the same relevant market, even if one of the products required an additional input to make it interchangeable with the other, as long as production could

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772 F.2d at 1470-71. This is determined by practical factors such as industry or public recognition of the submarket as a separate entity, unique customers, specialized vendors, and distinct characteristics and use of the product. Where there is a high degree of "substitutability" in the use of two services, then the market for the two should be considered the same. *See* Twin City Sportserv v. Charles O. Finley & Co., 512 F.2d 1264, 1272-74 (9th Cir. 1975).

18. 772 F.2d at 1469.

19. *Id.* at 1470.

20. 772 F.2d at 1471 (citing CAL. BUS. & PROF. CODE § 2725(b) (West Supp. 1986)).

21. 772 F.2d at 1471.

22. *Id.*

23. 510 F.2d 894 (10th Cir. 1975), *cert. dismissed*, 423 U.S. 802 (1975).

24. 532 F.2d 674 (9th Cir. 1976), *cert. denied*, 429 U.S. 940 (1976).

easily be converted from one to the other.[25] The court in *Bhan* reasoned that because the physician required by statute to supervise an anesthesist can be any physician, not just an M.D. anesthesiologist, and because such supervision is both common and readily obtainable in the medical profession, there did exist a reasonable interchangeability between the services of an anesthesist and those of an M.D. anesthesiologist.[26]

III. CONCLUSION

In *Bhan*, the Ninth Circuit has further clarified which parties are proper to bring an antitrust action. In addition, as evidenced by the amicus briefs filed on behalf of the plaintiff by the Attorney General of California, and by the Federal Trade Commission,[27] *Bhan* may become an important consumer protection decision if, upon remand, the district court finds for the plaintiff. The case may serve both to promote the state's recognition of nursing as a dynamic growing profession and help contain a small part of the spiraling costs of medical care by providing consumers with a choice of anesthesia services.

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25. *See Telex Corp.*, 510 F.2d 915-19; *Calnetics Corp.*, 532 F.2d 691. In these cases, the courts held that one manufacturer did have standing to sue another for antitrust violations, even if the products the companies produced were not identical, as long as one company's production facilities could easily have been turned to the production of the other company's products. If this could readily be done, the degree of substitutability would still be found to be high and the products would be considered part of the same relevant market.

26. 772 F.2d at 1471.

27. *Id.* at 1468.

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