

9th Circ. Judge Calls Kaiser Antitrust Dismissal 'Troubling'

By **Dorothy Atkins**

Law360 (February 3, 2020, 10:21 PM EST) -- A Ninth Circuit judge appeared open Monday to reviving a hospital group's antitrust suit accusing Kaiser Foundation Hospitals Inc. and its insurer of creating a monopoly on health care in California, saying he found it troubling that the lower court seemed to assume the factual allegations couldn't be true.

During a three-judge panel hearing in San Francisco, U.S. Circuit Judge Richard Paez said it seems that U.S. Magistrate Judge Laurel Beeler decided to dismiss NorthBay Healthcare Group's lawsuit by assuming that Kaiser doctors have an ethical duty to treat patients and wouldn't steer them to their own hospitals for profit, which is what NorthBay alleged in the complaint.

Judge Paez said that under the U.S. Supreme Court's *Iqbal* and *Twombly* decisions clarifying pleading rules, the lower court should have assumed the facts asserted in the complaint were true.

"What I found troubling, she seemed not to take the factual allegations as true," Judge Paez said. "She found them, I thought, [to be] implausible, and that doesn't seem to be consistent with *Iqbal* and *Twombly*."

The judge's comments came during a hearing on NorthBay's appeal of Judge Beeler's August 2018 order tossing NorthBay's 2017 lawsuit against Kaiser hospitals, Kaiser insurance and The Permanente Medical Group Inc., which manages doctors who work at Kaiser hospitals.

NorthBay claims that the companies have worked together to steer trauma patients away from two hospitals it runs in Solano County, California, while sending them uninsured patients that drive up hospital costs. NorthBay also pointed to a 2010 agreement that Kaiser insurance had with NorthBay under which Kaiser paid NorthBay a guaranteed rate for offering acute-care services to Kaiser health care plan enrollees. In May 2016, Kaiser abruptly ended the contract and cut its rates in half, according to the suit.

After multiple pleading rounds, Judge Beeler tossed the suit, finding that the pleadings were insufficient and that the hospital group failed to allege that it's been harmed by the alleged antitrust violations.

But NorthBay appealed the decision to the Ninth Circuit, and its counsel, Eric Konopka of Latham & Watkins LLP, argued before the panel Monday that the lower court's decision made multiple mistakes and ignored Kaiser's role in the health care market in Solano County.

Konopka said Judge Beeler was also "inappropriately skeptical" of the group's allegations that Kaiser was

steering trauma patients to Kaiser hospitals and ignored that Kaiser ended the insurance reimbursement agreement without warning and cut payments to the hospital group by 50% "overnight." The lower court also misunderstood the nature of the hospital group's antitrust injury, he argued.

As evidence of NorthBay's antitrust injury, Konopka pointed to data showing that the hospital group has seen a "massive drop off" in trauma patients. And although Kaiser could argue that the drop is caused by other factors, he said that debate should be reserved for a later stage in litigation.

Konopka also pointed the panel to a recorded phone conversation in which a Kaiser doctor directed an ambulance to take a 77-year-old patient with an open head wound to a Kaiser hospital, instead of the nearest hospital, which was NorthBay.

Konopka noted that the doctor on the phone asked if the patient had insurance and if the woman was covered by Kaiser before directing the ambulance to Kaiser, which he said was in violation of steering protocol.

"We think it's a clear example of steering," Konopka said.

Taking their turn, attorneys for Kaiser and the Permanente Medical Group argued that the lower court got it right when she tossed the suit, and Kaiser's counsel, Jason Craig Murray of Crowell & Moring LLP, said this case presents "little more than an everyday reimbursement dispute between a health insurer and a hospital."

Murray argued that there are a number of potential reasons why the hospital group could see a drop in trauma patients, and such a reduction is not evidence of anti-competitive behavior. He also noted that integrated health care isn't illegal.

"It's not an antitrust violation for a Kaiser doctor to send a Kaiser patient to a Kaiser hospital," he said.

Murray also said the lower court parsed the elements of the claim to reach her conclusion that they should be dismissed and the facts alleged are "minimal."

The panel took the arguments under submission.

U.S. Circuit Judges Richard Paez and Carlos Bea and U.S. District Judge Janis Graham Jack sat on the panel for the Ninth Circuit.

NorthBay Healthcare Corp. and NorthBay Healthcare Group Inc. are represented by Eric Konopka of Latham & Watkins LLP.

Kaiser Foundation Health Plan Inc. and Kaiser Foundation Hospitals are represented by Jason Craig Murray of Crowell & Moring LLP.

The Permanente Medical Group is represented by Thomas A. Ryan of McDermott Will & Emery LLP.

The case is NorthBay Healthcare Group et al. v. Kaiser Foundation Health Plan et al., case number 18-16769, in the U.S. Court of Appeals for the Ninth Circuit.

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