

# Physician's Antitrust Claim Against American Board of Orthopaedic Surgery Fails: *Ellison v. Am. Bd. of Orthopaedic Surgery, Inc.*

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Dr. Bruce Ellison ("Dr. Ellison"), an orthopaedic surgeon, exclusively practiced in California. Dr. Ellison sought to expand his practice and researched obtaining privileges at hospitals in New Jersey.<sup>1</sup> During this process, he learned that New Jersey hospitals required board certification as a condition for medical staff membership and privileges. Dr. Ellison was not board certified by the American Board of Orthopaedic Surgery ("ABOS"). Dr. Ellison did not seek privileges at New Jersey hospitals.

After determining that his lack of certification would effectively bar his practicing in New Jersey, Dr. Ellison brought an action against the ABOS based on allegations of antitrust laws. In his Second Amended Complaint, Dr. Ellison claimed that the ABOS prevented him from obtaining board certification unless he first held hospital medical staff privileges.<sup>2</sup> Conversely, hospitals refused to grant privileges to those who were not board certified. Dr. Ellison alleged this was a "scheme" between the hospitals and the ABOS to reduce competition at hospitals by excluding surgeons who practice exclusively at ambulatory surgery centers or other places that do not offer medical staff privileges.<sup>3</sup> He further alleged this "scheme" induced surgeons to be board certified, participate in ABOS programs, and pay fees to ABOS.<sup>4</sup>

Defendant ABOS oversees the board certification program for physicians specializing in orthopaedic surgery. The ABOS administers its board certification exam in many locations throughout the United States, including in New Jersey, and collects "up to a million dollars or more annually" from physicians located in New Jersey seeking or maintaining certification.<sup>5</sup>

While not named as defendants, Dr. Ellison's claims also involved two other entities, the American Board of Medical Specialties ("ABMS") and the American Hospital Association ("AHA"). The ABMS oversees educational and professional evaluation of all certified physicians. The ABOS is a member of the ABMS, which regulates physician certification in the United States. The AHA is a nonprofit organization of which 90% of all hospitals are members.<sup>6</sup> It also provides education and resources for hospital administration.

Dr. Ellison argued that the AHA and the ABMS entered into agreements to "provide money-making programs in connection with board certification by [defendant] ABOS and other specialty groups."<sup>7</sup> He claimed that in order to further these agreements, the AHA put pressure on hospitals to require

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physicians be board certified.

Dr. Ellison claimed he was personally victimized by this process because he was unable to obtain privileges in New Jersey or ABOS board certification. Dr. Ellison passed the written portion of ABOS's exam and was qualified to take the oral portion of the exam.<sup>8</sup> However, ABOS later denied him the opportunity to take the oral exam because he did not have medical staff privileges at any hospital.<sup>9</sup> Thus, Dr. Ellison argued he was "confronted with the proverbial catch-22: without medical staff privileges he cannot take Part II of the certification [oral] exam, but without the certification he cannot acquire medical staff privileges."<sup>10</sup> There is a common exception to the staff privileges prerequisite for physicians who have completed their residency within the last seven years, but that exception was unavailable to Dr. Ellison at the later stage of his career.<sup>11</sup>

Dr. Ellison's antitrust allegation was that this practice reduced competition to hospitals "by shutting out surgeons like himself," who practice exclusively at ambulatory surgery centers (which do not provide medical staff privileges), thereby reducing the number of orthopaedic surgeons available to patients.<sup>12</sup> He believed this resulted from the ABOS colluding with hospitals in requiring certification and these organizations thereby restricted the market for orthopedic surgeons in violation of the Sherman Act.<sup>13</sup>

The Sherman Antitrust 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 . . . to be illegal."<sup>14</sup> Courts will nullify those contracts which unreasonably restrain competition. "In order to sustain a cause of action under §1 of the Sherman Act, the plaintiff must prove: (1) that the defendants contracted, combined, or conspired among each other; (2) that the combination or conspiracy produced adverse, anti-competitive effects within relevant product and geographic markets; (3) that the objects of and the conduct pursuant to that contract or conspiracy were illegal; and (4) that the plaintiff was injured as a proximate result of that conspiracy."<sup>15</sup>

The court found that Dr. Ellison failed to prove his Sherman claim. First, Dr. Ellison failed to prove that the hospitals in New Jersey had an agreement with the AHA which restrained trade. The court noted that a hospital requiring certification of physicians has a legitimate medical purpose that is not aimed at impacting trade.<sup>16</sup> It went on to note that hospitals can exclude physicians from their medical staff for a variety of reasons, including professional competence.<sup>17</sup>

Dr. Ellison further failed to show a "substantial foreclosure of the market" due the agreement.<sup>18</sup> Dr. Ellison could not show that the ABOS exerted any influence on the decision of granting privileges or any evidence the ABOS was receiving any monetary benefit from these actions. The court declined to address the other factors, since Dr. Ellison could not even establish an agreement. Because Dr. Ellison could not show an agreement or any impact on trade, his Sherman Act claim failed and the court proceeded to dismiss his complaint.<sup>19</sup> Dr. Ellison filed an appeal, which is pending.

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1 *Ellison v. Am. Bd. of Orthopaedic Surgery, Inc.*, No. CV168441KMJBC, 2020 WL 1183345, at \*1 (D.N.J. Mar. 12, 2020).

2 *Id.*

3 *Id.*

4 *Id.* at 2.

5 *Ellison*, at 1.

6 *Id.* at 2.

7 *Id.*

8 *Id.* at 3.

9 *Ellison*, at 3.

10 *Id.*

11 *Id.* at 3.

12 *Id.*

13 *Id.* at 4.

14 15 U.S.C. § 1.

15 *Ellison*, at 6.

16 *Id.* at 7.

17 *Id.*

18 *Id.* at 9.

19 *Id.* at 10.

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