FPLG: CIVIL LITIGATION

The Latest on Three Intriguing Nonprofit Lawsuits

04.06.21 | Linda J. Rosenthal, JD

It's been quite a while since we last reported on any (non-pandemic) court cases involving nonprofit-sector plaintiffs or defendants. In any event, the nation's courthouses shut down entirely last spring and have only slowly reopened with mostly remote operations.

That takes us back to December 19, 2019: *Recent Court Cases: Philanthropy Related*. It's a post you may have missed: published just days before the Christmas break and hidden behind a remarkably bland title. That was unfortunate. It covered three big juicy lawsuits brought by or against major nonprofit "eds" and "meds."

Now, over a year later, there have been developments.

An Ed, a Med, and a Hybrid

In communities around the United States, the powerhouse organizations that are the "anchor institutions" are higher education and medical centers. They are often the largest employers in a region, wielding major influence over the local economy's growth and direction.

Collectively, they are often referred to by the popular shorthand "eds and meds."

For our late December 2019 blog post, we highlighted three intriguing lawsuits in this elite group: one "ed," one "med," and one fuzzy hybrid that is both an "ed" and a "med." In the third case, the result hinges on whether the scale tips more in one direction than the other.

Case 1: The Ed

The most prominent American "ed" – Harvard – is the defendant in this thorny affirmative action

lawsuit that's been active since 2014.

The plaintiffs are Asian-American applicants who claim discrimination because of an admission policy of special preference favoring *other* minority groups but not them.

This dispute – which we'll highlight in more detail in the section following these recaps – is now at the United States Supreme Court. The justices have before them a petition for writ of certiorari; they will decide in the next few months whether to accept the case for hearing next term. Recent events in the national headlines may add new layers of nuance to this emotionally charged controversy.

Case 2: The Med

This "med" defendant is nonprofit Sutter Health System, a "powerful, integrated network" of hospitals, clinics, and physicians that dominates the Northern California market. They describe themselves as having achieved major efficiencies due to scale while greatly benefiting the community in a myriad of ways including charity care.

Believing it's the wave of the future, Sutter's executive leadership has been proud of this business model; other folks … not so much.

For a few years before 2018, two private litigation locomotives rolled down the tracks in Sutter Health's direction. Alleging massive antitrust violations and gaining class-action certification along the way, they attracted the notice of California's Attorney General. By mid-March 2018, in his "law enforcement capacity," he filed a 49-page civil complaint against the medical giant, alleging in lurid detail how it had intentionally and wrongfully cornered the market and driven up prices.

By May 2018, the judge consolidated California's lawsuit for trial with one of the private actions. This powerful train then had a truly fearsome engine: huge potential money-damages claims (including disgorgement of profits and restitution) along with broad government powers to impose injunctions against future violations.

On the eve of the scheduled trial in October 2019, AG Becerra was dropping "hints" here and there that he "expected Sutter to face damages of up to $2.7 billion. Just before opening arguments, Sutter Health pulled on the emergency brake. It agreed to a tentative settlement in as-of-then-undisclosed amounts, but with the usual "not admitting any wrongdoing" caveat. Cases like these require further official approvals and sign-offs.

That's where we left this story in our post on December 19, 2019.

After a prolonged string of briefs and hearings, the trial judge gave preliminary approval on March 9, 2021 In addition to a $575-million monetary award, Sutter will have its "business operations monitored for 10 years" under a strict injunction. The final sign-off is expected around the middle of 2021.

And so we don't forget: There's another private class-action lawsuit chugging along towards trial; Sutter Health successfully struck out several antitrust claims, but one survives.

Watching nervously from the sidelines are hospitals and health systems around the nation – particularly now that Xavier Becerra has just been sworn in as the Secretary of Health and Human Service, with jurisdiction all across the United States.

Case 3: The Ed/Med ... or Whatever

The "ed/med" plaintiff is the world-renowned Mayo Clinic and its affiliated medical schools. (You didn't know that the Mayo Clinic has medical schools? Indeed, it does.)

This is a dispute over $11.5-million that the U.S. Treasury claims the 501(c)(3) parent-sub group owes in unrelated business income (UBI) taxes on account of certain debt-financed income.

When we left this story in late 2019, a federal district judge in Minnesota had already awarded Mayo Clinic a win in the first round (that is, the trial level) of litigation. The precise issue was whether the "ed" character of Mayo Clinic predominates; that is, if the medical care component exists to provide the training experience for the medical education mission – or perhaps vice versa. Why does it matter? It's all tied up with one of the complex, down-the-rabbit-hole, loopholes available to certain "qualified organizations" including "educational institutions."

The judge said "yes" on Mayo's motion for summary judgment, in the course of which he threw out the long-standing Treasury regulation purporting to define "educational institutions." This motion victory for Mayo Clinic eliminated the need for a trial.

The case is now languishing before a panel of judges at the 8th Circuit court of Appeals. Apparently, they are not quite sure what to do with it, despite having heard oral argument in October 2020: [It's a fascinating, potentially very difficult issue."] We'll wait to comment further until there is a decision.

If you can't wait, here's the audio link to the oral argument. See also: *Federal Tax Cases to Watch in 2020* (January 1, 2020) Kirkland & Ellis newsletter; *Mayo Clinic, IRS to face off in federal court* (October 2, 2020) Ayla Ellison, beckershospitalreview.com; and *Judge Signals Uncertainty Over Ruling on Mayo Clinic Tax Refund* (October 20, 2020) Aysha Bagchi, *Bloomberg Tax*.

Affirmative Action: Cert Issue Pending

Now we turn to a more substantive review of the developments in the Harvard lawsuit in advance of the anticipated decision – one way or another – from the Supreme Court on the pending certiorari petition.

The issue of affirmative action in higher education is not a new controversy or a novel legal issue. For over fifty years, courts and educational institutions around the United States have grappled with affirmative action as a remedy to lessen hundreds of years of racial inequality. *50 Years of Affirmative Action: What Went Right, and What It Got Wrong* (March 30, 2019) Anemona Hartocollus, The New York Times. It's complex, deeply nuanced, emotional, and political.

The plaintiffs in Students for Fair Admissions, Inc. v. President and Fellows of Harvard College (Harvard Corporation), Civil Action No. 14-cv-14176-ADB. had filed the initial complaint in the Eastern District of Massachusetts in 2014. They allege that the prestigious educational institution "violates civil rights law in ways that penalize Asian Americans" in the application process.

More specifically, the four key claims are "that Harvard had intentionally discriminated against Asian-Americans, used race as a predominant factor in admissions decisions, used racial balancing and considered the race of applicants without first exhausting race-neutral alternatives." See *Lawsuits*

allege unlawful racial bias in admissions at Harvard, UNC-Chapel Hill (November 17, 2014) Nick Anderson, *The Washington Post*; *Affirmative Action Battle Has a New Focus: Asian-Americans* (August 2, 2017) Anemona Hartocollis & Stephanie Saul, *The New York Times*.

For its part, Harvard acknowledged during court proceedings "that its undergraduate admissions process considers race as one factor among many," but this "use of race is consistent with applicable law."

On September 30, 2019, federal district judge Allison D. Burroughs issued her 130-page ruling after a bench trial in this lawsuit "with major stakes for higher education nationwide…." She wrote that "…the process could be better," but that was no reason to "dismantle a very fine admissions program." See *5 Takeaways From the Harvard Admissions Ruling* (November 5, 2019) Adeel Hassan, *The New York Times*.

In our December 2019 blog post, we reported on a trial court win for Harvard in "one of the most closely watched lawsuits concerning affirmative action and higher education in recent years."

Since then, Harvard has racked up a second critical victory. This time, in mid-November 2020, the First Appellate Circuit ruled even more decisively in the college's favor. *Appeals court upholds ruling that Harvard admissions process does not discriminate against Asian Americans* (November 12, 2020) Nick Anderson, *The Washington Post*.

Plaintiffs had two routes of appealing this loss: either ask for a full ("en banc") rehearing by the liberal-leaning First Appellate District or proceed to a petition for a writ of certiorari in the United States Supreme Court, a decidedly more conservative institution since even last November.

Plaintiffs chose Door No. 2, as expected. See *Group that sued Harvard asks Supreme Court to end use of race in college admissions* (February 25, 2021) Nick Anderson & Robert Barnes, *The Washington Post*; see also, *Students for Fair Admissions Files Petition for Certiorari to U.S. Supreme Court to End Race-Based Admissions at Harvard and All Colleges and Universities* (February 25, 2021) *PR Newswire*.

There is no set number of times that the justices can discuss a petition for writ of certiorari or a set time frame in which the high court must rule on it. The docket indicates that these preliminary proceedings will continue to at least mid-May 2021.

Conclusion

We'll keep on top of each of these cases for further developments.

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