

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

BROKERAGE CONCEPTS, INC.	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	
U.S. HEALTHCARE, INC., et al.	:	
Defendants,	:	NO. 95-1698
	:	
Newcomer, J.	:	April , 1999

**M E M O R A N D U M**

Presently before the Court are the following Motions and plaintiff's response thereto:

(1) Motion for Judgment as a Matter of Law of Defendants U.S. Healthcare, Inc. and United States Healthcare Systems of Pennsylvania, Inc., d/b/a The Health Maintenance Organization of Pennsylvania; and

(2) Richard Wolfson's Motion for Judgment as a Matter of Law.

For the reasons that follow, defendants' Motions for Judgment as a Matter of Law will be denied.

**A. Background**

Upon remand from the Third Circuit, this case was tried to a jury for the second time on plaintiff's sole remaining claim for tortious interference with contractual relations. After nearly three weeks of testimony, the jury returned a verdict for defendants Corporate Health Administrators ("CHA"), Scott Murphy, and William Brownstein, and against defendants U.S. Healthcare, Inc. ("USHC"), United States Healthcare Systems of Pennsylvania, Inc., d/b/a The Health Maintenance Organization of Pennsylvania

("HMO PA"), and Richard Wolfson. The jury awarded plaintiff \$105,000.00 in compensatory damages and \$1.75 million in punitives. The jury apportioned punitive damages as follows: \$1.25 million against USHC, \$500,000.00 against Wolfson, and \$0 against HMO PA. Defendants USHC, HMO PA, and Richard Wolfson now move for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(b).

**B. Legal Standard**

A motion for judgment as a matter of law should be granted "only if, viewing the evidence in the light most favorable to the nonmovant and giving it the advantage of every fair and reasonable inference, there is insufficient evidence from which a jury reasonably could find liability." Lightning Lube, Inc. v. Witco Corp., 4 F.d. 1153, 1166 (3d Cir. 1993). "In determining whether the evidence is sufficient to sustain liability, the court may not weigh the evidence, determine the credibility of witnesses, or substitute its version of the facts for the jury's version." Id. In short, the court must determine whether the verdict is supported by legally sufficient evidence. Id.

**C. Discussion**

1. Subject Matter Jurisdiction

Defendants raise four separate arguments in support of their Motions. In the first instance, defendants argue that this Court lacked subject matter jurisdiction to hear this case because, upon remand of this case from the Third Circuit, only a

state law tort action remained, and because the parties were not diverse. This issue has already been extensively briefed by the parties upon defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction, and the Court has already addressed this argument in its Order dated November 4, 1998 denying said Motion. Nothing in defendants' instant Motions persuades the Court that its prior ruling was in error.

As previously noted by the Court, the issue is not one of subject matter jurisdiction, as defendants erroneously and repeatedly claim. See Growth Horizons, Inc. v. Delaware County, 983 F.2d 1277, 1284 (3d Cir. 1993) ("Under the Judicial Improvements Act of 1990, the district court has jurisdiction over the state claim. Section 1367 states that the federal courts 'shall have supplemental jurisdiction' over claims which are 'part of the same case or controversy' as a claim over which the court exercises original jurisdiction."). Instead, under 28 U.S.C. § 1367(c), the relevant issue is whether the district court will, in its discretion, decline to exercise jurisdiction if any of the four statutory conditions are met. See id.

In the instant case, the Third Circuit's mandate to retry plaintiff's tortious interference claim required the Court to do so, "implement[ing] both the letter and spirit of the mandate, taking into account the appellate court's opinions and the circumstances it embraces." Bankers Trust Co. v. Bethlehem Steel Corp., 761 F.2d 943, 949 (3d Cir. 1985). In this case, the Third Circuit's mandate to retry the sole remaining state law

claim implicitly assumed that this court would exercise supplemental jurisdiction over that claim. Having disposed of the federal claims, the Third Circuit, as a matter of course, knew that the sole claim that remained for retrial was a state law cause of action. Indeed, the Third Circuit explicitly undertook the interpretation of the tortious interference claim under Pennsylvania law, ultimately predicting that the Pennsylvania Supreme Court would not require "independently actionable means" in a case such as this "where the defendant exerted 'economic pressure' or 'a superior power' in a market unrelated to the competitive market." Brokerage Concepts v. U.S. Healthcare, 140 F.3d 494, 531-32 (3d Cir. 1998). Thus, the Third Circuit's mandate implicitly assumed that this Court would not decline to exercise supplemental jurisdiction over the sole remaining state law claim, and accordingly this Court was and is without authority to contravene that mandate.

Furthermore, this Court held, in the alternative, that if this Court did have any discretion in this matter, all circumstances directed that the Court exercise jurisdiction. To have dismissed plaintiff's state law claim after years of litigation before this Court would have been grossly unfair, as well as a gross waste of judicial resources, both state and federal. Accordingly, the Court rejects defendants' first argument for judgment as a matter of law.

2. Improper Construction of Pennsylvania Law

Second, defendants argue that the Third Circuit's construction of comment e of Restatement (Second) § 768 and the application of that section to this case were improper. In brief, defendants argue that in order to constitute "wrongful means," defendants' conduct must have been independently actionable. As noted above, however, the Third Circuit explicitly addressed this issue, and as noted by plaintiff, this Court is without power to contravene a ruling by the Third Circuit. Accordingly, this argument too is rejected.

### 3. Insufficient Evidence

Third, defendants argue various grounds as to why there was insufficient evidence to support the jury's verdict. First, defendants argue that plaintiff produced no evidence showing that defendants' wrongful conduct was in matters "unrelated" to the business in which defendants and plaintiff compete. According to the Third Circuit's articulation of plaintiff's tortious interference claim, plaintiff could demonstrate "wrongful means" by showing that "the defendant exerted 'economic pressure' or 'a superior power' in a market unrelated to the competitive market." Brokerage Concepts, 140 F.3d at 531-32. The Third Circuit further stated that in the instant case, where plaintiff had "alleged that the defendants employed economic pressure in . . . the market for pharmacy customers (where BCI was not a competitor) in order to force Gary's hand in the TPA market (where BCI and CHA competed)," such competition was specifically deemed "wrongful" under comment e of § 768. Id. at 531.

Upon remand of the case to this Court, defendants raised for the first time the argument that their business activities are "related" to the business in which plaintiff and defendants compete. Using purposely vague and generalized language, defendants continue to assert that their "decision of whether or not to enter into a contract with Gary's Abington store as a provider is not 'unrelated' to the health care benefits business," that all of their "activity was occurring in the same business and field -- the health care benefits business," and that plaintiff and defendants both compete in this business. (Defs' Jt. Mem. in Supp. of Mot. for J. as Matt. of Law at p.34.)

In its Order of November 12, 1998 denying defendants' Motion for Summary Judgment, this Court addressed this "relatedness argument" and noted that the Third Circuit, in analyzing "wrongful means," explicitly differentiated between the market for pharmacy customers and the TPA market. This Court concluded that the Third Circuit's delineation of the two markets controlled this Court's analysis, and that defendants could not hope to escape the Third Circuit's determination that "BCI [had] adduced sufficient evidence at trial to allow a reasonable jury to find that defendants employed wrongful means and thus acted outside the scope of the competitors' privilege." Id. at 533.

This Court further found that defendants had waived the argument by failing to raise it on appeal when the self-same jury instructions on wrongful means were at issue before the Third

Circuit. At that time, defendants only argued that "wrongful means" requires a showing of independently actionable wrongful means, an argument rejected by the Third Circuit. Defendants did not, however, raise the instant argument -- that any economic pressure exerted by defendants was in matters related to the business in which the parties competed -- when addressing the same "wrongful means" issue. Accordingly, this Court concluded that defendants had waived their right to raise the argument at this juncture and were precluded from raising this argument in this case.

In its previous Order, this Court also noted that defendants' arguments, whether purposely or not, entirely missed the point of the Third Circuit's analysis. The two markets, as delineated by the Third Circuit, are distinct regardless of whether the TPA business involves providing customers, such as Gary's, with a pharmacy network. Indeed, TPA services would understandably include providing customers with such pharmaceutical services; but in the TPA context, such pharmaceutical services only apply to the employees of the customer, such as Gary's. It is Gary's employees who receive the pharmaceutical services of the TPA product. The market for pharmacy customers, on the other hand, is one where Gary's is not the customer but the provider, and it is Gary's customers, not its employees, that benefit from participation in a pharmacy network. To compete against defendants in this market, plaintiff would have to be able to give Gary's the right to participate in

a network that enables Gary's customers (not its employees) to buy pharmaceuticals at insured rates. Defendants cannot allege this and have not alleged this. Instead, relying upon purposely broad language, they can only argue in conclusory terms that the parties competed in all areas of the health care business and that therefore no conduct on defendants' part was in an "unrelated" matter.

Defendants have not raised any new arguments to persuade this Court that its prior determination was in error. Indeed, as plaintiff points out, there was ample evidence at trial showing that defendant Corporate Health Administrators ("CHA") was the TPA arm of USHC which competed directly against plaintiff in the market for TPA services. (See TR 1/5/99 at 11-12; 1/15/99 at 59; 1/20/99 at 73.) Ellen Radcliffe, an employee of plaintiff, testified specifically that plaintiff is not an insurance company, but rather a broker for insurance companies. (TR 1/5/99 at 10.) Furthermore, defendant William Brownstein, who was the regional pharmacy director of defendant USHC during 1993-1994 (see TR 1/7/99 at 211), succinctly testified that his department's decision not to process Gary's application to admit its Abington store into USHC's pharmacy network "was not a pharmacy problem" but instead due to the fact that "[w]e had been made aware . . . of the fact that Gary's had canceled its health care coverage for its employees with US Healthcare." (Id. at 238.) Based on such testimony, the Court is amply satisfied that sufficient evidence existed demonstrating the two different

markets, as delineated by the Third Circuit, and showing that plaintiff and defendants competed in the TPA market but could not and did not compete in the market of admitting pharmacies into pharmacy networks. Accordingly, this argument is also rejected.

Next, defendants argue that there was insufficient evidence of "market power" at the second trial. The Court agrees with plaintiff that this argument is frivolous in view of the ample testimony elicited by plaintiff of defendants' use of its economic power in the market for admitting pharmacies into the USHC pharmacy network in order to force Gary's hand in the TPA market. Accordingly this argument too is rejected.

Next, defendants argue that their actions, in particular defendant Wolfson's actions, were privileged as a matter of law. Raising the same arguments already addressed by this Court in previous motions, defendants now argue that plaintiff's alleged failure to disclose certain commissions would somehow "shock the public conscience." Such arguments are patently ridiculous and in no way address the ample and sufficient evidence of defendants' wrongful conduct. This Court instructed the jury on wrongful means and privileged conduct in accordance with the Third Circuit's opinion, and defendants cannot hope to argue their way out of the ample evidence showing defendants' unprivileged conduct. Accordingly, this argument is rejected.

Next, defendants argue that there was insufficient evidence that defendants' conduct was a substantial factor in

causing Gary's not to continue its contract with plaintiff. The Court again agrees with plaintiff that defendants' picking and choosing of evidence more favorable to their interpretation of the events is unavailing in light of the ample other evidence supporting the jury's finding that defendants' pressure tactics in the area of its pharmacy provider network caused Gary's to switch TPAs from plaintiff to CHA. (See Pl.'s Mem. Of Law in Opp. To Defs' Mot. at 17-18.) Accordingly, this argument too is rejected.

Next, defendants argue that insufficient evidence supports a finding that they intended or knew that a substantially certain result of their tortious conduct would be harm to plaintiff. As plaintiff notes, this Court has already ruled on this issue, stating that plaintiff need not show a "specific intent" to harm plaintiff, but instead that defendants knew that as a result of their actions, injury was certain or substantially certain to occur. And there is ample evidence supporting the jury's finding that defendants knew and intended that their coercive conduct towards Gary's would cause Gary's to terminate its contract with its existing TPA, thus causing harm to that party. As plaintiff accurately notes, defendant Scott Murphy, on behalf of USHC, wrote a revealing in-house memo naming Arnie Katz, the owner of plaintiff company. And given Mr. Wolfson's presence at the June 1994 meeting between CHA and Gary's, and the working relationship between Mr. Murphy and Mr. Wolfson, the jury was free to infer that Mr. Wolfson shared Mr.

Murphy's knowledge of plaintiff and Arnie Katz. Accordingly, this argument too is rejected.

Next, defendant argues that insufficient evidence supports the jury's verdict against defendant Wolfson, both with respect to USHC's audit of Gary's Eagleville store and USHC's delay in processing Gary's applications for admission of new pharmacies in USHC's pharmacy network. However, defendants' arguments, made for the first time at this juncture, amount to no more than frivolous assertions that somehow holding defendants liable for their conduct is unconstitutional, whether because this would constitute a deprivation of property or violate defendants' First Amendment right of free association. This baseless argument is also rejected by the Court.

Finally, defendants argue that there is insufficient evidence to support a finding that plaintiff had an existing or prospective contractual relationship with which defendant could have interfered. Again, evidence at trial amply demonstrated that Gary's intended to continue its contractual relation with plaintiff, and that a very real contractual relation did exist with which defendants tortiously interfered. Accordingly, defendants' arguments are rejected in full.

#### 4. Insufficient Evidence for Punitive Damages

Defendants' finally argue that even if the jury's verdict as to liability is upheld, the jury's award of punitive damages should be vacated because insufficient evidence supports such an award. The Court, however, finds defendants' arguments

to be unpersuasive. In the first instance, the Third Circuit squarely placed the issue of punitive damages in the jury's hands for the retrial. See Brokerage Concepts, 140 F.3d at 535 n.34 ("On retrial, the jury will have to consider anew whether defendants' behavior was outrageous enough to warrant an award of punitive damages under Pennsylvania law."). Thus it is unavailing on defendants' part to argue that punitive damages are impermissible as a matter of law because they were not on "notice" that their conduct was wrongful. Indeed, as plaintiff accurately counters, defendants have not raised the issue of the constitutionality of an award of punitive damages prior to this juncture. Furthermore, as the Third Circuit stated, under comment e of Restatement (Second) of Torts § 768, the form of "competition" relevant here -- the use of economic power in the market for pharmacy customers in order to force Gary's hand in the TPA market -- "is specifically deemed wrongful." Id. at 531 (emphasis added). In this Court's opinion as well, comment e is both clear and directly applicable to defendants' conduct as demonstrated through the evidence brought out at trial. And finally, in view of the same evidence, the Court is well satisfied that sufficient evidence supports the jury's finding of outrageousness and/or reckless indifference. Accordingly, defendants' arguments are rejected in full.

**D. Conclusion**

In conclusion, the defendants' Motions for Judgment as a Matter of Law will be denied.

An appropriate Order follows.

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Clarence C. Newcomer, J.

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BROKERAGE CONCEPTS, INC.	:	CIVIL ACTION
Plaintiff,	:	
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v.	:	
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U.S. HEALTHCARE, INC., et al.	:	
Defendants,	:	NO. 95-1698

**O R D E R**

AND NOW, this            day of April, 1999, upon consideration of the following Motions, and responses thereto, and consistent with the foregoing Memorandum, it is hereby ORDERED as follows:

(1) Motion for Judgment as a Matter of Law of Defendants U.S. Healthcare, Inc. and United States Healthcare Systems of Pennsylvania, Inc., d/b/a The Health Maintenance Organization of Pennsylvania is hereby DENIED.

(2) Richard Wolfson's Motion for Judgment as a Matter of Law is hereby DENIED.

AND IT IS SO ORDERED.

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Clarence C. Newcomer, J.