June 20, 2011

Eighth Circuit Affirms Summary Judgment for Medical Device Supplier in Antitrust Case Challenging Pricing Practices

In a potentially significant decision that may affect the pricing practices of sellers of medical devices or other products, the United States Court of Appeals for the Eighth Circuit recently affirmed summary judgment for a medical device supplier in an antitrust case challenging the supplier's pricing practices under the Sherman and Clayton Acts.

The decision in *Southeast Missouri Hospital* v. *C.R. Bard, Inc.*[1] rejected the plaintiff hospital's claim that the supplier's "share-based" discounts—giving hospitals discounts for committing to purchase specified percentages of certain product needs from the supplier—constituted *de facto* exclusionary agreements in violation of the antitrust laws. The Court also rejected the plaintiff's challenge to several other pricing practices, but on narrower grounds, holding that the plaintiff failed to offer evidence that products sold to hospitals through group purchasing organizations ("GPOs") constituted a "relevant market" (or "submarket") for antitrust purposes.[2]

Background

The plaintiff, a Missouri hospital, sued C.R. Bard, Inc. ("Bard"), a major supplier of Foley catheters (used to drain a patient's bladder over an extended period of time) and intermittent catheters (for single use only) to hospitals in the United States. The hospital, which purchased both types of catheters from Bard through a GPO, claimed that certain provisions in contracts between Bard and various GPOs unreasonably restrained trade in violation of federal and state antitrust laws. Specifically, the hospital objected to (i) the share-based discounts, (ii) sole-source provisions making Bard the only supplier of catheters on a price list supplied to hospital members of a GPO, and (iii) bundled discounts under which a hospital pays a lower price for purchasing several medical products together than for purchasing them separately. The hospital claimed that these pricing provisions rendered Bard's GPO contracts *de facto* exclusionary "because the discount prices are so attractive that hospitals cannot afford to forgo them."[3]

The district court granted summary judgment in favor of Bard. In August 2010, the Eighth Circuit affirmed the district court's ruling on various grounds. The Eighth Circuit subsequently granted a motion for rehearing and vacated its August 2010 opinion. On June 8, 2011, the

[1] *Southeast Missouri Hospital* v. *C.R. Bard, Inc.,* NO. 09-3325, 2011 WL 2201067 (8th Cir. June 8, 2011).

[2] GPOs are voluntary organizations used to negotiate purchasing contracts for medical devices on behalf of their member hospitals.

[3] *Id.* at *2.

same panel (with one circuit judge dissenting) issued a new opinion affirming the district court order.

Share-Based Discounts

The Eighth Circuit concluded that the hospital's challenge to Bard's share-based discounts was precluded by its 2000 decision in *Concord Boat Corp. v. Brunswick Corp*., which concerned a similar market-share discount program by a supplier of boat engines.[4] In *Concord Boat*, the court reversed a plaintiffs' jury verdict, holding that the "voluntary nature" of the agreements between the boat builders and the supplier (which did not require boat builders to commit to buy engines from the supplier for any specified period of time) and the willingness of boat builders to purchase engines elsewhere for better discounts, meant that the agreements were not *de facto* exclusionary.[5]

The court in *Southeast Missouri Hospital* reached the same conclusion regarding Bard's share-based discounts, specifically noting that, in order to receive the discounts, hospitals were not required either to purchase 100% of their catheter needs from Bard or to refrain from purchasing from other competitors.[6] Indeed, the court noted, the GPO agreements did not "contractually obligate hospitals to purchase anything" from Bard; instead, "[i]f a hospital purchased less than the agreed upon percent, it simply lost its negotiated discount."[7]

Although the hospital attempted to distinguish *Concord Boat* on the ground that the Bard-GPO agreements also included sole-source provisions and bundled discounts, the court rejected the argument, explaining (somewhat cryptically) that "share-based discounts are the heart of the sole-source contracts, and the centerpiece of the bundled discounts."[8]

Market Definition

The court turned to a discussion of the deficiencies in the plaintiff's proposed market definition, which provided a basis for the court to affirm summary judgment as to Bard's sole-source provisions and bundled discounting (in addition to its share-based discounting). In doing so, the court addressed the circumstances in which it may be appropriate to define a "submarket" that is limited to the sale of a product through a certain distribution channel. The hospital had argued that the two relevant submarkets for its antitrust claims should be defined as Foley catheters "sold under GPO contracts to hospitals" and intermittent catheters "sold under GPO contracts to hospitals."[9]

The court evaluated these proposed submarkets using the factors articulated by the Supreme Court in *Brown Shoe Co.* v. *United States*, which identify a submarket based on "industry or

[4] *Concord Boat Corp.* v. *Brunswick Corp.*, 207 F.3d 1039 (8th Cir. 2000).

[5] *Id*. at 1059–63.

[6] *Southeast Missouri Hospital*, 2011 WL 2201067 at *3.

[7] *Id*.

[8] *Id.*

[9] *Id*. at *4.

public recognition of its separate economic character, special uses or characteristics or production facilities, distinct customers or prices, price sensitivity, and specialized vendors."[10]

The court held that, although the hospital had satisfied the first of these factors—*i.e.*, that suppliers recognize that securing GPO contracts is a specific and necessary element in their businesses—the hospital had failed to satisfy the remaining *Brown Shoe* factors. The court emphasized that GPOs do not offer better delivery methods than other distribution channels because "catheters are delivered the same way, regardless of how they are bought."[11] Thus there were no distribution advantages—such as salespeople with specialized expertise—or other efficiencies that might indicate the existence of a separate submarket.

The court made clear that "a price differential alone does not establish two separate product markets."[12] The court went on to explain that even if a price differential were relevant, the hospital had submitted "no evidence of any uniform 'significant cost savings' from purchasing GPO catheters compared to non-GPO catheters."[13] Perhaps most significantly, the evidence showed that the hospital chose to purchase from Bard not because it feared losing a discount, but because its physicians preferred Bard products.

In light of the foregoing, the court concluded that the hospital had failed to offer sufficient evidence that Foley and intermittent catheters sold through GPO contracts were distinct product submarkets, and that summary judgment was therefore appropriate.

* * *

The Eighth Circuit's decision in *Southeast Missouri Hospital* v. *C.R. Bard, Inc.* is notable for two reasons.

By reaffirming key features that may help a share-based discounting program withstand an antitrust challenge, the Eighth Circuit's decision will likely be of significance to any supplier that offers share-based discounts or is considering whether to implement such a program. The court's decision does not, however, provide useful guidance regarding whether other types of discounts would withstand scrutiny.[14]

Second, to the extent the decision suggests that products sold through GPO distribution channels may not constitute a properly defined relevant "submarket" for antitrust purposes, the opinion may be good news for suppliers who use GPOs to distribute their products.

* * * *

[10] *Southeast Missouri Hospital*, 2011 WL 2201067 at *4 (citing *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325 (1962)).

[11] *Southeast Missouri Hospital*, 2011 WL 2201067 at *5.

[12] *Id*. at *6.

[13] *Id*. at *4.

[14] While the Eighth Circuit's August 2010 opinion (which was subsequently vacated) analyzed the hospital's bundling claim on the merits, the June 2011 opinion does not do so, which suggests a lack of consensus on this subject among this panel of judges.

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

Robert A. Atkins
(212) 373-3183
ratkins@paulweiss.com

Andrew C. Finch
(212) 373-3460
afinch@paulweiss.com

Kenneth A. Gallo
(202) 223-7356
kgallo@paulweiss.com

Jacqueline P. Rubin
(212) 373-3056
jrubin@paulweiss.com

Moses Silverman
(212) 373-3355
msilverman@paulweiss.com

Joseph J. Simons
(202) 223-7370
jsimons@paulweiss.com

Aidan Synnott
(212) 373-3213
asynnott@paulweiss.com

NEW YORK
1285 Avenue of the Americas
New York, NY 10019-6064
+1-212-373-3000

BEIJING
Unit 3601, Fortune Plaza Office
Tower A
No. 7 Dong Sanhuan Zhonglu
Chao Yang District, Beijing 100020
People's Republic of China
+86-10-5828-6300

HONG KONG
12th Fl., Hong Kong Club Building
3A Chater Road
Central Hong Kong
+852-2846-0300

LONDON
Alder Castle, 10 Noble Street
London EC2V 7JU
United Kingdom
+44-20-7367-1600

TOKYO
Fukoku Seimei Building, 2nd Floor
2-2, Uchisaiwaicho 2-chome
Chiyoda-ku, Tokyo 100-0011
Japan
+81-3-3597-8101

TORONTO
One Yonge Street, Suite 1801
Toronto, ON M5E 1W7
Canada
+1-416-504-0520

WASHINGTON, D.C.
2001 K Street NW
Washington, DC 20006-1047
+1-202-223-7300

WILMINGTON
500 Delaware Avenue, Suite 200
Post Office Box 32
Wilmington, DE 19899-0032
+1-302-655-4410

Contributing author: Jacklyn M. Siegel