Blog Post

Outpatient Surgery Center Avoids Dismissal of Antitrust Action Through an Assist from the DOJ

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In 2012, Marion Healthcare, an outpatient surgery center in southern Illinois, commenced an antitrust action against Southern Illinois Healthcare ("SIH"), a multi-hospital system operating in the same market. Marion alleged that SIH had negotiated exclusive dealing relationships with several area health insurers, and that these agreements made it difficult, if not impossible, for Marion to compete for surgical patients in southern Illinois. While Marion's first and second attempts to state an actionable antitrust claim were unsuccessful, it appears that its third amended complaint was the proverbial "charm," as Magistrate Judge Stephen Williams (S.D. Illinois) ruled on March 14, 2018 that Marion's allegations that the alleged exclusive dealing contracts violated Sections 1 and 2 of the Sherman Act were sufficient to state a claim.

In denying SIH's motion for judgment on the pleadings, Magistrate Judge Williams rejected SIH's contention that an exclusive dealing claim requires a formal written contract to be actionable, which Marion conceded did not exist for all periods covered under its complaint. Citing cases from the Sixth and Ninth Circuit, Magistrate Judge Williams held that an exclusive agreement "need not be explicit" to be actionable, and that the correct test was whether a written or unwritten exclusive agreement was in place, and whether it had

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substantial anticompetitive effects. Under this standard, Marion's allegation that SIH had suppressed competition "through exclusionary agreements and *ongoing related conduct*," was sufficient for Marion to adequately plead its antitrust claims. In further support of this ruling, the Court noted that Marion's expert witness had opined that the exclusive relationships had essentially continued "on a constructive basis" even after they were removed from SIH's contracts with payors.

Notably, the ruling comes approximately one month after the U.S. Department of Justice Antitrust Division filed a "Statement of Interest" in the case – an uncommon occurrence for the Antitrust Division at the district court level – refuting a second legal argument that had been made by SIH in support of its request for dismissal of the case. Specifically, SIH argued that the 7th Circuit held in *Methodist Health Services v. OSF Healthcare* that short-term exclusive contracts are legal "as a matter of law," and that, given that the exclusive arrangements in this case (at least those expressly set forth in the SIH contracts with payors), were not of a long duration, that Marion's claims could properly be dismissed on this basis as well. The Antitrust Division, however, characterized that contention as "wrong," and maintained that "the formal duration of a contract is not dispositive" of the issue. Instead, the Antitrust Division stated that, in its view, a fact-specific inquiry into the effect of the alleged agreement is required in all cases, regardless of the duration of the exclusivity. While Magistrate Judge Williams' ruling does not expressly address this argument, the Court's unwillingness to dismiss Marion's claims because the exclusive contracts were of a "short duration" appears to confirm that it rejected this argument by SIH as well.

With the Court's denial of SIH's motion, the case – which is being closely watched by many, particularly after the Antitrust Division became involved – now proceeds into discovery. Stay tuned.