

District Court Dismisses Tyco Antitrust Suit

Thursday, Jan 24, 2008 --- A Missouri magistrate judge on Tuesday dismissed all claims against Tyco International (US) and Tyco Health Care Group LP – now known as Covidien – in an antitrust class action case brought by Southeast Missouri Hospital.

The hospital alleged that a putative national class of hospitals was overcharged for urology catheters as a result of antitrust law violations by catheter suppliers Tyco and CR Bard Inc. These violations included monopolization, restraint of trade, civil conspiracy and engaging in contracts that hinder competition.

While Tyco and Covidien, which used to be part of Tyco, have been let off the hook, claims against the defendant still stand, the United States District Court for the Eastern District of Missouri ruled. This is partly because, depending on the type of catheter, Bard has a 75 to 90% market share, while Tyco's is much smaller.

A key issue in the case was that the plaintiff put the Tyco-affiliated groups together with Bard in the suit, as though the companies were undifferentiated competitors, said Covidien's attorney James Donato of Cooley Godward Kronish LLP. He argued that the companies could not be treated as one competitor in the matter because Bard's market share is so much greater than Tyco's.

The case “puts to rest this budding theory that you can lump everyone together that has common contracting practices, regardless of market shares,” Donato said.

Southeast Missouri Hospital had alleged that Bard and Tyco's behavior “stifle[s] competition in the Urological Catheter Markets” and has “a direct, substantial, and adverse effect on competition by monopolizing the Urological Catheter Markets, artificially creating barriers to entry in the Urological Catheter Markets and foreclosing competition on the basis of price and performance,” according to the memorandum and order filed by Magistrate Judge Thomas Mummert on Tuesday.

The hospital's claims against the companies fell under the Sherman Act, the Clayton Act, Missouri state antitrust laws and the Missouri Fair Merchandising Practices Act.

The judge found that in treating Bard and Tyco as one competitor, Southeast Missouri Hospital “aggregates the market power of each into a more imposing figure,” but fails to establish that Bard and Tyco agreed to act as

one. “Also, there is no need to infer a conspiracy if there is an agreement to engage in common action,” Judge Mummert wrote.

Recently there has been a “firestorm” of litigation involving Group Purchasing Organizations, which represent health care providers that want to consolidate their buying power for medical devices, Donato said. Companies that supply these devices make bids for contracts to provide devices to particular GPOs.

Both Tyco and Bard faced a lawsuit in U.S. Court for the Eastern District of Texas from Rochester Medical Corp. on similar grounds. Bard settled out of it, but the case against Tyco is still pending.

Attorneys for Southeast Missouri Hospital did not return requests for comment.

Covidien is represented in this matter by Cooley Godward Kronish LLP and Spencer, Fain, Britt & Browne.

Southeast Missouri Hospital is represented in this matter by Kenneth Walsh of Kirby McInerney LLP, Rusty Hardin, Straus & Boies LLP, and Cook, Barkett, Maguire and Ponder LC.

The case is Southeast Missouri Hospital, on behalf of itself and others similarly situated, v. C.R. Bard Inc.; Tyco International (US) Inc. and Tyco Health Care Group LP, case number 1:07cv0031, in the United States District Court for the Eastern District of Missouri.