By Curtis Rooney

Legal Findings

Federal courts again affirm GPO value and competitiveness

In the last decade a small, yet vocal, number of suppliers have prosecuted the argument that GPO business practices are anti-competitive and violate antitrust laws. On June 8, the U.S. 8th Circuit Court of Appeals (Southeast Missouri Hospital v. C.R. Bard Inc., No. 09-3325) found for the second time that, in fact:

- GPO membership is voluntary for hospitals. Hospitals can (and do) switch from one GPO to another, and may belong to multiple GPOs.
- Ninety-six to 98 percent of all hospitals in the United States voluntarily belong to one or more GPOs.
- On average, hospitals pay 10 to 15 percent less by buying under GPO contracts.
- GPOs do not purchase supplies. Member hospitals do under the terms of their GPO-negotiated contracts.
- Hospital contracts with GPOs can be terminated at any time with notice to the supplier.
- Hospitals are not required to purchase through their GPO contracts, but can instead purchase supplies "off-contract," negotiating their own prices directly with suppliers.

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The case

The first court to hear the case dismissed St. Francis Medical Center's class action suit that accused Bard of abusing its place in the catheter market. The plaintiff alleged that Bard, while contracting with a GPO, inflated catheter prices for hospitals in violation

of the Sherman Act. That court rejected St. Francis's challenges to bundled rebates due to the absence of below-cost pricing and to the sole-source and tiered-pricing terms. The district court said that the arrangement was perfectly legal and competitive because the hospital was "free to walk away" from the contract.

On appeal, the court twice rejected the arguments put forth by St. Francis and dismissed the case. After the first dismissal, the appeals court did agree to rehear the case on procedural grounds,

but again dismissed the action because there were not sufficient facts alleged to trigger legal review. As a result, the 8th Circuit affirmed that it will generally look to market-based competition to act as a constraint on single-firm pricing conduct such as market-share discounts and bundled product discounts. Having failed again at the appellate level, the only recourse for the plaintiff now is to appeal to the U.S. Supreme Court.

Similar to almost all U.S. hospitals, St. Francis is a member of a GPO that aggregates the purchasing power of providers buying medical supplies off of contracts that are discounted by suppliers like Bard. In this case, St. Francis purchased Foley catheters (a type of catheter used to drain a patient's bladder over extended periods of time) from Bard off of a GPO contract. From 2003 to 2008, Bard, a leading supplier of Foley catheters, was responsible for over 80 percent of Foley sales to hospitals. As an incentive to hospitals to purchase from Bard, some of Bard's GPO contracts were sole-source contracts with tiered pricing. When the hospital purchased higher percentages of supplies from Bard, it received larger discounts. Bard also offered bundled discounts for related products. Despite the fact that no hospital was required to purchase catheters from Bard, St. Francis alleged that "Bard's GPO contracts were *de facto* exclusionary because the discount prices are so attractive that hospitals cannot afford to forgo them."

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Financial pressures on hospitals continue to mount, and U.S. public policy will continue to focus on deficit reduction. In addition to the important legal findings involved in this case, it is clear that GPOs will play an increasingly important role in saving money for hospitals, Medicare and taxpayers. Now hospitals can move forward with their mission of caring for patients without fear of legal challenge to the contracting tools needed to purchase critical supplies. **JHC**

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A full decision of the 8th Circuit of Appeals can be found at: http://www.leagle.com/xmlResult.aspx?page=1&xmldoc=In%20FCO%2020110608115.xml&docbase=CSLWAR3-2007-CURR&SizeDisp=7