

\$200M Suture Antitrust Suit Nixed For Lack Of Market Power

By **Dani Kass**

Law360, New York (April 8, 2016, 5:39 PM ET) -- A Kansas federal judge had dismissed Suture Express' \$200 million antitrust suit against Cardinal Health and Owens & Minor because the wound care company failed to prove the other two had market power and that competition was injured by the alleged predatory pricing scheme, according to an order unsealed Thursday.

U.S. District Judge Daniel D. Crabtree had granted summary judgment on March 3 to Cardinal Health Inc. and Owens & Minor Inc., finding that Suture Express Inc.'s suit alleging a scheme to prevent hospitals from buying from it didn't hold up. The unsealed version took out confidential information about customers and business practices.

Suture Express has already announced its intent to appeal to the Tenth Circuit.

Judge Crabtree said the bundling of products hasn't halted competition, but instead has lowered prices as several others in the marketplace compete. The two companies don't hold a monopoly on the market and other competitors, including Medline Industries Inc. whose business has grown significantly, are still doing well, he said.

Regional distributors have also been growing, and at least two other businesses who aren't in the acute care market could enter the market and compete successfully, he said.

"The summary judgment facts describe a market rife with competitive rivals who are growing and expanding their business while Cardinal and O&M's market shares have declined or remained relatively flat," Judge Crabtree said. "Indeed, O&M and Cardinal compete vigorously against one another, winning and losing customers back and forth."

From 2008 to 2013, both Cardinal Health and Owens & Minor have lowered their product markups, as have other companies in the market, citing competitive pressure, he said.

The judge then said that Suture Express' argument that it was injured because it offers a better product and overnight delivery — "a better mousetrap" — are not enough, as it would have had to prove that competition was injured.

"The antitrust laws are not designed to protect competitors like Suture Express; instead, those laws were enacted to promote competition so that market participants could decide who had 'a better mousetrap,'" he said. "Thus, Suture Express must show harm to competition, not just harm to Suture Express."

Kansas-based Suture filed suit in December 2012, accusing Cardinal and Owens & Minor of using their market power over the distribution of medical-surgical supplies to squeeze acute care providers that would otherwise prefer to shop elsewhere for products used to seal wounds.

Suture claims that as the only distribution company operating solely in the wound closure product niche, it thrived thanks to a greater selection, better service and lower costs than the defendants, until the alleged antitrust scheme began in 2008.

Under the scheme, the defendants charged a higher price to customers that didn't buy at least 90 percent of their wound closure products through them, either through penalties applied to orders, or through the elimination of discounts that would otherwise apply, the complaint said. These discounts bring the prices of wound closure products below the defendants' costs, in order to retain market share ahead of Suture, according to the suit.

In August 2013, U.S. District Judge Richard D. Rogers trimmed the \$200 million antitrust suit, ruling that Suture hadn't shown any conspiratorial agreement between the defendants and that it also failed to support its Sherman Act monopolization and state-law unjust enrichment claims. He then dismissed the suit in full more than two years later.

Representatives for the parties didn't respond to requests for comment Friday.

Suture Express is represented by Charles W. German and Daniel B. Hodes of Rouse Hendricks German May PC and Daniel M. Abuhoff, Michael Schaper, Erica S. Weisgerber, Joseph W. Weissman and Derek Wikstrom of Debevoise & Plimpton LLP.

Cardinal was represented in district court by John W. Cowden and David M. Eisenberg of Baker Sterchi Cowden & Rice LLC and Michael Sennett, Paula W. Render, Eric P. Berlin, Michelle K. Fischer and Yael D. Aufgang of Jones Day.

Owens & Minor was represented in district court by James L. Eisenbrandt, Jennifer B. Wieland and John S. Kemp of Berkowitz Oliver Williams Shaw & Eisenbrandt LLP and John S. Gibson, Shari Ross Lahlou and Luke van Houwelingen of Crowell & Moring LLP.

The appeal is Suture Express v. Owens & Minor, et al, case number 16-3065, in the U.S. Court of Appeals for the Tenth Circuit.

— Additional reporting by Jeff Overley, Kelly Knaub and Daniel Wilson. Editing by Ben Guilfooy.
