UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

MEDICAL SAVINGS INSURANCE COMPANY,

Plaintiff,

vs. Case No. 2:04-cv-156-FtM-29DNF

HCA, INC., HCA HEALTH SERVICES OF FLORIDA, INC., LEE MEMORIAL HEALTH SYSTEM, CAPE MEMORIAL HOSPITAL, INC., MARTIN MEMORIAL HEALTH SYSTEMS, INC., MARTIN MEMORIAL MEDICAL CENTER, INC., FLORIDA HOSPITAL ASSOCIATION, INC., and FLORIDA HOSPITAL ASSOCIATION MANAGEMENT CORPORATION,

Defendants.
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OPINION AND ORDER

This matter comes before the Court on the following motions to dismiss: (1) Defendant Martin Memorial's Motion To Dismiss and Incorporated Memorandum of Law (Doc. #32); (2) HCA Defendants' Motion To Dismiss (Doc. #34) and Memorandum in Support (Doc. #35); (3) Defendants Lee Memorial Health System and Cape Memorial Hospital, Inc.'s Motion To Dismiss and Incorporated Memorandum of Law (Doc. #36); and (4) Florida Hospital Association's and Florida Hospital Association Management Corporation's Motion To Dismiss and Supporting Memorandum (Doc. #33).[1] Plaintiff filed a Memorandum in

[1] Defendants Florida Hospital Association, Inc. and Florida Hospital Association Management Corporation have adopted the arguments made by the other defendants in this case and have not set forth any additional arguments.

Opposition (Doc. #52) to these motions and an Exhibit (Doc. #54). Defendants Lee Memorial Health System and Cape Memorial Hospital, Inc. filed a Reply (Doc. #67) and plaintiff filed a Response (Doc. #75) with leave of Court. The Court requested (Doc. #77), and received (Docs. #82-86), supplemental memoranda from all parties addressing the issue of antitrust standing. To the extent that the parties addressed issues other than antitrust standing in their supplemental memoranda, the Court will disregard them.

I.

In deciding a motion to dismiss, the Court must accept all factual allegations in a complaint as true and take them in the light most favorable to plaintiff. Christopher v. Harbury, 536 U.S. 403, 406 (2002); Hill v. White, 321 F.3d 1334, 1335 (11th Cir. 2003). A complaint should not be dismissed unless it appears beyond doubt that plaintiffs can prove no set of facts that would entitle them to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (footnote omitted); Marsh v. Butler County, Ala., 268 F.3d 1014, 1022 (11th Cir. 2001)(en banc). To satisfy the pleading requirements of Fed. R. Civ. P. 8, a complaint must simply give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002). However, dismissal is warranted under Fed. R. Civ. P. 12(b)(6) if, assuming the truth of the factual allegations of plaintiff's complaint, there is a dispositive legal issue which

precludes relief. Neitzke v. Williams, 490 U.S. 319, 326 (1989); Brown v. Crawford County, Ga., 960 F.2d 1002, 1009-10 (11th Cir. 1992). The Court need not accept unsupported conclusions of law or of mixed law and fact in a complaint. Marsh, 268 F.3d at 1036 n.16.

This standard applies when the Court reviews issues of standing pursuant to a motion to dismiss. The principal purpose of standing is to ensure that the parties before the Court have a concrete interest in the outcome of the proceedings such that they can be expected to properly frame the issues. Harris v. Evans, 20 F.3d 1118, 1121 (11th Cir. 1994)(en banc), cert. denied, 513 U.S. 1045 (1994). Every complaint must contain sufficient allegations of standing, Church v. City of Huntsville, 30 F.3d 1332, 1336 (11th Cir. 1994), but the complaint may be dismissed for lack of standing only "if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Jackson v. Okaloosa County, Fla., 21 F.3d 1531, 1534 (11th Cir. 1994) (citation omitted). Standing always remains an open issue, and can be revisited under a different standard at the summary judgment stage or at trial. Church, 30 F.3d at 1336; Harris, 20 F.3d at 1121 n.4. This having been said, it is still plaintiff's responsibility to allege facts sufficient to establish its standing, and the Court cannot "speculate concerning the existence of standing, nor should we imagine or piece together an injury

sufficient to give plaintiff standing when it has demonstrated none." Miccosukee Tribe of Indians of Fla. v. Florida State Athletic Comm'n, 226 F.3d 1226, 1229-30 (11th Cir. 2000); see also Shotz v. Cates, 256 F.3d 1077, 1081 (11th Cir. 2001).

In order to establish standing, a plaintiff must adequately allege and ultimately prove, three elements: (1) that it has suffered an "injury-in-fact;" (2) a causal connection between the asserted injury-in-fact and the challenged conduct of the defendant; and (3) that the injury likely will be redressed by a favorable decision. Shotz, 256 F.3d at 1081, citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). These requirements are the "irreducible minimum" required by the Constitution for a plaintiff to proceed in federal court. Vermont Agency of Natural Resources v. United States, 529 U.S. 765, 771 (2000); Northeastern Fla. Chapter, Associated Gen. Contractors of America v. City of Jacksonville, 508 U.S. 656, 664 (1993).

In addition, plaintiffs seeking injunctive relief lack standing unless they allege facts giving rise to an inference that they will suffer future discrimination by the defendant. Shotz, 256 F.3d 1081. "[A] party has standing to seek injunctive relief only if the party alleges, and ultimately proves, a real and immediate - as opposed to a merely conjectural or hypothetical - threat of future injury." Church, 30 F.3d at 1337; see also Bowen

v. First Family Fin. Servs., Inc., 233 F.3d 1331, 1340 (11th Cir. 2000).

II.

The Revised Amended Complaint (Doc. #24) (hereinafter, the Amended Complaint) sets forth the following facts, which at this stage of the proceedings are assumed to be true. Plaintiff Medical Savings Insurance Company (plaintiff or Medical Savings) is an insurance company authorized to do business as an acute care hospitalization insurer in, among other places, the State of Florida. Plaintiff's hospitalization insurance product requires a fairly significant level of self-insurance by the patient/insureds through Health Savings Accounts. Plaintiff's policies provide coverage for "reasonable and customary" hospital charges, not the commonly referenced "usual and customary" charges. Plaintiff, thus, will not pay what it considers to be unreasonable overcharges.

Medical Savings entered the acute care hospitalization insurance market in Florida between 1997 and 2000. Soon after plaintiff began actively marketing its product in early 2000, Florida sales of its policies rose generally at a substantial overall rate of increase from April 2000 through December 2002. By December 2003, however, the sales growth of its product in Florida had substantially declined. As of the filing of the Amended Complaint, plaintiff had approximately 15,000 Florida insureds

which represents a small market share. As explained below in more detail, plaintiff contends that this decline in sales growth is attributable to certain unlawful actions by the defendants.

Defendant HCA, Inc. (HCA) is a for-profit hospital system with 41 acute care hospitals in Florida. Defendant HCA Health Services of Florida, Inc. (HCA Florida) is a for-profit hospital system with 3 or more acute care hospitals in Florida.[2] HCA is a member of defendant Florida Hospital Association. HCA controls over 10,000 acute care hospital beds, or over 19% of the acute care hospital beds available in Florida statewide.

Defendant Lee Memorial Health System operates three acute care hospitals: Cape Coral Hospital, Lee Memorial Hospital,[3] and Lee Memorial Health System Health Park (Health Park). Lee Memorial Hospital is wholly owned by defendant Lee Memorial Health System. Cape Coral Hospital is owned by defendant Cape Memorial Hospital, Inc.[4] Defendant Lee Memorial Health System is a member of

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[2] Where appropriate, the Court will refer to defendants HCA, Inc. and HCA Health Services of Florida, Inc. collectively as HCA.

[3] The Court notes that Lee Memorial Hospital is not a named defendant in the Amended Complaint. Plaintiff has not listed all defendants in the caption to the Amended Complaint and, instead, has listed them in the first unnumbered paragraph to its pleading. (Doc. #24, p. 1). This list does not include Lee Memorial Hospital. Thus, although the Amended Compliant later lists Lee Memorial Hospital in a description of the defendants (Doc. #24, p. 16), the Court concludes that Lee Memorial Hospital is not named as a defendant in the Amended Complaint.

[4] Where appropriate, the Court will refer to defendants Lee Memorial Health System and Cape Memorial Hospital collectively as

defendant Florida Hospital Association and controls over 900 acute care hospital beds or almost 2.0% of the acute care hospital beds available in Florida statewide, through its three acute care hospitals. In the past two years, the Lee Memorial defendants have initiated litigation against plaintiff and its insureds.

Defendant Florida Hospital Association is a tax-exempt, non-profit entity composed, in part, of 47 hospital systems that operate 222 acute care hospitals in Florida. Defendant Florida Hospital Association Management Corporation is a wholly owned subsidiary of defendant Florida Hospital Association.[5] Defendant Florida Hospital Association, through its FHA Insurance Services, competes with plaintiff in the Florida market for acute care hospitalization insurance by itself writing, selling, or otherwise providing such insurance. Defendant Florida Hospital Association has coordinated or attempted to coordinate legal action against plaintiff and has urged its members to avoid a dispute resolution program established by the Florida legislature.

Defendants Martin Memorial Health Systems, Inc. and Martin Memorial Medical Center, Inc. are non-profit corporations that

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the Lee Memorial defendants.

[5] Where appropriate, the Court will refer to defendants Florida Hospital Association and Florida Hospital Association Management Corporation collectively as FHA.

operate two acute care hospitals in Florida.[6] The Martin defendants have a total of 236 acute care hospital beds and, thus, directly control 0.63% of the acute care hospital beds available in Florida. Defendant Martin Memorial Medical Center, Inc. has initiated litigation against some of plaintiffs' insureds.[7]

The Amended Complaint divides defendants' alleged unlawful activity into three general categories. First, defendants have conducted a group boycott against plaintiff and/or engaged in a concerted refusal to deal with plaintiff because plaintiff refused to pay what it considered to be unreasonable prices for services provided to its insureds (the group boycott and/or concerted refusal to deal allegations). Second, defendants have conspired and colluded to stabilize prices at inflated levels for acute care hospital services (the price-fixing allegations). Third, plaintiffs have monopolized the market for these same services (the monopolization allegations).

With respect to the group boycott and/or concerted refusal to deal allegations, the Amended Complaint contends plaintiff has issued approximately 500 checks to Florida acute care hospitals to pay for hospital services to plaintiff's insureds and that 370 of

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[6] Where appropriate, the Court will refer to defendants Martin Memorial Health Systems, Inc. and Martin Memorial Medical Center, Inc. collectively as the Martin defendants.

[7] In addition to the named defendants, the Amended Complaint identifies some 23 "possible co-conspirators" to this action. (Doc. #24, pp. 21-22).

these checks (nearly 75%) have been refused. The Amended Complaint asserts that these checks have provided at least a 26% profit above the Medicare reimbursement rate. According to plaintiff, the only rational explanation for these refusals is coordination among competitors and defendant FHA to achieve the unlawful goals of a group boycott. The Amended Complaint also contends that more than 25 Florida acute care hospitals have sued plaintiff or its insureds. Plaintiff contends that these suits are intended as an anticompetitive weapon and make sense only in the context of a group boycott. Finally, the Amended Complaint alleges that defendants have engaged in other anticompetitive tactics including (1) publicizing a refusal "to recognize" plaintiff's insurance policies, (2) defaming plaintiff by stating falsely to plaintiff's insureds and the general public that plaintiff will not pay a reasonable price for acute care hospital services rendered to its insureds, and (3) urging all hospitals or hospitals systems in Florida that are members of FHA not to deal with plaintiff.

With respect to the price-fixing allegations, the Amended Complaint contends that defendants have instituted and maintained a three-tier pricing structure under which (1) consumers of Medicare, Blue Cross or HMO insurance policies (the first tier), (2) patients carrying basic health insurance (the second tier), and (3) all others, including uninsureds and those who have insurance not recognized by the hospitals (the third tier) pay vastly

different amounts for the same services.[8] Defendants codify their acute care services and product charges in a document called a "chargemaster." This chargemaster includes, inter alia, the highest amounts charged in the three-tier price system. Defendants and other acute care hospitals, facilitated by defendant Florida Hospital Association, regularly discuss and exchange their chargemasters and pricing policies. Despite sharing the chargemasters among themselves, defendants and other acute care hospitals guard these documents from disclosure to their patients and from insurers. Plaintiff contends that the discussion and exchange of the chargemasters by defendants and other acute care hospitals provides the "opportunity for price collusion" and results in a "de facto agreement to stabilize prices and lessen competition." Plaintiff further contends that this collusion is readily seen by the similarity of cost-to-charge ratios in Florida among defendants and other acute care hospitals.

With respect to the monopolization allegations, the Amended Complaint contends that the defendants, along with the possible co-conspirators mentioned above, control over 60% of the statewide market for acute care hospital services and have even greater control over the submarkets. Plaintiff identifies the relevant geographic market as the State of Florida and the relevant

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[8] According to the Amended Complaint, plaintiff is in the third tier because it does not have contractual agreements with acute care service providers such as defendants.

geographic submarkets as the metropolitan areas and/or counties in which the defendant hospitals reside. The Amended Complaint asserts that defendants' acquisition of monopoly power is the result of, inter alia, the deliberate misrepresentation of and/or concealment of material facts and information concerning the cost of acute care from patients and their insurers.

The six-count Amended Complaint (Doc. #24) alleges the following causes of action based on the actions set forth above: (1) violation of § 1 of the Sherman Act (group boycott and/or concerted refusal to deal); (2) violation of § 1 of the Sherman Act (price-fixing); (3) violation of § 2 of the Sherman Act (monopolization); (4) violation of the Florida Deceptive and Unfair Trade Practices Act; (5) violation of Florida's Antitrust Act (price fixing and group boycott and/or concerted refusal to deal); and (6) violation of Florida's Antitrust Act (monopolization). Plaintiff seeks both damages and injunctive relief for these alleged violations. Defendants have moved to dismiss all counts of the Amended Complaint.[9]

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[9] The Florida Antitrust Act, Fla. Stat. § 542.15 et seq., was patterned after the Sherman Act, and was intended to complement and follow the federal court interpretations of the Sherman Act. Fla. Stat. § 542.32; Auton v. Dade City, Fla., 783 F.2d 1009, 1010 n.1 (11th Cir. 1986). Accordingly, the Court's ruling on Counts I, II, and III, based on the Sherman Act, will apply as well to Counts V and VI, which assert parallel corresponding charges under the Florida Antitrust Act.

III.

The Lee Memorial defendants contend that the Amended Complaint must be dismissed as to them because the state-action immunity doctrine immunizes their allegedly anticompetitive conduct. (Doc. #36, pp. 14-19).

As the Eleventh Circuit has recognized, the "state-action immunity doctrine is rooted in the Supreme Court's decision in Parker v. Brown, 317 U.S. 341 (1943)." Bolt v. Halifax Hosp. Med. Center, 980 F.2d 1381, 1385 (11th Cir. 1993). In Parker, the Supreme Court held that the Sherman Act does not apply to "anticompetitive restraints imposed by the States 'as an act of government.'" City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 370 (1991), quoting Parker, 317 U.S. at 352. The state-action immunity doctrine, however, does not apply directly to a state's political subdivisions. Federal Trade Comm'n v. Hospital Bd. of Dirs. of Lee County, 38 F.3d 1184, 1187 (11th Cir. 1994), citing City of Layfayette, La. v. Louisiana Power & Light Co., 435 U.S. 389, 412 (1978). To obtain state-action immunity, an entity, such as the Lee Memorial defendants, must show the following: "(1) that it is a political subdivision of the state; (2) that, through statutes, the state generally authorizes the political subdivision to perform the challenged action; and (3) that, through statutes, the state has clearly articulated a state policy authorizing anticompetitive conduct." Federal Trade Comm'n, 38 F.3d at 1187-

88, citing Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985).

A.

As an initial matter, plaintiff contends that the Lee Memorial defendants have removed themselves from protection under the state-action immunity doctrine because they have acted as a commercial participant in the acute-care hospital services market. (Doc. #52, pp. 18-19). In support of its argument, plaintiff relies on statements made by the Supreme Court in City of Columbia v. Omni Outdoor Adver., 499 U.S. 365, 379 (1991). For example, in Omni, the Supreme Court stated that state-action immunity "does not necessarily obtain where the State acts not in a regulatory capacity but as a commercial participant in a given market." Id. at 374-75. In addition, the Court stated that "with the possible market participant exception, any action that qualifies as state action is 'ipso facto . . . exempt from the operation of the antitrust laws." Id. at 379. Thus, the Supreme Court's statements in Omni acknowledge the possibility of a market participant exception, but do not expressly recognize the existence of such an exception. See Paragould Cablevision, Inc. v. City of Paragould, 930 F.2d 1310, 1312-13 (8th Cir.), cert. denied, 502 U.S. 963 (1991) (stating that Omni's market participant exception is merely suggestion and not rule of law).

Subsequent to the Supreme Court's decision in Omni, the Eleventh Circuit stated that the state-action immunity doctrine "includes protection for states when they engage in business" and declined to address the Supreme Court's "invitation to employ a 'market participant' exception" to the doctrine. Crosby v. Hospital Auth. of Valdosta & Lowndes County, 93 F.3d 1515, 1525-26 n.14 (11th Cir. 1996). This Court is bound by the Eleventh Circuit's decision. As such, the Court rejects plaintiff's market participant argument.

B.

Plaintiff contends that the Lee Memorial defendants are not entitled to state-action immunity because the State of Florida has not clearly articulated a state policy authorizing the anticompetitive conduct at issue, i.e., the Lee Memorial defendants do not satisfy the third requirement listed above.[10] (Doc. #52, p. 19). The Supreme Court and the Eleventh Circuit "have rejected the concept that a clear articulation requires the state to state

[10] Plaintiff does not challenge the first two requirements listed above. The Court agrees that these requirements are met. First, the Eleventh Circuit specifically has held that the Lee Memorial defendants are a political subdivision of the State of Florida. Federal Trade Comm'n, 38 F.3d at 1188. Second, the Court agrees with the Lee Memorial defendants that through its statutes, the State of Florida generally has authorized the political subdivision to perform the challenged action. E.g., 1963 Fla. Spec. Laws Ch. 63-1552; Ch. 2000-439, §§ 10(2), 10(4), 11, Laws of Florida (authorizing the Lee Memorial defendants to sue and be sued, make contracts of all kind, collect payment from patients for services rendered, and bill and receive payment from insurance companies).

explicitly that it expects anticompetitive conduct to result from legislation." Federal Trade Comm'n, 38 F.3d at 1188, citing Town of Hallie, 471 U.S. at 41-43 and Askew v. DCH Reg. Health Care Auth., 995 F.2d 1033, 1040-41 (11th Cir. 1993). Instead, the clear articulation test "can be satisfied by showing that the legislation, pursuant to which the municipality is acting, contemplates or foresees anticompetitive conduct as a result." Bolt, 980 F.2d at 1386.

Consistent with this standard, the Eleventh Circuit has immunized conduct in the healthcare industry where the anticompetitive conduct was within the range of reasonable possibilities contemplated by the legislature. In Bolt, the Court held that a statute authorizing a hospital to conduct peer review of physicians' appointments to hospitals rendered it foreseeable that the hospital would engage in an anticompetitive boycott of certain physicians. 980 F.3d at 1386-87. Similarly, in Federal Trade Commission, the Court held that a statute authorizing a hospital board to acquire other hospitals in an effort to provide low-cost healthcare primarily to indigent citizens in the county made it foreseeable that the hospital would engage in anticompetitive conduct and that such conduct would result in the anticompetitive effect of the hospital acquiring one of only three private hospitals in the county. 38 F.3d at 1192.

As explained above, the anticompetitive conduct of the Lee Memorial defendants that plaintiff challenges in this action is three-fold: (1) group boycott/concerted refusal to deal; (2) price fixing; and (3) monopolization. The Lee Memorial defendants contend that the State of Florida has clearly articulated a state policy authorizing their conduct by the broad operating powers conferred on Lee Memorial by its authorizing legislation. For example, Lee Memorial is authorized "to sue and be sued," Ch. 2000-439, Laws of Fla. § 10(2), to "make . . . contracts of all kinds," id. § 10(4), to "collect from patients . . . such charges as the system board may, in its sole discretion, from time to time establish," id. § 11, to "bill and receive payment from insurance companies . . . for treatment and care of patients or for other purposes," id., and to "take any other action consistent with the efficient and effective operation of the public health care system provided for by this act, consistent with the constitution and laws of Florida," id. § 10(9). Thus, according to the Lee Memorial defendants, this legislation allows them to determine with whom and on what terms Lee Memorial will do business. (Doc. #36, p. 17). Plaintiff responds, without explanation, that this case is not like prior Eleventh Circuit precedent and that "Parker immunity simply does not apply." (Doc. #52, p. 19).

After reviewing the statutory provisions relied on by the Lee Memorial defendants, the Court concludes that it is foreseeable

that the Lee Memorial defendants would engage in the first and third categories of conduct described above, but it is not foreseeable as to the second category. Therefore, the Court concludes that the Lee Memorial defendants are entitled to immunity as to the group boycott/concerted refusal to deal allegations in Counts I and V and the monopolization allegations in Counts III and VI. Thus, Counts I, III, and VI are due to be dismissed in their entirety as to the Lee Memorial defendants. In addition, Count V is due to be dismissed as to the Lee Memorial defendants to the extent that it alleges a violation of Florida's Antitrust Act based on a group boycott and/or concerted refusal to deal. The Lee Memorial defendants' motion to dismiss based on the state-action immunity doctrine is otherwise denied.

IV.

Defendants contend that plaintiff's antitrust claims (Counts I, II, III, V, and VI) must be dismissed because plaintiff lacks antitrust standing. As explained above, the Court requested, and received, supplemental memoranda from all parties addressing this issue.[11] (Docs. #82-86).

A private plaintiff seeking damages under the antitrust laws must establish standing to sue. Antitrust standing differs from, and requires more than, the "injury in fact" and the "case or

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[11] Defendant FHA adopted the arguments made by the other defendants and did not set forth any additional argument on this issue. (Doc. #85).

controversy" requirements under Article III of the United States Constitution. Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1448 (11th Cir. 1991). The Eleventh Circuit uses a two-pronged approach to determine whether a plaintiff has standing to bring an antitrust lawsuit. Id. at 1449.

First, plaintiff must establish that it has suffered antitrust injury. Municipal Utils. Bd. of Albertville v. Alabama Power Co., 934 F.2d 1493, 1499 (11th Cir. 1991). To have an antitrust injury, a plaintiff "must prove more than injury causally linked to an illegal presence in the market [i.e., but for causation]. Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977). Antitrust injury "should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be the type of loss that the claimed violations would be likely to cause." Todorov, 921 F.2d at 1449, quoting Brunswick Corp., 429 U.S. at 489 (internal quotation and alteration omitted).

Second, plaintiff must establish that it "is an efficient enforcer of the antitrust laws." Florida Seed Co., Inc. v. Monsanto Co., 105 F.3d 1372, 1374 (11th Cir. 1997). To make this determination, the Eleventh Circuit uses the "target area test,"

which requires that an antitrust plaintiff "prove that [the plaintiff] is within the sector of the economy endangered by a breakdown of competitive conditions in a particular industry and that [the plaintiff] is the 'target against which anticompetitive activity is directed.'" National Independent Theatre Exhibitors, Inc. v. Buena Vista Dist. Co., 748 F.2d 602, 608 (11th Cir. 1984). "Basically, a plaintiff must show that it is a customer or competitor in the relevant antitrust market." Florida Seed, 105 F.3d at 489.

To determine whether plaintiff has antitrust standing, under the two-pronged standard outlined above, the Court must examine the allegations in the Amended Complaint. Todorov, 921 F.2d at 1448. Specifically, the Court must "evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them." Associated Gen. Contractors of Ca., Inc. v. California State Council of Carpenters, 459 U.S. 519, 535 (1983).

Taking these elements in a slightly different order, the Amended Complaint summarizes defendants' alleged wrongdoing as follows:

> The [defendants'] illicit activity includes: (i) conspiring and colluding to stabilize prices at an exorbitantly supra-competitive (*i.e.*, artificially high or inflated), discriminatory, irrational and inequitable price structure; (ii) conducting a group boycott against [plaintiff] or engaging in a concerted refusal to deal with [plaintiff] for its refusal to pay more than a reasonable value for goods and services rendered; and (iii) monopolizing the market for acute care hospitalization services.

(Doc.#24, ¶ 2).

The Amended Complaint summarizes the harm caused by this wrongdoing as follows:

> The deleterious and anticompetitive effects of the illegal conduct alleged herein include: (1) extraordinarily high and unjustifiably disproportionate charges levied against acute care hospital patients; (2) frequent rate increases of health care insurers seeking to pass on to the patient/insured consumers the expenses of unconscionable hospital price gouging; (3) preclusion of efforts by insurers seeking to effectuate competitive and reasonable pricing by acute care hospitals in Florida; and (4) effective denial to Florida consumers and businesses in Florida of the savings, utility, and flexibility of the new Heath Savings Accounts that Congress established as national law in late 2003.

(Doc. #24, ¶ 3).

With respect to the relationship between the alleged wrongdoing and the alleged harm, the Court notes that there is a certain disconnect between the two. Specifically, plaintiff does not assert that it suffered any of the alleged harm as a result of the alleged wrongdoing. First, by its own admission, plaintiff has not paid high and inflated hospital prices. (Doc. #82, p. 9). Instead, any such prices have been paid by the hospital's patients/plaintiff's insureds. Second, plaintiff does not allege that it has raised its rates seeking to pass on to its insureds the expenses of the hospital's prices. In fact, plaintiff has made clear that it does not pass on exorbitant hospital pricing to its insureds. Instead, plaintiff refuses to pay such pricing and, thus, its insureds are responsible for paying the hospitals

directly. Third, the harm suffered as a result of plaintiff's inability to change the prices that acute care hospitals in Florida charge their patients is felt by the patients and not by plaintiff. Finally, plaintiff has not been denied the savings, utility, and flexibility of new Heath Savings Accounts.

Viewing these facts in the light most favorable to plaintiff under the standard outlined above, the Court concludes that plaintiff lacks antitrust standing to pursue its antitrust claims.[12] With respect to the first prong of the test, the Court concludes that although the harm alleged by plaintiff may "reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation," plaintiff does not, and indeed cannot, allege that it suffered any of that harm. As a result, the Court also concludes that plaintiff cannot meet the second prong of the test. As an initial matter, plaintiff is neither a customer nor competitor of defendants. Further, assuming that plaintiff is within the relevant sector of the economy in the relevant industry (i.e., the provision of acute care hospitalization services), the Court concludes that plaintiff is not the target against which the alleged wrongdoing is directed.

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[12] The cases relied on by plaintiff in support of its contention that health insurers have antitrust standing to challenge the acts of healthcare providers are distinguishable from the present matter. In those cases, the insurers either actually purchased the relevant product at issue or actually paid the alleged overcharge. Neither is the case in the present matter.

As explained above, the targets for the purposes of this analysis are the patients themselves who arguably suffer the harm outlined above, i.e., the inflated hospital charges, the frequent insurance rate increases, and the denial of the benefits of Health Savings Accounts.[13] Thus, the Court concludes that plaintiff is not an efficient enforcer of the antitrust laws for purposes of the present matter. For these reasons, the Court concludes that Counts I, II, III, V, and VI of the Amended Complaint must be dismissed.[14]

V.

Defendants contend that Count IV of the Amended Complaint must be dismissed because plaintiff lacks standing to bring their claim under the Florida Deceptive and Unfair Trade Practices Act (FDUTPA or the Act) (Doc. #35, pp. 19-20), which declares unlawful "[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any

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[13] Plaintiff argues, in a footnote, that even if it lacks standing to pursue its damages claims under the antitrust laws, it still has standing to pursue injunctive relief. (Doc. #82, p. 2 n.3). The Court disagrees. The Eleventh Circuit has stated that to have standing to seek an injunction under the antitrust laws, a plaintiff must allege "threatened injury that would constitute antitrust injury if inflicted upon the plaintiff and the defendant's causal responsibility for such threatened injury." Todorov, 921 F.2d at 1452. The Amended Complaint does not allege either threatened injury that would constitute antitrust injury or defendant's causal responsibility for such threatened injury.

[14] Because of the Court's conclusion that plaintiff lacks antitrust standing to pursue its antitrust claims, the Court will not consider the defendants' remaining arguments regarding the pleading deficiencies of plaintiff's antitrust claims.

trade or commerce."[15] Fla. Stat. § 501.204(1). The Court agrees. As this Court has recognized, only "consumers" have private rights of action under FDUTPA. Shibata v. Lim, 133 F. Supp. 2d 1311, 1317 (M.D. Fla. 2000), citing Fla. Stat. § 501.202. Florida courts have interpreted "consumer" as requiring a person or entity to be a "purchaser" of goods or services. Id., citing N.G.L. Travel Assocs. v. Celebrity Cruises, Inc., 764 So.2d 672 (Fla. 3d DCA 2000); Warren Tech., Inc. v. Hines Interests Ltd. P'ship, 733 So.2d 1146 (Fla. 3d DCA 1999); Packaging Corp. Int'l v. Travenol Labs., 566 F. Supp. 1480 (S.D. Fla. 1983) (internal parentheticals omitted). Plaintiff does not allege in the Amended Complaint that it is a purchaser of any of defendants' goods or services. Thus, the Court concludes that plaintiff lacks standing to bring its FDUTPA claim, and that Count IV is due to be dismissed.[16]

Accordingly, it is now

ORDERED:

1. Defendant Martin Memorial's Motion To Dismiss (Doc. #32) is **GRANTED IN PART** as follows and is otherwise **DENIED.**

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[15] The Court notes that it continues to be true that "there is a surprising dearth of case law illuminating the scope of the Florida trade law." N.G. Travel Assoc. v. Celebrity Cruises, Inc., 764 So.2d 672, 674 n.3 (Fla. 3d DCA 2000), quoting Packaging Corp. Int'l v. Travenol Lab., Inc., 556 F. Supp. 1480 (S.D. Fla. 1983).

[16] Because of the Court's conclusion that plaintiff lacks standing to bring its FDUTPA claim, the Court will not consider the defendants' remaining arguments regarding this claim.

2. HCA Defendants' Motion To Dismiss (Doc. #34) is **GRANTED IN PART** as follows and is otherwise **DENIED.**

3. Defendants Lee Memorial Health System and Cape Memorial Hospital, Inc.'s Motion To Dismiss (Doc. #36) is **GRANTED IN PART** as follows and is otherwise **DENIED.**

4. Florida Hospital Association's and Florida Hospital Association Management Corporation's Motion To Dismiss (Doc. #33) is **GRANTED IN PART** as follows and is otherwise **DENIED.**

5. Counts I, III, and VI of the Revised Amended Complaint (Doc. #24) are **dismissed with prejudice** as to defendants Lee Memorial Health System and Cape Memorial Hospital under the state-action immunity doctrine. In addition, Count V of the Revised Amended Complaint (Doc. #24) is **dismissed with prejudice** as to defendants Lee Memorial Health System and Cape Memorial Hospital under the state-action immunity doctrine to the extent that Count V alleges a violation of Florida's Antitrust Act based on a group boycott and/or concerted refusal to deal.

6. Counts I, II, III, V, and VI of the Revised Amended Complaint (Doc. #24) are **dismissed without prejudice** as to all defendants because plaintiffs lack antitrust standing to pursue its antitrust claims.

7. Count IV of the Revised Amended Complaint (Doc. #24) is **dismissed without prejudice** as to all defendants because plaintiff

lacks standing to pursue claims under the Florida Deceptive and Unfair Trade Practices Act.

8. The Clerk shall terminate any pending motions or deadlines, and close the file.

DONE AND ORDERED at Fort Myers, Florida, this 25th day of October, 2004.

JOHN E. STEELE
UNITED STATES DISTRICT JUDGE

Copies:
Hon. Douglas N. Frazier
Counsel of record