

GPOs May Spurn Anti-Competitive Contracts After *Masimo v. Tyco* – MDMA

Masimo believes its \$420 mil. legal victory over Tyco will spur large manufacturers and GPOs to gradually alter their business practices, resulting in long-term cost savings for hospitals.

In a March 21 decision, a Los Angeles federal court jury favored the privately held company, which claimed that Tyco/Nellcor's hospital contracts unfairly restricted Masimo's pulse oximeter sales.

According to a court document, the jury decided that Nellcor achieved "unreasonable restraint of trade" through an "exclusive dealing arrangement" with hospitals. Judge Mariana Pfaelzer presided over the trial, which began Feb. 22 ("The Gray Sheet" Feb. 28, 2005, p. 9).

The alleged anticompetitive practices included market share-based compliance pricing contracts, sole-source contracts, product bundling and co-marketing agreements with original equipment manufacturers (OEMs), the document notes.

In his closing argument, Masimo attorney Stephen Susman suggested that the case's outcome will have far-reaching implications for the industry.

"Will patients get the best care at a lower cost? Will doctors and nurses have the right to choose? Will dominant and entrenched manufacturers be allowed to resort to practices that unnecessarily impede fair competition, or will they have to compete on the basis of price and innovation with new entrants?" he queried.

Nellcor counsel Stephen Neal emphasized that the firm had earned its leadership spot in the pulse oximetry market through legitimate competition.

Further, the Tyco unit is free to respond to potential new competitors "as aggressively as [desired] as long as it's pro-competitive and the end result...is better" for hospital consumers, Neal said.

Susman, on the other hand, maintained that "the question is not what is good for hospitals. The question is what is good for competition."

The attorney, a partner with Susman Godfrey, argued that many of Nellcor's contracting practices unfairly disadvantaged competitors. He deemed it irrelevant whether Masimo uses similar strategies in its own

marketing program, because "the law prohibits a monopolist from doing certain things that a company without market power can lawfully and freely do."

Susman similarly dismissed Nellcor's assertion that hospitals would not voluntarily enter into a restrictive contract if the arrangement were unfavorable to them.

Nellcor says it will challenge the March 21 decision in post-trial motions, including an appeal, if necessary.

"Tyco dominated so many areas of the healthcare industry for so long that it had conditioned GPOs and hospitals into believing that to get better prices, they had to offer greater restrictions on their own freedom of choice," Susman contended.

Neal characterized Masimo's struggle to compete as the nature of business. "In our competitive system," a company is "guaranteed no particular level of success," he noted.

Further, Neal suggested that Masimo had neglected to capitalize on viable marketing opportunities. For instance, when Consorta extended an option for manufacturers to bid on sole-sourcing privileges, "Masimo didn't bother submitting a bid," Neal said.

Susman denied that such opportunities existed prior to Masimo's decision to litigate. "The filing of this lawsuit caused a dramatic change in the [competitive] landscape," he stated. "It caused a change in what [GPOs] were willing to accept in the way of contractual restrictions."

Since filing its complaint, Masimo has negotiated contracts with Premier and Novation, which has effected a "dramatic" reduction in prices, Susman affirmed. "That's what competition does."

In a March 24 release, the Medical Device Manufacturers Association called the decision "a critical step in addressing the anticompetitive and other questionable practices by certain dominant manufacturers and hospital GPOs." Irvine, Calif.-based Masimo is an MDMA member.

MDMA Executive Director Mark Leahey proposed that the verdict will provide GPOs and their member hospitals with the "legal cover to refuse onerous contracts from dominant suppliers." GPOs previously have been accused of enabling anti-competitive contracts in exchange for substantial administrative fees, he observed.

Masimo won a patent infringement suit against Tyco in March 2004 ("The Gray Sheet" April 5, 2004, p. 26). In that case, an L.A. federal jury ruled that Nellcor willfully infringed four Masimo pulse oximetry patents relating to "motion-tolerant" software. Masimo was awarded roughly \$135 mil. in damages.

Nellcor has since petitioned for judgment as a matter of law on several issues, and the motions are currently under the court's consideration.

Nellcor, which controls more than 80% of the U.S. pulse oximetry market, says it will challenge the March 21 decision in post-trial motions and appeal the ruling if necessary. The jury awarded Masimo \$140 mil. – trebled to \$420 mil. under antitrust law – plus attorneys' fees.

In a March 22 release, the Tyco unit claims its practices have always been in full compliance with federal and state antitrust laws.

"Hospitals seek agreements with Nellcor because of the value and breadth of our product line, the superior

performance of our products and our exceptional attention to customer service," President David Sell stated. "We are confident that we will ultimately prevail when the legal process is complete."

Nellcor maintains that its business will not be significantly disrupted. "There will be absolutely no impact on Nellcor's ongoing ability to provide products and services to its customers as a result of this verdict," Sell said.

Masimo's triumph over a large manufacturer in the courtroom represents a relative rarity in antitrust litigation between device companies.

Safety needle manufacturer Retractable Technologies filed similar complaints against competitors Tyco and BD and GPOs Premier and Novation, alleging conspiracy to prevent sales of its *VanishPoint* retractable syringes.

By July 2004, however, RTI had settled with all four parties out of court, dismissing litigation in exchange for access to contracts and financial remuneration. ♦ ♦