

SUPERIOR COURT
CIVIL ACTION
DOCKET NO.

V.

COMPLAINT
(Request for Permanent
Injunction)

I. INTRODUCTION

1. This is an antitrust enforcement action brought by the Attorney General of the State of Maine pursuant to the merger provisions of Maine's antitrust laws, 10 M.R.S.A. §§ 1102-A & 1104 (Supp. 1990), seeking injunctive relief to prevent the occurrence of the adverse affects on competition which would result from the merger of Defendants.

II. PARTIES

2. Plaintiff, State of Maine, sues in its sovereign capacity. The State of Maine, through the Department of the Attorney General, is charged by statute with the enforcement of

antitrust laws, including the merger provisions found in 10 M.R.S.A. § 1102-A (Supp. 1990).

3. Defendant Cardiovascular and Thoracic Associates, P.A. is a Maine professional corporation with offices at 7 Bramhall Street, Portland, Cumberland County, Maine. Cardiovascular and Thoracic Associates, P.A. has two shareholders, Dr. Christopher Lutes and Dr. Richard White, both of whom are cardio-thoracic surgeons. Defendant Cardiovascular and Thoracic Associates, P.A. is in the business of providing cardiac and thoracic surgery services to patients at Maine Medical Center in Portland, Cumberland County, Maine.

4. Morton and Kramer, P.A. is a Maine professional corporation with offices at 321 Brackett Street, Portland, Cumberland County, Maine. Morton and Kramer, P.A. has two shareholders, Dr. Jeremy Morton and Dr. Robert Kramer, both of who are cardio-thoracic surgeons. The business of Morton and Kramer, P.A. is the provision of cardiac and thoracic surgery to patients at Maine Medical Center.

5. Heart and Lung Surgical Associates, P.A. is a Maine professional corporation with offices at 7 Bramhall Street, Portland, Cumberland County, Maine. Heart and Lung Surgical Associates has four shareholders, Dr. Christopher Lutes, Dr. Richard White, Dr. Jeremy Morton and Dr. Robert Kramer. The business of Heart and Lung Surgical Associates, P.A. is the provision of cardiac and thoracic surgery to patients at Maine Medical Center.

III. JURISDICTION AND VENUE

6. This Court has jurisdiction of this action pursuant to 4 M.R.S.A. § 105 (Supp. 1991), 10 M.R.S.A. § 1104 (Supp. 1991), and 14 M.R.S.A. § 6051(13) (1980).

7. Venue is proper in Kennebec County pursuant to 14 M.R.S.A. § 501 (1980).

IV. THE PROPOSED ACQUISITION

8. In late 1990, Defendant Cardiovascular and Thoracic Associates, P.A., and Defendant Morton and Kramer, P.A. agreed to merge into one corporate entity, Heart and Lung Surgical Associates, P.A. The new corporation would contain four of the nine cardiac surgeons practicing in Portland. These four surgeons perform over 60% of the cardiac surgery performed at Maine Medical Center.

9. The proposed merger of Defendants would substantially lessen competition in the market for the provision of cardiac surgery in southern Maine.

V. ANALYSIS OF ACQUISITIONS AND MERGERS

10. Pursuant to 10 M.R.S.A. § 1102-A, acquisitions and mergers which "may ... substantially ... lessen competition" or which will "tend to create a monopoly" in any line of commerce and in any section of the State are illegal. Pursuant to 10 M.R.S.A. § 1104(2), the Attorney General is empowered to seek an injunction to bar any merger or acquisition which violates § 1102-A.

11. In attempting to determine whether an acquisition may substantially tend to lessen competition, it is first necessary to identify all distinct lines of commerce or product markets which are affected by the acquisition. After identifying affected product markets, the geographical area or geographic market in which the particular product is purchased or sold must be identified. Once the product and geographical markets are defined, market shares may be calculated for the acquiring firm, the acquired firm and other major firms in the market.

12. The Herfindahl-Hirschman Index, or HHI as it is commonly known, is a well-recognized and accepted measure of market concentration. The HHI is utilized in the Merger Guidelines of the United States Department of Justice, ("DOJ Guidelines") and the Horizontal Merger Guidelines of the National Association of Attorneys General "NAAG Guidelines". The HHI is computed by squaring the market share percentage of each firm competing in the market and then totaling the resulting numbers. The reason for squaring the market shares is to reflect the increased market power of firms holding larger market shares. For example, a firm with a four percent market share will result in a total of 16 points (4 squared) in the HHI while a firm holding twenty-two percent of the market will add a total of 484 points (22 squared) to the index. As the concentration of market power within the industry increases, the total HHI increases. Pursuant to the DOJ and

the NAAG Guidelines, any industry is considered to be unconcentrated if the postmerger HHI is less than 1000 points; any industry is considered to be moderately concentrated when the postmerger HHI is between 1000 and 1800 points; and any industry is considered to be highly concentrated when the HHI exceeds 1800 points. The HHI also permits a measurement of the addition to the market concentration by an acquisition. For example, in a moderately concentrated market (between 1000 and 1800 points), an increase of over 100 points is thought to significantly increase concentration; and in a highly concentrated market (over 1800 points), an increase of over 50 points is thought to significantly increase concentration.

VI. NATURE OF CARDIAC SURGERY PRACTICE IN MAINE

A. Product Market

13. Patients with serious problems involving their coronary arteries and valves which cannot be treated medically by cardiologists are referred to cardio-thoracic surgeons for operative treatment. Cardio-thoracic surgeons, among other procedures, replace damaged valves with artificial ones and perform by-passes of damaged coronary arteries. This surgery is generally known as cardiac surgery.

14. No medical alternative currently exists to cardiac surgery.

15. The relevant product market in which to assess the effect of the merger of Defendants is the provision of cardiac surgery.

B. Geographic Market

16. Patients generally seek medical and hospital care close to their homes so as to permit easier visitations by family and friends.

17. Only two Maine hospitals have cardiac surgery programs: Maine Medical Center (MMC) in Portland and Eastern Maine Medical Center (EMMC) in Bangor.

18. Generally, residents of the northern part of the State obtain cardiac surgery at EMMC while patients in the southern part of the State obtain cardiac surgery from Maine Medical Center. Of the 850 Maine residents living south of a line running east to west from Rockland to Waterville to Rangeley who had cardiac surgery in 1989, 812 or 95.5% obtained their surgical care at Maine Medical Center in Portland.

19. The relevant geographic market for the provision of cardiac surgery is southern Maine, defined as that portion of the State of Maine south of a line running east to west from Rockland to Waterville to Rangeley.

C. Barriers to Entry

20. High barriers exist for the entry of new cardiac surgery programs in Maine. Hospitals seeking to begin a cardiac surgery program must obtain a Certificate of Need from the Department of Human Services of the State of Maine. The granting of a Certificate of Need for a new cardiac surgery program in Maine is extremely unlikely because the programs at

Maine Medical Center and Eastern Maine Medical Center have the capacity to serve the State. Moreover, even if such a program were approved, the time period from initial planning through the approval process and construction would take between two and two-and-one-half years.

21. High barriers exist for the entry of new physician practices in cardiac surgery at Maine Medical Center. For a number of reasons, cardiac surgeons seeking to move to Portland are likely to do so by joining an established practice rather than setting up a separate practice. Joining an existing practice provides a new physician with a guaranteed income, a source of referrals for surgery and coverage for weekends, nights and vacations. A new surgeon establishing a practice on his own in Portland would neither have a guaranteed income, a ready source of referrals or an arrangement on coverage.

22. At present a greater demand for cardiac surgery exists at Maine Medical Center than there are operating room slots. Consequently, even if a new physician could obtain referrals, he would not be assured of operating room time to perform those surgeries.

VII. CAUSE OF ACTION

23. Paragraphs 1 through 21 are realleged and incorporated into this Cause of Action.

24. In 1989, a total of 850 cardiac surgery cases were performed on residents in the southern Maine market.

Cardiovascular and Thoracic Associates, P.A. performed 254 procedures or 29.9%. Morton and Kramer, P.A. performed 260 procedures or 30.6%.

25. The market for the provision of cardiac surgery in southern Maine is highly concentrated. The post-merger HHI for this market is more than 4,000 which represents an increase of more than 1,800 points over the pre-merger HHI.

26. The merger of Defendants would substantially lessen competition in the market for provision of cardiac surgery in southern Maine. Further, the merger would permit the consolidated corporation to exercise its market power by increasing prices and by resisting efforts of managed care providers to negotiate discounted fees with cardio-thoracic surgeons.

27. The merger of Defendants, because of its effect on the market for the provision of cardiac surgery in southern Maine, constitutes a violation of 10 M.R.S.A. § 1102-A.

WHEREFORE, the State of Maine requests that this Court:

1. Find that the merger may substantially lessen competition or tend to create a monopoly in the market for the provision of cardiac surgery in southern Maine and violates 10 M.R.S.A. § 1102-A.

2. Permanently enjoin the merger of Defendant Cardiovascular and Thoracic Associates, P.A. and Defendant Morton and Kramer, P.A. into Defendant Heart and Lung Surgical Associates, P.A. unless the merger is subjected to conditions

to protect the public interest.

3. Order such further relief as the Court deems just and proper.

MICHAEL E. CARPENTER
Attorney General

Dated:

STEPHEN L. WESSLER
Deputy Attorney General
Chief, Consumer & Antitrust
Division
State House Station 6
Augusta, Maine 04333
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SUPERIOR COURT
CIVIL ACTION
DOCKET NO. C ✓ 9

Plaintiff,

V.

CONSENT DECREE OF
CARDIOVASCULAR AND THORACIC
ASSOCIATES, P.A.;
MORTON & KRAMER, P.A.; and
HEART & LUNG SURGICAL
ASSOCIATES, P.A.

Defendants.

I. JURISDICTION

This Court has jurisdiction over Plaintiff and Defendants and the subject matter of this action. The Complaint states a claim for relief under 10 M.R.S.A. § 1104 (Supp. 1990).

II. INJUNCTIONS

Defendants are hereby permanently enjoined pursuant to 10 M.R.S.A. § 1104 from merging with each other unless subsequent to the completion of the merger Defendants:

1. Accept assignment under the Medicare program and not bill any person receiving reimbursement under the Medicare program for services for any excess in Defendants' charges over the full amount of Medicare reimbursement and other insurance amounts payable on behalf of such persons, except for the amount of any co-insurance or deductible authorized under the Medicare program.

2. Enter into and remain a party to the agreement with the participating professionals then being used by Blue Cross and Blue Shield of Maine for cardiac and thoracic surgeons generally in the State of Maine but in no event bill any person receiving reimbursement under Blue Cross and Blue Shield of Maine for services for any excess in Defendants' charges over the full amount of Blue Cross and Blue Shield of Maine reimbursement and other insurance amounts payable on behalf of such persons, except for the amount of any co-insurance or deductible authorized by Blue Cross and Blue Shield of Maine; provided that the method used by Blue Cross and Blue Shield of Maine to determine the rate and amount of reimbursement to Defendants is no less favorable to Defendants than the method used by Blue Cross and Blue Shield of Maine to determine the

rate and amount of reimbursement generally to other cardiac and thoracic surgeons in the State of Maine.

3. Participate with a minimum of three managed care providers (including health maintenance organizations or preferred provider organizations), or a lesser number if there are fewer than three such providers, actually doing business in the Southern Maine area (that portion of the State of Maine south of a line running east to west from Rockland to Waterville to Rangeley) on terms (including discounts from regularly charged fees and withholds) no less favorable to the managed care provider than the managed care provider generally applies to cardiac surgeons or, if the managed care provider does not contract generally with cardiac surgeons, to general surgeons; provided that the Defendants shall not be required to participate with any managed care provider which the Department of the Attorney General or this Court concludes, based upon information presented by the Defendants, (a) is not financially sound, (b) has practices or terms which would diminish the quality of patient care, (c) has policies, practices or terms which conflict with the ethical obligations of physicians, (d) has management, personnel or policies which jeopardize either quality of patient care or financial soundness, or (e) has terms which shift liability for the provider's own negligence or other misconduct to the physicians.

✓ 4. Defendants shall not solicit any third party payer or any hospital to enter into an exclusive contract for the provision of cardiac or thoracic surgical services.

5. Adopt as its fees for each procedure, effective on the date the merger is completed, fees no higher than the average of the fees charged by the two Defendants separately on the day prior to the completion of the merger or association ("base fees").

6. Limit any increase in Defendants' base fees as follows:

a. Defendants shall not increase the base fees for a period of one year after the date on which the merger is completed;

b. Defendants shall limit any increase in the base fees for a four year period beginning on the expiration of one year after the completion of the merger so that the fees do not exceed the base fees multiplied by the implicit price deflator for gross national product (published in Survey of Current Business by the Bureau of Economic Analysis, U.S. Department of Commerce) ("index") for the quarter preceding the increase and divided by the index for the quarter preceding that in which the merger was completed.

7. Maintain one fee schedule applicable to self-pay patients and patients insured by commercial insurers, managed health care providers and Blue Shield of Maine; so long as nothing in this paragraph shall prohibit Defendants from

providing discounts from this schedule to self-pay patients, commercial insurers, managed health care providers of Blue Shield of Maine.

8. Provide notice to the Department of the Attorney General at least 30 days prior to any fee increase and at least 60 days prior to any merger with any other cardiovascular or thoracic surgery practice.

9. Provide the Department of the Attorney General upon seven days written request, any documents maintained by or in possession of Defendants, but not including clinical or other confidential information relating to specific patients; provided that any such documents requested by the Attorney General shall be treated as investigative records pursuant to 5 M.R.S.A. § 200-D.

III. TIME PERIOD

This Consent Decree shall terminate seven years after the date it is entered by the Superior Court.

IV. PUBLIC INTEREST

Entry of this Consent Decree is found by this Court to be in the public interest.

V. RETENTION OF JURISDICTION

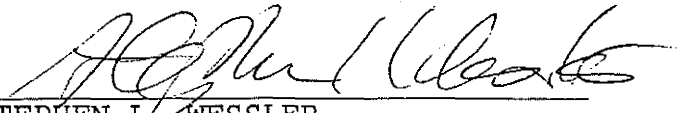
Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Consent Decree to apply to this Court at any time for such further orders or directions as may be necessary or appropriate for the construction or

carrying out of the Consent Decree, for the modification of or termination of any of the provisions hereof, and for enforcement of compliance herewith.

CONSENTED TO ON BEHALF OF THE
STATE OF MAINE BY MICHAEL E.
CARPENTER, ATTORNEY GENERAL.


Dated:

September 1, 1992


STEPHEN L. WESSLER
Deputy Attorney General
Chief, Consumer & Antitrust Division
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(207) 626-8800


CONSENTED TO ON BEHALF OF DEFENDANT
CARDIOVASCULAR AND THORACIC
ASSOCIATES, P.A. BY:

Dated: *AUGUST 31, 1992*


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CONSENTED TO ON BEHALF OF DEFENDANT
MORTON & KRAMER, P.A. BY:

Dated: *August 31, 1992*


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Portland, Maine 04101
(207) 773-6411

CONSENTED TO ON BEHALF OF DEFENDANT
HEART & LUNG SURGICAL ASSOCIATES,
P.A. BY:

Dated: AUGUST 31, 1992


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(207) 871-7500

. It is hereby Ordered and Decreed as set forth above.

Dated: 9-2-92


Justice, Superior Court