

Ninth Circuit Once Again Affirms That Malicious Actions To Destroy A Competitor Do Not State An Antitrust Claim Unless Accompanied By Injury To Competition

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On February 24, 2014, the **Ninth Circuit Court of Appeals** affirmed the lower court's grant of summary judgment dismissing DAW Industries' claims of conspiracy to restrain trade and attempted monopolization, once again affirming the tenet that **antitrust laws do not address malicious actions to destroy a competitor, unless injury to competition as a whole can also be established**. *DAW Indus., Inc. v. Hanger Orthopedic Group, Inc.*, 3:06-cv-01222 (9th Cir. Feb. 24, 2014) (unpublished opinion).

DAW, a manufacturer of prosthetic devices which sold the "Self-Learning Knee," first brought suit in 2006 in California state court. DAW alleged that defendants Hanger and Otto Bock, which sold competing prosthetic knees, "conspired to use [] their market dominance to try to crush a competitor" in violation of the Cartwright Act. Hanger and Otto Bock allegedly organized an industry symposium that DAW was blocked from attending, during which Hanger led the effort to define microprocessor knees to specifically exclude DAW's prosthetic. For several years thereafter, Hanger continued to tell physicians and consumers that DAW's prosthetic was not a microprocessor knee and that use of the microprocessor "L Codes" for insurance reimbursement would constitute fraudulent billing. One of Hanger's executives also made statements expressing a specific intent to "destroy" DAW. As a result of the defendants' allegedly anticompetitive actions, DAW's sales were cut in half, and remained historically low for several years, until it filed suit.

In a brief, unpublished opinion, the Ninth Circuit affirmed the grant of summary judgment for Hanger. Relying on the well-accepted principle that the antitrust laws only redress injury to competition, the Ninth Circuit stated in no uncertain terms that "[m]alicious action against a competitor with no adverse effect on competition is not actionable under [the antitrust laws]." DAW provided no real evidence that defendants' conduct adversely affected competition in the relevant market. The evidence actually showed that during the years that the defendants purportedly conspired to restrain trade and monopolize the market, several new prosthetic microprocessor knees entered the U.S. market.

The attempted monopolization claim also failed because DAW offered no evidence as to each competitor's share of the relevant market for prosthetic microprocessor knees. While some data was offered as to market shares for lower extremity prostheses in the U.S., those statistics were

overbroad and “tell us nothing of the relevant market.”

The Ninth Circuit also affirmed dismissal of DAW’s trade libel claim based on its failure to prove special damages by identifying particular customers and transactions of which it was allegedly deprived as a result of the libel. DAW’s position that it need not identify specific lost transactions at the summary judgment stage, coupled with its representation that it would be able to supply such evidence at trial, was deemed insufficient as a matter of law.

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