

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

BEVERLY ENTERPRISES;
BEVERLY ENTERPRISES-ALABAMA, INC.;
SOUTHERN MEDICAL SERVICES, INC.;
AMERICAN TRUST OF HAWAII, INC., AS
TRUSTEE UNDER THE SOUTHERN MEDICAL
SERVICES INC. PROFIT SHARING PLAN;
GEORGE H. SMITH AND JACK B. BRUCE,

Defendants.

Civil Action No. 84-70-1-MAC

Judge:

Filed: January 18, 1984

VERIFIED COMPLAINT:

The United States of America, plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States, brings this civil action to obtain equitable relief against the above-named defendants and complains and alleges as follows:

I.

JURISDICTION AND VENUE

1. This complaint is filed under Section 15 of the Clayton Act, (15 U.S.C. § 25) to prevent and restrain the violation by the defendants, as hereinafter alleged, of Section 7 of the Clayton Act (15 U.S.C. § 18).

2. Defendants Beverly Enterprises, Beverly Enterprises-Alabama, Inc., and Southern Medical Services, Inc. transact business and are found within the Middle District of Georgia.

3. Defendants American Trust of Hawaii, Inc., as Trustee under the Southern Medical Services, Inc. Profit Sharing Plan, incorporated in Hawaii, and defendants George H. Smith and Jack B. Bruce, residents of Alabama, are hereby joined as additional defendants pursuant to Section 15 of the Clayton Act (15 U.S.C. § 25).

II.

DEFINITIONS

4. "Nursing home care" means inpatient nursing care and related support services provided to geriatric patients who are chronically ill or physically disabled and unable to reside in a private residence without 24 hour care and supervision, but who do not require the level of care provided in an acute care hospital.

5. "Macon market" means the area in and around the cities of Macon and Gray, Georgia.

6. "Augusta market" means the area in and around the cities of Augusta, Martinez and Evans, Georgia and North Augusta, South Carolina.

7. "Montgomery market" means the area in and around the city of Montgomery, Alabama.

8. "Mobile market" means the area in and around the cities of Mobile and Eight Mile, Alabama.

9. "HHI" means the Herfindahl-Hirschman Index, a measure of market concentration. The HHI is calculated by squaring the

market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of three firms with shares of 50, 30, and 20 percent each, the HHI is 3800 ($50^2 + 30^2 + 20^2 = 3800$). The HHI takes into account the relative size and distribution of the firms in a market. It approaches zero when a market is served by a large number of firms of relatively equal size, and reaches its maximum of 10,000 when a single supplier exists in the market. The HHI increases both as the number of firms in the market decreases and as the disparity in size among those firms increases.

III.

DEFENDANTS

10. Beverly Enterprises ("Beverly") is made a defendant herein. Beverly is a corporation organized and existing under the laws of the State of California with its principal office in Pasadena, California. It is engaged in a variety of health care and retirement living businesses, including owning, leasing and managing nursing homes. Beverly operates over 800 nursing homes in 42 states and the District of Columbia. Beverly's revenues totaled \$816 million in 1982. Forty-four percent of these revenues or approximately \$369 million were received from private payers and the remainder from government programs.

11. Beverly is the largest provider of nursing home care in the United States. Among the nursing homes which it operates are:

- (a) Hospitality Care Center of Macon in Macon, Georgia.
- (b) Beverly Manor-Augusta and Windermere Nursing Home in Augusta, Georgia;
- (c) Montgomery Health Care Center in Montgomery, Alabama; and
- (d) Autumn Breeze Health Care Center and Bay Manor-Mobile in Mobile, Alabama.

12. Beverly Enterprises-Alabama, Inc. ("BEA") is made a defendant herein. BEA, a corporation organized and existing under the laws of California, is wholly owned by Beverly. Its principal place of business is in Pasadena, California.

13. Southern Medical Services, Inc. ("SMS") is made a defendant herein. SMS is a privately-held corporation organized and existing under the laws of Georgia with its principal place of business in Birmingham, Alabama. It is engaged in the provision of nursing home care through the ownership, leasing and management of nursing home facilities. It operates 49 nursing homes in seven states of the United States. In 1982, SMS revenues exceeded \$30 million.

14. SMS is the seventeenth largest provider of nursing home care in the United States. Among the nursing homes it operates are:

- (a) SMS of North Macon and SMS of East Macon in Macon, Georgia;
- (b) SMS of Augusta in Augusta, Georgia;

(c) Perry Hill Health Facility and SMS of Tyson Manor in Montgomery, Alabama; and

(d) SMS of Springhill and Lynwood Nursing Home in Mobile, Alabama.

15. American Trust of Hawaii, Inc., as Trustee under the SMS Profit Sharing Plan ("Trustee"), is made a defendant herein. It is a corporation organized and existing under the laws of Hawaii with its principal place of business in Honolulu, Hawaii. Trustee owns 340 shares of voting and 273,280 shares of nonvoting SMS stock and is a party to the agreement alleged in paragraph 29 below.

16. George H. Smith, an individual, is made a defendant herein. Mr. Smith, a resident of Birmingham, Alabama, is President of SMS, an owner of 330 shares of voting and 80,000 shares of nonvoting SMS stock and a party to the agreement alleged in Paragraph 29 below.

17. Jack B. Bruce, an individual, is made a defendant herein. Mr. Bruce, a resident of Birmingham, Alabama, is Corporate Secretary of SMS, an owner of 330 shares of voting and 80,000 shares of nonvoting SMS stock and a party to the agreement alleged in Paragraph 29 below.

IV.

TRADE AND COMMERCE

18. Nursing home care is highly regulated by federal and state authorities through licensure, certificate of need and federal and state reimbursement programs, including the Medicaid program.

19. The nursing home care provided to many patients is paid for by the Medicaid program which is jointly funded by the state and federal governments. Care provided to a smaller number of patients is provided under the Medicare program which is funded entirely by the federal government.

20. Patients who pay for nursing home care with their personal or other private resources are known as private-pay patients. A substantial portion of nursing home patients are private-pay patients. Nursing homes set their own private-pay rates which in Georgia and Alabama are generally higher than Medicaid rates. Nursing homes compete actively for private-pay patients and that competition not only helps to keep private-pay rates down but helps to ensure quality care for all patients in nursing homes.

21. In 1982 Beverly collected revenues of \$8.2 million from the nursing homes listed in Paragraph 11 above. At least \$1.0 million of these revenues were received in exchange for the provision of nursing home care to private-pay patients. A substantial portion of the remainder was received from the Medicaid and Medicare reimbursement programs.

22. SMS' revenues from the nursing homes listed in Paragraph 14 above exceeded \$4.2 million in 1983. Private-pay revenues at these nursing homes totaled at least \$1.2 million. A substantial portion of the remainder was received from the Medicaid and Medicare reimbursement programs.

23. Defendant Beverly and SMS are direct competitors for nursing home patients in the Macon, Augusta, Montgomery and Mobile markets. Entry by new firms into these markets is difficult in large part because of the legal requirement to obtain a certificate of need from the appropriate state regulatory body.

24. In the Macon market, there are thirteen facilities that provide nursing home care. The facilities are located in Macon and Gray, Georgia. If Beverly acquires SMS, Beverly will control 29% of the licensed nursing bed capacity in this market. The market would be concentrated with the largest four nursing home operators controlling 60% of the licensed beds. The HHI would increase from 1145 to 1432.

25. In the Augusta market, there are eleven facilities that provide nursing home care. The facilities are located in Augusta, Martinez and Evans, Georgia and North Augusta, South Carolina. If Beverly acquires SMS, Beverly will control 35% of the licensed nursing bed capacity in this market. The market would be highly concentrated with the largest four nursing home operators controlling 87% of the licensed beds. The HHI would increase from 1688 to 2307.

26. In the Montgomery market, there are eight facilities that provide nursing home care. The facilities are located in Montgomery, Alabama. If Beverly acquires SMS, Beverly will control 48% of the licensed nursing bed capacity in this market. The market would be highly concentrated with the

largest four nursing home operators controlling 100% of the licensed beds. The HHI would increase from 2213 to 3382.

27. In the Mobile market, there are thirteen facilities that provide nursing home care. These facilities are located in Mobile and Eight Mile. If Beverly acquires SMS, Beverly will control 36% of the licensed nursing bed capacity in this market. The market would be concentrated with the largest four nursing home operators controlling 67% of the licensed beds. The HHI would increase from 1181 to 1828.

28. Beverly, SMS and the facilities that they operate in the Macon, Augusta, Montgomery and Mobile markets are engaged in and affect interstate commerce. Beverly and SMS and the facilities which they operate in those four markets receive and transmit substantial amounts of monies and supplies across state lines in connection with their multistate nursing home operations, including payments for supplies and payments from third party payors, including government programs.

V.

VIOLATION ALLEGED

29. On or about October 19, 1983, Beverly and its wholly owned subsidiary BEA entered into an agreement with SMS, Trustee, George H. Smith and Jack B. Bruce to acquire 99% of SMS's common stock for approximately \$7.5 million. If this agreement is consummated, Beverly will acquire control of all nursing homes which SMS owns, leases or manages including those located in the Macon, Augusta, Montgomery and Mobile markets.

30. The effect of this acquisition may be substantially to lessen competition in the provision of nursing home care in the Macon, Augusta, Montgomery and Mobile markets in violation of Section 7 of the Clayton Act (15 U.S.C. § 18) in the following ways, among others:

- (a) Actual and potential competition between Beverly and SMS in the provision of nursing home care may be eliminated;
- (b) Concentration in these nursing home care markets will be substantially increased;
- (c) Patients of nursing homes in these markets may be denied the benefits of free and open competition in choosing among nursing homes based on price, quality and service; and
- (d) Competition among nursing homes in these markets may be substantially lessened.

VI.

PRAYER

WHEREFORE, plaintiff prays:

1. That pursuant to Section 15 of the Clayton Act (15 U.S.C. § 25) the Court order summons to be issued to American Trust of Hawaii as Trustee Under the Southern Medical Services, Inc. Profit Sharing Plan, to George H. Smith and to Jack B. Bruce commanding them to appear and answer allegations contained in this complaint, and to abide by and perform such orders and decrees as this court may make in the premises;

2. That the proposed stock acquisition by Beverly and BEA of SMS be adjudged in violation of Section 7 of the Clayton Act;

3. That the defendants, their successors, and all persons acting on their behalf be preliminarily and permanently enjoined from consummating the proposed acquisition or any similar plan or agreement the effect of which would be to allow the acquisition, merger, consolidation, operation, or in any other way permit the combination of the ownership or operation of the nursing homes owned, leased, managed or operated by Beverly and SMS;

4. That defendants be enjoined from directly or indirectly acquiring any stock or assets of any facility which provides nursing home care in the Macon, Augusta, Montgomery and Mobile markets without prior notice to and approval by plaintiff or this Court should plaintiff withhold its approval.

5. That the plaintiff have such other and further relief as the nature of the case may require and the Court may deem proper; and

6. That the plaintiff recover the costs of this action.

Dated:

January 18, 1984

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