2017 IL App (2d) 160969-U
No. 2-16-0969
Order filed September 26, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MARK SCHACHT, NEIL FRIEDMAN, ALLEN CHERNOFF, PETER VASELOPULOS, and GREATER CHICAGO UROLOGY, LLC, Individually and on behalf of all physicians and physicians' groups practicing in Lake and northeastern Cook counties,	)	Appeal from the Circuit Court of Lake County.
Plaintiffs-Appellants,	)	
v.	)	No. 15-CH-1493
NORTHSHORE UNIVERSITY HEALTH SYSTEM, an Illinois not-for-profit corporation, and ADVOCATE NORTHSHORE HEALTH PARTNERS, an Illinois not-for-profit corporation/joint venture,	)	Honorable Luis A. Berrones,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Zenoff and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly dismissed plaintiffs' antitrust complaint. Affirmed.

¶ 2 In a second amended complaint, plaintiffs, Mark Schacht, Neil Friedman, Allen Chernoff, Peter Vaselopulos (all physicians) and Greater Chicago Urology, LLC, on behalf of all physicians and physicians' groups practicing in Lake County and northeastern Cook County, sued defendants, Northshore University Health System (Northshore) and Advocate Northshore Health Partners (Advocate Northshore), for monopolization and an attempt to monopolize in violation of the Illinois Antitrust Act (Act) (740 ILCS 10/1 *et seq.*(West 2014)). Northshore moved, pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2014)), to dismiss the second amended complaint. The court granted the motion with prejudice, and plaintiffs appeal. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 A. Dismissal of Initial and First Amended Complaints

¶ 5 All three complaints filed in this case alleged the same two counts: monopolization and attempt to monopolize, both proscribed by section 3 of the Act (740 ILCS 10/3(3) (West 2014)). Specifically, section 3 provides that it is illegal to: "[e]stablish, maintain, use, or attempt to acquire monopoly power over any substantial part of trade or commerce of this State for the purpose of excluding competition or of controlling, fixing, or maintaining prices in such trade or commerce." *Id.* For context, we explain that, to survive dismissal for monopolization, plaintiffs were required to plead sufficient facts to establish that defendants: (1) possess "monopoly power" (the power to control output and prices) in a relevant market; and (2) engaged in improper conduct to acquire or maintain that power, "as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Ray Dancer, Inc. v. DMC Corp.*, 230 Ill. App. 3d 40, 53 (1992). For attempt to monopolize, plaintiffs were required to plead: (1) that defendants had specific intent to monopolize; (2) that

defendants engaged in predatory or anticompetitive conduct to accomplish monopolization; and (3) a dangerous probability of success. *Id.* We note that monopoly in and of itself is not illegal. *Popp v. Cash Station, Inc.*, 244 Ill. App. 3d 87, 101 (1992). What is illegal is the intent to maintain or acquire monopoly power through use of anticompetitive means. *Id.* Defendants must be shown to have utilized their dominant position in the market to control prices, exclude competition, or engage in other unfair methods of competition. *Dancer*, 230 Ill. App. 3d at 54.

¶ 6 Moreover, plaintiffs must establish that defendants engaged in prohibited anticompetitive conduct *and* that the conduct resulted in an "anti[]trust injury." *Popp*, 244 Ill. 2d at 101. Antitrust injury means economic injury from higher prices or lower output, "the principal vices proscribed by antitrust laws." Further, "even if an injury is causally related to an antitrust violation, it will not be considered an antitrust injury unless it is attributable to an anticompetitive aspect of the defendants' actions." *Id.* "The pleading of a recognized antitrust injury is an essential element of the action and also provides the plaintiff's requisite standing." *Holzrichter v. County of Cook*, 231 Ill. App. 3d 256, 266 (1992).

¶ 7 Returning to the case before us, plaintiffs' first two complaints (dated in August 2015 and January 2016) were filed against only Northshore. The overall gist of the complaints was that, by virtue of its size, referral practices, and relationship with Blue Cross Blue Shield, Northshore's actions violated the Act and injured plaintiffs. The problem, according to Northshore and the trial court, was that the complaints did not sufficiently define the relevant market or geographic area, nor did they allege sufficient *facts* to support any of the elements of the causes of action. Rather, in granting Northshore's section 2-615 motions to dismiss, the court found that, although the lengthy complaints recited antitrust "buzzwords," the allegations amounted to mere conclusions. For example, in dismissing the initial complaint, the court noted

that, with respect to the relevant market, it "quite honestly was not sure" what services plaintiffs were asserting constituted the market, as the initial complaint referenced, for example, "healthcare services," "outpatient primary care physician services," "medical services," and "inpatient services." Although the initial complaint vaguely identified the geographic market as the areas serviced by four hospitals, the court was not sure what constituted the geographic area for antitrust purposes, as the complaint stated only that consumers prefer to obtain medical services near their homes. Moreover, the trial judge stated "frankly, it wasn't even clear to me what the injury was that your *** clients, the doctors, are alleging here." The court dismissed the complaint with leave to amend.

¶ 8 Plaintiffs' amended complaint fared no better. Northshore again moved to dismiss under section 2-615, arguing that the same deficiencies that warranted the initial dismissal continued to plague the amended complaint. The court agreed, noting again the failure to plead facts, as opposed to conclusions. For example:

> "PLAINTIFFS' COUNSEL: *** the injury to the plaintiffs' group is that their prices are being dictated to them by Northshore.
>
> COURT: And their prices are being dictated in what way? They have to have higher prices, lower prices, what? I mean it's a conclusion, they are dictating. Give me a fact, because of that they have to price at X. I mean isn't that what you need? You need some detail to flesh out.
>
> I mean that is a conclusion. *** Are they objecting to the fact that they have to charge more for their services?
>
> PLAINTIFFS' COUNSEL: The general public would be objecting - -

COURT: But you're not the general public, you're doctors. That is another issue. You mix all these different classes."

¶ 9 Further, with respect to stating a claim that the plaintiffs were injured, the court noted:

"COURT: *** you haven't said that your clients have not gotten referrals, they don't get privileges. What has prevented them? I mean what is their specific injury? Other than you saying well, they have all this power; and therefore, we are injured.

PLAINTIFFS' COUNSEL: Right. The injury would be that the amount of referrals they get is limited because –

COURT: But how do I know that? Is it because you were getting a hundred before and now you're getting two? How do I know that? It's not in the complaint."

¶ 10 The court dismissed the amended complaint and concluded that "it is a conglomeration of throw everything in there and see what sticks. That is the only way I can describe it." It advised that the complaint lacked specificity and that, although it was not necessary to plead *evidence*, plaintiffs must allege *facts* that support each element of their antitrust claims. The court allowed plaintiffs "one more" opportunity to amend.

¶ 11 B. Motion to Dismiss the Second Amended Complaint

¶ 12 On August 1, 2016, plaintiffs filed a second amended complaint. This time, however, they add defendant "Advocate Northshore Health Partners, an Illinois not-for-profit corporation/joint venture."[1] In a footnote, the complaint asserts that the new defendant "consists

[1] We note that no appearance was ever filed on behalf of Advocate Northshore. Later, plaintiffs' counsel asserted that, because it served Northshore's counsel with the second amended complaint, it thereby also effected service on the new defendant, Advocate Northshore, because Northshore was one of the entities that comprised the Advocate Northshore "partnership." The

of a merger" of enumerated hospitals and practice groups and that, in September 2014 (*i.e.*, about one year before plaintiffs' filed their *intial* complaint), Advocate and Northshore "signed an affiliation agreement to *merge* and create Advocate Northshore Health Partners." (Emphasis added.) Plaintiffs allege that the lawsuit sought to recover for injuries caused by Northshore's conduct since early 2009 and, then, the expanded impact and injury that resulted from the "2014 merger agreement which has created" a "new corporate entity or joint venture which has/will absorb and replace as an operating entity what is/was [Northshore]."

¶ 13 In the second amended complaint, plaintiffs identify themselves as surgeons who provide medical services at various (undefined) institutions, including in Lake County and northeastern Cook County. Plaintiffs request class certification, asserting that the complaint is being brought on behalf of all physicians and physician practice groups in those counties who had been injured by defendants' monopolization or attempted monopolization of: "outpatient physician services groups" by acquiring outpatient primary care and specialist physician groups, contracting with the dominant insurer Blue Cross Blue Shield, and instituting a referral policy created through its bundling agreement with the insurer that "encourages" referrals to Northshore physicians and facilities to the "virtual exclusion" of plaintiffs and others in the class.

¶ 14 The complaint again claims that the relevant geographic market consists of the areas in Lake and Cook counties serviced by defendants' hospitals because "consumers of physician services care about the distance they need to travel for those services and prefer to stay close to home." Although the complaint initially references "outpatient physician services" as the relevant product market, it thereafter references "hospital services," "physician services," "primary care physician services," "specialty physician services" that are "sold to commercial

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validity of this assertion was not further developed or argued.

health plans," and "healthcare services." For example, in one paragraph, the complaint describes the relevant market as:

> "The 'physician services' product market consists of outpatient, physician services sold and provided to commercial payers and their insured members. The 'physician services' product market includes primary care physician services sold to commercial health plans, which encompasses the services typically provided by [primary care physicians] practicing general medicine, internal medicine and general practice. As a result of [Northshore's] referral practices, it also includes specialty physician services sold to commercial health plans."

¶ 15 The complaint alleges that Northshore's system consists of more than 1900 primary care physicians and specialists with more than 100 office locations, but it provides no figures to reflect what percentage or share of the alleged market those numbers represent. It adds that the affiliation agreement to merge and create Advocate Northshore would result in the group operating 16 hospitals, more than 350 points of care, 6000 physicians, 45,000 associates, and approximately $7 billion in revenue, but again provides no market-share figures. Plaintiffs assert that Northshore has acquired a number of primary care and specialty groups to dominate the market to plaintiffs' "detriment." Further, they assert that Northshore has contractually arranged for "in network" status with Blue Cross Blue Shield, and that, although "in-network" providers with similar out-of-pocket costs typically compete for patients, Northshore has utilized its relationship with Blue Cross Blue Shield, its referral policies, and its "market power in the physician services market to entrench itself further as the dominant physician service provider and effectively eliminate meaningful competition among even in-network providers of physician

services." (We note that the complaint does not state whether plaintiffs also have "in-network" status with Blue Cross Blue Shield).

¶ 16 As to referral policies, the complaint acknowledges that Northshore "*does not mandate* referrals solely to other [Northshore] physician groups." (Emphasis added.) Rather, plaintiffs allege that Northshore directs its hospital providers and physician groups to refer patients "almost exclusively" to Northshore, and that it provides (undefined) substantial economic incentives for them to do so. By shifting patients to its own facilities, Northshore is allegedly able to charge higher fees, and "the overall cost of hospital services has been increased, thereby harming *employers and insureds*." (Emphasis added.) The complaint continues that *patients* are forced to use more expensive facilities. The complaint then asserts that plaintiffs have "thus been excluded from acquiring and caring for potential patients, are unable to negotiate favorable 'in-network' arrangements[,] and have suffered a loss and will continue to suffer a loss ***." Plaintiffs allege that the outpatient services groups controlled by Northshore are able to steer patients back to Northshore hospitals for inpatient care. Plaintiffs further allege that they have lost over 40% of the referrals that they previously received from Northshore's affiliated hospitals. Plaintiffs assert that they have suffered injury in the form of loss of patients and/or loss of opportunity for referral business. They summarize that independent providers are left with a "stark choice: suffer substantial economic losses vis-à-vis decreased patients *or* agree to be acquired by or enter into an exclusive agreement with [Northshore]."

¶ 17 In count I, monopolization, plaintiffs summarize that:

> "By virtue of its acquisition of [primary care physician] and [specialist physician] groups and its bundling arrangement with [Blue Cross Blue Shield], [Northshore] has and [Advocate Northshore] has/will have acquired monopoly power in the relevant

> geographic market and has abused, and continues to abuse, that power to maintain and enhance its market dominance in the product market by unreasonably restraining trade, thus artificially and anti-competitively inflating the price of health care services provided to consumers, reducing price competition, foreclosing competition and reducing quality and innovation in the relevant market."

¶ 18 Plaintiffs enumerate their injury as: (1) loss of business and income that they would have received in excess of the 40% that they actually received; (2) continued and increased losses in the future; and (3) "[we] will be forced out of the market in the relevant geographic area and will be unable to maintain [our] practices."

¶ 19 In count II, attempt to monopolize, plaintiffs allege that defendants' actions have harmed competition and caused injury to physicians and medical groups and: (1) prices are higher than they would have been in a competitive market; (2) supply of services is lower than it would have been in a competitive market; and (3) "the number and effectiveness of competitors has been diminished by unlawful means."

¶ 20 C. Dismissal with Prejudice

¶ 21 Defendant Northshore (only) filed a section 2-615 motion to dismiss the second amended complaint. Characterizing the complaint as the "worst to date," defendant noted that the complaint added allegations about a pending merger between Northshore and Advocate "which is unconsummated as of the date of this brief and thus cannot have injured them." In a footnote, defendant asserted that the post-merger entity was a defendant, but the entity did not yet exist.[2]

[2] Ultimately, a federal court enjoined that proposed merger, pending the Federal Trade Commission's final decision following an administrative hearing on the merits. *FTC v. Advocate Health Care Network*, 2017 WL 1022015 (N.D. Ill. Mar. 16, 2017).

Defendant then reiterated that plaintiffs could not have been injured by a merger that had not happened, noting further that the proposed merger was announced in September 2014, well before plaintiffs filed their initial complaint, and argued that plaintiffs' last-minute attempt to tack on the entity as a new defendant "reeks of desperation."

¶ 22 In sum, defendant again challenged the inconsistency and lack of facts supporting a product market, as well as the lack of facts establishing a relevant geographic market, with plaintiffs merely "musing" that consumers care about the distance they travel for physician services and prefer to stay close to home. Defendant argued that the complaint alleged no facts as to why the location of hospitals would dictate where consumers and insurers would turn for different types of outpatient physician services, particularly where the inclusion of specialty physician services suggests that the geographic area for competition would be broader than just hospital locations and would vary by individual specialty. Defendant noted that, if the alleged merger were to happen, a substantial number of "post-merger", *i.e.*, Advocate hospitals, would demonstrably not even be in the alleged geographic market.

¶ 23 Moreover, defendant argued that a single product market encompassing all healthcare services (hospital and physician services) was indefensible, as plaintiffs do not offer hospital services. If plaintiffs intended that their product market focus instead on *all* outpatient physician services, including all primary care physicians and all types of specialists, that, too, must fail because physician specialties are in different markets and cannot be "clumped together." "The plaintiffs' own theory of referral-based anticompetitive conduct shows that primary care physicians and specialists are necessarily in different product markets. If primary care physicians and specialists were the same product, no referrals would be needed."

¶ 24 As to injury, defendant asserted that the complaint continued to assert injury on behalf of consumers, such as higher healthcare prices, while plaintiffs were physicians. Further, the complaint conceded that Northshore did *not* mandate referrals to only Northshore groups, and defendant pointed out that plaintiffs' allegation that they had lost more than 40% of referrals necessarily concedes that plaintiffs have *retained* 60% (*i.e.*, a majority) of their patient referrals. Defendant noted that no authority supported the assertion that a 60% retention of referrals reflects an antitrust injury; rather, the supposed harm of lost business is the same type of impact any provider can suffer from legitimate competition. Moreover, defendant asserted that plaintiffs' theory that Northshore used a contract with Blue Cross Blue Shield to charge anticompetitive rates to, ultimately, that insurer and to reduce the number of doctors available to it made no sense and lacked any facts establishing why the alleged dominant insurer would agree to harm itself.

¶ 25 Defendant concluded that the complaint simply failed to allege *facts* establishing anticompetitive conduct or injury. According to defendant, the complaint failed to allege the facts necessary to: (1) assess alleged market power; (2) show that defendant can raise prices without losing business, exclude competition, or that there exist barriers to entry; or (3) establish exclusive arrangements, which, defendant asserted, are not even inherently improper. Defendant noted that there is no proposition of law that would mandate its affiliated physicians send back to plaintiffs the alleged 40% reduction in referrals that plaintiffs alleged has occurred.

¶ 26 On November 4, 2016, the court held a hearing on the motion. Defense counsel appeared "on behalf of Northshore" and argued the merits of the motion, pointing out that, in their response to the motion, plaintiffs did not engage in any arguments on the merits. Defense counsel commented that, although the complaint mentioned a merger, it was a matter of public

record that the merger had been enjoined, which related to the element of antitrust injury in the complaint, *i.e.*, that plaintiffs could not have been injured by a merger that did not take place. Defendant argued that the allegation of injury based on a non-existent merger was just one more reason why the complaint failed to allege a cause of action, but that, overall, the alleged merger did not even matter because the complaint was deficient for numerous other reasons.

¶ 27 Plaintiffs' counsel responded that plaintiffs did not respond to the motion on the merits because they wished to preserve an objection to defendant filing a section 2-615 motion alleging that the court should assume an entity does not exist. Rather, plaintiffs asserted, a section 2-615 motion should assume the fact as pleaded, *i.e.*, that the entity exists, and any argument that the new defendant did not exist would instead be appropriate for summary judgment or a motion under section 2-619 of the Code (735 ILCS 5/2-619 (West 2014)). Plaintiffs further argued that, regardless of whether an official merger was approved, a "joint venture" had been created, and Northshore and Advocate Northshore held themselves out to the public as operating together. Plaintiffs argued that defendant was asking for dismissal "as if they are an entity. He didn't say, Judge, just dismiss Northshore, don't dismiss Advocate, don't dismiss the joint venture." Counsel argued that "they're in front of this Court now as a joint venture." Plaintiffs requested discovery on the nature of the relationship between Northshore and Advocate Northshore and to determine whether the joint venture exists.

¶ 28 Defense counsel replied, "[a]ll we said was that they mentioned the merger in their complaint and they can't have been injured by it. *** It has nothing to do with the case before you." Counsel argued that dismissal of the complaint was justified for numerous reasons that had nothing to do with the merger or a joint venture. Regardless of whether the joint venture

was included or not, counsel argued, the complaint did not satisfy the pleading elements under Illinois law to state an antitrust action.

¶ 29 The trial court dismissed the complaint with prejudice. The court agreed with *plaintiffs* that the motion before it was filed pursuant to section 2-615 of the Code and, therefore, that it was required to accept as true the factual allegations, but not conclusions, in the complaint. "Even if I *assume that there is a merger* and so forth, you still have to establish the elements of an antitrust violation." (Emphasis added.) The court found that the issues that plagued the initial and first amended complaints continued to plague the second amended complaint, as plaintiffs failed to allege *facts* to support the elements of an antitrust case. Although it was a lengthy complaint, the court commented, it really only recited conclusions:

> "There aren't sufficient allegations to reflect[,] not necessarily alleging evidence[,] but just alleging sufficient facts to hit all the elements of the claim. There are no facts, sufficient facts to establish the antitrust injury. I've looked at the cases and I think what you allege is deficient. The same thing with the product market is the problems we've had all along. *** I have not been able to determine from the allegation[s] in the complaint what the product market is. And, again, this is your third opportunity. The same thing with the geographic market. I don't think that you've shown an antitrust injury, a monopoly power[.]"

¶ 30 The court explained that the dismissal would be with prejudice. Plaintiffs' counsel asked the court whether it was dismissing the complaint on behalf of an entity that defendant claimed did not exist, which might have preclusive effect if, down the line, the entities did merge. The court clarified that it considered the complaint under section 2-615 and assessed whether, assuming a merger had taken place, the factual allegations sufficed to state a claim. Plaintiffs'

counsel again questioned precisely which parties were being dismissed. The court answered that it was dismissing the entire complaint and:

"COURT: All parties that you have on your caption are being dismissed.

PLAINTIFFS' COUNSEL: Which would include Advocate and the joint ventures, so we're clear?

COURT: The entire – Yes, because the entire case is being dismissed. You have a defendant of Advocate Northshore Health Partners.

PLAINTIFFS' COUNSEL: And Advocate Hospital, I believe.

COURT: Well, it just says 'Northshore University HealthSystem, an Illinois not-for-profit corporation, and Advocate Northshore Health Partners, an Illinois not-for-profit corporation/venture.' The complaint is dismissed as to those parties and it's dismissed with prejudice.

DEFENSE COUNSEL: Judge, when we write up the order, should we just say dismissed with prejudice for the reasons stated in open court?

COURT: That's fine.

PLAINTIFFS' COUNSEL: I think we should also have the order say as to the parties in the caption[,] so there's no argument later on clarity.

COURT: That's fine.

DEFENSE COUNSEL: It's your order, Judge, whatever you think is –

COURT: What he said, and the parties within the caption, that's fine.

PLAINTIFFS' COUNSEL: That's fine. The current caption?

COURT: Right."

¶ 31 Plaintiffs appeal.

¶ 32 II. ANALYSIS

¶ 33 We commence by resolving a few preliminary matters. First, only defendant Northshore has filed an appearance and brief on appeal. Therefore, as to defendant Advocate Northshore, we decide the case on the merits to the extent that the record is simple and the claimed error can easily be decided without the aid of its appellee's brief. *First Capitol Mortgage Corp. v. Talandis Construction Corp*., 63 Ill. 2d 128, 133 (1976).

¶ 34 Second, in their briefs, plaintiffs repeatedly represent that "defendants" (plural) argued various positions before the trial court and that "defendants' counsel" (again, plural defendants), took certain positions. This is misleading. Northshore's counsel never filed an appearance on behalf of the newly-added Advocate Northshore. Indeed, no appearance was ever made by anyone on Advocate Northshore's behalf. Further, the section 2-615 motion to dismiss the second amended complaint was filed only on behalf of Northshore. At oral argument, counsel represented that he was appearing on behalf of Northshore; he did not say on behalf of defendants (plural). On appeal, counsel has filed an appearance on behalf of only Northshore. Accordingly, plaintiffs' attempt to suggest that somehow Northshore made representations on behalf of Advocate Northshore, thereby conceding its existence, is misguided.

¶ 35 Similarly, plaintiffs assert in their briefs that "counsel for the defendants was given an option by the court to either withdraw and refile the motion [to dismiss] or have the order of dismissal encompass all defendants, including the supposedly nonexistent Joint Venture. Counsel for defendants chose the latter." In their reply, plaintiffs again state that the court presented "defendants" with the aforementioned choice and that "[d]efendants chose to have the dismissal entered and by their express invitation, had the court enter judgment in favor of what it now claims is a nonexistent entity." To put it bluntly, this never occurred. Or, if it did, it did not

occur on the pages plaintiffs cite for this proposition (in fact, in reply, plaintiffs do not even provide a record citation reflecting the alleged "express invitation"), and this court has been unable to find the exchange elsewhere in the record. This representation reflects another attempt by plaintiffs to somehow suggest that Northshore's motion and argument both conceded the existence of Advocate Northshore, while simultaneously arguing in a section 2-615 motion that the entity did not exist. That is not what happened. As the motion and record clearly reflect, Northshore argued that, to the extent that plaintiffs claimed antitrust injury based on a *merger*, that merger had not taken place. Moreover, despite plaintiffs' comment in reply that "the trial court not only entered a dismissal based on the assumption that the joint venture did *not* exist but entered judgment in favor of this supposed-nonexistent venture[,]" (emphasis added) this, again, is not what happened. The trial court made clear that, applying section 2-615 standards, it *assumed*, per plaintiffs' request, Advocate Northshore's existence, but found that, even if a merged entity existed, the complaint failed to state an antitrust cause of action against *any* defendant.

¶ 36 Thus, plaintiffs' focus and argument on appeal about the existence of the merger or a joint entity and the court's treatment of this issue is merely distraction. Plaintiffs raise no cogent argument that the trial court lacked *authority* to dismiss the complaint against Advocate Northshore on section 2-615 grounds (indeed, courts are free to *sua sponte* dismiss complaints (*People v. Vincent*, 226 Ill. 2d 1, 13-14 (2007) (("Illinois cases *** recognize that a trial court may, on its own motion, dispose of a matter when it is clear on its face that the requesting party is not entitled to relief as a matter of law"))) and we, therefore, are free to assess the propriety of the complaint's dismissal on section 2-615 grounds. To the extent that plaintiffs suggest that the

court effectively granted a section 2-619 motion in the absence of such a motion, the record clearly belies that assertion as the court assumed *arguendo* the entity's existence.

¶ 37 We turn now to the merits of the section 2-615 dismissal of plaintiffs' antitrust complaint. "The question presented by a motion to dismiss under section 2-615 is whether sufficient facts are contained in the pleadings which, if proved, would entitle the plaintiff to relief." *Urbaitis v. Commonwealth Edison*, 143 Ill. 2d 458, 475 (1991). Our standard of review is *de novo*, and "we may affirm the trial court's order on any basis appearing in the record." *White v. DaimlerChrysler Corp.*, 368 Ill. App. 3d 278, 282 (2006). In reviewing the legal sufficiency of the complaint, we take as true all well-pleaded facts, drawing all reasonable inferences therefrom in favor of the nonmoving party, but we disregard mere conclusions of law unsupported by specific factual allegations. *Krueger v. Lewis*, 342 Ill. App. 3d 467, 470 (2003). Moreover, "[i]n opposing a motion for dismissal under section 2-615 of the Code of Civil Procedure, a plaintiff cannot rely simply on mere conclusions of law or fact unsupported by specific factual allegations." *Anderson v. Vanden Dorpel*, 172 Ill. 2d 399, 408 (1996). Illinois is a fact-pleading jurisdiction, and a plaintiff must allege *facts* sufficient to bring his or her claim within the scope of the cause of action being asserted. *Id.* A complaint fails to state a cause of action if it does not contain factual allegations in support of *each element* of the claim that the plaintiff must prove in order to sustain a judgment; the complaint may not rest on mere unsupported factual conclusions. *Grund v. Donegan*, 298 Ill. App. 3d 1034, 1037 (1998). We note that, because section 3 of the Act is analogous to section 2 of the Sherman Act (15 U.S.C. § 2 (2014)), it is appropriate to construe section 3 in accord with federal law. See, *e.g.*, *Ray Dancer v. DMC Corp.*, 230 Ill. App. 3d 40, 49-50 (1992).

¶ 38 Here, we affirm the dismissal of the complaint. Although the motion to dismiss attacked as deficient all essential elements of the complaint, the failure to plead any one essential element is fatal to the cause of action (see, *e.g.*, *Grund*, 298 Ill. App. 3d at 1037) and, so, we choose to focus on the complaint's failure to plead an adequate antitrust injury.

¶ 39 Again, an antitrust plaintiff must allege facts establishing that the defendant engaged in prohibited anticompetitive conduct *and* that the conduct resulted in an "anti[]trust injury." *Popp*, 244 Ill. 2d at 101. An antitrust injury is economic injury from higher prices or lower output, "the principal vices proscribed by antitrust laws." *Id.* "The pleading of a recognized antitrust injury is an essential element of the action and also provides the plaintiff's requisite standing." *Holzrichter*, 231 Ill. App. 3d at 266.

¶ 40 Here, the second amended complaint fails to allege sufficient *facts* to establish an antitrust injury. Indeed, plaintiffs virtually concede as much in their briefs. Specifically, in addressing injury, plaintiffs' opening brief asks us to "see generally" various paragraphs in the complaint (citations which, in fact, do not appear to correspond to allegations of injury) and asserts only that the complaint sufficiently pleaded antitrust injury based on the allegations that plaintiffs "suffered an economic injury resulting from increased prices and lower output, the very types of injuries the antitrust laws were designed to prevent." These are conclusory statements. Plaintiffs do not identify *any* specific factual allegations in the complaint that support those conclusions.[3] The injury allegations in the complaint are similarly conclusory. As the trial court noted, buzzwords and conclusions without facts are insufficient to state a claim. See *Anderson*,

[3] In reply, plaintiffs offer no specific reply arguments to Northshore's response contentions concerning the complaint deficiencies, choosing instead to rely on their opening brief.

172 Ill. 2d at 408. Plaintiffs' reliance on *People ex rel Scott v. College Hills Corporation*, 91 Ill. 2d 138 (1982), for the proposition that there is no heightened pleading standard in Illinois for antitrust cases misses the point: plaintiffs must still plead facts that support each required element of the cause of action, including facts reflecting an antitrust injury.

¶ 41 Moreover, there are no *facts* in the complaint establishing that prices are rising in "the market," whatever that market may be. Even if there were, it remains unclear how plaintiffs have suffered from increased prices. As physicians, they are providers of services; in general, price increases are not considered an antitrust injury to competitors. See *O.K. Sand & Gravel, Inc. v. Martin Marietta Techs.*, 36 F.3d 565, 572-73 (7th Cir. 1994). Nor are there any facts explaining the meaning of, or injury resulting from, "lower output." Indeed, lower output of what? Generally, to constitute antitrust injury in this context, we would expect that the harm of lower output would present in the form of lower output of patient care or treatment (see, *e.g.*, *Wagner v. Magellan Health Services, Inc.*, 121 F. Supp. 2d 673, 681-82 (N.D. Ill. 2000), however, the complaint makes no such allegations.

¶ 42 The closest plaintiffs come to referencing an economic harm is their assertion of a reduction in referrals or, in effect, an implication that their patient train has been disrupted. However, they cite no authority reflecting that reduced referrals or a loss of business constitutes an *antitrust* injury. To the contrary, there exists authority reflecting the opposite. See, *e.g.*, *United States Gypsum Co. v. Indiana Gas Co., Inc.*, 350 F.3d 623, 627 (7th Cir. 2003) ("The antitrust-injury doctrine was created to filter out complaints by competitors and others who may be hurt by productive efficiencies, higher output, and lower prices, all of which the antitrust laws are designed to encourage. [Citations]. A plaintiff who wants something, such as less competition or higher prices, that would injure consumers, does not suffer antitrust injury."); see

also *Wagner v. Magellan Health Services, Inc.*, 121 F. Supp. 2d 673, 681-83 (N.D. Ill. 2000) (noting that antitrust laws were enacted to protect competition, not competitors; the plaintiff psychiatrist's allegations that patients were diverted away from him reflected injury to only his own business and professional interests, not an antitrust injury, in the form of higher prices for psychiatric treatment or lower output of patient care; complaint dismissed for failure to properly allege antitrust injury).

¶ 43 Further, as defendant points out, the lost-referrals allegation in this case arguably works against plaintiffs, as the allegations as pleaded reflect that defendant does *not* mandate that referrals be made solely to defendant's own physicians. In conclusory fashion and without factual support, plaintiffs assert that the bundling arrangement with Blue Cross Blue Shield has driven "competitors" from the market and has reduced market competition. However, if anything, the existing allegations reflect that plaintiffs have *not* been driven from any purported market and that they are *participating* in, as opposed to being excluded from, that market. We note that plaintiffs have not even alleged that they do not themselves have "in-network" relationships with Blue Cross Blue Shield or maintain surgical or hospital privileges within the Northshore system. We are not required to ignore facts set forth in the complaint that undermine plaintiffs' claims. See, *e.g.*, *Wagner*, 121 F. Supp. 2d at 683.

¶ 44 In sum, plaintiffs failed to properly plead an antitrust injury and the complaint was properly dismissed.

¶ 45 III. CONCLUSION

¶ 46 For the reasons stated, we affirm the judgment of the circuit court of Lake County.

¶ 47 Affirmed.