

Monopoly Claims Can Survive Summary Judgment: Medtronic Must Defend Conduct in “Bone Mill” Market

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One firm’s ability to break into the market for “bone mills” used in spinal-fusion surgery did not foreclose the possibility that medical device company Medtronic monopolized or attempted to monopolize the bone mill market, the U.S. Court of Appeals in Denver ruled last week. Bone mill manufacturer Lenox MacLaren Surgical Corporation raised sufficient fact questions, including questions regarding barriers to entry, to defeat summary judgment on its monopolization and attempted monopolization claims. The August 5, 2014, decision is [Lenox MacLaren Surgical Corp. v. Medtronic, Inc., No. 13-1307.](#)

The suit follows a falling out between Lenox and Medtronic. Lenox had sold some of its bone mills through a Medtronic entity. Lenox claimed that, as Medtronic planned to launch its own bone mill, it disparaged Lenox’s bone mills and helped to initiate a recall of the products in an effort to drive the company from the market.

The appellate court has decided that a jury needs to resolve the dispute. Genuine issues of material fact existed regarding market definition, monopoly power, exclusionary conduct, and harm to competition.

Relevant market. Lenox defined the relevant product market as the surgical bone-mill market. Medtronic contended that this market was too narrow because it excluded other tools used to mill bone, such as scalpels and surgical scissors.

The court held that a fact-finder could reasonably conclude that cross-elasticity of demand of bone mills and hand tools was low or zero, meaning that the products were not substitutes. The court offered three reasons for its determination: (1) Lenox presented expert testimony that substantial price changes would not lead surgeons to switch from bone mills to hand tools; (2) a substantial price difference existed between hand tools and bone mills, supporting an inference that the products belonged in different markets; and (3) Medtronic's market literature identified its competition as other companies' bone mills, not hand tools.

Monopoly power. Lenox presented sufficient evidence of market share and barriers to entry for a fact-finder to infer that Medtronic had monopoly power in the bone mill market, the court also ruled. It was alleged that Medtronic's market share ranged from 97 to 98 percent in 2007 to around 62 percent in 2010. While Medtronic's market shares and market dominance were disputed, a fact-finder could reasonably consider a 97-98 percent or 62 percent market share as evidence of monopoly power, in the court's view.

Barriers to entry. Though the court noted that Medtronic's market share could support a finding of monopoly power, it also considered in its monopoly power analysis the barriers to market entry—characteristics of the market impeding new entries. The court rejected the district court's determination that one new entrant's success in entering market was indisputable proof that barriers to entry were insignificant. That one competitor, Stryker Corporation, could be viewed as an "atypical competitor."

Stryker, already a major manufacturer of medical devices, had a ready-made distribution network and an existing reputation among hospital purchasers. Stryker also had a vast supply of capital to invest in a market generating limited revenues, the court noted. Notwithstanding Stryker's successful entry, a fact-finder could reasonably infer that Medtronic had monopoly power in the bone-mill market from 2007 to 2010 based on its high market share and the presence of barriers to entry, the court ruled.

Exclusionary conduct. Lenox alleged that Medtronic engaged in anticompetitive

conduct by: (1) telling potential customers that the Lenox mill was dangerous, and (2) helping to initiate a recall. The district court concluded that Lenox could not establish anticompetitive conduct under a six-factor test for trade disparagement, which presumes that the trade disparagement has only a *de minimis* effect on competition. Lenox contended that Medtronic's conduct extended beyond trade disparagement into a comprehensive scheme of exclusionary conduct and that a less stringent test should apply. Even under the trade disparagement test, Lenox demonstrated a fact question regarding anticompetitive conduct, the appellate court ruled.

The district court had concluded that Lenox satisfied the first three of the six factors needed to rebut the presumption of *de minimis* effect from trade disparagement, that the disparagement was: (1) clearly false, (2) clearly material, and (3) clearly likely to induce reasonable reliance. This determination was not disturbed on appeal. The appellate court held that there were fact questions regarding the remaining factors: (4) that Medtronic made false statements to buyers without knowledge of the subject matter; (5) that the materially false statements continued for prolonged periods; and (6) that Lenox could show that it was not able to readily neutralize the disparaging statements.

Harm to competition. In addition, a fact-finder could reasonably infer harm to competition from the challenged conduct, the appellate court ruled. According to the court, the inference was possible in part because Lenox presented evidence that from 2007 to 2010: (1) Medtronic was able to charge supracompetitive prices, and (2) other bone mills remained insubstantial.

Attempted monopolization. In light of the determination that a fact-finder could reasonably infer monopoly power and exclusionary conduct, a jury also could find an intent to monopolize for purposes of an attempted monopolization claim, according to the court. Thus, fact questions also existed on Lenox's claim of attempted monopolization.