

Antitrust Alert

No Bones About It: Tenth Circuit Permits Narrowest Market Definition and Raises the Bar for an Entry Defense When Reinstating Monopolization Suit

08.11.2014

BY [BRUCE D. SOKLER](#), [DIONNE LOMAX](#), [ROBERT G. KIDWELL](#), AND [FARRAH SHORT](#)

On August 5, 2014, the Tenth Circuit Court of Appeals reinstated claims of monopolization and attempted monopolization under Section 2 of the Sherman Act brought by a manufacturer of surgical bone mills against a competitor. In reversing the district court's grant of summary judgment for the defendant, the Tenth Circuit allowed a market definition which the district court had viewed as artificially narrow. The Court of Appeals also discounted the successful entry story of another competitor relied on by the lower court because "a single competitor's breakthrough does not preclude a finding of significant barriers to entry." The Court of Appeals then found that the plaintiff had created a triable issue of fact on each of the other elements of the monopolization and attempted monopolization claims. *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, Case No. 11-1251 (10th Cir., Aug. 5, 2014).

This decision creates substantial challenges for antitrust defendants. First, it suggests that plaintiffs be given latitude to narrowly construct a relevant product market to demonstrate a defendant's market power. Furthermore, by suggesting that courts should only give credence to entry by industry outsiders, this decision raises the bar for defendants seeking to rely on an entry defense.

Background

In 2000, Lenox MacLaren Surgical Corporation entered into a five-year exclusive licensing and distribution agreement with Medtronic Sofamor Danek USA (MSD USA) for the sale of Lenox's bone mill. Bone mills are medical devices used in spinal fusion surgery. In 2006, after the agreement's expiration, MSD USA issued a recall of the Lenox bone mills based on complaints received from some physicians. The FDA, after its own testing of the product, determined that Lenox need not recall the bone mills. After the recall, one of MSD USA's affiliates, Medtronic PS Medical, began selling a competing bone mill.

In 2010, Lenox filed this antitrust suit against the parent Medtronic entity, Medtronic, Inc., and several affiliates. In 2013, the district court ordered summary judgment for Medtronic which Lenox appealed.

Monopolization Claim

The district court held that Lenox failed to create a triable issue of fact on (1) the relevant product market; (2) monopoly power; (3) willful acquisition of monopoly power through exclusionary conduct; and (4) harm to competition. The Tenth Circuit disagreed on all points.

Product Market

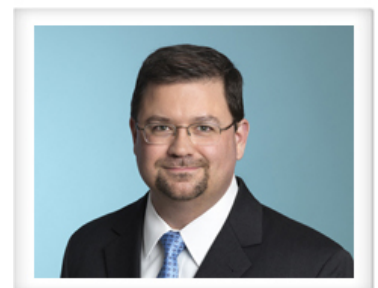
Lenox defined the relevant product market as the surgical bone mill market, excluding other tools used to mill bones, such as hand tools (e.g., scalpels and surgical scissors). Medtronic argued that the definition was too narrow, and that hand tools should be included. The Tenth Circuit disagreed with the district court's conclusion that "[t]he evidence in the developed record shows that the plaintiff's definition of the relevant product market is an artifice constructed to support its scenario." Instead, the Court of Appeals held that the differing definitions created a fact question that should have precluded summary judgment, finding that a fact-finder could



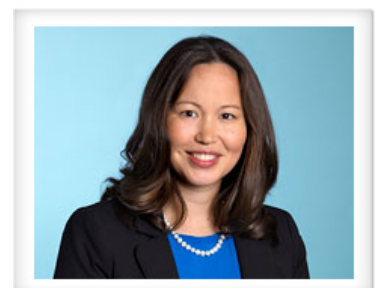
[Bruce Sokler](#), *Member*



[Dionne Lomax](#), *Member*



[Robert G. Kidwell](#), *Member*



[Farrah Short](#), *Associate*

RELATED PRACTICES

- [▶ Antitrust](#)
- [▶ Health Care Antitrust](#)

reasonably conclude that bone mills and hand tools are not substitutes for each other.

Monopoly Power

The Tenth Circuit also determined that a fact-finder could reasonably conclude that Medtronic had monopoly power in the bone mill market based on high market shares and the existence of barriers to entry. Lenox produced evidence that in 2007 Medtronic's market share was 97-98%, and still as high as 62% in 2010. Medtronic argued that the market shares were overstated by Lenox, and that its alleged market dominance was not durable. The Court of Appeals held that the question of durability involved a fact question for the jury.

On the issue of barriers to entry, the Tenth Circuit also found a genuine issue of fact despite the existence of Stryker — a competitor with a successful entry story that the district court had viewed as “indisputable proof that barriers to entry were insignificant.” (It was largely due to the entry of Stryker that Medtronic's market share dropped from 98% to 62%.) The Tenth Circuit gave credence to Lenox's argument that Stryker's entry was atypical because it had three attributes that provided it a competitive edge: (1) an existing distribution network; (2) credibility among institutional buyers; and (3) a vast supply of capital to invest in a market generating limited revenues. At the time of its entry into the bone mill market, Stryker was already a major manufacturer of other medical devices.

Exclusionary Conduct

To prevail on its claims, Lenox also needed to show anticompetitive conduct by Medtronic. The district court held that Lenox had only demonstrated injury to itself, not to competition. Lenox alleged that Medtronic engaged in anticompetitive conduct through trade disparagement tied to the product recall of Lenox's bone mills initiated by Medtronic. This trade disparagement, Lenox argued, was part of a comprehensive scheme of anticompetitive exclusionary conduct. The Court of Appeals again found a triable issue of fact, holding that a fact-finder could reasonably infer that Lenox successfully rebutted a presumption that the trade disparagement only had a *de minimis* impact on competition.

Harm to Competition

The Tenth Circuit also held that a fact-finder could reasonably infer harm to competition based on evidence presented by Lenox that from 2007-2010 Medtronic was able to charge supracompetitive prices as a result of eliminating Lenox from the market. The Court of Appeals further reasoned that despite Stryker's emergence as a significant competitor, there could still be harm to competition from the concentration of the market in Medtronic and Stryker.

This decision raises the bar for defendants in antitrust suits, particularly on the issues of market definition and entry defenses. In the Tenth Circuit's march through the monopolization elements, repeatedly finding triable issues of fact, it determined that a fact-finder could reasonably conclude that “cross-elasticity of demand of bone mills and hand tools is low or zero,” thus allowing the plaintiff's narrow product market definition. The district court, in concluding that excluding hand tools made the market artificially narrow, focused on the purpose of the tools (which was the same for the hand tools and the bone mills — “grinding of bone to a size and consistency enabling the implant to fuse with vertebral bone”), and the data in the record showing that during the relevant time period most of the spinal fusion surgeries performed in the United States did not use powered bone mills. Despite that evidence, the Tenth Circuit determined that the narrow definition was reasonable because (1) Lenox presented testimony from a single physician that a substantial price change would not lead surgeons to switch from bone mills to hand tools; (2) a substantial price difference existed between hand tools and bone mills; and (3) Medtronic's marketing materials identified only other bone mills as its competition.

Additionally, the Tenth Circuit's conclusion that the lower court erred in relying on Stryker's entry story as evidence of low barriers to entry creates a new hurdle for defendants. An entry defense to a monopolization claim typically requires that entry would be timely, likely, and sufficient to deter or counteract any anticompetitive effects of the alleged monopoly. It is quite common for such entry arguments to rely on the presence of other

RELATED INDUSTRIES

[Health Care](#)

industry participants who could quickly and easily add to an existing product line of related products a new competing product in the relevant product market at issue — just as Stryker did. Stryker was already a major player in the medical devices industry, which was why it was able to successfully enter the bone mill market (using its existing distribution network, established reputation, and financial resources). But this is precisely why the Tenth Circuit viewed it as an “atypical” entrant, and thus not a valid basis for a low barriers to entry defense. This suggests that courts should only give credit to entry stories by industry outsiders, which may be few and far between in many industries.

If you have any questions about this topic, please contact the author(s) or your principal Mintz Levin attorney.

Boston | London | Los Angeles | New York | San Diego | San Francisco | Stamford | Washington

www.mintz.com

Copyright © 2014 Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

This communication may be considered attorney advertising under the rules of some states. The information and materials contained herein have been provided as a service by the law firm of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.; however, the information and materials do not, and are not intended to, constitute legal advice. Neither transmission nor receipt of such information and materials will create an attorney-client relationship between the sender and receiver. The hiring of an attorney is an important decision that should not be based solely upon advertisements or solicitations. Users are advised not to take, or refrain from taking, any action based upon the information and materials contained herein without consulting legal counsel engaged for a particular matter. Furthermore, prior results do not guarantee a similar outcome.

4181-0814-NAT-AFR