

EXPERT TESTIMONY PIVOTAL IN REVERSAL OF SUMMARY JUDGMENT IN ANTITRUST CASE

Joshua Fruchter, Esq.

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A dash of corporate intrigue lurked beneath the surface of a recent Tenth Circuit antitrust decision (*Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 2014 WL 3827670 10th Cir. August 5, 2014). Lenox MacLaren Surgical Corporation (LMSC) was one of the first manufacturers to design and sell bone mills – a medical device used to grind bone during spinal fusion surgery that offered important advantages over hand tools traditionally used by surgeons for that purpose. LMSC's product attracted the interest of Medtronic, a much larger medical device manufacturer, which began selling the bone mills. The arrangement collapsed when Medtronic issued a recall of LMSC's bone mills, and began manufacturing and selling its own mills. Knowing that hospitals are extremely hesitant to acquire a product that has been the subject of a product recall when other alternatives are available, LMSC suspected that Medtronic had concocted the recall as a ruse to eliminate LMSC's device from the market and launch its own competing product. An arbitration panel agreed, and awarded damages to LMSC. LMSC then sued Medtronic in federal court for monopolization and attempted monopolization (for reasons discussed in the decision, the Tenth Circuit didn't grant the arbitration *res judicata*). The district court granted summary judgment to Medtronic, and LMSC appealed.

On appeal, LMSC confronted the challenge of persuading the Tenth Circuit that genuine issues of material fact precluded summary judgment on the following elements of LMSC's claim: product market, monopoly power, exclusionary conduct, and harm to competition. Backed by a roster of credible experts, LMSC succeeded.

The first step for LMSC in proving its monopolization claims was to identify the relevant product market. While LMSC defined the relevant market as surgical bone mills, Medtronic contended that the product market should include other traditional hand tools used in spinal fusion surgery. The Court ruled that the correct answer boiled down to "cross-elasticity of demand," i.e., the extent to which an increase in the price of bone mills would increase demand for traditional hand tools. On this question, LMSC's expert, Dr. Samuel J. Chewning, testified that, for a variety of reasons, a substantial increase in bone mill prices would not lead surgeons to substitute traditional hand tools for bone mills. In other words, surgeons do not view hand tools as reasonably interchangeable with bone mills. The Court concluded that Dr. Chewning's expert testimony created an issue of fact concerning the scope of the product market.

With respect to monopoly power, LMSC's economics expert testified that Medtronic's share of the bone mill market in 2007 was 97-98% (though it dropped to approximately 62% in 2010). Expert testimony from a designer and engineer of medical devices further established significant barriers to entry into the bone mill market. The Court held that a jury could reasonably infer monopoly power from the combination of these barriers and Medtronic's significant market share.

LMSC's medical expert testified concerning Medtronic's exclusionary conduct, opining that

hospitals would be extremely reluctant to acquire a product that had been the subject of product recall due to liability risks. Thus, to the extent Medtronic initiated the recall as a strategy to drive LMSC's bone mills from the market (and otherwise warned hospitals that LMSC's bone mills were dangerous), it engaged in anticompetitive conduct under the trade disparagement test.

Finally, LMSC proved "harm to competition" based on the testimony of its economics expert that by eliminating LMSC's bone mills from the market, Medtronic raised the prices of spinal fusion surgeries.

We invite readers to share any "war stories" concerning the management of multiple experts in a single antitrust or other complex commercial litigation.