



Attempted Monopolization Suit Based on Alleged Referral Steering Moves Forward with Court's Acceptance as Plausible of a Geographic Market Limited to a Single Hospital

Prepared by:
Bruce D. Sokler and Farrah Short
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

LORMAN[®]

Published on www.lorman.com - June 2018

Attempted Monopolization Suit Based on Alleged Referral Steering Moves Forward with Court's Acceptance as Plausible of a Geographic Market Limited to a Single Hospital,
©2018 Lorman Education Services. All Rights Reserved.

INTRODUCING

Lorman's New Approach to Continuing Education

ALL-ACCESS PASS

The All-Access Pass grants you **UNLIMITED** access to Lorman's ever-growing library of training resources:

- ✓ Unlimited Live Webinars - 120 live webinars added every month
- ✓ Unlimited OnDemand and MP3 Downloads - Over 1,500 courses available
- ✓ Videos - More than 1300 available
- ✓ Slide Decks - More than 2300 available
- ✓ White Papers
- ✓ Reports
- ✓ Articles
- ✓ ... and much more!

Join the thousands of other pass-holders that have already trusted us for their professional development by choosing the All-Access Pass.



Get Your All-Access Pass Today!

SAVE 20%

Learn more: www.lorman.com/pass/?s=special20

Use Discount Code Q7014393 and Priority Code 18536 to receive the 20% AAP discount.

*Discount cannot be combined with any other discounts.

Attempted Monopolization Suit Based on Alleged Referral Steering Moves Forward with Court's Acceptance as Plausible of a *Geographic* Market Limited to a Single Hospital

Written by [BRUCE D. SOKLER](#) AND [FARRAH SHORT](#) – 3/12/18

A private home health care agency's attempted monopolization suit against a dominant public hospital system and its home health care agency will move forward following a federal district court's denial of the defendant hospital's Motion for Judgment on the Pleadings. *American Home Healthcare Services, Inc. v. Floyd Memorial Hospital and Health Services*, Case No. 4:17-cv-00089 (S.D. Ind, Mar. 5, 2018). Plaintiff based its attempted monopolization claim on two theories: (1) the defendant home health care agency's market share of the defendant hospital's Medicare referrals, and (2) the "essential facilities" doctrine." Critical to both theories, the district court found that plaintiff's narrow relevant market definition limited to a single firm was plausible.

Background

Floyd Memorial Hospital and Health Services ("Floyd Hospital") is a public acute care hospital in Indiana. It owns Floyd Home Health, a licensed home health care agency. American Home Healthcare Services, Inc. ("American") is also a licensed provider of home health care service in Indiana. Floyd Hospital and American both serve patients in Floyd, Clark, Harrison, Scott, Washington, and Crawford counties. American serves an additional three counties that Floyd Hospital does not. The parties dispute the relevant market, but for purposes of these pleadings, the district court noted that it is

undisputed that Floyd Hospital's acute care hospital competitors are Clark Memorial Hospital ("Clark Memorial") and Kentuckiana Medical Center ("Kentuckiana"), both located in Clark County. American alleged that Floyd Hospital is the dominant acute care hospital, with more than double the revenue of Clark Memorial and more than eight times the revenue of Kentuckiana.

For Medicare patients who require home health care service upon discharge from a hospital, Medicare regulations require the hospital to provide the patient with a list of Medicare-eligible home health care agencies that serve the location where the patient lives. Those regulations state that a health care agency must request to be listed by the hospital, and the hospital may not specify or limit the qualified providers. Furthermore, the hospital must inform the patient of their freedom to choose among the participating Medicare home health care providers.

Alleged Attempted Monopolization

American alleged that Floyd Hospital steers patients to Floyd Home Health, despite the inclusion of American on a pamphlet Floyd Hospital provides to patients listing available home health care agencies. Specifically, American argued that Floyd Hospital's computer discharge system favors Floyd Home Health over other home health care providers because the computer drop-down menu provides only "Floyd" or "Other" as the available options. If the patient wants the "Other" option, the physician has to take the extra step of writing down the agency the patient chose. American alleged that in 2015, at least 64% of the Medicare patients referred by Floyd Hospital to home health care agencies went to Floyd Home Health, and only 30% were referred to the other six home health care agencies. American received only 11 referrals (1.3%) of the Medicare patients from Floyd Hospital. American further alleged that Floyd Hospital denied patient choice by referring patients

to Floyd Home Health without offering any choices, advocating exclusively for Floyd Home Health, ignoring the patient's choice to use American, or some combination of these actions.

District Court's Analysis

To survive Floyd Hospital's Rule 12(c) Motion for Judgment on the Pleadings, American merely needed to state a plausible claim for attempted monopolization. A court will only grant a defendant's Rule 12(c) Motion if it appears beyond a doubt that the plaintiff cannot prove any facts that would support its claim for relief. Like a motion to dismiss, the facts in the complaint are viewed in the light most favorable to the nonmoving party.

The relevant market definition, with its product and geographic prongs, is critical for an attempted monopolization claim. At the pleading stage, when no discovery has commenced, American need only have pled a plausible relevant market definition. American alleged that the relevant product market is home health services *following discharge from a hospital*, arguing that Medicare regulations provide for a distinct product by imposing unique requirements for discharge planning. Floyd Hospital countered that the product market is home health care services, regardless of the referral source. The district court held that American alleged a *plausible* relevant product market, finding that home health care services following discharge from a hospital could legally be classified as a submarket.

American likewise alleged a narrow relevant geographic market limited to Floyd Hospital, arguing that through its discharge planning process it refers patients for home health care services. Floyd Hospital again disagreed, arguing that American's alleged geographic market is under inclusive as a single firm, instead proposing a much broader definition based on the six to nine counties in which both home health care agencies operate. Noting that

the Supreme Court has rejected the argument that a single firm can never be a relevant market, the district court held that American alleged a plausible relevant geographic market. The district court accepted as true that Floyd Hospital is the dominant acute care hospital in Southern Indiana, and thus Floyd Hospital's exclusion of patients from competing home health care providers leans "toward a dangerous probability of success that Floyd Home Health could achieve monopoly power in the home health care market."

The district court held that American's theory based on Floyd Home Health's market share of Floyd Hospital's home health care referrals met the Seventh Circuit's benchmark of at least 50% for an attempted monopolization case. Because the district court found that American alleged a plausible market definition, then its alleged market share for Floyd Home Health of at least 64% based on Medicare patient referrals was sufficient.

In its "essential facility" theory, American argued that it must have access to Floyd Hospital in order to compete in the relevant market. Specifically, it alleged that it is economically infeasible to require it to build and operate its own hospital in order to obtain home health care referrals. Floyd Hospital responded that it is not plausible to allege that it is the only essential health care facility in the Louisville area, or even Southern Indiana, to which all home health care agencies must have access to survive. Noting that the relevant market definition is again critical for the essential facility theory, the district court accepted as true that Floyd Hospital controls the referral process by exclusionary conduct, and that American is unable to duplicate the essential facility, thereby denying access to competition.

Floyd Hospital also countersued for tortious interference with existing contracts and business relationships as well as for defamation. The court

granted in part and denied in part American's motion to dismiss those counter claims.

While not a decision on the merits, the district court's acceptance as plausible of a relevant market limited to a single hospital provides caution for health care providers with market power that refer within their own system. While there are often clinical and economic reasons to retain patients within a health care system, if the scales appear too heavily weighted toward the "home time," at a minimum, expensive litigation like this one can result. Health care systems are well advised to have their processes and materials reviewed from an antitrust perspective.

The material appearing in this website is for informational purposes only and is not legal advice. Transmission of this information is not intended to create, and receipt does not constitute, an attorney-client relationship. The information provided herein is intended only as general information which may or may not reflect the most current developments. Although these materials may be prepared by professionals, they should not be used as a substitute for professional services. If legal or other professional advice is required, the services of a professional should be sought.

The opinions or viewpoints expressed herein do not necessarily reflect those of Lorman Education Services. All materials and content were prepared by persons and/or entities other than Lorman Education Services, and said other persons and/or entities are solely responsible for their content.

Any links to other websites are not intended to be referrals or endorsements of these sites. The links provided are maintained by the respective organizations, and they are solely responsible for the content of their own sites.