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Litigators of the Week: Judge Gives an 'F' to Changes in Leapfrog's Safety Grades for Hospitals That Don't Participate in Its Survey

By Ross Todd
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A big "F".

That was the image that **Mary Beth Maloney** of **Gibson, Dunn & Crutcher** used at the beginning of her opening statement earlier this year on behalf of five South Florida community hospitals challenging changes that The Leapfrog Group made to the way the non-profit formulates its letter-based safety grades for hospitals.

That's also the way that U.S. District Judge Donald Middlebrooks in West Palm Beach started his post-trial decision last week finding the changes harmed hospitals who did not participate in Leapfrog's survey and constituted unfair and deceptive business practice under the Florida Deceptive and Unfair Trade Practices Act. Middlebrooks wrote that Leapfrog's methodology change "has no scientific basis, unfairly penalizes non-participating hospitals, and misrepresents hospital safety."

Our Litigators of the Week are Maloney and her partners **Sydney Scott** and **Lee Crain**.

Lit Daily: Who were your clients and what was at stake here?

Mary Beth Maloney: We represented five Tenet Healthcare Corporation-owned South Florida community hospitals: Good Samaritan, Delray Medical Center, Palm Beach Gardens Medical Center, St. Mary's Medical Center and West Boca Medical Center. The Leapfrog Group publishes A-through-F Hospital Safety Grades and markets them as measures of patient safety. The court found that Leapfrog was presenting those grades as meaningful indicators of hospital safety even though they "are not based upon performance" and instead reflected Leapfrog's "acknowledged goal of punishing

Courtesy photos

(l-r) Mary Beth Maloney, Sydney Scott and Lee Crain of Gibson, Dunn & Crutcher.

nonparticipants." The court ultimately held that Leapfrog's methodology "has no scientific basis, unfairly penalizes non-participating hospitals, and misrepresents hospital safety," and that its conduct "constitutes an unfair and deceptive business practice." That mattered because the grades affected how people viewed these hospitals and, in some cases, where they sought care.

How did this matter come to you and your firm?

Maloney: Tenet has been a long-standing client of the firm, and this matter grew out of that broader relationship.

Who was on your team and how did you divide the work? Did you break things down by individual hospital since you essentially had five different clients with five separate CEOs?

Sydney Scott: This was a cross-office Gibson Dunn effort, with **Jeff Marcus** serving as local counsel. Mary Beth Maloney served as lead trial counsel. Lawyers across offices handled major parts of the trial presentation, witness examinations, briefing, and legal issues. We did not divide the case strictly by hospital, but we did organize it so that hospital-specific proof was clearly developed while the common liability case was presented in a unified way. That allowed us to try one common case while also addressing each hospital's separate proof.

You dropped your damages claim when you amended your complaint. Why try this case to the bench instead of a jury?

Lee Crain: Because the central goal was to stop the conduct, not seek a damages award. The harm was ongoing and reputational, and the cleanest way to address it was through declaratory and injunctive relief.

This was a dense record about methodology, consumer-facing grades, internal communications and targeted equitable relief.

Ms. Maloney, you started your opening statement by presenting a large "F" image and the judge opens his opinion in the same way. Why did you start there?

Maloney: Because that was the message Leapfrog put in front of the public. The "F" was the consumer-facing product. The issue in the case was not what could be found later in a methodology document. It was the immediate impression created by the grade itself. The court's order begins in the same place for the same reason: that was what patients and families saw, and that was the message that shaped behavior.

The court credited testimony about real-world patient harm, including patients leaving hospitals against medical advice. Which pieces of evidence or testimony do you think most powerfully illustrated the real-world consequences of the changes to this grading system?

Scott: The most powerful evidence came from the hospital CEOs, because they could connect the grade to what was happening in their hospitals and communities. St. Mary's also showed the broader system impact. It is the region's only children's hospital and one of only two Level I trauma centers, yet the evidence showed patients were sometimes going first to hospitals that could not actually treat them and then being transferred back to St. Mary's for the care they needed, resulting in delay and added cost. And the CEOs testified that some patients arrived genuinely fearful because of the grade. These were only the examples we know about. They do not capture the patients who may have avoided these hospitals altogether because they were deterred by a failing grade the court ultimately found deceptive.

Right after the judge's summary judgment decision, the 11th Circuit issued a decision in *FTC v. Corpay*, which affected the showing you had to make for injunctive relief under the Florida Deceptive and Unfair Trade Practices Act—clarifying that proving a likelihood of future consumer harm could get you across the bar.

How did you navigate those changes in law in your trial presentation?

Scott: We addressed it directly and promptly. *Corpay* came down the same day as the summary judgment ruling, and we brought it to the court's attention in briefing and oral argument before and during trial. Ultimately, that mattered. In the final order, the court reconsidered its earlier view and held that, for injunctive and declaratory relief, both deception and unfairness under FDUTPA may be shown by conduct that is likely to cause injury to consumers. The court then found both actual harm and a likelihood of future harm on the record before it.

Walk me through the injunctive relief here. How will these court-ordered changes address what the judge found to be deceptive and unfair?

Crain: The injunction was tailored closely to the conduct the court found unlawful. First, it stops Leapfrog from assigning grades to these hospitals under a methodology that uses assumed values, treats non-participating hospitals differently or lowers a grade because a hospital declined to submit data. Second, it requires Leapfrog to take down the challenged grades and stop promoting them. Third, it requires corrective disclosures to the entities that licensed those grades and corrective language in future paid licensing materials. So the relief addresses both the ongoing practice and the information already put into circulation.

What else is significant in the judge's decision for others facing a situation like your clients faced here?

Maloney: The decision makes clear that nonprofit status or watchdog branding does not insulate an organization from scrutiny when the underlying conduct is unfair or deceptive. If an organization is going to publish consumer-facing judgments that affect real-world decisions, those judgments have to be fair and grounded in what is actually being measured. It also shows that injunctive relief can be available when the remedy is practical, targeted and equitable.

What will you remember most about this matter?

Crain: What I will remember most is the strength of the evidence. The record showed not just a flawed methodology, but repeated representations that the grades were grounded in expert review when court ultimately found otherwise. That evidence—especially from Leapfrog's own leadership and own internal emails—was central to the result.

Scott: The clients—especially the five hospital CEOs. They were thoughtful, credible leaders who are deeply connected to the patients and communities they serve. That came through clearly in their testimony and kept the case grounded in what actually mattered.

Maloney: The clients trusted us to handle a demanding case on a compressed timeline, and the lawyers across our offices rose to that challenge.

It was especially rewarding to see younger lawyers take on meaningful roles. In my experience, the best advocacy is often done quietly in the background, through preparation, collaboration, and judgment, and this team reflected that.