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Client Memorandum
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FTC v. Lundbeck: Alternative Drugs Used To Treat Same Condition Not Necessarily In Same Antitrust Relevant Product Market

The United States Court of Appeals for the Eighth Circuit recently affirmed a lower court decision finding that two drugs were not necessarily in the same relevant product market for antitrust purposes, even though the drugs were two alternatives used to treat the same condition. The Eighth Circuit decision was rendered in an appeal brought by the Federal Trade Commission (FTC) from an August 2010 decision of the Minnesota Federal District Court rejecting an FTC challenge to the acquisition by Lundbeck, Inc. (formerly Ovation Pharmaceutical) of NeoProfen from Abbott Laboratories Inc.

Background

Lundbeck acquired from Merck & Co. the patent rights to Indocin, which at the time was the only FDA approved drug for the treatment of patent ductus arteriosus (PDA). Lundbeck thereafter acquired from Abbott Laboratories Inc. the patent rights to NeoProfen, a drug also used for the treatment of PDA. At the time of the acquisition by Lundbeck, NeoProfen was not yet FDA approved. The NeoProfen transaction was not reportable under the Hart-Scott-Rodino Antitrust Improvements Act of 1976.

Shortly after acquiring the patent rights to NeoProfen, Lundbeck increased the price of Indocin and, following the FDA approval of NeoProfen, launched NeoProfen as its second PDA drug at a price just slightly lower than that of Indocin.

The FTC and State of Minnesota challenged the NeoProfen transaction under state and federal antitrust laws.

Judicial Review Of The FTC's Challenge

The FTC was required to prove that Indochin and NeoProfen were part of the same relevant product market and that the NeoProfen transaction adversely affected competition in that market. The District Court held that the FTC failed to meet its burden.

An important factor in proving a relevant market is the existence of price cross-elasticity between the products in question. The FTC offered one neonatologist (the doctors that treat PDA) who testified that he was equally comfortable prescribing either Indocin or NeoProfen and that a determinative factor in making his decision to prescribe either Indocin or NeoProfen was the price of the drugs. The FTC also argued that Indocin and NeoProfen are largely practicable alternatives as well as functionally similar.

The District Court was not persuaded, however, in light of contradictory evidence put forward by the defendants. The court found that neonatologists examined the clinical advantages or disadvantages of each drug and based their prescription decisions on these factors rather than price. It also found that loyalty to one or other of the drugs was more indicative of the choices

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made by neonatologists. The court was unswayed by the FTC's claim that marginal customers constrained the prices of the drugs because the number of marginal customers was small. It dismissed as unproven the FTC's argument that ownership of the drugs by separate companies vying for inclusion in a hospital's formulary, rather than a single company, would foster competition and decrease prices — crediting testimony by pharmacists that the final decision as to which drug was prescribed to a patient was that of the neonatologist and not that of the hospital.

The final basis on which the FTC attempted to prove a single relevant product market was the pricing discussion discovered in Lundbeck's internal documents. The District Court found this was indicative of "industry recognition" of Indocin and NeoProfen being in the same marketplace, but not necessarily evidence of an antitrust relevant product market.

On appeal, the FTC argued that the District Court ignored: (a) testimony of the only testifying neonatologist that price was a determinative factor in his decision as to whether to prescribe Indocin or NeoProfen; (b) evidence that hospitals may use the price of the drugs to determine which to purchase for their formulary; (c) the fact that Indocin and NeoProfen are practicable alternatives as well as functionally similar; (d) the ability of marginal customers to constrain prices; and (e) the existence of Lundbeck's internal documents stating that Indocin and NeoProfen are in the same market.

The Eighth Circuit affirmed the District Court, holding that definition of the product market was a fact determination that could be overturned only on a finding of "clear error." No such error was evident in the District Court's analysis. The Eighth Circuit held that the District Court, having considered and weighed the evidence provided by the FTC and Lundbeck, had simply found Lundbeck's evidence to be more persuasive.

Conclusion

In interpreting the significance of the decision, clients should be aware of several points:

- The decision illustrates that a broader relevant product market is not always better for parties to transactions. One often hears that a broad product market reduces the likelihood a company will run afoul of the antitrust laws, but the decision shows that the conventional wisdom does not necessarily apply in every case.
- The decision is based on the specific facts presented, so its application to future cases may be limited. The lack of price cross-elasticity between the two products was a significant factor to the District Court. The opinion is likely to be of significance in markets where price cross-elasticity is absent or minimal and where patient particularities and preferences drive customer decisions.
- This decision is not the first instance in which alternative drugs used to treat the same condition have been viewed as not necessarily falling within a single product market. The FTC itself commonly looks beyond the therapeutic use of two drugs before placing them in a single market and instead examines the drugs' respective mechanisms of action, dosage amounts and frequencies, and modes of delivery.