AntitrustConnect Blog

Some Reflections on the Lundbeck Appeal: Will Pharmaceuticals Get a Blanket Antitrust Immunity? And Is Quality Competition No Longer Protected by Antitrust?

Christopher Sagers (Cleveland-Marshall College of Law) · Wednesday, March 9th, 2011

A decision to watch for this year is the Eighth Circuit's pending consideration of *FTC v. Lundbeck, Inc.*, 2010-2 Trade Cases ¶77,160; 2010 WL 3810015 (D. Minn. Aug. 31, 2010). (While I helped draft an amicus brief in that case, on behalf of the American Antitrust Institute, the views here are strictly my own.)

If antitrust has a salient theme for me these days, it is the apparent sense of so many courts that antitrust cases simply *must* be dismissed, on any possible ground at hand, and that only after exhausting even the craziest possibilities should a plaintiff get past summary disposition. It seems to me that only such a view of things can explain an opinion like *Lundbeck.*

When the Commission first brought the case, it attracted a lot of attention. But most of what was initially sensational about it has fallen away.

As in most lawsuits in which one party can point to dramatic facts, those stressed early on by the Commission and a bit more bombastically by then-Commissioner Leibowitz wound up not dominating the case as much as the government might have liked. And an allegedly radical § 7 theory suggested in the concurring statements by Commissioners Leibowitz and Rosch, which had commentators rather riled up at the time, has now been largely forgotten.

Nevertheless, what should have been a straightforward § 7 case setting out an extremely strong case for the government—defendant already owned one product in the relevant market and acquired the only other one in existence, swiftly thereafter raising the price by more than tenfold—instead produced a bench verdict for defendant on a theory so radical that, if it survives appeal, it could threaten sub silentio antitrust exemption for a large swath of the pharmaceutical industry.

In one of the truly strange twists in the case, most of the district court's fact findings were taken verbatim from the *government*'s proposed findings of fact, and so, not surprisingly, the opinion sets out what amounts to an iron-clad demonstration that the two products are closely interchangeable substitutes. But, nevertheless, the court dwelt on its view that the two drugs in question were not significant *price* competitors. It reached the radical result that functionally interchangeable substitutes available to the same buyers in the same markets, but not displaying a significant cross-price elasticity, *are not in the same relevant market.*

Relying on the testimony of about a half-dozen doctors, who said they choose one or the other of Lundbeck's two drugs without regard to the price charged, and on the testimony of a defense economist (who was responding to the court's in-court questioning, not presenting the results of his own analysis), the court decided that the drugs displayed a low "cross-price elasticity." Never mind that measurement of cross-price elasticity would have been literally impossible—during the entire three years during which the two products had both been in existence, they were always owned by the same monopolist and they were always priced almost identically. Never mind as well the several explicit findings in the court's own opinion suggesting that the two drugs actually exerted significant price pressure on each other. Even taking the court's cross-elasticity finding as correct, it is alarming to hold that the Clayton Act just does not apply to two products so plainly in non-price competition of a kind that antitrust law is supposed to protect.

The idiosyncratic market characteristics on which the court reached this result seem unlikely to be limited to this particular case. Lots of other drugs are administered only in hospitals, and hospital drug purchasing should pretty much always display the same price-insensitivity as the *Lundbeck* court relied upon. In all those cases, after all, doctors exert substantial influence over the drugs chosen, and their concerns focus on quality to the exclusion of price. So the same pricing dysfunction should be at work in most or all hospital formulary decisions. In other words, if it survives appeal, *Lundbeck* may well convert a market *failure* into an antitrust immunity.

Who knows what the Eighth Circuit will do? The panel has not yet been identified. But it is emblematic of the current state of things that such a drastic result not only seemed to make sense to a federal judge, but also seems to have largely escaped everyone's attention.

This entry was posted on Wednesday, March 9th, 2011 at 12:25 am and is filed under FTC Enforcement, Mergers and Acquisitions, State Enforcement
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.