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FTC v. Lundbeck: Why, God, Why?

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What really has the world come to when a merger to monopoly followed by a 1300% price increase survives Section 7 challenge?

That, sadly, seems to be the final result in *Federal Trade Commission v. Lundbeck,* which the Eighth Circuit affirmed last Friday. There the maker of one drug to treat a heart defect in premature babies acquired the only other such drug in existence, and then drastically raised the price of both. The Commission brought what one might be forgiven to have thought was a slam dunk legal challenge, but instead lost by bench verdict. The case seems now pretty irrevocably to have been styled a "fact" case—the Eighth Circuit decided it that way, and it seems quite doubtful that its view will be disturbed. One accordingly presumes that efforts at either en banc review or certiorari will seem to the Commission not worthwhile. And so, one of the strangest, most remarkably incorrect district court opinions in quite awhile has now become part of the settled law.

Take my thoughts with a grain of salt, because I helped draft a brief in the Commission's support. But if there were need for proof that antitrust has gone completely haywire, this is it. Perhaps the strangest twist was the so far little-noticed fact that the district court adopted the Commission's proposed facts almost verbatim. You heard me, the *Commission*'s proposed facts. But then the court ruled for the defendant. The consequence was a series of acute logical conflicts between the facts found and the result reached, a point that we stressed to the Eighth Circuit to prove that the case was *not* a "fact" case.

There also was the district court's fundamental legal claim, which was that two products cannot be in the same relevant product market—and therefore that acquisition of both by the same firm is not a horizontal acquisition—if they do not exhibit substantial cross-price elasticity. A running point of confusion in the ruling was just what this purported lack of price competition was supposed to prove. The court repeatedly said it proved that the products were not in the same market, but that is both palpably absurd and sharply in conflict with quite a number of the court's other findings. The real point, which the court hinted at only rather more obliquely, seemed to be that an acquisition cannot cause *harm* if it does not cause price to go up. This is incorrect as a matter of law. Decades of case law hold that antitrust injury can include constraints on quality and innovation, regardless of effects on price. And here is a second reason that, with respect, *Lundbeck* is not even sort of a "fact" case: it was fundamentally premised on an incorrect proposition of law.

There are only two of the weensiest little bright spots in the case, for those of us who would rather the antitrust laws not be entirely repealed by the judiciary. First, the Eighth Circuit opinion in and

of itself may not have that much weight. The majority stressed that the affirmance was driven only by the standard of review, and it ended with the *de rigeur* observation that "[w]hether this court would come to the same conclusion is irrelevant." So the case ultimately may have little more significance (to those of us other than premature infants and their parents) than it would have if it were still just one district court opinion believed more or less universally to be wrong.

Second, there is the concurrence, by one Richard Kopf, a district judge fromNebraskasitting by designation. While agreeing that the standard of review should ultimately control, Judge Kopf's just-over-one-paragraph opinion tersely criticized the district court, and concluded that the opinion was an "oddity" that was "strange" and "perplexing."

That makes me feel a little bit better, I guess. But was it really so "perplexing," the district court order? I don't think so. *Lundbeck* just takes its place among a growing constellation of such decisions. We hear courts saying things like that a bunch of separately incorporated firms with no cross-ownership are just a single entity [*American Needle, Inc. v. NFL*, 538 F3d 736], that a bunch of competing ship captains in a naked price-fixing scheme are immune because they incorporated their conspiracy and issued a share to each conspirator [*Menkes v. St. Lawrence Seaway Pilots' Assn*, (CCH) 2007-1 Trade Cases ¶75,570; 2007 WL 167715], or that a conceded monopolist could never, ever violate the law so long as it is merely engaged in "ordinary business practices" [*Stearns Airport Equipment Co. v. FMC Corp.*, 170 F3d 518], whatever that means. I confess I find *Lundbeck* just one more decision by a judiciary bent on squeezing the merest possibility of antitrust liability out of our system.

The August 19, 2011, decision in *FTC v. Lundbeck, Inc.*, No. 10-3458/3459, is published at **(CCH) 2011-2 Trade Cases ¶77,570**.

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