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What Is a Relevant Market Anyhow?

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The Eight Circuit, in *FTC v. Lundbeck, Inc.*, No. 10-3458/3459 (Aug. 19, 2011), upheld the district court's finding that the FTC failed to show a relevant market, and thus was unable to challenge the acquisition of the drug NeoProfen. It already owned a drug called Indocin IV, which, along with NeoProfen, was used to treat a condition in low-birth-weight infants, known as patent ductus arteriosus. Although these two drugs had different active ingredients, they were both approved by the FDA to treat this condition.

Physicians would choose which drug to use apparently based on their preferences, and somewhat different side effects.

This paragraph in the court's decision caught my eye:

> When Lundbeck purchased Indocin IV, Merck charged $77.77 per treatment. Lundbeck immediately raised the price of Indocin IV. Two days after acquiring the rights to NeoProfen, Lundbeck raised the price thirteen-fold. By 2008, the price of Indocin IV settled at $1614.44. When Lundbeck introduced NeoProfen in 2006, it charged $1450 per NeoProfen treatment, and its price eventually settled at $1522.50.

At trial, there was testimony that the physicians prescribing the drug did not pay attention to the price. Because of this, the court ruled that there was insufficient evidence of a relevant market, and the FTC's case failed. On appeal, the appellate panel noted that there was no error of law (the court recited all of the right cases about how one determines a relevant market), and findings of fact would only be overturned if clearly erroneous.

Looking at the facts in the opinion, it seems like there *are* a lot of findings that are clearly erroneous—or at least strange. The fact that the doctors that prescribe the drug don't pay attention to the price is irrelevant. Someone else, usually an insurance company, is paying. There was no alternative drug treatment, and it must have been more than a coincidence that the price of Indocin IV was raised so dramatically. The fact that customers don't restrain prices does not mean that the items are not in the same market. These customers are not subject to normal market-based concerns. They aren't paying. Why would anyone care about price if someone else got the bill?

Internal documents from Lundbeck also showed, according to the FTC, that the products were substitutes, and they would promote one over the other in their fight against generic competition.

But the court ruled that there were alternative interpretations of these documents, and if there are two permissible views of evidence, the factfinder's choice between them is not clearly erroneous.

Economic analysis is very important to merger cases, but when it is divorced from human behavior it is not useful. Perhaps a behavioral economist could help here. He or she could answer the important question: Why did the company acquire this product, and why did they price it the way they did? The short answer: Because they could. Did the drugs perform exactly the same function? Yes. Was the pricing similar? Yes. This is not a case where someone argues that a Cadillac should not be in the same market as a Chevrolet. This is more like arguing that a red Chevy is not competing with a blue Chevy because some people prefer one over the other, and don't really look at price.

The fact that market forces did not exist to keep the prices down is precisely the reason why an antitrust challenge to this transaction makes sense. When market forces are missing it means that there is not competition, it does not mean that the products are not in the same market. En banc appeal, anyone?

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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