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Third Circuit Holds the Line on Antitrust Standing

Jeffrey May (Wolters Kluwer) · Thursday, January 24th, 2013

In order to assert an antitrust injury, a plaintiff needs to be a consumer or a competitor in the restrained market, the U.S. Court of Appeals in Philadelphia ruled yesterday. If a company makes the choice not to compete, then it will lack standing to pursue antitrust claims.

Ethypharm S.A. France, a French pharmaceutical company, brought an antitrust action in 2008 against Abbott Laboratories. Ethypharm alleged that the failure of its branded fenofibrate drug, Antara, to compete with TriCor, which was developed by a French company named Laboratories Fournier and distributed by Abbott in the United States, was a direct result of Abbott's anticompetitive conduct.

Ethypharm did not sell Antara directly in the United States. It did not receive the required Food and Drug Administration (FDA) approval to market Antara in the United States. Instead, it entered into an agreement with Reliant Pharmaceuticals, Inc., an American company, pursuant to which Reliant sold Antara in this country. Reliant obtained the necessary regulatory approvals to market the drug, which is used to lower cholesterol.

Abbott challenged Ethypharm's standing to bring the antitrust claims on the ground that Ethypharm did not compete with it because Ethypharm was not a supplier of Antara. The federal district court in Wilmington, Delaware, however, denied the motion to dismiss for lack of standing (598 F. Supp. 2d 611, 2009-1 Trade Cases ¶76,535). The court held "a foreign name-brand manufacturer, which does not itself market and distribute its product in the United States but does so through an exclusive United States distributor, is entitled to avail itself of the protection of the antitrust laws for the purpose of challenging the conduct of a manufacturer of a competing brand name drug."

Ultimately, Abbott was granted summary judgment, after the district court determined that Ethypharm had not presented enough evidence from which a reasonable jury could find a causal connection between the alleged antitrust injury and the damage it suffered.

Ethypharm appealed. Although Abbott did not file a cross-appeal, the plaintiff's standing argument was deemed to be a proper issue before the appellate court. The appellate court vacated the grant of summary judgment as to the federal claims and remanded with directions that they be dismissed for Ethypharm's lack of standing.

Antitrust injury, the type of injury for which the antitrust laws were intended to provide redress, is a necessary condition of antitrust standing, the court explained. To suffer an antitrust injury,

Ethypharm had to be a consumer or competitor in the relevant market–the sale of fenofibrate products in the United States–, or "must have suffered such injuries as "are the means by which the defendant[] seek[s] to achieve [its] anticompetitive ends."

Ethypharm did not claim to be a consumer. Although Ethypharm manufactured a product that was ultimately sold in the relevant market, it also was not a competitor. In the highly regulated U.S. pharmaceutical market, there was no cross-elasticity of demand between what Ethypharm could lawfully offer, i.e., bulk drug sales from outside the United States to an FDA-approved entity, and what Abbott offers, a finished pharmaceutical product within the United States. Customers in the United States could not purchase the drug at issue from Ethypharm.

"Ethypharm is literally not a lawful competitor in the United States fenofibrate market, and so it cannot be considered a competitor for purposes of antitrust injury," according to the court. Ethypharm chose not to surmount the legal barriers that prevented it from selling in the U.S. pharmaceutical market, the court explained.

"Inextricably Intertwined"

The appellate court also rejected Ethypharm's argument that, even if it was not a competitor in the U.S. fenofibrate market, it suffered antitrust injury because its injury was "inextricably intertwined" with Abbott's conduct. It argued that Ethypharm's "injuries are the means by which the defendants seek to achieve their anticompetitive ends."

An "inextricably intertwined" antitrust injury is limited to plaintiffs "whose injuries are the essential means by which defendants' illegal conduct brings about its ultimate injury to the marketplace," the court explained. The court refused to "extend[] the 'inextricably intertwined' exception 'beyond cases in which both plaintiffs and defendants are in the business of selling goods or services in the same relevant market,' though they may not directly compete against each other."

The January 23, 2013, decision in Ethypharm S.A. France v. Abbott Laboratories, No. 11-3602, is available here.

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