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FTC v. Invibio: Another Missed Opportunity to Provide Guidance

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On April 27, 2016, the FTC entered an administrative complaint against Invibio, Inc., accusing it and its parent company, Victrex, of violating FTC Act Section 5 through exclusive dealing contracts. The companies agreed to a consent order, also issued that day. Because the antitrust aspects of exclusive dealing remain unsettled, practitioners (and their clients) would have welcomed some guidance from the FTC. Unfortunately, the materials made public leave open questions about exactly what Invibio did wrong and what harm to competition it caused.

According to the complaint, in 1999 Invibio was the first to develop implant-grade polyetheretherketone (PEEK) for use in various medical devices like spinal interbody fusion devices. Invibio sold PEEK through exclusive dealing contracts to medical device manufacturers. In the mid-2000s, two other large chemical companies also developed implant-grade PEEK. By 2013, the FDA had approved devices using those competitors' PEEK. As those competitors entered the market, Invibio tightened up its exclusive dealing contracts. The result, according to the complaint, was that Invibio maintained approximately 90% of the market despite lower prices from its competitors and a desire by the medical device manufacturers for additional sources of such PEEK.

These allegations certainly are consistent with past FTC and private cases where similar actions were found to be anticompetitive. On the other hand, the facts could also be consistent with a story of an industry pioneer competing hard against two large chemical company competitors. Unfortunately, the complaint, analysis to aid public comment, and other material provide few details as to why the FTC thought the former explanation was correct.

What is the harm?

While experts disagree about the circumstances under which exclusive dealing agreements are anticompetitive, there is agreement that they are not always anticompetitive. As a result, the FTC needed to allege some harm to competition, especially after its most recent exclusive dealing case when a dissenting commissioner criticized his colleagues for not doing enough to show such harm.

The main harm alleged here is that these agreements enabled Invibio to "maintain *supracompetitive* prices" or "prices that were *substantially* higher than competing versions" despite offers from the two competitors of "*significantly* lower prices." None of those italicized terms are defined, explained, or even estimated in any way—was the price difference 10%? 100%? Was

there any other explanation for those differences, like quality or methods of production or delivery?

The complaint and other materials also alleged the agreements might have future negative effects on prices and innovation through potential effects on the two competitors: Because "each firm has missed sales targets," neither might achieve "sufficient returns to justify further investment in the business" and so "there is a significant risk" that they will "become even less effective competitors in the future." The claim at least leaves open many questions for future cases: If competitors are not losing money, then how "insufficient" must the returns be to raise issues? If competitors are not exiting the market, then how much "less effective" must they be before the FTC will step in? Whatever the risk is exactly, when does it become "significant?"

What are the offending terms?

Even if the allegations of higher prices are not as detailed as some practitioners would want, the "supracompetitive" allegation probably is sufficient at the complaint stage. It is the explanation for how those supracompetitive prices were obtained that is most lacking. For instance, these exclusive agreements are alleged to be "long-term supply contracts." How long are those terms? And how do those lengths compare to any standard length in the industry? Some cases have found contracts of less than a year presumptively lawful—were these contracts longer? The complaint and materials offer no details.

And how exclusive were the terms? Per the complaint and other material, the required exclusivity varied. Some contracts required customers to only use Invibio PEEK. Others required its use for "a broad category of PEEK-containing devices" or "a list of identified PEEK-containing devices . . . often including nearly every device in the customer's portfolio." How often was each type of agreement used? How broad were the categories? How often was "nearly every device" on the list?

The proposed order does provide at least one helpful bit of guidance. The order would limit when Invibio could use certain discounting practices. For instance, Invibio would not be able to offer volume discounts that are applied retroactively once a customer meets a certain threshold. For example, Invibio would not be allowed to lower the price of the first 99 units if and when the customer bought the 100th unit. Presumably, such retroactive discounts could harm competition by effectively preventing competitors from selling to a customer at least until the 100th unit is purchased.

If foreclosure is important, then how much was there?

Older cases focused closely on the amount of sales that were foreclosed to competitors by the exclusive arrangements. More recent analyses have described the foreclosure amount as the beginning, not the end, of the analysis (although there is still disagreement about the path to follow from that beginning). But if foreclosure has any importance, then it would be helpful to know what level the FTC thinks can lead to anticompetitive results like those alleged. Here, however, the only guidance received from the complaint is that the "exclusive contracts have foreclosed from competitors a substantial portion of the [market]." While the percentage of sales that can raise competition issues would vary by industry, the complaint and other materials gives no estimate or an explanation for why the amount is "substantial" here.

Courts have found that even incomplete foreclosure can be anticompetitive if it prevents the competitor from achieving an appropriate level of sales, such as minimum efficient scale, that

would allow it to be an effective competitor. That theory was accepted by all the commissioners in the *McWane* case—the disagreement there was over the appropriate evidentiary standard and whether that standard was met. Here, there is no specific theory or level of foreclosure outlined, only the implication that some indeterminate reduction in foreclosure would allow the two competitors to avoid becoming "less effective competitors in the future."

Why are certain customers, who are foreclosed to the two competitors, "key" customers?

Another way incomplete foreclosure could still be anticompetitive is if certain "key" customers are foreclosed. Here, the complaint makes that allegation but, again, is unfortunately unclear when explaining why the unnamed customers are "key" ones. First, it says that "Invibio recognized that it was particularly important to lock up the largest" customers, which forced the two competitors to "focus sales efforts small device makers." So are the foreclosed customers key because they prevent either competitor from achieving efficiencies? Or because the costs to serve the remaining small customers raise the competitors' costs? Or both? And how much must those costs be raised to be anticompetitive?

The complaint also describes the customers as "key" because they are the "most sophisticated medical device makers" and sales to them would "validate [the competitors] in the eyes of other device makers," thereby validating their "reputation." The complaint is silent as to why the two large chemical company competitors need a validation of their reputation. Are they new suppliers to these customers? Are they new to the FDA and its regulation? The complaint mentions the years it took each of them to go from developing industrial-grade PEEK to having implant-grade PEEK approved in certain medical devices—was that delay caused by necessary research and development? Regulatory burden? Invibio's exclusive agreements? Because the competitive effect of exclusive agreements can depend on the market and regulatory environment, more details about PEEK sales and regulation would have helped practitioners from outside this industry apply the FTC's actions in this complaint to other circumstances.

Conclusion

It is possible the FTC's investigation revealed answers to all these questions that supported an anticompetitive theory. It might even be likely, especially because Invibio decided not to fight the challenge. From the published materials, however, it is impossible to tell for certain. Because the matter is not being litigated, we will never know. As a result, the FTC missed another opportunity to guide practitioners about when exclusive dealing contracts are anticompetitive and under what circumstances it will find a Section 5 violation. Given the recent criticism of the Commission for providing insufficient Section 5 guidance, that failure is surprising. In response to that criticism, some commissioners and officials have directed practitioners to "read the complaints." Well, reading this complaint did not help much at all.

This entry was posted on Wednesday, May 4th, 2016 at 6:38 pm and is filed under Exclusive Dealing, FTC Enforcement
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