FEDERAL TRADE COMMISSION v. LUNDBECK, INC.

Today the Commission has petitioned the United States Court of Appeals for the Eighth Circuit to rehear *en banc* the August 19, 2011 panel decision,[1] which affirmed the district court's conclusion that Indocin IV ("Indocin") and NeoProfen—the only two FDA-approved drugs for the treatment of patent ductus arteriosus ("PDA"), a potentially fatal heart condition afflicting seriously premature infants—were not in the same relevant product market and thus did not violate the antitrust laws.[2] I concur in the decision to petition for rehearing of this case, which involves what can be characterized only as a merger to monopoly through defendant Lundbeck, Inc.'s ("Lundbeck") acquisition of the rights to both Indocin and NeoProfen, immediately followed by its exercise of monopoly power over the price of the two drugs.[3] I write separately, however, to express my view that the petition is not as crisp and direct as it could—and should—be in explaining why the district court and the Eighth Circuit panel erred, as a matter of law, insofar as they held that cross-price elasticity of demand between the two drugs was "essential" to proof of a relevant product market, so that findings of fact demonstrating reasonable interchangeability of use between the two drugs could be ignored.

The district court concluded that Indocin and NeoProfen were not in the same relevant product market despite making factual findings (1) that the two drugs were functionally interchangeable; (2) that a

NeoProfen; (3) that Lundbeck thereafter increased the price of Indocin nearly 1300 percent and then priced NeoProfen at a similar level; and (4) that Lundbeck's own business documents showed it priced the two drugs near parity so that one drug would not "cannibalize" the sales of the other.[4] Ignoring its own findings, the district court instead based its conclusion about the relevant product market on only two pieces of testimony: (1) the opinion of Lundbeck's economic expert that the cross-price elasticity of demand between the two drugs was "very low"; and (2) the views of a handful of neonatologists that they did not consider the prices of the two drugs in deciding which drug to use.[5]

The Eighth Circuit panel affirmed. It agreed at the outset that after acquiring NeoProfen, Lundbeck owned all of the drugs for treating PDA and increased the price of Indocin "thirteen-fold."[6] Nevertheless, the panel deferred to the district court's conclusion about the relevant product market, holding that the district court's reliance on the testimony of Lundbeck's economic expert and the neonatologists did not constitute "clear error."[7] The panel so held even though it recognized that deference was not required when a district court's finding of fact "is predicated on a misunderstanding of the governing rule of law."[8] Moreover, one of the panel members, in a concurring opinion, questioned the district court's reliance on the testimony of neonatologists that they would use one drug or the other without regard to price when the trial record established without contradiction that hospitals, not doctors, paid for the drugs.[9]

Both the district court and panel decisions were classic examples of economic theories (and specifically price theory) preventing a fair and rational judgment based on the undisputed and indisputable facts and in accordance with governing legal principles. The Commission has filed a petition for rehearing *en banc* in order to give the Eighth Circuit an opportunity to correct the district court and panel decisions' legal errors, which include, among other things, (1) allowing the opinion of Lundbeck's economic expert on cross-price elasticity to trump

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[4] *Id.*

uncontested facts that Lundbeck, after its acquisition of NeoProfen, controlled both drugs and exploited the monopoly position it had thus obtained (contrary to Supreme Court and Eighth Circuit case law);[10] (2) holding that evidence of price cross-elasticity of demand was "essential" to proof of a relevant product market, so that the district court's findings of fact on reasonable interchangeability of use between

measured by a broad interpretation of the economic notion of 'cross-elasticity.'" It is not clear to me what this statement means.

On the one hand, insofar as this statement is meant to imply that "cross-elasticity" may be based on non-price factors, then it is irrelevant to the district court's conclusion. That is so because the panel decision and concurring opinion (as well as the district court's findings that there was reasonable interchangeability) established that the district court's conclusion that the two drugs were not in the same relevant product market was based exclusively on price factors, namely, the testimony of Lundbeck's economist and a handful ofs

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