



Case & Project Experience

NERA's Role in *Federal Trade Commission v. Lundbeck, Inc.*

The Situation

In 2005, Ovation Pharmaceuticals purchased a bundle of five drugs from Merck & Co. Indocin IV, one of the drugs in the bundle, is used to treat a life-threatening heart condition in extremely premature infants called patent ductus arteriosus (PDA). In January 2006, Ovation acquired the marketing rights to NeoProfen, another drug used to treat PDA, from Abbott Laboratories. At the time of this acquisition, NeoProfen was still waiting for its FDA approval. Immediately after acquiring the rights to NeoProfen, Ovation raised the price of Indocin IV by almost 1,300 percent.

In 2008, the US Federal Trade Commission (FTC) and the state of Minnesota sued Ovation, claiming that the acquisition of the rights to NeoProfen was anticompetitive, and was a violation of the Clayton and FTC Acts. The FTC asked the court to order Ovation to divest one of the two drugs, and to disgorge profits obtained because of its alleged monopoly. The Danish firm H. Lundbeck A/S acquired Ovation in 2009, and its US subsidiary, Lundbeck, Inc., inherited the lawsuit.

NERA's Role

Lundbeck retained NERA Senior Vice President Thomas McCarthy to examine whether Ovation's acquisition of NeoProfen in 2006 resulted in any anticompetitive harm. Dr. McCarthy was assisted by NERA Senior Consultant Dr. Sourav Chatterjee. In his expert report, Dr. McCarthy opined that, despite being functional substitutes, Indocin and NeoProfen are not economic substitutes and, hence, they are not in the same antitrust market. The key evidence behind this conclusion came from the testimony of the neonatologists in charge of treating

these premature babies. The physicians each had strong clinical preferences for one drug or the other. Dr. McCarthy further opined that the record showed that Lundbeck planned to raise the price of Indocin long before it learned about the existence of NeoProfen. Finally, based on the economic literature on pharmaceutical pricing, Dr. McCarthy concluded that an independent manufacturer of NeoProfen would have priced NeoProfen at or above the price that Ovation chose.

In December 2009, Dr. McCarthy also testified on this matter in the US District Court for the District of Minnesota. At trial, Dr. McCarthy testified that the cross-price elasticity of demand between NeoProfen and Indocin IV is very low, and that the two drugs are not in the same product market even though they are used to treat the same condition. In her ruling, Judge Joan Ericksen said that she found Dr. McCarthy's testimony on these points "persuasive." She stated that:

"NeoProfen and Indocin IV are distinct; their side effects differ. The Court finds that NeoProfen and Indocin IV are not in the same product market."

The Result

On 31 August 2010, Judge Ericksen ruled in favor of Lundbeck. The ruling unequivocally stated that the FTC and Minnesota failed to demonstrate that NeoProfen and Indocin IV are in the same product market, that Lundbeck possessed monopoly power, or that the acquisition of the rights to NeoProfen substantially lessened competition.

About NERA

NERA Economic Consulting (www.nera.com) is a global firm of experts dedicated to applying economic, finance, and quantitative principles to complex business and legal challenges. For over half a century, NERA's economists have been creating strategies, studies, reports, expert testimony, and policy recommendations for government authorities and the world's leading law firms and corporations. We bring academic rigor, objectivity, and real world industry experience to bear on issues arising from competition, regulation, public policy, strategy, finance, and litigation.

NERA's clients value our ability to apply and communicate state-of-the-art approaches clearly and convincingly, our commitment to deliver unbiased findings, and our reputation for quality and independence. Our clients rely on the integrity and skills of our unparalleled team of economists and other experts backed by the resources and reliability of one of the world's largest economic consultancies. With its main office in New York City, NERA serves clients from more than 25 offices across North America, Europe, and Asia Pacific.

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