STATEMENT OF
COMMISSIONER J. THOMAS ROSCH[1] IN
FEDERAL TRADE COMMISSION v. LUNDBECK, INC.

Dkt. Nos. 10-3458 and 10-3459; FTC File No. 0810156

January 20, 2012

There are many reasons for seeking Supreme Court review of the the Eighth Circuit's panel and *en banc* decisions in the *Lundbeck* case, which blessed the district court's decision. To begin with, those decisions are about as erroneous as any merger decisions can get. This office is not alone in this view. The American Antitrust Institute (AAI) filed amicus briefs in the Eighth Circuit on the Commission's behalf. One of the authors of those briefs, Professor Chris Sagers of the Cleveland–Marshall College of Law at Cleveland State University, rhetorically asked, "Why, God, Why? What really has the world come to when a merger to monopoly followed by a 1300% price increase survives Section 7 challenge? … [I]f there were need for proof that antitrust has gone completely haywire, this [case] is it."[2]

FTC:Watch has also highlighted the erroneous nature of those decisions. That publication described the case as potentially having "far-reaching legal implications for antitrust law" because "[i]t could set a precedent, making it easier for judges to rule against government agencies on technical grounds of market definition, even when the victims are remarkably vulnerable—in this case, premature babies injured by what was alleged to be price-gouging by a monopolist."[3]

This view—that antitrust law failed in the *Lundbeck* case to protect consumers—was echoed by a poster on CBSNews.com: "Lundbeck could charge whatever the market—that is, desperate, frightened families—can bear."[4]

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[1] The views expressed in this statement are mine alone, and not necessarily those of the Commission or any other Commissioner.

[2] Christopher Sagers, FTC v. Lundbeck*: Why, God, Why?*, ANTITRUSTCONNECT BLOG (Aug. 23, 2011), http://antitrustconnect.com/2011/08/23/ftc-v-lundbeck-why-god-why/.

[3] Kirstin Downey, *Second Look at* Lundbeck, FTC:WATCH, Dec. 1, 2011, at 5.

[4] Dan Bischoff, *Is There Still Such a Thing as a Monopoly Under the Law?*, CBSNEWS.COM (Aug. 24, 2011, 1:56 PM), http://www.cbsnews.com/8301-505123_162-43555704/is-there-still-such-a-thing-as-a-monopoly-under-the-law/.

The first error of law[5] committed by the district court and the Eighth Circuit was that, in holding that the two drugs at issue in this case—Indocin and NeoProfen—did not compete with each other in the same relevant product market, both courts focused only on cross-*price* elasticity of demand—i.e., whether customers would switch from one product to the other based on *price* considerations alone, and they failed to embrace the basic legal (and economic) principle that cross-elasticity of demand includes non-price considerations as well. This was at odds with the Supreme Court's teachings in multiple merger decisions.[6] The FTC's Post-Trial Brief argued for a product market definition based on the prospect of non-price competition as well as price competition. The AAI's amicus briefs also asserted that this was a fundamental error of law.

Second, by erroneously focusing only on cross-*price* elasticity of demand, the district court allowed an economic expert's opinion to trump the record facts regarding how these products were being marketed, purchased, and used in the real world. There can be no doubt that the district judge committed this error because she said she was focusing on cross-price elasticity to the exclusion of other relevant, non-price factors, which were incorporated into her findings of fact. Moreover, that is what the Eighth Circuit panel's decision blessing her error said she did. To allow economic expert opinion and theory to override undisputed findings of fact made by the district court itself

[5] The Commission majority agrees with me that "the result in this case was profoundly wrong" but takes the view that the decisions of both the Eighth Circuit panel and the district court are limited to the latter's "assessment of the evidence." Although the Eighth Circuit panel did undertake to protect itself in that fashion, its decision nonetheless acknowledged that Rule 52(a) does not apply to errors of law, citing *Bose Corp. v. Consumers Union, Inc.,* 466 U.S. 485, 501 (1984), and *Universal Title Ins. Co. v. United States*, 942 F.2d 1311, 1314 (8th Cir. 1991). As the Commission pointed out in its petition for rehearing *en banc*, one of the reasons that these decisions were so "profoundly wrong" was that they conflicted with decisions of the Supreme Court and other courts of appeals (and with the views of Professor Hovenkamp, among others) on various points of law. Thus, the district court's errors (which were blessed by the Eighth Circuit) were not only outside the protection of Rule 52(a) but were squarely within the ambit of Supreme Court Rule 10 and the Court's other jurisprudence on grounds that traditionally merit certiorari review.

[6] *See, e.g.,* United States v. Continental Can Co., 378 U.S. 441, 455–56 (1964); United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 400 (1956).

contravenes the Supreme Court's—and indeed, the Eighth Circuit's own—teachings.[7]

Third, the district court concluded that—given its erroneous focus on cross-price elasticity—it had to blind itself, as a matter of law, to the parties' own business documents, which showed, among other things, that Lundbeck advantaged NeoProfen and disadvantaged Indocin in the marketplace because it did not want Indocin to "cannibalize" NeoProfen. That is contrary to the law as applied by the Supreme Court and by Judge Robert Bork, then sitting on the Court of Appeals for the D.C. Circuit.[8] Nor can it be said that the district court simply interpreted the parties' documents differently than the Commission did. The district judge instead said she was bound not to consider the parties' documents *at all*. Even Lundbeck admitted in its appellate brief that that was legal error, but suggested that the legal error could be cured on remand.

Fourth, the district court did not consider a hypothetical market, i.e., what the cross-elasticity of demand would have been had Lundbeck not controlled the manufacture, marketing, and sale of *both* products. The Eighth Circuit panel did not pretend that the district court had done otherwise. Instead, the panel asserted that the district court did not *need* to do so. That assertion was contrary not only to Eighth Circuit law, but to the law in a number of other circuits. Indeed, Professor Herbert Hovenkamp too has pointed out this error in his recent article on the Eighth Circuit panel's decision: "The court also rejected the use of what it termed a 'hypothetical' market in which the merger had not occurred. In fact, however, *all* merger analysis involves the use of hypothetical markets that postulate alternatives in which the merger did or did not occur."[9]

Notably, the first of these errors committed by the district court and blessed by the Eighth Circuit—interpreting "cross-elasticity of demand" to mean exclusively cross-*price* elasticity of demand—falls squarely within the third, traditional ground for certiorari, as set forth

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[7] Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 229, 242 (1993); Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1057 (8th Cir. 2000).

[8] Brown Shoe Co. v. United States, 370 U.S. 294, 329 n.48 (1962); Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 218 n.4 (D.C. Cir. 1986).

[9] Herbert Hovenkamp, *Mergers with Dominant Firms: The* Lundbeck *Case*, CPI ANTITRUST CHRON., Dec. 2011, at 5, *available at* https://www.competitionpolicyinternational.com/file/view/6585 (subscription required).

in Supreme Court Rule 10(c), namely, a decision on "an important question of federal law" (how a relevant product market under the Clayton Act is to be defined) "that has not been, but should be, settled by this Court, or … an important federal question … that conflicts with relevant decisions of this Court."

The Supreme Court has not reviewed a merger decision in a long time—not since the mid-1970s. To the extent that the Court has been unclear as to what "reasonable interchangeability … or … cross-elasticity of demand" means in its merger case law, this case presents an excellent opportunity for the Court to make clear that customers may switch from one product to another based on changes in non-price terms as well as price terms.

The Commission should not be afraid of losing. Whatever the result ultimately turns out to be in *Lundbeck*, we would not jeopardize review of our pending, non-merger decisions, and we would clarify merger law through Supreme Court review instead of just through the Horizontal Merger Guidelines, which, as courts have observed, do not have the force of law.

Nor should the Commission rely on the Solicitor General's opinions about whether the Supreme Court is likely to grant certiorari or whether we are likely to win or lose before the Court. Unlike many other agencies, Congress vested the Commission with independent litigating authority, which includes filing petitions to the Supreme Court. Although we always want to secure the Solicitor General's concurrence in a petition, if we can, so as to avoid a repeat of the situation in *Schering* in which the Court called for the views of the Solicitor General regarding our petition, we do not have to defer to the Solicitor General if we agree that it is worth asking for the Court's review. In fact, we have prevailed in at least two instances without the Solicitor General's support in petitioning for certiorari.[10]

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[10] See FTC v. Sup. Ct. Trial Lawyers Ass'n, 493 U.S. 411 (1990); FTC v. Ind. Fed'n of Dentists, 476 U.S. 447 (1986).