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District Court Breathes New Life Into Predatory Pricing and Refusal to Deal Claims After *Linkline* and *Trinko*

In *Safeway Inc. v. Abbott Laboratories,* 2010 WL 147988 (N.D. Cal. Jan. 12, 2010), Judge Wilkins of the United States District Court for the Northern District of California denied defendant Abbott Laboratories motion to dismiss predatory pricing and refusal to deal claims set forth in the second amended complaints filed by Direct Purchasers and Abbott's competitor, SmithKline Beecham Corp. ("GSK").

Abbott involves the sale of protease inhibitors ("PIs") which are currently the most effective class of drugs for treating HIV. In 1996, defendant Abbott introduced Norvir, consisting of a patented compound called ritonavir, as a stand-alone PI. After Norvir's release, it was discovered that when used in small quantities with other PIs, it could "boost" the antiviral properties of those other PIs. The use of Norvir in small amounts as a booster, rather than a stand-alone PI, caused sales of Norvir to decline significantly.

In 2000, Abbott introduced Kaletra, a single pill containing the PI lopinavir, as well as a booster quantity of Norvir. Several years later, two of Abbott's competitors (GSK and Bristol-Myers Squibb) introduced two new PIs which were meant to be used in conjunction with booster quantities of Norvir. These new PIs were just as effective as Kaletra, but were assertedly more convenient and caused fewer side effects. As a result of their introduction, Kaletra's market share plummeted.

Soon thereafter, Abbott raised the wholesale price of Norvir by 400%, while keeping the price of Kaletra constant. According to Abbott, this dramatic price increase was implemented in order to align the price of Norvir with the drug's enormous clinical value. Several groups of plaintiffs filed suit in response, alleging that Abbott's price increase was an unlawful attempt to monopolize the "boosted market" for PIs that are prescribed for use with Norvir.

Direct Purchasers alleged that Abbott engaged in predatory pricing with respect to Kaletra and the boosted market. Since Kaletra was a bundled product (containing both lopinavir and Norvir), Direct Purchasers alleged that the "discount attribution" standard set forth in the Ninth Circuit's decision in *Cascade Health Solutions v. Peacehealth*, 515 F.3d 883 (9th Cir. 2008), controlled. Applying *Cascade Health*, Direct Purchasers argued that when the full amount of the substantial discount Abbott offers on Kaletra is attributed to lopinavir (the competitive product in the boosted market), the resulting price is below Abbott's average variable cost to produce lopinavir, and so constituted unlawful predatory pricing by Abbott through bundled discounting. The District Court agreed, also finding that *Cascade Health* did not require that plaintiff plead a dangerous probability of recoupment, which is required in predatory pricing claims involving single products. The District Court also found that the Supreme Court's discussion in *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.,* 129 S.Ct. 1109, 1122 (2009), that an upstream monopolist is free to charge whatever wholesale price it would like, was inapplicable dicta as *Linkline* did not involve predatory pricing of a bundled product where a defendant had a duty to deal.

Both Direct Purchasers and GSK alleged that Abbott's 400% increase in Norvir's price disrupted a longstanding course of dealing, in violation of an antitrust duty to deal. The District Court, while recognizing the general rule that antitrust law imposes no generalized duty to deal, nevertheless relied on the Supreme Court's decisions in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.,* 472 U.S. 585 (1985), and *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP,* 540 U.S. 398 (2004), to hold that liability under the antitrust laws can arise when a defendant voluntarily alters a course of dealing and "anticompetitive malice" motivates the defendant's conduct. The court found that in this case, Abbott had voluntarily engaged in licensing agreements with its competitors, which induced its competitors to rely on Norvir's availability in the market, subject to normal, inflation-level price increases. Plaintiffs had also presented sufficient evidence to suggest that Abbott's sudden, dramatic increase in price may have been motivated by anticompetitive malice.

The court also found that the Direct Purchasers' claim that Abobtt monopolized the boosting market by keeping the price of Norvir at a reasonable level for several years, thereby inducing its competitors to rely on the availability of Norvir on reasonable terms and to forgo development of their own PI boosters, as sufficient to assert "an antitrust theory based on deceptive conduct that induced reliance."

Authored by:

Helen Cho Eckert
(213) 617-4286
HEckert@sheppardmullin.com