



Portfolio Media, Inc. | 648 Broadway, Suite 200 | New York, NY 10012 | www.law360.com
Phone: +1 212 537 6331 | Fax: +1 212 537 6371 | customerservice@portfoliomediamedia.com

Increasing Antitrust Enforcement Under Obama?

Law360, New York (December 30, 2008) -- On Dec. 16, 2008, the Federal Trade Commission filed a Complaint against Ovation Pharmaceuticals, challenging Ovation's January 2006 acquisition of the drug NeoProfen. The Complaint itself is consistent with traditional antitrust merger analysis.

The concurring opinions by Commissioners Leibowitz and Rosch, however, advocate a more aggressive approach to antitrust enforcement than taken by the Commission historically or in the Ovation Complaint.

These opinions are of particular significance because there are currently only four Commissioners at the FTC and President-elect Barack Obama will be nominating a fifth Commissioner and designating the next Chairman.

Thus, depending on who he selects to join and Chair the Commission, today's concurring opinion, could be tomorrow's majority opinion.

According to the FTC Complaint, Ovation's acquisition of NeoProfen reduced competition in the market for the treatment of patent ductus arteriosus ("PDA"), a serious congenital heart defect that affects premature infants.

The Complaint alleges a relatively straightforward, albeit egregious, antitrust violation — Ovation allegedly purchased the only product that would compete with Indocin, a drug it already owned, and, following that purchase, Ovation increased the price of Indocin by approximately 1,300 percent (from about \$36 per vial to about \$500 per vial) and essentially matched that price when it launched NeoProfen.

Of significance to the concurring opinions was that Ovation's alleged monopoly stemmed not just from its purchase of NeoProfen in 2006, but also from its earlier acquisition of Indocin in August 2005. At the time Ovation purchased Indocin, however, NeoProfen had not received FDA approval.

Thus, until NeoProfen received FDA approval, whoever owned Indocin would have had a monopoly in the market for PDA drugs. Ovation's purchase of Indocin, in other words, simply transferred the PDA monopoly from Merck, the previous owner of Indocin, to Ovation.

Nonetheless, in their concurring opinions, Commissioners Leibowitz and Rosch asserted that, in addition to challenging the acquisition of NeoProfen, FTC should have challenged Ovation's earlier acquisition of Indocin.

Ordinarily, the antitrust laws are concerned with acquisitions that lessen competition or result in the creation or maintenance of monopoly power, not an acquisition that simply transfers monopoly power from one firm to another firm.

The explanation offered by the concurring Commissioners for recommending a challenge to this earlier acquisition was that, although it did not lead to an increase in monopoly power, it did lead to an increase in the exercise of monopoly power.

Specifically, the Commissioners contended that, as a large company with a large product portfolio, Merck was constrained from raising prices on Indocin by the fact that the purchasers of Indocin were also purchasers of many of Merck's other, more profitable products.

By comparison, Ovation lacked Merck's large product portfolio and, therefore, was not constrained in its ability to raise prices for Indocin. Moreover, because Ovation had the ability to charge monopoly prices for Indocin, it also had an incentive to purchase NeoProfen so as to protect its monopoly.

Had Merck retained Indocin, according to Commissioner Rosch's opinion, it would have been less likely to purchase NeoProfen since reputational concerns were already preventing it from charging monopoly prices.

Under this theory, it can be argued that any change in ownership of a monopoly product could incur antitrust scrutiny if the new owner would be more likely to raise prices than the previous owner even if both had the same power to do so.

Commissioner Rosch attempts to alleviate this concern by identifying factual circumstances that make the Ovation scenario unique, including:

(i) the merger at issue was consummated so there was no need to speculate as to what the effects of the deal would be;

(ii) there was a possibility that the evidence would demonstrate that the acquisition enabled Ovation to exercise monopoly pricing power that could not have been exercised prior to the acquisition; and

(iii) Ovation's purchase of Indocin provided it with an incentive to make the later purchase of NeoProfen, which Merck would have been unlikely to do.

Even with these limitations, however, Commissioners Rosch and Leibowitz are advocating a relatively aggressive approach to antitrust enforcement.

A second noteworthy takeaway comes from a comment made in Commissioner Leibowitz's concurring opinion with regard to the Commission's decision to seek disgorgement of Ovation's profits.

Although the FTC has sought disgorgement before, it is a remedy that is not routinely requested. The conduct of Ovation, as alleged, was sufficiently egregious that it was not too surprising that disgorgement was sought in this case.

What was significant, however, was Commissioner Leibowitz's assertion that "[r]ecent literature on the subject makes a persuasive case for seeking disgorgement more frequently. I strongly agree: the Commission should use disgorgement in antitrust cases more often."

Although this statement was buried in the last two sentences of Commissioner Leibowitz's opinion, it is a clear signal that Commissioner Leibowitz will be inclined to push the FTC to pursue antitrust claims more aggressively than it has historically.

--By Michelle H. Seagull, Axinn Veltrop & Harkrider LLP

Michelle Seagull is counsel with Axinn in the firm's Hartford, Conn., office.

All Content © 2003-2009, Portfolio Media, Inc.