Concurring Statement of Commissioner J. Thomas Rosch
Federal Trade Commission v. Ovation Pharmaceuticals, Inc.

The Commission has voted unanimously to file a complaint against Ovation Pharmaceuticals, Inc., alleging that Ovation's acquisition of NeoProfen in January 2006 from Abbott Laboratories, Inc. substantially lessened competition. NeoProfen is one of two branded drugs approved by the Food and Drug Administration (FDA) to treat patent ductus arteriosus (PDA), a potentially fatal heart defect besetting premature babies. Like Commissioner Leibowitz, I have voted for that complaint. However, like Commissioner Leibowitz, I would also challenge Ovation's earlier August 2005 acquisition of Indocin, which at the time was the only FDA approved drug to treat PDA, from Merck & Co. There is reason to believe that that transaction violated Section 7 of the Clayton Act, which makes unlawful, among other things, any acquisition that "may tend to create a monopoly."

More specifically, when Ovation acquired Indocin from Merck, Indocin was the only pharmaceutical treatment approved by the FDA to treat PDA. Notwithstanding Indocin's market position, for many years before the acquisition, Merck made and sold Indocin for a non-monopoly price (under $30 per vial at the time of the acquisition). Merck was a very large ($25 billion in sales in 2007) and sophisticated company. If it profitably could have sold Indocin at a monopoly price it arguably would have done so. However, there is evidence that Merck had a large product portfolio that included a number of pharmaceutical products that were more profitable than Indocin. It is arguable that if it sold at a monopoly price a product used to treat premature babies, that could damage its reputation and its sales of those more profitable products. *A fortiori*, it arguably would not have the incentive to acquire another treatment that might prevent it from pricing Indocin at a monopoly price. Moreover, if and to the extent that post-complaint discovery were to disclose that Merck prevailed upon Ovation to sell Indocin at a price that was at or near the price that Merck had been charging for it unless and until Ovation could sell the product using its own trade dress instead of Merck's trade dress, that would tend to confirm these conclusions.

There is reason to believe that the sale of Indocin to Ovation had the effect of eliminating the reputational constraints on Merck that had existed prior to the sale. There is evidence that Ovation lacked Merck's large product portfolio and thus arguably was not concerned, as Merck had been, that the sale of Indocin at a monopoly price would damage its reputation and sales of more profitable products. More specifically, there is evidence that after the transaction, Ovation began charging roughly 1300 percent more than the price at which Merck sold the same product. Put differently, there is reason to believe that Merck's sale of Indocin to Ovation had the effect of enabling Ovation to exercise monopoly power in its pricing of Indocin, which Merck could not profitably do prior to the transaction. Moreover, there is also reason to believe that the transaction had the effect of substituting Ovation, a firm that had an incentive to protect its ability to engage in monopoly pricing, for Merck, which lacked the same incentive. It is arguable that Merck had no incentive to acquire NeoProfen, but Ovation had an incentive to do so in order to maintain its monopoly pricing in the PDA market. That, in my judgment, would be a violation of Section 7.

Such a challenge would not be without precedent. It could be seen as a variant of a number of Supreme Court and lower federal court cases that have held that a transaction that may result in a substantial lessening of competition or create a monopoly due to considerations neither horizontal or vertical in nature will violate Section 7. *See*, *e.g.*, *FTC v. Procter & Gamble*, 386 U.S. 568, 577 (1967) ("All mergers are within the reach of § 7, and all must be tested by the same standard, whether they are classified as horizontal, vertical, conglomerate or other."); *Ekco Products Co. v. FTC,* 347 F.2d 745 (7th Cir. 1965) (acquisition of firm with a monopoly by a firm that did not compete in the monopoly market held to violate Section 7 when the acquiring firm protected the monopoly power it acquired by purchasing a new entrant that the acquired firm would not have purchased). As the leading antitrust treatise acknowledges, this "precedent . . . has not been overruled." PHILLIP E. AREEDA AND HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION, (2nd and 3rd Ed. 1998-2007 and supplemented 8/08) ¶ 1140.[1]

Indeed, a similar theory appears in the agencies' 1992 *Horizontal Merger Guidelines*, which assert that the acquisition of a maverick firm which, prior to the acquisition, constrained the pricing in a market, would violate Section 7 because that transaction would eliminate the pre-transaction constraint. *See* Section 2.12 and note 20. To be sure, the source of the pre-transaction constraints on pricing are different (the source in the maverick case being the maverick's pricing and the source in this case being the reputational effects arguably constraining Merck), but the effect of the transaction in both cases would arguably be to eliminate constraints that would otherwise exist but for the transaction. Indeed, I view the transaction's arguable anticompetitive effect in this case to be much more pernicious than the acquisition of a maverick because its effect would be to eliminate a constraint on the exercise of *monopoly* power.

As in *Ekco Products*, 347 F.2d at 753, I emphasize that inclusion of this claim would not mean this agency should challenge any acquisition by a small company. As in *Ekco Products*, the claim here would be based on allegations describing a unique factual situation, and there would be limiting principles. First, as previously noted, this is a consummated merger so there is no need for speculation about what its effect may be. Second, if and to the extent the evidence were to show that the transaction enabled Ovation to exercise *monopoly* pricing that could not previously be exercised for this potentially life-saving drug for premature babies, this might be the limit case for this kind of claim. Indeed, it is hard to imagine a more compelling case for application of this legal theory if these are the facts. Third, the facts alleged in this claim would

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[1] The treatise observes that this case law does not reflect current economic thinking, but it states that "it would be arrogant to believe that today's economics is so clearly true that it will never give way to alternative views finding a greater basis for concern." *Id.* The treatise describes, as "the most serious flaw" in this jurisprudence, the "tendency to permit almost unrestrained speculation about future possibilities to guide its analysis." *Id.* at ¶ 1120a. That of course is manifestly not true of this case, where the merger is consummated so there is no need to speculate about its effects.

be very similar to *Ekco Products,* 347 F.2d 745, in that after Ovation's acquisition of Indocin, Ovation, unlike Merck, allegedly would have had an incentive to maintain its monopoly power in the PDA market by purchasing NeoProfen. In short, it is arguable that Ovation's acquisition of Indocin changed the competitive dynamic of the market and created a situation that allowed competition to be further reduced.

Finally, I see no tension between challenging both the first transaction and the second transaction. To the contrary, the challenge to the first transaction would be based on the claim that it "tend[ed] to create a monopoly" by enabling Ovation to exercise and maintain monopoly power that the prior owner of Indocin (Merck) could not profitably exercise and maintain, whereas the challenge to the second transaction is based on, among other things, a "monopoly maintenance" claim – *i.e.,* that it "maintained" Ovation's ability to exercise that power. Thus, the two claims are not at all inconsistent. Pleading and proof of the first claim would in fact strengthen the second claim because it would demonstrate that the monopoly power that was "maintained" was illegally acquired to begin with.

Thus, although I think there is ample reason to believe that Ovation's acquisition of NeoProfen from Abbott had the effect of enabling Ovation to maintain monopoly power and of substantially lessening competition, like Commissioner Leibowitz I would challenge Ovation's prior acquisition of Indocin from Merck as well.