

District Court Grants Summary Judgment for Cleary Gottlieb Client in Case Challenging Market Share Discount

The U.S. District Court for the District of New Jersey granted a motion for summary judgment filed by Cleary Gottlieb on behalf of Sanofi U.S. The March 28, 2014 opinion, unsealed on April 4, entered judgment for Sanofi U.S. on all claims brought against it by the plaintiff, Eisai, Inc., which had been seeking billions of dollars in damages.

Background

In 2008, Eisai filed a lawsuit against Sanofi U.S. alleging violations of Sections 1 and 2 of the Sherman Act, Section 3 of the Clayton Act, and the New Jersey Antitrust Act. Eisai's complaint asserted that Sanofi U.S.'s discounting and promotional practices for its market-leading anticoagulant, Lovenox, were anticompetitive.

Eisai contracted with Pfizer in 2005 for the U.S. rights to market Fragmin, an anticoagulant that competes with Lovenox. Eisai argued that, at the time it began distributing Fragmin, the product had a low market share due to Sanofi U.S.'s contracts with hospitals offering volume and "market share" discounts that granted customers greater discounts if they used Lovenox for a greater share of their anticoagulant needs. The contracts also conditioned discounts on Lovenox having at least equal status as certain competing drugs on a hospital's formulary.

Eisai argued that, but for the allegedly anticompetitive contracts, Fragmin would have had a market share in the range of 35% from late 2005 until the entry of the generic version of Lovenox in 2010.

The Decision

The case centered on the appropriate test for antitrust liability. Sanofi U.S. argued that the "price-cost" test applied to the challenged market share discount. Eisai, on the other hand, argued that the price-cost test applies only to predatory-pricing claims and not to its claim that Sanofi U.S. engaged in *de facto* exclusive dealing.

After an extensive review of Supreme Court and Third Circuit precedent, including the decision in *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254 (3d Cir. 2012), the court concluded that the price-cost test applied to Sanofi U.S.'s alleged conduct. The court explained that, under *ZF Meritor*, the price-cost test applies when price is the predominant mechanism by which a

defendant is alleged to have excluded its rivals. Eisai proffered six ways that Sanofi U.S. purportedly excluded its rivals aside from price, but the court found that all of these purported mechanisms came back to price.

Of these six purported non-price methods of exclusion, the court focused particular attention on the alleged bundling of “contestable and incontestable demand for Lovenox.” Eisai argued that Sanofi U.S. leveraged the demand for Lovenox that purportedly *could not* be satisfied by competing drugs (the “incontestable demand”) to increase its share of the demand that *could* be satisfied by competing drugs (the “contestable demand”). The court rejected this theory of single-product, single-market bundling for multiple reasons, including because the evidence showed that Eisai could have competed by increasing its discounts for Fragmin.

The court similarly rejected Eisai’s argument that the formulary-access provisions of the Lovenox contracts were non-price mechanisms of exclusion. Unlike the exclusionary practices identified in *ZF Meritor*, the Lovenox contracts did not require: (1) that Lovenox be the default anticoagulant at the hospital; (2) that hospitals remove competing drugs from their formularies; or (3) that hospitals give Lovenox any preferential treatment. Rather, the contracts required equal treatment for Lovenox and did not restrict any hospital from having Fragmin or any other product on its formulary. The Lovenox contracts were also distinguishable from the contracts in *ZF Meritor* because the failure to comply with the formulary-access provision could result only in a loss of a discount, not a termination of the contract or loss of supply, meaning that this provision, like the others, ultimately operated based on price.

After concluding that the price-cost test applied, the Court noted that, because there was no dispute that the price of Lovenox was always above cost, Sanofi U.S. was entitled to summary judgment.

The court also went on to explain that it would have reached the same result—judgment for Sanofi U.S.—even under the exclusive-dealing analysis that Eisai had sought because of two fundamental shortcomings in Eisai’s claims. First, Eisai failed to establish that it had suffered antitrust injury. The record showed that Eisai could win more market share by competing more vigorously. To the extent that Eisai was complaining because it could not win sales while maintaining high profit margins, the court concluded that this was not an antitrust injury. Second, the court held that Eisai had failed to establish that Sanofi U.S. engaged in unlawful exclusive dealing. The court pointed to four reasons for this conclusion: (1) customers could still benefit from the Lovenox contract’s discount structure while purchasing as much as 25% of their requirements from a competitor; (2) the contracts were terminable at any time for any reason and the only consequence for buying more from a competitor was the loss of discount; (3) there was no evidence that any customers wanted to buy Fragmin but were prevented from doing so by the Lovenox contracts or other Sanofi U.S. conduct; and (4) discounting based on a product’s share of a customer’s requirements was common in this market.

Implications

The District Court's ruling is the first to interpret the Third Circuit's decision in *ZF Meritor*. The ruling confirms that the Third Circuit is in line with its sister circuits in applying the price-cost test to antitrust claims challenging single product market share discounts. Although the Third Circuit articulated similar principles in *ZF Meritor*, in that case the court ultimately found for the plaintiff because it concluded that "price itself was not the clearly predominant mechanism" of the defendant's alleged exclusionary conduct on the facts of that case. 696 F.3d at 277. In contrast, the District Court's recent decision in *Eisai v. Sanofi U.S.* applied the price-cost test because it held that price was the predominant mechanism of alleged exclusion.

* * *

If you have any questions, please feel free to contact [George Cary](#), [Leah Brannon](#), or [Lev Dassin](#), or any of your regular contacts at the firm. You may also contact our lawyers listed under "[Antitrust and Competition](#)" or "[Litigation and Arbitration](#)" located in the "Practices" section of our website at <http://www.clearygottlieb.com>.

Office Locations

NEW YORK

One Liberty Plaza
New York, NY 10006-1470
T: +1 212 225 2000
F: +1 212 225 3999

WASHINGTON

2000 Pennsylvania Avenue, NW
Washington, DC 20006-1801
T: +1 202 974 1500
F: +1 202 974 1999

PARIS

12, rue de Tilsitt
75008 Paris, France
T: +33 1 40 74 68 00
F: +33 1 40 74 68 88

BRUSSELS

Rue de la Loi 57
1040 Brussels, Belgium
T: +32 2 287 2000
F: +32 2 231 1661

LONDON

City Place House
55 Basinghall Street
London EC2V 5EH, England
T: +44 20 7614 2200
F: +44 20 7600 1698

MOSCOW

Cleary Gottlieb Steen & Hamilton LLC
Paveletskaya Square 2/3
Moscow, Russia 115054
T: +7 495 660 8500
F: +7 495 660 8505

FRANKFURT

Main Tower
Neue Mainzer Strasse 52
60311 Frankfurt am Main, Germany
T: +49 69 97103 0
F: +49 69 97103 199

COLOGNE

Theodor-Heuss-Ring 9
50688 Cologne, Germany
T: +49 221 80040 0
F: +49 221 80040 199

ROME

Piazza di Spagna 15
00187 Rome, Italy
T: +39 06 69 52 21
F: +39 06 69 20 06 65

MILAN

Via San Paolo 7
20121 Milan, Italy
T: +39 02 72 60 81
F: +39 02 86 98 44 40

HONG KONG

Cleary Gottlieb Steen & Hamilton (Hong Kong)
Hysan Place, 37th Floor
500 Hennessy Road
Causeway Bay
Hong Kong
T: +852 2521 4122
F: +852 2845 9026

BEIJING

Twin Towers – West (23rd Floor)
12 B Jianguomen Wai Da Jie
Chaoyang District
Beijing 100022, China
T: +86 10 5920 1000
F: +86 10 5879 3902

BUENOS AIRES

CGSH International Legal Services, LLP-
Sucursal Argentina
Avda. Quintana 529, 4to piso
1129 Ciudad Autonoma de Buenos Aires
Argentina
T: +54 11 5556 8900
F: +54 11 5556 8999

SÃO PAULO

Cleary Gottlieb Steen & Hamilton
Consultores em Direito Estrangeiro
Rua Funchal, 418, 13 Andar
São Paulo, SP Brazil 04551-060
T: +55 11 2196 7200
F: +55 11 2196 7299

ABU DHABI

Al Sila Tower, 27th Floor
Sowwah Square, PO Box 29920
Abu Dhabi, United Arab Emirates
T: +971 2 412 1700
F: +971 2 412 1899

SEOUL

Cleary Gottlieb Steen & Hamilton LLP
Foreign Legal Consultant Office
19F, Ferrum Tower
19, Eulji-ro 5-gil, Jung-gu
Seoul 100-210, Korea
T: +82 2 6353 8000
F: +82 2 6353 8099