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Product-Hopping — The Line Between Trinko and Aspen Skiing

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by Anne Cruz and Stephanie Rzepka

Can a company introduce an improved product if it knows doing so will take sales from its competitors? "Well, of course," you say. "Isn't that called competition?" In the near future, the Second Circuit will have to answer this question. Hopefully it will agree.

In *People of the State of New York v. Actavis PLC*, No. 14-4624, the New York Attorney General attacked a practice known as product reformulation, or more often by its unfortunate moniker, "producthopping." This practice describes the roll-out by a branded pharmaceutical company of an improved version of a patent-protected drug combined with the discontinuance of the older drug at or near the time the patent will expire. The effect of this action is to neutralize the impact of state substitution laws — which either demand or permit the substitution by pharmacists of a generic version of the branded product. State substitution laws, combined with other pricing pressures from third-party payers (e.g., insurance companies), typically shift a monstrous share of the market for a pharmaceutical (80 percent or higher) from the innovator to the generics at the expiration of the patent.

The case currently is before the Second Circuit on an emergency motion due to the district courts unprecedented decision to impose an injunction on the defendants, Actavis plc and Forest Laboratories (collectively referred to as "Forest Labe") requiring that they continue to manufacture and market the older version of the drug until after the patent expires. Oral arguments were heard by a three judge panel in mid-April.

The Second Circuit has the opportunity to address some interesting issues. First and foremost, where does one draw the line between *Trinko*'s dictate that there is no duty under the antitrust laws to assist competitors, and Aspen Skiing's holding that there could be in certain situations?

Recall that in *Trinko* it was alleged that the defendant actually violated its regulatory obligations to aide its competitors. Despite this fact, the Supreme Court found for the defendant telephone company. Here, there is no allegation that Forest Labs violated any such regulation or law. Perhaps this case ultimately will give the Supreme Court the opportunity to demonstrate just how much it regrets Aspen Skiing.

Almost as important, should courts subject companies to antitrust liability where there are no clear rules to guide conduct? The Supreme Court has made it quite clear in *Trinko* and again in *linkLine* that this is not a great idea. The underlying rationale is obvious. Unclear rules of engagement dilute companies' competitive vigor, lest they inadvertently cross some inchoate line.

Unlike some of the prior product-hopping cases where there were allegations of other predatory conduct — such as delisting or raising questionable safety concerns about the older product — the current case is relatively "clean." Forest Labs rolled out a new product with apparent benefits and sought to effectively discontinue its older product within months of the expiration of the patent. It also appears from the district court opinion that Forest Labs made no bones about why it did this. It did it to neutralize the impact of the state

substitution laws. Other than the reformulation and withdrawal, there do not appear to be any other allegations of any real predatory conduct.

Just as *Trinko* has impacted conduct outside the telecommunications industry, the Second Circuit's opinion likely will impact more than just pharmaceutical companies. Putting aside my view as to the proper outcome, let us hope that — whatever the Second Circuit decides — it provides some clear guidance and avoids imposing subjective standards such as those advocated in a 2012 FTC amicus brief filed in *Mylan v. Warner Chilicott*.

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