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ICLE Amicus Brief in Sanofi-Aventis U.S. v. Mylan Inc.
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INTRODUCTION

Sanofi is seeking to overturn the district court's grant of summary judgment in favor of Mylan, which held that Mylan's EpiPen rebate agreements (loyalty discounts) did not foreclose Sanofi from competing in the market for epinephrine auto-injectors. As this brief argues, finding in favor of Sanofi would mark a misguided departure from the error-cost framework that has been the linchpin of modern antitrust enforcement. Loyalty discounts – and the lower prices they bring – routinely benefit consumers. The Court accordingly should not endorse a dubious theory of harm that does not adequately distinguish between procompetitive and anticompetitive behavior, as doing so would chill firms' incentives to compete on price.

Anticompetitive (that is, consumer-harming) strategies capable of foreclosing even efficient competitors are difficult – often impossible – to distinguish from vigorous competition (which benefits consumers). Courts are compelled to rely on a limited set of observable parameters to infer whether a firm's behavior falls under one or the other category. This process entails significant pitfalls. See Geoffrey A. Manne & Joshua D. Wright, If Search Neutrality Is the Answer, What's the Question?, 2012 Colum. Bus. L. Rev. 151, 184-85 ("The key challenge facing any proposed analytical framework for evaluating monopolization claims is distinguishing pro-competitive from anticompetitive conduct. Antitrust errors are inevitable because much of what is potentially actionable conduct under the antitrust laws frequently actually benefits consumers, and generalist judges are called upon to identify anticompetitive conduct with imperfect information.").

When it comes to allegedly anticompetitive lowering of prices – predation, discounts, and rebates – low prices themselves are the posited mechanism for anticompetitive foreclosure and thus a key component of the liability regimes pertaining to pricing practices. Yet low prices are also precisely the consumer benefit that antitrust law ordinarily seeks to preserve, especially when these low prices are sustained in the long run. In almost every circumstance, rebates and discounts represent welfare-enhancing price competition; nevertheless, economic theory teaches that strategic pricing can be anticompetitive. As Judge Easterbrook described, "[l]ow prices and large plants may be competitive and beneficial, or they may be exclusionary and harmful. We need a way to distinguish competition from exclusion without penalizing competition." Frank H. Easterbrook, The Limits of Antitrust, 63 Tex. L. Rev. 1, 26 (1984). In short, false positives in these settings

may be especially costly because they penalize consumer-benefiting low prices.

The challenge for courts is distinguishing between robust competition and anticompetitive conduct when a primary indicator of both – low prices – is the same. Although the dividing line will always be imperfect such that it is not always clear when anticompetitive conduct is occurring, the academic literature and the courts have established guiding rules and standards designed to minimize error, maximize ease of administration, and protect consumer welfare. Sanofi's approach, by contrast, would increase the risks of wrongly imposing antitrust liability and, in turn, harming consumers, while being more difficult to administer.

Read the full amicus brief here.

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