Bayer Antitrust Case Hinged On Evolving Market Definition

By **Amy Vegari and Colleen Anderson** (August 30, 2024)

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On Aug. 1, following five years of litigation, Tevra Brands LLC's antitrust suit against Bayer Healthcare LLC came to an end in the U.S. District Court for the Northern District of California.[1]

Tevra, a manufacturer of generic version topical flea and tick medications, alleged that Bayer engaged in anticompetitive conduct to secure exclusivity for its own name brand Advantage and Advantix products in the market for topical flea and tick medications, in violation of Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act.

As an element of these exclusive dealing and monopoly maintenance claims, Tevra needed to define the relevant market the parties' products competed in, and establish at trial that such a market actually existed.

This article explores the key role that Tevra's evolving market definition played in the development and outcome of the Tevra v. Bayer case, highlighting the challenges litigants can eventually face when the fact-finding necessary to assess a proposed market definition finally takes place at trial.

At each stage of the litigation, Tevra's decision to exclude other flea and tick medications with similar functions but different active ingredients from its definition faced skepticism from the court even as it denied Bayer's dispositive motions.

The issue ultimately proved dispositive when a jury in the District of Northern California found that Tevra failed to prove its relevant market by a preponderance of the evidence, and judgment was entered in Bayer's favor.

Background

Prior to August 2020, Bayer made name-brand versions of over-the-counter imidacloprid topical flea and tick products called Advantage and Advantix. In 2019, Tevra filed suit[2] against Bayer, alleging that Bayer engaged in anticompetitive conduct to foreclose sales of Tevra's generic version of imidacloprid topicals.

Specifically, Tevra alleged that Bayer entered into agreements with retailers and distributors of imidacloprid topicals that required the retailers not to carry generic versions of the flea and tick treatments, provided rebates for sales of certain amounts of Bayer products, and tied purchases of and rebates on Bayer's Seresto flea collar to purchases of Bayer's Advantix products.

Tevra also alleged that Bayer made up approximately 85% of the relevant market and received patent royalties for most of the other 15%, thus dominating the imidacloprid topical market as a monopolist while taking steps to protect its monopoly. The case was assigned to U.S. District Judge Beth Labson Freeman in the Northern District of California.

Alleged Exclusive Dealing Agreements

Throughout the pleading and summary judgment stages, Bayer argued that its agreements with retailers did not constitute anticompetitive conduct under the U.S. Court of Appeals for the Ninth Circuit's 1997 decision in Omega Environmental Inc. v. Gilbarco Inc.[3], because they were short-term and easily terminable, both factors that weighed against a finding of exclusive dealing in Omega.

Tevra, however, pointed to evidence in the record that Bayer's contracts were never actually terminated early due to marketplace realities such as annual shelving practices, and punitive measures taken by Bayer in response to actual early termination.

The court acknowledged in its summary judgment order[4] that on their face, Bayer's contracts had multiple provisions permitting retailers to opt in or out of its imidacloprid discounts, permitting early termination and setting short terms, and there were retailers in at least one contract cycle who took advantage of those opt-outs.

However, Tevra's own evidence that Bayer used discounts, monetary levers and informal avenues such as pitches and presentations to pressure retailers into exclusivity was enough to create a genuine issue of material fact to be resolved by the jury.

The Evolution of Tevra's Market Definition

At the heart of the dispute from the case's inception was Tevra's proposed market definition. A threshold requirement for a plaintiff bringing exclusive dealing and monopoly claims is to define what market the defendant is alleged to be excluding competitors from, which allows the court and ultimately the jury to evaluate whether the defendant's conduct was anticompetitive based on its effect on the defined market.

In its summary judgment decision, the court relied on the 2023 merger guidelines released by the U.S. Department of Justice and Federal Trade Commission for the definition[5] of a relevant market: "an area of effective competition, comprising both product (or service) and geographic elements."

Tevra proposed a market definition in the first amended complaint[6] limited to "[t]opical flea and tick products containing Imidacloprid sold at wholesale by manufacturers to Over-the-Counter retailers in the U.S."

To support its market definition, Tevra relied on a formulation of the hypothetical monopolist test called the SSNIP — referring to small but significant nontransitory increase in price — test.

According to the 2023 merger guidelines, the SSNIP test asks (1) whether a hypothetical profit-maximizing firm that was the only present and future seller of a group of products would, if not prevented from doing so by regulation, undertake "at least a small but significant and non-transitory increase in price ('SSNIP') ... for at least one product in the group," (2) such that the price increase would result in profit for the hypothetical monopolist, rather than a loss of sales as a result of consumers turning to a reasonable alternative product instead.[7]

Tevra later broadened the definition in the second amended complaint[8] to eliminate the limitations on distribution channels, while maintaining its allegation that the market was limited to the topicals using imidacloprid as the active ingredient.

The court denied the motion to dismiss the second amended complaint and found[9] that Tevra's allegations that Bayer had been able to enact a price increase for its brand-name imidacloprid topicals over five years while losing little to no sales plausibly supported Tevra's allegations that Bayer was able to impose an SSNIP.

However, even as it denied the motion, the court cautioned Tevra that its market definition might face difficulties at the expert stage if it relied on an SSNIP test as currently articulated, and that Tevra had not yet provided persuasive support for differentiating the market based on the difference between the imidacloprid topicals at issue and fipronil topicals.

Battle of the Experts Over the Scope of the Relevant Market

As the court had predicted, the market definition dispute surfaced once more at summary judgment. After the close of discovery, Tevra's expert, Paul Wong, submitted a report in which he purported to perform an SSNIP test showing the impact on both Bayer's product and Frontline's fipronil topicals when other generic fipronil products were to the market in 2011.

Wong's analysis found that while both Frontline and Bayer increased prices during that period, Frontline sales decreased after implementing a slight price increase in fipronil products, while Bayer's sales increased, suggesting that consumers were willing to substitute one fipronil product for another, but not fipronil products for Bayer's imidacloprid products. Accordingly, Wong opined that the market for fipronil products is distinguishable from the market for imidacloprid products.[10]

Given the variety of methods for conducting an SSNIP test, the court focused its analysis on Kentucky Speedway LLC v. National Association of Stock Car Auto Racing Inc., a 2009 decision from the U.S. Court of Appeals for the Sixth Circuit that addressed when an SSNIP analysis is excludable under Daubert.[11]

In Kentucky Speedway, the expert's SSNIP test examined ticket prices and attendance figures over an eight-year span, and then concluded that both price and demand increased. However, the Sixth Circuit found that such a test was excludable under Daubert because it examined only the change in price and sales of a single product over a long period of time, and failed to consider "whether a price increase at a particular point in time would result in consumer substitution of an alternative product."[12]

The court distinguished Wong's analysis from the one in Kentucky Speedway because his application of the SSNIP test adequately considered the prospect of consumer substitution of an alternative product.

The court acknowledged that Bayer had leveled other criticisms at Wong's analysis, but found that the critiques went to the weight, rather than admissibility, of Wong's opinion.[13] However, although the court allowed Tevra's claims to proceed, it warned Tevra that its market definition was likely to pose significant challenges to Tevra's ability to prove its case to the jury.

Tevra's Claims at Trial

Trial began on July 22.[14] Tevra argued that its evidence would show that Bayer planned to keep generic versions of its imidacloprid topicals from the market by offering retailers

like PetSmart Inc. and Petco Animal Supplies Inc. an anticompetitive 2% exclusivity discount.

However, Bayer claimed that Tevra's losses stemmed from Tevra's competition with other generic flea-and-tick product makers, and that Tevra's market definition was implausible because consumers do not buy pet medication based on the active ingredient.

The jury instructions,[15] like the evidence at trial, devoted substantial time to addressing how to define the relevant market. The instructions explained that Tevra's alleged relevant antitrust market was topical imidacloprid flea and tick treatments for dogs and cats, whereas Bayer contended that the "relevant antitrust market also includes other flea and tick topicals, such as those containing fipronil, as well as other types of flea and tick treatments, such as oral medications and flea collars."

To determine which proposed definition was correct, the court instructed the jury to use the SSNIP test, explaining that it was required to determine whether enough customers would accept a small but significant, nontransitory increase in the price of one product — approximately 5% — such that the price increase would be profitable, or whether so many customers would switch to an alternative produce that the price increase would be withdrawn.

If the customers would switch, the product would be in the relevant market; if they would not switch, the alternative product was outside the product market.[16]

The court's skepticism throughout the case over Tevra's proposed market definition ultimately proved prescient. On Aug. 1, the jury returned a verdict[17] finding that Tevra had failed to prove "that the relevant antitrust market is topical imidacloprid flea and tick products for dogs and cats in the United States" by a preponderance of the evidence.

Because the jury found that Tevra had not proved the relevant market, it did not reach the remainder of the elements of the exclusive dealing and monopoly claims.

Tevra's Next Steps

Tevra has not yet filed a notice of appeal or announced whether it intends to do so. However, Tevra filed a new lawsuit[18] on the same day the verdict was issued, this time against Elanco Animal Health Inc. and Elanco US Inc. for claims of exclusive dealing and maintenance of a monopoly in the market for flea and tick topicals.

Elanco purchased Bayer Healthcare LLC in 2020, but was not a party to the original Tevra lawsuit; Tevra initially sought damages against Bayer even for the period following the sale, but the court granted summary judgment to Bayer for any damages after Elanco's purchase of Bayer Healthcare LLC on or around Aug. 1, 2020.

Takeaways

The 2023 merger guidelines explicitly recognize that even if there are "competitive restraints from significant substitutes" outside a proposed product group, a "narrow group of products" can nevertheless constitute a "market in its own right."

The guidelines suggest that product features such as "size, quality, distances, customer segment, or prices" are all relevant to determining the scope of a market's definition.

Here, Tevra's attempt to identify the market through the relevant product's distribution channels and active ingredient is consistent with the process outlined in the guidelines, but the Tevra case highlights the difficulties litigants can face in practice when they attempt to narrowly circumscribe the product features enumerated in the guidelines.

The case also highlights the risks presented by the issue of market definition: its fact-intensive nature may allow plaintiffs to proceed to trial after years of litigation only to falter on this threshold question.

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[1] "Calif. Jury Clears Bayer In Flea And Tick Med Antitrust Suit," Law360, August 1, 2024, https://www.law360.com/articles/1864217.

[2] Tevra Brands LLC v. Bayer HealthCare LLC, Complaint, July 26, 2019.

[3] 127 F.3d 1157, 1162 (9th Cir. 1997).

[4] Tevra Brands LLC v. Bayer HealthCare LLC, Order Granting in Part and Denying in Part Defendant's Motion for Summary Judgment, April 15, 2024.

[5] Merger Guidelines, U.S. Department of Justice and the Federal Trade Commission, December 18, 2023, at 40.

[6] Tevra Brands LLC v. Bayer HealthCare LLC, Amended Complaint, March 20, 2020.

[7] Merger Guidelines, pp. 41-42.

[8] Tevra Brands LLC v. Bayer HealthCare LLC, Second Amended Complaint, March 19, 2021.

[9] Tevra Brands LLC v. Bayer HealthCare LLC, Order Denying Motion to Dismiss the SAC, January 13, 2022.

[10] Summary Judgement, pp. 8-9.

[11] 588 F.3d 908 (6th Cir. 2009).

[12] Id. at 918.

[13] Summary Judgment, pp. 8-9, 11.

[14] Tevra Says Bayer Owes Millions as Antitrust Trial Opens, Law360, July 22, 2024, https://www.law360.com/articles/1860652.

[15] Tevra Brands LLC v. Bayer HealthCare LLC, Jury Instructions, July 31, 2024, pp. 23-24.

[16] Jury Instructions, pp. 23-24.

[17] Tevra Brands LLC v. Bayer HealthCare LLC, Verdict Form, August 1, 2024.

[18] Tevra Brands, LLC v. Elanco Animal Health Incorporated, Complaint, August 1, 2024.