RIGGING THE SYSTEM? PERMITTING ANTICOMPETITIVE SETTLEMENTS

Jeffrey I. Shinder, Esq. & Matthew L. Cantor, Esq.
Constantine & Partners
New York, NY

Editor's Note: This article and the one that follows by Kevin McDonald are intended as **Point/Counterpoint** *pieces. Please be sure to read both!*

Introduction

This article concerns a recent antitrust decision by a famous conservative jurist, Judge Richard Posner. That decision would permit incumbent drug manufacturers to pay generics to stay out of the market. We believe that this decision does not comport with governing antitrust law. We also think that it sets a dangerous precedent for consumers who seek lower cost and innovative drug alternatives.

As Congress celebrates the passage of the controversial Medicare package and seniors gain limited (and arguably insufficient) coverage for prescription drug costs, conservative forces on the federal bench continue to protect the pharmaceutical industry's ability to charge high non-market prices for drugs. The issue in question is a complex one: to what extent can incumbent drug manufacturers use potentially baseless patent infringement lawsuits and settlements of such suits to protect their market power and keep drug prices high. Because pharmaceutical companies have a First Amendment protected right to petition the courts to protect their patents, unless the lawsuit is a "sham" it will be immunized from antitrust scrutiny.

The more difficult question is whether that immunity should extend to potentially anticompetitive settlements of patent infringement lawsuits. According to Judge Posner, a conservative jurist on the Seventh Circuit Court of Appeals, the answer to that question is yes. This holding could shield "reverse payment" settlements – where incumbents pay generic firms to stay out of the market – from antitrust prosecution. If that happens, drug consumers, including many seniors who will continue to bear substantial prescription drug costs under the Medicare bill, will pay far more than they should for prescription drugs. If ever there is a moment where antitrust enforcement should trump undue solicitude to intellectual property rights it is this one.

"Sham" Litigation Jurisprudence

Ten years ago, the Supreme Court set forth the test for private parties who seek to challenge drug companies that have used baseless litigation as an anticompetitive weapon. The Court, at that time, was faced with pronouncing a standard that would permit victims of "sham" litigation to hold "sham" perpetrators liable under the antitrust laws without unnecessarily deterring litigants from pursuing intellectual property cases, as is their right under the First Amendment. In a decision entitled *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, Justice Clarence Thomas held that, in order to prove that a patent infringement lawsuit is a mere "sham," a litigant must demonstrate that the drug incumbent's suit was "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits."

The courts have interpreted this standard as a high burden of proof for plaintiffs to satisfy. Indeed, under this standard, a plaintiff's subjective intent becomes irrelevant: even if he thought the action was frivolous, it would not satisfy the burden unless an objective person could state that there was no realistic opportunity to prevail. Accordingly, only a small subset of all sham litigation cases have survived summary dismissal before trial.

Immunizing Settlements

In *Asahi Glass Co. Ltd. v. Pentech Pharmaceuticals*, Judge Posner dismissed a lawsuit prior to trial that was based on the following factual scenario. A supplier of inactive ingredients needed to improve the solubility of a generic version of Paxil – an anti-depressant – sued GlaxoSmithKline (*i.e.*, the producer of branded-Paxil) and a generic manufacturer to challenge as anticompetitive their settlement of a patent infringement suit that had been brought by Glaxo against the generic manufacturer. The settlement precluded the generic manufacturer from selling a generic version of Paxil (including its own which had yet to be approved by the Food and Drug Administration) in the fifty states until other generics had entered that market. However, the settlement did provide the generic a license (which paid Glaxo a hefty licensing fee) to sell a generic version of Paxil in Puerto Rico.

In short, for some time, the settlement precluded the generic manufacturer from competing in the fifty states against Paxil in exchange for a right to sell branded-Paxil in Puerto Rico. The supplier thus claimed that the settlement amounted to an impermissible market allocation scheme – leaving Glaxo with a monopsony (or absolute buyer power) over ingredients needed to make Paxil in the fifty states and a monopoly (or absolute selling power) over consumers needed to purchase Paxil in the fifty states.

Judge Posner ruled that he saw "nothing suspicious about the circumstances of the settlement" even though he recognized it was "unlikely" that the generic drug manufacturer had infringed upon Glaxo's patent. Specifically, Judge

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Posner argued that, under *Professional Real Estate Investors*, he was compelled to find the settlement proper even if it resulted in anticompetitive results because, while it was unlikely that Glaxo's suit would succeed, the suit was not so frivolous as to be called "objectively baseless." And while Judge Posner recognized that Glaxo licensed its product to the generic by "paying" it to stay out of the domestic market (*e.g.*, by permitting it to sell branded-Paxil in Puerto Rico), he did not find this result to be anticompetitive.

Judge Posner reached this result by erecting the following straw man. Glaxo could have continued to litigate its patent infringement claim against the generic under the antitrust laws because the underlying was not a "sham" and if it had done that the generic would not have been able to sell in Puerto Rico, and ultimately, the rest of the United States, until 2007. According to Judge Posner, the settlement is therefore pro-competitive as it enabled the generic to sell immediately in Puerto Rico. This analysis makes sense only if the policy rationale for immunizing non-sham litigation from antitrust scrutiny applies equally to settlements of such actions. And, as many courts have found, that is not the case. The "sham" litigation standard protects litigants First Amendment rights to petition the courts for redress. Those rights are not implicated when litigants enter into private settlements that involve no petitioning activity.

Judge Posner's decision demonstrates how extending the "sham" standard to private settlements can be abused. The incumbent faced a likely finding that its patent would not prevent immediate competition from the generic industry. To ward off that result, it leveraged the extreme costs of continued litigation to convince the generic to agree to allocate markets for a period of time. If this agreement had been reached in a non-litigation context, there would be little doubt that it was blatantly anticompetitive and a *per se* violation of the antitrust laws. And the same analysis should have applied here; this blatantly anticompetitive private agreement should not be immunized simply because the underlying lawsuit was not a sham.

The Policy Implications

The threat to consumers created by this decision is very real and very tangible: higher prices, reduced output, and less innovation in pharmaceutical markets. Now, in light of Judge Posner's ruling, incumbents can pay off generics to keep them out of the market so long as they make such payments in the context of a settlement to a colorable, although likely unsuccessful, legal claim. Further, these payments may be enticing to generics who may prefer the comfort of a quick payment to the uncertainty of competition against entrenched incumbents. That this result would be endorsed at a time when our society is attempting to expand Medicare to cover prescription drugs is deeply troubling.

Appellate courts should view Judge Posner's ruling, despite his status as a respected jurist, as mere political doctrine and as anti-consumer. If the courts decline to reverse Judge Posner, then the legislature should.

Messrs. Shinder and **Cantor** are partners at Constantine & Partners, PC, a firm specializing in antitrust law and counseling. They served as lead counsel for the merchant class in *In re Visa Check/MasterMoney Antitrust Litigation* – a lawsuit that resulted in the largest antitrust recovery in history.