ANTITRUST AND INTELLECTUAL PROPERTY RIGHTS: PRINCIPLES V. POLICY

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ANTITRUST LEGAL PRINCIPLES EMBRACE IP RIGHTS

1. Antitrust Law respects property rights, including intellectual property.
2. IP rights are often the ***only*** thing that renders IP conduct legal.
3. Antitrust law does not protect unlawful competition.
4. The antitrust plaintiff has the burden to show that excluded competition would have been lawful.
5. Competitive changes made by other regulatory laws do not impose new antitrust duties.

ANTITRUST ENFORCEMENT POLICY DOES **NOT** EMBRACE IP RIGHTS

1. Antitrust is the political catch-all remedy for “bad” business behavior.
2. As institutional plaintiffs, federal and state enforcement agencies

   -- push for new and broader theories of liability, and

   -- routinely mistake regulation for competition
3. Intellectual development in antitrust comes primarily from the same agencies and the academy.
4. Enforcement agencies have the power to “investigate” away lawful conduct.

APPLYING THE PRINCIPLES: THE CASE OF REVERSE PAYMENTS

1. Antitrust law does not protect unlawful (and hence infringing) competition.

2. The antitrust plaintiff has the burden to show that excluded competition would have been lawful.

3. That burden can't be carried by re-trying the settled patent claim during the antitrust case. If the claim was colorable, we already know that either side might have won.

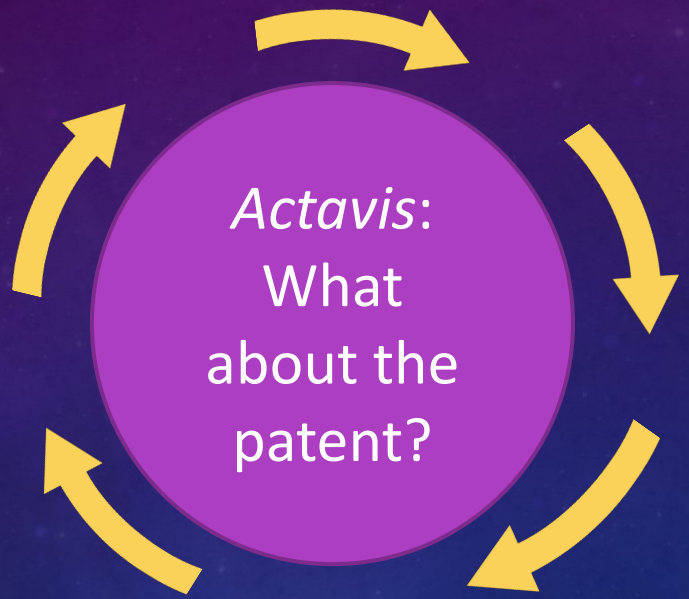
4. To show the generic entry would have been legal, plaintiff must show that the infringement claim was "objectively baseless."

ACTAVIS: ITS CHALLENGES AND ITS "SOLUTION"

- Find a theory of competitive harm that ignores the patent
- Preserve traditional patent settlements in which the alleged infringer does not have to pay the full amount if its infringing sales and yet delays or exits
- A settlement that contains a "large," "unexplained" reverse payment is anticompetitive because it retains for the patentee a right it might lose if it lost the litigation and had to "face … a competitive market"
- The reverse payment may not be suspect if it represents "traditional settlement considerations, such as avoided litigation costs or fair value for services"

"But, be that as it may," payment "likely seeks to prevent the risk of competition"

Except: for "a particularly valuable patent," "even a small risk of invalidity justifies a large payment"



"In a word," payment size "can provide a workable surrogate for a patent's weakness"

"Large" payment "would normally suggest that the patentee has serious doubts" about patent

It's "normally not necessary" to address patent merits "to answer the antitrust question"

Thus, no need for "a detailed exploration of the" patent merits

ACTAVIS IN THE LOWER COURTS

- "[T]he Supreme Court in *Actavis* was deliberately opaque about the parameters of reverse payment claims," *In re Lipitor* (CA3)
- "[In dissent, t]he Chief Justice clearly saw that the holding in Actavis was likely to cause much difficulty …. These motions have certainly proven the Chief Justice's concerns to be well-founded." *In re Loestrin* (D.R.I.)
- "The view ... espoused by the FTC [and] adopted by the majority in Actavis … has been subject to cogent criticism, see, e.g., *Actavis* … (Roberts, C.J., dissenting), but the controlling precedent is what it is." *Wellbutrin* (CA3)
- "The present case appears to vindicate the Chief Justice's analysis. As he predicted, … we cannot resolve this aspect of the case without considering the merits of the underlying patent dispute." *Wellbutrin* (CA3)

AFTER *ACTAVIS*

- Turducken is on the menu:
  - Patent trials within antitrust cases are plentiful. Experts on patent law are testifying as to who would have won.
  - *Nexium* (CA1) and *Wellbutrin* (CA3) not only invited, but required, plaintiffs to prove legal entry.
- Courts are using the safe harbors in *Actavis* to create work-arounds
  - e.g., Judge Easterbrook in *Humira*, rejecting argument that, if you settle two cases, one is the reverse payment for the other. Payment ≠ "Opportunity Cost"
- CA5 (*Impax Labs./Endo*) has given FTC its "better settlement" theory, disguised as the "less restrictive means" step in rule of reason analysis.