The (Slowly) Revolving Door at the Antitrust Agencies

By William R. Vigdor

With the elections behind us, we can begin looking at possible changes at the top of the Antitrust Division of the Department of Justice (the “DOJ”) and Federal Trade Commission (the “FTC”). Attorney General Eric Holder selected Renata Hesse as Acting Assistant Attorney General for Antitrust at the DOJ (Acting AAG), replacing Joseph Wayland, who had stepped down. The nomination of Bill Baer as the next Assistant Attorney General for Antitrust (AAG) continues to be held up in the Senate. At the FTC, there is a rumor afoot that Chairman Leibowitz will be leaving. Further, President Obama has nominated George Mason University (GMU) Law Professor Joshua Wright as Commissioner, replacing Thomas Rosch whose term is set to expire. Finally, we note that Will Tom has stepped down as General Counsel for the FTC.

Ms. Hesse has practiced antitrust law for many years, both in public and private practice. Ms. Hesse rejoined the Antitrust Division in March of 2012 as a Special Advisor to the AAG. She was appointed Deputy AAG for Criminal and Civil Operations in the Antitrust Division. Ms. Hesse joined the DOJ from the Federal Communications Commission, where she had served as Senior Counsel to the Chairman for Transactions. In that role, she oversaw the Commission’s investigation of AT&T’s proposed acquisition of T-Mobile. In 2006, she served as Chief of the Antitrust Division’s Networks & Technology Enforcement Section after having served as an attorney in the Division’s Merger Task Force and Transportation, Energy & Agriculture Section. Ms. Hesse was in private practice from 2006 to 2011.

Some of Ms. Hesse’s more notable matters were the Division’s challenge to Oracle’s proposed acquisition of PeopleSoft, FirstData Corporation’s proposed acquisition of Concord EFS, and the Division’s challenge to Microsoft’s alleged monopolist conduct. Ms. Hesse is particularly well known for her work in the intellectual property area. Ms. Hesse received her Bachelor of Arts in Political Science from Wellesley College in 1986 and her Juris Doctor from the University of California, Berkeley in 1990.

At the FTC, changes may be coming early next year because there are rumors that Chairman Leibowitz is stepping down. Chairman Leibowitz joined the Commission as a commissioner in 2004. He was a recess appointment by George W. Bush. In 2009, President Obama appointed him as chairman. Prior to joining the FTC, Mr. Leibowitz was the Vice President of Congressional Affairs for the Motion Picture Association (MPAA). Before joining the MPAA in 2000, he served for 11 years on the staff of Senator Herb Kohl (D-WI). During this time, Mr. Leibowitz served as chief counsel to the Senate Subcommittee on Terrorism and
Credit Card Fees and Practices Face Antitrust Scrutiny

By Alden L. Atkins and Vincent C. van Panhuys

An enormous amount of commerce is conducted through credit card transactions. In 2011, combined spending on all major branded credit, debit, and prepaid cards was more than $3.5 trillion. Revenues from swipe fees (charges paid by merchants to credit card companies and issuing banks for each transaction) have increased as well in recent years as the volume of credit card transactions and the amount of swipe fees themselves have increased. Moreover, in the United States the swipe fees are among the highest in the world – for example swipe fees charged to U.S. merchants are more than five times higher than such fees charged in most European countries.

Those fees have attracted antitrust scrutiny that is bringing major changes to the industry. The Antitrust Division of the Department of Justice (the “DOJ”), private plaintiffs, Congress, and regulators are all examining swipe fees and the practices credit card companies require merchants to follow. In several lawsuits, plaintiffs and the DOJ allege that the swipe fees are at supra-competitive levels, and that the credit card companies impose rules that insulate themselves from competition that could drive those fees down. While some lawsuits are proceeding, settlements in other lawsuits are already bringing changes to the industry. In addition, Congress has enacted the Durbin Amendment to the Dodd-Frank Wall Street Reform and Consumer Protection Act, which reduces the swipe fees for debit (but not credit) cards and imposes other rules.


designed to encourage competition. These cases demonstrate the degree to which antitrust cases can alter significant industry-wide practices.

**Visa and MasterCard Class Action Settlement**

On November 27, U.S. District Court Judge Gleen in the Eastern District of New York preliminarily approved a $7.25 billion settlement that would end the seven year multidistrict antitrust litigation against Visa and MasterCard and the major banks that issue these credit cards. If given final approval, this will be the largest antitrust class action settlement in U.S. history.

In this lawsuit, plaintiffs alleged that Visa and MasterCard charged merchants supra-competitive fees and imposed rules that limited merchants’ ability to encourage customers to use lower cost forms of payment.

Under the proposed settlement, the defendants agreed to pay approximately $6 billion to a class of about 7 million merchants. In addition, Visa and MasterCard agreed to reduce their interchange fees for eight months (worth about $1.2 billion). Significantly, the settlement also allows merchants to charge customers an extra fee for credit card transactions, which until this point has been prohibited by Visa’s and MasterCard’s contracts. Visa and MasterCard are required to make the rule changes set out in the settlement by January 27, 2013, according to the current schedule. The proposed settlement sets out two separate settlement classes. One settlement class is composed of merchants that would receive monetary damages based on the interchange fees they have been charged from January 1, 2004 until November 27, 2012. This settlement class would be certified pursuant to Federal Rule of Civil Procedure 23(b)(3). Merchants would be able to opt out of this class and, if they do so, can bring individual actions against Visa and MasterCard for monetary damages based on the harm they allegedly suffered. The other settlement class is one for injunctive relief under Federal Rule of Civil Procedure 23(b)(2). This class would require Visa and MasterCard to alter their credit card rules (e.g. allowing merchants to charge customers for the use of specific credit cards). The settlement would also bar merchants from suing Visa and MasterCard based on the level of the swipe fees, swipe fee rules, or related fees or rules charged by the credit card company or implemented in the future. All merchants, past or future, that accept Visa and MasterCard, are bound by this injunctive class; merchants cannot opt out.

Since the proposed settlement was first announced last July, many retail groups and large retailers have aligned against the agreement, including 10 of the 19 named plaintiffs. A group of plaintiffs opposing the settlement have appealed the court’s preliminary approval decision and have requested a stay of the settlement provisions pending the appeal. Those opposing the settlement include national associations of convenience stores, restaurants, community pharmacists, and truck stop operators, as well as a number of major retailers such as Wal-Mart, Target, Expedia, Home Depot, and American Eagle. Those objectors argue that because of the ineffective nature of the injunctive relief and the broad nature of the releases granted by the proposed settlement, the settlement entrenches Visa’s and MasterCard’s anticompetitive practices and immunizes the credit card companies from lawsuits challenging future allegedly anticompetitive conduct. Moreover, those opposing the settlement object that, under the current settlement structure, plaintiffs cannot opt out of these key releases that cement the current credit card rules. For example, objectors complain that under the settlement they will no longer be able to challenge other rules they consider anticompetitive, such as the “honor all card” rules that require merchants to accept all types of a branded card (e.g. Visa Traditional Rewards and Visa Classic) regardless of whether those types of cards have different levels of swipe fees.

Objectors also take issue with perhaps the most significant rule change imposed by the settlement, i.e., allowing merchants to charge consumers for the use of specific credit cards. First, the objectors argue that this change would not increase competition or lower swipe fees. Second, charging consumers for using Visa and/or MasterCard is not a realistic competitive option for many merchants, because they rely heavily on consumers using the cards and the risk of losing this business would deter merchants from charging consumers for using their credit card. In 2011, Visa and MasterCard accounted for 68 percent of credit card spending. In addition, charging consumers for credit card use is not an option for merchants in the ten U.S. states that prohibit such

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4 In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation, No. 1:05-md-01720 (E.D.N.Y.).

surcharges, including California, Florida, New York, and Texas. Finally, those opposing the settlement argue that imposing the surcharge by brand, as the settlement allows, is not an option for those who also accept American Express because of the interplay between the settlement agreement provisions and standard provisions of the American Express contracts. The objectors contend that the settlement requires merchants who implement a surcharge by brand (e.g. on all Visa cards) impose the same surcharge on all other branded cards that have equal or greater average swipe fees. That requirement would make surcharging impossible for merchants that accept American Express cards, because American Express typically has higher interchange fees but does not generally permit surcharging.

In announcing his decision to grant preliminary approval of the settlement, Judge Gleenon stated that some of the plaintiffs’ objections were “overstated.” Nonetheless, the judge also acknowledged that the effectiveness of allowing consumer surcharges as a measure to increase competition required more scrutiny. He added that he would likely appoint an expert to evaluate that portion of the settlement. The court scheduled a final approval hearing for September 12, 2013, during which it will assess the fairness, reasonableness, and adequacy of the settlement and address any objections to it.

DOJ (and Private) Anti-Steering Litigation
Other DOJ and private litigation are also impacting the industry. In October 2010, the U.S. Department of Justice sued Visa, MasterCard, and American Express in the Eastern District of New York challenging “anti-steering” provisions in these credit card companies’ contracts with merchants. Anti-steering provisions are rules in the credit card agreements that prohibit merchants from encouraging (or steering) customers to use one form of payment over others. Because some forms of payment are less expensive for merchants, the DOJ alleged that rules prohibiting merchants from steering customers to lower cost forms of payment were anticompetitive. The DOJ settled its claims with Visa and MasterCard in July 2012. In the settlement, Visa and MasterCard agreed to remove their anti-steering provisions and to refrain from implementing such provisions going forward. (The terms of Visa and MasterCard’s settlement with the DOJ were also specifically incorporated into the private class action settlement proposal discussed above.) American Express did not settle and continues to litigate these claims with the DOJ, and discovery is ongoing. In a parallel action, a group of merchants have also challenged American Express’s anti-steering provisions in private litigation that is being coordinated with the DOJ action. Recently, the Supreme Court granted certiorari to review the Second Circuit’s decision that the private plaintiffs could proceed in court notwithstanding the arbitration provisions in their contracts with American Express.

The DOJ alleged that the credit card companies’ anti-steering provisions reduce competition by insulating these card companies from competition with each other as well as other, smaller competitors such as Discover Card. According to the DOJ, anti-steering provisions harmed competition in the general market for credit and charge card services and, separately, in the submarket for travel and entertainment services. The DOJ alleged that travel and entertainment merchants, such as hotels, airlines, and rental car companies, were particularly dependent on credit and charge cards for their revenues and were, therefore, disproportionately harmed. The DOJ pointed out that the credit card companies charged higher swipe fees to travel and entertainment merchants than they did to other merchants, evidencing the market power that the three credit card companies allegedly have over these merchants.

Visa’s and MasterCard’s settlement with the DOJ required the companies to amend their agreements with merchants to remove the anti-steering provisions. In addition, the settlement required Visa and MasterCard to explicitly provide examples of permissible steering, including:

- Offering consumer discounts, incentives, or rebates for the use of specific cards
- Expressing a preference to consumers for the use of specific cards

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7 Id.
8 United States v. Visa, MasterCard, and American Express, No. CV-10-4496 (E.D.N.Y.).
9 In re American Express Anti-Steering Rules Antitrust Litigation, No. 1:11 MD 2221 (E.D.N.Y.).
• Promoting a specific card to consumers using posted information through its size, prominence, sequencing of payment choices, or other information
• Informing customers of the actual or relative costs of each card to the merchant

The DOJ emphasized that American Express generally had the highest swipe fees among all the credit and charge cards and by far the highest fees to travel and entertainment merchants. American Express was used by many corporate travelers and American Express had the highest market share in the travel and entertainment segment (37 percent). In contrast, across credit card purchases from all merchants, American Express allegedly had only a 24 percent market share whereas Visa and MasterCard allegedly held 43 percent and 27 percent, respectively. The DOJ also stressed that American Express had even more stringent anti-steering provisions than Visa and MasterCard. For example, the DOJ alleged that, pursuant to agreements with American Express, merchants that accept American Express:
• “must not indicate or imply that they prefer, directly or indirectly” that the merchant prefers another card
• “must not try to dissuade” American Express cardholders from using their card
• “must not criticize” the American Express card or any American Express services
• “must not try to persuade or prompt” customers to use any other method of payment (including payment by check)
• “must not” impose any restrictions, conditions, or disadvantages when using the American Express card that are not imposed on other cards
• “must not” promote any other card more actively than American Express (other than a private label card which can only be used at that merchant’s establishment)
• “must” prominently display that they take American Express and include American Express if a customer asks what payments are accepted

American Express, in its public statements about the case, underscored its relatively small market share among all credit card transactions, arguing that it is not a “must-carry” card. In addition, American Express emphasized its large investments in attracting desirable American Express cardholders and the importance of its anti-steering provisions in preventing other card companies from “free riding” on these investments.

Debit Card Interchange Fee Limits — Durbin Amendment to Dodd-Frank Act
Notwithstanding the significance of the DOJ and private litigation in the credit card part of the market, Congress is weighing into the matter on the debit card side of things. In October 2010, the Durbin Amendment to the Dodd-Frank Wall Street Reform and Consumer Protection Act came into effect limiting the interchange fees charged on debit cards.¹¹ By statute, these fees were limited to 21 cents per transaction plus .05 percent of the sales amount. As a result, debit card interchange fees are, in all but the smallest transactions, significantly lower than credit card fees which are typically 5 to 10 cents per transaction plus 1 percent to 2.5 percent of the sales amount.¹² That is, the percentage of a sale that goes to interchange fees in a credit card transaction is now commonly 20 to 50 times higher than the percentage of the sale that goes to the interchange fee in a debit card transaction.¹³

As a result of this legislation, most merchants have a significant incentive to steer customers towards debit cards, while, in contrast, banks are discouraging the use of the debit cards. For example, several banks have cancelled rewards programs and, in some cases, started charging consumers for the use of debit cards.¹⁴ Banks and credit card companies have also been more reluctant to provide interchange fee discounts for merchants with small transactions such as coffee shops, charging them the full 21 cent fee. This is making it very expensive for these shops to accept debit cards.¹⁵

Conclusion
The fees and practices of credit card companies are facing antitrust scrutiny on a number of fronts. Although several different lawsuits are ongoing, the trend of the settlements and legislation to date is to lower fees charged by credit card companies and to eliminate their practices that limit

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¹¹ Public Law No. 111-203.
¹³ Id.
merchants’ ability to encourage customers to use lower cost forms of payment. ■

FTC settles Price-Fixing Allegations with Puerto Rico Pharmacy Cooperative

By Hannah Carrigg Wilson

On November 6, 2012, the FTC finalized a settlement with a Puerto Rico pharmacy cooperative, resolving allegations that the cooperative had violated the antitrust laws by fixing prices in its negotiations with third-party payers. The settlement with Cooperativa de Farmacias Puertorriqueñas (Coopharma) illustrates the FTC’s continued antitrust scrutiny of all levels of the health care industry.

According to the FTC, pharmacies negotiate with third-party payers such as health insurers to establish the terms and conditions under which pharmacies provide services to the payers’ health plan subscribers. Generally speaking, pharmacies negotiate these contracts individually. The government views competition over these contract terms as having the potential to reduce costs for patient subscribers.

The FTC’s Complaint alleged that Coopharma’s members compete with each other to provide pharmacy services and agreed to fix prices in their negotiations with third-party payers. Coopharma is a Puerto Rican corporation whose approximately 300 pharmacy owner members allegedly account for at least a third of all pharmacies in Puerto Rico. The FTC’s Complaint alleged that Coopharma coerced pharmacy benefits manager CVS-Caremark (Caremark) into accepting its terms by “demanding to negotiate and contract collectively, threatening that its members would terminate their Caremark contracts, and contacting Caremark’s clients.” As a result of these tactics, Caremark allegedly was forced to make concessions to Coopharma members that were not available to other independent pharmacies in Puerto Rico.

In settling with the FTC, Coopharma did not admit any antitrust violations. By the terms of the FTC’s Decision and

Order, however, Coopharma may not enter into agreements between or among pharmacies requiring that individual pharmacies (a) negotiate on behalf of any other pharmacy with any payer; (b) refuse to deal with any payer; (c) mandate certain terms or conditions; or (d) refuse to deal individually with any payer. Notably, the Order does not contain a provision permitting joint conduct that involves legitimate risk sharing or other integrative activities.

The FTC’s Order also prohibits information exchanges between pharmacies concerning payer contracts. And, significantly, the Order empowers payers to terminate preexisting contracts with Coopharma members without penalty or charge.

The FTC challenge to the conduct of Coopharma reflects the FTC’s ongoing interest in health care markets. ■

Antitrust Division Requires Changes to Agreements Between Verizon and Cable Companies

By Dimitri Dubé

On August 16, 2012, the Antitrust Division of the Department of Justice (the “DOJ” or the “Division”) filed a complaint and entered into a proposed settlement with Verizon Communications Inc. (Verizon), Verizon Wireless, Inc. (Verizon Wireless) and four large cable companies, Comcast Corporation, Time Warner Cable, Inc., Bright House Networks, and Cox Communications (collectively, the “cable companies.”). Verizon Wireless is a wireless telecommunications provider whose parent Verizon offers voice, video, and internet services over a fiber optic network through its FiOS service that, according to the DOJ, competes with the cable companies in select markets. At issue is a series of agreements (the “Commercial Agreements”) under which Verizon Wireless and the cable companies agreed to market and develop bundled “quad play” services that consist of Verizon Wireless’ wireless

22 Id. ¶ IIB.
23 Id. ¶ IIIB.
24 The proposed settlement terms are included in the proposed final order that was filed by the Division in the District of Columbia on August 16, 2012, in U.S. v. Verizon Communications, et al., 1:12-cv-01354 (D.D.C. 2012). The Division simultaneously filed the complaint, the proposed final judgment, and the competitive impact statement.
services and the cable companies' wireline voice, video, and internet services. The proposed settlement is notable for a number of reasons. First, the DOJ challenged the conduct even though there were immediate consumer benefits flowing from the venture. Second, it involved a series of both horizontal and vertical issues, providing some additional insight into the DOJ’s renewed interest in challenging vertical restraints. Third, no actual consumer harm was alleged. Rather, the Division only alleges that the restrictions eliminated current and existing competition and reduced the incentive and ability of the parties to compete in several ways.

The Division raised several competitive concerns with the Commercial Agreements. First, the Commercial Agreements required Verizon to sell quad play services through the joint venture in markets where Verizon was already offering quad play packages with FiOS. The Commercial Agreements also required Verizon to sell the joint venture quad play offerings on an equivalent basis as the quad play offerings with FiOS and provided Verizon with a commission for sales of the joint venture quad play offerings. According to the DOJ, this reduced the incentive and ability for Verizon to discount FiOS to compete with the cable companies. It also limited the ability to market FiOS using the services of Verizon Wireless, foreclosing an important channel of distribution. Further, the Commercial Agreements allegedly created an opportunity for harmful coordinated interaction between the cable companies and Verizon on pricing and marketing of competing offerings and other services.

Second, the Division concluded that the unlimited wireless exclusivity provision in the agreements unreasonably and unnecessarily restrained competition in the long term because it would eliminate the incentive and ability of the cable companies to provide quad play services with Verizon competitors. The Division also alleged that the unlimited wireless exclusivity provision unreasonably restrained Verizon’s ability to provide similar quad play services with companies that provide video, voice, and internet services using satellites. The unlimited duration of the technology joint venture also was alleged to reduce competition. While the venture had the potential to produce innovations that would benefit consumers, the companies’ permanent inability to innovate outside of the joint venture would allegedly reduce their ability and incentives to compete on product developments and enhance the potential for coordination.

Third, the Division also took issue with a provision in the Commercial Agreement prohibiting the cable companies from re-selling wireless services for four years. The DOJ alleged that the cable companies had in the past been resellers of wireless services in competition with the wireless service companies. The Division posited that the four-year delay before the cable companies could resell their wireless services, plus their reliance on Verizon during those four years, would diminish their ability to bring their wireless services to market after the four years. This would allegedly result in anti-competitive effects because the extensive infrastructure of the cable companies would make them particularly effective competitors against Verizon Wireless.

In response to these concerns, the proposed settlement requires the parties to make these changes to the Commercial Agreements:

- Prohibit Verizon from selling the quad play offerings through the joint venture in any area where it sells Verizon FiOS.
- Eliminate the provision that requires Verizon to sell its bundled wireless and FiOS “quad-play” packages on an equivalent basis to “quad-play” packages with the cable companies.
- Permit Verizon to offer similar “quad-play” bundle services with satellite companies.
- Permit the cable companies to offer bundle packages with other wireless companies after five years.
- Remove the four year delay before cable companies can resell wireless services using Verizon’s spectrum.
- Restrict the duration of the joint venture technology agreement to December 2016. The companies may apply for extension of the agreement after December 2016, which the Division can deny if it determines continuation would adversely impact competition.

As required under the Tunney Act, the proposed settlement was published in the Federal Register on August 23, 2012. The 60 day comment period expired on September 22, 2012. As of the date of this publication, the Division has not yet moved for entry of the final proposed final judgment.
Supreme Court to Determine Antitrust Standards for Reverse Payment Settlements

By William R. Vigdor

In a late breaking but widely expected development, the Supreme Court of the United States granted the request of the Federal Trade Commission (FTC) to review a decision of the Eleventh Circuit in Federal Trade Commission v. Watson Pharmaceuticals, Inc. The defendants acquiesced in the FTC’s request for Supreme Court review.

The case involves the Eleventh Circuit’s decision to affirm a district court order dismissing the FTC’s complaint alleging that a “reverse payment settlement” violated the antitrust laws. A reverse payment settlement involves the settlement of patent litigation brought under the Drug Price Competition and Patent Term Restoration Act, Pub. L. No. 98-417, 98 Stat. 1585 (commonly known as the Hatch-Waxman Act) in which the patent holder and brand-name drug manufacturer agrees to resolve its patent lawsuit against the manufacturer of a generic drug by paying the generic drug manufacturer a specified sum and the generic drug manufacturer agreeing not to enter the market earlier than a specified date, where such date would be before the allegedly infringing patent would expire. In deciding the matter, the Eleventh Circuit applied the so-called “scope of the patent” test, which provides that absent sham litigation or fraud in obtaining the patent, a reverse payment settlement is immune from antitrust attack so long as its anticompetitive effects fall within the scope of the exclusionary potential of the patent. The Eleventh Circuit, as well as the Second Circuit and Federal Circuit, has applied this rule on several occasions.

The scope of the patent test, however, conflicts with a rule long advocated by the FTC and recently adopted by Third Circuit in In re K-Dur Antitrust Litigation. Rather than presuming the reverse payment settlement to be unlawful, the Third Circuit rule presumes such settlements to be unlawful unless the parties to the settlement can demonstrate that the payment is for some other purpose than delayed entry or advances some other procompetitive purpose. The Supreme Court will now decide the issue, which is exceptionally important for the pharmaceutical industry, in which patent rights are worth billions of dollars. The FTC claims such settlements reduce competition and cost consumers billions of dollars.

This case and several others involve litigation arising under the Hatch-Waxman Act. The Hatch-Waxman Act was passed to promote generic entry while promoting drug innovation, including allowing allowing branded drug manufacturers to protect their patent rights. Under the Hatch-Waxman Act, a branded drug manufacturer must demonstrate the safety and efficacy of the product and disclose its patents. The Hatch-Waxman Act seeks to facilitate generic entry by authorizing the Food and Drug Administration (FDA) to approve a generic drug if the product is bioequivalent to the approved branded drug. This saves significant costs for the generic entrant. To obtain FDA approval the generic entrant may also need to disclose that its product does not infringe the branded manufacturer’s product or the patent is invalid. If the branded manufacturer files a patent infringement suit against the generic entrant within 45 days of the generic application to the FDA, the FDA may not grant final approval for the generic drug to enter the market until 30 months after the lawsuit is filed or until the generic entrant prevails in litigation, whichever occurs later. The litigation generally involves substantial financial risks for both parties.

The FTC has challenged settlements of Hatch-Waxman litigation when the essential terms of the settlement involve a payment from the branded manufacturer to the generic entrant and a date upon which the generic can enter. The dates of entry are prior to the expiration of the patent. Thus, the scope of the patent test indicates that because the branded manufacturer’s patent could potentially exclude generic entry and, under patent law, the patent is presumptively valid, the settlement cannot eliminate competition unless the patent litigation is a sham or the patent was obtained by fraud. That is, because both the patent and antitrust laws permit a patent owner to exclude competition for lawfully obtained and valid patents, the

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26 The scope of the patent test would not apply to settlements involving an agreement whereby the generic drug company would not enter the market after the date upon which the allegedly patent expires. Andrx Pharm., Inc. v. Elan Corp., 421 F.3d 1227 (11th Cir. 2005). The Eleventh Circuit applies a traditional rule of reason to such settlements because such settlements can extend the exclusion beyond the date upon which the patent would expire.
27 Valley Drug Co. v. Geneva Pharm. Inc., 344 F.3d 1294 (11th Cir. 2003) (applying the scope of the patent test); Schering-Plough Corp. v. FTC, 402 F.3d 1056 (11th Cir. 2005) (same); Andrx, 421 F.3d 1227; see also In re Tamoxifen Citrate Antitrust Litig., 429 F.3d 370 (2d Cir. 2005), amended, 466 F.3d 187 (2d Cir. 2006) (same); In re Ciprofloxacin Hydrochloride Antitrust Litig., 544 F.3d 1323 (Fed. Cir. 2008) (same).
28 686 F.3d 197 (3d Cir. 2012).
settlement cannot reduce competition unless it extends the life of the patent. Further, the scope of the patent test is generally consistent with the judicial preference for the settlement of litigation. Proponents of the scope of the patent test argue that generic entry could be deterred if patent litigation cannot be settled.

In contrast, the Third Circuit test is premised on uncertainty of the validity and infringement of the patent and the potential anticompetitive effect of the settlement. Proponents of the Third Circuit rule argue that the scope of the patent test effectively assumes the patent is valid and infringed. While supporters recognize the presumption of patent validity, they argue the presumption is rebuttable and there is no presumption of infringement. The Third Circuit maintains that its rule does not discourage settlement, reasoning that while settlement of patent litigation is a laudable goal, its rule does not preclude settlements, only reverse payment settlements. Further, the Third Circuit explained that patent litigation effectuates the purposes of the Hatch-Waxman Act, essentially allowing the branded manufacturer to protect its rights but also preventing monopolies.

Absent extension, amicus briefs supporting the FTC would be due January 28, 2013, and briefs supporting Watson Pharmaceuticals are due February 27, 2013.
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