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Patent Settlement Agreement Among Drug Makers Survives Antitrust Challenge

The Federal Circuit recently affirmed a lower court's ruling that reverse payment settlement agreements between a branded drug manufacturer and several generic drug manufacturers did not violate Sections 1 or 2 of the Sherman Act. *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 544 F.3d 1323 (Fed. Cir. 2008). The settlement agreements between Bayer and several generic drug manufacturers concerned Bayer's patent for ciprofloxacin hydrochloride (sold by Bayer as Cipro®) and provided for a series of payments by Bayer to the generic manufacturer in exchange for the generic manufacturer's agreement not to market a generic version of the drug until after the patent expired. A consortium of patient advocacy groups and purchasers of Cipro® brought suit to challenge the settlement agreements under state and federal antitrust laws. The District Court granted the defendants summary judgment and the Federal Circuit affirmed.

The Court of Appeals judged the agreements under the rule of reason and defined the relevant market as ciprofloxacin. It found that Bayer had market power in the relevant market. However, the court held that any anticompetitive effects flowing from the settlement agreements were the result of the monopoly granted by the patent, and therefore could not be redressed under the antitrust laws. Both the Court of Appeals and the District Court acknowledged the tension between patent law and antitrust law, noting that "a patent by its very nature is anticompetitive; it is a grant to the inventor of the right to exclude others from making, using, offering for sale, or selling the invention." A patent is "an exception to the general rule against monopolies and to the right of access to a free and open market." Where the alleged anticompetitive effects flow from the patent holder's exclusionary power under its patent, "the outcome is the same whether the court begins its analysis under antitrust law by applying a rule of reason approach to evaluate the anti-competitive effects, or under patent law by analyzing the right to exclude afforded by the patent." The critical inquiry is whether the agreements restrict competition beyond the exclusionary

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zone of the patent. Where that is not the case, the agreements are lawful.

Sham Litigation Claim Survives Summary Judgment

Drug purchasers fared better in *Teva Pharmaceuticals USA Inc. v. Abbott Laboratories*, 2008 WL 4471368 (D. Del. Oct. 2, 2008). There the District Court denied drug company defendants' motion for summary judgment on plaintiffs' claims that the defendants patent enforcement actions constituted sham litigation and restrained trade in violation of the Sherman Act. Various plaintiffs, consisting of direct and indirect purchasers and competitors, filed suit against Abbott Laboratories, Fournier Industrie et Sant, and Laboratories Fournier. The plaintiffs alleged that the defendants' patent infringement lawsuits against generic manufacturers in an effort to delay generic entry for Tricor, a cholesterol- and triglycerides-controlling drug, were anticompetitive.

The defendants moved for summary judgment arguing that their infringement lawsuits were exempt from antitrust challenge under the Supreme Court's *Noerr-Pennington* doctrine, which confers antitrust immunity on conduct seeking government action, even if the result is anticompetitive. However, the court noted an exception to *Noerr-Pennington* when a lawsuit that is "a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor." To come within this exception, a plaintiff must establish that the defendant's lawsuit was (1) objectively baseless "in the sense that no reasonable litigant could realistically expect success on the merits" and (2) was a concealed attempt to interfere directly with the business relationships of a competitor. Sham litigation claims rarely survive pre-trial motions. In *Teva*, however, the court concluded that plaintiffs had raised sufficient factual issues to permit the jury to decide whether the lawsuits in question came with the sham exception and therefore violated the antitrust laws. The Court found that defendants' claim construction in its patent infringement actions was "untenable" and therefore, a jury could find that the infringement actions were objectively baseless.

Price Fixing Complaint Fails *Twombly* Standard

Purchasers of digital music (compact disks and music available over the Internet) brought a nationwide class action against the nation's four largest record companies alleging a conspiracy to fix the price of digital music. *In Re Digital Music Antitrust Litigation*, 2008 U.S. Dist. LEXIS 79764 (S.D.N.Y. Oct. 9, 2008). The complaint alleged that the defendants conspired to inflate the price of compact disks by fixing a high price for and restraining the availability of music over the Internet. The conspiracy allegations were based on the defendants' participation in two joint ventures, increases in prices to licensees at about the same time, the use of most favored nations clauses in their licenses, and market conditions which made collusion possible.

The defendants moved to dismiss the complaint arguing that the allegations of conspiracy were insufficient under the Supreme Court's decision in *Twombly*. In an extensive analysis of the plaintiffs' allegations in light of the pleading standards established in *Twombly*, the District Court agreed with the defendants, dismissing the complaint and denying plaintiffs' motion to amend the complaint.

The Court noted that *Twombly* requires a complaint to "include 'enough facts to state a claim to relief that is plausible on its face.'" To state a conspiracy under Section 1 of the Sherman Act "requires more than a bare showing of parallel conduct." The complaint must include facts "that tend[] to exclude the possibility of independent action." Turning to the complaint, the Court found that the plaintiffs did not challenge the legality of the joint ventures in which the defendants participated. Those ventures were intended to address widespread music piracy through collaborative efforts, which the Court found to be legitimate conduct from which no inference of conspiracy could be raised. The Court rejected plaintiffs' assertion that the defendants had a motive to conspire because they knew that price competition among them would drive prices down. The Court noted that the observed pricing patterns were normal oligopolistic behavior from which no inference of agreement could be drawn.

The plaintiffs alleged that defendants' prices for digital music were higher than the prices charged by independent music labels. But the court found that these facts did not indicate acts against the defendants' self interest. Finally, the Court rejected the significance of market circumstances that made collusion in the digital music market possible. Such facts -- high seller-side concentration, low buyer-side concentration, and similar seller cost structures -- indicated only a market where conspiracy could exist, not one where conspiracy does exist. Relying on Judge Posner, the Court stated that "just because you grow up in a high crime area does not make you a criminal."

The *Digital Music* decision shows that at least some courts are taking the Supreme Court's *Twombly* decision seriously and are closely scrutinizing antitrust complaints to see if conspiracy is adequately alleged.

Quantity Discount Pricing Program Survives Robinson-Patman Attack

The Ninth Circuit has affirmed summary judgment for the defendants in a lawsuit challenging a seller's quantity discount program under the Robinson-Patman Act. *General Auto Parts Co. v. Genuine Parts Co.*, 2008 WL 4280134 (9th Cir., Sept. 18, 2008). General Auto Parts sued its supplier, Genuine Parts, and the favored purchaser, Dyna Parts, alleging unlawful price discrimination. Genuine Parts employed a standard volume discount pricing program under which customers that purchased in higher volumes received larger discounts. General Auto did not purchase in the highest volumes and therefore paid a higher price for its auto parts. The defendants moved for summary judgment arguing that the lower prices were functionally available to the plaintiff, it simply elected not to buy in the quantities necessary to obtain them.

The Ninth Circuit found insufficient the testimony of the plaintiff's owner that limited cash flow and storage space precluded General Auto from purchasing in the quantities required for the lowest prices. The owner admitted that he had not evaluated the feasibility of obtaining additional credit or storage space. As a result, the Court concluded that the plaintiff "lost the benefit of the discounts" through its own conduct, not

that of the defendants. The Ninth Circuit's decision is the latest in a growing body of law that establishes that the availability of the lower prices to the plaintiff defeats a claim of price discrimination. The defendant must show that the lower prices are truly available to the plaintiff and that it is feasible for the plaintiff to qualify for the lower prices.

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