REVERSE PAYMENTS SETTLEMENTS:
THE PATENT-ANTITRUST INTERSECTION REVISITED

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Abstract

Antitrust and patent law both seek to advance public welfare, but there has long been an undeniable tension between them. Where antitrust seeks to minimize market power in order to ensure competitive markets and pricing, patent law seeks to provide market power in order to provide incentives for the creation and disclosure of desirable inventions. In its most recent iteration, the tension between patent and antitrust law was before the Court in FTC v. Actavis, a case involving the legality of so-called reverse payments settlements. In a reverse payment settlement, a pharmaceutical company and a generic drug company settle claims of patent infringement by agreeing that the generic drug company will remain out of the pharmaceutical market covered by the patent in return for a payment from the patent-holding pharmaceutical company. The various circuit courts had reached widely variant conclusions on whether reverse payment settlements were legal, with some courts ruling such agreements, essentially, per se illegal, and other courts ruling such agreements, essentially, per se legal, at least so long as the agreement’s anticompetitive effects fell within the patent’s exclusionary scope. In its decision, the Court rejected both approaches, and required courts to apply the rule of reason to these settlements. Exactly what a rule of reason analysis would look like in these cases, the Court left decidedly unclear. With the hope of suggesting some workable principles, this article re-examines the economics of patent settlement through a game theoretic approach, and tries to identify guidelines that can help courts develop a rule of reason analysis that will best advance the somewhat inconsistent goals of the patent and antitrust laws in this context.