The AIPLA Antitrust News

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Chair's Corner

We hope 2021 opened well for all committee members, and that everyone is safe. The 2021 AIPLA virtual mid-winter institute will be held from February 1-5, 2021, and will feature IP thought leaders including Fed. Cir. Judge Hon. Kathleen O'Malley and Shira Perlmutter, the new Register of Copyright and Director of the U.S. Copyright Office. The full program and registration are available here.

Our committee will hold a joint meeting with the SOS committee during the mid-winter on Thursday, February 11 from 2-3 pm EST at this zoom link.

The current newsletter contains two topical articles. The first, by Stephen Larson and Adam Powell, reviews *Fresenius Kabi USA v. Par Sterile Products*, a new Third Circuit decision holding that patents can break the chain of causation between anticompetitive conduct (*e.g.*, exclusive dealing) and purported antitrust injury where the patents independently would have prevented market entry. This case presents an interesting intersection of antitrust and patent law, potentially providing options to patentees sued for alleged antitrust violations.

The second article, by Mark Hamer and Dan Graulich, analyzes the DOJ Antitrust Division's Business Review Letter (BRL) for Avanci's licensing Platform. The Avanci BRL provides guidance on the antitrust considerations when pursuing joint patent licensing, reaffirming and expanding upon past BRLs for joint licensing platforms. It confirms that under U.S. antitrust law, Avanci's essentiality evaluation approach, its incentives for patent owner actions to address infringement, and its end-product field of use approach are unlikely to harm competition.

Our Committee aims to publish this newsletter three times each year. To contribute, please contact Stephen Larson at Stephen.Larson@knobbe.com.

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Fresenius Kabi USA, LLC v. Par Sterile Prods, LLC: Unasserted Patents May Break the Chain of Causation Required for Antitrust Injury

Stephen Larson and Adam Powell[1]

Earlier this month, in *Fresenius Kabi USA, v. Par Sterile Products*, the Third Circuit held that patents that independently would have prevented market entry may break the chain of causation between anticompetitive conduct (*e.g.*, exclusive dealing) and antitrust injury.[2] *Fresenius* so held even though the patents at issue were not asserted. *Fresenius* presents an interesting intersection of antitrust and patent law, potentially providing options to patentees sued for alleged antitrust violations.

1. The *Activis* Debate

Fresenius relied on prior cases addressing challenges to "reverse payment" settlement agreements, which originated with the Supreme Court's decision in *FTC v. Actavis*, 570 U.S. 136 (2013). Thus, our story begins with *Actavis*.

In *Actavis*, the Supreme Court held that "reverse payment" settlement agreements between branded and generic pharmaceutical companies may be subject to antitrust scrutiny. The Supreme Court described a "reverse payment" settlement as an agreement by the generic company not to bring a generic drug to market for a specified number of years in exchange for a large and unjustified payment to settle patent litigation.[3] Most or all "reverse payment" agreements occur in suits brought under unique statutory provisions allowing branded drug companies to sue before a generic drug has been released and sold.[4]

A defendant may attempt to justify the size of a challenged "reverse payment," in part, based on the strength of the relevant patent. As a result, the majority and the dissenting Chief Justice debated whether lower courts would have to resolve substantive patent issues to resolve the merits of reverse payment cases.[5]

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[2] --- Fed. Appx. ----, 2021 WL 80616 (3d Cir. Jan. 11, 2021).

[3] *FTC v. Actavis*, 570 U.S. 136, 140, 157-58 (2013).

[4] *Id.* at 141-142 (explaining procedures whereby patent disputes are resolved early by allowing branded companies to sue for patent infringement when the generic drug company submits an Abbreviated New Drug Application to the FDA).

[5] *Id.* at 157, 171.

Writing for the majority, Justice Breyer reasoned that it is "normally ***not*** necessary to litigate patent validity to answer the antitrust question. A large, unexplained reverse payment can provide a workable surrogate for a patent's weakness, all without forcing a court to conduct a detailed exploration of the patent's validity."[6] In his dissent, the Chief Justice disagreed, noting that the settlement of a patent claim "cannot *possibly* impose unlawful anticompetitive harm if the patent holder is acting within the scope of a valid patent and therefore permitted to do precisely what the antitrust suit claims is unlawful."[7]

2. *Wellbutrin*: The Chief Justice Was Right

In *In re Wellbutrin XL Antitrust Litigation*, 868 F.3d 132, 167 n.58 (3d Cir. 2017) ("*Wellbutrin*"), the Third Circuit observed that the facts of that case "appear[ed] to vindicate the Chief Justice's analysis." In *Wellbutrin*, the Third Circuit permitted the defendant to argue the patent that was the subject of the settlement agreement defeated the chain of causation required for antitrust injury.[8]

The Third Circuit explained, "It is not enough for the appellants to show that Anchen wanted to launch its drug; they must also show that the launch would have been legal. After all, if the launch were stopped because it was illegal, then the Appellants' injury (if it could still be called that) would be caused not by the settlement but the patent laws prohibiting the launch."[9]

The Third Circuit observed that, as predicted by the Chief Justice, the Court could not "resolve this aspect of the case without considering the merits of the underlying patent dispute."[10] The Court then analyzed the antitrust plaintiffs' expert testimony regarding the settled litigation—including the expert's predictions as to the accused infringer's likelihood of establishing noninfringement, invalidity and inequitable conduct. Based on that analysis, the Court held the antitrust plaintiffs had not provided a sufficient basis to show the accused infringer "would have been more likely than not to prevail."[11] The Third Circuit thus reversed the district court's decision denying summary judgment on the antitrust claims.

3. *Fresenius*: The District Court Declines To Consider the Merits of an Unasserted Patent Claim

In *Fresenius Kabi USA, LLC v. Par Sterile Prods., LLC*, 2020 WL 901967 at *3-4 (D.N.J. Feb. 25, 2020), the District Court examined whether *Wellbutrin* would permit an antitrust defendant to argue that patents broke the chain of causation required for

[6] *Id*. at 157 (emphasis added).

[7] *Id*. at 171.

[8] *Id*. at 165.

[9] *Id*.

[10] *Id*. at 167 n. 58.

[11] *Id*. at 169.

antitrust injury in different circumstances. Unlike *Wellbutrin*, in *Fresenius* (1) the antitrust lawsuit challenged exclusive dealing—rather than an alleged reverse payment settlement agreement—and (2) the patents were not asserted.

In *Fresenius*, the antitrust plaintiff argued that the defendant's exclusive dealing agreements with several suppliers impeded the plaintiff's ability to obtain compounds necessary to conduct stability testing and thus delayed entry of generic drugs by delaying the plaintiff's and other company's filing of ANDAs.[12]

The district court applied *Wellbutrin* and held that a patent broke "the chain of causation" because it "would have prevented market entry."[13] Unlike in *Wellbutrin*, however, the district court declined to let the plaintiff argue that it would have overcome the patents by establishing non-infringement or invalidity in federal court, or invalidity via IPR.[14] The district court observed that, unlike in *Wellbutrin*, "no litigation or IPR was ever initiated" and "evaluating what would happened in a purely hypothetical, complex patent proceeding would require too much speculation, particularly when patents are presumed valid."[15]

The district court observed that the plaintiff was asking it, and ultimately a jury, "to determine how a hypothetical court in a hypothetical patent litigation would have ruled on any substantive rulings such as claim construction or summary judgment, and how the Federal Circuit would have ruled on any final decision."[16] The district court reasoned that, "without any concrete decisions in the underlying patent action to guide a jury in this action, determining the ultimate outcome of the underling patent litigation is fundamentally unknowable and procedurally impossible."[17]

The district court further observed that "[e]xpert testimony attempting to do so is coming up with probabilities out of whole cloth and would be far too speculative to aid a jury in making a reasoned decision." *Id*. (internal quotation omitted). The district court reasoned that the analysis in *Wellbutrin* "critically" differed because "(1) the underlying patent actions actually existed and were litigated past the early stage; and (2) an ANDA underlying the patent challenge had been filed."[18] "*Wellbutrin's* alternative world was much more concrete than the

[12] *Fresenius*, 2020 WL 901967 at *1-2. Manufacturers may file Abbreviated New Drug Applications ("ANDA's") to obtain approval for "generic" versions of drugs that were approved through the filing of New Drug Applications ("NDA's").

[13] *Id.* at *3.

[14] *Id*. at *4.

[15] *Id*.

[16] *Id*.

[17] *Id*. (internal quotation omitted).

[18] *Id*. at *6.

alternative [plaintiff] proposes considering here, allowing experts a less speculative basis for their opinions."[19]

4. The Appellate Court in *Fresenius* Applies *Wellbutrin* to an Exclusive Dealing Case, Even Though the Patent at Issue Was Not Asserted

The Third Circuit reversed. *See Fresenius USA, LLC v. Par Sterile Prods., LLC*, --- Fed. Appx. ----, 2021 WL 80616 (3d Cir. Jan. 11, 2021). In a relatively short, unpublished opinion, the Third Circuit held that the district court had erred in declining to consider the substance of the patent claims.

The Third Circuit characterized *Wellbutrin* as directing how the court should "handle an assertion that a patent would have blocked an antitrust plaintiff's entry into the market, and the patent would therefore break the chain of causation between the defendant's allegedly anticompetitive conduct and the plaintiff's injury."[20]

The Third Circuit remarked that "[b]ecause a patent would break the chain of causation, we discussed whether a district court, as part of an antitrust case, must consider challenges to the patents."[21] "We recognized that when a product infringes a valid patent, that patent blocks the plaintiff's entry into the market and precludes a claim that the defendant's allegedly anticompetitive conduct caused the plaintiff's injury."[22] Thus, "we held that the district court 'must consider the substance of' those patent claims, because where a valid patent independently blocks the plaintiff's entry into the relevant market, the defendant's allegedly anticompetitive conduct cannot be the cause of the plaintiff's injury."[23]

The Third Circuit rejected the district court's reasoning for declining to engage in the analysis required by *Wellbutrin*.[24] The Third Circuit explained that *Wellbutrin* "does not require that patent litigation be commenced or that a ANDA be filed for a court to determine whether the patent breaks the chain of causation. Rather, an argument that a patent would have blocked an antitrust plaintiff's market entry, and a response that the patent is either invalid, or unenforceable, or the product at issue does not infringe it, triggers a patent analysis under *Wellbutrin*."[25]

The Third Circuit also rejected the district court's reasoning that such an analysis would necessarily be too speculative: "The analysis of such a hypothetical infringement suit or patent

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[19] *Id*.

[20] *Id*. at *2.

[21] *Id*.

[22] *Id*.

[23] *Id*. (quoting *Wellbutrin*, 868 F.3d at 167, n.58).

[24] *Id*.

[25] *Id*.

challenge may in some cases be predicted based on binding legal precedents, including statutory and case law."[26] The Third Circuit thus remanded, observing that "[w]hether the record permits the District Court to engage in such an analysis of course will be for it to decide."[27] The Third Circuit included a long footnote discussing exclusive dealing law, suggesting that the district court consider "whether the exclusivity agreement even constitutes anticompetitive conduct," such that no patent analysis is needed."[28]

5. Analysis

Although a relatively short and unpublished decision, *Fresenius* arguably confirms and expands *Wellbutrin*. *Fresenius* apparently reasons that the existence of a patent can defeat the causation element of an antitrust case even where the allegations do not involve an alleged reverse payment settlement (*Fresenius* alleged exclusive dealing) and even though the patent was never actually asserted.

One could arguably characterize the defendant's patent-based argument in *Fresenius* as a patent "defense" to antitrust claims. *Fresenius* explained that it may arise where there is "an assertion that a patent would have blocked an antitrust plaintiff's entry into the market, and the patent would therefore break the chain of causation between the defendant's allegedly anticompetitive conduct and the plaintiff's injury."[29]

One can imagine several scenarios where a company facing antitrust claims might identify patents that cover the antitrust plaintiff's products or proposed products. The company may argue, for example, that previously unidentified patents would have precluded the antitrust plaintiff from entering the market. Would such a patent "defense" defeat the plaintiff's chain of causation and thus defeat the plaintiff's antitrust claims?

The district court in *Fresenius* mirrored the reasoning of several other courts in identifying the litigation difficulties presented by such an argument.[30] Such an argument may require a court or jury "to determine how a hypothetical court in a hypothetical patent litigation would have ruled on any substantive rulings such as claim construction or summary judgment, and how the Federal Circuit would have ruled on any final decision."[31]

Moreover, a *Wellbutrin/Fresenius* patent "defense" would not be an affirmative defense at all: it would be the *plaintiff's* burden to establish causation and thus to show that the patent would not have delayed

[26] *Id*.

[27] *Id*.

[28] *Id*. at *4 n.12.

[29] *Fresenius*, 2021 WL 80616 at *3.

[30] *See, e.g., In re: Androgel Antitrust Litigation*, 2018 WL 2984873 at *13 (N.D. Ga. June 14, 2018) ("Clearly, actually litigating the underlying merits would be a procedural and administrative nightmare").

[31] 2020 WL 901967 at *4.

market entry. Thus, ambiguities regarding the outcome of a theoretical patent litigation could be held against the antitrust plaintiff. Indeed, the Third Circuit in *Wellbutrin* reversed the district court's denial of summary judgment against the plaintiff, apparently reasoning that the patent defeated the chain of causation, in part, because the antirust plaintiff failed to present evidence sufficient to overcome the uncertainty raised by an attempt to predict the outcome of a patent litigation.[32]

Perhaps a broad interpretation of *Fresenius* could be tempered by the fact that, although the antitrust claim targeted exclusive dealing, the facts involved an ANDA-related dispute, and thus may not be that far afield from a traditional reverse-payment settlement case. Indeed, the antitrust plaintiff's argument was that ***because*** of the exclusive dealing, the plaintiff could not even perform the testing necessary to file an ANDA and trigger patent litigation. Because the anticompetitive conduct ***itself*** prevented patent litigation from beginning, it may have been unjust to preclude an antitrust action merely because the patent litigation had not yet begun.

Moreover, the *Fresenius* district court granted summary judgment ***against*** the plaintiff based on an unasserted patent, declining to consider the merits of invalidity and infringement. The Third Circuit at least suggested the district court evaluate the substantive patent issues on the merits, not simply rule against the plaintiff because of the existence of an unasserted patent.

The impact of *Wellbutrin* and *Fresenius* will surely be debated in future cases at the intersection of antitrust and patent law.

[32] *See Wellbutrin*, 868 F.3d at 169.

The DOJ Antitrust Division's Business Review Letter for Avanci's 5G Connected Car Platform Provides Fresh Guidance on Joint Licensing of Standard-Essential Patents

Mark Hamer & Dan Graulich[1]

On July 28, 2020, the U.S. Department of Justice Antitrust Division ("DOJ") issued a Business Review Letter ("BRL") to Avanci LLC regarding its proposed platform for joint licensing of standard-essential patents ("SEPs") for 5G telecommunications technologies for use in vehicles and, in the future, other Internet of Things ("IoT") devices.[2]

The DOJ concluded that Avanci's proposed 5G platform is unlikely to harm competition.[3] Building upon DOJ business review letters for various patent pools over the last 25 years, the BRL reaffirms the procompetitive benefits of joint patent licensing, and underscores the safeguards needed to mitigate against potential anticompetitive concerns. It also clarifies the degree to which independent evaluations of essentiality are required for joint SEP licensing; concludes that Avanci's provisions incentivizing pursuit of infringement claims by participating patent owners are not anticompetitive; and confirms that Avanci's platform license with a field of use at the end-product level—rather than at the component level higher up the automotive supply chain—is not anticompetitive.

1. Background

When 5G wireless technology is deployed in the next generation of vehicles, connected cars with meaningful communication capabilities will soon be possible. That enhanced functionality will require implementation of 5G cellular standards previously relevant primarily for smartphone uses. Automobile OEM implementation will involve many thousands of SEPs owned by many different companies, creating the potential for high bilateral licensing transaction costs and infringement risk.

Avanci neither owns patents nor implements technologies.[4] It offers a 5G

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[2] Press Release, Antitrust Div., U.S. Dep't of Justice, *Justice Department Issues Business Review Letter To Avanci For Proposed Licensing Platform To Advance 5G Technology For Interconnected Automobiles* (July 28, 2020), https://www.justice.gov/opa/pr/justice-department-issues-business-review-letter-avanci-proposed-licensing-platform-advance [accessed September 8, 2020].

[3] Letter from Makan Delrahim, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, to Mark H. Hamer, Partner, Baker & McKenzie, at 1-2 (July 28, 2020), https://www.justice.gov/atr/page/file/1298626/download [accessed September 8, 2020] [hereinafter "BRL Response"].

[4] Letter from Mark H. Hamer, Partner, Baker & McKenzie, to Makan Delrahim, Assistant Att'y Gen.,

licensing platform to serve as a "one-stop" solution for IoT device makers seeking to secure a single license for standard-essential cellular wireless technologies from multiple SEP holders in one transaction.[5] The patents licensed would include any essential claims owned by the Avanci licensors that are relevant to the practice of 5G cellular standards.[6]

2. Analysis

Discussion of the Avanci 5G Platform's Likely Procompetitive Benefits

The DOJ has long recognized that patent pools can "provide procompetitive benefits by integrating complementary technologies, reducing transaction costs, clearing blocking positions, and avoiding costly infringement litigation."[7] The letter highlights that the Avanci platform "may be particularly useful as the IoT develops" because "potentially thousands to tens of thousands of patents may be declared essential to manufacturing a product with 5G functionality."[8]

In concluding that the platform "appears likely to create efficiencies that may increase consumer welfare,"[9] the DOJ highlighted the following features in its antitrust evaluation:

- **The aggregation of complementary patents could reduce transaction costs, minimize licensing disputes, and facilitate faster implementation**. By acting as a centralized agent for licensing a large percentage of 5G SEPs, the BRL notes that Avanci can facilitate licensing and help integrate emerging 5G technologies into vehicles faster, with less infringement risk, and at reduced transaction costs. Recognizing that cellular SEP holders are "fairly new" to licensing in the automotive space, the DOJ concluded that the Avanci platform has the potential to reduce costs and facilitate negotiations in a "fragmented and opaque" automotive industry.[10] The DOJ also noted that Avanci's scale could help minimize other kinds of transaction costs like those related to monitoring and compliance.[11]
- **The Avanci platform could help promote patent owner participation and reduce hold out.**

Antitrust Div., U.S. Dep't of Justice, at 5 (Nov. 21, 2019), https://www.justice.gov/atr/page/file/1298631/download [accessed September 8, 2020] [hereinafter "BRL Request"].

[5] *Id.*

[6] *Id.* at 8.

[7] BRL Response at 8.

[8] *Id.*

[9] *Id.* at 9.

[10] *Id.* at 9-10.

[11] *Id.*

The letter notes that the efficiencies that can be achieved through joint licensing are contingent in part on the extent to which licensors are willing to participate in the platform.[12] The DOJ discusses how the following features are likely to promote broad platform participation by patent owners:

- *Avanci's Balanced Royalty Allocation Approach*. The letter highlights four point categories that Avanci would use in calculating shares for participating licensors: (i) the number of evaluated essential patents the licensor possesses, (ii) other licensing revenues, which are based on a given licensor's three-year average annual licensing, (iii) standard contributions, which would be determined through an Avanci-commissioned independent third-party study of technical contributions to relevant 3GPP working groups, and (iv) licensing support, which would be awarded to licensors that are willing to enforce their essential patents for the benefit of the platform.[13] Each of these point categories would be capped, with a more limited points cap for licensing support.[14]
- *Quantitative and qualitative factors for calculating royalties*: The letter notes that the point categories Avanci would use in determining royalty distributions "could encourage both large and small licensors to join the platform."[15] For example, the use of a points cap for essential patents could encourage smaller licensors to join, while the points allocations for standards contributions and prior licensing revenues could make the platform more attractive to established licensors with larger 5G portfolios.[16]
- *Licensing support provisions*: The letter recognizes that the provisions relating to licensing support could help discourage hold out by licensees and help licensors bear the costs of enforcement

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

efforts that encourage infringers to take a platform license.[17] At the same time, by limiting the reward of royalty points, the support provisions tend to protect against potential over-enforcement.[18]

- *Reimbursement of litigation costs*: The letter acknowledges that reimbursement of litigation costs could encourage licensors to take legal action against manufacturers that are unwilling to take an Avanci platform license, which could cause fewer firms to continue infringing on licensed patents.[19] The letter also concludes that the platform is unlikely to cause licensors to assert essential patents when they otherwise would not have done so "given the large number of SEPs that may be licensed through the proposed Platform, the safeguards in place to check essentiality, and the correspondingly high probability of infringement (even if some Licensed Patents are later determined to be invalid)."[20]

Discussion of Avanci's Safeguards to Minimize Potential Anticompetitive Effects

While noting that patent pools can potentially harm competition, the letter highlights the Avanci platform's safeguards that would reduce the risk of competitive harm:

- **The use of a definitional license helps ensure substitute patents would be excluded from the platform**. Avanci would be limited to licensing patents that are "by definition" technically essential to the practice of relevant cellular standards.[21] The platform would license only essential patent claims that are "necessary on technical grounds" to comply with cellular standards and excludes non-essential patents from being licensed through the platform.[22] This "definition is consistent with, and in some cases, a more rigorous standard than those used in other pools that the DOJ has found to adequately prevent the inclusion of substitute patents."[23]

[17] *Id.* at 11.

[18] *Id.*

[19] *Id.*

[20] *Id.* at 12.

[21] *Id.* at 15.

[22] *Id.* at 13.

[23] *Id.* at 13-14.

- **Avanci's essentiality review process strikes the right balance.** The Avanci platform would be open to any licensor that owns at least one SEP that has been evaluated by an independent expert.[24] In turn, Avanci would implement procedures, including the assignment of independent patent examiners, to evaluate the patent portfolios submitted by participants for essentiality review.[25] While Avanci would not require licensors to have "all" of their declared SEPs independently reviewed for essentiality, the letter notes the DOJ's appreciation for "Avanci's position that such an extensive evaluation may be 'commercially impractical' due to the number of patents that may be licensed through the Platform and this requirement could inhibit the proposed Platform's formation."[26] Further, the letter notes that independent evaluation is not the only safeguard to prevent licensing of non-essential patents: other safeguards include the Avanci platform's use of a definitional license and the ability of licensees to challenge licensed patents outside the platform.[27]
- **Participants would be permitted to negotiate licenses independently outside the platform**. The licensor would also be required to resolve the effect of any overlapping license to prevent licensors from collecting royalties from the same licensee twice.[28] The proposal allows for independent bilateral licensing outside the platform, and requires licensors to identify overlapping licenses to prevent "double dipping" (collecting royalties through the platform for technologies that are also directly licensed).[29] In doing so, the proposal lessens potential competitive concerns by preserving licensors' ability to compete with the pool license.
- **Avanci's exclusivity provision is not anticompetitive**. The DOJ discusses a provision of the Avanci platform agreement that prohibits licensors from joining another joint licensing program that also licenses cellular SEPs for 5G connected vehicles.[30] The letter concludes that this provision is unlikely to harm competition for at least three reasons: (i) the provision allows for direct competition from alternative joint

[24] *Id.* at 14.

[25] *Id.*

[26] *Id.* at 15.

[27] *Id.*

[28] *Id.* at 16.

[29] *Id.*

[30] *Id.* at 17.

licensing arrangements that existed prior to Avanci and from independent licensors, (ii) the provision allows for competition from joint licensing arrangements in different or closely related fields of use (such as components), and (iii) the provision may provide benefits to licensees by helping to make the platform a more effective "one stop shop."[31]

- **The license would be made available on a non-discriminatory basis to all parties within the proposed field of use (i.e., the connected vehicle at the end-device level)**. While the Avanci platform's field of use is for manufacture of connected end-use vehicles, rather than components in the supply chain, the letter states that limiting the relevant field of use to the end-use device "does not necessarily make the Platform anticompetitive."[32] The letter explains that (i) the efficiencies associated with Avanci's proposed field of use could be considerable by allowing patent owners to more efficiently capture the value of their innovations, and (ii) the US Antitrust Agencies' *Antitrust Guidelines for the Licensing of Intellectual Property* make clear that field-of-use restrictions can be procompetitive by increasing incentives for patent holders to license their technologies.[33] The letter references the DOJ's prior business reviews in finding that field of use limitations in the joint licensing context are "not uncommon."[34]

- **Avanci would protect participants' competitively sensitive information**. The letter notes that the platform takes measures to protect against sharing of competitively sensitive, confidential business information, such as limitations on access and requiring Avanci employees to sign non-disclosure agreements.[35] The letter also concludes that because Avanci is an independent licensing administrator "with no patents of its own" and "does not participate in the automotive industry," "it has little incentive to coordinate on price or output downstream."[36]

3. Conclusion

The Avanci BRL marks a key development in the DOJ's ongoing efforts to strike an appropriate balance between intellectual property rights and antitrust law. It provides fresh guidance on the antitrust

[31] *Id.* at 17-18.

[32] *Id.* at 18.

[33] *Id.* at 18-19.

[34] *Id.* at 19.

[35] *Id.* at 21.

[36] *Id.*

considerations when pursuing joint patent licensing, reaffirming and expanding upon past business review letters for joint licensing platforms. Finally, it confirms that under U.S. antitrust law and under the circumstances presented, Avanci's essentiality evaluation approach, its incentives for patent owner actions to address infringement, and its end-product field of use approach are not likely to harm competition.