The AIPLA Antitrust News

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Chair's Corner

This Spring marks the end of another productive period for the AIPLA Committee on Antitrust Law. In February, our committee helped draft AIPLA comments on a U.S. Department of Justice draft Policy Statement on Licensing Negotiations and Remedies for Standards-Essential Patents Subject to F/RAND Commitments. And in March, our guest speaker James Kress presented to the committee on the recent Fifth Circuit decision in *Continental Automotive Systems v. Avanci LLC*.

The current newsletter includes two articles. The first article by Stephen Larson and Adam Powell is regarding *FTC v. Endo Pharms., Inc.*, a case at the intersection of patent law and antitrust law that applies *Actavis* to the FTC's challenge of an exclusive license. The case takes an interesting approach of examining whether patent law "immunized" activity that the court accepted—for purposes of the pleading—as anticompetitive. The court employed that analysis to reject the FTC's challenge of an exclusive license that allegedly discouraged one of two horizontal competitors from competing.

The second article, by David Cohen, focuses on the Fifth Circuit's recent decision in *Continental v. Avanci*. The case involved Sherman Act claims, including allegations of an agreement to only offer licenses at the OEM level in an attempt to obtain elevated royalties. The Northern District of Texas Court dismissed the claims for lack of antitrust standing, finding plaintiff's antitrust violation theories untenable, but maintaining constitutional Article III standing. On appeal, the Fifth Circuit vacated the lower court's decision and remanded with instructions to dismiss for lack of Article III standing because the plaintiff suffered no cognizable injury.

Our committee publishes this newsletter three times each year. We welcome articles on any relevant topic. To contribute, please contact Stephen Larson at Stephen.Larson@knobbe.com.

We look forward to seeing as many of you as possible at the Spring Meeting in New Orleans on May 17-19.

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FTC v. Endo Pharms., Inc.: The D.C. District Court "Treads [the] Tenuous Line Between Patent and Antitrust Laws" to Reject the FTC's Challenge of an Exclusive License That Allegedly Discouraged Competition

Stephen Larson and Adam Powell[1]

In *FTC v. Endo Pharms., Inc.*,[2] the FTC challenged a patent license between Endo Pharmaceuticals ("Endo") and Impax Laboratories, LLC ("Impax") as an alleged unlawful restraint of trade that discouraged competition between two horizontal competitors. Endo and Impax countered that the patent license was merely an exclusive license that has long been permissible and squarely within the rights of a patent holder.

The District Court accepted the FTC's allegations in its pleading that the agreement purportedly harmed competition. The District Court summarized its decision, however, as primarily "turn[ing] on a single question: Are defendants' actions protected from antitrust liability under the patent laws?"[3] The Court characterized the issues presented as "tread[ing] [a] tenuous line between patent and antitrust laws" and resolved the issue by applying the Supreme Court's decision in *FTC v. Activis*.[4] The District Court characterized its decision as the first case in the D.C. Circuit to apply "the analysis in *Actavis* to patent activity beyond reverse payment settlements."[5]

The Court took an interesting approach of examining whether patent law "immunized" activity that the court accepted—for purposes of the pleading—as anticompetitive. The Court employed that analysis to reject the FTC's challenge of an exclusive license that allegedly discouraged one of two horizontal competitors from competing.

1. Facts

In 2008, Endo filed a patent infringement lawsuit against Impax in response to Impax's Abbreviated New Drug Application ("ANDA") seeking to market a generic version of Endo's drug.[6] In the 2010 settlement, Impax agreed not to launch its

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[2] 2022 WL 951640 (D.C. Mar. 30, 2022).

[3] *Id*. at 6.

[4] 570 U.S. 136 (2013). In *Actavis*, the Supreme Court held that reverse payment settlement agreements between branded and generic pharmaceutical companies are subject to antitrust scrutiny. *Id*. at 158.

[5] *Endo Pharms.*, 2022 WL 951640 at *6.

[6] Manufacturers may file Abbreviated New Drug Applications ("ANDA's") to obtain approval for "generic" versions of drugs that were approved

generic product until Endo's patents expired in 2013. In exchange, Endo agreed to provide Impax a license to any then-issued and future patents that could cover that drug. The parties agreed to negotiate in good faith an amendment to the terms of the license to address later-issued patents.[7]

In the years after the 2010 agreement, Endo settled with nine more companies that filed ANDAs directed to the generic drug. But Endo did not grant any of these other companies the same licensing promise that it offered to Impax. Thus, when Endo obtained additional patents—including a patent that does not expire until 2029—Endo asserted those patents against generic manufacturers other than Impax. "When the dust settled from Endo's patent-litigation frenzy," Endo and Impax were the only two companies allowed to sell the generic drug.[8]

In 2012, Endo launched a reformulated version of the FDA drug. However, in response to FDA safety concerns, Endo stopped selling the reformulated drug. Given the importance of the drug to Endo's revenue, Endo prepared to relaunch its original drug. Instead of doing so, however, Endo demanded that Impax pay Endo an 85% royalty fee for the license to Endo's later issued patents. When Impax refused, Endo sued Impax, alleging that Impax had failed to negotiate in "good faith," as required by the 2010 agreement.

After the court denied Impax's motion to dismiss, Endo and Impax settled in August 2017 (the "2017 Agreement").[9] The 2017 agreement provided Endo a royalty equal to a certain portion of Impax's gross profits, but zero royalties if Endo enters the market once again to sell the drug. After the agreement, Endo decided not to enter the market, causing Impax to be the sole provider, which resulted in higher prices.[10]

In 2017, the FTC filed an action alleging that the 2017 agreement and Impax's subsequent monopoly violate Sections 1 and 2 of the Sherman Act. Endo and Impax moved to dismiss, arguing that the 2017 agreement was not anticompetitive because Endo could freely enter the market at any time. Endo and Impax also argued that, even if the 2017 agreement did prevent such competition, "the patent laws give patentholders a right to exclude others from using patented technology and to issue exclusive patents." *Id*. at *3.[11]

2. Analysis

The Court initially found that the FTC had plausibly alleged the existence of an exclusive licensing agreement that resulted in

through the filing of New Drug Applications ("NDA's").

[7] *Id*. at *1.

[8] *Id*. at *2.

[9] *Id*.

[10] *Id*.

[11] *Id*. at *3.

monopoly.[12] The Court then observed, however, that "certain anticompetitive activity is protected from antitrust scrutiny under the patent laws." [13] To examine whether the alleged activity was "protected," the Court applied the Supreme Court's reasoning in *Actavis*. Specifically, the Court applied the following "considerations" from *Actavis*: (1) the validity of the patent in question; (2) whether the "patent statute specifically gives a right" to restrain competition in the manner challenged; (3) "whether competition is impeded to a greater degree by the restraint at issue than other restraints previously approved of as reasonable"; (4) whether the patent license is "overly restrictive"; (5) whether the patent-holder "dominated the industry and curtailed the manufacture and supply of an unpatented product" and (6) "whether the settlement was traditional or unusual."[14]

a. The validity of the patent

The Court cited *Actavis* to observe that a "[a]n invalidated or non-infringed patent includes no right to exclude (and accordingly no protection from antitrust liability), so a settlement that ends litigation challenging a patent's validity is suspect." [15] The Court observed that, in contrast, the "Federal Circuit has held endo's patents valid multiple times" and the "validity of Endo's patents is not in question."[16] The Court also found there was "no question" the generic drug "infringes on Endo's patents." [17] "So, unlike *Actavis*, there is no concern that Endo may be paying Impax not to challenge the validity of Endo's patents or its patents' preclusive effect on generics." [18]

b. Whether the patent statute specifically gives a right to restrain competition in the manner challenged

The Court observed that "[t]o 'strike th[e] balance' between 'the lawful restraint on trade of the patent monopoly and the illegal restraint prohibited' by the antitrust laws, the Supreme Court instructed courts to ask whether the patent laws grant parties the right to restrain competition in the specific way that is challenged." [19]

The Court observed that the "Patent Act explicitly gives a right to maintain a patent monopoly. A patent has 'the right to exclude others from making, using, offering for sale, or selling the invention throughout the United States or importing the invention into the United States.'" [20] The Court summarized

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[12] *Id*. at *6.

[13] *Id*. at *6.

[14] *Id*. at *7 (quoting *Actavis*, 570 U.S. at 147-52).

[15] *Id*. at *8 (citing *Actavis*, 570 U.S. at 147).

[16] *Id*. at *8.

[17] *Id*.

[18] *Id*.

[19] *Id*. (quoting *Actavis*, 570 U.S. at 148).

[20] *Id*. (quoting 35 U.S.C. § 154 (a)(1)).

the FTC's challenge as an allegation that "one company is the exclusive provider of [the generic drug] for the entire country."[21] "But the FTC's arguments run headlong into the Patent Act's express permission for one company to hold monopoly power." [22] The Court further observed that the "Patent Act also approves of exclusive licenses—i.e., an agreement that confers the patent monopoly to a licensee." [23]

c. Whether competition is impeded to a greater degree by the restraint at issue than by other restraints previously approved as reasonable

The Court explained that "the Supreme Court instructed courts to compare the alleged anticompetitive activity with past activity deemed protected by the patent laws. [24] The Court found that "[e]xclusive licenses like the 2017 Agreement, which exclude all others and permit only the licensee to compete, have been repeatedly deemed reasonable by the Supreme Court and the federal courts of appeals." [25]

The FTC had argued the agreement not only granted an exclusive license, but also "prevents Endo from competing with Impax."[26] The Court rejected this argument, citing *Rail-Trailer Co. v. ACF Indus. Inc.*, 358 F.2d 15, 16-17 (7th Cir. 1966), as holding that exclusive license agreements between two parties are reasonable even when the agreement functionally operates as a noncompete.[27] The Court summarized *Rail-Trailer* as holding that a patentee may "grant an exclusive license for the manufacture of the patented device" that excludes even "himself from engaging in the manufacture of the device…."[28] This action purportedly "does not violate the Sherman Act because the restraint arises from the patent grant and a lawful transfer of a part of the rights to which the grant attached." [29]

The Court also distinguished the FTC's cases as each implicating "additional anticompetitive activity beyond an exclusive license and patent monopoly."[30]

d. Whether competition is impeded to a greater degree by the restraint at issue than by other restraints previously approved as reasonable

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[21] *Id*.

[22] *Id*.

[23] *Id*. at *9.

[24] *Id*. at *9 (citing *Actavis*, 570 U.S. at 148).

[25] *Id*. at *9.

[26] *Id*.

[27] *Id*.

[28] *Id*.

[29] *Id*.

[30] *Id*. at 10.

The Court observed that, in *Actavis*, "the Supreme Court noted that while a single patentee granting a single license containing a minimum resale price was a 'reasonable restraint,' a minimum resale price set by multiple patentees cross-licensing patents to each other is 'overly restrictive.'"[31] The Court found that "[t]he 2017 Agreement sets no minimum resale price" and "is not an agreement between two patentees to pool patents—Impax is not sharing any related patents with Endo."[32]

e. Whether the patent holder dominated the industry and curtailed the manufacture and supply of an unpatented product

The Court observed that, in *Actavis*, the Supreme Court noted "that a cross-licensing agreement could violate antitrust law if the parties dominate the industry and influence the market of unpatented products."[33] The Court found no such allegations: "Here, the FTC only alleges conduct related to the oxymorphone ER market. There are no other products that the FTC alleges Endo or Impax have attempted to dominate or curtail. Endo has not attempted to expand its monopoly ... beyond the scope of the monopoly which its patent gave."[34]

f. Whether the settlement is traditional in form

The Court observed that *Actavis* emphasized that patent "settlements" taking "commonplace forms have not been thought ... subject to antitrust liability" and that the *Actavis* decision "d[id] not intend to alter that understanding."[35]

As an example of a "commonplace form" of settlement, "*Actavis* cited a situation where Company A sues Company B and demands $100 million in damages, and Company B pays a lesser, but still reasonable, amount to settle—say $40 million."[36]

The Court in *Endo* found that was "exactly the situation here—Endo sued Impax for patent infringement and breach of contract after Impax rebuffed Endo's request for 85% royalties."[37] The Court observed that in the "2017 Agreement," the parties "ultimately settled" for a "lesser amount…."[38] The Court found the 2017 agreement to be a "commonplace" settlement.[39]

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[31] *Id*. at 10 (citing *Actavis*, 570 U.S. at 150).

[32] *Id*. at 10.

[33] *Id*. at 11 (citing *Actavis*, 570 U.S. at 151).

[34] *Id*. at 11 (citing *Actavis*, 570 U.S. at 151).

[35] *Id*. at 11 (quoting *Actavis*, 570 U.S. at 152).

[36] *Id*. at 11.

[37] *Id*.

[38] *Id*.

[39] *Id*.

The Court summarized that "[a]t bottom, the concerns identified in Actavis are not present here…. Seeking to benefit fully from its lawful patent monopoly, Endo chose to exclusively license [the drug] to Impax instead of competing or licensing other competitors."[40] "The Patent Act provides Endo the right to make that decision."[41] Accordingly, the Court concluded that the FTC had failed to allege "the 2017 Agreement or the resulting patent monopoly violate Sherman Act Sections 1 or 2."[42]

3. Conclusion

The Court's decision provides an interesting take on the intersection of patent law and antitrust law in the context of licensing. The Court repeatedly conceived of patent law as providing "antitrust law immunity" in certain circumstances.[43] For example, the Court acknowledged the FTC's allegation that a practice was anticompetitive but reasoned the "Patent Act protects this anticompetitive conduct."[44] The Court also placed great weight on the fact that the challenged agreement was an intellectual property license that bore similarities to many other intellectual property licenses.[45]

The Court's approach is interesting in view of, for example, the DOJ/FTC's 2017's updated guidelines for licensing intellectual property.[46] Those guidelines identify circumstances when a typical intellectual property license may nonetheless receive antitrust scrutiny: "antitrust concerns may arise when a licensing arrangement harms competition among entities that would have been actual or potential competitors in a relevant market in the absence of the license (entities in a "horizontal relationship")."[47] Thus, the guidelines appear to focus on the harm to competition that may result from a particular intellectual-property licensing agreement as opposed to whether such an agreement, even if anticompetitive, is nonetheless "immunized" by the patent laws. The forthcoming Appellate Court's decision in *Endo Pharms.* should also provide some additional interesting reasoning and guidance on the intersection of patent and antitrust law.

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[40] *Id*.

[41] *Id*.

[42] *Id*.

[43] *Id*. at *4-6.

[44] *Id*. at *4-6.

[45] *Id*. at *8-11.

[46] *See* Antitrust Guidelines for the Licensing of Intellectual Property (Jan. 12, 2017).

[47] *See id*. at 7-8.

The Fifth Circuit's *Continental v. Avanci* Decision: A Licensing Roadmap

David Cohen[1]

1. Background

On February 28, 2022, the Court of Appeals for the Fifth Circuit vacated the district court's decision in *Continental v. Avan* that Continental had standing under Article III of the Constitution. The Fifth Circuit found Continental did not sustain any injury and thus rejected the so-called license-to-all argument recently adopted by various automotive suppliers.[2]

This matter is part of a broader global dispute between Daimler and its supplier Continental on one end, and pool administrator Avanci LLC and some of its licensor members on the other. In May 2019, Continental Automotive Systems, a provider of automotive components filed suit in the Northern District of California against Avanci and several patent owners participating in its licensing program (Conversant, Nokia and Sharp).[3]

The complaint alleged various legal violations deriving from the defendants' patent licensing practices. According to the complaint, as amended, owners of standard-essential patents ("SEPs") who committed to fair reasonably and non-discriminatory ("FRAND") licensing assurances "concealed [their] intent to [] refuse to license certain users of standards in a given supply chain, charge supra-competitive royalty rates, and demand discriminatory terms and conditions."[4] Continental alleged that, after being incorporated into the standards, the defendants, via their licensing vehicle Avanci, sought "inflated and non-FRAND royalty rates" that "Avanci knew Continental could not agree to." Continental alleged that these actions had amounted to "illegally maintaining the monopoly power [defendants] initially obtained when their patented technologies became standardized."[5] The lawsuit also claimed that Avanci and its licensor members supposedly "collusively agreed to only offer licenses to the automotive industry at the OEM level in an attempt to obtain elevated royalties."[6]

On August 30, 2019, the defendants moved to dismiss Continental's claims on a

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[2] *Continental Automotive Systems v. Avanci LLC* (5th Cir, 2022) *available at* https://law.justia.com/cases/federal/appellate-courts/ca5/20-11032/20-11032-2022-02-28.html

[3] File 5:19-cv-02520 *Continental Automotive Systems v. Avanci LLC*.

[4] See ¶¶ 87-98 of the complaint, available at https://images.law.com/contrib/content/uploads/documents/403/16984/Continental-v.-Avanci.Complaint.pdf

[5] *Id.* at ¶¶ 8 and 126, respectively.

[6] *Id.* at ¶ 8.

number of grounds. With respect to the Sherman Act Section 2 claims, the defendants argued that Continental's allegations rested upon "an alleged breach of contract" not a violation of the antitrust laws, and that "a pricing disagreement over a contractual royalty rate commitment is not exclusionary conduct.[7] Defendants further argued Continental failed to plead with the required specificity that defendants deceived the relevant SSOs regarding their commitment to offer a FRAND rate.[8] The case was transferred to the Northern District of Texas without deciding that motion to dismiss.[9]

On February 27, 2020, the U.S. Department of Justice weighed in through the filing of a statement of interest ("Statement"), arguing that Continental's alleged breach of FRAND claims was not an allegation that defendants engaged in any unlawful exclusionary conduct for a few reasons.[10] Among other things, the Statement explained that a patent holder's effort to maximize its licensing rates after agreeing to abide by FRAND terms does not constitute unlawful exclusionary conduct. The Statement also explained that there is no antitrust duty to deal, including in FRAND contexts. And it noted that FRAND negotiations are already adequately policed by contract and patent laws, and thus a third antitrust liability layer would be inappropriate.

2. District Court Dismissal of the Case

In September 2020, the District Court granted the defendants motion to dismiss, finding that the plaintiffs failed to plead antitrust standing, an unlawful agreement to restrain trade under § 1 of the Sherman Act, and an unlawful monopoly or conspiracy to monopolize under § 2 of the Sherman Act. The Court found plaintiff's theories—that defendants unlawfully agreed to price fix through the Avanci platform and unlawfully monopolized through deception of the SSOs—legally untenable, and therefore ordered that these claims be dismissed with prejudice.

However, the district court declined to dismiss for lack of constitutional Article III standing and ripeness because, while any injury Continental might have from its potential obligation to indemnify OEMs was too speculative, it had sufficient injury based on its alleged inability to obtain from Defendants, on FRAND terms, SEP licenses needed for its TCUs.[11]

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[7] See defendants' Motion to Dismiss, Doc. 162, at 13.

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

[9] *See* https://www.scribd.com/document/439467709/19-12-11-Order-Granting-Avanci-Et-Al-Motion-to-Change-Venue#from_embed.

[10] Case 3:19-cv-02933-M *Continental Automotive Systems v. Avanci LLC* https://www.justice.gov/atr/case-document/file/1253361/download

[11] *See* https://www.lit-antitrust.shearman.com/siteFiles/32796/Continental%20v%20avanci%20usdc%209-14.pdf at 8.

With respect to standing under antitrust law, the court found that Continental's alleged inability to obtain a FRAND license did "not harm its competitive position or its position as a consumer of products used in its devices." This was because:

"Even in light of Defendants' allegedly anticompetitive conduct, [Continental] can still produce TCUs for the OEMs, since, according to Plaintiff, Defendants are actively licensing the SEPs to the OEMs. In fact, Plaintiff may be able to produce TCUs at a lower cost, since it would not have to pay a license for an SEP, because the OEMs have one."[12]

Noting that "Plaintiff and the OEMs form distinct parts of the TCU supply chain. Plaintiff builds the TCUs that then go downstream to the OEMs, which install the TCUs in vehicles they manufacture," and citing the Ninth Circuit's 2020 *FTC v. Qualcomm* decision,[13] the court held that "[t]he anticompetitive conduct allegedly directed at the downstream OEMs does not create an antitrust injury for the upstream TCU suppliers, like Plaintiff" and thus Plaintiff has no antitrust standing.[14] Because all of Continental's federal question claims were dismissed, the court declined to exercise supplemental jurisdiction and dismissed the federal claims *with prejudice*.[15]

3. Fifth Circuit Affirms the Dismissal

Continental timely appealed the dismissal to the Fifth Circuit. In its February 28, 2022 decision,[16] the Fifth Circuit focused on Continental's constitutional Article III standing. The Fifth Circuit first addressed the company's theory that it had suffered an injury through the possibility that OEMs would take non-FRAND licenses and pass those costs onto Continental through indemnity agreements. The Fifth Circuit agreed with the district court that there was no standing because Continental's injuries were "not . . . actual or imminent."[17] Moreover, it found that the:

"alleged injury is 'doubly speculative': Continental would not be harmed unless OEMs first accepted non-FRAND licenses and then invoked their indemnification rights against Continental. Here, the pleadings do not establish that OEMs have accepted such licenses and invoked such rights … at most [Continental's submissions] demonstrate that

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[12] *Id*. at 13.

[13] *FTC v. Qualcomm* (9th Cir., 2020) https://law.justia.com/cases/federal/appellate-courts/ca9/19-16122/19-16122-2020-08-11.html.

[14] *See* https://www.lit-antitrust.shearman.com/siteFiles/32796/Continental%20v%20avanci%20usdc%209-14.pdf at 14.

[15] *Id.* at 26.

[16] *Available at* https://law.justia.com/cases/federal/appellate-courts/ca5/20-11032/20-11032-2022-02-28.html

[17] *Id.* at 8.

OEMs may seek to have Continental offset costs associated with licensing."

The Fifth Circuit also found that "Continental does not appear to be an intended beneficiary contractually entitled to a license on FRAND terms. And as an incidental beneficiary, it would have no right to enforce the FRAND contracts between the Patent-Holder Defendants and the SSOs."[18] However, that finding was not dispositive because the court found that, even if Continental were an intended beneficiary, it had "suffered no cognizable injury" because the patent owners had satisfied their FRAND commitment with respect to Continental:

"The supplier acknowledges that Avanci and Patent-Holder Defendants are 'actively licensing the SEPs to the OEMs[,]' which means that they are making SEP licenses available to Continental on FRAND terms." As it does not need to personally own SEP licenses to operate its business, it has not been denied property to which it was entitled. And absent a 'denial of property to which a plaintiff is entitled,' Continental did not suffer an injury in fact."[19]

Under the relevant circumstances, the Fifth Circuit observed that it would be "easier" for OEMs to establish an injury-in-fact if the defendants were to sue them for infringement or threaten do to so, and for SSOs to establish an injury if the defendants breached their FRAND contracts by imposing non-FRAND rates. Because that was not before the Court, the Court vacated the lower court decision and remanded with instructions to dismiss for lack of Article III standing, declining to reach the issues of antitrust standing and the merits.

It appears that, like the Ninth Circuit's 2020 *FTC v. Qualcomm* decision, the Fifth Circuit has effectively confirmed that SEP holders are free to choose their licensing model. The cases and reasons are different, but the shared philosophical foundation is that patent holders have certain rights and other market players cannot impose a compulsory duty on them to do business on any particular terms only because those are the plaintiffs' preferred terms.

4. Conclusion

On April 13, 2022, Continental filed a petition for rehearing. The petition claims the opinion creates a circuit split because (according to plaintiffs' read of the case law) the Ninth Circuit and the Federal Circuit have both held that any business is a third-party beneficiary of an SEP owner's FRAND obligation. Continental also argues that the question of Continental's third-party beneficiary standing is one that should be decided on the merits and not in the context of standing. Finally, Continental claims that the Fifth Circuit decision disrupts industries that rely on standards and will cause uncertainty across multiple industries. It will

[18] *Id.* at 11.

[19] *Id*. at 12.

be interesting to see how this matter concludes.