

Insights **Skadden**

Excerpted from *2014 Insights*. The complete publication is available at www.skadden.com.

2014

A COLLECTION OF COMMENTARIES ON THE CRITICAL LEGAL ISSUES IN THE YEAR AHEAD

Antitrust and Competition: Nonmerger Enforcement Activity Heats Up on Both Sides of the Atlantic

CONTRIBUTING PARTNERS

James A. Keyte / New York

Gary A. MacDonald /
Washington, D.C.

Ingrid Vandenborre / Brussels

COUNSEL

Tiffany Rider / Washington, D.C.

ASSOCIATES

Thorsten C. Goetz / Brussels

Sean M. Tepe / Washington, D.C.

Julia K. York / Washington, D.C.

U.S. and European antitrust agencies had similar enforcement priorities last year, a trend we expect to continue in 2014. Nonmerger enforcement will continue to focus on intellectual property, financial services and pharmaceuticals, which also will be in the crosshairs of private plaintiffs. In the U.S., a recent Supreme Court decision may have a significant impact on the certification of antitrust class actions. In Europe, officials will push to pass new legislation designed to increase the availability of private antitrust damages actions throughout the EU, and the pharmaceutical, financial services and high-technology sectors will remain the subject of intense scrutiny by competition authorities. Global companies must be aware of the differences, similarities and trends on both sides of the Atlantic that are critical to developing global litigation strategies. This is particularly important given the continuing strong coordination between U.S. and European antitrust agencies, and increasing coordination with other antitrust agencies around the world.

United States

Under new Assistant Attorney General Bill Baer, the DOJ has continued to promote an active enforcement agenda, ranging from merger challenges to criminal cartel prosecutions. Similarly, the FTC, now led by Chairwoman Edith Ramirez, a former intellectual property litigator, has been active in both merger and nonmerger enforcement activity and has maintained its focus on pharmaceutical “reverse payment” settlements and the intersection of antitrust and intellectual property. Additional changes at the FTC include a new commissioner, Joshua Wright, a Republican who joined in 2013, and another awaiting confirmation, Terrell McSweeney, a Democrat who was nominated as the FTC’s fifth commissioner in June 2013.

We expect the DOJ and FTC to continue their merger-related activity (see [Global M&A/“Antitrust and Competition: Surveying Global M&A Enforcement Trends”](#)). Additionally, private litigation likely will shadow the agencies’ enforcement activity; for example, reverse payment cases are multiplying. However, private actions also will face tougher standards for class certification in antitrust cases in the wake of recent Supreme Court decisions (see [“Mass Tort and Consumer Class Action Outlook: A Mixed Landscape for Defendants in 2014”](#)).

Intellectual Property

- Reverse payment patent settlements will remain in the spotlight following the U.S. Supreme Court’s June 2013 decision in *Federal Trade Commission v. Actavis, Inc.*, 133 S.Ct. 2223 (2013). The ruling addressed the antitrust analysis applicable to settlements of patent litigation between brand-name and generic pharmaceutical manufacturers, where the brand-name manufacturer allegedly has paid the generic manufacturer to delay entry of a competing generic product. In a 5-3 decision, the Court rejected both the “scope of the patent” approach and the FTC’s proposed presumption of illegality for such settlements, instead adopting a rule of reason approach under which the antitrust plaintiff bears the burden of proving “significant unjustified

On the standard essential patents front, developments in 2013 brought greater clarity to the boundaries of enforcement.

anti-competitive consequences” flowing from the agreement¹ (see “[Intellectual Property and Technology: Patent Issues to Watch in 2014](#)”). In the wake of *Actavis*, private plaintiffs are challenging settlements involving at least 14 brand-name drugs.² The FTC also plans to “re-examine settlements previously filed with the Commission to determine whether they merit further investigation,”³ and Commissioner Wright recently stated that he is “quite certain” that the FTC plans “to bring a couple more” reverse payment cases in addition to the two it has pending.⁴

- The FTC will commence a study of patent assertion entities (PAEs),⁵ with the goal of examining the “costs and benefits” to “competition and innovation” of the PAE business model and PAE activities. The FTC will seek detailed information from a number of PAEs and from a select number of manufacturers and licensing entities in the wireless communications sector. Patent assertions in the wireless sector will be used as a case study and compared to patent assertions by PAEs in other industries. The FTC will issue a report in a year or two, but in the interim we would not be surprised to see private parties challenge PAEs, particularly those alleged to be engaged in “privateering,” under the antitrust laws.
- On the standard essential patents (SEP) front, developments in 2013 brought greater clarity to the boundaries of enforcement. The FTC (in *Google/Motorola Mobility*), the DOJ (in speeches at industry forums, including by Deputy Assistant Attorney General Renata B. Hesse) and even the White House (which vetoed an ITC exclusion order against Apple) established limits on patent holders’ ability to seek injunctive relief in patent infringement suits involving SEPs that are subject to a “fair, reasonable and non-discriminatory” (FRAND) licensing commitment. Moreover, two federal courts issued the first rulings determining FRAND royalties for particular SEPs.⁶ Additionally, the DOJ has engaged in advocacy to help clarify patent policies adopted by standards setting organizations (SSOs) so as to avoid later disputes regarding SEPs and FRAND terms. We expect the DOJ’s work with SSOs will continue, that more courts will issue FRAND rulings and that enforcement activity in the SEP space may increase.⁷

¹ *Actavis*, 133 S.Ct. at 2227, 2237-38.

² The drugs are Aggrenox, AndroGel, Cipro, Effexor XR, K-Dur 20, Lamictal, Lidoderm, Lipitor, Loestrin 24, Nexium, Niaspan, Provigil, Solodyn and Wellbutrin XL. Because a single patent settlement can spawn multiple follow-on private suits, the number of brand-name drugs at issue vastly understates the number of actual reverse payment cases pending.

³ Prepared Statement of the FTC Before the U.S. Senate Committee on the Judiciary on “Pay-for-Delay Deals: Limiting Competition and Costing Consumers,” July 23, 2013, available at http://www.ftc.gov/sites/default/files/documents/public_statements/statement-chairwoman-edith-ramirez-pay-delay-settlements/130923pfdo_peningstatement_0.pdf.

⁴ Jeff Bliss, “FTC plans to sue more drugmakers over pay-for-delay deals, Wright says,” Mlex, November 14, 2013.

⁵ Agency Information Collection Activities; Proposed Collection; Comment Request, 78 Fed. Reg. 61,352 (Oct. 3, 2013); see “FTC Seeks Comment on Collection of Information Relating to Patent Assertion Entities” (Sept. 30, 2013) available at <http://www.skadden.com/insights/ftc-seeks-comment-collection-information-relating-patent-assertion-entities>.

⁶ *Microsoft Corp. v. Motorola, Inc.*, No. 10-1823, 2013 WL 2111217 (W.D. Wash. Apr. 25, 2013); *In re Innovatio IP Ventures, LLC Patent Litig.*, No. 11-9308, 2013 WL 5593609 (N.D. Ill. Oct. 3, 2013); see also “US District Court Issues First Decision Calculating a FRAND Royalty for Standard-Essential Patents” (Apr. 29, 2013), available at <http://www.skadden.com/insights/us-district-court-issues-first-decision-calculating-frand-royalty-standard-essential-patent>.

⁷ Regarding future enforcement actions, the DOJ has repeatedly stated that it will “continue to explore where there is room for liability under Section 2 of the Sherman Act in cases where holders of FRAND-encumbered SEPs seek injunctive relief after a standard is in place.” Remarks of Deputy Asst. Attorney General, Renata Hesse, *The Art of Persuasion: Competition Advocacy at the Intersection of Antitrust and Intellectual Property* (Nov. 8, 2013), available at <http://www.justice.gov/atr/public/speeches/301596.pdf>.

Class Certification

- In 2014, courts will grapple with the significance of the Supreme Court's *Comcast Corp. v. Behrend* ruling, which reversed certification of a class of Comcast subscribers because plaintiffs' class expert's damages model failed to isolate damages resulting from the remaining theory of antitrust liability and impact.⁸ The Court held that "a model purporting to serve as evidence of damages ... must measure only those damages attributable to that theory" of liability. Rule 23(b)(3) predominance could not otherwise be shown because "[q]uestions of individual damage calculations" — *i.e.*, was the class member damaged by the accepted liability theory or some other conduct — "will inevitably overwhelm questions common to the class." *Comcast* mandates that the certification analysis must include careful scrutiny of the expert's models to prevent the acceptance of "any method" that purports to be applied class-wide. Open questions in the wake of *Comcast* include whether *Comcast* has changed the rule that individual damages calculations do not preclude class certification under Rule 23(b)(3); whether it is permissible to certify a class that potentially contains some number of uninjured class members; whether *Comcast* is limited to situations in which the expert's model is not "linked" to the liability case; and whether courts will seek to avoid injury- and damages-related complications by certifying classes on liability only under Rule 23(c)(4).

European Union

In 2013, the EU's competition law enforcement activity continued to focus on the pharmaceuticals, financial services and high-technology sectors. In the area of private enforcement, the European Commission (EC) published its long-awaited proposal for a harmonizing directive that would, once adopted, establish certain minimum standards for private damages actions in EU member states. These developments will set the stage for 2014. The term of office of the EC runs until October 31, 2014, and new commissioners, including those for competition, will be appointed or reappointed for another five-year term. In any event, the EU's nonmerger enforcement activity is unlikely to slow down in the interim.

Proposed Legislation on Private Antitrust Damages

- On June 11, 2013, the EC issued a package of measures relating to private damages actions consisting of (i) a proposal for a directive on rules governing private antitrust damages actions (the Proposed Directive), (ii) a nonbinding practical guide for national courts on the quantification of harm in private antitrust damages actions and (iii) a nonbinding recommendation on collective redress mechanisms (the Recommendation), which applies to antitrust damages claims and civil claims in other areas, including data protection, the environment and financial services.
- The centerpiece of the legislative package is the long-awaited Proposed Directive, which is the product of almost 10 years of internal considerations and a long-running public debate. The Proposed Directive seeks to establish certain minimum standards for private damages actions throughout the EU. Key elements of this proposal concern (i) the disclosure and protection of evidence, (ii) the effect of decisions issued by national competition authorities, (iii) limitation periods, (iv) joint and several liability,

⁸133 S. Ct. 1426 (2013).

(v) the “passing-on” defense and (vi) proof of harm. The Proposed Directive does not address collective redress, which is dealt with separately in the Recommendation. The Proposed Directive is subject to adoption by the EU Parliament and the EU Council and may be modified in the course of the legislative process. The Proposed Directive is anticipated to be adopted before summer of 2014, but timing will depend largely on when the relevant institutions and stakeholders can agree on the final scope of the Proposed Directive’s provisions. However, it is very likely that 2014 will bring further clarity to the terms and the scope of private damages claims in Europe. Once adopted, EU member states will have two years to implement the directive.

Pharmaceuticals

- After its pharmaceutical sector inquiry in 2008 and 2009 and subsequent monitoring of patent settlements in the EU, the European Commission issued its first decision in relation to reverse payment settlements on June 19, 2013, imposing a fine of €93.8 million on the brand-name originator firm Lundbeck and fines totaling €52.2 million on a number of generic producers that concluded patent settlement agreements with Lundbeck in the period 2002 and 2003. The EC’s decision supports a standard of review for the reverse payment patent settlements at issue based on a presumption of anti-competitive effects, which appears to contrast with the U.S. Supreme Court’s findings in *FTC v. Actavis* endorsing an effects-based rule of reason analysis as discussed above. The EC’s decision has been appealed to the EU’s General Court, which is expected to clarify the applicable legal standard.
- On December 10, 2013, the EC issued a decision imposing fines of €10.8 million on Johnson & Johnson and €5.5 million on Novartis in relation to a co-promotion agreement involving a reverse payment which, according to the decision, delayed the market entry of Novartis’ generic drug in the Netherlands.
- Two additional EC investigations are pending in relation to patent settlement agreements involving reverse payments from brand-name originators to generic firms. The EC has publicly indicated that it may open additional investigations in the future, so we expect this issue to remain on the forefront of the EU’s agenda in 2014.

Financial Services

- On December 4, 2013, the EC issued its first decisions concerning cartels in the financial sector since the start of the financial crisis in 2008. In two parallel decisions concerning the alleged manipulation of interest rate derivatives covering the European Economic Area relating to the EURIBOR, JPY TIBOR and Euroyen TIBOR rates, the EC imposed fines on eight financial institutions totaling more than €1.7 billion, which constitutes the highest-ever fine issued in Europe. The decisions were issued under the EU settlement procedure which allows for a simplified process. A number of banks and financial brokers involved in the investigations decided not to settle, and the EC opened formal proceedings against those companies under the standard (non-settlement) cartel procedure. The timing of decisions in the cases that did not settle is unclear.
- In July 2013, the EC also issued a Statement of Objections in the *Markit* case involving credit default swaps. A second EU probe relating to credit default swaps officially was put on hold.

“Significant legal uncertainty remains in the EU over whether a patent owner can seek injunctive relief based on its patent.”

- The EC in 2013 also extended its benchmark-rate investigations to the potential manipulation of such rates denominated in Swiss francs and launched new preliminary investigations into the possible manipulation of foreign exchange rates at several banks.
- The EC has indicated publicly that cartel enforcement in the financial sector remains a “top priority.”

High-Technology

The EC issued a Statement of Objections against Motorola Mobility in May 2013 for an alleged misuse of its standard essential patents when it sought to enforce those patents against Apple through an injunction in an alleged breach of FRAND commitments. In a similar case, the EC had issued a Statement of Objections against Samsung in December 2012, for the alleged misuse of patents by seeking injunctions against Apple under a possible violation of FRAND commitments. In October 2013, Samsung offered commitments to the EC that are being market-tested. Under the proposal, Samsung commits for a period of five years not to seek injunctions on the basis of any of its standard essential patents, present and future, that relate to technologies implemented in smartphones and tablets against any company that agrees to a particular licensing framework. Once the commitments are accepted, the EC will issue a commitment decision making the commitments binding.

Significant legal uncertainty remains in the EU over whether a patent owner can seek injunctive relief based on its patent, despite having entered into FRAND commitments, and more generally whether any obligation exists for a patent holder to license a patent under FRAND terms. Hopefully, 2014 will bring some clarity as the *Samsung* and *Motorola Mobility* cases move to a final decision.

* * *

U.S. and EU antitrust agencies show no signs of slowing down in 2014, and their coordination will continue to strengthen. Global businesses will need to be attuned to the trends on both sides of the Atlantic when mapping their global litigation and risk management strategies.