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QUESTIONS FOR FTC/DOJ IP AND ANTITRUST  
PATENT SETTLEMENT HEARING

by

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1. Do settlement agreements between competitors or potential competitors in technology, goods or innovation markets create special antitrust risks? Are such risks more acute when the litigation involves claims of patent invalidity or infringement?
2. Do parties have stronger incentives to enter into anticompetitive IP settlements than other types of settlements?
3. What do we make of the fact that cases that have identified anticompetitive settlements have usually involved egregious antitrust violations, such as the Singer case? Is this the tip of the iceberg?
4. Should the consumer interest be systematically considered when competitors or potential competitors enter into settlement agreements involving infringement claims?
5. Do we have any reliable data on the competitive effects of recent patent settlement agreements?
6. To what extent do enforcement agency have knowledge of current settlement agreements since the agreements are entered into privately? Is there any effort by enforcement agencies to monitor horizontal settlement agreements?
7. Would it be desirable to provide for a settlement notification system such as for mergers or R&D joint ventures? Would such a system make sense at least for pharmaceutical settlements, as for example contained in S.754 (the Leahy, Kohl, Schumer & Durbin Bill)?
8. What disclosures might such a system reasonably require? See e.g. Robert J. Hoerner, Antitrust Pitfalls in Patent Litigation Settlement Agreements, 8 Fed. Cir Bar J. 113, 135-39 (proposed questionnaire)

9. Do pharmaceutical settlements raise greater risks than other types of settlements (or is it just that we know more about them)?
10. If the problem is more acute in pharmaceuticals, is this due solely to the existence of complex regulation, which makes possible strategic behavior to manipulate the rules?
11. Is the risk of anticompetitive settlements greater in industries where patents are a key R&D factor, such as chemicals, agriculture and pharmaceuticals (Scherer testified in 1995 FTC Hearings that these were the industries in which patents were the most important to the participants)?
12. Should the presumption favoring settlement agreements generally in the law, be a larger (smaller) factor in evaluating patent settlement agreements involving competing patents or infringement claims?
13. Should intent be a more important element in assessing patent settlement agreements involving competing patents or infringement claims than for other antitrust settlements. Are there more objective factors that could minimize the need for intent evidence?
14. In antitrust analysis of patent infringement settlements is it necessary for the antitrust court to assess the validity of the IP rights or the likelihood of non-infringement? If so, how is this feasibly to be done in an antitrust case?
15. If probable validity or infringement is to be assessed, should the estimate be quantitative and how is the measurement to be integrated into the antitrust analysis?
16. Are there alternative proxies that could substitute for patent validity or infringement measures in antitrust cases?
17. In the pharmaceutical cases, if reverse payments were eliminated, would the 180-day exclusivity for the generic entrant pose a problem?