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The US Court of Appeal for the seventh circuit rejects "Patent Thicket" allegation against a pharmaceutical company, on the claim of prevention of market entry (*AbbVie*)

ANTICOMPETITIVE PRACTICES, BURDEN OF PROOF, INTELLECTUAL PROPERTY, PHARMACEUTICAL, SETTLEMENT, BARRIERS TO ENTRY, UNITED STATES OF AMERICA, STANDARD ESSENTIAL PATENT

US District Court for the Seventh Circuit, *AbbVie*, Case: 20-2402, Court decision, 1 August 2022

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Seventh Circuit's Rejection of Insurers' Monopolization Case is Not the Final Word on "Patent Thicket" Litigation*

The theory that patent holders can be held liable under the antitrust laws for blocking competition with a thicket of patents may be down—but it is not out.

Although the "patent thicket" theory was unsuccessful in *Mayor and City Council of Baltimore, et al. v. AbbVie Inc., et al.*,¹ this recent decision of the U.S. Court of Appeals for the Seventh Circuit hints at ways that theory could support a viable monopolization claim.

The Seventh Circuit panel affirmed a district court's decision to dismiss claims brought by insurers against drugmaker AbbVie for monopolizing the market for the Humira arthritis drug by creating a "patent thicket" to prevent entry.

Indirect purchasers of Humira alleged that AbbVie had created an insurmountable barrier to competition by accruing 132 patents for the drug. These patents preserved AbbVie's exclusive rights to the market after its original core patent expired in 2016. A number of generic manufacturers challenged AbbVie's patents pursuant to the Biologics Price Competition and Innovation Act ("BCPIA"), but settled rather than face an expensive, drawn-out fight over all 132 patents.

The Seventh Circuit panel, led by Judge Frank Easterbrook, affirmed Judge Manish Shah's ruling that plaintiffs failed to state claims under either Section 1 or Section 2 of the Sherman Act.

With respect to plaintiffs' Section 2 claims, the court affirmed the trial court's holding that plaintiffs failed to state a claim because challenged not the underlying validity of the Humira patents, but merely AbbVie's aggregation of the patents. In our view, this pleading failure was a significant strategic error that leaves open the door for future antitrust challenges to "patent thickets."

As the Seventh Circuit noted, invalid patents cannot be used to create or protect a monopoly. This means that rival drugmakers could enter the market with biosimilars and defend any infringement action brought under the BCPIA on that basis. And, to that end, the Seventh Circuit implicitly questioned whether a class of insurers would have standing to do so. This leaves open the possibility that potential entrants could, in fact, defend against an infringement suit by claiming that the patent holder had "flooded the zone" with multiple overlapping patents with a reckless disregard for their validity—especially if the infringement suit cites each of the patents comprising the "thicket."

The appellate court also upheld the dismissal of plaintiffs' Section 1 allegations regarding AbbVie's settlement of its potential competitors' patent claims. The court held that plaintiffs had not met their burden of proof under Actavis to show that "the patent holder pa[id] the potential entrant to defer entry . . . [since] the payment exceed[ed] any reasonable estimate of the costs of litigation and is best understood as a portion of the spoils from a market-division agreement.

In particular, the Seventh Circuit rejected as implausible plaintiffs' allegations that defendants had paid potential generic competitors to delay entry in the U.S. by providing those competitors with an earlier entry date in the much less valuable European markets. The court's rejection of this theory strikes us as premature, given that evidence of such a market allocation would be solely in the defendants' possession and the theory would appear to fall squarely within the ambit of Actavis. The Court, however, disagreed, essentially finding that the plaintiffs' bare pleadings were insufficient to meet federal pleading standards in light of the many legitimate reasons why European entry dates might precede entry in the U.S..

The main takeaway from the case, however, is the continued failure of "patent thicket" theories to succeed in federal antitrust litigation. As this blog *discussed* [↗] last year, "patent thicket" issues may receive Supreme Court attention in the near term, depending on how the U.S. Court of appeals for the Ninth Circuit rules in the pending case of *Intel v. Fortress Investment Group*.

In our view, "patent thicket" cases are likely to eventually succeed. To do so, plaintiffs (or defendants in an infringement action) will need to plead that the patent holder's assertion of its patents was in reckless disregard for the validity of those patents, trusting that the work needed to challenge each patent within the "thicket" will be too great a challenge for a potential entrant. The Seventh Circuit ruling—that plaintiffs cannot shortcut that analysis—does not question the underlying premise that a patent holder's assertion of dozens of invalid patents to protect a monopoly position can violate the antitrust laws.

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