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**Collusive and Exclusive Settlements of
Intellectual Property Litigation**

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COLLUSIVE AND EXCLUSIVE SETTLEMENTS OF INTELLECTUAL PROPERTY LITIGATION

C. Scott Hemphill*

In giving this year's Handler Lecture, it is an honor to continue a tradition begun by my late colleague Milton Handler, a pioneer in antitrust scholarship and practice. I share Professor Handler's interest in how antitrust intersects with intellectual property, and his belief—demonstrated in his academic writings and the life he lived—that the academic community and organized bar can collaborate fruitfully to advance understanding of competition policy.

My subject is a pair of developments at the intersection of antitrust and intellectual property during the past year. Both are “local” cases, filed in the district courts of New York, that have national significance. One is a proposed settlement of copyright litigation over the Google Book Search (GBS) program, currently pending in the Southern District of New York, where a judge is considering antitrust and other objections to the settlement.¹ The other is a consummated settlement of patent litigation between competing drug makers, which attracted an antitrust challenge filed in the Eastern District. The appeal of that case was recently decided by the Second Circuit.²

The cases share several features. Most obviously, both are settlements of intellectual property litigation involving

* Professor of Law, Columbia Law School. This paper is adapted from remarks made on April 7, 2010, as the Milton Handler Lecture before the Antitrust Section of the New York City Bar Association. Harvey Goldschmid, Bert Huang, Christopher Leslie, Henry Monaghan, and Randy Picker provided helpful discussion and comments on previous drafts. Jesse Creed, Taylor Kirklin, Tejas Narechania, and Yan Shurin provided outstanding research assistance. The author has consulted with the Federal Trade Commission on the antitrust issues raised by patent settlements in the pharmaceutical industry. Views or errors are the author's alone.

¹ Amended Settlement Agreement, *Authors Guild, Inc. v. Google Inc.*, No. 05-8136 (S.D.N.Y. Nov. 13, 2009).

² *Ark. Carpenters Health & Welfare Fund v. Bayer AG*, 604 F.3d 98, 110 (2d Cir. 2010) (per curiam).

an innovator. In the drug setting, the innovator is the intellectual property plaintiff, a brand-name drug maker that seeks to block entry by a generic rival. In the GBS case, by contrast, the innovator (Google) is an intellectual property defendant.

The antitrust issues also share a basic underlying economic structure. In each, the innovator has made a large and risky investment to create a new product that would not have existed absent these investments. Now that it is successful, the innovator's profits are threatened by potential competition from a rival that hopes to free-ride, making use of the innovation without duplicating the innovator's investments. The settlements have attracted attention because they implement, in different ways discussed below, a relatively low level of competition with free-riders. They therefore raise the question: to what degree does antitrust require the innovator to assist, or permit it to resist, the free-rider?

A series of prominent cases—*United States v. Aluminum Co. of America*,³ *Broadcast Music, Inc. v. Columbia Broadcasting System*,⁴ and *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*⁵—provides one starting point for an answer. In *Alcoa*, Judge Learned Hand instructed that “[t]he successful competitor, having been urged to compete, must not be turned upon when he wins.”⁶ *BMI* makes clear that innovative contractual arrangements that result in new products, such as new licensing schemes, merit substantial antitrust deference.⁷ *Trinko* goes even further, stating that the possession of monopoly power is “not only not unlawful” but sometimes desirable, since it “attracts ‘business acumen’” and “induces risk taking that

³ 148 F.2d 416 (2d Cir. 1945).

⁴ 441 U.S. 1 (1979).

⁵ 540 U.S. 398 (2004). These cases are “local” too: all three were filed in the Southern District of New York.

⁶ 148 F.2d at 430.

⁷ 441 U.S. at 23 (discussing the inapplicability of per se liability where an “agreement on price is necessary to market the product at all”).

produces innovation and economic growth.”⁸ To be sure, these older cases are not directly on point. Among other differences, two of them (*Alcoa* and *Trinko*) consider unilateral conduct by a monopolist, whereas the settlement cases feature concerted behavior.⁹ But taken together, they illustrate the broad principle that innovators enjoy substantial latitude in retaining the profits from innovation.

In the settlement cases, antitrust defendants have elevated that latitude to a full defense. They argue that the creation of a new product, particularly if protected by a patent, may offer complete insulation against antitrust liability. Such claims go too far. Innovation is not a complete defense, even when backed by a patent. The key question is whether the innovator has acted, either by colluding with or excluding a rival, in a way that is likely to limit competition and harm consumers, relative to feasible alternatives. In Part I, I answer that question as to one element of the GBS settlement—the “de facto exclusivity” that it confers upon Google as to orphan works—and conclude that this harm has not been established. In Part II, I turn to settlements between competing drug makers, and reach a different conclusion. Along the way, I will offer a few thoughts about alternatives to the antitrust perspective that has dominated the consideration of both cases.

I. THE GOOGLE BOOKS SETTLEMENT

Probably no firm has received more antitrust scrutiny in the past several years, on a greater number of topics and with the involvement of both U.S. enforcement agencies, than Google. From the Federal Trade Commission (FTC), the search giant has received close examination of its

⁸ 540 U.S. at 407.

⁹ This distinction, however, should not be overstated, given the overlap between sections 1 and 2 of the Sherman Act, and the fact that the GBS settlement and drug patent settlements have a significant section 2 component.

acquisitions¹⁰ and board of director overlaps with other technology companies.¹¹ The Department of Justice's Antitrust Division, meanwhile, forced Google to abandon a proposed agreement about search-based advertising with Yahoo,¹² and more recently, obliged it to change its hiring practices in an effort to increase competition for talent with Silicon Valley rivals.¹³

These actions stop short of a direct challenge to Google's conduct in its core business of search-based advertising. Private plaintiffs, however, have taken that further step, asserting that Google manipulates search and advertising results to disfavor competitors.¹⁴ These plaintiffs closely model their allegations on the government's monopolization suit against Microsoft. They portray their business as an economic complement to Google, much as the Netscape browser was a complement to Windows. Google, they argue, came to see the complementary business as a future competitor, giving the dominant firm an incentive to "starve nascent competition."¹⁵ Google, like Microsoft, is alleged to have used its dominance in search to prevent the emerging rival from achieving the economies of scale necessary to

¹⁰ See, e.g., Press Release, FTC, FTC Closes Its Investigation of Google AdMob Deal (May 21, 2010), <http://www.ftc.gov/opa/2010/05/ggladmob.shtm> (announcing agency conclusion that proposed acquisition of AdMob, a mobile advertising company, was unlikely to harm competition); Press Release, FTC, Federal Trade Commission Closes Google/DoubleClick Investigation (Dec. 20, 2007), http://www.ftc.gov/opa/2007/12/google_dc.shtm. Similar scrutiny is expected for Google's pending acquisition of ITA, a software maker focused on organizing and presenting airline data.

¹¹ Miguel Helft & Brad Stone, *Board Ties at Apple and Google Scrutinized*, N.Y. TIMES, May 5, 2009, at B1.

¹² Press Release, U.S. Dep't of Justice, Yahoo! Inc. and Google Inc. Abandon Their Advertising Agreement (Nov. 5, 2008), <http://www.justice.gov/opa/pr/2008/November/08-at-981.html>.

¹³ Press Release, U.S. Dep't of Justice, Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements (Sept. 24, 2010), http://www.justice.gov/atr/public/press_releases/2010/262648.htm.

¹⁴ See, e.g., Complaint at 3–4, *TradeComet.com LLC v. Google Inc.*, 693 F. Supp. 2d 370 (S.D.N.Y. 2010) (No. 09 Civ. 1400).

¹⁵ *Id.* at 3.

survive.¹⁶ There are signs that public enforcement agencies have begun to take an interest in these allegations.¹⁷

This extensive attention sets the stage for Google's latest antitrust battle. In 2004, in service of its corporate mission "to organize the world's information and make it universally accessible and useful,"¹⁸ Google began an audacious attempt to create a universal digital library, with better accessibility and usability than its brick-and-mortar counterparts.¹⁹ A major element of this effort was to make scanned copies of large numbers of copyrighted books. In 2005, a group of authors and publishers sued Google for copyright infringement.²⁰

The copyright suit focuses on "snippets." Although Google copied the entirety of copyrighted books without authorization, it did not permit a GBS user to see the full text, but only small portions responsive to a user search.²¹ This use, Google argues, is properly considered a fair use not subject to liability.²² Much like a card catalog or index, these uses are complements that ultimately promote book sales and thus actually benefit authors and publishers. Complementarity tends to weigh in favor of fair use²³ but is

¹⁶ *Id.*

¹⁷ Michael Liedtke, *Google Facing Inquiry by Texas Attorney General*, WASH. POST, Sept. 4, 2010, at A14.

¹⁸ *Frequently Asked Questions*, GOOGLE INC., <http://investor.google.com/corporate/faq.html#mission> (last visited Dec. 1, 2010).

¹⁹ See generally John Markoff & Edward Wyatt, *Google Is Adding Major Libraries to Its Database*, N.Y. TIMES, Dec. 14, 2004, at A1.

²⁰ Complaint, Authors Guild, Inc. v. Google Inc., No. 05-8136 (S.D.N.Y. Sept. 20, 2005).

²¹ Markoff & Wyatt, *supra* note 19.

²² See 17 U.S.C. § 107 (2006) (defining fair use by reference to four-factor test); see also Answer, Jury Demand, and Affirmative Defenses of Defendant Google Inc. at 7, Authors Guild, Inc. v. Google Inc., No. 05-8136 (S.D.N.Y. Nov. 30, 2005).

²³ See, e.g., *Ty, Inc. v. Publ'ns Int'l Ltd.*, 292 F.3d 512, 517 (7th Cir. 2002) ("[C]opying that is complementary to the copyrighted work (in the sense that nails are complements of hammers) is fair use, but copying that is a substitute for the copyrighted work (in the sense that nails are substitutes for pegs or screws), or for derivative works from the copyrighted work, is not fair use.").

not the only relevant factor.²⁴ It is far from clear how a court would decide the copyright case.

In 2008, the parties announced a proposed settlement of the suit.²⁵ In response to criticism, the settlement was substantially revised, and an amended settlement was submitted in November 2009.²⁶ The agreement sets up a licensing regime for a wide variety of digital uses of copyrighted works, including consumer purchases of electronic books and bulk subscriptions for libraries and other institutions.²⁷ The settlement reaches far beyond the original fight over snippets, for these additional uses were not at issue in the original copyright suit. Google did not assert, for example, that it did not need a license to offer print-on-demand services of copyrighted works, one of the many uses covered by the settlement.²⁸

The settlement is not only ambitious but also ingenious. Making brilliant use of the class action mechanism, the settlement applies not only to the works of named plaintiffs, but also to a much larger set of copyrighted works that are covered by the class action suit.²⁹ As a practical matter, that means its scope encompasses so-called “orphan” or “unclaimed” works whose owners are currently unknown. Unlocking the potential value of orphan works has long bedeviled copyright policy because it is costly to locate the owner and yet risky to use the work without permission,

²⁴ Complementarity bears upon one of four statutory factors enumerated in 17 U.S.C. § 107, “the effect of the use upon the potential market for or value of the copyrighted work.” It is not a complete account even of that factor, however, for a derivative work can be a complementary use but not a fair one, as the quotation from *Ty* indicates. For a comprehensive discussion of all four factors, see 2 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 12.2.2 (3d ed. 2010).

²⁵ Settlement Agreement, Authors Guild, Inc. v. Google Inc., No. 05-8136 (S.D.N.Y. Oct. 28, 2008).

²⁶ Amended Settlement Agreement, *supra* note 1.

²⁷ *See, e.g., id.* § 4.1 (institutional subscriptions), § 4.2 (consumer purchases).

²⁸ *Id.* § 4.7(a).

²⁹ *Id.* §§ 1.13, 1.19, 1.75 (providing a broad definition of the settlement class and affected set of copyrighted works).

thereby opening the door to infringement suits and potential damages.³⁰ An agreement *without* this prior litigation could not have purported to bind the owners of orphan works. The class action mechanism thus provides a neat way around that problem by flipping the usual opt-in rule of copyright into the opt-out rule of a class action.

The proposed settlement agreement, even in its amended form, is controversial.³¹ Some objectors have argued that the class action mechanism may not be used to launch a joint

³⁰ For a discussion of this problem, and an argument that the settlement provides a useful framework for devising a legislative solution in the United States and Europe, see Katharina de la Durantaye, *Finding a Home for Orphans: Google Book Search and Orphan Works Law in the United States and Europe*, 21 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* (forthcoming 2010).

³¹ For analyses critical of the settlement, see, e.g., James Grimmelman, *The Amended Google Books Settlement Is Still Exclusive*, *COMPETITION POL'Y INT'L ANTITRUST J.*, Jan. 2010 (2); James Grimmelman, *How to Fix the Google Book Search Settlement*, *J. INTERNET L.*, Apr. 2009, at 1; Randal C. Picker, *Assessing Competition Issues in the Amended Google Book Search Settlement* (Univ. of Chi. John M. Olin Law & Econ. Working Paper No. 499, 2009), available at <http://ssrn.com/abstract=1507172> [hereinafter Picker, *Assessing Competition Issues*]; Randal C. Picker, *The Google Book Search Settlement: A New Orphan-Works Monopoly?*, 5 *J. COMPETITION L. & ECON.* 383 (2009); Randal C. Picker, *Antitrust and Innovation: Framing Baselines in the Google Book Search Settlement*, *GLOBAL COMPETITION POL'Y: THE ANTITRUST CHRON.*, Oct. 2009 (Release 2) [hereinafter Picker, *Antitrust and Innovation*]; Pamela Samuelson, *Google Book Search and the Future of Books in Cyberspace*, 94 *MINN. L. REV.* 1308 (2010). Defenses of the settlement include Einer Elhauge, *Why the Google Books Settlement Is Procompetitive*, 2 *J. LEGAL ANALYSIS* 1 (2010) [hereinafter Elhauge, *Settlement Is Procompetitive*]; Einer Elhauge, *Framing the Antitrust Issues in the Google Books Settlement*, *GLOBAL COMPETITION POL'Y: THE ANTITRUST CHRON.*, Oct. 2009 (Release 2) [hereinafter Elhauge, *Framing the Antitrust Issues*]; Jerry A. Hausman & J. Gregory Sidak, *Google and the Proper Antitrust Scrutiny of Orphan Works*, 5 *J. COMPETITION L. & ECON.* 411 (2009); Mark A. Lemley, *An Antitrust Assessment of the Google Book Search Settlement*, 2010-2 *AMI: TIJDSCHRIFT VOOR AUTEURS-, MEDIA- & INFORMATIERECHT* 55 (2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1431555.

venture of such great scope.³² Others have focused on questions of class representation, privacy, treaty obligations, and alterations to the existing bargain between authors and publishers.³³ I will put all these to one side, and focus on the antitrust objections to the settlement raised by the Department of Justice.

Much of the antitrust attention has focused on the concern that the settlement might restrict price competition among rightsholders.³⁴ The original agreement made use of a particular revenue-sharing formula applicable to a range of works, set default prices (subject to renegotiation), and limited discounting,³⁵ which raised concerns about horizontal price-fixing.³⁶ I do not wish to dwell on this objection. Apparently in response to the government's objections, the revised settlement altered certain price formulas and provided for more individualized negotiation of prices.³⁷ The parties have also waived any claim to *Noerr-Pennington* immunity, which covers activities related to a lawsuit or other petitioning activity.³⁸ Without the waiver, the parties might later argue that the court's approval of the settlement—despite the antitrust objections raised at the time—had immunized the conduct described in the approved

³² See, e.g., Transcript of Proceedings at 117–24, *Authors Guild, Inc. v. Google Inc.*, No. 05-8136 (S.D.N.Y. Feb. 18, 2010).

³³ See generally *id.*

³⁴ See, e.g., Statement of Interest of the United States of America Regarding Proposed Class Settlement at 17–22, *Authors Guild, Inc. v. Google Inc.*, No. 05-8136 (S.D.N.Y. Sept. 18, 2009), available at <http://www.justice.gov/atr/cases/f250100/250180.pdf> [hereinafter United States Initial Brief]; see also Statement of Interest of the United States of America Regarding Proposed Amended Settlement Agreement at 16–21, *Authors Guild, Inc. v. Google Inc.*, No. 05-8136 (S.D.N.Y. Feb. 4, 2010), available at <http://www.justice.gov/atr/cases/f255000/255012.pdf> [hereinafter United States Second Brief].

³⁵ Settlement Agreement, *supra* note 25, § 4.2(b)–(c).

³⁶ See United States Initial Brief, *supra* note 34, at 17.

³⁷ Amended Settlement Agreement, *supra* note 1, § 4.2(b)–(c).

³⁸ United States Initial Brief, *supra* note 34, at 16 n.6; see also Picker, *Assessing Competition Issues*, *supra* note 31, at 3–4 (discussing this concession).

agreement. With the waiver, there is little reason not to wait and see what effects the agreement, if approved, actually has before pursuing any concerns about an anticompetitive horizontal restraint.

I want to focus instead on another objection raised by the government: that the deal gives Google *de facto* exclusivity over the digital distribution of orphan works.³⁹ In considering this objection, let us assume a point that is sharply contested—that exclusive access to such works would provide a significant source of market power, either by permitting Google to offer subscriptions to a comprehensive set of copyrighted works that rivals are unable to match, or by improving Google’s already strong position in the search business.

The government has expressed the concern that Google receives a benefit through the settlement that later entrants cannot easily replicate. As it explained in a brief submitted to the district court:

Google’s competitors are unlikely to be able to obtain comparable rights independently. They would face the same problems—identifying and negotiating with millions of unknown individual rightsholders—that Google is seeking to surmount through the Settlement Proposal. Nor is it reasonable to think that a competitor could enter the market by copying books *en masse* without permission in the hope of prompting a class action suit that could then be settled on terms comparable to the Proposed Settlement.⁴⁰

In other words, a firm such as Amazon may find it daunting to replicate the sequence of events that resulted in Google’s copyright class action settlement. Moreover, as the government added in a subsequent brief, “[t]he suggestion that a competitor should follow Google’s lead”—by

³⁹ United States Initial Brief, *supra* note 34, at 23.

⁴⁰ *Id.* at 23–24.

attempting that sequence of unlikely events—is “not something the antitrust laws require a competitor to do.”⁴¹

The government is certainly correct that nothing in antitrust law obliges Amazon or any other firm to follow Google’s lead. But neither does it oblige Google to lend a helping hand to its rivals. Google made substantial investments and undertook substantial risk to create a new, innovative good, and it ought to be allowed to reap where it has sown. Absent the settlement, there would be no access to orphan works. The alchemy of settlement may well be very difficult for others to repeat, but that alone is not a sufficient basis for antitrust liability. If it is hard for Amazon to duplicate the feat, but no harder than it was before Google entered the picture, it is difficult to see an anticompetitive harm cognizable as an antitrust offense.

Rather, the key question to ask is whether the settlement makes it *harder* for later entrants to achieve digital distribution of orphan works.⁴² The answer to this question appears to be no. The settlement agreement does not, by its terms, inhibit other entrants from doing a similar deal. In one important respect, the parties’ activities actually make life easier for later entrants by proving the market’s value (if it does prove valuable) and by blazing a sue-and-settle trail that others might attempt to follow. Moreover, the importance of orphan works is likely to decline over time. Certain features of the settlement induce owners of orphan works to step forward to claim revenues from Google’s licensing scheme that have been reserved for them, and thereby to identify themselves for negotiation with a new entrant. If this analysis is correct, then we should not punish Google for significant barriers to entry that others face but are not of Google’s making.

What if I am wrong about that, and the settlement *does* raise potential rivals’ costs in accessing orphan works? Here,

⁴¹ United States Second Brief, *supra* note 34, at 21.

⁴² See generally Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals’ Costs to Achieve Power over Price*, 96 YALE L.J. 209 (1986) (discussing different strategies by which firms impede the competitive prospects of rivals).

settlement proponents have a fallback argument. Consider, for example, an amicus brief of prominent economists and law professors that was submitted in support of the settlement.⁴³ As one of several independent reasons to approve the settlement as to its treatment of orphan works, the professors argue that

[E]ven if the settlement *did* allow monopoly pricing over unclaimable [i.e., orphan] books, the settlement would still be procompetitive because one market option is better than none and monopoly pricing is better for consumer welfare than no market at all. The but-for alternative for unclaimable books is no licensing at all, which produces the anticompetitive output of zero Even monopoly pricing would necessarily increase output and lower effective prices and royalty rates from that but-for baseline.⁴⁴

Other settlement advocates make similar arguments.⁴⁵ Call this the “one is better than none” argument: if conduct raises welfare by creating a new market option, compared to the alternative in which there is no such market option, then antitrust liability is inappropriate.

The one is better than none argument contains an important truth at its core: antitrust law is not perfectionist in its approach to competition. An antitrust enforcer cannot always simply mandate an alternative arrangement on the theory that it would provide even greater consumer benefit.

⁴³ Amicus Brief of Antitrust Law and Economics Professors in Support of the Settlement, Authors Guild, Inc. v. Google Inc., No. 05-8136 (S.D.N.Y. Sept. 8, 2009), available at http://thepublicindex.org/docs/letters/antitrust_profs.pdf.

⁴⁴ *Id.* at 18; see also *id.* at 21–22 (making an analogous argument as to new institutional subscription product contemplated under the settlement). The brief, written by Einer Elhauge, closely tracks the analysis in Elhauge, *Settlement Is Procompetitive*, *supra* note 31.

⁴⁵ See, e.g., Elhauge, *Settlement Is Procompetitive*, *supra* note 31, at 51 (making the point in terms nearly identical to the amicus brief); Lemley, *supra* note 31, at 9–10 (section titled “One Is Better Than Zero”); Transcript of Proceedings, *supra* note 32, at 153 (statement of Daralyn J. Durie) (“From the perspective of consumers, one way to get something is unquestionably better than no way to get it at all.”).

If antitrust law did take this approach, any joint venture could be challenged on the ground that there exists a “better” alternative. Such alternatives will frequently be beyond the capacity of courts to determine, and require a tradeoff between static efficiency and dynamic efficiency—since lower prices also mean lower profits—that courts are ill-equipped to make. As the Court explained in *Trinko*, judges do not have “carte blanche to insist that” a firm subject to antitrust scrutiny must “alter its way of doing business whenever some other approach might yield greater competition.”⁴⁶ In *Trinko*, the Court’s focus was a refusal to deal, but the same principle applies to the settlement at issue here.

However, as Randal Picker has noted,⁴⁷ the one is better than none view goes well beyond this proposition. It appears to require an up-or-down decision about a particular settlement provision, based on whether its net benefits are positive, compared to the alternative in which the provision is absent. Indeed, in some formulations, the one is better than none approach appears to require a binary choice not merely about a single settlement provision, but about the settlement as a whole. For example, several analyses frame the key question as follows: “Does the settlement lower consumer welfare from what it would be without a settlement?”⁴⁸ As long as the settlement raises consumer

⁴⁶ *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 415–16 (2004).

⁴⁷ Picker, *Antitrust and Innovation*, *supra* note 31, at 6.

⁴⁸ Elhauge, *Framing the Antitrust Issues*, *supra* note 31; see also Einer Elhauge, Presentation for the Institute for Information Law & Policy at New York Law School: Framing the Antitrust Issues in Google Books Settlement (Oct. 10, 2009), http://www.nyls.edu/user_files/1/3/4/30/58/Elhauge_Slides.pdf (establishing a “But-For Baseline” and defining the “[r]ight question” as “does settlement lower consumer welfare from what it would [be] without a settlement?”); Jonathan Jacobson, Presentation for the Federalist Society: Implications of the Google Book Search Settlement (Dec. 14, 2009), http://fora.tv/2009/12/14/Implications_of_the_Google_Book_Search_Settlement#fullprogram (stating that the appropriate question is “does Settlement lower consumer welfare from what it would be without a settlement? . . . By creating new and valuable products that would not otherwise exist, and by eliminating no existing competition, the Settlement is unambiguously beneficial.”).

welfare compared to the but-for world without the settlement, they seem to suggest, the antitrust inquiry is at an end.

Some proponents reject the one is better than none account as an oversimplification or distortion of their views. For example, Einer Elhauge has dismissed this characterization as a straw man, offering in its place an alternative account in which a settlement that contains both procompetitive and anticompetitive aspects should be condemned under certain circumstances.⁴⁹ These nuances, however, are submerged or missing in most statements of the proposition.⁵⁰ The omission raises the likelihood that the one is better than none argument, far from being treated as a straw man, will be mistaken for the real thing by a court.

The one is better than none view is an incomplete statement of antitrust law. Although, as noted above, antitrust enforcers cannot *always* insist upon a structure that is more competitive than the status quo offered by the parties to an agreement, sometimes they can. When presented with a joint venture that has some procompetitive and some anticompetitive features, an antitrust enforcer must consider whether there is a less restrictive way to achieve the procompetitive effect. As then-Judge Sotomayor put it, “a restraint that is unnecessary to achieve a joint venture’s efficiency-enhancing benefits may not be justified based on those benefits.”⁵¹ The insistence on utilizing a less restrictive alternative, where available, is shared by courts⁵²

⁴⁹ Elhauge, *Settlement Is Procompetitive*, *supra* note 31, at 22 (advocating an approach under which, if a particular provision within the settlement agreement “has anticompetitive effects and does not contribute to the procompetitive effects of the rest of the agreement, then it is separable” and subject to condemnation).

⁵⁰ See, e.g., the sources discussed in notes 43–45, 48, and accompanying text, with the exception of Elhauge, *Settlement Is Procompetitive*, *supra* note 31.

⁵¹ *Major League Baseball Props., Inc. v. Salvino*, 542 F.3d 290, 339 (2d Cir. 2008) (Sotomayor, J., concurring).

⁵² One common formulation situates this inquiry as the final step in a three-step rule of reason process. In step one, the plaintiff identifies an anticompetitive restraint. In step two, the defendant establishes a

and enforcement agencies.⁵³ In other words, we are not always forced to accept the bitter with the sweet.

Whether a feasible alternative exists here is uncertain. One contemplated alteration to the settlement would entail the licensing of later entrants as to orphan works, perhaps by further empowering a fiduciary, already defined in the amended settlement, to negotiate such licenses with third parties.⁵⁴ However, it is unclear whether the class action settlement mechanism is capable of binding absent rightsholders—here, the orphan work owners—as to third parties.⁵⁵ The government appears to harbor doubts about

procompetitive justification for the restraint. In step three, the plaintiff is directed to prove “either that the challenged restraint is not reasonably necessary to achieve the defendants’ procompetitive justifications, or that those objectives may be achieved in a manner less restrictive of free competition.” *United States v. Visa USA, Inc.*, 344 F.3d 229, 238 (2d Cir. 2003). For similar statements, see, e.g., *Major League Baseball Props., Inc.*, 542 F.3d at 317; *Law v. NCAA*, 134 F.3d 1010, 1019 (10th Cir. 1998); *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 56 (2d Cir. 1997).

⁵³ See, e.g., *In re Polygram Holding, Inc.*, 136 F.T.C. 310, 347–49 (2003) (requiring that an antitrust defendant demonstrate a “specific link between the challenged restraint and the purported justification,” and emphasizing the relevance of a plaintiff’s showing that “proffered procompetitive effects could be achieved through means less restrictive of competition”); U.S. DEPT OF JUSTICE & FTC, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS § 3.36(b) (2000), available at <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf> (concluding that liability is appropriate where “similar efficiencies” are available through “practical, significantly less restrictive means”); see also Brief of Amicus Curiae Federal Trade Commission on Rehearing En Banc Supporting Neither Party at 9–10, *Princo Corp. v. ITC*, No. 2007-1386 (Fed. Cir. Aug. 30, 2010), 2010 WL 3385953 (collecting cases supporting the less restrictive means approach).

⁵⁴ *United States Initial Brief*, *supra* note 34, at 25.

⁵⁵ For an argument that it is not, see, e.g., Library Association Comments on the Proposed Settlement at 17, *Authors Guild, Inc. v. Google Inc.*, No. 05-8136 (S.D.N.Y. May 4, 2009) (“The class action mechanism cannot bind absent rightsholders with respect to third parties not participating in the Settlement.”); see also Jonathan Band, *The Long and Winding Road to the Google Books Settlement*, 9 J. MARSHALL REV. INTELL. PROP. L. 227, 286 (2010) (reaching the same conclusion).

feasibility.⁵⁶ Ordinarily, the burden of identifying a less restrictive alternative rests with the plaintiff.⁵⁷ So far, that burden has not been met. This state of affairs resembles an agency's review of a horizontal merger that has both procompetitive and anticompetitive effects that are inextricably bound together, where the agency approves the merger on the view that the procompetitive elements are larger.⁵⁸

The analysis to this point has proceeded on the assumption, maintained by the United States in its objections and reflected in much of the debate about the settlement, that an antitrust analysis is the right approach. That assumption, however, is subject to challenge. Some settlement skeptics view this approach as too narrow—that even if the settlement raises no antitrust concern per se, since no rival's costs are being raised, it might nevertheless be optimal as a matter of public policy to have multiple distributors of orphan works.⁵⁹

Certainly, the district judge evaluating the settlement is not bound to follow antitrust principles. His task is to determine whether the settlement is, in the language of Rule 23(e) of the Federal Rules of Civil Procedure, “fair, reasonable, and adequate.”⁶⁰ That language is seemingly quite capacious. But the point of the class action settlement

⁵⁶ United States Initial Brief, *supra* note 34, at 23 (“[T]he parties have represented to the United States that they believe the Registry would lack the power and ability to license copyrighted books without the consent of the copyright owner—which consent cannot be obtained from the owners of orphan works.”); *id.* at 25 (collecting sources suggesting that such licensing might be possible); United States Second Brief, *supra* note 34, at 25 (urging the court to “carefully examine” whether later entrants can be licensed).

⁵⁷ See note 52 *supra*.

⁵⁸ U.S. DEP'T OF JUSTICE & FTC, HORIZONTAL MERGER GUIDELINES § 10 n.14 (2010), available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf>.

⁵⁹ For example, Picker thinks of the orphan works problem as a government licensing or franchising question, rather than an antitrust question per se. *Antitrust and Innovation*, *supra* note 31, at 3.

⁶⁰ FED. R. CIV. P. 23(e)(2).

analysis is quite different from, for example, a Tunney Act evaluation of an antitrust settlement. The major evaluative goal of the Rule 23(e) inquiry is to determine whether the settlement is fair, reasonable, and adequate *for class members*, not consumers.⁶¹ As one court put it, the objectors are “volunteer lawyers for the class.”⁶² Although there exist judicial statements that settlement terms ought to be responsive to “public” or “third party” interests, a closer look reveals that these cases stop well short of injecting an antitrust analysis—much less one vindicating the interests of non-parties—into the settlement of a non-antitrust case.⁶³

⁶¹ See, e.g., 7B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1797 (2010) (“The purpose of subdivision (e) is to protect the nonparty class members from unjust or unfair settlements affecting their rights when the representatives become fainthearted before the action is adjudicated or are able to secure satisfaction of their individual claims by a compromise, abandoning the claims of the absent class members.”); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974) (influential opinion describing factors for evaluating settlements under Rule 23(e) and focusing on the interests of class members); *In re New Mexico Natural Gas Antitrust Litig.*, 607 F. Supp. 1491, 1497 (D. Colo. 1984) (“The primary concern addressed by Rule 23(e) is the protection of class members whose rights may not have been given adequate consideration during the settlement negotiations.”); see also Pamela Samuelson, *Is the Proposed Google Book Settlement “Fair”?* 2, available at <http://people.ischool.berkeley.edu/~pam/GBSFair.pdf> (“Whether the Google Book settlement is in the public interest is, strictly speaking, not relevant to whether it should be approved, as the formal question before Judge Chin is whether the proposed settlement is ‘fair’ to the settling class.” (emphasis added)).

⁶² *Reynolds v. Beneficial Nat’l Bank*, 288 F.3d 277, 287 (7th Cir. 2002).

⁶³ For example, some objectors rely upon *In re Masters Mates & Pilots Pension Plan and Irap Litigation*, 957 F.2d 1020 (2d Cir. 1992), which states that although the “normal focus” of a class action settlement is fairness, reasonableness, and adequacy to the plaintiff class, “[w]here the rights of third parties are affected . . . their interests too must be considered.” *Id.* at 1025–26. But the third parties that the court had in mind here were a non-settling defendant and its insurer, rather than unrelated non-parties.

Objectors also rely on cases that evaluate settlements of antitrust class actions on antitrust grounds. See, e.g., *Grinin v. Int’l House of Pancakes*, 513 F.2d 114, 123 (8th Cir. 1975) (considering objection to settlement of antitrust class action raised by non-settling plaintiff, an

Evaluating the benefits of the settlement for class members is a project quite different from, and considerably narrower than, an antitrust analysis. A loss to consumers or Google's competitors need not imply a loss to authors and publishers, the class members. Indeed, the opposite is likely to be true. If the exclusivity is valuable to Google, then that bounty is likely to be shared with the authors and publishers.⁶⁴ Even if consumers are harmed, they are generally outside the concern of Rule 23(e). (On this view, the benefits that the settlement brings to consumers should be ignored too.) Therefore, one could accept the argument that the settlement raises the cost of new entry, and yet approve the settlement on the ground that this effect does no harm to class members. The Rule 23(e) mechanism is

IHOP franchisee, by reference to whether the settlement eliminated the anticompetitive effects asserted by plaintiffs); *In re Microsoft Corp. Antitrust Litig.*, 185 F. Supp. 2d 519, 528–29 (D. Md. 2002) (considering objection to settlement of antitrust class action brought by Microsoft software purchasers by reference to the settlement's possible anticompetitive effects). In an antitrust class action, a judge is obliged under Rule 23(e) to worry about a collusive settlement that sells out the antitrust plaintiffs by failing to do anything about the asserted antitrust harm. But that evaluation is entirely consistent with a focus on the parties' interests in an antitrust case. *See, e.g., Grunin*, 513 F.2d at 123 (adhering to the view that “[u]nder Rule 23(e), the district court acts as a fiduciary who must serve as a guardian of the rights of absent class members.”).

Moreover, even in an antitrust case, the court may resist engaging in a full antitrust analysis at the settlement stage. For example, in *Grunin*, the court concluded that although “a court cannot lend its approval to any contract or agreement that violates the antitrust laws,” it would decline to approve the settlement on antitrust grounds only if the alleged illegality were “a legal certainty” or “illegal per se,” conditions not present there. *Id.* at 123–24. To undertake a full antitrust analysis in the settlement of a non-antitrust class action seems even further afield. The point here is not that the Department of Justice is wrong to raise antitrust objections—its authority under 28 U.S.C. § 517 to file a statement of interest is broad—but that the district court's review is comparatively narrow.

⁶⁴ This is particularly likely here to the extent that the authors and publishers negotiated as a group and therefore may be less vulnerable to a divide-and-conquer strategy. Such a strategy might otherwise reduce their profits from agreeing to an exclusive outlet.

therefore an inapt mechanism for advancing antitrust or related innovation policy objections to the licenses for orphan works.

II. PAY-FOR-DELAY SETTLEMENTS

My second settlement example comes from the pharmaceutical industry. This is an industry that Handler understood well as an author of the Food, Drug, and Cosmetic Act of 1938.⁶⁵ The modern regime regulating competition between drug makers is a set of 1984 amendments to that law called the Drug Price Competition and Patent Term Restoration Act, commonly known as the Hatch-Waxman Act.⁶⁶ The Act creates a regulatory pathway for so-called generic drug makers to introduce a competing, unbranded version of a brand-name drug.

Patents obviously provide very important protection against generic drug competition. When competition arrives, drug prices fall, making generic entry an important source of consumer savings. Sometimes, the generic drug maker waits until all the patents expire before trying to enter. But in many cases, the generic drug maker is more aggressive and tries to enter before patent expiration. To do that, it argues that the unexpired patents are invalid or not infringed. This strategy makes particular sense when the relevant patent is not a basic patent on a novel active ingredient, but a patent on an ancillary aspect, such as an extended-release formulation.⁶⁷ These ancillary patents tend to be less likely to be valid and infringed.

⁶⁵ Pub. L. No. 75-717, 52 Stat. 1040 (1938) (codified as amended in scattered sections of 21 U.S.C.).

⁶⁶ Drug Price Competition and Patent Term Restoration Act, Pub. L. No. 98-417, 98 Stat. 1585 (1984) (codified as amended in scattered sections of 15, 21, 35, and 42 U.S.C.). In 2003, Congress amended this scheme in Title XI of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, tit. XI, subtit. A–B, 117 Stat. 2066, 2448–64 (codified at 21 U.S.C. § 355 (2006)).

⁶⁷ See C. Scott Hemphill & Bhaven N. Sapat, *When Do Generics Challenge Drug Patents?* (Columbia Law & Econ. Working Paper No. 379, Aug. 2010), available at <http://ssrn.com/abstract=1640512> (reporting that

In most cases, the brand-name firm files a patent infringement suit to stop entry, and generic drug makers win a sizable proportion of these suits.⁶⁸ In many cases, the parties settle prior to judgment. For example, the parties might dismiss the suit and agree on a particular date when the generic firm can enter the market. The date of entry is a hard-fought bargain between competitors. The brand-name firm pushes for a very late date, arguing that it is likely to win the case at trial if put to the test. The better the argument, the later the entry date.

So far, so good. None of this is an antitrust problem when the settlement rests solely upon the inherent strength of the patent. Delayed entry in this situation reflects the protection from competition granted by Congress through the patent system. That protection is important and valuable because it induces research and development into life-saving drugs. Indeed, patents help reinforce the protection to innovators discussed in the introduction. Nowhere is that reinforcement more necessary than in the drug industry, given the ease with which a generic competitor can copy a brand-name drug unless legally restrained.

However, although the incentive provided by patent law is large, it is also limited. Patents insulate drug makers from competition, but only up to a point. To see the limit, consider what happens when a brand-name drug maker not only relies on the likelihood that it will win the case, but also makes a payment to the generic drug maker as part of the settlement. In that case, the payment secures a later date of entry—and less competition—than is warranted by the patent alone. It is this payment to a rival to secure

drugs with patents on ancillary aspects of the drug face a higher probability of pre-expiration challenge).

⁶⁸ See RBC Capital Markets, *Pharmaceuticals: Analyzing Litigation Success Rates* (Jan. 15, 2010), <http://amlawdaily.typepad.com/pharma-report.pdf> (concluding that generic firms won 48% of cases that reached judgment between 2000 and 2009); FTC, *GENERIC DRUG ENTRY PRIOR TO PATENT EXPIRATION* vi (2002), <http://www.ftc.gov/os/2002/07/genericdrug-study.pdf> (reporting generic win rate of 73% for cases through June 2002).

additional delay in generic entry that violates the Sherman Act.

This is bad for reasons that are easy to see. A pay-for-delay settlement transfers wealth from consumers to drug makers in the form of continued high prices. The brand-name firm shares part of its additional profits with the generic firm. The situation is like the bar preparation case decided by the Supreme Court, *Palmer v. BRG of Georgia, Inc.*, in which one provider paid a rival not to compete.⁶⁹ The higher price also introduces a further welfare loss by altering the purchasing decisions of consumers and insurance providers.

The effort to stop pay-for-delay settlements has bipartisan and unanimous support from Republican and Democratic members of the FTC. The Department of Justice has recently joined the pro-enforcement chorus as well.⁷⁰ The settlements have remained a high enforcement priority in part because the stakes are so high. As one drug maker CEO put it in a moment of unexpected candor, thanks to settlements on one drug, “[w]e were able to get six more years of patent protection. That’s \$4 billion in sales that no one expected.”⁷¹ The FTC estimates that these settlements are associated with a consumer harm of \$35 billion over ten years.⁷² It is fair to say that these settlements, which have generated enormous debate,⁷³ are the most important unresolved problem in antitrust policy today.

⁶⁹ 498 U.S. 46 (1990) (per curiam).

⁷⁰ See, e.g., Brief for the United States in Response to the Court’s Invitation, *Ark. Carpenters Health & Welfare Fund v. Bayer AG*, 604 F.3d 98 (2d Cir. 2010) (No. 05-2851).

⁷¹ John George, *Hurdles Ahead for Cephalon*, PHILA. BUS. J., Mar. 20, 2006, at 1, available at <http://philadelphia.bizjournals.com/philadelphia/stories/2006/03/20/story1.html>.

⁷² FTC, PAY-FOR-DELAY: HOW DRUG COMPANY PAY-OFFS COST CONSUMERS BILLIONS 2 (2010), <http://www.ftc.gov/os/2010/01/100112payfordelayrpt.pdf>.

⁷³ For analyses of the controversy, see, e.g., 1 HERBERT HOVENKAMP, MARK D. JANIS, MARK A. LEMLEY & CHRISTOPHER LESLIE, *IP AND ANTITRUST: AN ANALYSIS OF ANTITRUST PRINCIPLES APPLIED TO INTELLECTUAL PROPERTY LAW* § 15.3(a)(1) (2d ed. 2010); Roger D. Blair & Thomas F. Cotter, *Are*

Despite this, several appellate courts, including the Second Circuit, have taken the view that pay-for-delay settlements do not violate antitrust law.⁷⁴ They have adopted a rule that verges upon per se legality, concluding that so long as the settlement is within the nominal scope of the patent, and entails no sham litigation or fraud on the patent office, the agreement is fine. “Nominal scope” means

Settlements of Patent Disputes Illegal Per Se?, 47 ANTITRUST BULL. 491, 534–38 (2002); Jeremy Bulow, *The Gaming of Pharmaceutical Patents*, 4 INNOVATION POLICY AND THE ECONOMY (Adam B. Jaffe et al. eds., 2004); Michael A. Carrier, *Unsettling Drug Patent Settlements: A Framework for Presumptive Illegality*, 108 MICH. L. REV. 37 (2009); Daniel A. Crane, *Exit Payments in Settlement of Patent Infringement Lawsuits: Antitrust Rules and Economic Implications*, 54 FLA. L. REV. 747, 779–96 (2002); Bret Dickey, Jonathan Orszag & Laura Tyson, *An Economic Assessment of Patent Settlements in the Pharmaceutical Industry*, ANNALS HEALTH L., Winter 2010, at 367; C. Scott Hemphill, *Paying for Delay: Pharmaceutical Patent Settlement as a Regulatory Design Problem*, 81 N.Y.U. L. REV. 1553 (2006) [hereinafter Hemphill, *Paying for Delay*]; C. Scott Hemphill, *An Aggregate Approach to Antitrust: Using New Data and Rulemaking to Preserve Drug Competition*, 109 COLUM. L. REV. 629 (2009) [hereinafter Hemphill, *Aggregate Approach*]; Herbert Hovenkamp, Mark D. Janis & Mark A. Lemley, *Anticompetitive Settlement of Intellectual Property Disputes*, 87 MINN. L. REV. 1719 (2003); Kevin D. McDonald, *Hatch-Waxman Patent Settlements and Antitrust: On “Probabilistic” Patent Rights and False Positives*, ANTITRUST, Spring 2003, at 68; Marc G. Schildkraut, *Patent-Splitting Settlements and the Reverse Payment Fallacy*, 71 ANTITRUST L.J. 1033 (2004); Carl Shapiro, *Antitrust Limits to Patent Settlements*, 34 RAND J. ECON. 391 (2003); Robert D. Willig & John P. Bigelow, *Antitrust Policy Towards Agreements that Settle Patent Litigation*, 49 ANTITRUST BULL. 655 (2004).

⁷⁴ The Second and Federal Circuits have declined as a matter of law to impose antitrust liability even in cases in which the payment was quite large. See *Ark. Carpenters Health & Welfare Fund v. Bayer AG*, 604 F.3d 98, 110 (2d Cir. 2010) (per curiam); *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 544 F.3d 1323, 1341 (Fed. Cir. 2008). The Eleventh Circuit has applied a somewhat different standard, but with substantial deference to the patent and the settlement. See *Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1076 (11th Cir. 2005); *Valley Drug Co. v. Geneva Pharms., Inc.*, 344 F.3d 1294, 1304–06, 1312–13 (11th Cir. 2003). The Sixth Circuit, however, has concluded that some settlements are per se illegal. See *In re Cardizem CD Antitrust Litig.*, 332 F.3d 896, 908 (6th Cir. 2003); see also *Andrx Pharms., Inc. v. Biovail Corp. Int’l*, 256 F.3d 799, 809–12 (D.C. Cir. 2001) (reaching similar conclusion in dicta).

whatever competition could have been blocked by the patent, had it already been judged valid and infringed. On this view, it is no problem to make a large payment even if it delays entry all the way to patent expiration.

A rule of effective *per se* legality unduly insulates the brand-name firm from antitrust liability and flouts the entry-promoting goal of the Hatch-Waxman Act. Moreover, the rule has several absurd implications. First, patents that have received *no judicial test* can block competition until patent expiration, just like those that have been litigated. The Patent Office has reviewed the patent before issuance, but that is a poor substitute, given the limited scrutiny that each patent receives during examination. And it is no substitute at all when infringement, rather than invalidity, is at issue. An ironclad patent can delay entry until patent expiration, but so can a trivial patent. The only difference is that if the patent is trivial, the brand-name firm is forced to make a larger payment to its rival.

This end-of-patent-term baseline produces a second absurd result. Drug makers sometimes persuade the Patent Office to issue a weak patent on an ancillary aspect of the drug, years after the drug has entered the market. This patent, which expires later than the early, important patents, can provide a fig leaf for settlement with an even later entry date than would otherwise be possible. The result is entry later than the expiration of any patent that could plausibly have blocked entry.⁷⁵

These appellate courts rely in part on the idea that settlements are desirable, while litigation is not.⁷⁶ But that ignores a countervailing view, emphasized by the Supreme

⁷⁵ For a discussion, see Hemphill, *Aggregate Approach*, *supra* note 73, at 638–39.

⁷⁶ See, e.g., *Schering-Plough Corp.*, 402 F.3d at 1076 (emphasizing “costs of lawsuits to the parties,” “public problems associated with overcrowded court dockets,” and “correlative public and private benefits of settlements”); *Valley Drug Co. v. Geneva Pharm., Inc.*, 344 F.3d 1294, 1308 n.20 (11th Cir. 2003) (“The cost and complexity of most patent litigation is a familiar problem to the court system. The cost savings of settlement . . . are equally widely-recognized.” (internal citations omitted)).

Court, which is the public interest served when patents are tested.⁷⁷ Handler summarized this doctrine well: “[t]he exclusive patent privilege being an exception to our competitive way of life, the court desires to constrict the permissive area of monopoly to the narrowest limits. It encourages the contest of patent validity from every quarter.”⁷⁸ This is a message that bears repeating today.

Whatever one considers to be the proper antitrust resolution—and a variety of solutions have been proposed—the right answer is not to permit a patentee to use an untested patent, no matter how weak, as an excuse to pay a rival to delay entry until patent expiration. Interestingly, settling drug makers have declined to take full advantage of the permission seemingly provided by the courts. It appears to be the case that no settling brand-name firm in recent years has dared pay for a settlement that extends all the way out to patent expiration.⁷⁹ Possibly the drug makers are betting that when the dust settles on this issue, leniency will not extend that far.

Why have courts taken this extreme view? One likely reason is that judges are attracted to the simplicity of *per se* legality. To decide a case, a judge can simply figure out what would happen if the patentee won the suit and make sure that the settlement doesn’t go beyond that. Note, however, that this does not mean that every settlement passes muster under that test; some do not.⁸⁰ Still, the courts’ rule is easier to explain and apply than alternative rules—for example, that the outcome of the settlement should be compared to the likely outcome of the patent litigation, as measured by an

⁷⁷ See, e.g., *Lear, Inc. v. Adkins*, 395 U.S. 653, 670 (1969) (emphasizing the “public interest in permitting full and free competition in the use of ideas,” and holding that the licensee was not estopped from attacking patent validity).

⁷⁸ 1 MILTON HANDLER, *TWENTY-FIVE YEARS OF ANTITRUST* 151–52 (1973).

⁷⁹ For a review of publicly available information about settlements, see Hemphill, *Aggregate Approach*, *supra* note 73, at 648–57.

⁸⁰ See, e.g., *King Drug Co. v. Cephalon, Inc.*, 702 F. Supp. 2d 514, 534 (E.D. Pa. 2010) (denying motion to dismiss on the ground that “[p]laintiffs may be able to prevail under the scope of the patent test”).

examination of the merits of the patent case. Not all proliability rules are so complicated. For example, the court could accord a presumption of illegality to agreements that include a substantial payment, since such payments lead to settlements with less expected benefits for consumers when compared to litigation.⁸¹

Given the reluctance of courts to recognize antitrust liability, it is worth considering alternative approaches to the pay-for-delay settlement problem. One such approach shifts the focus from antitrust enforcement to the Hatch-Waxman Act itself. Generic firm challenges are promoted by a special incentive, a 180-day exclusivity period available to the generic firm that is the first to challenge a brand-name drug's patents. Pay-for-delay settlements, in turn, are encouraged by the fact that the generic firm retains eligibility for the exclusivity period even if it settles. We could instead require the generic firm, either as a matter of agency interpretation or through statutory change, to give up the 180-day period if it settled. That measure would alleviate the harm of anticompetitive settlements.⁸²

III. CONCLUSION

For more than thirty years, we have seen a shift in antitrust from a simple rule of per se illegality to the more complex and contingent rule of reason.⁸³ Overall, this has been a laudable development. We should be careful, however, not to overshoot the mark, by slipping toward an

⁸¹ For further discussion, see Hemphill, *Paying for Delay*, *supra* note 73, at 1596.

⁸² For an analysis of the benefits and costs of such an approach, see C. Scott Hemphill & Mark A. Lemley, *Earning Exclusivity: Generic Drug Incentives and the Hatch-Waxman Act* (Nov. 2010) (unpublished working paper) (on file with *Columbia Business Law Review*).

⁸³ *See, e.g.*, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 907 (2007) (adopting rule of reason for resale price maintenance); *State Oil v. Khan*, 522 U.S. 3, 21–22 (1997) (same, for maximum resale price maintenance).

opposite extreme of per se legality.⁸⁴ The temptation to overshoot is particularly great in the cases we have been considering, in which investments in developing or exploiting intellectual property are at stake.

The organized bar has a constructive role to play in helping courts to determine the appropriate contours of enforcement. The point is particularly vivid with respect to drug patent settlements. I have spoken with many sophisticated practitioners who agree, quietly, that at least some of these settlements violate the Sherman Act. Yet we have not seen the same publicly spirited participation that we see in other areas of antitrust policy making. If the bar were to engage on this issue, consistent with the constraints of client service, their participation could have important benefits for the development of sound antitrust policy.

⁸⁴ *Cf.* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST (Robert Pitofsky ed., 2008).