Reverse Payment Settlement Paradigms

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In its recent ruling in *FTC v. Actavis*, the Supreme Court decided that antitrust suits involving so-called reverse payment settlements should be examined under the rule of reason. Brand-name pharmaceutical patentees often end up paying generic manufacturers when settling Paragraph IV challenges to pharmaceutical patents under the Hatch-Waxman Act. Critics view these settlements as inherently suspect because they reverse the typical flow of payment in patent infringement suits, a characteristic these critics view as effectively paying would-be generic competitors to stay out of the market. In regarding reverse payment settlements as potentially anticompetitive, however, the Supreme Court clearly adhered to the common view of patents as "embarrassments" - that is, exceptions - to what would otherwise be a properly competitive environment. To view patents (or intellectual property) as anticompetitive embarrassments, however, one must believe that, outside of patent protection, competitors necessarily should be permitted to use each other's inventive concepts. The law has no such view of tangible goods, however: no similar presumption of a competitive right to use another's property. Patents (and other intellectual property) presumably differ because the *res* of these property-like rights are nonrivalrous and nonexcludable by nature. Under a naturalistic fallacy type of reasoning, then, patentable inventive concepts and other intellectual property should not be excludable in an ideally competitive market the same way tangible property rights are. Intellectual property rights can be viewed within a different paradigm, however: patents and other IPRs are not embarrassments to competition but in fact protections against unfair competition. This article examines evidence supporting this paradigm and then applies this paradigm to evaluations of reverse-payment settlements.

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