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Pot to Frying Pan—Settlement Agreements as Antitrust Violations

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Speaking Engagement

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Introduction

Settlement agreements are routinely used to resolve actual and potential lawsuits. However, when such deals go too far, they can raise significant antitrust risks.

On March 29, 2012, partner William MacLeod spoke during the panel, “Pot to Frying Pan—Settlement Agreements as Antitrust Violations,” at the American Bar Association Section of Antitrust Law Spring Meeting in Washington D.C. The panel provided guidance concerning how to reduce the risk that a particular settlement agreement may cross the line into the zone of antitrust liability. Below is a preview of some of the questions which the panel addressed.

Settlement Agreements are Contracts that Resolve Actual and Potential Litigation, Much Like Other Contracts

The antitrust implications of settlement agreements are analyzed under the Rule of Reason. They generally do not violate antitrust law if they are reasonably necessary to achieve a pro-competitive purpose, and they do not go further than what is reasonably necessary. But as Justice Oliver Wendell Holmes, Jr. once observed, “General propositions do not decide concrete cases.” *Lochner v. New York*, 198 U.S. 45, 76 (1905)(Holmes, J., dissenting). How do the considerations vary for different types of agreements, and how have courts drawn the line in concrete cases?

Settlement Agreements are Analogous to Non-compete Agreements that Are Ancillary to Procompetitive Objectives

The FTC Bureau of Competition has provided guidance concerning the antitrust implications of non-compete clauses, agreements to restrict advertising, and other types of deals. Non-competes are often entered for the purpose of securing the seller’s rights to preserve the tangible and intangible resources being sold. Sometimes antitrust challenges to such deals fail, but sometimes they are held to be unduly restrictive and therefore injurious to competition. How does one draw the line?

The More Ambitious Contracts Can Provoke Antitrust Challenge

Some types of settlement terms are routinely used without challenge, while some have been repeatedly challenged or criticized by governmental enforcers. What kinds of settlement terms are particularly risky?

Comparative Advertising Cases

It is common for one company to run an ad comparing its products to those of a competitor. The competitor may cry foul. How far can the companies go in resolving the dispute - a reciprocal agreement that each may not disparage the other's products? Not to mention them at all? When does this type of agreement cross the line?

Reverse Payment Settlements

While settlements of drug patent litigation have garnered perhaps more press than other types of settlement agreements, it is important to be aware that antitrust issues can arise whenever a settlement is being contemplated.

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