SHEPPARD MULLIN
SHEPPARD MULLIN RICHTER & HAMPTON LLP
Antitrust Law BLOG
Current Antitrust News and Regulatory Developments

# Antitrust Law Blog

Posted at 2:58 PM on July 9, 2009 by Sheppard Mullin

## The FTC's Latest Remarks In Opposition To Reverse Payment Settlements: Banning Them Would Save Consumers $35 Billion

The Federal Trade Commission's Chairman, Jon Leibowitz, continued the FTC's aggressive campaign against reverse payment settlements (also called "pay-for-delay" or "exclusion" settlements) by delivering a speech at the Center for American Progress entitled "'Pay-for Delay' Settlements in the Pharmaceutical Industry: How Congress Can Stop Anticompetitive Conduct, Protect Consumers' Wallets, and Help Pay for Health Care Reform (The $35 Billion Solution)" (June 23, 2009). In his speech, Chairman Leibowitz reiterated that banning such settlements -- settlements of patent disputes in which the brand name pharmaceutical company makes a "reverse" or "exclusion" payment to the would-be generic competitor to delay its entry into the relevant drug market -- is one of the FTC's highest priorities. He also reiterated the FTC's position that because the profits that a would-be generic competitor anticipates making by entering the market are significantly less than the profits the brand-name firm stands to lose, both parties have greater incentives to settle their patent disputes and share in the monopoly profits than to compete with one another. While reverse payment settlements are "win-win" propositions for both settling parties, American consumers, on the other hand, bear the ultimate costs of such settlements. (Read our previous blog article about the FTC's latest suit against reverse payment settlements.)

What was novel about the Chairman's speech were the results of a new empirical study conducted by the FTC's Bureau of Economics. The study purportedly shows that American consumers could save $35 billion over the next ten years if these settlements are banned. Since the federal government itself pays for one third of the $235 billion spent annually on prescription drugs, it could save $12 billion over ten years. The Chairman explained that the study was based on relatively conservative assumptions about consumer savings from generic competition, the likelihood of future reverse payment settlements and the volume of drugs for which settlements are likely. According to the FTC, reasonable alternative assumptions would result in even bigger consumer savings of $75 billion.

The Chairman closed with what the FTC viewed as encouraging steps in the right direction. Although the Supreme Court just recently declined, yet again, to hear the issue, the Chairman pointed to the Obama administration's opposition to these settlements. In addition, the new Assistant Attorney General for the Department of Justice, Christine Varney, testified in her confirmation hearings to her intent to oppose these settlements and "align" the position of the

DOJ with that of the FTC. Finally, the Chairman explained, proposed laws banning such settlements are currently making their way through the legislative process in both the House and the Senate.

Authored By:
Helen Cho Eckert
(213) 617-4286
HEckert@sheppardmullin.com