ANTITRUST AND TRADEMARK SETTLEMENTS

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In today's digital economy, online competitive advertising plays a major role in the competitive process. Accordingly, rival firms have a greater incentive and opportunity to impose restraints on such advertising. Some restraints may be justified by trademark law, which prohibits certain marketing practices that confuse consumers about the source of a product. Alternatively, firms might enter into collusive trademark settlements that restrain forms of competitive advertising that do not raise any significant risk of confusion—an effort that could invite antitrust liability. However, unlike other types of IP settlements, there is relatively little case law or scholarship clarifying when trademark settlements between competitors run afoul of the antitrust laws.

This Article is an effort to fill that gap. We explain how the standard developed in the Supreme Court's *Actavis* decision, a watershed ruling about patent settlements, can be adapted and applied to trademark cases. We articulate how courts can identify anticompetitive settlements without having to evaluate the merits of the underlying trademark infringement claims. Settlements imposing broad restraints on competitive targeted advertising may raise significant antitrust concerns that are unlikely to arise in run-of-the-mill settlements that merely restrain what marks a firm can attach to its product. We also consider and evaluate a number of possible procompetitive justifications for restrictive trademark settlements. Our analysis uncovers substantial errors in the first appellate decision addressing these restraints.

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Introduction

The interface between antitrust and intellectual property has a rich and complex history. A major focus of litigation and debate is IP settlements between rivals, in which the firms agree to restrain competitive activity in a manner that may or may not be justified by IP law. This area has traditionally dealt with patent and copyright law. By contrast, the intersection with trademark law is a relatively undeveloped field.

The rapid and continuing growth of online commerce guarantees that this is a temporary state of affairs, and that the antitrust/trademark intersection will have an important role to play in the future. In today's digital economy, online marketing practices are a central feature of the competitive process. For example, in an online market, the absence of a traditional storefront means that firms are especially dependent on advertising to let consumers know about what products and prices they are offering and how they compare to those of competitors.

Of course, not all marketing practices constitute lawful competition. Trademark law protects a firm against marketing activity that creates a risk of consumer confusion—particularly confusion as to the identity of the seller of a product.[1] However, competitive advertising that creates no risk of confusion is both lawful and desirable. The problem is that firms dislike competitive advertising, whether or not it creates a risk of confusion. Consequently, firms have an incentive to enter into agreements that restrain competitive advertising in ways that are not justified by trademark law. Such agreements may violate the antitrust laws, just like anticompetitive settlements involving patents or copyrights. However, at present, there is relatively little case law or scholarship shedding light on when this is the case.

This article is an effort to fill that gap. We analyze the competitive effects of trademark settlements and propose a means to assess whether a particular settlement is an unlawful restraint of trade, with a view to reconciling antitrust concerns about competitive markets with the policy interests underpinning trademark law.

The antitrust concerns are well illustrated by the restrictive settlements between 1-800 Contacts ("1-800")—the leading online retailer of contact lenses—and its competitors, such as Walgreens. These agreements restrain competitive advertising on online search engines, and

[1] The canonical example is "passing off," where a firm sells a product using a mark that deliberately resembles the trademark of an established brand. This creates the false impression that the firm's product is associated with the better-known brand.

recently provoked the Federal Trade Commission (FTC) to bring an antitrust action against 1-800.[2] Competitors like Walgreens ran advertisements that appeared alongside Google's search results when a user searched for *1800contacts*. The ads made it easy for consumers to learn about Walgreens' lower prices. 1-800's suit alleged that the ads confused users and thus infringed the 1-800 CONTACTS trademark. Rather than litigating the suit to conclusion, the parties settled. In these settlements, each firm agrees not to run ads triggered by a search for the other firm. Among other things, this deprives consumers who search for 1-800 from learning about the better prices offered by Walgreens.

Does this settlement violate antitrust law? Winning a trademark suit, of course, is not an antitrust violation, even when it acts to restrict competitive activity. But a litigated injunction and a private agreement are not necessarily equal in the eyes of the law. Answering this question is urgent. Settlements have become a frequent feature of online competition in industries ranging from airlines to hotels to credit cards. Antitrust enforcers and private plaintiffs in the United States and Europe have challenged these settlements as unlawful restraints of trade, with mixed results.[3] Meanwhile, some of the country's largest advertisers have reached similar agreements with their competitors, with the blessing and encouragement of industry commentators. Our article provides a practical framework that courts can use to evaluate the antitrust implications of such settlements.

Our first step is to distinguish two types of trademark settlements. Most settlements merely limit a competitor's ability *to choose its own mark*.[4] That is, they restrict what mark the competitor can attach to its own product. In such cases, the firm can "invent around" any trademark issue by choosing a different mark. The perceived ease of doing so yields the conclusion that trademarks are a "weak" IP right compared to patents, in terms of their exclusionary potential, and hence unworthy of antitrust attention. Search advertising settlements, by contrast, limit a competitor's ability *to target the incumbent* for competition by means of a trademarked term, typically the incumbent's brand name.[5] Such settlements restrain an important mode of competition, one that is particularly important to lower-priced rivals. In this context, the "weak trademark" intuition simply does not apply.

Our proposed approach draws upon the analogous antitrust evaluation of patent settlements that restrain competition. An important point of connection is to recognize that litigation—specifically, the expected result of trademark litigation between the parties—is the relevant benchmark for

[2] 1-800 Contacts, Inc. v. Federal Trade Commission, 1 F.4th 102 (2d Cir. 2021).
[3] *See infra* Part I.A.
[4] *See infra* Part I.B.
[5] *See infra* Part I.C.

evaluating a settlement's competitive effects.[6] This is the basic rule applied in the cases involving patent settlements,[7] and the same logic supports its application in trademark cases. The possession of a trademark does not provide an unqualified right to restrain competitive advertising. Only marketing practices shown to create a significant risk of consumer confusion would be enjoined by a court. Accordingly, the relevant baseline for evaluating a settlement is the expected result of litigation. For example, if a win is 50% likely, then the litigation baseline is one-half the difference between the effect of winning and the effect of losing. From a consumer standpoint, the relevant question is whether the settlement confers less welfare than this baseline. This approach, embraced by courts in the context of patent settlements, applies equally to trademarks.

Assessing liability presents a practical challenge, because the answer to this question might seem to depend upon the probability of winning the trademark case, a quantity that may be difficult to determine. But, as in the patent context, this is not actually necessary in practice. Rather, it is sufficient to assess antitrust liability based on the nature of the firms' agreement. We explain how to identify anticompetitive settlements without evaluating the merits of the underlying trademark claim.[8] Such settlements fall into one of two silos. Some settlements exceed the scope of the trademark—that is, they restrain competition to a greater extent than a trademark judgment would. Other settlements are anticompetitive due to a collusive bargaining problem that persuades an accused infringer to accept a significantly stronger restraint than it expects to incur from a court's judgment. As we explain, settlements in both categories will usually confer less expected benefit than litigation, a conclusion that can be established without any need to study the merits of the trademark claim. We also analyze various practical complications that arise when using these tools.

Finally, we assess several potential justifications for otherwise problematic settlements.[9] The most obvious, at first blush, is that a settlement might vindicate the interests of trademark law, by avoiding consumer confusion arising from the alleged infringement. However, ordinary settlements already protect against confusion to a degree commensurate with the likelihood that the trademark plaintiff would win its case. To justify an even more restrictive outcome would require a showing that confusion ought to be avoided to a degree greater than that already provided by trademark law, a conclusion that faces important conceptual and practical challenges.

[6] *See infra* Part II.A; *cf.* Mark A. Lemley & Carl Shapiro, *Probabilistic Patents*, J. ECON. PERSP., Spring 2005, at 75.

[7] *See* FTC v. Actavis, Inc., 570 U.S. 136, 157 (2013); Impax Laboratories, Inc. v. FTC, 994 F.3d 484 (5th Cir. 2021).

[8] *See infra* Parts II.B-C.

[9] *See infra* Part III.

Along the way, we identify important errors in the Second Circuit's recent decision in *1-800*—the first appellate decision on the antitrust implications of trademark settlements involving online advertising.[10] The court vacated a decision by the FTC that imposed antitrust liability for 1-800's settlements with rivals. As we explain, the *1-800* court wrongly conflated the two types of trademark settlement, incorrectly dismissed the relevance of settlement terms that exceeded the mark's scope, and failed to recognize the risk of collusive bargaining, among other significant errors.

This Article proceeds in three parts. Part I identifies the anticompetitive harms from search advertising settlements and explains why the conventional wisdom about weak trademarks does not apply. Part II explicates the probabilistic approach to trademarks and identifies conditions under which an unreasonable settlement may be identified. Part III considers possible procompetitive justifications and provides a framework for their evaluation.

I. The Competitive Effects of Settlement

This Part sets out two types of trademark litigation and the settlements associated with each type. The first type, considered in Part I.A, challenges the use of trademarks to facilitate targeted competition between the mark owner and a competitor. The second type, considered in Part I.B, challenges the selection of a brand name—in the jargon of trademark law, a source identifier—that is confusingly similar to that of the mark owner. The competitive effects of these two types of settlement are quite different, a point elaborated in Part I.C.

A. Limits on Targeted Competition

Search advertising settlements arise in the context of Google's search ads, which appear above or below the ordinary ("organic" or "natural") results on the search engine results page (SERP).[11] For example, Walgreens has promoted its online contacts business by buying ads that appear when a Google user searches for *1800contacts*. Google sells the ad space to Walgreens in an auction at which 1-800 and other firms might also bid. The auction system, called Google Ads, matches bidders with a particular user query. The auction winner is decided based on both the price bid and the quality of the ad, particularly the likelihood that the ad will be clicked by a user.

[10] 1-800 Contacts, Inc. v. Federal Trade Commission, 1 F.4th 102 (2d Cir. 2021).

[11] This account is a simplification of the actual search advertising process. Google has a share of search advertising in excess of 80%. Initial Decision at *40, In re 1-800 Contacts, Inc., No. 9372, 2017 FTC LEXIS 125 (F.T.C. Oct. 27, 2017). The similar analysis for other search engines is omitted for simplicity.

Search ads are a powerful way for sellers to connect with customers. A user searching for *1800contacts* is likely to be interested in buying contact lenses. Buying an ad that appears on the SERP for a rival's name is particularly potent. The online setting makes it easy to view competitive offerings side by side, facilitating comparison shopping. Because of these benefits, search ads, triggered by a search for a rival's name, are commonly used in marketing products and services to consumers. In online retailing of contact lenses, retailers have found it an effective way to attract sales.[12]

The trademark infringement question arises when the advertiser targets a user query that is a trademarked term, such as 1-800 CONTACTS. In its trademark suit, 1-800 alleged that the Walgreens ads infringed its mark and sought an injunction to prevent their appearance on the SERP for *1800contacts*.[13] Instead of litigating this question to judgment, the parties settled. The settlement prohibits Walgreens ads from appearing on the SERP for *1800contacts*, much as if 1-800 had won its trademark suit.[14] The agreements are also reciprocal, in that 1-800 agrees not to place ads in response to a user search for, say, *walgreens*. In addition to Walgreens, 1-800 entered settlements with thirteen other rivals that, together with 1-800, account for the lion's share of online contact sales.[15] The settlements have no effect on Google's organic search results.

Agreeing with a rival to limit search advertising cuts off one mode of competition for customers. Moreover, this mode is particularly well suited to helping a price-cutter get the word out about its lower prices by targeting potential customers of its more expensive rival. Suppressing such advertising tends to limit the effectiveness of price competition.[16] The likely effect is particularly strong where, as with online sales of contacts, lesser known rivals have lower prices, and consumers are

[12] *Id.* at *143 ("Paid search advertising . . . is an important method for marketing contacts online . . . .).

[13] *See id.* at *89.

[14] In fact, the settlement reaches beyond what 1-800 could accomplish if it had won the trademark suit. *See infra* Part II.B.

[15] 1-800 makes a majority of online contact sales. 1-800 Contacts, Inc. v. Federal Trade Commission, 1 F.4th 102 (2d Cir. 2021). The settling competitors account for another thirty percent. *1-800 Contacts*, 2017 FTC LEXIS 125, at *143–44.

[16] *See* Elisa V. Mariscal & David S. Evans, *The Role of Keyword Advertising in Competition Among Rival Brands* (Coase-Sandor Working Paper Series in Law and Economics, 2012); Netherlands Authority for Consumers and Markets, Price Effects of Non-Brand Bidding Agreements in the Dutch Hotel Sector (2019) (finding higher hotel prices in the presence of bidding agreements); Amicus Brief of 29 IP, Internet Law, and Antitrust Professors, 1-800 Contacts, Inc. v. Federal Trade Commission, No. 18-3848 (2d Cir. 2019).

unaware of the price differential.[17] The expected result of suppression is higher prices,[18] injuring consumers.

Search advertising agreements have become an important feature of online competition in many industries in which online sales play an important role, from airlines to hotels to credit cards.[19] Industry consultants report that the practice is commonplace.[20] The agreements take several forms. Some cover rival manufacturers, rival service providers, or rival retailers. Others have been reached between an upstream provider and a downstream retailer, such as a clothing manufacturer and a reseller or a hotel and an online travel agent, and potentially protect the manufacturer or hotel's own online sales from reseller competition.[21] Agreements have also been reached between mark owners (such as American Airlines) and Google, the supplier of advertising space.

Search advertising settlements have attracted the attention of antitrust enforcers and private plaintiffs.[22] In the leading case in the United States thus far, the FTC challenged 1-800's settlements as unlawful restraints of trade. The European Commission, after identifying the issue in a study of e-commerce,[23] condemned settlements reached between a clothing

[17] Initial Decision at 206–07, 1-800 Contacts, Inc., No. 9372, 2017 FTC LEXIS 125 (F.T.C. Oct. 27, 2017).

[18] A full market analysis requires evaluation of substitute channels, including from an ophthalmologist or optometrist, and stores such as PearleVision and Lenscrafters. The ALJ concluded that 1-800's settlements likely led consumers to pay higher prices. *Id.* at 345.

[19] *See* Giuseppe Colangelo, *Competing Through Keyword Advertising in the EU and the US* 41 (TTLF Working Paper 2020) ("Keyword advertising restrictions appear common and widespread.").

[20] Jaime Sikora, When—and How—To Bid on Competitors' Keywords, 3Q Digital, July 25, 2013, http://3qdigital.com/featured/when-and-how-to-bid-oncompetitors-keywords (asserting existence of "gentleman's agreement" not to bid "in some industries"). This article, and the citations discussed in notes 30–32 *infra*, are quoted in Samuel N. Weinstein, *Rigged Results? Antitrust Lessons from Keyword Auctions*, 91 TULANE L. REV. 1 (2017). Sikora's statement is ambiguous; the author might mean interdependent conduct without any communication. *See also* Chris Sheen, PPC Ads: Should You Bid on a Competitor's Name?, econsultancy, Aug. 26, 2015, https://econsultancy.com/blog/66859-ppc-ads-should-you-bid-on-a-competitor-s-name (noting successful threat to retaliate against competing advertiser); id. (comment of Robert Hoogendam) (request for removal, followed by retaliation).

[21] *See* Tichy v. Hyatt Hotels Corp., 376 F. Supp. 3d 821 (N.D. Ill. 2019) (denying motion to dismiss); TravelPass Group LLC v. Caesars Entertainment Corporation, No. 5:18-cv-153-RWS, 2019 WL 5691996 (E.D. Tex. 2019); European Commission, *Guess*, Case AT.40428, C (2018) 8455.

[22] *See, e.g.*, 1-800 Contacts, Inc. v. Federal Trade Commission, 1 F.4th 102, 111–12 (2d Cir. 2021); Thompson v. 1-800 Contacts, 2018 WL 2271024 (D. Utah May 17, 2018); *Tichy*, 376 F. Supp. 3d 821; *TravelPass*, 2019 WL 5691996; *Guess*, Case AT.40428, C (2018) 8455.

[23] European Commission, E-commerce Sector Inquiry (2017).

manufacturer and its competing online retailers that protected the manufacturer's e-store.[24] National competition enforcers in Europe have raised concerns about settlements in airlines, credit cards, hotels, and broadband, among other industries.[25]

The cases have had mixed results. In the single appellate ruling thus far, in 2021 the Second Circuit vacated the FTC's judgment that 1800's settlements with rivals violate antitrust law.[26] The court declined to decide whether the FTC had proved an anticompetitive effect, while expressing skepticism that trademark settlements can have such an effect. It rested judgment instead on the claimed procompetitive benefits of avoiding litigation expense and "protecting [1-800's] trademark rights."[27] The court further concluded the FTC's asserted failure to show that these benefits could be accomplished in a manner less harmful to competition.[28] We return to these points below.

Despite their importance, search advertising agreements have received little scholarly attention.[29] In the meantime, industry commentators have urged firms to reach such deals with their competitors. For example, one article—written by lawyers for an audience of in-house counsel—advises, as a "cost-efficient solution" for protecting trademarks, "to approach your competitors and agree not to bid on each other's respective trademarks . . . ."[30] As an alternative to a written agreement, a "gentleman's agreement" is suggested, the prospect of defection is considered, and a nod to antitrust liability is made.[31] Industry consultants suggest "handshake agreements" with competitors not to advertise on the SERP for a competitor's brand name.[32]

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[24] European Commission, *Guess*, Case AT.40428, C (2018) 8455.

[25] UK Competition and Markets Authority, Digital Comparison Tools Market Study (2017); Netherlands Authority for Consumers and Markets, Price Effects of Non-Brand Bidding Agreements in the Dutch Hotel Sector (2019). The Netherlands authority points to online travel agents as a particularly potent competitor because they expose customers to competing brands.

[26] *1-800 Contacts*, 1 F.4th at 111–12 (reviewing procedural history).

[27] *Id.* at 119–20.

[28] *Id.* at 120–22.

[29] The main exceptions are Weinstein, *supra* note 20 (discussing potential anticompetitive effects); and Geoffrey A. Manne, Hal Singer & Joshua D. Wright, *Antitrust Out of Focus: The FTC's Myopic Pursuit of 1800 Contacts' Trademark Settlements*, ANTITRUST SOURCE, Apr. 2019 (opposing antitrust liability); *see also* Giuseppe Colangelo, *Competing Through Keyword Advertising in the EU and the US* (TTLF Working Paper 2020) (summarizing developments in various jurisdictions).

[30] *See* Alexandra Ross, Andrew Leibnitz & Eugene Mar, Fighting the Brand Cannibals: Protecting Your Trademark from Being Misused on Search Engines, ACC Docket, Dec. 2008, at 68, 75.

[31] *See id.* (concluding that given antitrust concerns, agreement "must be carefully crafted").

[32] *See* Why Is My competitor Bidding on My Brand Terms?, Location3, Aug. 6, 2013, https://www.location3.com/blog/why-is-my-competitor-bidding-on-my-brand-

B. Limits on a Choice of Brand Name

Antitrust scrutiny of search settlements has taken place against a background of skepticism that trademarks can ever be used as an anticompetitive tool. It is frequently objected that trademark settlements are not a fit subject for antitrust inquiry. The ground is that trademark is regarded as a particularly weak form of intellectual property right, compared to (say) patent law. It is often asserted that most trademarks confer only "slight monopoly power."[33] The dismissive conclusion is that exclusion by a mark holder ordinarily is not worth the "heavy artillery" of antitrust law.[34]

The typical case that prompts this reaction is something like the following real world case. The maker of LYSOL kitchen disinfectant faced fresh entry from the makers of PINE-SOL, already a well-known mark for floor cleaners. The entrant wished to offer a competing kitchen disinfectant under the PINE-SOL name. The incumbent filed a trademark suit alleging that use of the PINE-SOL name raised an unacceptably great risk of confusion, and sought to enjoin entry on that basis.

The parties ultimately reached a settlement restricting the use of the PINE-SOL mark.[35] The settlement granted PINE-SOL some competitive running room, compared to the degree of exclusion initially sought by the LYSOL mark owner.[36] Such "consent-to-use" agreements commonly arise when a mark owner seeks to restrict the choice of mark of an alleged infringer. The agreement amounts to a compromise in the closeness of competition permitted to the maker of PINE-SOL.

In response, the competition minded critic might shrug, so what? The worst that happens, as a consequence of litigation or settlement, is that the rival must choose a different mark to serve as its source identifier. There is a risk here of being too dismissive. Inventing around can be expensive enough to limit entry.[37] One scenario, perhaps illustrated by the PINE-SOL example, arises when having a well-recognized brand is an important

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terms (urging, as solution to competitor bidding, that target "[c]reate a handshake agreement with your competitors").

[33] Sheridan v. Marathon Petroleum Co., 530 F.3d 590, 595 (7th Cir. 2008) (Posner, J.). *See also* Deven R. Desai & Spencer Weber Waller, *Brands, Competition, and Antitrust Law*, *in* BRANDS, COMPETITION LAW AND IP 75, 94 n.104 (Deven R. Desai et al. eds., 2015) (collecting sources); Benjamin Klein, *Market Power in Antitrust: Economic Analysis After Kodak*, 3 SUP. CT. ECON. REV. 43, 72 (1993); William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 956–57 (1981).

[34] *Sheridan*, 530 F.3d at 595.

[35] *See* Clorox Co. v. Sterling Winthrop, 117 F.3d 50, 52–54 (2d Cir. 1997) (summarizing the terms of settlement).

[36] *Id.*

[37] These issues are discussed in Barton Beebe & C. Scott Hemphill, *The Scope of Strong Marks: Why Should Trademark Law Protect the Strong More than the Weak?*, 92 N.Y.U. L. Rev. 1339 (2017).

element of success. If building a brand is expensive, then redeploying an existing brand from floor cleaners to disinfectants is a relatively important form of entry.[38] Preventing that move is consequently a useful form of entry deterrence.[39] A second scenario is that exclusive use of a term denoting a particular product attribute raises a rival's cost of developing a differentiated mark.[40] Economic theory predicts lower investment by rivals, higher consumer search costs as to the rivals' products, decreased industry supply, and deadweight loss.[41]

In *Clorox*, the Court of Appeals considered the real-world PINE-SOL settlement. The court found the consent-to-use agreement reached by the parties to be "common" and indeed "favored, under the law."[42] Thus, "[i]n the absence of evidence to the contrary it is reasonable to presume that such arms-length agreements are pro-competitive.[43] The court also took the opportunity to express severe skepticism that trademark settlements can be anticompetitive. It opined that "[t]rademarks are by their nature non-exclusionary"[44] and that it is "difficult to show that an unfavorable trademark agreement creates antitrust concerns."[45]

C. Reconsidering the "Weak Trademarks" Critique

The "weak trademarks" critique and *Clorox*'s dismissive attitude toward antitrust liability are rooted in the particular kind of trademark claim discussed in Part I.B. In these cases, the restraint limits a rival's ability *to choose its own mark*. This type of agreement, however, should not be conflated, however, with a restraint that limits a rival's ability to target the incumbent for comparative advertising—that is, to advertise how one's own product (or price) compares to that of an established competitor. The two situations are quite different. A restraint on competitive advertising cannot be invented around in the way that a restriction on one's trade dress frequently can.

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[38] *See Clorox*, 117 F.3d at 52–54 (summarizing PINE-SOL dispute).

[39] Acquiring or licensing a different existing mark from another firm, though costly, might support entry in some cases.

[40] For example, suppose the producer of PLAY-DOH secures an injunction preventing a rival from marketing under the FUNDOUGH mark, forcing the latter to choose a less similar mark. Exclusive use of "doh"/"dough" to denote toy modeling compound raises its competitors' costs. *See* Beebe & Hemphill, *supra* note 37. In partial recognition of this problem, trademark law prohibits exclusive use of generic terms. Kellogg Co. v. National Biscuit Co., 305 U.S. 111, 116–17 (1938).

[41] WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 187, 191–92 (2003).

[42] *Clorox*, 117 F.3d at 55; *id.* at 60 ("favored").

[43] *Id.* at 60.

[44] *Id.* at 55–56.

[45] 1-800 Contacts, Inc. v. Federal Trade Commission, 1 F.4th 102, 119 (2d Cir. 2021) (quoting *Clorox*).

The competitive harm of a restraint on truthful and non-confusing competitive advertising is different in kind from the sort of settlement at issue in *Clorox*. It restrains an important mode of competition—one that is especially important for competitive entry. If a market is currently served by a large incumbent, a rival may seek to enter by offering consumers a better deal. To communicate this to consumers may entail comparative advertising highlighting the difference in price or product features. Courts have long recognized that such competitive advertising is critical to the competitive process.[46] The effect is likely to be particularly pronounced in markets for undifferentiated products that are sold mainly online.

To be sure, firms have many other ways to advertise, even if this avenue is cut off. However, an agreement need not restrain all possible forms of competition, or all forms of competitive advertising, in order to have an appreciable anticompetitive effect. It is enough to restrain a form of competitive advertising that is especially important within the relevant market. That is the case with search advertising targeting the incumbent's mark. Such ads are the most direct and effective way to let the incumbent's customers know about what their other options are. The available alternatives do not replace the competitive benefits of comparative advertising.[47]

The *1-800* court missed this fundamental difference. It relied heavily on the *Clorox* analysis of consent-to-use agreements, quoting and emphasizing all of the statements quoted above.[48] This reliance was incorrect because in *Clorox*, an entrant's choice of mark was at stake, and this was the context in which the dismissive dicta was offered. Moreover, although it is true, as the *1-800* court suggested, that most trademark

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[46] Smith v. Chanel, Inc., 402 F.2d 562, 568–69 (9th Cir. 1968) ("The most effective way (and in some cases the only practical way) in which others may compete . . . is to tell the public they have [produced the product], and if they could be barred from this effort [trademark owners] would have found a way to acquire a practical monopoly . . . to which they are not legally entitled.")

[47] Beyond the suppression of downstream competition, search advertising agreements have a further upstream anticompetitive effect, by excluding a rival bidder in certain advertising auctions. The immediate victim of lost upstream competition is Google, for whom search advertising is the main source of profits. Much as with an old-fashioned bidding ring, a restraint on bidding transfers wealth from the seller (Google) to the buyers (advertisers) and distorts the market for advertising. This upstream harm is not a distinctive feature of trademark settlements, and therefore not a focus of the present paper.

[48] *See 1-800*, 1 F.4th at 116 ("[t]rademarks are by their nature non-exclusionary") (quoting *Clorox*, 117 F.3d at 55–56); *id.* at 119 (same); *id.* at 116 ("Agreements to protect trademarks, then, should not immediately be assumed to be anticompetitive—in fact, *Clorox* tells us to presume they are *procompetitive*."); *id.* at 119 ("agreements to protect trademark interests are 'common, and favored, under the law.'") (quoting *Clorox*); *id.* ("As a result, 'it is difficult to show that an unfavorable trademark agreement creates antitrust concerns.'") (quoting *Clorox*).

settlements do not pose a threat to competition, but that is because they very rarely include broad restraints on competitive advertising. It makes no sense to defend an unusually broad restraint by pointing to more typical settlements whose restrictions are far narrower in scope. In summary, the intuitions built in choice-of-mark cases do not carry over to target-the-incumbent cases, where the opportunity for anticompetitive effects are greater.

II. Identifying Anticompetitive Settlements

As explained in Part I, prohibiting a rival's targeted advertising can result in significant competitive harm. Nevertheless, if a mark owner wins a trademark suit, and thereby excludes its rival through an injunction, there is no antitrust violation. Here, trademark law displaces antitrust law, notwithstanding any harm to competition. This result is unsurprising and consistent with other limited exemptions from antitrust to effectuate (for example) the policies behind labor law, agricultural policy, and legalized export cartels.

The analysis is different if the parties settle rather than litigating to judgment. Trademark law does not confer a right to exclude, simply by virtue of possessing a trademark. It merely grants a right to *try to* exclude by bringing a trademark suit.[49] A private agreement that reproduces the effect of an injunction—or goes beyond it—does not enjoy the same protected status. Thus, settlements that harm competition, beyond the limits of trademark law, are unreasonable restraints of trade. In this Part, we offer an approach to identifying those unreasonable settlements.

As we explain in Part II.A, antitrust law accommodates its overlap with trademark law by prohibiting settlements that, by restraining competition, leave consumers worse off than the expected outcome of litigation. The remainder of the Part spells out two types of settlements that leave consumers worse off. The first is a settlement with a term that is *overbroad*—that is, a term that exceeds what the mark owner could achieve through litigation. The second is a settlement that results from *collusive bargaining*, in which the mark owner induces its competitor to compete less by sharing the profits from avoided competition. Such settlements are the subjects of Parts II.B and II.C, respectively.

A. Ordinary Bargains and the Litigation Benchmark

Settlements of trademark litigation are not only common but also typically harmless from an antitrust perspective. Consider, for example, the PINE-SOL settlement. This agreement permitted the sale of certain types of PINE-SOL disinfectants, such as non-aerosol pump sprays, while

[49] *Cf.* Lemley & Shapiro, *supra* note 6.

prohibiting others.[50] It also provided that the PINE-SOL product must be marketed primarily as a cleaner rather than a disinfectant.

Ordinary settlements have two important features. First, the result is a compromise. The parties agree to permit some, but not all, of the particular uses sought by the alleged infringer. The settlement thus offers less competition, compared to the outcome if the alleged infringer won, and more competition, compared to the state of affairs if the mark owner won.

Second, the compromise is the result of a hard-fought bargaining process between competitors. The mark owner argues for as much restraint as possible, arguing that it is likely to win its suit. The alleged infringer pushes in the other direction, making the opposite argument. The agreed upon set of uses is a compromise, a bargain reflecting the probability of success. The middle ground reached by the parties thus reflects the parties' expectations about the outcome of litigation if taken to conclusion.

This ordinary bargain is an appropriate baseline for considering the competitive effects of a particular settlement. In other words, a relevant baseline for evaluating a settlement is the expected consumer welfare from litigation that has an uncertain outcome. For example, if a win is 50% likely, then the litigation baseline is one-half the difference between the effect of winning and the effect of losing. From a consumer standpoint, the relevant question is whether the settlement confers less welfare than this baseline.

Two points about the litigation benchmark bear emphasis. First, it is not enough for an antitrust plaintiff to show that the settlement harms consumers compared to the fully competitive outcome. The proper approach takes account of the possibility that the mark owner might otherwise win the trademark suit and exclude competition. Second, consumers may be harmed not only by the settlement of "weak" trademark claims that the alleged infringer is likely to win, but also by strong claims. The upshot is that even if the mark owner is likely to win the suit, consumers are harmed if the settlement restricts competition even more than the expected outcome of litigation, without compensating consumer benefit.[51]

The litigation baseline is drawn from the analogous assessment of patent settlements. In *Actavis*, the Supreme Court held that patent settlements that eliminate the "risk of competition" are properly subject to antitrust scrutiny.[52] The particular context was a settlement of so-called "reverse payment" settlements, a subject considered in more detail below.[53]

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[50] *Clorox*, 117 F.3d at 53–54.

[51] *Id.* (acknowledging harm when there is "even a small risk of invalidity").

[52] Federal Trade Commission v. Actavis, Inc., 570 U.S. 136, 157 (2013); Impax Laboratories, Inc. v Federal Trade Commission, 994 F.3d 484 (5th Cir. 2021).

[53] *See infra* Part II.C.

In taking this approach, the Court explicitly rejected an alternative approach, drawn to the so-called "scope of the patent," that arguably had been applied in older cases.[54] The scope of the patent test granted safe harbor to settlements that were no more restrictive than what could be achieved through a litigated injunction.[55] On this view, a settlement permitting entry one day prior to patent expiration would be immune from antitrust challenge.[56] In rejecting this view, the Court recognized the fundamental difference between successful litigation and an untested assertion of infringement.

The litigation baseline is now a widely adopted rubric for evaluating patent settlements.[57] The same approach is appropriate for the evaluation of trademark settlements. A trademark does not afford a certain right to exclude a rival's use of an allegedly confusing mark, but rather, a right to try to exclude it.[58] The mark owner might or might not win the trademark infringement suit. In this sense, trademarks, like patents, are probabilistic rights. Settlements are problematic from an antitrust standpoint when, by restricting competition, they provide consumers with less benefit than litigation.

However, the focus on the "probabilistic" rights and the "expected value" of litigation may provoke practical concerns about administrability. How is a court supposed to figure out the IP owner's probability of winning a counterfactual lawsuit? Courts would prefer not to conduct an IP trial within the antitrust case, an unappetizing "turducken" task[59] that the *Actavis* Court worried would "prove time consuming, complex, and expensive."[60]

However, the standard espoused in *Actavis* and applicable here does not ask the courts to confront such difficulties. Indeed, when evaluating patent settlements in practice, courts generally do not engage in any speculation about litigation probabilities. This is possible for two reasons. First, when a settlement term is more restrictive than any relief that could

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[54] *See, e.g.*, United States v. General Electric, 272 U.S. 476 (1926). The *GE* rule has been narrowly construed in later cases. *See* Philip AREEDA, LOUIS KAPLOW, AARON EDLIN & C. SCOTT HEMPHILL, ANTITRUST ANALYSIS: PROBLEMS, TEXT, AND CASES 331–33 (8th ed. 2021) (summarizing the case law).

[55] *Id.* at 147 (acknowledging "that the agreement's 'anticompetitive effects fall within the scope of the exclusionary potential of the patent'" while rejecting the implication "that that fact . . . can immunize the agreement from antitrust attack").

[56] *See id.* (discussing lower court's adoption of scope-of-the-patent test).

[57] *See* Aaron Edlin, Herbert Hovenkamp, C. Scott Hemphill & Carl Shapiro, *Activating Actavis*, Antitrust Mag., Fall 2013, at 16; In re Cipro Cases I & II, 348 P.3d 845 (Cal. 2015); Impax Laboratories, Inc. v. FTC, 994 F.3d 484 (5th Cir. 2021). For an argument that the baseline includes alternative, less restrictive settlements, see Edlin et al., *Activating Actavis*.

[58] *Cf.* Lemley & Shapiro, *supra* note 6.

[59] FTC v. Watson Pharm. Inc., 677 F.3d 1298, 1315 (11th Cir. 2012), *rev'd on other grounds*, *Actavis*, 570 U.S. 136 (2013).

[60] *Actavis*, 570 U.S. at 153.

be obtained through litigation, then we need not assess the merits to know that the term is more restrictive than a court's judgment would have been. Second, the nature of the firms' settlement agreement—the types of terms it contains—is informative about whether the settlement outcome departs from the ordinary bargain in a manner harmful to consumers.[61] The remainder of this Part discusses these points and explains how they eliminate the need to assess the merits of the trademark case.

B. Overbreadth

The first type of problematic settlement contains an overbroad term that restricts competition beyond the nominal scope of the mark. In other words, even if the mark owner won the trademark suit and secured an injunction, it could not thereby suppress the competitive conduct in question. In such cases, the restraint does not enjoy any IP-based safe harbor and will be enjoined if anticompetitive. For example, in the patent context, courts have acknowledged that overbroad settlement terms—such as by restraining sales of a competing product that makes no conceivable use of the patented technology—may violate the antitrust laws.[62] The same principle applies to trademark settlements.

As discussed above, most trademark settlements are compromises that stop short of what the mark owner could achieve through litigation. Exceptions arise when the settlement prevents competitive conduct that does not even arguably infringe the trademark. Here are two examples drawn from the *1-800* litigation, centered on trademark's requirements that the conduct must produce a likelihood of confusion and constitute a use in commerce.

Likelihood of confusion. Trademark infringement requires a likelihood of consumer confusion, a determination that depends on the specific nature of the defendant's marketing practices. If a settlement restrains a broad category of activity that does not inherently create a risk of confusion, then the restraint goes beyond the scope of trademark law. For example, suppose an incumbent's rival puts up a new billboard whose text allegedly creates a risk of consumer confusion. An injunction would merely proscribe the confusing text. If the settlement prohibits the rival

[61] *See* Erik Hovenkamp & Jorge Lemus, *Antitrust Limits on Patent Settlements: A New Approach*, J. INDUSTRIAL ECON. (forthcoming 2022) (demonstrating this point); Erik Hovenkamp, *Antitrust Law and Patent Settlement Design*, 32 HARV. J. L. & TECH. 417, 450–57 (2019) (discussing the legal implications for patent settlements).

[62] *See, e.g.*, Valley Drug Co. v. Geneva Pharm., Inc., 344 F.3d 1294, 1311 n.26 (11th Cir. 2003) (distinguishing In re Cardizem CD Antitrust Litig., 332 F.3d 896, 907–08 (6th Cir. 2003), on the ground that the agreement contained restrictions broader than patent at issue); In re Terazosin Hydrochloride Antitrust Litig., 352 F. Supp. 2d 1279, 1297 n.16, 1317 (S.D. Fla. 2005) (on remand from *Valley Drug*, concluding that the agreement contained restrictions broader than the patent at issue, and indicating antitrust significance of that fact).

from putting up *any* billboard advertisements, such an agreement goes beyond the scope of trademark law, because it proscribes even noninfringing billboard advertisements.

1-800's settlements arguably go beyond the scope of the trademark for analogous reasons.[63] Buying a trademarked keyword, in itself, is not an infringing act.[64] The likelihood of confusion hinges on the nature of the defendant's advertisement, such as its text and appearance. If it is misleading—for example, if its text falsely implies that the defendant's product or website is affiliated with the trademark owner—then it could very well create an actionable risk of consumer confusion. But absent such facts, there is no reason to suspect that consumers will be confused.[65]

Nevertheless, 1-800's settlements with competitors impose a blanket ban on all ads on the SERP for *1800contacts*, even those creating no risk of confusion. To be sure, some particular ads could be confusing, but a court would not on that basis prohibit the defendant from running *any* ads triggered by the trademark, regardless of whether they infringe.[66] Thus,

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[63] *See* Brief for Intellectual Property, Internet Law, and Antitrust Professors as Amici Curiae in Support of Respondent and Affirmance, 2019 WL 4412646, 13 (Sept. 12, 2019) (making an argument to this effect).

[64] *See, e.g.,* Alzheimer's Disease and Related Disorders Association, Inc. v. Alzheimer's Foundation of America, Inc., 307 F. Supp. 3d 260, 284 (S.D.N.Y. 2018); J.G. Wentworth, S.S.C. Ltd. Partnership v. Settlement Funding LLC, 85 U.S.P.Q.2d 1780 (E.D. Pa. 2007); FPX, LLC v. Google, Inc., 276 F.R.D. 543 (E.D. Tex. 2011); Jurin v. Google Inc., 695 F. Supp. 2d 1117, 95 U.S.P.Q.2d 1803, 2010-1 Trade Cas. (CCH) ¶ 76957 (E.D. Cal. 2010); Infostream Group Inc. v. Avid Life Media Inc., 109 U.S.P.Q.2d 1512, 2013 WL 6018030 (C.D. Cal. 2013); General Steel Domestic Sales, LLC v. Chumley, 2013 WL 1900562, *10 (D. Colo. 2013), judgment aff'd, 627 Fed. Appx. 682, 2015-2 Trade Cas. (CCH) ¶ 79255 (10th Cir. 2015).

The Commission noted that the defendant could identify only one case taking a contrary position, and it was from 2008. Opinion of the Commission, In re 1-800 Contacts, Inc., Trade Reg. Rep. ¶80,586, 2018 WL 6201693, at *37 (F.T.C. Nov. 7, 2018) (citing Soilworks, LLC v. Midwest Indus. Supply, Inc., 165 F. Supp. 3d 1256, 1266 (D. Ariz. 2008)). *See also, e.g.,* J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION, §25A:7 (5th ed., 2021) ("almost all district courts have found that no likelihood of confusion was caused by the purchase of keywords alone"); Tempur-Pedic N. Am., LLC v. Mattress Firm, Inc., No. CV H-17-1068, 2017 WL 2957912, at *7 (S.D. Tex. July 11, 2017) ("Courts have consistently rejected the notion that buying or creating internet search terms, alone, is enough to raise a claim of trademark infringement"); Acad. of Motion Picture Arts & Sciences v. GoDaddy.com, Inc., 2015 WL 5311085, *50 (C.D. Cal. Sept. 10, 2015) ("There is a growing consensus in the case authorities that keyword advertising does not violate the Lanham Act.").

[65] *See, e.g.,* Stacey L. Dogan & Mark A. Lemley, *Trademarks and Consumer Search Costs on the Internet,* 41 HOUS. L. REV. 777, 829 (2004) ("keyword advertisements . . . *when paired with misleading ad content*, may well confuse consumers") (emphasis added).

[66] By analogy, if a defendant's semiconductor chip design is held to infringe a patent, the court will only enjoin sales of the infringing chip. It will not issue a blanket ban under which the defendant cannot sell any chips at all.

the restraint is more restrictive than any relief a mark owner could hope to obtain from litigation.

Use in commerce. Trademark infringement also requires that the alleged infringer make a "use in commerce" of the plaintiff's mark. Courts have concluded, controversially, that bidding on a trademark term to trigger an ad[67] qualifies as such a use.[68] However, not all bidding strategies require the advertiser to proactively choose the trademarked term.

An alternative and popular bidding strategy is to employ a generic keyword, such as *contact lens*, as a "broad" match.[69] When a user searches for *1800contacts*, Google determines whether the Walgreens ad keyed to *contact lens* is sufficiently pertinent to the user search for *1800contacts* that the Walgreens bid should be included in the auction. Broad-match advertising campaigns are often a cost-effective way of reaching customers.[70]

Notably, in this broad-match campaign, Walgreens makes no proactive selection of the *1800contacts* keyword. Google, not Walgreens, makes the connection between the *contact lens* campaign and the *1800contacts* query. As a consequence, Walgreens makes no use in commerce, and without any such use, 1-800's infringement claim against Walgreens must fail.[71]

Nevertheless, 1-800's settlements prohibit Walgreens from showing ads in response to a user search for *1800contacts*, even when Walgreens is merely bidding on *contact lens* in broad match. This restriction is accomplished by requiring Walgreens to implement *1800contacts* as a "negative keyword," which instructs Google not to display the ad for any user search for the negative keyword.[72] This term goes beyond the scope

[67] This might be accomplished through either an "exact" match or a "phrase" match. An exact match bids on user queries for *1800contacts* but omits other queries. A phrase match includes the advertiser in the bidding for longer queries such as *1800contacts coupon*.

[68] Rescuecom Corp. v. Google Inc., 562 F.3d 123, 129 (2d Cir. 2009); Network Automation, Inc. v. Advanced Systems Concepts, Inc., 638 F.3d 1137, 1144–45, 97 U.S.P.Q.2d 2036 (9th Cir. 2011).

[69] Broader match types using a particular keyword result in potential inclusion in a larger set of auctions: broad match > phrase match > exact match. Bidding on the *1800contacts* keyword in broad match would, like phrase match, produce matches if the user searched for (inter alia) *1800contacts* or *1800contacts coupon*.

[70] Initial Decision at 198–200, 1-800 Contacts, Inc., No. 9372, 2017 FTC LEXIS 125 (F.T.C. Oct. 27, 2017) (discussing this evidence).

[71] Here, we discuss settlement terms that fall outside the scope of a trademark infringement claim. Depending on the facts, a particular settlement might, of course, fall within the scope of some other legal claim asserted by the plaintiff, such as false advertising.

[72] *1-800 Contacts*, 2017 FTC LEXIS 125, at 48–50. In fact, the settlement goes further, by also prohibiting ads for user searches that merely *include* the negative keyword (even if they also include additional content). *Id*. at 99–100.

of the trademark, because it restricts competitive activity in a manner that trademark litigation never would.[73]

The *1-800* court concluded that 1-800's trademark claims, if victorious in court, "might have permitted it to preclude competitors from bidding on its trademarked terms in search advertising auctions or running advertisements on those terms."[74] The court apparently believed that the restraints fell within the scope of 1-800's trademark rights. However, this unreasoned assertion is contradicted by the lack of any plausible trademark claim against those ads that raised no risk of confusion and those triggered by the broad-match process.

Whenever a restraint goes beyond the scope of the trademark right, this fact precludes any trademark-based safe harbor. In that case, the liability question is assessed in the same manner employed in cases not involving IP. The first question is whether the agreement restrains competition in some way. If the deal includes any restrictions on noninfringing competitive advertising, such as the restraints in *1-800*, then the answer to this question is almost certainly Yes. The burden then shifts to the defendant to argue that the restraint nevertheless serves a procompetitive purpose. We explore the latter query in Part III.

C. Collusive Bargaining

The second type of problematic settlement need not restrain competition beyond the nominal scope of the trademark right. The problem is that the hard-fought bargain associated with an ordinary settlement—the arms' length negotiation emphasized by *Clorox*—is replaced by "collusive bargaining." Rather than pushing to be restrained as little as possible, the infringer accepts the highly restrictive settlement outcome preferred by the IP owner, even if this result deviates significantly from the expected result of litigation.

As an illustration, consider reverse payment settlements of patent litigation.[75] Here is how the Supreme Court described the situation:

[73] Here are two further examples. [1] Walgreens bids on *contacts* in phrase match, resulting in an ad on the SERP for *1800 contacts* (with a space). This possibility arises because the 1-800 CONTACTS brand name includes the name of the generic category, contacts. [2] Walgreens bids on *cheap lenses* in phrase match, resulting in an ad on the SERP for *1800contacts cheap lenses*.

[74] 1-800 Contacts, Inc. v. Federal Trade Commission, 1 F.4th 102, 113 (2d Cir. 2021) (internal quotation marks omitted).

[75] For discussion of these settlements, *see, e.g.,* C. Scott Hemphill, *Paying for Delay: Pharmaceutical Patent Settlements as a Regulatory Design Problem,* 81 N.Y.U. L. Rev. 1553 (2006); Daniel A. Crane, *Exit Payments in Settlement of Patent Infringement Lawsuits*, 54 FLA. L. REV. 747 (2002); Michael A. Carrier, *Unsettling Drug Patent Settlements: A Framework for Presumptive Illegality*, 108 MICH. L. REV. 37 (2009); Aaron Edlin, Herbert Hovenkamp, C. Scott Hemphill & Carl Shapiro, *The Actavis Inference: Theory and Practice,* 67 RUTGERS UNIV. L. REV. 585 (2015); Einer

"Company A sues Company B for patent infringement. The two companies settle under terms that require (1) Company B, the claimed infringer, not to produce the patented product until the patent's term expires, and (2) Company A, the patentee, to pay B many millions of dollars."[76] Note that in this example, the resulting restraint is no more restrictive than an injunction, and thus does not exceed the nominal scope of the patent.

The concern is that by paying the alleged infringer, the patentee can persuade it to accept a much more restrictive outcome than either firm expected to result from litigation. In other words, the settlement delays competition much longer than litigation would have (in expectation). Reverse payments accomplish this by letting the accused infringer share in the profits generated by suppressing competition. The payment distorts the bargaining process between the rights holder and the infringer. This is a little like a professional boxer paying his opponent to take a dive. The payment persuades the firm to accept a restraint that is excessive in the sense that it is significantly more restrictive than the expected result of litigation, as determined by the merits of the IP claims.

Absent such a profit-sharing mechanism, no profit-maximizing firm will agree to be restrained excessively in this sense. As discussed in Part II.A, the firms are ordinarily led to agree on terms that line up with their expectations about litigation. An example is a "pure delay" settlement in which two competitors bargain over the timing of competitive entry, but without using a reverse payment.[77] In fact, fact most conventional types of IP settlements—notably including ordinary royalty deals—have this property. That is because most settlements lack any mechanism for persuading a firm to be restrained excessively.[78] To be sure, such settlements typically restrict competition, but only to a degree that is commensurate with the merits of the underlying IP claims. This is

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Elhauge & Alex Krueger, *Solving the Patent Settlement Puzzle*, 91 TEX. L. REV. 283 (2012).

[76] Federal Trade Commission v. Actavis, Inc., 570 U.S. 136, 140–41 (2013). The payment is "reverse" because "the settlement requires the patentee to pay the alleged infringer, rather than the other way around." *Id.*

[77] For example, suppose there are ten years left in the patent term and the firms privately believe that the patent is only 40% likely to be valid. Then, in expected value, litigation will generate 40% x 10 = 4 years of monopoly. Thus, in settlement negotiations, the patentee will insist that its rival is delayed by at least four years. And, because there is no reverse payment, the patentee's rival will not agree to delay its entry much longer than four years. As such, the firms are naturally led to agree on a delay period of about four years, which emulates the expected result of litigation. The Supreme Court has indicated that these agreements are lawful. *See Actavis*, 570 U.S. at 158 (The firms "may . . . settle in other ways, for example, by allowing the generic manufacturer to enter the patentee's market prior to the patent's expiration, without the patentee paying the challenger to stay out prior to that point").

[78] Hovenkamp & Lemus, *supra* note __.

consistent with IP policy, for it means the agreement's impact on competition will be strong if and only if the underlying IP claim is strong.

Accordingly, settlements not involving problematic profit-sharing terms generally do not raise antitrust concerns, even when they restrain competition substantially. Even without evaluating the merits of the IP claim, a court can infer that the settlement outcome will be commensurate with the expected result of litigation. But when firms use a reverse payment or other strategy to facilitate collusive bargaining, the opposite inference is warranted. The agreement will likely cause harm by inducing one or both firms to accept an excessive restraint, resulting in less consumer welfare than expected from litigation.[79] Thus, a natural focus of analysis is the nature of the firms' agreement, and in particular on whether it subverts the accused infringer's bargaining incentives.[80]

A direct payment to the infringer is not the only means to facilitate collusive bargaining. A closely related strategy is a quid pro quo between reciprocal restraints.[81] That is, rather than one firm paying the other to accept an excessive restraint, the firms agree that they will both be restrained excessively in parallel. This dynamic is familiar in cartels. A single firm would not agree to be the only firm whose price is raised far above the competitive level; its rivals could then steal all of its sales by undercutting it. But it will accept the restraint so long as its rivals agree to be restrained in parallel, as this leaves all firms better off.

Patent settlements involving reciprocal restraints are often condemned as antitrust violations.[82] For example, in *Summit Technology*, two firms each controlled various patents related to specialized machines used in eye surgery.[83] They agreed to form a patent pool, which charged each firm high royalties. The two firms then split the pool's proceeds.[84] A

[79] *Cf.* Carl Shapiro, *Antitrust Limits to Patent Settlements*, 34 RAND J. ECON. 391 (2003) (arguing that the relevant antitrust standard should be to condemn IP settlements only when they cause more harm to consumers than the expected result of litigation).

[80] Erik Hovenkamp, *Antitrust Law and Patent Settlement Design*, 32 HARV. J. L. & TECH. 417, 450–57 (2019).

[81] For an economic analysis demonstrating that reverse payments and reciprocal restraints both lead to the same kind of collusive bargaining problem, see Erik Hovenkamp & Jorge Lemus, *Antitrust Limits on Patent Settlements: A New Approach*, J. INDUSTRIAL ECON. (forthcoming 2021); Hovenkamp, *supra* note 80, at 450–57.

[82] In some such cases, the defendants' arrangement was scarcely distinguishable from an ordinary cartel, in which case its illegality is fairly obvious. *See, e.g.*, United States v. National Lead, 332 U.S. 319 (1947) (condemning a settlement in which competitors agreed to confine themselves to separate territories to avoid competition); United States v. Masonite Corp. 316 U.S. 265 (1942) (condemning a settlement in which the firms agreed to fix prices).

[83] In the Matter of Summit Technology, Inc., 127 F.T.C. 208 (1999).

[84] *Id.* at 209–10.

royalty obligation is a very ordinary restraint—certainly within the scope of the patent.[85]

Conventional royalty settlements do not raise antitrust concerns.[86] But the defendants' reciprocal royalty scheme was highly problematic. The royalties naturally induced both firms to raise their prices (by raising their costs). The expenditures were ultimately recouped by virtue of the firms' ownership of the patent pool. Under this arrangement, it is in both firms' interest to set an excessive royalty rate in order to force their prices upward.[87] The firms ultimately abandoned this arrangement after the FTC challenged it.[88]

Another example arises in the pharmaceutical industry as a variant of the reverse payment problem. The branded drug maker may compensate the generic drug maker not with cash, but rather a promise not to launch its own competing generic drug. In exchange, the generic firm will accept a more anticompetitive result—a longer delay in market entry—than it would otherwise agree to, based on the merits of the IP claim. The resulting settlement restrains generic entry by both firms, not just the generic challenger. Courts have recognized the anticompetitive effects of such settlements.[89]

Trademark settlements may exploit reciprocal restraints to suppress competitive advertising. For example, mutual agreements not to advertise using the other's keywords restrain both firms in parallel, prohibiting each from using the other's trademark to trigger keyword advertisements. This kind of reciprocity can have a major impact on the firms' bargaining, regardless of the merit of the underlying infringement claims. By default, neither firm has an incentive to agree to abstain from running the ads; each relies on such ads to steal sales from the other. However, the firms earn larger profits if they simply agreed to stop competing in this way, both by avoiding the expense of the ads and by reducing the potency of and hence incentive for price competition. This is analogous to an agreement in which two cross-town rivals agree not to put up billboards in one another's

[85] A royalty raises the accused infringer's costs, which will push its price upward and diminish its sales. But an injunction would prohibit *all* sales of the allegedly infringing product, which is clearly a more restrictive result.

[86] *See* Hovenkamp & Lemus, *supra* note 82, at 10–12 (demonstrating, in a model of oligopoly competition, that absent a collusive inducement, a firm will not agree to pay a royalty that diminishes its competitive vitality to a materially greater extent than the expected result of litigation).

[87] This allows the firms to emulate the results of price-fixing without having to form an explicit agreement to fix prices. For further discussion of the economics behind this scheme, *see, e.g.*, Carl Shapiro, *Patent Licensing and R&D Rivalry*, 75 AM. ECON. REV. 25, 26 (1985).

[88] *Summit Technology*, 127 F.T.C. at 217.

[89] *See, e.g.*, King Drug Co. of Florence v. SmithKline Beecham Corp., 791 F.3d 388, 394 (3d Cir. 2015) (condemning a no-authorized generic settlement); *see also* Edlin et al., *Actavis Inference*, *supra* note 75 (discussing no-AG agreements as a reciprocal restraint).

territories. It does not entirely eliminate competition, but it does eliminate an important relevant channel of competition, which is a sufficient basis for antitrust liability.[90]

The *1-800* court wrongly ignored the danger of collusive bargaining. The court saw the settlement as merely the result of "hard-nosed trademark negotiations."[91] It suggested that "what is reasonably necessary [to settle] . . . is likely to be determined by competitors during settlement negotiations."[92] In other words, the court erroneously suggested that there is no need to worry that competitors might agree to improper or excessive restraints when settling an IP dispute.

The court once again relied heavily on its analysis of a consent-to-use agreement in *Clorox*.[93] There, the court had had stated that "[w]here large competitors each represent their respective trademark interests, unless one party is irrational, the result should accord with how the parties view their respective rights."[94] That is true as applied to an ordinary bargain in which the parties negotiate over a single restraint on some competitive activity that is the subject of a trademark suit.[95] But the result does not apply when the firms negotiate reciprocal concessions in which each firm avoids competition. Thus, the *1-800* court was wrong to conclude that "while trademark agreements limit competitors from competing as effectively as they otherwise might, we owe significant deference . . . to those agreements."[96] This perspective ignores the incentive and opportunity to engage in collusive bargaining.

Various arguments might be offered in defense of settlements containing reciprocal restraints. For example, the fact that the parties have filed dueling infringement claims against one another might be thought to require or somehow justify a quid pro quo between reciprocal restraints. In Part III, we explain why this perspective is mistaken.[97] Alternatively, a defendant might argue that one of the reciprocal restraints is superfluous in the sense that it does not cause any change in the firm's behavior.[98] As we explain in Part III, if true, this could allay the collusive bargaining

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[90] *See supra* Part I.C.

[91] 1-800 Contacts, Inc. v. Federal Trade Commission, 1 F.4th 102, 120 (2d Cir. 2021).

[92] *Id*. at 121 (citing *Clorox*).

[93] *Id.* at 122 (relying on *Clorox*, 117 F.3d at 59–60, as basis for granting deference to parties "arm's length use agreements negotiated by the parties").

[94] Clorox Co. v. Sterling Winthrop, Inc., 117 F.3d 50, 61 (2d Cir. 1997).

[95] In other words, it is true in a settlement that does not contain any profit sharing mechanism, such as reverse payments or a quid pro quo between reciprocal restraints.

[96] *1-800*, 1 F.4th at 122.

[97] *See infra* Part III.E.

[98] For example, if a restraint prohibits a firm from putting up a billboard in a certain area, the firm might argue that it was not planning to erect a billboard in that area anyway.

concerns. Nevertheless, such arguments should generally be rejected when assessing a settlement's legality.[99]

III. Assessing Potential Justifications

Restraints on competitive activity are lawful if they have reasonable procompetitive justifications. In this Part, we consider some possible justifications related to trademark law and policy that defendants might raise. We also explore some related considerations, such as whether the defendants could obtain the asserted procompetitive benefits by less restrictive means.

A. When Is a Justification Necessary?

IP settlements between competitors routinely restrain competition in one way or another. Indeed, in many IP cases it would be impossible to settle without some restraint.[100] And yet the large majority of such settlements do not require any detailed analysis on this point. In particular, if a court has no reason to believe that a settlement is more restrictive than the expected result of litigation, the agreement is presumptively authorized by trademark law. In such cases, the plaintiff has failed to carry its burden of establishing a prima facie violation. Indeed, *Actavis* implies that a plaintiff cannot establish a violation merely by showing that a settlement is likely to restrain competition in some fashion. She must give evidence suggesting that it is likely to be more restrictive than a court's judgment on the IP question would be (in expectation).

As we have emphasized, this can be assessed based on the nature of the terms being negotiated. Accordingly, an analysis of the defendants' justifications is necessary only when the firms rely on a problematic term that is likely to render the settlement more restrictive than the expected result of litigation. This could involve either: (1) a competition-suppressing term that goes beyond the nominal scope of the trademark; or (2) a profit-sharing mechanism that facilitates collusive bargaining, such as a reverse payment or a quid pro quo between reciprocal restraints. The reason that very few settlements require a consideration of justifications defense is that most settling parties avoid using these types of problematic terms.

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[99] *See infra* Part III.F. They could be germane to the calculation of damages, however.

[100] Litigation has some probability of resulting in an injunction, which is akin to a strong restraint. Thus, for a settlement to be acceptable to the mark owner, at least a partial restraint may be necessary.

B. Avoiding Free Riding

A second trademark-related argument is that proscribing otherwise-lawful competitive advertising serves the asserted procompetitive purpose of curbing "free riding" by the mark owner's rivals, which could help to bolster incentives for investment in one's own brand. [101] In the context of keyword advertising, the argument would proceed as follows. A firm that does most of its business online may invest heavily in making consumers familiar with its brand. That way consumers are more likely to seek out the firm when they shop online. For example, 1-800 pioneered online sales of contact lenses and made substantial investments in marketing to make consumers aware of the lower prices available online.[102] But a competitor might attempt to free ride on 1-800's brand by targeting ads at consumers who search for *1800contacts*. This might diminish the incentive of firms like 1-800 to invest in their brands. If true, a restraint on such free riding could stimulate incentives for investment, and that would be a good thing.

This defense does not rely on the proposition that free riding is necessarily actionable under trademark law. There are a few cases suggesting that free riding may provide a basis for finding trademark infringement liability,[103] but also reasons to doubt that trademark policy supports such a strong anti-free-riding policy.[104] And there is ample judicial support within trademark law for the proposition that free riding is essential to the competitive process.[105] Indeed, in many situations, terms like "free riding" and "copying" are just pejoratives for competitive activity that an incumbent doesn't like.[106]

At its core, the argument asserts that free riding on established brands is inefficient because it chills investment, and therefore it is desirable to

[101] *See* Transcript of Pretrial Conference at 24, In re 1-800 Contacts, Inc., Docket No. 9372 (F.T.C. Sept. 7, 2016) (attributing free-riding defense to 1-800). *See also* Brief of Richard A. Epstein, Keith N. Hylton, Thomas A. Lambert, Geoffrey A. Manne, Hal Singer, and Washington Legal Foundation as Amici Curiae in Support of Petitioner, 2019 WL 2581166 (June 14, 2019) (arguing that the prevention of free riding constitutes a procompetitive justification for 1-800's settlements).

[102] Initial Decision at 166, 1-800 Contacts, Inc., No. 9372, 2017 FTC LEXIS 125 (F.T.C. Oct. 27, 2017).

[103] *See* Kenner Parker Toys Inc. v. Rose Art Indus., Inc., 963 F.2d 350, 353 (Fed. Cir. 1992) ("Both the mark's fame and the consumer's trust in that symbol, however, are subject to exploitation by free riders"). For discussion and a critique of this position, *see* Beebe & Hemphill, *supra* note 37.

[104] *Id*.

[105] *See, e.g.*, Smith v. Chanel, Inc., 402 F.2d 562, 568–69 (9th Cir. 1968) ("Disapproval of the copyist's opportunism may be an understandable first reaction, 'but this initial response to the problem has been curbed in deference to the greater public good.' By taking his 'free ride,' the copyist, albeit unintentionally, serves an important public interest by offering comparable goods at lower prices.") (citations omitted).

[106] Moreover, if the avoidance of free riding were a key element of trademark law, that would raise the objection discussed in Part III.A, as such a settlement would protect an asserted trademark policy goal to a greater extent than trademark law itself.

restrain such activities. This argument, if accepted, would potentially establish a justification for all kinds of far-reaching restraints on targeted advertising, even when they create no risk of confusion.

The key problem with the free riding argument is that, even if its core premise is true, it does constitute a cognizable antitrust defense. That is, even if one is convinced that it would be efficient to restrain free riders, this would not provide a legal justification for doing so. If Congress passes IP legislation under which a given form of free riding is recognized as privileged competition, then courts applying the antitrust laws are obliged to accept that determination. Antitrust does not permit firms to engage in anticompetitive self-help to shore up a perceived deficit of IP protection. By way of analogy, one might take the position that twenty years of patent protection is not enough. But that policy perspective would not authorize a private agreement that restrains a competitor's use of an invention for even longer.[107]

The leading case on this point is *Fashion Originators' Guild of America v. FTC*. Designers in the 1930s were afflicted by style pirates, who copied and sold versions of their designs at a much lower price. The style pirates were free riding, legally—copyright did not cover the designs—albeit without any special legal encouragement. The designers joined forces and arranged a boycott of retailers that did business with pirates. The Court ultimately condemned the arrangement without regard to any claimed economic benefits from the avoidance of free riding. The case is often recognized for the proposition that firms are not entitled to create a "private IP system" whose restrictions on competitive activity reach farther than those stipulated by IP law.

This same point is also visible in the analogous context of competition between branded and generic drug makers. The brand incumbent often has made a large investment in R&D to develop and secure approval of the drug. When a generic rival threatens to enter the market, "piggybacking" on the brand's investment, that effort is protected by antitrust law. The Court rejected the idea that defendants might justify a horizontal agreement that avoids competition on the ground that reduced competition increases profits, which in turn induces or is spent on investments in increased innovation.[108]

More generally, the mere fact of investment provides no privileged basis under antitrust law to enter horizontal agreements to insulate oneself from free riding that takes the form of market competition.[109] As a general

[107] *See* Hovenkamp, *supra* note 80, at 424 n.35 (a horizontal restraint that persists after patent expiration is a transparent antitrust violation).

[108] In *Actavis*, this argument was emphasized by the dissent but rejected by the Court. FTC v. Actavis, Inc., 570 U.S. 136, 167 (2013) (Roberts, C.J., dissenting) (emphasizing role of patents in encouraging innovation); *id.* at 176 (criticizing Court on ground that its ruling "weakens the protections afforded to innovators by patents").

[109] *See, e.g.,* Smith v. Chanel, Inc., 402 F.2d 562, 568–69 (9th Cir. 1968) ("A large expenditure of money does not in itself create legally protectable rights").

matter, alleged consumer benefits premised on reductions in competition are not cognizable. For example, engineers cannot refrain from price competition on the ground that competition will result in shoddy bridges.[110] As the Supreme Court explained, considering this argument when a group of engineers made it, "the Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable."[111]

To be sure, free-riding arguments are sometimes recognized as antitrust justifications. However, these arguments do not contend that we should permit firms to suppress competition in order to stimulate investments whose long-run value will offset the loss of competition. Rather, they argue that eliminating a certain free riding problem will help to enhance competition right away, such as by increasing output.[112]

C. Less Restrictive Alternatives

For an efficiency justification to be an effective antitrust defense, the defendant's restraint must be reasonably necessary to achieve it. If not, there is no reason to permit the restraint. To this end, a plaintiff can overcome an asserted justification by showing the existence of a less restrictive alternative (LRA). LRAs are a standard method for establishing antitrust liability.[113] The LRA inquiry asks the factfinder to compare the defendant's conduct to a hypothesized alternative that serves the same claimed goal and consider whether that alternative is less restrictive and therefore poses a lesser risk of harm to competition.

To offer a basis for liability, the asserted LRA needs to be feasible and practical, not unreasonably speculative.[114] The defendants can contest feasibility, but doing so demands more than a bald assertion of some subjective difficulties that make the LRA unworkable. Otherwise, defendants could avoid liability by asserting highly subjective excuses that plaintiffs cannot realistically disprove.

For example, suppose a settlement contains a problematic term, such as a reverse payment. The overwhelming majority of settlements do not

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[110] Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 696 (1978).

[111] *Id.*

[112] For example, antitrust law takes a lenient approach to certain vertical restraints, such as resale price maintenance and exclusive retail territories, on the ground that the restraint encourages the downstream retailer to exert effort and invest in quality enhancements, which would otherwise be undercut by other distributors of the same brand. The argument is that eliminating the free-rider problem ultimately enhances competition. Similarly, a restraint on free riding may enhance competition if it is ancillary to the formation of a joint venture. *See, e.g.*, Polk Bros., Inc. v. Forest City Enterprises, Inc., 776 F.2d 185 (7th Cir. 1985).

[113] *See* C. Scott Hemphill, *Less Restrictive Alternatives in Antitrust Law*, 116 COLUM. L. REV. 927, 938–41 (2016).

[114] Hemphill, *supra* note 113, at 983–86.

contain such terms. This suggests that they are generally not necessary for parties to settle. Then the plaintiff has a very strong argument for the existence of an LRA: the firms could just settle without using the problematic term. After all, everyone else gets along fine without them.

However, the defendants may make subjective arguments about why they "just can't agree on terms" without the challenged term.[115] This is a defense alleging that the problematic term is necessary to achieve a relevant efficiency (the avoidance of litigation).[116]

Such arguments should be viewed quite skeptically, as they are typically not susceptible to proof. For example, defendants sometimes argue that they need to use a reverse payment in order to settle because the patentee is risk averse and without a large payment to the alleged infringer, settlement will fail and the patentee will experience the risk bearing cost.[117] There are good reasons to reject this argument on substantive grounds,[118] but the more important objection relates to administrability. A patentee's claim that it is risk averse will likely be very difficult for an antitrust plaintiff to evaluate, because it concerns the patentee's subjective feelings toward risk. If such a defense were permitted, there is a risk of widespread abuse by defendants.

The same arguments apply to trademark settlements. The defendants might assert some subjective reasons why they need the term in order to achieve a settlement. But they properly bear the burden of proving this. Further, to avoid widespread abuse, courts should not entertain any asserted justifications that cannot be demonstrated with objective evidence.

The *1-800* court erred on this point. The Commission had proposed a number of plausible less restrictive settlements—for example, a "disclosure requirement" under which a rival merely promises to clearly identify itself as the seller in ad's text.[119] But the court swiftly rejected these arguments. In effect, it held that the FTC was obliged to disprove the possibility that some subjective or context-specific difficulties might prevent 1-800 from reaching an amicable settlement without a blanket ban on keyword advertising.[120] Such a demanding proof requirement is likely to be prohibitive in virtually all cases. Indeed, while the court was deeply

[115] *See* Hovenkamp, *supra* note 80, at 473.

[116] We discuss this and a related efficiency in the next subsection.

[117] *Id.*; Aaron Edlin, Herbert Hovenkamp, C. Scott Hemphill & Carl Shapiro, *Actavis and Error Costs: A Reply to Critics*, ANTITRUST SOURCE, Oct. 2014.

[118] *See* Hovenkamp, *supra* note 80, at 474; Edlin et al., *Actavis and Error Costs*, *supra* note 117.

[119] Opinion of the Commission, In re 1-800 Contacts, Inc., Trade Reg. Rep. ¶80,586, 2018 WL 6201693, at *28–30 (F.T.C. Nov. 7, 2018).

[120] 1-800 Contacts, Inc. v. Federal Trade Commission, 1 F.4th 102, 121 (2d Cir. 2021) (holding that the Commission "failed to consider the practical reasons for the parties entering into the Challenged Agreement . . . [It] did not consider, for example, how the parties might enforce such a requirement moving forward or give any weight to how onerous such enforcement efforts would be for private parties.").

concerned about the practical difficulties of enforcing trademark rights,[121] it expressed no concern at all for the equally important project of maintaining administrable antitrust standards.

D. Protecting Trademark Rights and Avoiding Litigation Costs

When assessing potential justifications for restrictive IP settlements, courts often mention the protection of IP rights and the avoidance of litigation costs as relevant efficiencies. To be sure, such effects may well be desirable, but they generally cannot justify an otherwise anticompetitive settlement.[122] The reason is that *any* mutually acceptable settlement agreement will achieve these benefits. Clearly any settlement will avoid litigation costs. And a settlement cannot be acceptable to the mark owner unless it gives her protections against infringement that are at least on par with those she expected to obtain from litigation.[123]

This is important because, as noted in Part II, problematic terms like reverse payments or reciprocal restraints are normally not needed in order to reach a mutually acceptable settlement. Thus, pointing out that *this* settlement avoids litigation costs, or protects trademarks, provides no justification for entering an anticompetitive settlement rather than an ordinary one.

A defendant may protest that their preferred settlement protects trademark interests to an even greater degree than the ordinary settlement. But to return to a familiar point, it is the ordinary settlement that better approximates whatever protections are actually offered by trademark law. The extra protection from the settlement is anticompetitive and goes beyond the force of the trademark considered on its own. To be sure, the parties' preferred settlement might result in higher firm profits, but that is a predictable consequence of the anticompetitive settlement term.

The strongest case for defendants is presented if defendants are able to demonstrate that they could not have reached an ordinary settlement instead. Such a demonstration is necessary but not sufficient to avoid liability. Under antitrust's consumer welfare standard, consumers need not bear the costs of the firms' inability to reach an agreement without using anticompetitive terms. Such a settlement, though "necessary" so far as the firms are concerned, might nevertheless be condemned because it is more

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[121] *Id*.

[122] The Second Circuit mistakenly concluded otherwise in *1-800*. 1-800 Contacts, Inc. v. Fed. Trade Comm'n, 1 F.4th 102, 119 (2d Cir. 2021).

[123] The converse is not true, however. A settlement may be mutually acceptable even if it is far more restrictive than the expected result of litigation. The anticompetitive settlements discussed in Part II all share exactly this feature. Given the IP owner's strong interest in benefiting from any settlement, there is reason to worry that a particular settlement results in excessive restraints, and little reason to be concerned that it fails to sufficiently protect the owner's IP rights.

restrictive than the expected result of litigation.[124] And there is no reason to assume the firms' litigation cost savings will outweigh the resulting injury to consumer welfare.[125] Finally, it bears note that a failure to settle does not imply that the mark owner's IP rights will go unprotected. A court's judgment will furnish such protection to the extent that the mark owner is entitled to it.

E. Settlements of Countervailing Infringement Claims

As noted earlier, in many infringement claims, a mutually beneficial settlement will require that the accused infringer is restrained to some extent.[126] One might therefore wonder whether, in a case involving countervailing infringement claims between two rivals, if a mutually acceptable settlement somehow requires reciprocal restraints. The answer is No. More accurately, a *quid pro quo* between reciprocal restraints is not necessary for the firms to settle.

For example, suppose that two firms sell similar products with similar branding, and that each has recently erected some billboards in the other's territory. Each firm now alleges that its rival's billboards commit trademark infringement. A resolution may indeed require that both firms are restrained in some way, at least in terms of the content of their billboard advertisements. As always, we would like each restraint to be commensurate with the expected result of litigation. However, if there is a quid pro quo between the two restraints, we will get the usual collusive bargaining problem. For example, the firms might agree that they will no longer erect *any* billboards in each other's territory. This would be unlawful, as no trademark judgment would impose a blanket ban on billboard advertising.[127]

To avoid this problem, the quid pro quo ought to be eliminated, with each restraint negotiated independently. Then, assuming there are no other problematic terms being negotiated, each settlement will impose a restraint that is commensurate with the merit of its respective infringement claim. At minimum, this requires that there is no *express* quid pro quo between the two restraints.

However, even if there is no express quid pro quo, there is still the risk of a tacit exchange. One practical solution is to separate the

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[124] For example, in the reverse payment context, there is no reason to believe the firms would limit their payment to the smallest level needed to settle the case. On the contrary, unless constrained by antitrust liability, they are likely to exploit this opportunity to the maximum extent. *See* Aaron Edlin et al., *Actavis and Error Costs: A Reply to Critics*, ANTITRUST SOURCE, Oct. 2014.

[125] Note also that there is no reason to think litigation cost savings will pass through to consumers. Unlike variable production costs, litigation costs do not scale with output.

[126] See note __, *supra*.

[127] *See, e.g.,* Blackburn v. Sweeney, 53 F.3d 825 (7th Cir. 1995) (finding a per se violation where competitors agreed not to place ads in each other's territories).

negotiations in time, with one firm's claim being settled before the other. This kind of arrangement has been used in the patent context to avoid collusive bargaining problems involving reverse payments.[128]

F. Superfluous Restraints?

In principle, a restraint could be superfluous in the sense that it does not cause any change in the behavior of the firm being restrained. For example, consider the settlement between 1800 and Walgreens, which prohibits each firm from using the other's brand name to trigger online ads. 1800 might argue that it was not planning to use WALGREENS as an advertising keyword anyway.[129] If true, the restraint imposed on 1800 would be superfluous. That would suggest that it does not confer any benefit upon Walgreens. In that case, Walgreens would not make any extra concessions—such as accepting an excessive restriction on its own advertising practices—in exchange for the restraint on 1800. This would allay the collusive bargaining concerns discussed previously.[130]

However, such arguments should generally be rejected when evaluating a settlement's legality. There are several reasons for this. First, an antitrust plaintiff generally has no realistic way to disprove a defendant's assertion that it would have behaved the same way in any event. This is why courts do not require plaintiffs to furnish such proof in ordinary collusion cases. For example, if two defendants each agree to charge $100, provided that the other does so as well, the fact of this agreement is sufficient to find a violation. The defendant may not escape liability by arguing that it would have charged $100 in any event.

Second, and relatedly, a restraint's inclusion within an agreement supports a strong presumption that it is meaningful rather than superfluous. This is particularly true if the restraint arouses antitrust concerns. Indeed, it is hard to explain why a firm would subject itself to antitrust scrutiny to defend a restraint that has no impact on anyone. Third, if a restraint really is superfluous, then there is no harm in enjoining it.

For these reasons, in cases involving a quid pro quo between reciprocal restraints, there should generally be a strong presumption of illegality. Assessing the magnitude of a restraint's impact on competitive behavior is properly left to the calculation of damages.

Conclusion

[128] *See, e.g.*, Proposed Stipulated Revised Order for Permanent Injunction and Equitable Monetary Relief, FTC v. Cephalon Inc., ftc.gov/system/files/documents/cases/teva_proposed_stipulated_revised_order.pdf

[129] It is conceivable that 1800 would make such an argument, given that it has repeatedly claimed that it is unlawful to use rival marks to trigger online ads.

[130] *See* Part II.C, *supra*.

There are significant differences between trademarks and other forms of IP. For instance, trademarks are not intended to confer a right to restrain or exclude competitors in the same sense that patents and copyrights do. Nevertheless, trademark agreements between competitors do sometimes restrain activities that are relevant to the competitive process, such as competitive advertising. And these agreements may raise antitrust concerns, such as when they restrain a markedly broader set of activities than a court's injunction typically would.

In such cases, courts should of course be cognizant of the distinctive features of trademark law. But this can and should be done in the course of applying the same general framework used to evaluate other types of IP settlements. The first inquiry is whether the restraints in question go beyond what a trademark judgment would ever prescribe. If so, then it cannot be saved by trademark law; it should thus be evaluated under the same standards applied to horizontal agreements not involving IP. Second, if the restraint does fall within the scope of the IP right, then it should be condemned if it contains problematic terms designed to generate collusive bargaining outcomes, such as a reverse payment or a quid pro quo between reciprocal restraints.