

Patent Settlements Between Rival Drug Makers

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This Article reports early results from the first comprehensive empirical examination of an important problem in patent policy, the settlement of patent litigation between brand-name drug makers and their generic rivals. The analysis draws upon a novel data set of more than 80 settlements. The analysis uncovers a process of evolution in settlement terms, wherein later settling parties retain the basic effect of earlier settlements but avoid formal characteristics that attract the attention of public and private enforcers.

The second contribution of the Article is to show by example how empirical analysis shapes the choice of a workable antitrust rule. The analysis of drug patent settlements reveals a high likelihood of "false negatives"—erroneous exonerations—to which a generalist court evaluating a single case is highly prone. The continuing evolution in settlement terms heightens the false-negative risk. The heightened risk has important implications for the choice of legal rule.