CASE NO. 02-12091-J

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

ABBOTT LABORATORIES, GENEVA PHARMACEUTICALS, INC.,
Defendants-Appellants,

v.

LOUISIANA WHOLESALE DRUG CO., INC.; VALLEY DRUG COMPANY;
WALGREEN CO., INC.; CVS MERIDIAN, INC.; ECKERD CORPORATION;
HY-VEE, INC.; ALBERTSON'S, INC.; KROGER CO.; RITE-AID CORPORATION,
Plaintiffs-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

[PROPOSED] BRIEF OF *AMICUS CURIAE* AMERICAN ANTITRUST INSTITUTE IN SUPPORT OF PLAINTIFFS-APPELLEES URGING AFFIRMANCE OF THE GRANT OF PARTIAL SUMMARY JUDGMENT IN FAVOR OF THE PLAINTIFFS

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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 02-12091-J
ABBOTT LABORATORIES v. LOUISIANA WHOLESALE DRUG CO., et al.

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 11th Cir. R. 26.1, the American Antitrust Institute ("AAI") makes the following disclosure:

1. Is said party a subsidiary of a publicly owned corporation? No.
   If the answer is YES, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

   N/A

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? No.

   If the answer is YES, list the identity of such corporation and the nature of the financial interest:

   N/A

______________________________ ______________________________
Paul E. Slater Date

BRIEF *AMICUS CURIAE* OF THE AMERICAN ANTITRUST INSTITUTE

The American Antitrust Institute ("AAI") respectfully submits this brief *amicus curiae* in support of the district court's holding that the agreement between Abbott Laboratories ("Abbott") and Zenith Goldline Pharmaceuticals, Inc. ("Zenith") and the agreement between Abbott and Geneva Pharmaceuticals, Inc. ("Geneva") are both per se violations of §1 of the Sherman Act. The AAI believes that the holding below is correct and that the departure from the per se rule requested by the defendants would threaten competition and expose consumers to higher prices.

Identity and Interest of *Amicus Curiae*

The AAI is an independent, not-for-profit organization dedicated to economic research, study of the antitrust laws and public education. The directors of the AAI, Jonathan Cuneo, Esq., Albert H. Foer, Esq., and Professor Robert Lande of the University of Baltimore Law School, authorized this filing. The Advisory Board of the AAI consists of 58 prominent lawyers, law professors, economists and business leaders (The members of the Advisory Board are listed on Exhibit A attached hereto). The members of the Advisory Board serve in a consultative capacity and their individual views may differ from the positions taken by the AAI. The AAI's mission is to increase the role of competition and challenge the undue concentration of economic power. No director of the AAI represents any party in the above-referenced suit. Several Advisory Board members have represented parties on both sides of this litigation in other matters.

The agreements here in question provide that Abbott, the holder of a patent for the prescription drug terazosin hydrochloride, will pay generic drug manufacturers millions of dollars to refrain from entering the terazosin hydrochloride market and competing against Abbott with allegedly infringing products. Specifically, the agreement between Abbott and Geneva provides that Geneva will be paid $4,500,000 per month to refrain from marketing its generic version of terazosin hydrochloride. *In Re Terazosin Hydrochloride Antitrust Litigation*, 164 F.Supp.2d 1340, 1346 (S.D. Fl. 2000). The agreement between Abbott and Zenith provides that Zenith will be paid $3,000,000 at signing and $6,000,000 per quarter to "not sell, offer for sale, . . . or otherwise commercially distribute" terazosin hydrochloride in the United States. *Id.* at 1346. The district court held both agreements to be horizontal market allocations and per se violations of §1 of the Sherman Act (15 U.S.C. §1).

In its proposed brief, the AAI argues that the district court correctly analyzed the intersection between the antitrust and patent laws. Its ruling grants proper deference to the patent system without allowing a patentee to preclude market entry by simply paying a generic manufacturer to withhold his lower-priced product from consumers.

The AAI believes that if the decision below is reversed, the agreements in question will become templates which pharmaceutical manufacturers will use to withhold lower-priced generic drugs from the market while they share the resulting monopoly profits. In order to protect the public's interest in lower pharmaceutical prices and the sound application of the antitrust laws, the AAI, pursuant to F.R.App.P. 29(b), seeks leave of Court to file its *Amicus Curiae* brief urging affirmance of the ruling below and contemporaneously submits its Motion for Leave to File *Amicus Curiae* Brief In Support of the Plaintiffs-Appellees.

I. The Antitrust Rule Structure

A. The Per Se Rule

Section 1 of the Sherman Act proscribes "every contract ... or conspiracy ... in restraint of trade." Since 1911, however, only agreements that unreasonably restrain competition have been held to be unlawful. *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 343 (1982).

There are two tests to determine whether an agreement unreasonably restrains competition. Most restraints are judged under the rule of reason, which requires a detailed analysis of the effect on competition within a defined economic market. *National Society of Professional Engineers v. United States*, 433 U.S. 679, 692 (1978). Certain types of agreements, however, which "always or almost always tend to restrict competition," are deemed "per se illegal" without further analysis. *Broadcast Music, Inc. v. Columbia Broadcasting Systems, Inc.*, 441 U.S. 1, 19-20 (1979). Under this approach one need only determine whether the agreement in question falls within one of the per se categories. If it does, illegality automatically follows because such agreements are "conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1958); *Maricopa County*, 457 U.S. at 344. Indeed, if an agreement falls within a per se category, evidence of its pro-competitive effect or economic justification is not even admissible. *United States v. Suntar Roofing, Inc.*, 897 F.2d 469, 472 (10th Cir. 1990) ("evidence of reasonableness and/or economic justification for the alleged activities" held inadmissible where defendant is charged with horizontal market allocation which is a per se offense); *E.A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Committee*, 467 F.2d 178, 186 (5th Cir. 1972) (if agreement is of the type which the courts hold to be per se illegal, then "no evidence of the reasonableness of defendant's conduct will be considered in justification").

B. The Rationale For The Per Se Rule

In *Maricopa County*, the Supreme Court explained the rationale for the per se rule. The Court pointed out that inquiry into the reasonableness of a particular business practice "often is extensive and complex" and "entails significant costs." 457 U.S. at 343. The Supreme Court further noted that judges often lack the economic expertise needed to "determine with any confidence a practice's effect on competition;" and, that the complexity of the required analysis provides very "little certainty or guidance about the legality of a practice." *Id.* at 343; *see also Balmoral*

America, Inc. v. Allied Artists Pictures Corp., 885 F.2d 313, 314 (6th Cir. 1989) (holding that agreements which fall into the per se categories are "so unlikely to produce any procompetitive effects that courts deem it unnecessary and a waste of resources to engage in complicated rule of reason analysis").

The Supreme Court has acknowledged that its hard and fast rule might catch some harmless or even pro-competitive agreements, but has held that this cost is acceptable in order to obtain predictability, avoid complex economic analysis and reduce the expense of litigation. As stated in *Maricopa County*:

> For the sake of business certainty and litigation efficiency, we have tolerated the [per se] invalidation of some agreements that a full blown inquiry might have proved to be reasonable.
>
> * * *
>
> Per se rules thus require the Court to make broad generalizations about the social utility of particular commercial practices . . . . Cases that do not fit the generalization may arise, but a per se rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them.

457 U.S. at 344 and n. 16. *Accord, Continental TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 50 n. 16 (1977); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 15-16 n. 25 (1984).

C. Types Of Agreements Which Are Per Se Unlawful

Despite the shared label, not all per se violations are treated alike. Group boycotts and tying arrangements are per se unlawful only when defendants have market power. *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284, 296 (1985); *Jefferson Parish*, 466 U.S. at 12-15. Vertical minimum price fixing is per se unlawful only when there is an agreement "on the price or price levels to be charged." *Business Electronics Corp. v. Sharp Electronics Corp.*, 108 S.Ct. 1515, 1521 (1988). Vertical maximum price fixing is no longer per se unlawful at all. *State Oil Co. v. Khan*, 522 U.S. 3 (1997).

This does not mean, however, that all per se violations require threshold proof of market power or specified prices. Quite the contrary, horizontal agreements which fix prices or allocate markets are viewed as cartelizing behavior which constitutes a frontal assault on the free market and justifies strict application of the per se rule without any threshold showing. Only proof of the agreement is required. As stated in ABA, *Antitrust Law Developments (Fourth)*, Vol. I, p. 44:

> The extent of analysis necessary before a restraint can be deemed illegal per se has come to depend upon the nature of the restraint. Certain agreements are treated as illegal per se with virtually no factual inquiry. For example, naked price-fixing . . . and market-allocation agreements among competitors rarely have plausible procompetitive justifications, and all a plaintiff usually needs to prove to establish illegality is that such an agreement exists.

D. The Rational For The Strict Per Se Rule Against Horizontal Price Fixing And Market Allocation Agreements

The reason for the strict per se rule against horizontal price fixing is that horizontal competition "is the primary concern of antitrust law" (*Continental TV*, 433

U.S. at 51 n. 19) and price/output decisions are "the central nervous system of the economy." *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 224-26 n. 59 (1940). As a result, the Supreme Court has held agreements which "raised, lowered, or stabilized prices" to be per se unlawful even if the conspirators lack the power to accomplish their price fixing scheme (*id.* at 221, 225, n. 59), and regardless of the means employed. As explained below, horizontal market allocations have the same economic effect on price and output as horizontal price fixing agreements, and as a result are analyzed with the same unforgiving per se rule.

In *United States v. Topco Associates, Inc.,* 405 U.S. 596 (1972), an association of independent grocers developed a private brand label in order to allow its members to better compete against national supermarket chains. Each association member agreed that it would not sell Topco goods in competition with other association members. The lower court applied the rule of reason and held that the injury to competition between Topco members was more than outweighed by the benefit to competition between Topco members and national chains. *Id.* at 605-06. The Supreme Court reversed. It held that after considerable experience with horizontal market allocations, it had determined that they were "classic examples of a per se violation" and subject to a "rigid rule" of per se illegality. *Id.* at 608, 609-10. As a result, the Court held that whether the agreement was "well intended . . . or developed to increase competition" or whether it would pass muster under the rule of reason "is irrelevant to the issue before us." *Id.* at 609-10.

More recently, in *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 47 (1990), the Supreme Court addressed an agreement between HBJ and BRG, two providers of bar review services. HBJ agreed that it would not compete against BRG in the Georgia market. In consideration, BRG agreed to share the revenue from the Georgia market by paying HBJ $100 per Georgia student. As a result of this horizontal allocation, the price paid by Georgia students went up. *Id.* at 47-48.

As in *Topco*, the lower court analyzed the agreement under the rule of reason and held it to be lawful. *Id*. Again, the Supreme Court reversed. It pointed out that the revenue sharing feature of the horizontal agreement coupled with the impact on price demonstrated an anticompetitive purpose. Relying on *Topco*, the Court held that such horizontal market allocations are "unlawful on [their] face" and a "classic example of a per se violation." *Id.* at 49-50.

In *General Leaseways, Inc. v. National Truck Leasing Assoc.*, 744 F.2d 588, 594-95 (7th Cir. 1984), Judge Posner explained that a horizontal market allocation -- like the agreements here in question -- is equivalent to an agreement to reduce output and "equates to a price fixing agreement." *Id.* at 594. Judge Posner pointed out that "one way the firm can free itself from competition is by agreeing with sellers of the same product that they will not enter each other's markets." Once the agreement is reached, the firm "is free from competition [and] will reduce output below the competitive level and . . . [c]onsumers will pay more when supply is scarcer." *Id.* As Judge Posner stated:

> An agreement on output also equates to a price fixing agreement. If firms raise price, the market's demand for their product will fall, so the amount supplied will fall too -- in other words, output will be restricted. If instead the firms restrict output directly, price will as mentioned rise in order to limit demand to the reduced supply. *Thus, with exceptions not relevant here, raising price, reducing output, and dividing markets have the same anticompetitive effects.*

744 F.2d at 594 (emphasis added). *Accord*, *California Dental Association v. FTC*, 526 U.S. 756, 777 (1999) (adopting the above passage from *General Leaseways* verbatim); *Blue Cross & Blue Shield United v. Marshfield Clinic*, 65 F.3d 1406, 1415 (7th Cir. 1995) ("the analogy between price fixing and division of markets is compelling. It would be a strange interpretation of antitrust law that forbade competitors to agree on what price to charge, thus eliminating price competition among them, but allowed them to divide the markets, thus eliminating all competition among them.").

In keeping with the view that horizontal market allocations necessarily restrict output and raise price, the courts have repeatedly held that such agreements are subject to a strict rule of per se illegality. *United States v. Goodman*, 850 F.2d 1473, 1475-76 (11th Cir. 1988) (holding that a horizontal "customer allegation agreement alone is a per se violation" and the existence of anticompetitive effects is not even relevant); *United States v. Cooperative Theaters of Ohio, Inc.*, 845 F.2d 1367, 1370-71 (6th Cir. 1988) (rejecting the contention that the per se rule should not apply because the market allocation agreement in question was novel and the courts lacked experience with such agreements); *Suntar Roofing*, 897 F.2d at 472-73.

II. Application Of The Per Se Rule To The Current Case

By March, 1998, both Zenith and Geneva were on the verge of entering the terazosin hydrochloride market in competition with Abbott. 164 F.Supp.2d at 1345. Market entry by either company, however, was prohibited by the agreements here in question.

The Zenith agreement was executed on March 31, 1998. Abbott agreed to dismiss its patent infringement claims against Zenith and also agreed to pay Zenith $3,000,000 upon dismissal of the claim and $6,000,000 per quarter. In consideration, Zenith promised "not sell, . . . or otherwise commercially distribute" terazosin hydrochloride. *Id.* at 1346. Zenith also promised not to help any other company gain FDA approval to enter the terazosin hydrochloride market.

The Geneva agreement was executed one day later. The agreement did not provide for the dismissal of Abbott's patent infringement claims against Geneva and no lawsuit was settled. Abbott merely agreed to pay Geneva $4,500,000 per month in return for Geneva's promise not to market its FDA-approved terazosin hydrochloride drug until some other company entered the market or until Geneva received a non-appealable ruling that it had not infringed Abbott's patent. *Id*. at 1346-47. Geneva also agreed not to transfer its FDA authorization to enter the market to any other company. *Id*. at 1347.

The effect of these agreements is simple. The number of actual or potential competitors in the terazosin hydrochloride market was reduced from three to one. The two potential competitors, Zenith and Geneva, also agreed to help Abbott forestall the market entry of any other potential entrant. After the agreements were signed, Abbott remained the terazosin hydrochloride only seller of terazosin hydrochloride for a period of sixteen months.

The trial court correctly noted that as a result of Abbott's status as the only seller of terazosin hydrochloride that drug output of would be lower and its price higher than otherwise would have been the case. 164 F.Supp.2d at 1349. As pointed out by Judge Posner, a firm that is free from effective competition due to a market allocation agreement "will reduce output below the competitive level" causing consumers to "pay more [because] supply is scarcer." *General Leaseways,* 744 F.2d at 574-95.[1] This result is hardly surprising, as generic drugs are inevitably less

[1]As pointed out by Economics Professor, Keith Lefler, where a patentee pays a potential entrant to stay out of the market 1) the incentives "are not to maximize efficiency, but rather to maximize profits", and 2) the profit maximizing "settlement" for both the patentee and the alleged infringer will eliminate competition and result in

expensive than their brand-name counterparts. Indeed, Congress passed the Hatch-Waxman amendments specifically "to make available more low-cost generic drugs." *In Re Cardizem CD Antitrust Litigation*, 105 F.Supp.2d 682, 685 (E.D. Mich. 2000).[2]

In sum, Abbott's agreements with Geneva and Zenith had the following effects: (1) lower-priced generic drugs were excluded from the market; (2) Abbott continued for sixteen months to sell its higher-priced brand name drug without losing sales to a lower-priced alternative; and (3) output was necessarily reduced. As the trial court found, Abbott, Zenith and Geneva entered into agreements "to enhance their collective profits" by reducing output and maintaining higher prices all "to the detriment of its consumers." 164 F.Supp. at 1349. Just as in *BRG of Georgia*, actual or potential horizontal competitors agreed to allocate the entire market to one competitor and that competitor agreed to share the monopoly profits attributable to the resulting higher (*i.e.*, supracompetitive) prices with the sellers who had agreed to stay out of the market. The detrimental effects which justify the use of the "rigid" per se rule are all

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monopoly prices. Lefler and Lefler, Want to Pay a Competitor to Exit the Market? Settle a Patent Infringement Case, 2 ABA, Antitrust Law Section, Economics Committee Newsletter, p. 27-28 (Spring 2002).

[2] *See also* FTC Analysis to Aid Public Comment Concerning HMR/Andrx Consent Orders Dkt. 9293 at 1 (March 29, 2001) ("generic drugs typically are sold at substantial discounts from the price of branded drugs").

present. Indeed, a more perfect example of a per se unlawful price fixing or market allocation agreement is hard to imagine.

Defendants, of course, assert that their agreements were really pro-competitive or justified because Abbott had filed patent infringement claims against Zenith and Geneva. *Topco* and *Maricopa County*, however, teach that even if these contentions had merit, the expense and economic complexity of addressing them and the resulting lack of certainty makes the analysis not worth the systemic cost.[3] As held in *Topco*, the question of whether a market allocation agreement is on balance pro-competitive or whether it would pass muster under the rule of reason is simply irrelevant. Indeed, evidence of such procompetitive effects which defendants would like to offer is not even admissible. *Suntar Roofing*, 897 F.2d at 472; *E.A. McQuade Tours*, 467 F.2d at 186.

III. Objections To The Use Of The Per Se Rule

Defendants claim that the per se rule should not be used in this case because: (1) the courts have had insufficient experience with this type of agreement and, (2)

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[3]Professor Lefler has estimated that the likelihood of a "settlement", where the patentee pays the alleged infringer to stay out of the market, being pro- competitive is less than 1%. Lefler, supra. at 28. As a result, Professor Lefler has concluded that the condemnation of such a "settlement" by use of the per se rule is appropriate. *Id.* at 28-29,33.

the agreement in question settled patent disputes. Each of these contentions is addressed below.

A. The Courts Have Had Sufficient Experience With Market Allocation Agreements

Defendants claim that the judiciary has had insufficient antitrust experience with the pharmaceutical industry and the Hatch-Waxman amendments to allow for the use of the per se rule. The reference to the Hatch-Waxman amendments, however, is a red herring. Those amendments do not re-define the meaning of competition or alter the antitrust analysis in any way . Rather, those amendments establish new guidelines for the approval of generic drugs and were intended to speed, not delay, the early "entry of relatively inexpensive generic drugs into the market place." *In re Cardizem,* 105 F.Supp.2d at 685. The amendments are in no way inconsistent with the purposes of the Sherman Act and there is no basis to assert that they render otherwise anticompetitive conduct pro-competitive or innocuous or that they modify the operative antitrust rule structure. *See National Gerimedical Hospital v. Blue Cross of Kansas City*, 452 U.S. 378, 388-89 (1981) (holding that the antitrust laws are the fundamental national economic policy and are altered by another federal statute only in cases of clear repugnancy).

The contention that the courts have had too little experience with competition between patented and generic drug manufacturers, is similarly wide of the mark. The Supreme Court has decided that it has had sufficient experience with horizontal market allocation agreements to declare them per se unlawful. The market allocation agreement here in question is therefore per se unlawful, regardless of the complexity of competition in the pharmaceutical industry.

For example, in *Maricopa County*, defendant argued that the per se rule was inapplicable because the judiciary had not had sufficient experience with the complex competition in the health care industry. The Supreme Court disagreed. It held that regardless of the competitive characteristics of a particular industry that the Sherman Act "establishes one uniform rule applicable to all industries alike." 457 U.S. at 349. Indeed, the Court held that the per se rule was specifically created to avoid the necessity of engaging in complex competitive analysis on an industry-by-industry basis:

> Finally, the argument that the per se rule must be rejustified for every industry that has not been subject to significant antitrust litigation ignores the rationale for per se rules, which in part is to avoid "the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable -- an inquiry so often wholly fruitless when undertaken.

457 U.S. at 350-51. *Accord*, *United States v. Cooperative Theaters of Ohio, Inc.*, 845 F.2d 1367, 1370-71 (6th Cir. 1988) (holding conduct that amounted to a horizontal market allocation agreement was per se illegal and rejecting the contention

that the courts had not had sufficient experience with "non-solicitation" agreements). The pertinent question is not whether the courts have had experience with competition between generic and patented drugs. The issue is whether the courts have had sufficient experience with horizontal market allocations to declare them per se unlawful in whatever context they arise. Clearly, the courts have had sufficient experience to do so, and just as clearly the agreements here in question qualify as horizontal market allocations.

B. The Contention that these are Patent Settlements Does Not Avoid the per Se Rule

Defendants claim that the agreements in question cannot be per se illegal because they are settlements of patent infringement claims and because application of the per se rule would render virtually every patent settlement lawful. As explained below, these contentions are factually and legally incorrect.

1. The Nature of the Agreements

The agreement between Abbott and Geneva was not a settlement agreement as the infringement claim against Geneva was not dismissed or released. Indeed, the infringement Geneva continued and the courts eventually held that the patent, which supposedly gave Abbott the lawful authority to exclude competitors, was invalid.

Rather, the bargain that the parties' struck was that Abbott would pay money to Geneva in consideration for Geneva promising not to enter the terazosin hydrochloride market with its FDA approved drug. It was not Abbott's patent or Geneva's fear of an infringement claim that procured Geneva's absence from the market. If the strength of the patent had been sufficient to persuade Geneva to exit the market, there would have been no need for Abbott to pay Geneva millions of dollars. The payment of that money by the patentee to the alleged wrongdoer could only be in consideration of Geneva's promise to stay out of the market. Thus, the bargain that was struck was not a patent settlement at all. It was a promise by one competitor to stay out of the market in exchange for a promise by the other competitor to share the resulting monopoly profits -- a classic per se violation.

The agreement between Abbott and Zenith was similar. Although, Abbott did dismiss an infringement claim against Zenith, that dismissal was consideration that flowed to Zenith and could not possibly have been in exchange for the money payments which also flowed to Zenith. As in the Geneva agreement, the consideration that flowed to Abbott, in exchange for the money payment, was the promise by Zenith to stay out of the market.

Thus, the nature of the bargain between Abbott and the generic manufacturers becomes clear. Abbott pays money to generic firms and the generic firms allocate the terazosin hydrochloride market to Abbott by promising not to compete. The patent settlement nature of these agreements is, at most, incidental to the fundamental nature of this exchange

2. The District Court Ruling Does Not Threaten Bona Fide Patent Settlements With Per Se Illegality

Defendants contend that if the district court's ruling is allowed to stand that routine patent settlements will be per se unlawful. (Def.Br. at 39;Washington Legal Foundation Amicus Br. at 12). Accordingly to defendants, if, as routinely happens, an alleged infringer agrees to respect a patent and stop selling the infringing product, a per se violation of § 1 of the Sherman Act will result.

This contention is false. In the routine patent settlement, it is the strength of a presumably valid patent and its lawful exclusionary power, not a money payment, that procures the absence of the alleged infringer from the market. No one contends that such an agreement is per se unlawful.

In the current case, however, it is not the exclusionary power of the patent, but rather the payment of money by the patentee to the alleged infringer, which has secured market exclusivity for the patentee. In the routine settlement there is no payment by the patentee to the alleged wrongdoer in exchange for monopoly status and there is no division of monopoly profits between the two competitors. The essential elements of the per se violation are missing.

Finally, defendants contention that patent settlements are always analyzed under the rule of reason is incorrect. No court has ever so held and the authority offered in support of this proposition does not sustain it.[4] Indeed, in *In Re Cardizam CD Antitrust Litigation*, 105 F.Supp. 2nd 682 (E.D. Mich. 2000), on facts virtually identical to the current case, the court held that the agreement between the patentee and the alleged infringer:

> on its face, allocates the entire U.S. market...to [the patentee] for the life of the agreement. Accordingly, this court concludes that it is a naked horizontal market allocation agreement and thus constitutes a restraint of trade that is illegal per se under Section 1 of the Sherman Antitrust Act.

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[4] Defendant's rely primarily on *Standard Oil Co. v. United States*, 283 U.S. 163 (1931). (Def. Br. at 35) That case however, does not hold that agreements, otherwise per se unlawful, are permissible if they are part of a patent settlement. Indeed, *Standard Oil* holds that rights granted patentees "do not exempt them from the prohibitions of the Sherman Act." *Id.* at 168. Similarly, *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50 (2d Cir. 1997) is not a case which "could have been analogized to a per se improper horizontal market allocation agreement"as defendants wrongly contend. (Def. Br. at 40-41). In *Clorox*, the settlement agreement only prevented a competitor from using a trademark. It did not prevent the competitor from entering or competing in any market -- an essential feature of any market allocation agreement. *Id.* at 51. Since no market was allocated, there was, of course, no basis to apply the per se rule.

Id. at 705-706.

Similarly, in *United States v. New Wrinkle, Inc.*, 342 U.S. 371, 377 (1952) the defendants settled cross-patent claims and agreed to prevent prices from going down. The Supreme Court had no trouble finding this "patent settlement" to be per se unlawful. 342 U.S. at 377, 380.

The law is quite clear that a patent settlement violates the antitrust laws if it goes beyond what is necessary to protect the rights granted to the patentee. *Duplan Corp. v. Deering Milliken Inc.*, 444 F.Supp. 648, 684 (D.S.C. 1977), *aff'd,* 594 F.2d 979 (4th Cir. 1979); *United States v. Masonite Corp.*, 316 U.S. 265, 278-79 (1942). A patent settlement which not only protects the patentee, but also rewards an allegedly infringing competitor with the bounty of reduced competition, is unlawful. *United States v. Singer Manufacturing Co.*, 374 U.S. 174, 193-95 (1963) (holding patent settlement unlawful because "[patentee] went far beyond its claimed purpose of merely protecting its own 401 machine -- it was protecting [competitors] Gegauf and Vigarelli . . . under the same umbrella").

Defendant's seek to avoid the foregoing precedent by 1) ignoring *In re Cardizem* and 2) arguing that the remaining cases hold only that a patent settlement can be per se illegal if the conduct amounts to horizontal price fixing. (Def. Br. at 37-

38). Even if true, this argument would be of no aid to the defendants[5]. As previously demonstrated, the horizontal market allocation agreements which defendants entered "equate to a [horizontal] price fixing agreement." *General Leaseway,* 744 F.2d at 594. *California Dental Association v. FTC,* 526 U,S. 756, 777 (1999) (stating that horizontal agreements "raising price, reducing output and dividing markets have the same anticompetitve effects") Indeed, in *In re Cardizem* the court not only held that the defendant's purported patent settlement was a per se unlawful market allocation, but also held that the agreement constituted horizontal price fixing. 105 F.Supp.2d at 706. Thus, even if the agreements here in question were true patent settlements and even if, as defendants contend, patent settlement can be per se unlawful only when they amount to the horizontal price fixing – the Abbott/Zenith and Abbott/Geneva agreements would still be per se unlawful.

Conclusion

The agreements here in question are between horizontal competitors. They exclude all but one seller from competition; allocate the entire market to the higher-priced brand name seller; and provide the competitors who agreed to stay out of the

[5]In fact, no court has ever held that per se unlawful conduct other than horizontal price fixing, must be subjected to rule of reason analysis if it is incorporated into a patent settlement. *In re Cardizem* rejects that proposition and it is inconsistent with the cases cited above which hold that a patent agreement which protects not only the patentee but also the alleged infringer from competition is fully subject to the antitrust laws.

market with a share of the resulting monopoly profits. Consumers are deprived of all choice and price competition. It is respectfully submitted that the Abbott/Geneva and Abbott/Zenith agreements are classic per se violations and that the ruling below is correct and should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 29(d)

Amicus Curiae American Antitrust Institute has complied with Fed.R.App.P. 29(d), which limits this brief to 7,000 words. Compliance was confirmed using the Word Count feature of WordPerfect 9.0, which indicates a total of 5160 words.

CERTIFICATE OF SERVICE

I hereby certify that I have caused two copies of the foregoing **[Proposed] Brief of *Amicus Curiae* American Antitrust Institute In Support Of Plaintiffs-Appellees Urging Affirmance Of The Grant Of Partial Summary Judgment In Favor Of The Plaintiffs** to be served by Federal Express (the same manner in which the document was transmitted to the Clerk of the Court) upon each of the following on July 8, 2002:

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Full Listing Of AAI Directors And Advisory Board Members