

though both companies' products were still in the development stage.³

under the Supreme Court’s analysis in *Actavis*.¹² And in September, the Commission brought its first post-*Actavis* lawsuit, charging pharmaceutical companies with filing sham patent litigation suits against potential generic competitors to delay the introduction of lower-priced versions of the blockbuster testosterone replacement drug Androgel. The Commission also charged that those same pharmaceutical companies subsequently entered into an anticompetitive reverse payment agreement in the form of an authorized generic deal on an unrelated drug to delay generic competition with Androgel further.¹³

Patent Assertion Entities

Another area in which the FTC is working to get the balance right between competition policy and IP is the conduct of patent assertion entities (PAEs). PAEs raise a number of significant questions from a competition policy perspective. Proponents of PAEs argue that they foster a valuable secondary market for patents, enabling inventors to capitalize on their ideas and encouraging venture capital firms to fund new projects. On the other hand, critics argue that PAEs divert resources away from manufacturing firms’ productive research and development efforts, take advantage of an imbalance in litigation costs between PAEs and defendants, and act as a drag on innovation. Fundamentally, this is a debate about whether PAEs enhance or reduce output.

The Commission believes that it is important to understand how PAEs do business and how they affect innovation and competition. The Commission hosted a workshop with the Department of Justice on the subject of patent assertion entities in 2012, and received approval this summer to use our 6(b) authority – which allows the FTC to compel production of information from market participants – to conduct a study on PAEs.¹⁴ Last year we issued information requests to approximately 25 patent assertion entities in connection with our PAE 6(b) study, as well as to approximately 15 non-practicing entities and manufacturing firms in the wireless chipset sector. The FTC intends to publish a descriptive report that will allow industry participants, policymakers, and academics to gain a better understanding of the PAE business model.

At the same time, the FTC is also using its authority to address the deceptive use of patent demand letters, and other potentially abusive tactics, by PAEs. For example, last year the FTC challenged MPHJ for sending tens of thousands of deceptive demand letters falsely threatening patent suits. MPHJ’s letters alleged that the companies were illegally sending emails of scanned documents from a networked copier – something I think most of us have done – without paying a licensing fee to do so. In its letters, MPHJ claimed that “many other

¹² See Br. of Fed. Trade Comm’n as *Amicus Curiae* in Supp. of Pl.-Appellants, *King Drug Co. of Florence, Inc. v. SmithKlineBeecham Corp.*, No. 14-1243 (3d Cir., filed Apr. 28, 2014), available at http://www.ftc.gov/system/files/documents/amicus_briefs/re-lamictal-direct-purchaser-antitrust-litigation/140428lamictalbrief.pdf.

¹³ See generally Compl., *FTC v. AbbVie, Inc.*, No. 14-CV-5151 (E.D. Pa. filed Sept. 8, 2014), available at <http://www.ftc.gov/system/files/documents/cases/140908abbviecmpt1.pdf>.

¹⁴ See 15 U.S.C. § 46(b).

Conclusion

The task of 21st century competition enforcers is to protect competition and innovation – to make sure that hi-tech markets remain dynamic, fertile grounds for new products and ideas.