



## Wright criticizes proposed Canadian approach to reverse payments

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### IN BRIEF

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Criminalizing reverse payments, in which a brand drugmaker makes a payment to settle a patent challenge by a generic, could stifle legitimate behavior, Commissioner Joshua Wright and US Circuit Judge Douglas H. Ginsburg said in a submission to Canada's Competition Bureau (see here).

"We respectfully recommend against imposing criminal liability for reverse-payment settlements because such an approach threatens to over-deter procompetitive conduct," the two said.

Their comments were made in response to the bureau's request for public comment on draft intellectual property enforcement guidelines that the agency has proposed.

The draft guidelines, released in June, will direct bureau enforcement in areas where competition law and complicated IP law intersect.

Canada's chief competition enforcer, Commissioner John Pecman, highlighted in a speech that the bureau would consider criminal sanctions for reverse payment deals, also called pay-for-delay agreements, if evidence showed an intent to fix prices or allocate markets (see here).

The bureau will favor approaching the payments as a civil matter first, though, Pecman said, veering away from an earlier, more criminal-focused tack.

Wright and Ginsburg criticized any criminalization of the agreements and said that an approach to reverse payments that focuses on the intent of the parties has problems. The bureau should focus instead on the effects of any conduct, given that some agreements benefit consumers, they said.

Wright and Ginsburg also advocated for a relatively soft approach on product switching, a scenario in which a brand name drugmaker pulls a drug about to face generic competition from the market and replaces it with a newer alternative.

Use of that strategy has drawn debate. Though drug companies have stridently argued that they should not be forced to keep drugs on the market to aid generic competitors, enforcers have begun to target switches they argue are anticompetitive.

Enforcers should only impose competition sanctions on product switching when a brand new alternative is a "sham innovation with zero or negative consumer welfare benefits," Wright and Ginsburg said.

Even small changes in a product's design can benefit consumers, they said.

"New drug formulations may involve changes that appear small but are of significant benefit to consumers or are critical stepping-stones to potentially life-saving inventions," they said.

"Therefore, potential competition law liability for introducing new formulations or introducing minor product design changes risks chilling future innovation that could yield significant consumer benefits," they said.

The two said that even sophisticated competition enforcement agencies are not in a good position to displace market judgments and effectively micromanage product design.

The Competition Bureau released an updated version of its draft guidelines in June and opened them to public comment. That comment period ended Monday.

#### **Related case file(s)**

Canada - Intellectual property enforcement guidelines