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Disclaimer:

Φ The opinions expressed in this presentation are my own and not those of Attorney General Tom Corbett or the Pennsylvania Office of Attorney General

What is Antitrust?

Φ The Antitrust Laws mean
you are entitled to the
benefits of Competition.

Φ Robert Lande

Venable Professor of Law
University of Baltimore

Overall State Goal

- Φ Get the benefits of competition in the drug industry.

- Φ Benefits often go to others:

- Φ Doctors

- Φ Pharmacies

- Φ PBMs

In Short, the States seek lower prices

- Φ For themselves because of budget constraints
- Φ For consumers because of affordability and economic viability concerns

Competition Requires

- Φ A functioning market

- Φ Where consumers have access to information about:

- Φ Price, and

- Φ Quality



Or Put another way

Competition requires
Transparency:

Clinical Transparency

Economic Transparency

Key Area of Focus

Φ Reverse Payments

Φ Under what circumstances will a payment from a brand name drug company to a generic drug company where the brand name company is accusing the generic of patent infringement be unlawful.

Two Views

Φ The Cardizem View

- Φ These arrangements are per se illegal

Φ The Valley Drug/K-Dur View

- Φ No illegality as long as the arrangement does not expand the bounds of the patent

In Re Cardizem CD Antitrust Litigation

- Φ By delaying Andrx's entry into the market, the Agreement also delayed the entry of other generic competitors, who could not enter until the expiration of Andrx's 180-day period of marketing exclusivity, which Andrx had agreed not to relinquish or transfer.FN12 *908 There is simply no escaping the conclusion that the Agreement, all of its other conditions and provisions notwithstanding, was, at its core, a horizontal agreement to eliminate competition in the market for Cardizem CD throughout the entire United States, a classic example of a *per se* illegal restraint of trade.
- Φ 332 F.3d 896, 907-08 (6th Cir., 2003). (Footnote omitted).

Valley Drug Co. v. Geneva Pharmaceuticals

- ⊕ Unlike some kinds of agreements that are *per se* illegal whether engaged in by patentees or anyone else, such as tying or price-fixing, the exclusion of infringing competition is the essence of the patent grant. As one court has concluded "when patents are involved ... the exclusionary effect of the patent must be considered before making any determination as to whether the alleged restraint is *per se* illegal."

334 F.3d 1294, 1306 (11th Cir., 2003)
(citation omitted).

Why Care?

- Φ These are agreements among horizontal competitors to restrict output.
- Φ Generic entry can result in as much as an 80% reduction in drug prices.