Anticompetitive Acquiescence

Jacob Noti-Victor & Mark A. Lemley
Benjamin N. Cardozo School of Law; Stanford Law School

Across a wide range of lawsuits, regulations, and administrative adjudications, companies are giving up. They settle cases they know they would win. They agree to regulations they know they could avoid. And they pay more money than necessary to license intellectual property and other assets.

We think the explanation for this puzzling behavior is a phenomenon we call "anticompetitive acquiescence." We argue that companies behave in this seemingly irrational way in many different circumstances because they know that even if they will suffer the consequences of paying too much or limiting their behavior, doing so will make their competitors suffer even more. We document nearly a dozen different categories of conduct that fit within the anticompetitive acquiescence label, from generative AI companies agreeing to pay for data that they might not be legally required to license to generic drug manufacturers agreeing not to invalidate a patent that prevents them from entering the market to social media companies asking Congress to subject them to costly regulation

In providing the first account of anticompetitive acquiescence, we also explain why this problem is particularly complicated, and why courts have so far done virtually nothing to stop it. Settlements are generally considered good for litigants and good for society, and it can be hard to disentangle good faith attempts to resolve disputes from anticompetitive motivations. We offer three categories of solutions to reduce the harm from anticompetitive acquiescence without sacrificing the benefits of settlement: procedural solutions that focus court attention on problematic behavior, substantive legal solutions that minimize the impact settlements and private deals have on third parties, and proposals to ban certain of the most problematic categories of anticompetitive acquiescence.