PHARMA FEUDS
NEGOTIATION

Teaching Note

First, a confession: I have only taught this an earlier version of this case once, in a special "alumni event" class where two IP attorneys came had come to my negotiation class. Since then, and in response to their suggestions, I've made some revisions. Thus, it's fair to say that this teaching note outlines how I believe it could be used, but it's not based on specific experience with this simulation.

Anyone familiar with the *Independent Immunities* and the *Value Pharming* negotiation simulations will see that these arise out of the same core fact ideas: one company is manufacturing a version of a drug that some patients can't tolerate. A group of the company's scientists decide to form their own company to manufacture a purer version of the drug that these patients will be able to use without severe side effects. In *Value Pharming* and in this one, the holder of the original patent was a not-for-profit venture working in collaboration with the university. In this case, the not-for- profit is part of a joint venture with the original manufacturer of the product. (This does complicate matters.). *Value Pharming* and *Independent Immunities* involved negotiation of the transaction with the new start-up – Pure Health - that intends to make and sell the purer form of the drug – Immuno-Pure. Value Pharming is intended to be simpler: primarily about terms for purchasing or leasing the Immuno-Pure IP. *Independent Immunities* is set up as more complex, setting out multiple issues for negotiation. (Note that Prof Dwight Golann and I have produced and directed a video of the *Independent Immunities* negotiation, available at adrvideos.org. Password is "adrteacher123".)

This simulation – *Pharma Feud* – takes place three years or so after the transaction is complete. Pure Health has been making and selling Immuno-Pure for a while and has developed improvements in the manufacturing process that reduce its costs. Pure Health has also developed a new anti-microbial product for coating medical instruments, etc.

The parties are now locked in two disputes, arising from different interpretations of language in their original agreement stating: "pharmaceutical process or product improvements would revert to Blue-Pharm for use in other pharmaceutical products." They disagree about (1) whether Blue-Pharm should be permitted to share improvements in the Immuno-Pure manufacturing process Pharmalux (now a competitor), and (2) whether Pure Health is obligated to share its new anti-microbial product developments with Blue-Pharm.

While the case looks like it's about IP, it really turns on contract interpretation. It's clear that Pure-Health was obligated to share Immuno-Pure manufacturing process improvements with the not-for-profit Blue Pharm for use in "other pharmaceutical products." And it did. However, Blue Pharm has stated its intention to provide these to Pharmalux – a competitor to Pure Health that is also part of Blue Pharm's not-for-profit joint venture. Pure Health is outraged, arguing that "other pharmaceutical products" does

NOT include the original Immuno-Plus, from which Immuno-Pure was derived. Other means other, not its sibling or Pharma family. Also referencing the contract language, Pure Health maintains that its anti-microbial coatings are not "pharmaceutical products". Thus, they have no obligation to provide these to Blue Pharm.

From the confidential information, we learn that Pure Health needs the revenues from both Immuno-Pure and the anti-microbial coatings. Immuno-Pure has not been as profitable as projected to date. (As a not-for-profit, set up in cooperation with Blue State, Blue Pharm would not want Pure Health to fail, and thus fail to provide Immuno-Pure to patients who need it. Indeed, that was the original purpose of the transaction.). We also learn that major improvements in Immuno-Pure manufacturing mean that it may soon compete with Immuno-Plus on price, to the detriment of Pharmalux's business. On the other hand, if Pharmalux gets access to these improvements, they could begin to "purify" Immuno-Plus, and drive Pure Health out of business. The other complexity is Blue Pharm's conflict of interest – or really, the conflict of interest for Pharmalux's members on Blue Pharm's board.

Whose contract interpretation would be found correct? What are the range of solutions? I leave this one to your students. I see some future non-compete provisions, perhaps, or agreements over product names? (It would be interesting to bring in attorneys from the pharmaceutical/IP world to discuss how it might be handled, what types of creative solutions would be realistic.)

With respect to the anti-microbial products, Blue Pharm's confidential information states that they have no plans to develop anti-microbials. Unless a pharma executive or lawyer corrects this assumption, I think Pure Health has the better argument on the contract language. Pure Health sees the anti-microbials as generating high future profits. Blue Pharm's concession on the anti-microbials would be worth a great deal to Pure Health. They may be willing to trade this for some flexibility on other terms.

I would welcome improvement to this teaching note by those who work with Pharma Feuds.