

A “Substantial Need” to Discover Settlement Documents?

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A team of attorneys from Davis Polk & Wardwell LLP presented the ABA's January Antritrust Update for In-House Counsel. The following article summarizes one of the recent developments discussed during the program.

As is likely familiar to readers of this newsletter, following the Supreme Court's 2012 decision in *Federal Trade Commission v. Actavis*, litigation challenging so-called reverse payment settlements as anticompetitive has focused on demonstrating that the “reverse” payments are “large and unjustified.”⁷ Plaintiffs have sought to find culpable explanations for such allegedly “large and unjustified” settlement payments in privileged or work product documents prepared during negotiation of the challenged settlement. Two recent decisions arising out of “reverse payment” litigation, *FTC v. Boehringer Ingelheim Pharmaceuticals* and *In re AndroGel Antitrust Litigation*, chart the limits of protections for settlement documents—and offer privilege and work product considerations for counsel negotiating settlements.

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