

FTC v. Actavis: Supreme Court Rejects Bright Line Tests for Reverse Payment Settlements; Complex Questions Remain in Structuring Pharmaceutical Patent Infringement Settlements

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On June 17, 2013, the Supreme Court decided a case of considerable importance to the pharmaceutical industry. The case involved the question of whether and to what extent “reverse payment” settlements – which have been a common method for resolving patent disputes between branded and generic pharmaceutical companies – will be found to violate the federal antitrust laws. The lower courts have been split on the issue of whether such settlements – in which the patent owner pays cash or other consideration to the alleged generic “infringer” to resolve the litigation – are unlawful. Several appellate courts have found that these settlements generally are permissible (with some exceptions), while one recently found that they generally are impermissible (with some exceptions). In a 5-3 decision, and as predicted by some observers, the Supreme Court decided to take a middle ground. It concluded that such settlements may violate the federal antitrust laws, but that a court will have to consider all of the relevant facts and circumstances in determining whether, on balance, the agreement is “reasonable.” *FTC v. Actavis*, Slip Op. No. 12-416 (S. Ct. June 17, 2013). Pharmaceutical companies that wish to include a reverse payment or other consideration to a generic as a component of settlements now will have to carefully consider how to do so under what the dissent termed “the unruly rule of reason.”

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