

Supreme Court Hears Oral Argument Involving “Reverse Payment” Patent Infringement Settlements

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After more than a decade of litigation in the lower courts, the Supreme Court yesterday heard oral argument in a case of considerable consequence to the pharmaceutical industry. The issue is under what circumstances a “reverse payment” settlement of patent infringement litigation violates the antitrust laws. In a so-called “reverse payment” settlement, the plaintiff brand-name manufacturer pays money or other consideration to the allegedly infringing generic firm, which then agrees not to enter the market for a period of years. In the case before the Court, the Federal Trade Commission (“FTC”) is challenging the Eleventh Circuit’s “scope of the patent” rule, which deems such agreements lawful – so long as they do not go beyond the temporal or the substantive limitations of the patent grant and the patent infringement suit is not a “sham.” In contrast, the FTC views what it calls “pay for delay” settlements as “presumptively unlawful” agreements not to compete. In the FTC’s view, the likelihood of consumer injury is so great that only a narrowly circumscribed “quick look,” rather than a full rule-of-reason analysis, is needed to determine if the agreement violates the antitrust laws. In practical terms, then, the FTC advocates a presumption that reverse payment agreements are unlawful, with relatively brief analysis into whether there are countervailing benefits – in effect, a rule close to per se illegality. The FTC’s view was recently adopted by the Third Circuit – creating, for the first time, a clear conflict in the circuits and thereby setting the stage for what all concerned hope will be a ruling from the Supreme Court that makes clear what constitutes a permissible settlement. To the extent that the justices’ questions at oral argument are a guide, neither side may get its way, and a fuller rule-of-reason analysis may be accorded reverse payment settlements going forward.

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