

# 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.”

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

**Arthur J. Burke**

+1 212 450 4352  
+1 650 752 2005  
arthur.burke@davispolk.com

**Arthur F. Golden**

+1 212 450 4388  
arthur.golden@davispolk.com

**Ronan P. Harty**

+1 212 450 4870  
ronan.harty@davispolk.com

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