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Just What on Earth Did Actavis Really Say? And Does It Mean Something for Section 1 More Broadly?

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It’s going to be a strict, nearly-per-se quick look rule, folks, in more or less every reverse-payment case likely to be brought from here on out. Dollars-to-donuts.

A few weeks have gone by, and quite a lot of folks are chewing over the entrails of *Federal Trade Commission v. Actavis, Inc*. The case may finally have ended the decades-long saga of the so-called “reverse payment” or “pay-for-delay” settlements, in which a branded incumbent drug maker pays a would-be generic entrant to stay out of its market and respect its patent. Unlike most lower courts to consider them, the five-Justice *Actavis* majority found these deals subject to Sherman Act challenge, under a standard that seems stricter than full-blown rule of reason. I, like most observers outside the industry, see that as good news and a long time coming.

There’s a bit of a puzzle, though. While Parts II-B and III of the brief majority opinion purportedly reject either a “presumption of illegality” or a quick look standard, they then lay out the elements of what looks like a special § 1 cause of action, which doesn’t look at all like a full rule of reason inquiry.

Superficially, that’s a thinker. The law prevailing before *Actavis* was a circuit split between a rule of the Federal, Second and Eleventh Circuits widely characterized as a rule of essentially per se legality, and the 2012 decision of the Third Circuit in *In re K–Dur Antitrust Litigation*, 686 F.3d 197 (C.A.3 2012), adopting a rule of presumptive *il*-legality. Defendants in *Actavis* favored per se legality, and the Federal Trade Commission favored a rule of presumptive illegality or quick look analysis, as did some of its *amici* (like the brief of my peeps at the American Antitrust Institute, which was cited by the Court and was exceptionally well done in large part because it was drafted by IP/antitrust heavy-weights Mike Carrier and Mark Lemley). So one might have thought the Court would pick either one or the other of those two options, or, rejecting them both, choose the familiar open-ended rule of reason. But it appears on first glance to have done something else.

Moreover, as if to remove all doubt, the Court last Monday vacated *K-Dur* and remanded for further consideration in light of *Actavis* (*see* 81 USLW 3090 and 81 USLW 3090). The Supremes seem eager to make clear that *K-Dur*’s “presumptive illegality” rule was *not* what they themselves had in mind.

So what in god’s name did they mean?

Well, while I don’t personally think there’s that much doubt, commenters are in dispute and most of them expect that there will be a lot of uncertainty. Some drug sector folks and their counsel are complaining that patent settlements will now be uncertain and dangerous to negotiate, and will risk very expensive and unpredictable legal challenge. At least on the defense side, the early consensus appears to be that *Actavis* states a pretty broad, open-ended rule of reason standard for all reverse payment deals (see, e.g., here), and plenty of people seem to think that "the way forward . . . is far from clear."

Me, I don't think so. Maybe I'm optimistic, but I just don't see a lot of mystery in this opinion. I think it states a stern quick look analysis, which as a practical matter will be the governing standard in most or all reverse payment cases likely to be brought, and I'll say in a second why I think Justice Breyer claimed otherwise.

First off, I doubt that just nothing was intended by the majority's conspicuous citation, at the very beginning of the opinion, to *Palmer v. BRG of Georgia*. *Palmer* strongly and tersely reaffirmed that horizontal agreements not to compete are per se illegal.

Later, and crucially, the Court began the substantive part of its opinion by rejecting the policy reasoning underlying the 11th Circuit's rule of per se legality. The 11th Circuit found the preference for settlements to outweigh the value of litigating antitrust claims, since so much time and money would be spent examining the issues of patent validity and infringement. What is so crucial is that the Supreme Court found reverse payment settlements, a "form of settlement [that] is unusual," to bear a "potential for genuine adverse effects on competition"—quoting that language from *Indiana Federation of Dentists*, perhaps *the* quintessential quick look opinion. The willingness to put aside expensive fact litigation, where there are facially apparent anticompetitive risks, has been the hallmark of the Court's quick look cases to date.

Shortly thereafter, the Court described the elements of the cause of action it foresaw in subsequent reverse payment cases. I think *Actavis* states a tidy, three-prong little cause of action, which looks like this:

Ÿ A settlement of litigation among horizontal competitors is a violation of Sherman Act § 1 if:

- it makes a payment that is "reverse"—which is to say, the *plaintiff,* who alleged that a competitor's conduct violated plaintiff's rights, pays the *defendant* to exit (again, the Court said, with not a little understatement, that such settlements are "unusual"); and

- the payment is "large," apparently in relation to the anticipated costs of litigation and the likelihood of plaintiff success on patent validity; and

- there are no offsetting justifications.

Two fairly remarkable features of this standard account for its looking like a quick look, in my mind. First, merely measuring the size of the payment can short-circuit essentially all of the expensive factual litigation that ordinarily makes rule of reason cases more or less per se legality cases. That a payment is "large" apparently can both prove market power—without any market definition—and resolve doubts as to patent validity without any litigation of the patent itself. Second, the Court's discussion of offsetting justifications makes one wonder whether a “large” payment could ever be legal. The Court suggested two possible justifications, and acknowledged that there might be others, but it seems virtually by definition that neither of the two identified could ever be shown where the payment is “large.” (Specifically, the Court thought a reverse payment could be justified if it were a reasonable estimate of the costs of avoided litigation or a reasonable consideration for services to be provided by the generic during the term of the settlement, like help with distribution or marketing of the branded drug.)

In any case likely to be brought against a reverse payment settlement, the defense is pretty surely going to flunk this test. Consider the *Actavis* case itself, which was not particularly unusual. In *Actavis*, the size of the reverse payment renders the defendants’ justifications of it palpably absurd. The branded-drug incumbent, defendant Solvay, contracted to pay a group of generics something on the order of $250-350 million over nine years. Solvay and the generics claimed the payment was consideration for services the generics would render, specifically to recommend the drug to doctors. If Solvay’s management agreed to pay $300 million for that service, they should be thrown in prison for criminal incompetence.

Likewise, the patents in these cases are ordinarily going to be quite weak as a matter of legal substance. As explained in the AAI brief generics in the large majority of cases challenge weak patents, and when infringement cases against them actually make it to trial, the generics succeed in a huge majority of them. That is really quite sensible: The generics are industry insiders. Their incentive to try to enter prior to patent expiration is highest where the claim of either patent validity or infringement is weak. That is so not only because the generic would likely win a patent infringement challenge, but because the incumbent would be most likely to cut a lucrative agreement not to compete, to preserve a valuable but legally vulnerable patent.

Again consider *Actavis.* The $300 million payment could not be justified on the likely strength of Solvay’s patent, because the drug in question, Androgel, was of pretty questionable innovativeness. Androgel is a topical ointment for administering synthetic testosterone through the skin; synthetic testosterone has been around since 1935 and gels that can be used to administer medicine through the skin have existed for decades.

Anyway, if a test like this isn’t a quick look standard, then I don’t know what is.

So why would the Court lay out what seems so clearly a quick look or a presumption of illegality, but then deny it had done so? I’ll take a guess, and state it in two words: Anthony Kennedy. Unable otherwise to secure Kennedy’s vote, I would like to believe, the Court punted. After all, it wrote at the end of its opinion that “[a]s in other areas of law, trial courts can structure antitrust litigation so as to avoid, on the one hand, the use of antitrust theories too abbreviated to permit proper analysis, and, on the other, consideration of every possible fact or theory irrespective of the minimal light it may shed on the basic question—that of the presence of significant unjustified anticompetitive consequences.” The Court therefore “le[ft] to the lower courts the structuring of the present rule-of-reason antitrust litigation.” So four Justices, who might well have preferred a clear rule of presumptive illegality, secured a majority by just not saying so out loud and leaving it to the lower courts to achieve the same practical result.

In one sense, I really don’t like this. This sort of thing continues and worsens a frustrating habit the Court has had at least since *California Dental*, of drawing unreasonable, unhelpfully fine distinctions among standards that will apply in different cases. And after *Actavis,* the idea that there is some discrete “quick look” rule that is identifiably different than other antitrust rules—a claim implicitly made in *Actavis* itself—is gobbledy-gook and doesn't mean anything.

But I don't care, I'll take it. I think as a practical matter this is a big win for pro-enforcement antitrust, according to rules that are simple (and therefore cheap to litigate) and that err on the side of enforcement.

The dissent, of course, predicts many, many horribles, and believes that oh my heavens to Betsy we've never said any such thing in our prior cases, and so on and so forth. One of the bottomest of bottom lines in antitrust is that everybody loves clear rules, and everybody hates clear rules. You love them when they go your way, and you hate them when they don't.

Anyway, I'm not the only one that thinks that *Actavis* states a strong presumption of illegality. Thomas Cotter of the University of Minnesota, who has written about these matters before, already has a very polished paper on the topic here.

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