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Supreme Court Rules that "Reverse Payment" Settlement Agreements are not Presumptively Unlawful but may be Challenged Under Antitrust Laws

June 18, 2013

On June 17, 2013, the Supreme Court issued its long-awaited ruling in *Federal Trade Commission v. Actavis, Inc. et. al*., No. 12-416. This case centered on the question of whether “reverse payment” settlement agreements unreasonably diminish competition in violation of the antitrust laws. In a 5-3 decision, the Court held that reverse payment settlement agreements are not presumptively unlawful, but they may be challenged as violating the antitrust laws.

In a typical reverse payment (or so-called 'pay-for-delay') settlement agreement, a generic drug company agrees to drop its challenge to a brand drug company’s patent and refrain from entering the market for a specified period of time in exchange for a payment by the brand drug company to the generic drug company.

A split among several circuits had developed with respect to the legality of these agreements. For example, the Third Circuit ruled in In *Re K-Dur Antitrust Litigation* that such “reverse payments” are prima facie evidence of an unreasonable restraint of trade. Previously, however, the Eleventh Circuit, in *Federal Trade Commission v. Watson Pharmaceuticals, et. al*., joined the Second Circuit and the Federal Circuit in ruling that such agreements are valid if they do not extend beyond the exclusionary scope of the patent. The Supreme Court’s decision now settles this split among the circuit courts.

The Court “decline[d] to hold that reverse payment settlement agreements are presumptively unlawful.” Rather, the Court stated that “Courts reviewing such agreements should proceed by applying the ‘rule of reason,' rather than under a ‘quick look' approach.” As a result, although these agreements do not presumptively violate the antitrust laws, they remain subject to antitrust challenge. Factors that may be considered in evaluating these agreements under the antitrust laws include payment size, anticipated litigation costs, services rendered as part of the agreement, and “lack of any other convincing justifications.”

The Court’s decision may embolden the FTC to increase its scrutiny, and corresponding challenges, to these types of agreements under the antitrust laws. Going forward, settlement agreements involving a “reverse payment” should be carefully structured to withstand such scrutiny. Looking backward, companies should consider evaluating any past agreements and assessing whether they present any issues under the Court’s ruling that would justify renegotiation of the agreement.