

E-ALERT | Antitrust

June 19, 2013

U.S. SUPREME COURT WEIGHS INTO THE DEBATE OVER ANTITRUST IMPLICATIONS OF SETTLEMENTS OF HATCH-WAXMAN ANDA PATENT LITIGATION

On Monday, June 17, the Supreme Court in *FTC v. Actavis, Inc.*, 570 U.S. __ (2013) (“*FTC Slip Op.*”), addressed whether “reverse payment” settlements of Hatch-Waxman ANDA patent litigation “unreasonably diminish competition in violation of the antitrust laws.” *FTC Slip Op.* at 1. In a 5-3 decision, the Court held that such settlements “can sometimes violate the antitrust laws” and therefore must be judged under a traditional rule-of-reason analysis. See *id.* at 2, 20-21 (“the FTC must prove its case as in other rule-of-reason cases”).

The Court rejected the “scope of the patent” test applied by the Eleventh Circuit below, as well as by the Second and Federal Circuits. That test held “reverse payment” settlements lawful unless (1) the settlement exceeded the exclusionary scope of the patent or (2) the patent at issue had been obtained by fraud on the PTO or the infringement lawsuit was objectively baseless. See, e.g., *FTC v. Watson Pharmaceuticals, Inc.*, 677 F.3d 1298 (11th Cir. 2012). The Court also rejected the Third Circuit’s “quick look” analysis, which required district courts to treat any “payment” from an innovator to a generic firm as “*prima facie* evidence of an unreasonable restraint of trade.” See *In re K-Dur Antitrust Litig.*, 686 F.3d 197, 218 (3rd Cir. 2012).

The Court did not decide whether the settlement in the case before it violated the antitrust laws. Instead, the Court largely left it to the district courts to determine the “structure” and application of the rule-of-reason analysis. *FTC Slip Op.* at 21. The Court offered the following guidance to the lower courts:

First, the Court identified a non-exclusive list of considerations that indicate “the likelihood of a reverse payment bringing about anticompetitive effects,” including the payment’s “size, its scale in relation to the payor’s anticipated future litigation costs, its independence from other services for which it might represent payment, and the lack of any other convincing justification.” *Id.* at 20.

Second, the Court stated that an “unexplained large reverse payment” could suggest an anticompetitive motive. *Id.* at 18-19. The Court did not indicate what may constitute a “large” payment; it did suggest that payments that are “no more than a rough approximation of the litigation expenses saved through the settlement” or that reflect “fair value” for “other services that the generic has promised to perform” would not raise the “concern that a patentee is using its monopoly profits to avoid the risk of patent invalidation or a finding of infringement.” *Id.* at 17.

Third, the Court observed that courts may be able to assess the reasonableness of a particular settlement “without litigating the validity of the patent,” but the Court also suggested that the strength of the patent may be a relevant consideration by stating that “the size of the unexplained reverse payment can provide a workable surrogate for a patent’s weakness. . . .” *Id.* at 19-20.

Chief Justice Roberts authored a dissent joined by two other justices endorsing the scope of the patent test.

If you have any questions concerning the material discussed in this client alert, please contact the Co-Chairs of Covington's antitrust group:

Thomas Barnett
Deborah Garza

+1.202.662.5407
+1.202.662.5146

tbarnett@cov.com
dgarza@cov.com

This information is not intended as legal advice. Readers should seek specific legal advice before acting with regard to the subjects mentioned herein.

Covington & Burling LLP, an international law firm, provides corporate, litigation and regulatory expertise to enable clients to achieve their goals. This communication is intended to bring relevant developments to our clients and other interested colleagues. Please send an email to unsubscribe@cov.com if you do not wish to receive future emails or electronic alerts.

© 2013 Covington & Burling LLP, 1201 Pennsylvania Avenue, NW, Washington, DC 20004-2401. All rights reserved.