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Bylined Article

How the Supreme Court's Reverse Payments Decision May Affect General Patent Litigation

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Last summer, the Supreme Court held that so-called "pay for delay" settlements of pharmaceutical patent litigation, in which the branded company pays the allegedly infringing generic firm to "delay" its entry into the market, are subject to scrutiny under the antitrust laws. These "reverse payments," in which the money flows from the patentee to the alleged infringer, might induce the generic firm to agree to abandon its challenge to the patent's validity and accept a license with a later entry date than it would have absent the payment.

The decision, *FTC v. Actavis,* leaves many questions unanswered, including what constitutes a payment and just how large it must be to trigger antitrust concerns. Lower courts are just beginning to tackle these issues in the context of pharmaceutical patent settlements. However, the decision also raises broader questions for settlement of patent litigation generally. Every settlement involves an exchange of consideration and an agreement to end the patent litigation. Can't it always be said that the consideration provided by the patent holder affects the defendant's decision to drop its invalidity claim? Unless the license is unlimited in scope, doesn't it always result in less competition than would have existed had the alleged infringer gone on to win the patent case? In short, does *Actavis* open settlements outside the pharmaceutical context to antitrust attack?

Before *Actavis*, it could safely be said that settlements and patent license agreements within the "scope of the patent"—those that constrain competition no more so than the patent does itself—were in most cases immune from scrutiny. A patent, after all, is a legally authorized monopoly for the duration of its term. A settlement granting the alleged infringer a license to make and sell a competing product before a patent's expiration has traditionally been viewed as procompetitive. Even settlements including licenses that would otherwise violate the antitrust laws, such as those that fix the price at which the licensee can sell, or the territory in which he can do business, were generally secure from antitrust liability.

But now, there is support for an argument that any settlement in which the patent holder gives something to the alleged infringer in exchange for its agreement to abandon its invalidity claim is subject to antitrust scrutiny. It is no longer safe to rely on the presumption, set forth in the Patent Act itself, that the patent is valid until proven otherwise. According to the Supreme Court, because we can never be sure that the patent is actually valid or not, we must turn to antitrust laws to determine whether the settlement, even if it gives the alleged infringer a license, unlawfully restrains competition.

Such an undertaking would seemingly invite examination of the value of the consideration. To be sure, the eyebrow-raising feature of reverse payment pharmaceutical settlements is the often significant amount of money paid by the branded firm to the generic—sometimes hundreds of millions of dollars. Any enterprising plaintiff's lawyer, however, could say that below-market royalty terms are no different. Might the alleged infringer have held out for an earlier license date if the patentee had demanded less by way of royalties? If so, doesn't the settlement harm competition?

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An even more troubling question is what role, if any, is played by the merits of the patent case. One concern arising from the existence of a payment is that it eliminates the possibility that the alleged infringer will succeed in invalidating the patent. In the court's view, a payment from the patentee to the alleged infringer is evidence of the patent's weakness—in other words, but for the payment, the alleged infringer would have won the patent case. Yet this doesn't guarantee that the patentee would be permitted to defend itself in an antitrust case by showing that it would have won. To the contrary, the court proclaims that "it is normally not necessary to litigate patent validity to answer the antitrust question." Rather, the focus seems to be on what the patentee thought about its chances of winning—an estimation that the Supreme Court says is revealed by the size of the payment itself. The presence of a "large and unjustified" payment (whatever that may mean) "would normally suggest that the patentee has serious doubts about the patent's survival."

To be sure, litigating the patent merits in a subsequent antitrust case is not a very attractive proposition; by settling the patent case, the parties will have settled nothing. But delving into what the parties thought about their chances of winning isn't any more appealing. The best evidence of that is likely contained in communications with their lawyers. *Actavis* thus instructs us to use the size of the payment as a proxy for the patent's weakness—the larger the payment, the weaker the patent.

As the dissent points out, every settlement removes the chance that a patent will be invalidated. If this is an antitrust problem, then it is not limited to pharmaceutical patent settlements that provide large payments to the alleged infringer. Settling any patent case by granting a license to the alleged infringer eliminates the possibility that the patentee will lose the case. Under the reasoning of *Actavis*, anything short of an immediate, wholly unrestricted royalty-free license signals calls for antitrust scrutiny.

Parties settling patent litigation with potential competitors would be wise to consider this when structuring settlement terms. It is no longer safe to assume that as long as the terms don't restrain competition any more than the patent does so itself, a settlement is immune from antitrust attack. In light of *Actavis*, one must consider whether the consideration given in exchange for settling could be viewed as payment for not competing. And given the court's focus on intent, parties should also be mindful of the possibility that documentation of their views about the merits of the case might be discoverable. Regulators and plaintiffs' lawyers are unlikely to view the reasoning of *Actavis* to be limited to pharmaceutical patent litigation settlements.

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