

went to great lengths to discuss the fact that any patent might or might not be valid. “A critical insight undergirding *Actavis* is that patents are in a sense probabilistic, rather than ironclad: they grant their holders a potential but not certain right to exclude.”⁶³ The court went on to explain that a patent is simply a legal conclusion reached by the Patent Office under time and resource pressure, which is why “Congress has elected not to make the issuance of a patent conclusive but, rather, subject to validation or invalidation in court proceedings.”⁶⁴ Thus, the California Supreme Court implemented a “structured rule of reason” test for scrutiny of reverse payment settlements, one falling somewhere between the notion that such settlements are per se illegal and the amorphous rule of reason.⁶⁵ The test focuses on whether the value of that reverse payment exceeded litigation costs combined with the value of any other services the generic might agree to provide to the brand – essentially, did the brand-name company pay the generic more than what they should have received for their legal costs and any contractual services it agreed to supply to the brand.⁶⁶ Critically, the court held that in presenting any procompetitive arguments in favor of a settlement, the brand-name company may not include arguments that the patent is actually valid or that the settlement allowed preexpiration entry.⁶⁷

Similarly, in the spring of 2015, Teva agreed to pay \$512 million to settle a class action brought by purchasers of the company’s drug Provigil, a widely used narcolepsy drug.⁶⁸ The lawsuit had accused Teva of paying four different generic competitors – who had all filed their generic applications for Provigil on the same day – more than \$300 million to stay out of the market for six years.⁶⁹ (Confusingly, Teva was one of those generic competitors before it acquired Cephalon, the original maker of Provigil.) The settlement was the largest ever for direct purchasers in a pay-for-delay case.

⁶³ *Ibid.* at 859.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.* at 865–67.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.* at 870–71.

⁶⁸ Kelly Knaub, *Teva to Pay \$512M to End Provigil Pay-for-Delay Dispute*, LAW360 (Apr. 20, 2015, 3:38 PM), www.law360.com/lifesciences/articles/645224/teva-to-pay-512m-to-end-provigil-pay-for-delay-dispute; Katie Thomas, *Teva to Pay \$512 Million to Settle Suit Over Delay of Sleep Disorder Drug*, N.Y. TIMES (Apr. 20, 2015), www.nytimes.com/2015/04/21/business/teva-to-pay-512-million-to-settle-suit-over-delay-of-sleep-disorder-drug.html?_r=0. The drug was originally sold by Cephalon, a company bought by Teva in 2011. Chris V. Nicholson, *Teva to Buy Cephalon for \$6.8 Billion*, N.Y. TIMES (May 2, 2011), http://dealbook.nytimes.com/2011/05/02/teva-to-buy-cephalon-for-6-8-billion/?_r=0.

⁶⁹ See Rebecca R. Ruiz & Katie Thomas, *Teva Settles Cephalon Generics Case with F.T.C. for \$1.2 Billion*, N.Y. TIMES (May 28, 2015), www.nytimes.com/2015/05/29/business/teva-cephalon-provigil-ftc-settlement.html; Matthew Bultman, *FTC Can Seek Disgorgement in Cephalon Suit, Judge Says*, LAW360 (Apr. 16, 2015, 1:48 PM), www.law360.com/articles/643622/ftc-can-seek-disgorgement-in-cephalon-suit-judge-says.