In a 5–3 decision with a majority opinion written by Justice Stephen Breyer, the Supreme Court reversed the Eleventh Circuit and ruled that the FTC's case against a brand-name firm should not have been dismissed, further adding that pay-for-delay settlements are open to antitrust scrutiny.[51] The Court declined to hold that reverse payment settlements are presumptively unlawful, however, preferring instead a rule of reason test to decide whether an antitrust violation has taken place.[52]

The rule of reason is a laborious standard that has been described by courts and commentators as difficult to meet and burdensome on both plaintiffs and the judicial system.[53] The classic description of the rule of reason can be found in the seminal antitrust treatise by the late Philip Areeda.[54] The plaintiff has the initial burden of establishing that the behavior restrains competition in a properly defined market, which includes delineating the relevant product and geographic markets. If the plaintiff meets this initial burden, the burden shifts to the defendant to show that its behavior serves legitimate objectives. If the defendant meets this burden, the plaintiff must then establish that the defendant could meet its objective using a less restrictive alternative. Deep breath – if the matter is *still* unresolved at this point, the court must weigh the harms and benefits of the restraint with the plaintiff shouldering the burden at this stage to show that the restraint is unreasonable on balance. Fun, right?

Together, the test involves complex economic analysis, requires extensive information about industries that may be difficult to obtain, and follows an amorphous set of standards that are difficult to pin down and establish. Thus, plaintiffs in an antitrust case try to avoid the rule of reason by framing the case to fit into one of a limited number of per se categories – categories of activities that are presumed to be illegal, such as price fixing or territorial allocation of sales territories.[55]

[51] *Actavis, Inc.*, 133 S. Ct. at 2237. Justice Alito recused himself from the case.

[52] *Ibid*.

[53] *See* Robin Feldman, *Defensive Leveraging in Antitrust*, for a discussion of the rule of reason and the extensive criticism of it. 87 Geo. LJ. 2079, 2107–08 (1999) (citing the following sources: *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 34 (1984) (O'Connor, J., concurring) (comparing the rule of reason to the odd form of per se rule applied in tying cases and describing both as requiring extensive and time-consuming economic analysis); *Continental T.V., Inc. v. GTE Sylvania*, 433 U.S. 36, 50 (1977) (describing rule of reason as complex and burdensome on litigants and the judicial system); *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958) (noting that rule of reason analysis requires complicated and prolonged economic investigation into the entire history of an industry and related industries); Robert Pitofsky, *Antitrust in the Next 100 Years*, 75 Calif. L. Rev. 817, 830, 830 n.42 (1987) (explaining that the court refused to apply rule of reason given the practical difficulties of the minute inquiry required into economic organization)).

[54] *See* 7 Philip E. Areeda, Antitrust Law § 1502, at 371–72 (1986).

[55] *United States Attorneys' Manual*, *Antitrust Resource Manual* U.S. Dep't of Justice 8 (1997), www.justice.gov/usam/antitrust-resource-manual-8-identifying-sherman-act-violations.