position in the market, the antitrust laws place limits on what one can do with that monopoly power.[37] In this context, the Supreme Court uses a variety of standard antitrust measures when judging whether a patent holder's behavior violates antitrust law.[38]

Many traditional antitrust questions are raised by pay-for-delay settlements, starting with their potential negative effects on consumers.[39] With timing set aside, in the abstract the agreements also function to allocate a market, by maintaining the brand-name drug's monopoly, and to fix prices, by essentially agreeing to let the pharma patent holder continue to charge supracompetitive prices.[40] Hemphill has referred to this as the "consumer-disregarding" effects of these settlements,[41] and similar consequences in other contexts tend to invite Sherman Act antitrust scrutiny regardless of the circumstances. These settlements are especially troubling in the context of Hatch-Waxman, which was specifically designed as a procompetitive catalyst for generic drug development and marketing. Settlements undermine Hatch-Waxman's intent to move patent bargaining into the open and therefore speed along the introductionof some generic drugs in cases of patent invalidity.[42] One should note that cases attempting to attack drug company settlements as anticompetitive are not cases pitting the generic against the brand-name company – the generic also benefits from these agreements! The generic versus brand battles are limited to the initial patent infringement cases that end up being settled. Instead, the plaintiffs are generally government agencies such as the FTC or New York attorney general, or purchasers of the drug, such as insurers, who argue that the settlement led to inappropriately higher prices and caused harm to businesses and consumers. In fact, in the following case, Actavis was the generic that entered into the pay-for-delay agreement!

After years of FTC complaints and studies, and cases that bounced around lower courts, the Supreme Court finally weighed in with its 2013 decision in *FTC v. Actavis*. The case involved a pay-for-delay settlement with the agreed-upon generic entry date occurring prior to the patent's expiration date.[43] The parties were Solvay (now

[37] *See generally Kimble v. Marvel Enters.* 135 S. Ct. 2401 (2015) (deciding that agreements to pay royalties on sales after the expiration of a patent are illegal). For information on limitations on monopoly power legitimately gained, see generally Robin Feldman, *Patent and Antitrust: Differing Shades of Meaning*, 13 Va. J.L. & Tech. 5 (2008).

[38] *Federal Trade Commission v. Actavis, Inc. et al.*, 133 S. Ct. 2223, 2231 (2013).

[39] Hemphill, *Aggregate Approach to Antitrust*, *supra* note 1, at 636.

[40] Robin Feldman, Rethinking Patent Law 162 (2012); *Federal Trade Commission v. Actavis, Inc. et al.*, 133 S. Ct. 2223, 2232 (2013), citing *United States v. Line Material Co.*, 333 U.S. 287, 312 (1948) ("As the Sherman Act prohibits agreements to fix prices, any arrangement between patentees runs afoul of that prohibition and is outside the patent monopoly").

[41] Hemphill, *Aggregate Approach to Antitrust*, *supra* note 1, at 636.

[42] Robin Feldman, Rethinking Patent Law 164 (2012).

[43] It is worth noting that the settlement in *Actavis* was not a pure cash payment. Along with a payment from Solvay to Actavis of approximately $19 million to $30 million per year for nine years, Actavis