

Although the rule of reason test traditionally has been the death knell for antitrust cases, the *Actavis* ruling actually improved the state of the field. In the decision, the Supreme Court opened the door to serious antitrust consideration by suggesting that lower courts “structure” the rule of reason in these cases.<sup>56</sup> Most important, the Court concluded that “a reverse payment, where large and unjustified, can bring with it the risk of significant anticompetitive effects,” rebuking the Eleventh Circuit “scope of the patent” argument and giving credibility to the arguments that had long been made by academics and the FTC.<sup>57</sup>

In the aftermath of *Actavis*, courts and parties have taken the Supreme Court’s message to heart, at least when it comes to pay-for-delay settlements that are entirely in cash.<sup>58</sup> In the FTC’s report on agreements between brand-name and generic companies in fiscal year 2014 – the first full year after *Actavis* – the FTC found that the number of suspected pay-for-delay settlements dropped to 21, compared to 29 in fiscal year 2013 and the record-high of 40 in 2012.<sup>59</sup>

Pay-for-delay agreements are also under fire outside the United States. In early 2016, the United Kingdom’s Competition and Markets Authority announced total fines of £45 million against pharmaceutical companies engaging in pay-for-delay settlements.<sup>60</sup> Between 2001 and 2004, a brand-name company had paid generics £50 million to delay entry of a popular antidepressant into the UK market.<sup>61</sup>

Looking again at the United States, two cases, in particular, signal the beginning of the end for traditional delay games, leaving no doubt that the guidance in *Actavis* is being used to scrutinize these settlements heavily. In the case of *In re Cipro*, the California Supreme Court applied *Actavis* to California’s own antitrust law, which follows certain aspects of federal law.<sup>62</sup> The case concerned a pay-for-delay settlement regarding Bayer’s popular antibiotic Cipro. In rendering its opinion, the court

<sup>56</sup> For analysis of the *Actavis* case, see generally Aaron Edlin et al., *Activating Actavis*, 28 ANTITRUST 16 (2013); Feldman, *Ending Patent Exceptionalism and Structuring the Rule of Reason*, *supra* note 34; Michael A. Carrier, *Payment After Actavis*, 100 IOWA L. REV. 7 (2014).

<sup>57</sup> *Actavis, Inc.*, 133 S. Ct. at 2237.

<sup>58</sup> For further analysis of how courts have treated the *Actavis* decision, see generally Michele M. Kang, *ANDA Reverse Payments and the Post-Actavis Landscape*, 8 HASTINGS SCI. & TECH. L.J. 73 (2016).

<sup>59</sup> *See Agreements Filed with the Fed. Trade Commission under the Medicare Prescription Drug, Improvement, and Modernization Act of 2003: Overview of Agreements Filed in FY 2014*, BUREAU OF COMPETITION, FED. TRADE COMM’N at 4 exhibit 1, [www.ftc.gov/system/files/documents/reports/agreements-filled-federal-trade-commission-under-medicare-prescription-drug-improvement/16013mmf14rpt.pdf](http://www.ftc.gov/system/files/documents/reports/agreements-filled-federal-trade-commission-under-medicare-prescription-drug-improvement/16013mmf14rpt.pdf). Note that under the FTC’s definition of a pay-for-delay agreement, some of these agreements include side deals and “no-AG” clauses that will be discussed in Chapter 2.

<sup>60</sup> Press Release, U.K. Competition & Mkts. Auth., CMA Fines Pharma Companies £45 Million (Feb. 12, 2016), [www.gov.uk/government/news/cma-fines-pharma-companies-45-million](http://www.gov.uk/government/news/cma-fines-pharma-companies-45-million).

<sup>61</sup> The settlements included cash payments as well as supply and distribution agreements. See Jeff Overly, *GSK Fined \$54M Over UK ‘Pay-for-Delay’ Deals*, LAW360 (Feb. 12, 2016, 11:03 AM), [www.law360.com/ip/articles/758706](http://www.law360.com/ip/articles/758706).

<sup>62</sup> *See generally In re Cipro Cases I & II*, 348 P.3d 845 (Cal. 2015).