included delay.[12] However, Ranbaxy *did not even produce* the active ingredient and was instead sourcing it from a third-party manufacturer.[13] The brand-name company was essentially agreeing to pay higher prices by allowing the generic company to stand in as the middleman. According to the FTC, a senior manager at the brand-name company called the supply deals – which were struck with multiple generics – a "supply chain disaster."[14]

Thus, the side deals are hollow promises that may or may not ever be fulfilled. Rather, they may function purely as a façade for the pay-for-delay that lies beneath the language of the settlement. Teasing out these pay-for-delay deals, however, can be quite difficult.

Back to K-Dur – how was the story resolved? In the case of *In re K-Dur*, a case brought by drug purchasers and decided 15 years after the initial settlement, the Court of Appeals for the Third Circuit found that the Schering and Upsher licensing agreement was a "reverse payment" for generic delay, despite the fact that the cash payment was supposedly for the licenses. The circuit court ruled that a "quick look rule of reason" test, "based on the economic realities of the reverse payment settlement rather than the labels applied by the settling parties," should be applied to these settlements.[15]

It is interesting to note that the *very first instance* of a Generation 2.0 settlement facing a major court challenge led to a ruling that reverse payments could encompass more than direct cash payments. Why did the story not end there for Generation 2.0? In fact, rather than being a seminal case applying suspicion to side deal settlements, *In re K-Dur* is mostly notable for its role in advancing jurisprudence in reverse payment settlements in general. The Third Circuit's test stood in contrast to the Eleventh Circuit's decision in the *Actavis* line of cases in the same year.[16] These developments created a circuit split encouraging Supreme Court review, which concluded with the SCOTUS decision in *FTC v. Actavis*. As described in Chapter 1, the *Actavis* decision rejected the approach taken by the Eleventh Circuit, but was not as clear as the Third Circuit in delineating what kinds of reverse payments might meet its criteria for scrutiny.

[12] *See* Complaint for Injunctive Relief at paras. 64–68, *FTC v. Cephalon, Inc.* (settlement approved E.D. Pa. June 17, 2015) (No. 2:08-cv-2141), complaint filed D.D.C. Feb. 13, 2008, www.ftc.gov/sites/default/files/documents/cases/2008/02/080213complaint.pdf.

[13] *Ibid.* at para. 68; *see also* Hemphill, *Aggregate Approach to Antitrust*, *supra* note 1, at 668 n. 165.

[14] Complaint for Injunctive Relief, *supra* note 12, at para. 57.

[15] *In re K-Dur Antitrust Litigation*, 686 F.3d 197, 218 (3rd Cir. 2012).

[16] Years earlier, the Eleventh Circuit, in a case brought by the FTC rather than by private plaintiffs against K-Dur, had rejected the argument that the K-Dur deal was anticompetitive, using a line of reasoning similar to what the Eleventh Circuit would later apply in *Actavis*. *Schering-Plough Corp.*, 402 F.3d.