

DEACTIVATING *ACTAVIS*:  
THE CLASH BETWEEN THE SUPREME COURT  
AND (SOME) LOWER COURTS

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ABSTRACT

Numerous trial courts have misinterpreted the Supreme Court's recent decision in *FTC v. Actavis, Inc.* An interesting question is why they have done so. Perhaps lower courts disagree with the Supreme Court about so-called "reverse payment" cases, the subject of the *Actavis* opinion. Or perhaps they simply have made random mistakes, as is perhaps inevitable, particularly in a challenging area of the law like antitrust. This Article suggests an alternative account: that lower courts are seeking clear guidance from *Actavis*, clear guidance that the Supreme Court has not tended to provide in antitrust cases in general and that it did not provide in *Actavis* in particular. This Article attempts to correct the ensuing confusion, and concludes with a modest suggestion about how the Supreme Court could minimize these sorts of difficulties in the future.

"I need four walls around me to hold my life, to keep me from going astray . . . ." -James Taylor, *Bartender's Blues*

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## I. ILLUSORY PRISON BARS

Judge Smith's opinion in *In re Loestrin 24 Fe Antitrust Litigation*<sup>1</sup> appears at first to be arresting but not novel. The district court faced the challenge of applying the U.S. Supreme Court's recent decision in *FTC v. Actavis, Inc.*<sup>2</sup> *Actavis* held that so-called "reverse payments" are subject to judicial scrutiny under federal antitrust law. In deciding whether that holding extended to non-cash payments, Judge Smith believed he had to make a difficult but familiar choice: between doing justice and maintaining fidelity to the law. To understand his dilemma, some background is necessary.

Before *Actavis*, some lower courts had held that "reverse payments" were for all practical purposes automatically legal.<sup>3</sup> That was a troubling result. A "reverse payment" usually involves a brand-name drug manufacturer resolving its patent dispute with a generic drug manufacturer by giving substantial compensation to the generic drug manufacturer to stay off of the market.<sup>4</sup> The adjective "reverse" applies because the brand manufacturer accuses the generic of past or incipient infringement but ultimately forgoes damages and instead provides great value to the alleged infringer.<sup>5</sup> The brand manufacturer may receive in exchange later market entry of the generic drug than would occur without the "reverse payment." The risk of the brand and generic drug manufacturers enriching themselves at the expense of consumers and competition is obvious and great, as the Supreme Court recognized in

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1. No. 1:13-md-2472, 2014 U.S. Dist. LEXIS 123322 (D.R.I. Sept. 4, 2014).

2. 133 S. Ct. 2223 (2013). For a recent analysis of *Actavis*, including a reply to critics of the decision, see Aaron Edlin, Scott Hemphill, Herbert Hovenkamp & Carl Shapiro, *The Actavis Inference: Theory and Practice*, 67 RUTGERS U. L. REV. 585 (2015).

3. See, e.g., *FTC v. Watson Pharms.*, 677 F.3d 1298, 1312–13 (11th Cir. 2012) (applying the "scope-of-the-patent" test, which immunizes settlements from antitrust scrutiny so long as the anticompetitive effects of the settlement fall within the scope of the patent's exclusionary potential, except under the unusual circumstances of fraud on the Patent and Trademark Office or sham litigation), *rev'd*, *Actavis*, 133 S. Ct. 2223 (2013); *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 544 F.3d 1323, 1336 (Fed. Cir. 2008) (same); *In re Tamoxifen Citrate Antitrust Litig.*, 466 F.3d 187, 212–13 (2d Cir. 2006) (same).

4. *Actavis*, 133 S. Ct. at 2227.

5. The "reverse payment" as a "form of settlement is unusual." *Id.* at 2231. Indeed, it appears unique to Hatch-Waxman litigation. See *id.* at 2227 ("[M]ost if not all reverse payment settlement agreements arise in the context of pharmaceutical drug regulation[.]"); *id.* at 2235 ("[S]cholars in the field tell us that 'where only one party owns a patent, it is virtually unheard of outside of pharmaceuticals for that party to pay an accused infringer to settle the lawsuit.'" (quoting 1 H. HOVENKAMP, K. JANIS, M. LEMLEY & C. LESLIE, IP AND ANTITRUST § 15.3, at 15–45 n.161 (2d ed. Supp. 2011)). But see *Actavis*, 133 S. Ct. at 2242–43 (Roberts, C.J., dissenting) (questioning accuracy and importance of majority's characterization).

*Actavis*.<sup>6</sup> The drug manufacturers could in effect use patent rights, however weak, as the pretext for an agreement between horizontal competitors not to compete, the *bête noir* of antitrust law.<sup>7</sup>

What is striking in *Loestrin* is the dilemma that Judge Smith appeared to believe he faced. He had to decide whether the ruling in *Actavis* applies only to cash payments or whether it also applies to non-cash payments. On one hand, he seemed to recognize that if the holding applies only to cash, it contains an exception that swallows the rule.<sup>8</sup> It is much too easy for a brand drug manufacturer to provide non-cash compensation to a generic drug manufacturer—for example, free product or various forms of intellectual property or other rights<sup>9</sup>—rather than cash. So limiting *Actavis* to cash could render it a dead letter. Indeed, as Judge Smith noted, there is no meaningful distinction between the effect of a cash payment and a non-cash payment, and more and more “reverse payments” are taking a non-cash form.<sup>10</sup> On the other hand, Judge Smith seemed to think formal legal analysis obligated him to conclude that the holding of *Actavis* extended only to cash.<sup>11</sup> He felt caught, then, between what justice demands and what the law requires.

Of course, this situation is not new. Nor is it the most notable context in which the dilemma arises. To be sure, billions of dollars are at stake in reverse payment cases, as are significant effects on the public health. The Federal Trade Commission has estimated that “reverse payments” will cost drug purchasers \$3.5 billion per year for the next ten years.<sup>12</sup> In an

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6. *Actavis*, 133 S. Ct. at 2234–35.

7. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984) (“Certain agreements, such as horizontal price fixing and market allocation, are thought so inherently anticompetitive that each is illegal *per se* without inquiry into the harm it has actually caused.”).

8. *Loestrin*, 2014 U.S. Dist. LEXIS 123322, at \*37–39.

9. *See, e.g.*, *United Food & Comm. Workers Local 1776 & Participating Emp’rs Health & Welfare Fund v. Teikoku Pharm. USA*, No. 14-md-2521, 2014 U.S. Dist. LEXIS 161069, at \*57 (N.D. Cal. Nov. 17, 2014) (supplying free product); *see also In re Effexor XR Antitrust Litig.*, No. 11-cv-5479, 2014 U.S. Dist. LEXIS 142206, at \*35–36 (D.N.J. Oct. 6, 2014) (agreeing not to launch an authorized generic during generic manufacturer’s 180-day exclusivity period).

10. *Loestrin*, 2014 U.S. Dist. LEXIS 123322, at \*37–38 (quoting Michael A. Carrier, *Solving the Drug Settlement Problem: The Legislative Approach*, 41 RUTGERS L.J. 83, 93 (2009)).

11. *Id.* at \*35 (“The Court reaches this conclusion because . . . it is dictated by the language and meaning of *Actavis* and considerations of public policy, but does so not without significant reservations.”).

12. FTC, PAY-FOR-DELAY: HOW DRUG COMPANY PAY-OFFS COST CONSUMERS BILLIONS 2 (2010), available at <http://www.ftc.gov/sites/default/files/documents/reports/pay-delay-how-drug-company-pay-offs-cost-consumers-billions-federal-trade-commission-staff-study/100112payfordelayrpt.pdf>.

age of low-income people skimping on their medication to make ends meet, the resulting harm to their health is significant and disturbing. But history contains far more compelling examples of the law clashing with justice. Consider Robert Cover's famous discussion of judges in "free states" enforcing the Fugitive Slave Act.<sup>13</sup> Or reflect on the debates about the role of judges in Nazi Germany.<sup>14</sup> In contrast, an ineffective antitrust rule hardly seems either tragedy or travesty.

But what is distinctive about *Loestrin*—and similar lower court opinions that interpret *Actavis* restrictively—is that they are remarkably unpersuasive as a matter of positive law. Their reasoning is strained. They ignore authoritative sources of law and longstanding antitrust doctrines. This is true not only of whether *Actavis* requires cash payments—as addressed in *Loestrin*—but also of the structure of the antitrust analysis under *Actavis*. A careful examination suggests that *Loestrin* and similar decisions in fact buck the holding of the Supreme Court in *Actavis*, not that they helplessly abide by it. How then can we make sense of Judge Smith's *cri de couer*? Why would a judge do what he thinks produces rank justice when the law permits him—indeed, properly understood, requires him—to rule justly?

One possibility is ideological opposition to *Actavis*. Maybe lower courts disagree with vigorous enforcement of the antitrust laws. But that interpretation seems ungenerous. It also is hard to reconcile with Judge Smith's opinion in *Loestrin*. His frank acknowledgment of the policy concerns with his own ruling and his stated rationale would have to be stunningly cynical if he really meant to defy the Supreme Court.<sup>15</sup>

Another possibility is judicial error. Antitrust law is notoriously tricky to interpret.<sup>16</sup> Its intermingling of traditional legal doctrine and economic principle is foreign to many judges.<sup>17</sup> Perhaps lower courts interpreting *Actavis* simply make random mistakes—unpredictable if understandable deviations from the underlying reasoning of the decision.

Perhaps. But there does seem to be an organizing principle at work, one that ties together various ways in which some lower courts have misread *Actavis*. The principle relates to the explanation above—that many federal judges are uncomfortable with the internal logic (or at least

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13. ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 212 (1975).

14. Compare H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958), with Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

15. See *Loestrin*, 2014 U.S. Dist. LEXIS 123322, at \*35.

16. Richard J. Pierce, Jr., *Is Post-Chicago Economics Ready for the Courtroom? A Response to Professor Brennan*, 69 GEO. WASH. L. REV. 1103, 1111–12 (2001).

17. *Id.* at 1105–06, 1109.

rationality) of federal antitrust law. Notably, this explanation involves defiance, not compliance with positive law.<sup>18</sup>

Here is the hypothesis. Some trial courts are waging a quiet rebellion about the shape of antitrust doctrine. More specifically, some trial courts want relatively mechanical, formalistic rules that are easy to apply. Indeed, they insist on them, if not necessarily consciously. The Court, however, has resisted such mechanical rules. It has made clear that antitrust doctrine privileges substance over form and flexibility over predictability. Lower courts like the one in *Loestrin* can be understood as finding in Supreme Court decisions the easily applied rules that they crave but that are not there. They may be like an airplane pilot suffering from spatial disorientation<sup>19</sup> because of poor visibility, her mind creating the illusions that her eyes desperately seek. Perhaps judges, like pilots, perceive what they want to see—at times with disastrous effects—when deprived of the guidance to which they are generally accustomed.

This point may apply to antitrust doctrine generally. But in particular it has manifested in the “reverse payment” context in various ways. Together these manifestations offer a map of common errors courts have made in applying *Actavis*. First, as in *Loestrin*, some lower courts have erroneously held that *Actavis* applies only to cash payments.<sup>20</sup> Second, some lower courts have interpreted the *justifications* the Supreme Court offered for its holding in *Actavis* as if they formed part or all of a *legal standard* it imposed for “reverse payments.”<sup>21</sup> Third, some courts have applied the rule-of-reason analysis in a rigid way, ignoring significant constraints and unusual possibilities *Actavis* created for how it should be conducted.<sup>22</sup> Fourth, and more basically, many lower courts have refused to take seriously the Supreme Court’s repeated admonition—confirmed in *Actavis*—that the relevant antitrust standards

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18. It is also possible that lower courts have such an ingrained disposition in favor of settlement that they resist application of *Actavis* in a way that renders some settlements illegal. As discussed below, that would be directly contrary to recognition by the Supreme Court that cases can settle even without reverse payments. *FTC v. Actavis, Inc.*, 133 S. Ct. 2223, 2237 (2013).

19. Spatial disorientation is “the inability of a person to determine his true body position, motion, and altitude relative to the earth or his surroundings. Both airplane pilots and underwater divers encounter the phenomenon.” See *Spatial Disorientation*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/558427/spatial-disorientation>.

20. See *Loestrin*, 2014 U.S. Dist. LEXIS 123322, at \*34; *In re Lamictal Direct Purchaser Antitrust Litig.*, 18 F. Supp. 3d 560, 567–69 (D.N.J. 2014).

21. See, e.g., *Loestrin*, 2014 U.S. Dist. LEXIS 123322, at \*28–29; *Lamictal*, 18 F. Supp. 3d at 564–66.

22. *Lamictal*, 18 F. Supp. 3d at 570; *In re Effexor XR Antitrust Litig.*, No. 11-cv-5479, 2014 U.S. Dist. LEXIS 142206, at \*76–78 (D.N.J. Oct. 6, 2014).

should be understood as lying on a continuum from strict to forgiving rather than as discrete tests to apply in particular categories of cases.<sup>23</sup>

All of these errors appear to derive from a single source: an effort by lower courts to find a set of tools to decide “reverse payment” cases in a relatively mechanical manner, a set of tools that the Supreme Court has resisted providing. The Supreme Court simply did not write *Actavis* in a way to make management of a “reverse payment” case completely straightforward. It asked lower courts to take into account certain economic realities. Some lower courts seem resistant to that task.

Perhaps there is not much to be done about this conflict. Lower courts may simply have to soldier on as best they can. They may have no practical alternative, unless they flout the law. After all, the Supreme Court is authoritative.<sup>24</sup>

But there may be a lesson for the Supreme Court as well. It could better take into account the institutional needs and limitations of lower courts in establishing legal standards. If lower courts have difficulty applying some of the Supreme Court’s rulings—and if they prove unable or unwilling to follow others—the Court might respond by attempting to craft standards that suit them. It is true that the Justices have other concerns—garnering a majority for a particular position, hedging against sweeping statements that may produce unintended consequences, and the like.<sup>25</sup> The Court, however, intervenes so rarely in any area of the law. To do so in a way that conflicts with the decision-making tendencies of lower courts can generate lasting uncertainty and confusion. In other words, perhaps—dare it be said?—the Supreme Court could be a bit more practical.

Part II explains four ways in which some lower courts have misinterpreted *Actavis*. It contends that a unifying theme is that those courts appear to be seeking decision-making rules that are more mechanical than the ones the Court provided.

Part III concludes by discussing some of the ways to reconcile the apparent tension between the Supreme Court and some lower courts. One obvious possibility is that the lower courts follow more carefully the decisions of the Supreme Court—including *Actavis*—even if the resulting decision-making process is uncomfortable. Another possibility—not

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23. See, e.g., *Lamictal*, 18 F. Supp. 3d at 564–65, 570 (suggesting the ordinary rule of reason applies).

24. As Justice Robert Jackson famously said of the Supreme Court: “We are not final because we are infallible but we are infallible only because we are final.” *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

25. See, e.g., Mark Tushnet, *Themes in Warren Court Biographies*, 70 N.Y.U. L. REV. 748, 763–66 (1995) (describing Justice Brennan’s “rule of five”).

mutually exclusive with the first—is that the Supreme Court could place a greater priority on formulating legal standards that the lower courts find congenial and workable.

## II. THE REASON FOR LOWER COURT RESISTANCE TO ACTAVIS

### A. *The Court's Reasoning in Actavis*

In *Actavis*, the Supreme Court addressed an issue that had been percolating for some time in the lower courts: the standard for assessing the legality of “reverse payments.” On one hand, reverse payments arguably constitute an agreement between horizontal competitors not to compete. They might therefore be treated as *per se* illegal<sup>26</sup> or presumptively unlawful,<sup>27</sup> as some courts had ruled. On the other hand, they arguably fall within the potential patent rights of the brand-name drug manufacturer and facilitate settlement of litigation, so they might be virtually always legal, as other courts had ruled.<sup>28</sup> The Supreme Court steered a middle course, holding that reverse payments can violate federal antitrust law and then identifying procompetitive justifications that can—and cannot—render them legal.

In reaching this conclusion, the Court began by rejecting the formalistic argument that virtually any settlement within a patentee’s alleged patent rights is legal.<sup>29</sup> It turned instead to a substantive evaluation of the policies behind the patent and antitrust laws.<sup>30</sup> This point is crucial. The Court refused to elevate form over substance—as the dissent preferred—and instead focused on the underlying economics. Using that approach, it concluded that both the relevant patent law<sup>31</sup> and antitrust law<sup>32</sup> support an inquiry into the procompetitive and anticompetitive effects of a reverse payment. After all, if the patentee confers substantial compensation to the alleged infringer, that can

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26. See, e.g., *In re Cardizem CD Antitrust Litig.*, 332 F.3d 896, 907 (6th Cir. 2003) (agreement effecting delay in generic entry *per se* illegal).

27. See, e.g., *In re K-Dur Antitrust Litig.*, 686 F.3d 197, 218 (3d Cir. 2012) (holding reverse payments presumptively unlawful and subject to “quick-look” approach), *vacated*, *Upsher-Smith Labs., Inc. v. La. Wholesale Drug Co.*, 133 S. Ct. 2849 (2013).

28. See, e.g., *FTC v. Watson Pharms.*, 677 F.3d 1298, 1312 (11th Cir. 2012), *rev'd*, *FTC v. Actavis, Inc.*, 133 S. Ct. 2223 (2013); *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 544 F.3d 1323, 1336 (Fed. Cir. 2008); *In re Tamoxifen Citrate Antitrust Litig.*, 466 F.3d 187, 212–13 (2d Cir. 2006).

29. *Actavis*, 133 S. Ct. at 2230–31.

30. *Id.* at 2231, 2233–34.

31. *Id.* at 2234.

32. *Id.* at 2231–33.

“provide strong evidence that the patentee seeks to induce the generic challenger to abandon its claim with a share of its monopoly profits that would otherwise be lost in the competitive market.”<sup>33</sup> In other words, the reverse payment can eliminate competition that would result if the parties were forced to litigate the patent dispute to a conclusion or if they were to settle without a reverse payment, based on the strength of the patent claim. In these circumstances, as the Court put it, “The patentee and the challenger gain; the consumer loses.”<sup>34</sup>

Note, in this light, the Court’s central line of reasoning. Its focus was on the risk that drug companies would resolve a patent dispute in a way to delay competition, maintain inflated prices, and share monopoly profits. Delaying generic entry in return for a large payment from the brand-name drug manufacturer can be a way to achieve that end. If it is in a particular case—if the effect of a reverse payment is to delay competition as compared to a settlement without a reverse payment—courts should condemn it under the antitrust laws, notwithstanding the asserted patent rights of the brand manufacturer. In other words, no formal approach to the problem would cause the Court to ignore the underlying economics. Instead, the Court would proceed “by considering traditional antitrust factors such as likely anticompetitive effects, redeeming virtues, market power, and potentially offsetting legal considerations present in the circumstances.”<sup>35</sup>

Along this line of reasoning, the Court identified five reasons reverse payments should not be, in effect, *per se* legal. The first is set forth above: they have “the ‘potential for genuine adverse effects on competition.’”<sup>36</sup> Second, the Court reasoned that the anticompetitive effects of reverse payments will not always be offset by countervailing procompetitive effects. The Court offered two examples—and only two examples—of potential procompetitive effects. The first is that the payments might be no greater than the litigation costs that the patentee would save by settling.<sup>37</sup> The second is that the patentee might make the reverse payment for other services the alleged infringer has agreed to perform,

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33. *Id.* at 2235.

34. *Id.*

35. *Actavis*, 133 S. Ct. at 2231.

36. *Id.* at 2234 (quoting *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 460–61 (1986)).

37. *Id.* at 2236. Note the questionable reasoning here. It assumes that the patentee is willing to pay to avoid the costs of litigation but the challenger is not. There is little reason to think that is so. Proof would seem to be required that brand drug manufacturers are likely to be more averse to risk than generic drug manufacturers. See Joshua P. Davis, *Applying Litigation Economics to Patent Settlements: Why Reverse Payments Should Be Per Se Illegal*, 41 RUTGERS L.J. 255, 304–05 (2009).



not in exchange for delayed generic entry.<sup>38</sup> Importantly, it followed traditional rule-of-reason analysis in placing the burden on defendants to provide procompetitive justifications, noting that an “antitrust defendant may show. . . that legitimate justifications are present . . . .”<sup>39</sup>

Third, the Court justified its approach by recognizing that reverse payments pose a real risk of anticompetitive harm. They are no mere paper tiger. There is a real chance that they will limit the availability of drugs that purchasers value. The Court noted that a large payment can itself be “a strong indicator of power.”<sup>40</sup> Why, after all, would a drug manufacturer pay a large sum to delay generic entry unless it could more than compensate for that payment by charging higher prices? And, as the Court also indicated, an “important patent” is important precisely because it can confer market power.<sup>41</sup>

Fourth, the Court pointed out that it would not be as administratively challenging to subject reverse payments to antitrust scrutiny as some lower courts had worried.<sup>42</sup> Indeed, the Court suggested various proxies—or shortcuts—a lower court might use to assess the illegality of a reverse payment. A trial court generally need not assess the strength of a patent directly, for instance, because “[a]n unexplained large reverse payment itself would normally suggest that the patentee has serious doubts about the patent’s survival.”<sup>43</sup> The same “unexplained large reverse payment” would also indicate the payment’s “objective is to maintain supracompetitive prices.”<sup>44</sup> Again, otherwise, why would the patentee agree to make such a large payment? Additionally, a trial court need not entertain the argument that the large payment is designed to avoid “even a small risk of invalidity.”<sup>45</sup> That would be a confession, not a justification. It would be an acknowledgement that the payment is intended to avoid the risk of competition. And “that consequence constitutes the relevant anticompetitive harm.”<sup>46</sup> As a result, risk aversion cannot justify a reverse payment. After all, an appeal to risk aversion is just another way to say that delaying generic entry can be procompetitive—a view that *Actavis* ruled out by characterizing a delay

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38. *Actavis*, 133 S. Ct. at 2236. Note that the Court’s reasoning arguably suggests there may be no reverse payment at all if the compensation is actually for services.

39. *Id.* at 2236.

40. *Id.* at 2236 (quoting 12 PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶2046, at 351 (3d ed. 2012) [hereinafter “AREEDA”]).

41. *Id.*

42. *Id.*

43. *Id.*

44. *Actavis*, 133 S. Ct. at 2236.

45. *Id.*

46. *Id.*

in generic entry as anticompetitive. For these reasons, reverse payment litigation would be manageable in practice.

Fifth, the Court rejected the notion that reverse payments are necessary for drug manufacturers to settle disputes over patent rights.<sup>47</sup> They could settle without reverse payments.<sup>48</sup> After all, the overwhelming majority of cases settle, and they do so without an agreement between competitors not to compete and without sharing resulting monopoly profits.

All of this reasoning led the Supreme Court to conclude that reverse payments should not be immunized from meaningful antitrust scrutiny. It also held, however, that they should not be subject to quick look or *per se* analysis, but rather to the rule of reason. A few points about its reasoning in this regard are crucial. First, the Court noted that a presumption against the legality of reverse payments would not be proper “because the likelihood of a reverse payment bringing about anticompetitive effects depends upon its size, its scale in relation to the payor’s anticipated future litigation costs, its independence from other services for which it might represent payment, and the lack of any other convincing justification.”<sup>49</sup> Note how narrow this reasoning is. It suggests that if a reverse payment is large, if it is out of proportion to a brand-name drug company’s anticipated litigation costs, if it is not in exchange for (adequate) services, and if the brand company cannot offer any other convincing justification for the payment, it is illegal. So the Court rejected a presumption of illegality, but it also confirmed constraints on the rule-of-reason analysis that its reasoning entailed.<sup>50</sup>

Second—and related—the Court relieved lower courts of any need to address certain issues or undertake certain analyses. Parties challenging a reverse payment need not prove the lack of invalidity of the patent at issue, “empirically demonstrate the virtues or vices of the patent system,” or “present every possible supporting fact or refute every possible pro-defense theory.”<sup>51</sup> These points follow in part logically from the shortcuts the Court had offered. A large reverse payment, for example, can provide “strong evidence” that a payer is seeking to delay generic entry because of

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47. *Id.* at 2237.

48. *Id.*

49. *Id.*

50. See Aaron Edlin, Scott Hemphill, Herbert Hovenkamp & Carl Shapiro, *Activating Actavis*, 28 ANTITRUST 16 (2013); Thomas F. Cotter, *FTC v. Actavis, Inc.: When Is the Rule of Reason Not the Rule of Reason?*, 15 MINN. J.L. SCI. & TECH. 41 (2014).

51. *Actavis*, 133 S. Ct. at 2237.

the weakness of its patent<sup>52</sup> and can be “a strong indicator” of market power—that is, the power to raise prices above competitive levels.<sup>53</sup>

Third—and again related—the Court did not require lower courts to apply a full-blown rule-of-reason analysis. Again, this follows logically from the shortcuts the Court endorsed. But it also follows from a broader commitment the Court has made. It has repeatedly directed lower courts not to think in terms of three distinct tests for assessing antitrust violations: *per se*, quick look, and rule of reason. *Actavis* confirmed that antitrust standards should instead fall along a continuum with *per se* analysis marking one end and rule-of-reason analysis marking the other. It explained: “As a leading antitrust scholar has pointed out, ‘there is always something of a sliding scale in appraising reasonableness’ and as such ‘the quality of proof required should vary with the circumstances.’”<sup>54</sup> As a result, lower courts could curtail the rule-of-reason analysis in reverse payment cases, not only by using the shortcuts the Court provided but also in general by employing a less involved inquiry where it suffices to establish the illegality of a reverse payment. The Court elaborated:

As in other areas of law, trial courts can structure antitrust litigation so as to avoid, on the one hand, the use of antitrust theories too abbreviated to permit proper analysis, and, on the other, consideration of every possible fact or theory irrespective of the minimal light it may shed on the basic question—that of the presence of significant unjustified anticompetitive consequences. We therefore leave to the lower courts the structuring of the present rule-of-reason antitrust litigation.<sup>55</sup>

The above analysis of *Actavis* provides background for understanding various errors lower courts have made in interpreting the decision and for trying to identify a theme that unifies those errors.

### *B. Cash Only*

One of the issues that has arisen since *Actavis* is whether its holding applies to any form of benefit a brand drug manufacturer confers on a generic drug manufacturer or whether it applies only to cash. This issue should not be difficult. While the Court did not address it explicitly, it

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52. *Id.* at 2235.

53. *Id.* at 2236.

54. *Id.* at 2237–38 (quoting *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 780 (1999)).

55. *Id.* at 2238 (citing 7 AREEDA, ¶1508c, at 438–40 (1986)).

modeled how to do so. The Court's reasoning revealed that what matters should be the underlying economics, not empty formalism.<sup>56</sup> The Court held that a reverse payment is not automatically legal merely because it delays generic entry within the life of the patent at issue. True, the Court could have relied on precedent to reach the contrary conclusion, as the dissent contended.<sup>57</sup> True, a bright-line rule legalizing settlements during the life of a patent would have been easier to administer than one that delved into economic effects. But the Court made clear that the antitrust analysis should attend to procompetitive and anticompetitive effects, not to wooden or arbitrary categories.<sup>58</sup>

The same reasoning resolves the issue in regard to non-cash payments. There is no *economic* reason why a brand conferring a benefit in a non-cash form should be exempt from *Actavis*. Some non-cash payments can be readily equated to a monetary amount, such as free product.<sup>59</sup> Others may require more analysis, such as the brand company agreeing not to launch an authorized generic<sup>60</sup> or not to license other generics,<sup>61</sup> conferring on the generic a license to market a particular drug,<sup>62</sup> or offering other rights or opportunities the generic would not otherwise have.<sup>63</sup> All of these actions can provide great value to a generic drug company. Any of them can trigger an agreement by the generic manufacturer to delay generic entry longer than otherwise would occur<sup>64</sup>

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56. In doing so, it followed a long line of precedent. *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 466–67 (1992) (“Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law.”); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58–59 (1977) (focusing on “economic effect rather than . . . formalistic line drawing”); *United States v. Sealy, Inc.*, 388 U.S. 350, 352 (1967) (“If we look at substance rather than form, there is little room for debate.”).

57. *Actavis*, 133 S. Ct. at 2239 (Roberts, C.J., dissenting).

58. *Id.* at 2237 (majority opinion).

59. See, e.g., *United Food & Commercial Workers Local 1776 & Participating Emp'rs Health & Welfare Fund v. Teikoku Pharm. USA, Inc.*, No. 14-md-0251, 2014 U.S. Dist. LEXIS 161069, at \*59 (provision of free branded product is a “simple transfer of a fungible product” so that “[c]alculating its value is straightforward”).

60. See *id.* at \*60–62; see also *In re Effexor XR Antitrust Litig.*, No. 11-5479, 2014 U.S. Dist. LEXIS 142206, at \*35 (D.N.J. Oct. 6, 2014); *In re Niaspan Antitrust Litig.*, 13-md-2460, 2014 U.S. Dist. LEXIS 124818, at \*13 (E.D. Pa. Sept. 8, 2014); *In re Loestrin 24 FE Antitrust Litig.*, No. 13-2472, 2014 U.S. Dist. LEXIS 123322, at \*17 (D.R.I. Sept. 4, 2014); *In re Lamictal Direct Purchaser Antitrust Litig.*, 18 F. Supp. 3d 560 (D.N.J. 2014); *In re Nexium (Esomeprazole) Antitrust Litig.*, 968 F. Supp. 2d 367, 382 (D. Mass. 2013).

61. See, e.g., *Loestrin*, 2014 U.S. Dist. LEXIS 123322, at \*17.

62. See, e.g., *id.*

63. See, e.g., *id.*; *In re Lipitor Antitrust Litig.*, No. 12-cv-2389, 2014 U.S. Dist. LEXIS 127877, at \*40 (D.N.J. Sept. 12, 2014); *Nexium*, 968 F. Supp. 2d at 383–84.

64. See *United Food*, 2014 U.S. Dist. LEXIS 161069, at \*61 (“If the no-authorized-generic term has any value . . . then it plausibly incentivized [the generic manufacturer] to

and could enable the brand and generic companies to share inflated profits they would not otherwise receive. Of course, if relevant, as part of the rule of reason, the Court would have to determine whether the amount of the benefit is larger, for example, than the anticipated litigation costs of the brand drug company or exceeds the value of a fair exchange for some other service provided to the brand company (as opposed to being a disguised reverse payment). Burdens pertaining to pleading, production, and persuasion dictate which party must make the relevant assertions and provide pertinent evidence. But nothing about non-cash payments changes the underlying *economic* analysis. A non-cash payment can have precisely the same anticompetitive consequences as a cash payment. The reasoning of *Actavis* suggests no reason it should not be subjected to the same antitrust scrutiny.<sup>65</sup>

Why then have some courts held that *Actavis* applies only to cash?<sup>66</sup> One reason is that the opinion often used the terms “dollars” or “money” or “payment.”<sup>67</sup> This line of reasoning is unpersuasive for various reasons. First and foremost, it is contrary to the emphasis in *Actavis* on the underlying economics. The Court adopted in significant measure the economist’s perspective and, from that perspective, formal distinctions—such as what counts as a payment—do not matter.<sup>68</sup> Indeed, the economist’s perspective can explain the Court’s use of the terms “dollars” or “money” as a proxy for a broader concept. That is how economists express themselves. They are likely to be surprised and confused if someone points out that they are using those terms loosely and that the same point can apply to other forms of compensation. “Of course they

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accept an entry date later than it otherwise would have. This is precisely the harm that *Actavis* sought to prevent.”)

65. *Nexium*, 968 F. Supp. 2d at 392 (internal citation omitted) (declining to “read into [*Actavis*] a strict limitation of its principles to monetary-based arrangements alone” and instead reasoning that “adopting a broader interpretation of the word ‘payment’ . . . serves the purpose of aligning the law with modern-day realities”).

66. To be sure, numerous district courts have recognized that *Actavis* does apply to non-cash payments. See, e.g., *United Food*, 2014 U.S. Dist. LEXIS 161069, at \*57; *Effexor*, 2014 U.S. Dist. LEXIS 142206, at \*62; *Time Ins. Co. v. Astrazeneca AB*, No. 14-cv-4149, 2014 U.S. Dist. LEXIS 140110, at \*13 (E.D. Pa. Oct. 1, 2014); *Lipitor*, 2014 U.S. Dist. LEXIS 127877, at \*64; *Niaspan*, 2014 U.S. Dist. LEXIS 124818, at \*32; *Nexium*, 968 F. Supp. 2d at 392; *In re Lipitor Antitrust Litig.*, No. 3:12-cv-2389, 2013 WL 4780496, at \*26 (D.N.J. Sept. 5, 2013); *In re Nexium (Esomeprazole) Antitrust Litig.*, 968 F. Supp. 2d 367, 392 (D. Mass. 2013).

67. See, e.g., *Loestrin*, 2014 U.S. Dist. LEXIS 123322, at \*24–26; *Lamictal*, 18 F. Supp. 3d 560 (D.N.J. 2014).

68. See *Niaspan*, 2014 U.S. Dist. LEXIS 124818, at \*33 (“To read *Actavis* as so limited would be particularly anomalous in the context of antitrust law, in which ‘economic realities rather than a formalistic approach must govern.’”) (quoting *United States v. Dentsply Int’l. Inc.*, 399 F.3d 181, 189 (3d Cir. 2005)).

can,” the economist is likely to think. It is standard practice in economic theory to equate goods and services with money for purposes of analysis. Economists—and judges familiar with and engaging in standard economic reasoning—are not apt to state this obvious point. Indeed, from a lawyerly perspective, the repeated use of the word “dollars” in *Actavis* could mean that reverse payments made in yen or euros are not subject to antitrust scrutiny. An economist would reject this lawyer’s distinction out of hand, just as they would reject the one between monetary and other forms of payment.

The same points pertain to use of the term “payments.” It is even less plausibly interpreted as applying only to cash. “Payments” are recognized as extending beyond money. *Black’s Law Dictionary*, for example, defines a “payment” as “[p]erformance of an obligation by the delivery of money or some other valuable thing accepted in partial or full discharge of an obligation.”<sup>69</sup>

There is another reason—beyond the convention in economics to equate all things of value with dollar amounts—that the *Actavis* opinion may have focused on cash payments. This was the form that the reverse payment took in the facts before the Supreme Court.<sup>70</sup> It therefore had little reason to address non-cash payments. But it nonetheless made clear at one point that cash was only illustrative—not a requirement—of what constitutes a reverse payment. In responding to the dissent, it addressed “reverse payment settlements—e.g., in which A, the plaintiff, pays money to defendant B purely so B will give up the patent fight[.]”<sup>71</sup> Payment of money, then, would seem to be only an example. It would not seem to be the sole form a reverse payment can take. And the terms the Court used—“dollars,” “money,” and “payments”—should not artificially constrict the scope of *Actavis*.

Another line of reasoning in the lower courts is more puzzling. Some courts have suggested *Actavis* does *not* extend to non-cash payments because the dissent in *Actavis* said that the majority’s logic *does* extend to non-cash payments.<sup>72</sup> This inference is counterintuitive. One would think the dissent’s assertion would lead to the opposite conclusion: that the dissent is right that *Actavis* applies to non-cash payments.<sup>73</sup> The

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69. BLACK’S LAW DICTIONARY 1243 (9th ed. 2010); *see also* 60 AM. JUR. 2D PAYMENT § 26 (“A payment may refer to the transfer of value other than money.”).

70. *FTC v. Actavis, Inc.*, 133 S. Ct. 2223, 2229 (2013); *see also Nexium*, 968 F. Supp. 2d at 392 (holding the same premise as *Actavis*).

71. *Actavis*, 133 S. Ct. at 2233 (Roberts, C.J., dissenting).

72. *See Lamictal*, 18 F. Supp. 3d at 568; *Loestrin*, 2014 U.S. Dist. LEXIS 123322, at \*30.

73. *Actavis*, 133 S. Ct. at 2245 (Roberts, C.J., dissenting).

latter conclusion is all the more plausible because the majority did *not* deny that its holding applied to non-cash payments, even though it did respond to and attempt to refute various other arguments the dissent made.<sup>74</sup> Further, in responding to the dissent in the quotation above, the majority indicated that cash payments were only one kind of reverse payment and that it was using them only as an example.<sup>75</sup> Given the great care with which the Justices and their clerks write, it is implausible that the majority would have failed to contradict the dissent—and indeed would have confirmed the dissent’s view—if instead it meant to limit reverse payments to cash.

Why then have some lower courts drawn the inference from the dissenting opinion that the majority meant to address only cash? They seem to have read the dissent as *assuming* that the majority meant to distinguish cash from non-cash payments<sup>76</sup>—although the dissent never makes this point explicitly—and then to have read the majority as failing to rebut this implicit position. This reading of *Actavis* is not entirely illogical, but it is too attenuated and convoluted to persuade. Judge Posner recently rejected a similar argument by explaining that a defendant was “wrong to think that anything a dissenting opinion approves of the majority *must* disapprove of.”<sup>77</sup> It seems comparably odd to infer that the holding in *Actavis* does not extend to non-cash payments just because the dissent says it does. Not everything the dissent says is necessarily wrong. This inference would be particularly strange because, as noted above, the majority indicated its holding *does* extend beyond cash.

A couple of other points made by the lower courts warrant consideration. In limiting reverse payments to cash, one court expressed a concern about discouraging settlements.<sup>78</sup> But the Supreme Court rejected the notion that banning reverse payments would prevent parties from settling.<sup>79</sup> Given that non-cash reverse payments can have the same economic consequences as cash reverse payments—such as when brand manufacturers provide free product to generic manufacturers—the Court’s reasoning precludes using the policy in favor of settlement as justification for restricting *Actavis* to cash. The Court held that the

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74. See, e.g., *id.* at 2231–32, 2233, 2235 (responding to the dissent’s arguments).

75. *Id.* at 2233.

76. One court makes this step of the analysis explicit. See *Lamictal*, 18 F. Supp. 3d at 568. It also seems to underlie *Loestrin*.

77. *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 800 (7th Cir. 2013).

78. *Loestrin*, 2014 U.S. Dist. LEXIS 123322, at \*33.

79. *Actavis*, 133 S. Ct. at 2237 (“[T]he fact that a large, unjustified reverse payment risks antitrust liability does not prevent litigating parties from settling their lawsuit.”).

various considerations weighing in favor of subjecting reverse payments to antitrust scrutiny “outweigh the single strong consideration—the desirability of settlements—that led [lower courts] to provide near-automatic antitrust immunity to reverse payment settlements.”<sup>80</sup> So the policy in favor of settlements does not provide a persuasive basis for reading *Actavis* narrowly, but it may suggest what is motivating some lower courts.

So may another point at least one lower court has made. The court in *Loestrin* worried that non-cash payments would be difficult to quantify.<sup>81</sup> Yet quantification would be necessary, for example, to compare the size of the payment to the anticipated costs of litigation for the brand company.<sup>82</sup> Again, it is hard to reconcile this point with the reasoning of *Actavis*. Economic analysis of antitrust issues often involves quantifying what is difficult to quantify. But the Supreme Court required lower courts to brave those difficulties when it adopted the rule of reason and rejected both the scope-of-the-patent test and the quick-look approach.<sup>83</sup>

The concern about quantifying non-cash payments may well be revealing. It may explain why some lower courts have been resistant to *Actavis*. They may not like the challenging task the Supreme Court has put before them, preferring bright-line rules to open-ended economic inquiry. They may share the sentiments of the Chief Justice in dissent: “Good luck to the district courts that must, when faced with a patent settlement, weigh the likely anticompetitive effects, redeeming virtues, market power, and potentially offsetting legal considerations present in the circumstances.”<sup>84</sup> In short, they may be resistant to the daunting task they perceive the Supreme Court to have imposed on them. They

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80. *Id.* at 2237.

81. *Loestrin*, 2014 U.S. Dist. LEXIS 123322, at \*28–29 (the value conferred by a brand company to a generic company—a key consideration in the analysis under *Actavis*—“can be reasonably measured when the reverse payment is a cash payment; a non-cash settlement, particularly one that is multifaceted and complex . . . , is almost impossible to measure”). *But see* United Food & Comm. Workers Local 1776 & Participating Emp’rs Health & Welfare Fund v. Teikoku Pharm. USA, No. 14-md-2521, 2014 U.S. Dist. LEXIS 161069, at \*59 (N.D. Cal. Nov. 17, 2014) (internal citations omitted) (“[T]o determine if a [settlement] term is a large and unjustified payment, as *Actavis* requires, courts must be able to calculate its value. However, not all non-monetary payments are impossible to value. There are many plausible methods by which plaintiffs may calculate the value of non-monetary terms.”); Edlin et al., *supra* note 50, at 18 (“Although sometimes intricate, handling this complexity is well within the competence of a district court.”).

82. *Loestrin*, 2014 U.S. Dist. LEXIS 123322, at \*28–29. As discussed *infra*, the comparisons the *Loestrin* court discussed would not all be relevant, as they followed from the court confusing the five justifications for the *Actavis* decision with the test for applying *Actavis* in future cases. *See infra* notes 105–08 and accompanying text.

83. *Actavis*, 133 S. Ct. at 2237.

84. *Id.* at 2245 (Roberts, C.J., dissenting) (quoting the majority).



may not, however, have grasped the precise nature of that task, as discussed next.

*C. From Justifications to a Legal Standard*

A second issue that has confused courts is the relationship between the structure of the Court's reasoning in *Actavis* and the legal standard it adopted. The Court's reasoning proceeded in three relevant steps. First, the Court explained why, as a matter of doctrine, patent law does not immunize reverse payments from antitrust scrutiny.<sup>85</sup> Second, it provided "five sets of considerations" that led the Court to conclude that antitrust scrutiny should apply to the reverse payment agreement before it:<sup>86</sup> (1) reverse payments have the potential for adverse effects on competition;<sup>87</sup> (2) reverse payments have adverse effects that will not always prove justified by procompetitive effects;<sup>88</sup> (3) patentees are likely to have sufficient market power to cause harm to competition;<sup>89</sup> (4) antitrust scrutiny of reverse payments is likely to be more administratively feasible than some lower courts had concluded;<sup>90</sup> and (5) parties could settle without anticompetitive reverse payments.<sup>91</sup> After setting forth these justifications for subjecting reverse payments to antitrust scrutiny, the Court recapitulated:

In sum, a reverse payment, where large and unjustified, can bring with it the risk of significant anticompetitive effects; one who makes such a payment may be unable to explain and to justify it; such a firm or individual may well possess market power derived from the patent; a court, by examining the size of the payment, may well be able to assess its likely anticompetitive effects along with its potential justifications without litigating the validity of the patent; and parties may well find ways to settle patent disputes without use of reverse payments. In our view, these considerations taken together, outweigh the single strong consideration—the desirability of settlements—that led the

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85. *Id.* at 2230 (acknowledging that the reverse payment at issue may have fallen within "the scope of the exclusionary potential" of the brand manufacturer's patent but then noting that "we do not agree that that fact, or characterization, can immunize the agreement from antitrust attack").

86. *Id.* at 2234.

87. *Id.* at 2234–35.

88. *Id.* at 2235–36.

89. *Actavis*, 133 S. Ct. at 2236.

90. *Id.* at 2236–37.

91. *Id.* at 2237.

Eleventh Circuit to provide near-automatic antitrust immunity to reverse payments settlements.<sup>92</sup>

Third, the Court described the legal standard that lower courts should apply.<sup>93</sup>

Some lower courts have been thrown off by the structure of the *Actavis* opinion. In particular, they have relied on portions of the Court's reasoning that were explicitly meant to *justify* its denial of antitrust immunity to reverse payments as if they were intended to create a *legal test*.<sup>94</sup> The confusion may stem in part from the Court's focus on why it was deciding the way it was rather than on the standard it was formulating. It may also result from comments the Court made in justifying its conclusion that *should* structure the analysis of the lower courts. The Court never integrated its justifications for adopting the rule of reason—which it interspersed with constraints on that analysis—with the legal standard it adopted. It never provided a summary of the test lower courts should apply.

Perhaps too the confusing nature of antitrust doctrine has contributed to the difficulties of lower courts: Consider the rule of reason, which consists of a series of shifting burdens.<sup>95</sup> First, a plaintiff must show that a restraint on trade has significant anticompetitive effects.<sup>96</sup> Second, a defendant must show procompetitive effects.<sup>97</sup> Finally, a plaintiff may prevail by demonstrating the procompetitive effects could have been achieved by means that would not have had as severe anticompetitive effects or that the anticompetitive effects outweigh the procompetitive effects.<sup>98</sup> That is the basic framework lower courts should apply (although, as discussed below, it should be adjusted to reflect key constraints the Court imposed). Yet many lower courts have missed this point.

*Lamictal* is illustrative because the district court quoted the summary in *Actavis* of *why* the Court imposed the rule of reason and treated it as if it addressed *how* the legal standard should apply.<sup>99</sup> The

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92. *Id.*

93. *Id.* at 2237–38.

94. *See, e.g., In re Loestrin 24 Fe Antitrust Litig.*, No. 13-md-2472, 2014 U.S. Dist. LEXIS 123322, at \*27 (D.R.I. Sept. 4, 2014); *In re Lamictal Direct Purchaser Antitrust Litig.*, 18 F. Supp. 3d 560, 565 (D.N.J. 2014).

95. *See, e.g., Tanaka v. USC*, 252 F.3d 1059, 1063 (9th Cir. 2001).

96. *King Drug v. Cephalon, Inc.*, No. 06-cv-1797, 2015 WL 356913, at \*7 (E.D. Pa. Jan. 28, 2015).

97. *Id.* at \*8.

98. *Id.*

99. *Lamictal*, 18 F. Supp. 3d at 564–65.

result is that the trial court imposed a three-part test, requiring plaintiffs first to show there is a reverse payment and second to show that the reverse payment is large and unjustified.<sup>100</sup> Only then would the trial court take the third step of applying the rule of reason.<sup>101</sup> For the most part, this confusion would not deviate much from proper application of the rule of reason. The plaintiff should have to show a reverse payment to invoke *Actavis*—perhaps even a significant reverse payment. But in one crucial regard, the confusion in *Lamictal* has a practical adverse effect. It appears to place on plaintiffs the burden of showing the reverse payment is unjustified. *Actavis* did not suggest inverting the ordinary rule of reason in this way. To the contrary, the Supreme Court stated: “An antitrust *defendant* may show in the antitrust proceeding that legitimate justifications are present, thereby explaining the presence of the challenged term and showing the lawfulness of that term under the rule of reason.”<sup>102</sup> One of the sources on which the Supreme Court relied, Areeda’s treatise, makes clear that the burden of establishing procompetitive justifications falls on the defendants.<sup>103</sup> So the Court did not mean to reverse the standard burden under the rule of reason regarding procompetitive justifications but rather to adopt it.<sup>104</sup>

*Loestrin* involves a similar mistake. It described *Actavis* as follows: “Ostensibly to assist the lower courts, *Actavis* set forth five considerations to guide the inquiry as to whether a settlement payment satisfies the rule of reason.”<sup>105</sup> The trial court then explained that a court should consider: first, whether a payment has the potential for adverse effects on competition; second, whether the payment is justified; third, whether the size of the reverse payment indicates the patentee had sufficient market power to cause competitive harm; fourth, whether the size of the payment suggests a lack of confidence in the patent; and, fifth,

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100. *Id.*

101. *Id.* at 565.

102. *FTC v. Actavis, Inc.*, 133 S. Ct. 2223, 2236 (2013) (emphasis added) (citing *Ind. Fed’n of Dentists*, 476 U.S. 447, 459 (1986)); 7 AREEDA & HOVENKAMP, ANTITRUST LAW ¶¶ 1504a–1504b, at 401–404 (3d ed 2010)).

103. 7 AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 1502, at 390 (3d ed 2010) (noting once plaintiff establishes a restraint of trade, “the burden passes to the defendant to offer evidence that a legitimate objective is served by the challenged behavior”).

104. *See Cephalon*, 2015 WL 356913, at \*10–11 (appropriately placing on defendants the burden of justifying a reverse payment).

105. *In re Loestrin 24 Fe Antitrust Litig.*, No. 13-md-2472, 2014 U.S. Dist. LEXIS 123322, at \*27 (D.R.I. Sept. 4, 2014) (internal quotation omitted). The *Lamictal* court similarly suggested the five justifications were meant to guide application of the rule of reason. *Lamictal*, 18 F. Supp. 3d at 565 (internal citation omitted) (“The *Actavis* opinion lays out ‘five considerations’ to guide district courts in applying the rule of reason in this context.”).

whether there are adequate reasons for the payment.<sup>106</sup> This analysis of *Actavis* holds the potential to cause a great deal of mischief. The Court did not provide the five considerations to *guide* lower courts—ostensibly or otherwise—but rather to *justify* subjecting reverse payments to antitrust scrutiny. The Court made clear that “five sets of considerations lead us to conclude that the FTC should have been given the opportunity to prove its antitrust claim.”<sup>107</sup> Confusing the role of the considerations in this way could cause a lower court to revisit issues the Supreme Court has resolved, inadvertently challenging the Supreme Court’s authority. The Court held that reverse payments *can* harm competition, sometimes *are* unjustified, *are* likely to involve an abuse of market power, *can* be evaluated for antitrust purposes in an administratively feasible manner, and are *not* necessary for parties to settle. For a lower court to conclude otherwise would flout *Actavis*.

So why then are some lower courts losing their way? We cannot be certain. But use of the word “ostensibly” in *Loestrin* may provide a clue.<sup>108</sup> It suggests that, in the trial court’s view, the Supreme Court did not actually provide meaningful guidance, but rather merely purported to do so. As we now see, the Supreme Court did not even purport to do so in the relevant portions of its opinion. It was merely explaining why it reached its ultimate conclusion. But the trial court’s apparent frustration—that it had not received the guidance it would have liked—is telling. The lower courts that go astray in reading *Actavis* may be finding guidance that is not there. Indeed, they may feel the need for better guidance so acutely that they inadvertently treat passages justifying the opinion as if they create a test for lower courts to apply.

None of this is to say that the Supreme Court’s reasoning as to why it reached its conclusion provides *no* guidance as to how lower courts should apply the rule of reason. To put the same point without the double negative, some of the Court’s reasoning *does* cast light on how lower courts should undertake the relevant antitrust analysis. The irony, however, is that while some lower courts seem to have imposed a more

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106. *Loestrin*, 2014 U.S. Dist. LEXIS 123322, at \*28–29. The trial court in *Loestrin* did not apply these “considerations” but rather relied on them as a basis for concluding that *Actavis* should apply only to cash, because if a reverse payment were not readily quantifiable, the five steps would be difficult to apply. *Id.* at \*29. The court’s error about the significance of these considerations therefore may have contributed to its error about whether *Actavis* applies to non-cash payments. The trial court in *Lamictal* did attempt to apply all five “considerations” under the rule of reason and its analysis went predictably awry. See *Lamictal*, 18 F. Supp. 3d at 570. For a discussion of the resulting confusion, see *supra* notes 100–01 and accompanying text.

107. *Actavis*, 133 S. Ct. at 2234.

108. *Loestrin*, 2014 U.S. Dist. LEXIS 123322, at \*27.

difficult burden on plaintiffs than does the standard rule of reason, *Actavis* actually suggests ways in which that burden should be lighter than usual.

*D. Ignoring Key Constraints on the Rule of Reason*

Although the Court focused in *Actavis* on justifying its decision to apply the rule of reason to reverse payments, it did make some comments along the way to simplify how the rule of reason would apply. To proceed under the rule of reason, plaintiffs must show that the defendant or defendants had sufficient power in the relevant market to cause harm, and exercised that power to harm competition.<sup>109</sup> As noted above, the defendant or defendants may then provide a procompetitive justification for the conduct, to which plaintiffs then have an opportunity to respond.<sup>110</sup> *Actavis*, however, did not merely leave this standard version of the rule of reason intact. It altered it in two general ways: allowing plaintiffs to make their initial showing by establishing the existence of a large reverse payment and limiting the kinds of justifications defendants can offer.

As to plaintiffs' initial burden, *Actavis* held that a large reverse payment itself can establish market power and the exercise of that market power in a way that harms competition. The Court explained that a large payment from a brand to a generic drug manufacturer itself constitutes "a strong indicator of power—namely, the power to charge prices higher than the competitive level."<sup>111</sup> In other words, a large reverse payment evinces market power.<sup>112</sup> Second, a large reverse payment can obviate the need for any inquiry into the strength of the patent at issue or into whether an agreement had an anticompetitive effect.<sup>113</sup> The Court noted that it is reasonable to infer from the size of the reverse payment that "the patentee has serious doubts about the patent's survival" and that "the payment's objective is to maintain

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109. See, e.g., *Lamictal*, 18 F. Supp. 3d at 565 (citing *United States v. Brown Univ.*, 5 F.3d 658, 679 (3d Cir. 1993)).

110. *Tanaka v. USC*, 252 F.3d 1059, 1063 (9th Cir. 2001).

111. *Actavis*, 133 S. Ct. at 2236 (internal quotation omitted).

112. The Court reasoned that a brand manufacturer would not "pay 'large sums' to induce 'others to stay out of its market'" unless it had the market power to raise prices. *Id.* (internal quotation omitted). And because charging inflated prices serves as direct evidence of market power, see *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 460–61 (1986) (concluding that circumstantial evidence of market power merely serves as a "surrogate" for direct evidence of anticompetitive effects on the market), it follows that a large payment suffices to show market power.

113. *Actavis*, 133 S. Ct. at 2236–37.

supracompetitive prices . . . .”<sup>114</sup> These constraints on the rule-of-reason analysis are particularly important for pleading, although they also pertain to summary judgment and trial. In particular, if a plaintiff alleges a large reverse payment, that should suffice to survive a motion to dismiss. After all, that allegation is enough—at least at the pleading stage, when plaintiffs’ non-conclusory allegations must be taken as true<sup>115</sup>—to establish *Actavis* applies, market power exists, and anticompetitive effects occurred.<sup>116</sup> Of course, later in the proceedings, defendants will have the opportunity to contest whether the alleged conduct occurred or to offer procompetitive justifications for it.<sup>117</sup>

Note, on this last point, that *Actavis* also imposes a constraint on the kind of justification that is legally cognizable. The Court held that it is not a procompetitive justification that the patentee paid a large sum to avoid the risk of a bad result in the underlying litigation, perhaps because of an aversion to risk.<sup>118</sup> Such a justification would be an admission that the goal of the payment was to prevent “the risk of competition.”<sup>119</sup> According to the Court: “[T]hat consequence constitutes the relevant anticompetitive harm.”<sup>120</sup>

At least some lower courts have missed this guidance from the Supreme Court. *Lamictal* provides an interesting example. It is difficult to read too much into the case because before the trial court was a motion for reconsideration in which plaintiffs conceded that *Actavis*—newly decided between the original order dismissing the complaint and the request for reconsideration—should not alter the trial court’s “position” (which plaintiffs believed was incorrect in any case).<sup>121</sup> Also, as discussed above, the *Lamictal* court incorrectly held that *Actavis* applies only to cash. But the trial court, in dicta, nonetheless applied the rule of reason, and in doing so failed to take into account the constraints *Actavis* imposes on that standard.

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114. *Id.*

115. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

116. Evidence of anticompetitive effects should also suffice as direct evidence of market power, obviating any need for an independent inquiry into that issue. *See, e.g.*, *Ind. Fed’n of Dentists*, 476 U.S. at 460–61 (concluding circumstantial evidence of market power merely serves as a “surrogate” for direct evidence of anticompetitive effects on the market).

117. *See King Drug v. Cephalon, Inc.*, No. 06-cv-1797, 2015 WL 356913 (E.D. Pa. Jan. 28, 2015) (holding the plaintiff has the burden to show payment was “large,” but the burden then shifts to the defendant to show that it was not “unexplained”).

118. *Actavis*, 133 S. Ct. at 2236–37.

119. *Id.* at 2236.

120. *Id.*

121. *In re Lamictal Direct Purchaser Antitrust Litig.*, 18 F. Supp. 3d 560, 564 (D.N.J. 2014).

At issue in *Lamictal* were drugs with the active ingredient lamotrigine, drugs that treat epilepsy and bipolar disorder.<sup>122</sup> GlaxoSmithKline LLC (“GSK”) was the brand manufacturer of the drugs under variations on the name Lamictal.<sup>123</sup> Its domestic sales exceeded \$2 billion annually. A generic drug manufacturer, Teva,<sup>124</sup> obtained a ruling from the bench that GSK’s relevant patent was invalid; the parties then promptly settled.<sup>125</sup> The settlement allowed Teva to enter the market before the expiration date of the patent, although not immediately, and it required GSK not to launch an authorized generic for six months during which no other generic drug manufacturer could compete with Teva (the “No-AG Agreement”).<sup>126</sup> Given the sales of \$2 billion per year, the agreement not to launch an authorized generic was likely worth hundreds of millions of dollars to Teva.<sup>127</sup>

The *Lamictal* court misconstrued *Actavis* in various ways in applying the rule of reason. As noted above, one was to apply the five justifications for the *Actavis* ruling as a five-factor test to guide lower courts. Most relevant for present purposes, however, are the ways it missed the guidance *Actavis* did provide. The trial court, for example, found that there was no “potential for genuine adverse effects on competition” because the duration of the No-AG Agreement was only six months, among other reasons.<sup>128</sup> But that should not matter. What is crucial is

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122. *Id.* at 561.

123. *Id.*

124. “Teva” includes both Teva Pharmaceutical Industries Ltd. and Teva Pharmaceuticals. *Id.*

125. *Id.*

126. *Id.* at 561–62.

127. According to an FTC report analyzing the market effects of authorized generics, the FTC found that the presence of an authorized generic generally reduces a competing generic’s revenues by 40–52% during the first 180 days of generic marketing exclusivity. This occurs primarily because (1) the authorized generic takes a significant share of sales away from the first-filer; and (2) prices decrease dramatically when the first-filer faces price competition from an authorized generic. For these reasons, an agreement not to launch an authorized generic confers substantial value on the first filer (and, as a result, causes consumers to pay significantly more). KAREN A. GOLDMAN ET AL., FTC, AUTHORIZED GENERIC DRUGS: SHORT-TERM EFFECTS AND LONG-TERM IMPACT ii–iii (2011), available at <http://www.ftc.gov/sites/default/files/documents/reports/authorized-generic-drugs-short-term-effects-and-long-term-impact-report-federal-trade-commission/authorized-generic-drugs-short-term-effects-and-long-term-impact-report-federal-trade-commission.pdf>.

128. *Lamictal*, 18 F. Supp. 3d at 570. The trial court also relied on the agreement allowing Teva to enter the market before expiration of the patent. *Id.* This last point also involves an error, as the agreement in *Actavis* permitted generic entry before the patent expired. *Actavis*, 133 S. Ct. at 2230 (*Actavis* settlement allowed generic entry sixty-five months before the patent expired); see also Edlin et al., *supra* note 50, at 19 (citing *Actavis*, 133 S. Ct. at 2234–35) (“Comparing the consumer benefits from delayed entry with entry at patent expiration—essentially arguing that the settlement is a blessing, compared to the

the value of the No-AG Agreement. It appears to have been worth a great deal, far more than the anticipated litigation costs. That should have been enough for the complaint to survive a motion to dismiss, giving rise as it does to a plausible inference that there was a reverse payment, that defendants had market power, and that they used that market power to harm competition by delaying generic entry.<sup>129</sup>

The *Lamictal* court made a similar error by holding that the reverse payment was “justified” because it was “reasonably related to the removal of the uncertainty created by the dispute.”<sup>130</sup> Arguably, this finding was improper because plaintiffs had no burden regarding a procompetitive justification—that lies with defendants (although if plaintiffs make sufficient allegations to *establish* a procompetitive justification, a court can rule on that basis). But the crucial misstep was the failure to recognize that *Actavis* had ruled out the procompetitive justification on which the trial court relied. The Supreme Court anticipated this issue, characterizing the effort “to prevent the risk of competition” as “the relevant anticompetitive harm.”<sup>131</sup> It was therefore improper for the *Lamictal* court to find that the removal of uncertainty—which is just another way of saying eliminating the risk of competition—was somehow procompetitive.<sup>132</sup>

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worst case—is similarly off the table [following *Actavis*].”). One of the main points of *Actavis* is that “patent and antitrust policies are both relevant in determining the scope of the patent monopoly[.]” *Actavis*, 133 S. Ct. at 2231 (internal quotation marks omitted). If generic entry would have occurred even earlier without the reverse payment, that agreement violates antitrust law (unless otherwise justified). *See id.* at 2237 (emphasis added) (companies may lawfully “settle in other ways, for example, by allowing the generic manufacturer to enter the patentee’s market prior to the patent’s expiration, **without the patentee paying the challenger to stay out prior to that point**”). The *Lamictal* court also relied on the lack of a cash payment. *Lamictal*, 18 F. Supp. 3d at 570. As discussed above, that point too is irrelevant under *Actavis*.

129. *See* *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (holding that courts should take non-conclusory allegations as true and ask whether they plausibly satisfy the elements of a claim); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2006) (same). It is notable that the *Loestrin* court—although dismissing because it held *Actavis* applies only to cash—recognized the tension between its ruling and *Twombly*. *In re Loestrin 24 FE Antitrust Litig.*, 2014 U.S. Dist. LEXIS 123322, at \*35–37 (D.R.I. Sept. 4, 2014). In *Effexor* and *Lipitor*, Judge Sheridan dismissed both complaints for failing to allege sufficient facts to value the respective non-cash payments at issue. *In re Effexor XR Antitrust Litig.*, 2014 U.S. Dist. LEXIS 142206, at \*22 (D.N.J. Oct. 6, 2014); *In re Lipitor Antitrust Litig.*, 2014 U.S. Dist. LEXIS 127877, at \*68–72 (D.N.J. Sept. 12, 2014).

130. *Lamictal*, 18 F. Supp. 3d at 570.

131. *Actavis*, 133 S. Ct. at 2236.

132. One court has interpreted the Supreme Court’s discussion of the settling parties’ intentions as allowing defendants to justify their reverse payment agreement by providing evidence that they did not intend to cause anticompetitive harm. *Effexor*, 2014 U.S. Dist. LEXIS 142206, at \*76–78. In *Effexor*, the court concluded at the pleading stage



At first blush, the above analysis may appear to conflict with the thesis of this Article. The constraints *Actavis* placed on the rule of reason should make the job of trial court judges easier. Their resistance to those constraints could be hard to reconcile with the notion that they are seeking clearer guidance. On the other hand, it is possible that some trial courts are looking for prefabricated guidance rather than a do-it-yourself kit. It may be easier—or at least less fraught with potential error—to apply five readily available considerations than to figure out how constraints sprinkled throughout an opinion modify the standard rule of reason. Applying the five considerations from *Actavis*—even though they are in fact inapposite—may seem more straightforward than attempting to synthesize the various constraints *Actavis* mentioned with the burden shifting of the ordinary rule of reason.

*E. Favoring Discrete Tests over a Continuum: “[A]n [E]nquiry [M]eet for the [C]ase . . . .”*<sup>133</sup>

The final way in which some—indeed, many—lower courts have resisted *Actavis* forms part of a larger pattern. As has become common over the years, *Actavis* described “a sliding scale in appraising reasonableness” for purposes of the rule of reason, and noted that “the quality of proof required should vary with the circumstances.”<sup>134</sup> In other

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that “any alleged antitrust intent held by the parties is negated by the fact that the settlement and license agreements were forwarded to the FTC evidencing the parties’ willingness to submit those agreement[s] for review prior to the settlement becoming effective.” *Id.* at \*76–77. Because the defendants were willing to submit their settlement to FTC review and because the FTC did not act upon the initial request, the *Effexor* court held that defendants had offered a “a sufficient justification that the agreement . . . did not constitute an unexplained payment.” *Id.* at \*78. As already noted, the court’s acceptance of defendants’ “procompetitive” justification at the pleading stage was premature. But more importantly, the court added a subjective component to the *Actavis* analysis by looking at the parties’ actual intent. That approach is inconsistent with the reasoning of *Actavis*, which focuses on the economic impact of a reverse payment and, in particular, on whether it has caused anticompetitive harm. In addition, it is not a valid defense for alleged conspirators to claim they did not mean to violate the antitrust laws. 7 AREEDA & HOVENKAMP, ANTITRUST LAW ¶1504a, at 401 (3d ed. 2010) (“The defendants’ mistaken belief, no matter how sincere, that their collaboration improves competition should be immaterial to the tribunal’s decision whether to enjoin it as an unreasonable trade restraint.”); *Id.* ¶1506, at 420–21 (“[I]ntent seldom determines reasonableness. Indeed, intent is often superfluous to the analysis of reasonableness, for it adds nothing to the conduct from which it is usually inferred . . . . Whenever a restraint appears unreasonable in the light of the defendant’s power and the restraint’s redeeming virtues and alternatives, the defendant’s innocent mental state will not save it.”).

133. *California Dental Ass’n v. FTC*, 526 U.S. 756, 781 (1999).

134. *Actavis*, 133 S. Ct. at 2237–38 (quoting *California Dental*, 526 U.S. at 780 (internal quotation marks omitted)).

words, the standards implied by the phrases rule of reason, quick look, and *per se* should be taken not as distinct but rather as lying along a continuum. And the depth of the inquiry into the challenged conduct should vary “so as to avoid, on the one hand, the use of antitrust theories too abbreviated to permit proper analysis, and, on the other, consideration of every possible fact or theory irrespective of the minimal light it may shed on the basic question—that of the presence of significant unjustified anticompetitive consequences.”<sup>135</sup> The Court then invited “lower courts [to] structur[e]” the rule-of-reason analysis appropriately in reverse payment cases.<sup>136</sup>

Historically, lower courts have not accepted this invitation.<sup>137</sup> At most, they tend to recognize three separate tests under antitrust law—the rule of reason, quick look, and *per se*—and often focus on only the first and last, overlooking or deemphasizing the middle category.<sup>138</sup> To be fair, the Supreme Court itself has given conflicting signals in this regard, at times seeming to treat different antitrust tests as discrete.<sup>139</sup> So lower courts would have some basis for either of two approaches, one that treats antitrust tests as marking points along a continuum or as requiring distinct analyses. The continuum approach has not been popular. Lower courts are more likely instead to acknowledge only two separate tests, the rule of reason and *per se*. As Lemley and Leslie observe: “[S]o many lower courts continue to treat the categories of *per se* and rule-of-reason analysis as dichotomous.”<sup>140</sup>

The trial courts in reverse payment cases have followed the trend so far. They have not suggested that plaintiffs can rely on a less stringent standard than the ordinary rule of reason.<sup>141</sup> In part, as noted above, this position means ignoring the constraints *Actavis* imposes on lower courts. But it also suggests a relatively mechanical application of the rule-of-reason standard rather than some creative effort to streamline the inquiry into the underlying economics at issue. The reluctance of trial courts to innovate in that way is understandable. Doing so might well

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135. *Id.* at 2238.

136. *Id.*

137. *See, e.g.*, Mark A. Lemley & Christopher R. Leslie, *Categorical Analysis in Antitrust Jurisprudence*, 93 IOWA L. REV. 1207, 1218–19 (2008).

138. *Id.*

139. *Id.* at 1218.

140. *Id.* at 1219.

141. It is difficult to prove a negative, but the description and application of the rule of reason in *Lamictal*, for example, suggests the ordinary rule of reason would apply, not some alternative standard on the antitrust continuum. *See In re Lamictal Direct Purchaser Antitrust Litig.*, 18 F. Supp. 3d 560, 564–65, 570 (D.N.J. 2014).

invite error and reversal. They likely have insufficient comfort with economic analysis to engage in such creativity.

### III. CONCLUSION

Some lower courts have gone astray in applying *Actavis*. They have held that the decision applies only to cash, confused justifications with guidelines, and overlooked key constraints the Court placed on the rule of reason in reverse payment cases. They also have ignored the Court's invitation to employ a vague continuum in antitrust cases rather than discrete legal standards, although in this last regard they are in good company. Is there any solution for this problem?

One might criticize the lower courts and exhort them to do better. Put differently, we might simply ask them to correct course. They should not artificially constrain the scope of *Actavis*. They should not revisit the rationales the Court offered for its opinion as if they were framing questions rather than providing answers. They should take seriously the constraints the Court put on the rule-of-reason analysis in reverse payment cases. These are important points. Adopting them would clear up an important area of the law.

But there may well be a lesson for the Supreme Court as well. Arguably, it could be more mindful of the practical needs of trial court judges. It could try to provide better guidance than it currently does, formulating rules that will be manageable for lower courts. There is an argument, to be sure, for judicial minimalism and the benefits of deciding "one case at a time."<sup>142</sup> But that does not mean the Court need write in riddles. There is an alternative to leaving lower courts to hunt and peck for key propositions of law in binding Supreme Court opinions. *Actavis* actually does take some clear stands. It just does not foreground them, creating unnecessary opportunities for confusion. Of course, no court is prescient. It is impossible to anticipate all of the varying circumstances that life will bring. But one has a sense that the Court gives a low priority to framing legal doctrines in a way that will work in the courtroom or identifying them clearly when it does. Guiding lower courts is not the Court's top priority—and perhaps it should not be—but it is a consideration that nonetheless should be given more weight. The great majority of litigators and judges would benefit if it were. And the resulting certainty and efficiency would benefit the society that the law is meant to serve. It would also decrease the odds that a trial court would

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142. See, e.g., CASS SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (2001).

feel compelled to reach an unjust result, particularly when the law actually requires it to do justice.