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Clarity May Be Around the Corner for Antitrust Scrutiny of Reverse Payment Settlements

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In the ten years since the Supreme Court ruled in *Federal Trade Commission v. Actavis* that reverse payment settlements—or settlements where a patent holder pays an accused patent infringer cash or other consideration to end the patent litigation—may be subject to antitrust scrutiny if they are "large and unjustified," lower courts have been in search of an administrable pleading standard for these claims. Today, one of the many questions a Second Circuit panel grappled with during oral argument in *In re: Bystolic Antitrust Litigation* was whether (and how) antitrust plaintiffs' identification of a so-called "side-deal" between the patent holder and accused infringer could plausibly allege a "large and unjustified payment" under *Actavis*. Though the Second Circuit may decide on narrow grounds specific to the *Bystolic* case alone, there certainly seemed to be an appetite for a broader decision providing clarity to future litigants.

We previewed the oral argument in a *Law360* article linked here. But in summary, the *Bystolic* appeal arises from settlements involving "side-deals" between patent-holder Forest Laboratories and six companies seeking to market generic versions of the blood pressure drug Bystolic. The district court ruled that plaintiffs had failed to plausibly allege that five of the six "side-deals" constituted "unjustified" reverse payments and that the sixth payment was "large." The resulting appeal is the first time the Second Circuit has considered the issue in the patent settlement context. Other Circuits—like the Third—have set the pleading bar relatively low, raising the specter of a circuit split should the Second Circuit affirm the district court.

Because *Actavis* also arose from the district court's dismissal of a complaint, the *Bystolic* parties (and the FTC, which argued as amicus on behalf of plaintiffs) all relied on the Supreme Court's analysis of the FTC's allegations in *Actavis* as guidance for what meets the "plausibility" pleading threshold. But *Actavis* provides a roadmap that is not a model of clarity. One judge on the *Bystolic* panel pointed out that, on the one hand, *Actavis* says a reverse payment reflecting "fair value for services" does not raise "the same concern that a patentee is using its monopoly profits" in an anticompetitive way. But mere sentences later, *Actavis* also says "that possibility does not justify" dismissing a complaint. So how are plaintiffs' allegations to be evaluated?

The judges on the *Bystolic* panel did not appear to have come to the argument having pre-decided the issue, asking pointed questions of both sides and of the FTC (arguing as an amicus for reversal) in an effort to land on a standard that could apply to all reverse payment cases. They recognized that evidence that a payment was "unjustified" is likely to be in the hands of defendants, but they were simultaneously concerned that setting the pleading bar too low would cause every "side-deal" contemporaneous with a reverse payment—even those that were for fair market value and entered into in good faith—to survive a motion to dismiss. Clarity may come if the Second Circuit reverses the district court, but an affirmance would create a circuit split and take the question back to where it began—the Supreme Court.

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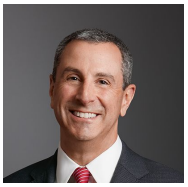

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