IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 14-1243

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KING DRUG CO. OF FLORENCE, INC. and LOUISIANA WHOLESALE DRUG CO., INC.,

Appellants

v.

SMITHKLINE BEECHAM CORPORATION, *et al.*

Appellees

BRIEF FOR THE STATES OF MISSISSIPPI, ALASKA, ARKANSAS, ARIZONA, CALIFORNIA, CONNECTICUT, DELAWARE, HAWAII, IDAHO, ILLINOIS, INDIANA, KENTUCKY, MASSACHUSETTS, MARYLAND, MICHIGAN, MINNESOTA, NEW HAMPSHIRE, NEW MEXICO, NEW YORK, NEVADA, OHIO, PENNSYLVANIA, RHODE ISLAND, TENNESSEE, TEXAS, UTAH, VERMONT, AND WASHINGTON AS *AMICUS CURIAE*

APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
ENTERED JANUARY 24, 2014

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DATE: April 25, 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF THE *AMICI*

Amici are the States of Mississippi, Alaska, Arkansas, Arizona, California, Connecticut, Delaware, Hawaii, Idaho, Illinois, Indiana, Kentucky, Massachusetts, Maryland, Michigan, Minnesota, New Hampshire, New Mexico, New York, Nevada, Ohio, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Vermont, and Washington . The *amici* States received the consent of all parties to this litigation to file the foregoing *Amicus* Brief. The States have strong interests, both as pharmaceutical purchasers and reimbursers, as well as antitrust enforcers in protecting fair competition in our pharmaceutical markets.

Prescription drugs represent a major expenditure for the States. States purchase drugs and make reimbursements for the cost of drugs through state Medicaid and other public health programs.[1] Altogether, state entities across the country spent approximately $9.4 billion for Medicaid prescription drugs in 2012.[2]

The States also have a recognized interest in enforcing federal antitrust laws to protect their citizens' economic well-being against anticompetitive practices.

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[1] The word "purchase" is sometimes used in this brief to include both the direct exchange of money for drugs and the reimbursement of purchases made by others.

[2] U.S. Dep't of Health & Hum. Svcs.,National Health Expenditures by Type of Service and Source of Funds: Calendar Year 1960-2012 http://www.cms.gov/Research-Statistics-Data-and-System/Statistics-Trends-and-Reports/NationalHealthExpendData/ NationalHealthAccountsHistorical.html.

Citizens of the States spend significant sums on prescription drugs with a nationwide total of more than $263.3 billion annually.[3] Of this amount, state and local governments typically reimburse or otherwise pay for some 17% of the total purchases, or about $44.71 billion annually.[4]

This case concerns "pay-for-delay" drug patent settlements, agreements that purport to settle drug patent disputes. However, they go much further. Specifically, patent holders compensate potential generic competitors in return for the potential competitors' agreement to delay their entry into the relevant markets. These agreements cause direct and substantial economic harm to the States and their residents by increasing drug prices and restricting consumer choice. A recent study shows that "pay-for-delay" agreements cause drug purchasers nationwide to pay at least $3.5 billion per year more for the drugs. [5]

As major drug purchasers, the *amici* States have a strong interest in avoiding those additional increased costs, and have standing to sue to protect their proprietary interests. *See, e.g., Massachusetts v. E.P.A.,* 549 U.S. 497, 519 (2007).

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[3] *Id.*

[4] California Health Care Foundation, *California Health Care Almanac, Health Care Costs 101: Slow Growth: A New Trend?,* 10-11, (Sept. 2013) www.chcf.org/~/media/MEDIA LIBRARY Files/PDF/H/PDF HealthCareCosts13.pdf

[5] FTC, *Pay-for-Delay: How Drug Company Pay-Offs Cost Consumers Billion* (Jan. 2010), 650 fn. 6, 651-53 [finding these agreements cost consumers some $12-14 billion per year.]

The States also have statutory standing under the Sherman Act and under their own often unique antitrust and competition statutes to protect their interests in the economic well-being of their residents.[6]

Acting as antitrust enforcers, the States previously challenged pay-for-delay agreements to protect their consumers from the artificially high drug prices those agreements produce. For example, the State of California paired with the FTC in bringing the underlying action in which the U.S. Supreme Court recently issued the *FTC v. Actavis*[7] ("*Actavis*") decision.

Many of the states have also appeared as parties or amicus curiae in numerous proceedings in various venues around the nation challenging these agreements. Briefs include but are not limited to the Brief of the States of California, *et al*. in *Louisiana Wholesale Drug Co. v. Bayer* (U.S. Sup. Ct. Jan. 7, 2011) Ct. No. 10-762, Brief of 34 State Attorneys General as Amici Curiae in *Arkansas Carpenters Health and Welfare Fund v. Bayer AG.* (2d Cir. 2010) 604

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[6] 15 U.S.C. § 15c; *See Georgia v. Pennsylvania R.R.,* 324 U.S. 439, 447 (1945); *California v. American Stores Co*., 495 U.S. 271 (1990).

[7] *FTC v. Actavis*, 133 S. Ct. 2223 (2013). (*Originally titled FTC and the State of California v. Watson Pharmaceuticals, Inc., et al.; filed in C.D. Cal. (Case No. CV-09-00598 AHM (PLAx)) on January 29, 2009; transferred to Georgia, over the jurisdictional objections of the State of California after which the State entered a voluntary dismissal).*

F.3d 98, and a *Brief of 38 Attorneys General as Amici* in *FTC v. Watson* (U.S. Sup. 2013) No. 12-416.[8]

Amici offer this brief to address the drastic and erroneous interpretation of *Actavis* by the District Court of New Jersey in *In re Lamictal Direct Purchaser Litigation* ("*Lamictal*"), 2014 WL 282755 (D.N.J. Jan. 24, 2014) at *7, in which the *Actavis* holding was erroneously limited to those reverse payment agreements where consideration for the delay was obtained solely with direct cash payments, as opposed to payments made with other forms of consideration or financial benefit. The language, context and spirit of *Actavis,* which the District Court is required to follow, did not limit its mandate to only those reverse payments made in cash.

Given the reality of today's reverse payment agreements, this limitation effectively eviscerates the mandate of *Actavis* to scrutinize the agreements in light of the consumer harm which they cause. 133 S. Ct. at 2235-2236. The *Amici* States' brief does not address the other positions taken in the decision in *Lamictal* and should not be construed as agreeing or disagreeing with those positions or holdings.

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[8] *See, e.g., In re Terazosin Hydrochloride Antitrust Litig.*, 352 F. Supp. 2d 1279 (S.D. Fla. 2005); *Colorado v. Warner Chilcott Holdings Co. III, Ltd.,* No. 1:05-CV- 2182 (CKK), 2007 WL 6215857 (S.D.N.Y. Nov. 7, 2005); *In re Cardizem CD Antitrust Litig.,* 332 F.3d 896 (6th Cir. 2003).

The ruling in *Lamictal* contradicts overall antitrust law which traditionally is more concerned with substance and impact than with form. The case also ignores common sense and historical payment norms. Accordingly, the District Court's reasoning in *Lamictal* has no support for such an interpretation. *Actavis*, 133 S. Ct. at 2223.

Reverse payment agreements enrich the pharmaceutical companies at the expense of consumers, by depriving consumers of the lower drug costs that competition provides, thereby costing them billions of dollars. The delayed competition and the resulting consumer harm caused by pay-for-delay agreements are the same no matter the type of payment made to the generic whether it is cash, bitcoins, gold bullion, free drug supplies, land rights, sweetheart side deals, or other forms of financial benefit.

Over the last several years, these delayed entry agreements have evolved. Would-be competitors have transitioned from using transparent cash payments to using less transparent and often multi-layered forms of consideration[9], to the point at which pure cash reverse payment agreements are considered rather "quaint."[10]

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[9] C. Scott Hemphill, *The Aggregate Approach to Antitrust: Using New Data and Agency Rules to Preserve Drug Competition*, 109 Colum. L. Rev. 629, 663-68 (2009).

[10] Michael A. Carrier, *Solving the Drug Settlement Problem: The Legislative Approach*, 41 Rutgers L.J. 83, 96 (2009).

Roughly *half* of the anticompetitive transfers today take the form of agreements by which brands promise not to introduce their own versions of generic drugs during the 180-day marketing exclusivity period of the first-filer generic manufacturer.[11] Such agreements are referred to as "no-authorized-generic agreements" or "no-AG agreements."

The competition that would otherwise be created by "authorized generics" in the market dramatically reduces the generic manufacturer's profits by some 42% to 52% on average. Therefore, a brand's promise not to introduce its authorized generic into the market provides substantial economic value to the generic.[12]

Indeed, the Supreme Court recognized in its *Actavis* decision that the 180 day period free of competition from the AG could be worth several hundred millions of dollars to the generic producer. *Actavis,* 133 S. Ct. at 2229. Unfortunately, this windfall for the companies comes at the expense of consumers who are forced to pay more for the drugs due to the lack of competition.

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[11] Fed. Trade Comm'n, *Authorized Generic Drugs: Short-Term Effects and Long-Term Impact* (2011) at 145. Fed. Trade Comm'n Bureau of Competition, Agreements Filed with the Federal Trade Commission ("FTC") under the Medicare Prescription Drug, Improvement, and Modernization Act of 2003: Overview of Agreements Filed in FY 2012, at 1 (2013), http://www.ftc.gov/os/2013/01/130117mmareport.pdf (study found that no-authorized generic agreements have steadily increased over the past few years).

[12] *Id*. at iii, 33.

These no-AG agreements are simply a variation of the unlawful reverse payment agreement addressed in *FTC v. Actavis*, 133 S. Ct. 2223 (2013). In *Actavis*, the branded company paid the generics an amount well over the actual value of services provided by the generics in exchange for the generics' agreement to delay their market entry which resulted in an extended brand name monopoly.

In *Lamictal*, in exchange for the generic delaying its entry and dropping its challenge to the brand's patent, the branded company paid the generic by: (i) agreeing not to compete against the generic for a period when the generic ultimately entered the market, thereby letting the generic be the exclusive seller of the generic drug; and (ii) supplying actual drugs to the generic to sell. 2014 WL 282755 at *2. As a result, competition diminished two fold – first by the generic's delayed entry and second by the brand name's agreement not to compete when the generic ultimately entered the market.

Affirming the District Court's narrowing of *Actavis* will only encourage companies to obfuscate the value of the payments with complex and delphic side deals to evade antitrust scrutiny. The form of payment does not change the anticompetitive effect. Accordingly, the antitrust analysis does not change merely because the generic delays entry in exchange for payment in the form of a no-AG pledge rather than, as in *Actavis*, payment in the form of an above-market-value business deal.

ARGUMENT

In *Actavis*, the Supreme Court focused on the "genuine adverse effects on competition" that can flow from reverse payment agreements at the expense of consumers in the form of higher prices. *Actavis*, 133 S. Ct. at 2235, 2237. The adverse effects are the same regardless of the form of payment, and the District Court's attempted restriction of *Actavis* to only cash payments is erroneous for numerous reasons.

First, the language, spirit and facts of *Actavis* do not call for such a restriction. To the contrary, *Actavis* specifically applies to all types of reverse payment transactions including noncash forms, both in its language and factual setting. Second, antitrust law, the Supreme Court's use of the term "payments," and common understandings of the term "payment" do not support *Lamictal*'s formalistic distinctions. Third, no matter how the generic is paid, the substance and result of the transaction are the same. In all, the delayed competition procured with financial benefit to the generic, has the same significant anticompetitive effects and harm to consumers.

Antitrust law and *Actavis* analysis are based not on the form of the payment, but on the payment's economic and anti-competitive impact and the resulting consumer harm, which is the ultimate touchstone of antitrust law. [13]

I. ANTITRUST LAW SERVES TO PROTECT CONSUMERS AND REJECTS DISTINCTIONS MADE ON FORM RATHER THAN SUBSTANCE

The Supreme Court in *Actavis* confirmed that the ultimate goal of our federal antitrust law is to protect the consumers from harm caused by anticompetitive conduct.[14] Thus, the central inquiry for antitrust analysis is not a transaction's form but its economic substance and the harm it causes to consumers.

In evaluating the competitive impact of a practice or agreement, the Supreme Court and Third Circuit have consistently required that antitrust analysis "be based upon demonstrable economic effect rather than . . . upon formalistic line drawing."[15] Antitrust law, in evaluating a price fixing scheme, is indifferent to

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[13] *Actavis*, 133 S. Ct. at 2238 ("The point of antitrust law is to encourage competitive markets to promote consumer welfare.")

[14] *Id*. 133 S. Ct. at 2266

[15] *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58-59 (1977). *See also Eastman Kodak Co. v. Image Tech. Servs., Inc*., 504 U.S. 451, 466-67 (1992) ("formalistic distinctions" are "generally disfavored in antitrust law"); *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 283 (3d Cir. 2012) (actual market impact, not formalism, matters); *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 189 (3d Cir. 2005) ("economic realities rather than a formalistic approach must govern review of antitrust activity"). *See also Toys "R" Us, Inc. v. Fed. Trade*

(continued…)

whether it is the cash, credit, or service components that are fixed by competitors' agreements. Similarly, the Hart-Scott-Rodino Act's reporting requirement of merger transactions of a prescribed dollar threshold, reaches all forms of compensation being exchanged, whether cash, real estate, contracts, stock options, product swaps or license rights.[16]

Antitrust law in this respect is no different from contract law and other subject areas which disregard the form of the consideration or payment in prescribing an enforcement regime and remedy. Contract law has historically held that a promise for a promise or a promise for an act is an adequate form of consideration.[17] Case law and the United States Code are full of different forms of payment. The Supreme Court has held that a plane ticket can be payment of wages.[18] Likewise, our tax laws prescribe property taxes based upon values, and, under 26 U.S.C. §61(a)(1) one cannot evade payment of income tax simply by

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Comm'n, 221 F.3d 928 (7th Cir. 2000); *United States v. Apple, Inc.*, No. 12 Civ. 2826 (S.D.N.Y. July 10, 2013); *United States v. Socony-Vacuum Oil Co*.,310 U.S. 150 (1940).

[16] 15 U.S.C. § 18a. (The States have provided various examples of payment throughout the brief as examples and further perspective.)

[17] *Shadwell v. Shadwell*, 9 C.B.N.S 159, 362 (1860); 27 Yale L.J. 382 1917-1918.

[18] *American Foreign S.S. Co. v. Matise*, 423 U.S. 150, 159 (1975).

receiving compensation in non-cash forms.[19] A tax credit is considered by the Supreme Court as the same as a cash payment.[20]

Lamictal acknowledges, as it must, that common understandings of the term "payment" include anything of value given in exchange. *Lamictal,* 2014 WL 282755 at *8. *See e.g.*, Merriam Webster Online Dictionary (payment is "something that is given to someone in exchange for something else.") Throughout history, "payment" has had a broad meaning and taken countless forms.[21] For example, Phoenician merchants and Roman soldiers were paid with bags of salt, and, in the Middle Ages, bags of wheat or barrels of nutmeg served as payment. Many societies still barter or pay with agricultural animals and other in-kind exchanges, and today's multinational commercial transactions are fueled with swaps, exchanges, and other non-cash forms of payment. Nothing in *Actavis* calls for abandoning common usage and understanding of the word "payment," and the law clearly disfavors any interpretation that narrows or alters the common usage of a term.[22]

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[19] IRS Publication 525 (2013).

[20] *Mueller v. Allen*, 463 U.S. 388, 404 and 408 (1983). *See also* 11 USC § 548 (value of a transfer in bankruptcy).

[21] http://en.wikipedia.org/wiki/History_of_money (last modified April 13, 2014)

[22] *Carcieri v. Salazar*, 555 U.S. 379, 388-89 (2009).

For all of these reasons, the two courts which have evaluated no-AG agreements post-*Actavis* have held that they may be unlawful under antitrust law.[23] The district court in Massachusetts stated that "[n]owhere in *Actavis* did the Supreme Court explicitly require some sort of monetary transaction to take place for an agreement between a brand and generic manufacturer to constitute a reverse payment," and "[a]dopting a broader interpretation of the word 'payment' . . . serves the purpose of aligning the law with modern-day realities."[24]

Lamictal dismisses this language in *Nexium* because money changed hands in that case. 2014 WL 282755 at *9. However, cash payments were made in only one of the three agreements at issue, while the other two agreements involved forgiveness of contingent liabilities.[25] Likewise, *Lamictal* dismisses *Lipitor* as "more like a request for further briefing than a decision," although it was, in fact, a decision on a motion to dismiss in which the district court explicitly declined to hold that the *Actavis* mandate reaches only to cash payments. *Id.* [26]

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[23] *In re Nexium Antitrust Litigation*, 2013 WL 4832176, at *15 (D. Mass. Sept. 11, 2013)

[24] *Id. See In re Lipitor Antitrust Litigation*, 2013 WL 4780496, at *26 (D.N.J. Sept. 5, 2013) ("nothing in *Actavis* strictly requires that the payment be in the form of money").

[25] *In re Nexium Antitrust Litigation*, 2013 WL 4832176, at *15.

[26] *In re Lipitor Antitrust Litigation*, 2013 WL 4780496, at *26.

II. NOTHING IN ACTAVIS SUPPORTS LAMICTAL'S RESTRICTION OF ITS MANDATE TO ONLY CASH FORMS OF PAYMENT

According to the District Court in *Lamictal,* the Supreme Court's decision in *Actavis* "reek(s) with discussion of payment of money" and its concerns about the anticompetitive effects of reverse payment agreements extended only to those made with "money" and not to non-monetary forms of consideration. *Lamictal* 2014 WL 282755 at *7-9. This statement is both legally and factually erroneous.

Most notably, *Actavis* did not involve a direct cash payment as a *quid pro quo* for the delayed generic entry. Rather, the companies in *Actavis* entered into a series of sweetheart side deals in which the branded company gave consideration for the generics' agreement to delay entry. As the Court noted, it was through the vehicle of these side deals, in which the brand overpaid for promotional and manufacturing services from the generics, that the generics received consideration in exchange for their delayed entry. *Id*. at 2229. Rather than focus on the form, the court focused on the substance of the transaction, noting that "through the above-market-value business deal, *in substance*, the plaintiff agreed to pay the defendants many millions of dollars . . . ." *Id*. at 2231 (emphasis added).

In other words, the language of *Actavis* was not limited to cash payment agreements. The majority only refers to "money" explicitly as one *example* of consideration in reverse payments. *Lamictal* even acknowledges that *Actavis*' use

of "e.g." in its sole use of "money" "suggests that this [money] scenario is nothing more than an example of a reverse payment settlement and there are others." 2014 WL 282755 at *8.

The majority in *Actavis* repeatedly uses the term "millions of dollars" to quantify the financial benefit of the first-filing generic's 180 day exclusivity period which is free from competition. *Actavis*, 133 S. Ct. at 2229 & 2235. This is especially true when the first filer is further free of competition from the brand name's authorized generic, and it is this freedom from competition in addition to the freedom from not having to actually manufacture all of the drugs which are the very forms of financial benefit offered to the generic in *Lamictal*.

The *Lamictal* Court's selective quotations from *Actavis,* used to support its result, miss the mark and are distorted, having been removed from their context. Further, the District Court misinterprets the FTC's statement that "settlements *taking this form* tend to have significant adverse effects" as referring only to cold hard cash when the FTC, like the Supreme Court, was actually broadly referring to settlements in which a plaintiff compensates a defendant who has no counterclaims. 2014 WL 282755 at *14 *citing Id*. at 2233-2234. *Lamictal* also relies upon *Actavis*' statement about allowing "settle[ments] in other ways, for example, by allowing the generic manufacturer to enter the market prior to the patent's expiration" to mean that non-cash forms of payment are acceptable, when

in actuality, the statement referred to settling in other ways which do not restrain competition. 2014 WL 282755 at *19 *quoting Id*. at 2237. Lastly, *Lamictal* frames the non-authoritative dissenting comments in *Actavis* as a criticism of the majority opinion's alleged distinction between monetary and nonmonetary transfers; however, the dissent simply stated that one cannot impose antitrust liability when a party is acting strictly within their rights as a patent holder. 2014 WL 282755 at *15.

The *Lamictal* court ultimately recognized that its limitation to cash form payments was possibly contrary to *Actavis* which included "indications that the Supreme Court intended its holding to apply to non-monetary 'payments.'" 2014 WL 282755 at *8. In furtherance of this reality, *Lamictal* concedes that the generic, "without doubt"… "received consideration in the settlement" and then actually referred to the No-AG agreement as "the payment" in question. 2014 WL 282755 at *15 & 18. Indeed, *Lamictal* concludes that the no-AG settlement in question was "within the gestalt of *Actavis*," but then finds the settlement reasonable with purely circular reasoning. 2014 WL 282755 at *9.[27] These portions alone demonstrate

[27] In addition to its position on non-cash payments, the court in *Lamictal* refers to the period without competition as "relatively brief" as a hallmark of its reasonableness, while ignoring *Actavis*' recognition of the enormous value of exclusivity in this period and established law that an illegal anticompetitive practice cannot escape liability due to its length. *Id*., at *9. *See eg. In re Static*

(continued…)

Lamictal's misreading of *Actavis* and its unfounded and overly formalistic concept of payments.

III. A NO-AG PLEDGE PROVIDES VALUE THAT IS WORTH MILLIONS OF DOLLARS AND CAUSES CONSUMERS TO OVERPAY FOR THEIR DRUGS

While the first generic manufacturer for a drug is free from competition for 180 days from other generic manufacturers under the Hatch-Waxman Act, they are legally not protected from the brand name manufacturer's own authorized generic. In *Lamictal*, the branded drug company, GSK, allegedly secured an extended monopoly period by providing the generic with a highly valuable agreement not to launch an AG during its 180-day exclusivity period. 2014 WL 282755 at *2.

Public records show that generic sales of Lamictal in 2008 were some 671 million dollars.[28] Therefore, the pledge not to compete during the 180-day period was clearly worth millions of dollars, if not hundreds of millions of dollars to the generic.

Little is said about the apparent fact that the branded drug company also provided the generic with a supply of chewable drugs which the generic was allowed to sell long before the generic had its own FDA approval, thereby

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(…continued)
Random Access Memory (SRAM) Antitrust Litigation, 264 F.R.D. 603, 614 (N.D.CA. 2009).

[28] money.cnn.com/2009/08/05/news/companies/top_generic_drugs.fortune/

relieving the generic of some of the burden of production costs. *Lamictal*, 2014 WL 282755 at *1. This appears to be nothing more than an outright gift to the generic and another way in which the branded drug company provided financial consideration to the generic for its delayed entry.

In all material respects, this transaction, either with its no-AG pledge or the transfer of a supply of drugs, or both, has the same economic structure and effect as the agreement in *Actavis*. In *Actavis,* the brand conveyed consideration to the generic in the form of an above-market-value business deal. Both agreements involved the exchange of large consideration for the generic's agreement to delay launch of its generic product. In both, the brand bought additional delay of competition, beyond what could be secured by winning the patent litigation, and ultimately harmed the consumer.

Consumer harm from the use of no-AG pledges has been the subject of extensive studies by the FTC, the body mandated by Congress to study marketplace conduct and protect our consumers.[29] The FTC's studies established that the competition by an authorized generic significantly reduces the first-filer generic's revenues by 40 to 60 percent, on average because it reduces their volume

[29] 15 U.S.C §§ 41-58

and because wholesale and retail prices of the first filer generic will decrease.[30] The reduced prices benefit the consumer. However, the consumer is harmed from the extension of noncompetition and resulting higher prices which are all part of the "payment" to the generic manufacturer by the brand name.

Both here and in *Actavis,* the agreements provide something of value including protection from competition *beyond* what the generic could have received by winning the patent litigation. In other words, the companies are not merely compromising disputed patent rights, but also making extraneous transfers of financial benefits, however highly disguised and obfuscated, to buy additional market exclusivity. As stated in *Actavis,* "the [patent] plaintiff agreed to pay the defendants many millions of dollars to stay out of its market, even though the defendants did not have any claim that the plaintiff was liable to them for damages." 133 S. Ct. at 2231, 2233. Thus, the payment is not and cannot be justified as an incident of patent power but rather is a naked agreement to buy freedom from competition.

Even by winning the patent case underlying the dispute in *Lamictal*, the generic could not obtain the right to prevent the branded company from entering

[30] FTC Bureau of Competition, Agreements Filed with the FTC under the Medicare Prescription Drug, Improvement, and Modernization Act of 2003: Overview of Agreements Filed in FY 2012 (2013), www.ftc.gov/os/2013/01/130117mmareport.pdf.

with an authorized generic during the 180-day exclusivity period.[31] Nor would the generic have received free supplies of the branded company's own product if it won the patent litigation. Yet, Teva appeared to receive even further payment via boxes of Lamictal chewables. *Lamictal*, 2014 WL 282755 at *1.

Just like the patent litigants in *Actavis*, the companies in *Lamictal* could have settled the case by splitting the patent term "without the patentee paying the challenger to stay out prior to that point." *Actavis*, 133 S. Ct. at 2237. However, they did not. Instead, these competitors chose to divide the markets between themselves,[32] providing one another exclusive monopoly periods and dividing the monopoly profits between themselves - all at the expense of the consumers. *Lamictal's* extensive exalting of form over substance cannot change the economic reality of these harmful agreements. As a result, *Lamictal* must be reversed to stop the spread of these manifestly anticompetitive agreements and to keep the Third Circuit case law in line with the Supreme Court holding.

CONCLUSION

[31] Hatch Waxman Act, 21 U.S.C. 355.

[32] Market division among competitors is considered perhaps the most pernicious from of anticompetitive business behavior since it completely eliminates *all* competition between the parties on *all* grounds. Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 2031 (3d ed. 2012).

Throughout our history, collusive market division agreements have been condemned and considered patently unlawful. While the patent element in reverse payment agreements may have allowed the agreements to escape detection for a period of time, that time is now over. *Actavis* restored antitrust oversight to this species of market division agreements. Artificial distinctions, as to the precise form in which the market divisions are secured, cannot be allowed to derail Supreme Court precedent and harm our consumers.

This the 25th day of April, 2014.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF COMPLIANCE

1. I, Crystal M. Utley, am a member of the Third Circuit Bar, having been admitted on April 17, 2014.

2. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,069 words, including the parts of the brief exempted by Fed. R. App. P.32 (a)(7)(B)(iii).

3. This brief complies with the typeface requirements of Fed. R. App. P.32 (a)(5) and the type style requirements of Fed. R. App. P.32 (a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times Roman.

4. On behalf of the State of Mississippi, *ex rel* the Mississippi Attorney General's Office (Consumer Protection Division,) I hereby certify that a copy of the foregoing is being provided to all counsel of record this day by email per their consent.

5. The text of this PDF file and the hard copies of the brief are identical.

6. A virus check was performed using Symantec Endpoint Protection, version 12.1.1000.157 RU1.

This the 25th day of April, 2014.

BY: JIM HOOD, ATTORNEY GENERAL
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