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THE RULE OF REASON IN THE POST-*ACTAVIS* WORLD

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Though known more as U.S. President and Supreme Court Chief Justice, William Howard Taft played an important role in the development of antitrust law. As Sixth Circuit judge, his ruling in the Addyston Pipe *case can be linked to modern antitrust law, including the Supreme Court's 2013 decision in* FTC v. Actavis *on drug patent settlements. This essay draws lessons from* Addyston Pipe *for these settlements, explains how courts today apply the Rule of Reason, and explores the analysis of settlements after* Actavis.

I. INTRODUCTION

William Howard Taft is famously known as the only person to serve as U.S. President and Supreme Court Chief Justice. He is less well-known for his role as a judge on the Sixth

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Circuit.[1] But in this capacity he issued a landmark antitrust ruling in *United States v. Addyston Pipe & Steel Co*.[2] In this essay, I connect this opinion to the Supreme Court's 2013 decision in *FTC v. Actavis*.[3]

First, I extract five lessons from *Addyston Pipe* that are relevant to understanding the analysis of settlements by which brand drug firms pay generic companies to settle patent litigation and delay entering the market. Second, I explain how courts today apply the Rule of Reason, focusing in particular on *NCAA v. O'Bannon*, in which the Ninth Circuit misapplied the framework. Third, I explore the antitrust analysis of settlements after *Actavis*, paying special attention to (a) a case ignoring *Actavis* (*In re Wellbutrin XL Antitrust Litigation*[4]), (b) the current Rule-of-Reason framework addressing settlements, and (c) lessons learned from *Addyston Pipe*.

II. *ADDYSTON PIPE*

In the decades following the passage of the Sherman Act in 1890, courts played a critical role in shaping the contours of antitrust law. Such a role was essential because the statute's language does not provide much guidance. Section 1 prohibits "[e]very contract, combination in the form of trust or

1 Judge Taft also contributed to antitrust law in his capacity as U.S. President, "launching twice as many antitrust prosecutions as had his progressive predecessor" and, in his 1911 State of the Union address, defending Supreme Court decisions that had adopted a Rule-of-Reason analysis. He further contributed to antitrust law as a scholar at Yale Law School, where he authored *The Anti-trust Act and the Supreme Court*, which, again, defended the Supreme Court's antitrust jurisprudence. William H. Rooney & Timothy G. Fleming, *Introduction: William Howard Taft, the Origin of the Rule of Reason, and the* Actavis *Challenge*, 2018 COLUM. BUS. L. REV. 1, 2 (2018); *see also William Howard Taft*, ENCYCLOPAEDIA BRITANNICA (last updated Jan. 25, 2018), https://www.britannica.com/biography/William-Howard-Taft.

2 United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

3 FTC v. Actavis, 133 S. Ct. 2223 (2013).

4 *In re* Wellbutrin XL Antitrust Litig., 868 F.3d 132 (3d Cir. 2017).

otherwise, or conspiracy, in restraint of trade or commerce among the several States."[5] Amidst this generality, Judge Taft's *Addyston Pipe* opinion offered a building block for the development of an analytical framework for antitrust law.

We can draw five lessons from *Addyston Pipe*. First, in analyzing a combination of manufacturers and vendors of cast-iron pipe that would "raise the prices for pipe for all the states west and south of New York, Pennsylvania, and Virginia,"[6] Judge Taft drew an important distinction between "naked" and "ancillary" restraints. A naked restraint occurs when "the sole object . . . is merely to restrain competition and enhance or maintain price," as such restraints "would necessarily have a tendency to monopoly, and therefore would be void."[7] In contrast, an ancillary restraint is "merely ancillary to the main purpose of a lawful contract and necessary to protect the covenantee in the full enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party."[8] In drawing the naked/ancillary distinction, *Addyston Pipe* provided a helpful framework for future Rule-of-Reason analysis.

Second, Judge Taft refused to create different standards for public and private actors. The defendants had argued that there should be a "less stringent" rule for cases "related to a quasi public employment necessarily under public control, and affecting public interests" than for those applying to "contracts restricting parties in sales of merchandise, which is purely a private business having in it no element of a public or quasi public character."[9] Judge Taft did not embark on such an analysis, concluding that even private parties are subject to liability if "the contract of association . . . was void and

5 15 U.S.C. § 1 (2012).

6 *Addyston Pipe,* 85 F. at 291.

7 *Id.* at 282–83.

8 *Id.* at 282.

9 *Id.* at 278.

unenforceable at the common law because [it was] in restraint of trade."[10]

Third, Judge Taft's distinction between naked and ancillary restraints was designed to avoid the "sea of doubt" by which courts would analyze the reasonableness of prices even though the agreements had "no other purpose and no other consideration on either side than the mutual restraint of the parties."[11] Taft explained that "[t]he manifest danger in the administration of justice according to so shifting, vague, and indeterminate a standard would seem to be a strong reason against adopting it."[12] Ancillary agreements cabin this discretion because "[t]he main purpose of the contract suggests the measure of protection needed, and furnishes a sufficiently uniform standard by which the validity of such restraints may be judicially determined."[13]

Fourth, the distinction between naked and ancillary restraints does not answer all of the questions facing courts applying a Rule-of-Reason analysis. While the distinction is useful for agreements accompanying partnerships and the sale of property, Judge Taft did not articulate a fully-formed framework that would cover agreements beyond this setting such as production-enhancing joint ventures or those that reduce costs while requiring sellers to set uniform prices.[14]

Fifth, *Addyston Pipe* incorporated an economic foundation into antitrust analysis. As leading antitrust scholar Herbert Hovenkamp noted, the opinion "fuse[d] the neoclassical model of competition with the legal doctrine of combinations in restraint of trade," thereby "creat[ing] the illusion that the law of combinations in restraint of trade had always been concerned with 'competition,' neoclassically defined."[15] In fact, *Addyston Pipe* "so overwhelmed future antitrust case law that

10 *Id.* at 278–79.

11 *Id.* at 283.

12 *Id.* at 284.

13 *Id.* at 282 (internal quotation marks and citation omitted).

14 Herbert Hovenkamp, *The Sherman Act and the Classical Theory of Competition*, 74 IOWA L. REV. 1019, 1041 (1989).

15 *Id.* at 1044.

[Justice Oliver Wendell] Holmes's dissenting position in *Northern Securities* [*v. United States*][16] six years later, although historically more correct, was all but forgotten."

III. RULE OF REASON

Throughout the twentieth century, antitrust courts varied in the robustness of the economic analysis they applied. After a period in which other concerns took priority, economic considerations rose to the fore in the late 1970s. In the context of analyzing agreements under Section 1 of the Sherman Act, the Supreme Court in the 1977 case *Continental T.V. v. GTE Sylvania*[17] replaced a formalistic analysis centering on whether title to an article had passed with an economic approach analyzing competitive effects. With the exception of agreements (such as price fixing and market division) that are *per se* illegal since they impose significant anticompetitive effects with no countervailing justifications, courts consider agreements under the Rule of Reason. Such a framework is needed since courts must be able to consider the anticompetitive and procompetitive effects of agreements. And they must be able to order that analysis, while ideally reducing the chance of errors and minimizing time spent on unnecessary issues.

The common understanding of the Rule of Reason is that courts balance anticompetitive and procompetitive effects. This view, however, is not accurate. In two empirical studies covering all Rule-of-Reason cases from 1977 to 1999[18] and 1999 to 2009,[19] I found that courts engaged in a burden-shifting approach.

[16] 193 U.S. 197 (1904).

[17] 433 U.S. 36 (1977).

[18] Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 BYU L. REV. 1265 (1999).

[19] Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827 (2009). Post-2009 developments confirm the conclusions in the text.

First, the plaintiff must show a significant anticompetitive effect, either an actual effect (such as a price increase or output reduction) or potential effect (such as market power).[20] Second, if the plaintiff can make such a showing, the burden shifts to the defendant to show a legitimate procompetitive justification for the restraint.[21]

Third, if the defendant can offer a justification, the plaintiff can show that the restraint is not reasonably necessary to achieve the defendant's objectives or that the objectives could be achieved by alternatives "less restrictive" of competition.[22] And fourth, courts balance anticompetitive and procompetitive effects.[23]

I found that courts almost always dispose of the case at the first stage. In my initial study, the plaintiff was not able to show an anticompetitive effect in 84% of the cases,[24] with this figure rising to 97% in the second study.[25] Courts typically find that plaintiffs not satisfying the first stage allege only harm to themselves instead of harm to competition.

Second, in cases in which the plaintiff puts forward an anticompetitive effect, the defendant must offer a procompetitive justification. In my studies, I found that the courts dismissed 3% and 0.5% of cases on the grounds that the defendant could not provide a justification.[26]

In the third stage, the plaintiff has the opportunity to show that the restraint is not reasonably necessary or that there is a less restrictive alternative. The plaintiff made such a showing in 1% and 0.5% of cases.[27] Finally, in 4% and 2% of

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20 Carrier, *supra* note 18, at 1268.

21 *Id.*

22 *Id.* at 1269.

23 *Id.*

24 *Id.* at 1293.

25 Carrier, *supra* note 19, at 829.

26 Carrier, *supra* note 18, at 1293 (3% from 1977 to 1999); Carrier, *supra* note 19, at 829 (0.5% from 1999 to 2009).

27 Carrier, *supra* note 18, at 1293 (1% from 1977 to 1999); Carrier, *supra* note 19, at 829 (0.5% from 1999 to 2009).

cases, the court balances anticompetitive and procompetitive effects.[28]

As a general matter, this burden-shifting approach makes sense. Courts should endeavor to minimize the number of cases in which they must balance the apples of anticompetitive effects against the oranges of procompetitive justifications. The incidences of such challenging balancing are reduced by the first two stages of the analysis. Removing from consideration cases in which there is no anticompetitive effect and no procompetitive justification ensures that courts do not need to balance more than necessary.

The operation of the third stage is different because the plaintiff, by showing that the defendant could achieve its goals in a manner less restrictive of competition, can win the case outright. Such a showing allows us to have our competition cake and eat it too, as the defendant can achieve its goals while imposing a lesser restriction on competition. Only when the plaintiff cannot make this showing in a situation in which there are anticompetitive and procompetitive effects does the court, in the final stage, conduct balancing.

IV. *O'BANNON*

The Rule-of-Reason framework articulated above is straightforward. And while few cases make it past the first two stages, one recently did. In that case, *NCAA v. O'Bannon*, the Ninth Circuit shot an air ball, missing the basket of hornbook antitrust analysis.

The case involved Ed O'Bannon, a former UCLA star basketball player, who brought the case after seeing his likeness in a videogame featuring classic college teams.[29] Even though the avatar resembling him did not include his

[28] Carrier, *supra* note 18, at 1293 (4% from 1977 to 1999); Carrier, *supra* note 19, at 829 (2% from 1999 to 2009).

[29] Jon Solomon, *How Sonny Vaccaro Accidentally Created the Ed O'Bannon Case*, CBS SPORTS (June 6, 2014), https://www.cbssports.com/college-basketball/news/how-sonny-vaccaro-accidentally-created-the-ed-obannon-case/ [perma.cc/4SRS-L9KS].

name on the jersey, it depicted a "UCLA power forward with O'Bannon's height, weight, [baldness,] skin tone, No. 31, and left-handed shot."[30] O'Bannon claimed that the NCAA violated antitrust law by not allowing student-athletes to be paid when their name, image, or likeness [NIL] appeared in a video game, live game telecast, or other footage.[31]

After an exhaustive district court trial, the Ninth Circuit weighed in. First, it found that plaintiffs showed a significant anticompetitive effect: NCAA rules "fix the price of one component of the exchange between school and recruit, thereby precluding competition among schools with respect to that component."[32] The court also found that the "student-athletes . . . are harmed by the price-fixing agreement" and that "[t]he athletes accept grants-in-aid, and no more, in exchange for their athletic performance, because the NCAA schools have agreed to value the athletes' NILs at zero, 'an anticompetitive effect.'"[33]

Turning to the next stage, the court found that the NCAA offered legitimate justifications. It concluded that "the NCAA's compensation rules serve the two procompetitive purposes accepted by the district court: integrating academics with athletics, and 'preserving the popularity of the NCAA's product by promoting its current understanding of amateurism.'"[34] In particular, the court found that "the amateur nature of collegiate sports increases their appeal to consumers."[35]

The Ninth Circuit next turned to less restrictive alternatives. It upheld the first alternative of payment beyond the "grant-in-aid" scholarship (tuition/fees, room and board, and required books) up to the "cost of attendance" stipend

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30 Steve Fainaru & Tom Farrey, *Game Changer*, ESPN (July 24, 2014), http://www.espn.com/espn/otl/story/_/id/11255945/washington-attorney-michael-hausfeld-most-powerful-man-sports [perma.cc/S52T-YNZX].

31 O'Bannon v. NCAA, 7 F. Supp. 3d 955, 963 (N.D. Cal. 2014).

32 O'Bannon v. NCAA, 802 F.3d 1049, 1071 (9th Cir. 2015).

33 *Id.*

34 *Id.* at 1076.

35 *Id.*

(typically a few additional thousand dollars covering transportation, supplies, and nonrequired books).[36] The court found that "raising the grant-in-aid cap to the cost of attendance would have virtually no impact on amateurism" and that "[n]othing in the record . . . suggested that consumers of college sports would become less interested in those sports if athletes' scholarships covered their full cost of attendance.[37]

The Ninth Circuit, however, rejected the second alternative: a payment of up to $5000 (deferred until after graduation) for the use of a student-athlete's name, image, and likeness in videogames, live game telecasts, and other footage.[38] It was not willing to "agree that a rule permitting schools to pay students pure cash compensation and a rule forbidding them from paying NIL compensation are both *equally* effective in promoting amateurism and preserving consumer demand."[39] And it concluded that "it is clear the district court erred in concluding that small payments in deferred compensation are a substantially less restrictive alternative restraint."[40] As a result, the court struck down the $5000 cap. But in doing so, it made several errors.

First, the Ninth Circuit did not defer sufficiently to the district court. The lower court, through twenty-four witnesses, fifteen days, and thousands of pages of trial testimony, left no stone unturned in the first trial focused on amateurism.[41] The court heard about the NCAA's shifting versions of amateurism[42] as well as football players "accept[ing] Pell

36 *Id.* at 1054 n.3

37 *Id.* at 1075.

38 O'Bannon v. NCAA, 7 F. Supp. 3d 955, 963 (N.D. Cal. 2014).

39 *O'Bannon*, 802 F.3d at 1076.

40 *Id.* at 1079.

41 Steve Berkowitz, *O'Bannon Trial: Case vs. NCAA in Hands of Judge*, USA TODAY (June 28, 2014, 12:38 AM), https://www.usatoday.com/story/sports/college/2014/06/27/obannon-antitrust-case-vs-ncaa-trial-closes/11576223/ [perma.cc/B3EM-JSC7].

42 *O'Bannon*, 7 F. Supp. 3d at 1000 ("[T]he NCAA has revised its rules governing student-athlete compensation numerous times over the years, sometimes in significant and contradictory ways," and "even today," it "does not consistently adhere to a single definition of amateurism.").

grants in excess of their cost of attendance" and tennis recruits earning "$10,000 per year in prize money."[43] The court's conclusion about support for the deferred $5000 alternative also was, as dissenting Chief Judge Thomas explained, "based on testimony from at least four experts—including three experts presented by the NCAA."[44] Relying on this evidence (with "no evidence to the contrary"[45]), the district court concluded that "permitting schools to make limited payments to student-athletes above the cost of attendance would not harm consumer demand for the NCAA's product,"[46] which "is not driven by the restrictions on student-athlete compensation but instead by other factors, such as school loyalty and geography."[47] Despite these findings, the Ninth Circuit engaged in armchair empiricism, holding that these modest payments would not constitute an effective alternative that could achieve the defendant's objectives.[48]

This failure in deference aside, the court erred in its application of the Rule of Reason by not recognizing that plaintiffs do *not* lose if they cannot show a less restrictive alternative.[49] In the Ninth Circuit's defense, courts usually do not proceed this far into the analysis, and the application of the third stage is nuanced.

But the consequences of not satisfying the third factor diverge from the first two. Under the first factor, plaintiffs that cannot show an anticompetitive effect lose. Similarly, pursuant to the second factor, defendants that cannot show a procompetitive justification lose. With the third factor, in

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43 *O'Bannon*, 802 F.3d at 1080 (Thomas, C.J., concurring in part and dissenting in part).

44 *Id.* at 1080–81.

45 *Id.* at 1083.

46 *O'Bannon*, 7 F. Supp. 3d at 983.

47 *Id.* at 1001; *see generally* Michael A. Carrier, *How Not To Apply the Rule of Reason: The* O'Bannon *Case*, 114 MICH. L. REV. FIRST IMPRESSIONS 73 (2015).

48 *See* Carrier, *supra* note 47, at 80.

49 VII PHILLIP E. AREEDA, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1507, at 397 (1986).

contrast, if plaintiffs cannot show a less restrictive alternative, that just means they do not win outright. Instead, the court proceeds to balancing, the only way to account at the end of the analysis for anticompetitive and procompetitive effects.

Even if a plaintiff cannot show a less restrictive alternative, it makes sense to balance as there could be significant anticompetitive effects but limited procompetitive justifications. Under the Ninth Circuit's rule, however, with the less-restrictive-alternative stage signifying the end of the analysis, the court never gets that far.

In fact, if the court had balanced anticompetitive and procompetitive effects, the plaintiffs likely would have won. The Ninth Circuit recognized the significant anticompetitive effect from players not being paid.[50] At the same time, the justification based on amateurism was questionable, marked by shifting definitions and inconsistency.[51] In short, the *O'Bannon* decision illustrates an erroneous application of the Rule of Reason.

This ruling notwithstanding, the straightforward application of the burden-shifting approach under the Rule of Reason is generally not contested. Its application to drug patent settlements, however, has been more disputed.

V. *ACTAVIS*

The issue of "reverse payment" settlements—i.e., settlements involving payments from brands to generics to delay entering the market, unlike settlements in industries in which alleged infringers pay patentees to enter the market—has received varied treatment in the courts. Between 2005 and 2012, appellate courts upheld these settlements based on five propositions: (1) payment fell within the "scope of the patent," (2) patents are presumed valid under the Patent Act, and settlements (3) serve important public policies, (4) promote innovation, and (5) are a "natural by-product" of the

50 *O'Bannon,* 802 F.3d at 1070–71.

51 *O'Bannon,* 7 F. Supp. 3d at 1000.

Hatch-Waxman Act.[52] Most notably, the Federal, Second, and Eleventh Circuits upheld settlements by applying a test that found that they fell within the scope of the patent, reasoning that a payment within the patent term could not harm competition because the patent holder could exclude competition based on the patent itself.[53]

In 2012, however, in *In re K-Dur Antitrust Litigation*, the Third Circuit rejected the scope-of-the-patent test, explaining that the test assumed the validity at issue and was irrelevant when the issue is infringement (on which the patentee bears the burden of proof).[54] The court also concluded that a reverse payment was "prima facie evidence of an unreasonable restraint of trade" that could be rebutted only if the settling parties could show that the payment was for a purpose other than delay or that it "offers some pro-competitive benefit."[55]

In 2013, the Supreme Court resolved the circuit split in *FTC v. Actavis*,[56] rejecting the scope-of-the-patent test and finding it "incongruous" to "determine antitrust legality by measuring the settlement's anticompetitive effects solely against patent law policy, rather than by measuring them against procompetitive antitrust policies as well."[57] The Court found that reverse-payment settlements had the "potential for genuine adverse effects on competition" since "payment in return for staying out of the market . . . keeps prices at patentee-set levels."[58]

One of the issues confronting courts that do not assume a patent's validity involves assessing patent strength. In

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[52] Michael A. Carrier, *Unsettling Drug Patent Settlements: A Framework for Presumptive Illegality*, 108 MICH. L. REV. 37, 60–66 (2009).

[53] FTC v. Watson Pharms., 677 F.3d 1298, 1312 (11th Cir. 2012); *In re* Ciprofloxacin Hydrochloride Antitrust Litig., 544 F.3d 1323, 1332–33, 1336, 1337 (Fed. Cir. 2008); *In re* Tamoxifen Citrate Antitrust Litig., 466 F.3d 187, 208–09, 213 (2d Cir. 2006).

[54] *In re* K-Dur Antitrust Litig., 686 F.3d 197, 214 (3d Cir. 2012), *vacated sub nom*. Merck & Co. v. La. Wholesale Drug Co., 133 S. Ct. 2849 (2013).

[55] *Id.* at 218.

[56] FTC v. Actavis, Inc., 133 S. Ct. 2223 (2013).

[57] *Id.* at 2231.

[58] *Id.* at 2234.

Actavis, the Court revealed its strong preference for analyzing this issue by examining the payment rather than the patent, emphasizing that the "size of the unexplained reverse payment can provide a workable surrogate for a patent's weakness, all without forcing a court to conduct a detailed exploration of the validity of the patent itself."[59]

The Supreme Court also rejected brands' contentions that strong patents justify the payment, reasoning that even an unexplained payment on a "particularly valuable patent . . . likely seeks to prevent the risk of competition," with this consequence "constitut[ing] the relevant anticompetitive harm."[60] Finally, the Court found that the policy in favor of settlement did not immunize the agreements for five reasons centered on reverse payments' (1) anticompetitive effects, (2) lack of justification, and (3) market power, along with (4) the feasibility of judicial analysis and (5) parties' ability to settle without payment.[61]

The Court concluded that "the FTC must prove its case as in other rule-of-reason cases."[62] It instructed future courts to analyze payments' "size, . . . scale in relation to the payor's anticipated future litigation costs, . . . independence from other services for which it might represent payment, and . . . lack of any other convincing justification."[63]

Even though the Court did not adopt the "quick look" approach advocated by the Federal Trade Commission ("FTC"), it also did not embrace a "kitchen sink" approach. In particular, the Court adopted shortcuts favoring plaintiffs. First, it found that the "size of the payment" serves as "a strong indicator of power,"[64] which makes sense since "[a] producer in a highly competitive market would not pay anything to keep a rival out because price-cost margins are already low and keeping one firm out would not improve that

59 *Id.* at 2236–37.
60 *Id.* at 2236.
61 *Id.* at 2234–37.
62 *Id.* at 2237.
63 *Id.*
64 *Id.* at 2236.

situation."[65] And second, the Court found that a large and unjustified payment has the "potential for genuine adverse effects on competition"[66] because the payment "in effect amounts to a purchase by the patentee of the exclusive right to sell its product, a right it already claims but would lose if the patent litigation were to continue and the patent were held invalid or not infringed by the generic product."[67]

By offering shortcuts for plaintiffs to demonstrate market power and anticompetitive effects, the Court provided powerful tools allowing plaintiffs to clear the first stage of the Rule-of-Reason analysis. With ninety-seven percent of cases today dismissed at the first stage due to plaintiffs' failure to show an anticompetitive effect,[68] the *Actavis* shortcuts are significant.[69]

The Rule-of-Reason analysis is further streamlined because the Court was not willing to accept procompetitive justifications other than payments not exceeding litigation costs or for generic services.[70] The settling parties, for example, are no longer able to offer reasons based on entry before the end of the patent term or preventing risk aversion.

Nor is the existence of a patent reason to defer to the settlement. The Supreme Court made clear that it is

[65] Aaron Edlin et al., *Activating* Actavis, 28 ANTITRUST 16, 17 (2013).

[66] *Actavis*, 133 S. Ct. at 2234.

[67] *Id.*

[68] *See supra* note 25 and accompanying text.

[69] Saul Morgenstern and Adam Pergament's response criticizes my acknowledgment of shortcuts but fails to sufficiently appreciate *Actavis*'s focus on the "prevent[ion of] the risk of competition" as "the relevant anticompetitive harm." *Actavis*, 133 S. Ct. at 2236. Such a recognition makes clear that (1) patent weakness is determined at the time of settlement; (2) the objection to a large and unjustified payment is that it "maintain[s] supracompetitive prices to be shared"; and (3) in assessing antitrust liability, courts need not evaluate "but for" determinations of litigation or other settlements. *Id.*; *see* Saul P. Morgenstern & Adam M. Pergament, *Commentary: Applying the Rule of Reason in the Post-*Actavis *World,* 2018 COLUM. BUS. L. REV. 45, 54–65 (2018).

[70] *Actavis*, 133 S. Ct. at 2236. The court mentioned "other justifications" but did not elaborate on this concept. In the years since *Actavis*, no other court has applied such a category.

"normally not necessary to litigate patent validity to answer the antitrust question."[71] The Eleventh Circuit recognized the difficulty of courts "deciding a patent case within an antitrust case about the settlement of the patent case,"[72] which it analogized to the southern dish of turkey, duck, and chicken known as "turducken."[73] Not requiring a plaintiff to demonstrate a patent's ultimate invalidity also makes sense because the relevant time for determining antitrust liability is the moment of settlement.[74]

VI. *WELLBUTRIN*

Despite the Supreme Court's pronouncements on payment as a surrogate for patent weakness and the benefits of the risk of competition, the Third Circuit in the recent case of *In re Wellbutrin XL Antitrust Litigation*[75] ignored the Court. The *Wellbutrin* court hypothesized reasons for payment based on a brand's "improper[] evaluat[ion]" of the patent.[76] Such a hypothesis, however, is contrary to *Actavis*, which made clear that an "unexplained large reverse payment . . . suggests that the payment's objective is to maintain supracompetitive prices to be shared among the patentee and the challenger."[77] In fact, earlier in its opinion, the Third Circuit conceded that the "$233 million . . . payment can be said to be large" and

71 *Id.*

72 FTC v. Watson Pharms., Inc., 677 F.3d 1298, 1315 (11th Cir. 2012), *rev'd and remanded sub nom.* FTC v. Actavis, Inc., 133 S. Ct. 2223 (2013).

73 Amanda Hesser, *Turkey Finds Its Inner Duck (and Chicken)*, N.Y. TIMES (Nov. 20, 2002), http://www.nytimes.com/2002/11/20/dining/turkey-finds-its-inner-duck-and-chicken.html [https://perma.cc/KS24-8HH7].

74 See HERBERT HOVENKAMP, MARK D. JANIS, MARK A. LEMLEY, CHRISTOPHER R. LESLIE & MICHAEL A. CARRIER, IP AND ANTITRUST: AN ANALYSIS OF ANTITRUST PRINCIPLES APPLIED TO INTELLECTUAL PROPERTY LAW § 16.01[D], at 16-31 to 16-32 (3d ed. 2017) (the "problematic aspect" of reverse payment settlements is that "they raise a strong inference that the parties believed ex ante that there was a significant chance that the patent was invalid").

75 *In re* Wellbutrin XL Antitrust Litig., 868 F.3d 132 (3d Cir. 2017).

76 *Id.* at 168.

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

"unjustified in the sense of being unexplained."[78] Although the court found "multiple plausible ways" to interpret the brand's payment,[79] *Actavis* rejected the interpretations it advanced.[80]

The Third Circuit was even "persuaded" by an argument in an amicus brief submitted by economists that resuscitated the risk-aversion defense rejected in *Actavis*. This brief offered a "lottery" example that (undercutting *Actavis*[81]) showed nothing more than brand firms' desire for certainty rather than taking the chance of losing the patent case.[82] The Third Circuit somehow found that the amicus brief "effective[ly] rebutted" the argument that a payment's size is a surrogate for the patent's weakness.[83] It is difficult, however, to see how a lower court can employ an argument that the Supreme Court majority *rejected* to "rebut" an argument that the majority *accepted*.

VII. RULE OF REASON

How should courts apply the Rule of Reason after *Actavis*? As an initial matter, plaintiffs should not be required to clear a threshold of showing a "large and unjustified" payment before reaching the Rule-of-Reason analysis. *Actavis* instructed courts to apply the Rule of Reason, not a new framework with a threshold never mentioned. Moreover, such a threshold is inconsistent with the Court's allowance of shortcuts for plaintiffs and imposition of burdens on defendants to show justifications.[84]

Turning to the antitrust analysis itself, several courts after *Actavis* have applied a Rule-of-Reason framework, most

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78 *In re Wellbutrin*, 868 F.3d at 162.

79 *Id.* at 168.

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

81 *Id.* at 2236–37.

82 *Id.*

83 *In re Wellbutrin*, 868 F.3d at 168.

84 *See generally* Michael A. Carrier, *Why a "Large and Unjustified" Payment Threshold Is Not Consistent with* Actavis, 91 WASH. L. REV. 109, 110 (2016). *See supra* notes 64–70 and accompanying text.

notably the California Supreme Court in *In re Cipro Cases I & II*,[85] the Third Circuit in *King Drug Company of Florence v. Smithkline Beecham Corp.*,[86] and district courts in *In re Nexium (Esomeprazole) Antitrust Litigation*[87] and *King Drug Company of Florence v. Cephalon*.[88] These courts have articulated a burden-shifting analysis, which can be synthesized as follows.

First, a plaintiff must show a limit on generic entry and compensation to the generic.[89] Courts have not focused on the limitation on entry, finding it satisfied by entry delayed from the date of the settlement. The issue of compensation, in contrast, has received substantial attention. The primary issue that has been litigated since *Actavis* is whether payment is limited to cash or extends to noncash conveyances. Nearly every court that has examined the issue has adopted the broader approach—extending the payment to noncash conveyances—and the two district courts that did not were overturned on appeal.[90] Such an interpretation makes sense: Economics 101 tells us that providing $100 million in cash is functionally equivalent to making a promise worth $100 million.[91] Courts have also found that payments must be

85 *In re* Cipro Cases I & II, 348 P.3d 845, 869–70 (Cal. 2015).

86 King Drug Co. of Florence v. Smithkline Beecham Corp., 791 F.3d 388, 403 (3d Cir. 2015).

87 *In re* Nexium (Esomeprazole) Antitrust Litig., 42 F. Supp. 3d 231 (D. Mass. 2014), *aff'd*, 842 F.3d 34, 77 (1st Cir. 2016).

88 *See* King Drug Co. of Florence v. Cephalon, Inc., 88 F. Supp. 3d 402, 405 (E.D. Pa. 2015).

89 *Cipro*, 348 P.3d at 871.

90 *See* Rochester Drug Co-Operative, Inc. v. Warner Chilcott Co. (*In re* Loestrin 24 Fe Antitrust Litig.), 814 F.3d 538 (1st Cir. 2016); *King Drug Co.*, 791 F.3d at 410–11.

91 Related to the application of payment to noncash conveyances is the issue of what a plaintiff needs to plead to survive a motion to dismiss. On that question, the Third Circuit in *In re Lipitor Antitrust Litigation*, 868 F.3d 231 (2017), offered a reasonable approach that overturned the excessively high standard applied by the district court and demonstrated consistency with *Actavis* and the landmark pleading cases *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

"large," a concept most reasonably interpreted from the viewpoint not of the brand company (as a $100 million payment is a drop in the bucket for a $5 billion drug) but from the vantage point of the generic, who might be "induce[d] . . . to abandon its claim with a share of its monopoly profits that would otherwise be lost in the competitive market."[92]

Second, the defendant then has the opportunity to offer justifications for the payment. The Supreme Court made clear that the defendant has the burden of production on this point, as "[a]n 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."[93] Such a burden makes sense since defendants are likely to have in their possession evidence related to the value of the services they purchase.

Finally, the plaintiff has the chance to rebut the defendant's showing, demonstrating, for example, that the payment is for delay rather than generic services.[94] The case law has revealed examples of brand payments that do not

[92] FTC v. Actavis, Inc., 133 S. Ct. 2223, 2235 (2013).

[93] *Id.* at 2236; *see also id.* at 2237 ("One who makes such a payment may be unable to explain and to justify it.").

[94] Another issue that private plaintiffs must demonstrate is causation. Courts offering a more flexible approach, such as *In re Niaspan Antitrust Litigation*, 42 F. Supp. 3d 735 (E.D. Pa. 2014), and *United Food & Commercial Workers Local 1776 v. Teikoku Pharma USA*, 74 F. Supp. 3d 1052 (N.D. Cal. 2014), ask if the settlement prevented the risk of competition, which could be shown by a generic poised to enter the market "at risk" (before a court finds the patent invalid or not infringed) or purchasing materials in preparation of entering the market. In contrast, a stricter standard, such as that offered in *In re Nexium (Esomeprazole) Antitrust Litigation*, requires plaintiffs to demonstrate exactly what would have occurred absent the settlement and rejects a causal link if the failure to obtain FDA review constituted an intervening hurdle. *In re* Nexium (Esomeprazole) Antitrust Litig., 42 F. Supp. 3d 231 (D. Mass. 2014), *aff'd*, 842 F.3d 34, 77 (1st Cir. 2016). *See generally* Kevin B. Soter, *Causation in Reverse Payment Antitrust Claims*, 70 STAN. L. REV. (forthcoming 2018) (on file with author).

appear to be for generic services, with brands typically not interested in generic services outside the settlement context.[95]

One example is provided by the facts alleged in *FTC v. Actavis*.[96] In its complaint (which was dismissed before being reinstated by the Supreme Court), the FTC asserted that the brand's co-promotion deals with generics were not independent business transactions, explaining that before entering into settlement discussions with the generics: (1) "Solvay [the brand firm] had not been looking for a co-promotion partner"; (2) the company's business plan had "assumed no co-promotion"; (3) "two prior AndroGel co-promotion efforts had been canceled because they had 'no significant impact' on sales trends"; and (4) an "analysis from a consulting firm had concluded that future AndroGel co-promotion offered 'little revenue upside.'"[97] In addition to the lack of interest in co-promotion, Solvay's payments "far exceed[ed] the value of the services provided."[98] Solvay "projected that it would pay [the generics] more than . . . $300 per sales call," much more than a previous co-promotion deal that had "involv[ed] projected payments of around $30–$45 per sales call" and even more than the $150 per call that a senior Watson (now Actavis) executive had called "ridiculous."[99]

VIII. *ADDYSTON* LESSONS FOR *ACTAVIS*

Judge Taft's *Addyston Pipe* opinion articulated several principles that remain relevant today and are applicable to *Actavis*. First, in 1898 the Rule of Reason required structure,

[95] Michael A. Carrier, *Payment After* Actavis, 100 IOWA L. REV. 7, 22 (2014) (citing testimony of former FTC Chairman Jon Leibowitz and review of securities filings by Scott Hemphill).

[96] *Actavis*, 133 S. Ct. at 2223.

[97] Second Amended Complaint for Injunctive and Other Equitable Relief at ¶ 82, FTC v. Watson Pharm., Inc., No. 1:09-cv-00955-TWT (N.D. Ga. May 28, 2009).

[98] *Id.*

[99] *Id.* (internal quotation marks omitted); Carrier, *supra* note 95, at 23–24.

which was provided by *Addyston Pipe*'s distinction between naked and ancillary restraints. 115 years later, in 2013, the intersection of the antitrust and IP laws required structure in the context of the pharmaceutical industry, which the Supreme Court, by rejecting the scope-of-the-patent test and highlighting the harms from settlements with payment, provided in *Actavis*.

Second, just as the court refused to draw a line in *Addyston Pipe* between public and private restraints, the Supreme Court refused to draw a similar distinction in *Actavis*. Even though *Actavis* involved the FTC, the Supreme Court never stated or intimated that the standards for liability should be different for private parties than for the government.

Third, Judge Taft did not wish to enter into a "sea of doubt" in ascertaining the reasonableness of prices.[100] Such caution is akin to the Supreme Court's avoidance of a "turducken"[101] approach that wades into the morass of the patent merits.

Fourth, the task of refining antitrust analysis continued even after *Addyston Pipe*, as the naked/ancillary distinction could not account for every permutation of competition. Similarly, the Supreme Court in *Actavis* recognized that lower courts must further flesh out the Rule of Reason.

And fifth, just as *Addyston Pipe* connected common law restraints of trade with neoclassical competition, the Supreme Court, appropriately considering the regulatory regime, connected antitrust law with patent law and the Hatch-Waxman Act in *Actavis*.

In short, though it followed 150 years later, *Actavis* finds support in *Addyston Pipe* and the important role that Judge Taft articulated in laying a fundamental building block underlying antitrust law.

100 *See supra* note 11 and accompanying text.

101 *See supra* note 73 and accompanying text.