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Ending Patent Exceptionalism and Structuring the Rule of Reason: The Supreme Court Opens the Door for Both

Robin Feldman*

In a wonderfully crisp manner, Justice Breyer's majority opinion in the recent case of *FTC v. Actavis, Inc.* sets out the issue in the case:

[T]wo companies settle under terms that require . . . the claimed infringer[] not to produce the patented product until the patent's term expires, and . . . the patentee[] to pay [the infringer] many millions of dollars. Because the settlement requires the patentee to pay the alleged infringer, rather than the other way around, this kind of settlement agreement is often called a "reverse payment" settlement agreement. And the basic question here is whether such an agreement can sometimes unreasonably diminish competition in violation of the antitrust laws.¹

The simplicity of the description is particularly impressive given that very little in the context of patent litigation between generic and branded pharmaceutical companies is crisp or clear.

The litigation and regulatory system for launching generic drugs is called Hatch-Waxman,² after the legislation that spawned its web-like complexity.³ And herein lies the problem;

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1. *FTC v. Actavis, Inc.*, 133 S. Ct. 2223, 2227 (2013).

2. *See* Drug Price Competition and Patent Term Restoration (Hatch-Waxman) Act of 1984, Pub. L. No. 98-417, 98 Stat. 1585 (codified as amended in scattered sections of 15, 21, 28, and 35 U.S.C.).

3. For a detailed description of the Hatch-Waxman Act and the machinations it has engendered, see C. Scott Hemphill, *Paying for Delay: Pharmaceutical Patent Settlement as a Regulatory Design Problem*, 81 N.Y.U. L. REV. 1553, 1578–79 (2006) (describing the 180-day exclusivity duopoly that can be granted to generic firms under the Act); Matthew Avery, Note, *Continuing Abuse of the Hatch-Waxman Act by Pharmaceutical Patent Holders*

the complexity of Hatch-Waxman has provided opportunities for patent manipulation. These opportunities appear against a backdrop of the patent system in general, in which manipulation of the patent system has been elevated to an art form.⁴

The difference between our aspirations for the patent system and what we are currently experiencing can be summed up as the difference between deploying the legal right and deploying the legal system. Some patent holders, both within the Hatch-Waxman context and in other circumstances, are taking advantage of weaknesses in the litigation system to extract value that is unrelated to any value that the patents might contribute to a product.⁵ It is a singularly unproductive use of a government-granted right—a right that, ironically, is intended to enhance productivity. As Rob Merges noted in a recent article on litigation abuses in patent trolling: “As a way of resolving disputes over the transfer of assets or legal rights, litigation makes sense. As the basis of productive economic activity, not so much.”⁶

A patent gives one an opportunity to exploit an idea. It is not intended as a universal pass for exploiting the legal system. Nevertheless, an inappropriate notion that I would call patent exceptionalism has been allowing patent holders, all too frequently, to exercise free rein. Patent exceptionalism, this devotion to an artificial image of patents, is distorting the

and the Failure of the 2003 Amendments, 60 HASTINGS L.J. 171, 173 (2008) (giving an overview of how the 2003 amendments modified the Act).

4. See, e.g., Tom Ewing & Robin Feldman, *The Giants Among Us*, 2012 STAN. TECH. L. REV. 1, 1 (“The patent world is quietly undergoing a change of seismic proportions.”); Robin Feldman, *Intellectual Property Wrongs*, 18 STAN. J.L. BUS. & FIN. 250 (2013) [hereinafter Feldman, *Intellectual Property Wrongs*]; Carl Shapiro & Fiona Scott Morton, *Strategic Patent Acquisitions*, A.B.A. ANTITRUST L.J. (forthcoming 2014) (manuscript at 1), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2288911 (describing the increasing popularity of “strategic patent acquisitions”).

5. See Feldman, *Intellectual Property Wrongs*, *supra* note 4 (describing inappropriate rent-seeking activity with intellectual property rights in general); see also ROBIN FELDMAN, RETHINKING PATENT LAW 158–78 (2012) [hereinafter FELDMAN, RETHINKING PATENT LAW] (describing patent manipulations in the pharmaceutical industry in both the Hatch-Waxman and other contexts).

6. See Robert Merges, *Some Common Sense About Innovation and Patent Litigation*, MEDIA INST. (July 22, 2013), <http://www.mediainstitute.org/IPI/2013/072213.php>.

patent system, as well as the other legal domains with which it must interact.

The patent system is not a deity to which we must respectfully defer. It is a living, breathing part of the organism that is our legal system. If we continue to treat patents with exceptionalism, we have only ourselves to blame as we walk willingly into the volcano.

Part I of this Article describes Hatch-Waxman and the questions that arise in reverse payment settlements between branded and generic pharmaceutical companies. Part II describes patent exceptionalism and explains how the Supreme Court decision in *Actavis* moves away from it. This part also highlights where exceptionalism imagery continues to lurk within some of the Justices' language, both in the majority and dissenting opinions.

Part III moves beyond patent exceptionalism and explains how the appeal of patent exceptionalism is intertwined with problems in the antitrust system. To put it bluntly, patent exceptionalism is alluring because it makes life so simple. Moving away from patent exceptionalism means that we have to worry about the messy question of what is acceptable and what is not acceptable patent behavior.

In the antitrust arena, this question is generally addressed through the rule of reason, and there is nothing messier than the rule of reason—at least in its pure form. As I have noted in the past, the rule of reason analysis is so complex that it is a burden on litigants and the judicial system.⁷ Once again, the Supreme Court language in *Actavis* opens the door for moving away from this problem, although one could argue that the door was opened merely a crack. Specifically, by directing the lower courts to “structure” antitrust litigation,⁸ the Court provided an opportunity to give form to the amorphous rule of reason, an apparition that has repelled the hardiest of antitrust warriors. Part III of this Article will discuss the notion of a structured rule of reason and how it might give form to the inquiry.

7. Robin Cooper Feldman, *Defensive Leveraging in Antitrust*, 87 GEO. L.J. 2079, 2107–08 (1999) [hereinafter Feldman, *Defensive Leveraging in Antitrust*] (citing various sources showing the difficulty of applying the rule of reason).

8. See *FTC v. Actavis, Inc.*, 133 S. Ct. 2223, 2238 (2013).

I. PAY-FOR-DELAY

A. HATCH-WAXMAN

Approved in 1984, the Hatch-Waxman Act (the Act) was designed to reduce the price of medicines by bringing generic drugs to market as quickly as possible.⁹ Studies show that the price of medication drops by 20%–30% when one generic enters the market and can fall as much as 80% or more when multiple generics enter and saturate the market.¹⁰

Prior to the Hatch-Waxman Act, generic companies could not begin working on approval and production of a medicine until the expiration of the branded drug's patent.¹¹ This allowed continuation of the branded drug's market power beyond the life of the patent.¹² Among other things, the Act provided a mechanism for the generic drug maker to begin the approval process ahead of time so that the generic drug would be ready for launch at the expiration of the patent.¹³

The Act's attempts to encourage generic entry go well beyond lining up for entry. In particular, the Act allows generic companies to piggy-back on the extensive studies required for FDA approval of a drug.¹⁴ Rather than repeating the lengthy and expensive drug trials required for a new drug, generic companies can use the data from the original studies and focus on demonstrating that the generic version has the same active ingredients and is biologically equivalent to the original drug.¹⁵

9. H.R. REP. NO. 98-857, pt. 1, at 14 (stating the purpose of the Act was to "make available more low cost generic drugs").

10. See, e.g., Jessie Cheng, *An Antitrust Analysis of Product Hopping in the Pharmaceutical Industry*, 108 COLUM. L. REV. 1471, 1476 n.30 (2008); Benjamin G. Druss et al., *Listening to Generic Prozac: Winners, Losers, and Sideliners*, 23 HEALTH AFF. 210, 214 (2004); see also Answer, Affirmative Defenses, and Counterclaims at 23, Bayer Schering Pharma AG v. Sandoz Inc., No. 2:08-CV-3710-PAC (S.D.N.Y. July 11, 2008), 2008 WL 4486682; Henry G. Grabowski & John M. Vernon, *Brand Loyalty, Entry, and Price Competition in Pharmaceuticals After the 1984 Drug Act*, 35 J.L. & ECON. 331, 335–36 (1992).

11. See Avery, *supra* note 3, at 174–75.

12. *Id.* at 175.

13. *Id.* at 176.

14. See 21 U.S.C. § 355(j) (2012) (providing for abbreviated new drug applications (ANDAs)).

15. Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S, 132 S. Ct. 1670, 1676 (citing 21 U.S.C. § 355(j)(2)(A)(ii), (iv)).

The Act also includes an incentive for companies to step up to the plate, bring forth generic versions, and challenge the branded behemoths—and, in fact, there has been some grumbling that Hatch-Waxman tilts too far in favor of generics in various aspects. Specifically, the first generic to file for approval under the Hatch-Waxman system and get the drug to market will receive a six-month exclusivity period.¹⁶ In other words, no other generic can come to market during that period. This has the effect of ensuring that the price will stay higher for the branded drug company and for the single generic during this period than when all generics are eventually allowed in after six months. The six-month exclusivity period can be worth as much as hundreds of millions of dollars to a generic company.¹⁷

The Hatch-Waxman Act also contains a procedure for resolving potential patent disputes between the generic and the branded drug companies. Among other options, a generic company can assert that the patents covering the drug are either invalid or do not apply to the generic version.¹⁸ The branded drug company can then bring an infringement suit, which stops the FDA approval process for thirty months while the parties litigate.¹⁹

B. WHY PAY FOR DELAY?

The end of the life of a patent can be a traumatic time for the maker of a blockbuster drug, and as with many end-of-life decisions, it can produce a flurry of activity to extend the company's life blood—its prominence in the market—for as long as possible. Pay-for-delay settlements are one of a variety of approaches pharmaceutical companies have developed that have the effect of delaying the inevitable and holding onto the stream of supercharged prices a little longer.²⁰

16. 21 U.S.C. § 355(j)(5)(B)(iv).

17. Hemphill, *supra* note 3, at 1579.

18. 21 U.S.C. § 355(j)(5)(B)(iii). Such challenges are referred to as Paragraph IV challenges, “which occur when a generic manufacturer seeks FDA approval to make a generic equivalent of a pioneer’s drug before its patent term has expired.” Avery, *supra* note 3, at 177.

19. 21 U.S.C. § 355(j)(5)(B)(iii).

20. For a description of other approaches, see FELDMAN, RETHINKING PATENT LAW, *supra* note 5, at 158–78.

Imagine if a branded company pays the generic company to stay off the market beyond the expiration of the patent term. Given that Hatch-Waxman prevents additional generics from coming to market until six months after the first generic gets to market, whenever that may be, the agreement could have the effect of keeping all generic companies off the market beyond the expiration of the patent term. This arrangement could raise concerns about anticompetitive behavior. The end of the patent should bring competition and drive prices down, but the branded company has delayed that day of reckoning. In essence the branded company, knowing that prices will stay at a supracompetitive level, may be sharing some of those monopoly rents with the generic company, with the two agreeing to keep competition out of the market. The loser, of course, would be the consumer who continues to pay inappropriately high drug prices—although increasingly, the losers are also the insurance companies and government entities that pay those prices.

The settlement in *FTC v. Actavis, Inc.* is more subtle. There, the branded company paid the generic, and the generic agreed to drop its patent challenge but to stay off the market only until a time before the expiration of the patent—sixty-five months before the expiration of the patent.²¹ This brings the issues into stark relief. On the one hand, the branded company can argue that the settlement is a rational calculation of the costs and risks of litigation that a company may incur even if the patent is perfectly valid and validly applies to the generic drug. On the other hand, one could argue that a reverse payment of this kind is much like the classic reverse payment settlement described above. Although the life of a patent that is valid and validly applied may have been sixty-five months more, the life of a patent that is *invalid* or *invalidly applied* is zero. Thus, an *Actavis*-style settlement could be an inappropriate use of a patent in an anticompetitive manner. Overshadowing all of this, we have patent exceptionalism, which has been applied to prevent the courts from even considering these issues.

II. PATENT EXCEPTIONALISM

The clash between patent law and antitrust law is often portrayed as a battle of the Titans, with antitrust law

21. *FTC v. Actavis, Inc.*, 133 S. Ct. 2223, 2229 (2013).

abhorring monopoly and patent law championing it. One version of the narrative is something like the following: Patents confer a monopoly; anticompetitive though this may be, it is the life we have chosen for our patent system. Thus, when a patent is at play, antitrust should yield, and the government should keep its nose out. Following this line of reasoning, some courts have been willing to say, as the Eleventh Circuit did in this case, that given a patent holder's lawful right to exclude others from the market, a patent "conveys the right to cripple competition."²² The dissenters in *Actavis* articulated the issue in simple, stark terms: "A patent carves out an exception to the applicability of antitrust laws."²³ Or, as Chief Justice Roberts noted: "[A] patent holder acting within the scope of its patent has an obvious defense to any antitrust suit: that its patent allows it to engage in conduct that would otherwise violate the antitrust laws [T]hat's the whole point of a patent: to confer a limited monopoly."²⁴

The problem with this approach is that it fails to distinguish between deploying the right and deploying the system. If a patent is valid and if it is being validly asserted against an infringer, the patent holder may be deploying the right. There is no guarantee, however, that those things are true. If they are not, the patent holder may simply be using the system to extract value or gain an advantage beyond the value of the patent. If one shuts off any inquiry the moment a patent appears, one loses the opportunity to ask whether the behavior involves deploying the patent system, rather than deploying the patent. This is a danger of patent exceptionalism.

The majority opinion recognized this when it noted the following: "Solvay's patent, if valid and infringed, might have permitted it to charge drug prices sufficient to recoup the reverse settlement payments it agreed to make to its potential generic competitors But we do not agree that that fact, or characterization, can immunize the agreement from antitrust attack."²⁵

22. *FTC v. Watson Pharm., Inc.*, 677 F.3d 1298, 1310 (11th Cir. 2012) (internal quotation marks omitted), *rev'd sub nom.* *FTC v. Actavis, Inc.*, 133 S. Ct. 2223 (2013).

23. *Actavis*, 133 S. Ct. at 2238 (Roberts, C.J., dissenting).

24. *Id.* at 2240.

25. *Id.* at 2230 (majority opinion).

To some extent, patent exceptionalism flows from a distorted view of what a patent actually is. The notion of exclusion in patent law is quite different from the notion of exclusion in antitrust law, or in popular discourse.²⁶ In antitrust law, exclusion—as in exclusion of rivals—connotes an image of occupying a competitive sphere to prevent the incursion of rivals. The patent notion of exclusion is far more subtle. Despite much sloppy language from courts and commentators, a patent does not grant an exclusive right to make, use, or sell a product.²⁷ In fact, a patent does not grant the right to do anything at all. A patent merely grants the right to exclude others from making, using, or selling the invention, but others may have overlapping rights to exclude.²⁸ In other words, all you get is the right to exclude others from standing in the sphere of the invention—as long as they do not have their own rights to be standing in that sphere as well.²⁹

For example, suppose an inventor holds the patent on a chemical for making a bright blue dye for candy. Having identified a use for the chemical, and if the patent is drafted broadly enough, the patent holder can obtain the right to exclude anyone from using the dye for any purposes. Suppose, however, a medical researcher discovers that the dye is also useful for treating spinal cord injuries. The researcher can now obtain a patent on the specific use of the dye for treating spinal injury.³⁰ At that point, the original inventor has the right to exclude everyone from using the dye for any reason. In addition, the medical researcher has the right to exclude everyone from using the dye for the specific purpose of treating injuries. Neither one can operate in the most valuable space—curing spinal injuries, not selling candy—without obtaining a license from the other. Their rights are overlapping, a reality that is quite different from what most people imagine when

26. For an extensive discussion of the ways in which patent and antitrust law use the same concepts and terminology with differing meaning and contexts, see Robin Feldman, *Patent and Antitrust: Differing Shades of Meaning*, VA. J.L. & TECH., Spring 2008, at 1.

27. See, e.g., *id.* at 8 n.27, 9 n.36.

28. See *id.* at 8.

29. See *id.* at 8–9.

30. This hypothetical is based on an actual medical discovery. See *Schering Corp. v. Amgen Inc.*, 222 F.3d 1347 (Fed. Cir. 2000). The hypothetical and the concepts are described further in FELDMAN, RETHINKING PATENT LAW, *supra* note 5, at 23–35.

they think of the patent system. The point is simply that a patent does not necessarily grant an “exclusive” right at all. The right to exclude is not the same thing as having an exclusive right.

The difference is more than one of semantics. The patent system contemplates far less power and control than many people assume. Oblivious to this, courts treat patents as exceptional creatures, endowing them with a power well beyond what is contemplated by the patent system itself.

In a similar vein, some courts and commentators blithely assume that a patent confers a monopoly. That is simply untrue. A patent may give its holder the opportunity to try to carve out space in the market or to find others interested in licensing the patent to do so, but that pursuit rarely succeeds, let alone leads to a monopoly.³¹ Historically, the vast majority of patents never create any economic return at all.³² Translating a patented idea into an actual product usually requires the use of multiple patented inventions,³³ as well as much that is not patented. In the pharmaceutical arena, one must be able to translate the patent into a product that is stable and can be mass-produced, as well as one that is approved by the FDA. In addition, there may be other close substitutes or sufficient cross-market elasticities. One might hold the patent on aspirin, for example, but still have to compete with those who make acetaminophen and ibuprofen. The Supreme Court itself has recognized that a patent does not necessarily confer a monopoly.³⁴

In short, a patent is a remarkably limited right, and its limited nature reflects the policies inherent in the patent system. Despite common misperceptions, the patent system is not a monstrous beast, rapacious for the sacrifice of competition.

31. See Feldman, *supra* note 26, at 4.

32. See, e.g., Mark A. Lemley & Carl Shapiro, *Probabilistic Patents*, 19 J. ECON. PERSP. 75, 75 (2005).

33. See *id.* at 81–82 (“In a number of key industries, . . . companies file numerous patent applications on related components that are integrated into a single functional product.” (internal citations omitted)).

34. See *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 45–56 (2006) (holding that a patent by itself is not sufficient to create a presumption of market power for the purposes of a tying claim).

Even the majority opinion in *Actavis* subtly falls prey to an image of the patent system as single-mindedly anticompetitive. For example, the Court notes that “[i]t would be incongruous to determine antitrust legality by measuring the settlement’s anticompetitive effects solely against patent law policy.”³⁵ Similarly, at another point the Court describes precedential cases that “seek to accommodate patent and antitrust policies, finding challenged terms and conditions unlawful unless patent law policy offsets the antitrust law policy strongly favoring competition.”³⁶ Along the same lines, the dissenting opinion is strongly out of focus when it notes that “the whole point of a patent [is] to confer a limited monopoly.”³⁷ In contrast to these declarations, however, the conflict between patent policy and antitrust policy is less stark when one recognizes that the patent system contemplates a far weaker and more limited vehicle than the sleek, anticompetitive racehorse most people have in mind.

The danger of treating patents as exceptional creatures, for which all antitrust inquiry must yield, becomes even greater in the context of sham litigation. Current doctrines hamper a court’s ability to respond to sham litigation brought by patent holders. The problems can be traced to the *Noerr-Pennington* doctrine. The *Noerr-Pennington* doctrine holds that if citizens have the right to petition their government, they should be able to do so without fear of antitrust liability, even if the results of that petition would harm their competitors.³⁸ The original doctrine developed to protect citizens who petition legislators to enact a law or regulators to enforce a law, but it has been expanded to protect citizens who petition the courts by filing a lawsuit.³⁹ There is, however, a critical exception. Parties who file sham litigation may still be liable for antitrust violations.⁴⁰

35. *FTC v. Actavis, Inc.*, 133 S. Ct. 2223, 2231 (2013).

36. *Id.* at 2233.

37. *Id.* at 2240 (Roberts, C.J., dissenting) (internal punctuation omitted).

38. *See Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 56 (1993) (citing *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965); *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961)) (“Those who petition government for redress are generally immune from antitrust liability.”).

39. *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972).

40. *Noerr*, 365 U.S. at 144.

Under current doctrine, the standards for showing sham litigation are extraordinarily difficult to meet in the case of a patent lawsuit. In order to establish that a lawsuit is a sham, one must show that the suit is both objectively and subjectively baseless.⁴¹ With the vast uncertainty involved in interpreting the language of any patent, it is remarkably difficult to show that any patent lawsuit is both objectively and subjectively baseless.⁴² One can always make an argument in patent law that one had some reason to believe someone might construe language somewhere in some claim in a way that is favorable. Thus, even if a patent holder's argument is tremendously weak, courts are reluctant to find that it constitutes a sham.⁴³

Worse yet, some courts have suggested that the burden for proving sham litigation should be even higher in cases that involve patents than in other cases, on the grounds that patents are presumptively valid.⁴⁴ This is a remarkable misinterpretation of patent law. It is true that a patent carries a presumption of validity, but that has nothing to do with whether the assertion of the patent against a particular target is valid. The fact that a patent is presumed valid does not answer the question of whether the *use* of that patent is valid from an antitrust perspective.

41. See *Prof'l Real Estate Investors*, 508 U.S. at 57 ("We now . . . hold that an objectively reasonable effort to litigate cannot be sham regardless of subjective intent."). For a discussion of the history and requirements of the *Noerr-Pennington* doctrine in relation to Hatch-Waxman litigation, see FELDMAN, RETHINKING PATENT LAW, *supra* note 5, at 164–70; see also Matthew Avery et al., *The Antitrust Implications of Filing "Sham" Citizen Petitions with the FDA*, 65 HASTINGS L.J. 113 (2013) (proposing changes to FDA regulations and judicial doctrines to avoid problems caused by sham petitions).

42. FELDMAN, RETHINKING PATENT LAW, *supra* note 5, at 168 ("Proving sham litigation, however, requires satisfaction of a remarkably high burden . . .").

43. For a troubling example of how difficult this standard is to meet, see Robin Feldman, Public Comment on Intellectual Property Assertion & Monetization, FTC Patent Assertion Entity Activities Workshop (Mar. 27, 2013), at 48–56, *available at* <http://www.ftc.gov/os/comments/pae/pae-0034.pdf> (describing the j2 Global patent assertion campaign).

44. See, e.g., *Loctite Corp. v. Ultraseal Ltd.*, 781 F.2d 861, 876 (Fed. Cir. 1985), *overruled on other grounds by* *Nobelpharma AB v. Implant Innovations, Inc.*, 141 F.3d 1059 (Fed. Cir. 1998); *Handgards, Inc. v. Ethicon Inc.*, 601 F.2d 986, 996 (9th Cir. 1979); *Honeywell Int'l, Inc. v. Universal Avionics Sys. Corp.*, 343 F. Supp. 2d 323 (D. Del. 2004).

All of these issues must be understood in the context of Hatch-Waxman. A significant corner of the Hatch-Waxman system is litigation-based. If we combine the complexities of Hatch-Waxman (including its potential for manipulation) with the rigidity of the sham litigation rules and add in patent exceptionalism, we risk granting companies a free pass for anticompetitive behavior. The key to disrupting this unholy trinity lies in acknowledging the difference between the legitimate use of the patent right and the illegitimate use of the patent system.

III. STRUCTURING THE RULE OF REASON

Patent exceptionalism is a particularly appealing myth when faced with the specter of a messy antitrust inquiry. And in the world of antitrust, nothing is messier than the rule of reason in all its full glory.

The rule of reason traditionally has been an amorphous and undisciplined inquiry. It is described in full in Justice Brandeis' formulation from almost a hundred years ago:

[T]he court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its conditions before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.⁴⁵

With its extensive requirements for economic proof and its open-ended nature, the rule of reason is not for the faint of heart, nor for ordinary mortals who lack deep pockets. In fact, the rule of reason has been described by courts and commentators as complex and burdensome on litigants and on the judicial system.⁴⁶ Moreover, a plaintiff abandoned to the mercy of the rule of reason will almost certainly lose.⁴⁷

45. *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918).

46. *See, e.g., Cont'l T. V., Inc., v. GTE Sylvania Inc.*, 433 U.S. 36, 50 n.16 (1977) (noting that *per se* rules are used to avoid the complexity of rule-of-reason trials); *United States v. Topco Assocs.*, 405 U.S. 596, 609–10 (1972) (noting that the “inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector is one important reason we have formulated *per se* rules”); *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958) (expressing frustration that the rule of reason inquiry is “often wholly fruitless when undertaken”);

In a 1999 article entitled *Defensive Leveraging in Antitrust*, I suggested the development of a “structured rule of reason.”⁴⁸ Since then, the notion of a structured rule of reason has appeared in scattered academic commentary and occasional court opinions.⁴⁹

In particular, the Supreme Court hinted at the idea of structuring the rule of reason in the 2007 *Leegin* case.⁵⁰ In

Feldman, *Defensive Leveraging in Antitrust*, *supra* note 7, at 2106–12 (contrasting the rule of reason with per se and other intermediary inquiries and describing the burdensome nature of the rule of reason); Nicole McGuire, *An Antitrust Narcotic: How the Rule of Reason Is Lulling Vertical Enforcement to Sleep*, 45 LOY. L.A. L. REV. 1225, 1247–51 (2012) (noting criticisms of the rule of reason in the context of evaluating vertical restraints); Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375, 1490 (2009) (noting that the rule of reason is expensive and its outcomes unpredictable and that it is deficient under rule of law principles of nonarbitrariness, and general applicability); *see also* Robert Pitofsky, *Antitrust in the Next 100 Years*, 75 CALIF. L. REV. 817, 830 n.42 (1987) (citing *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927), in which the Court refused to apply the rule of reason because of the practical difficulties of the minute inquiry into economic organization required); *cf.* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 34 (1984) (O'Connor, J., concurring) (comparing rule of reason to the peculiar form of per se rule applied in tying cases and describing both as requiring extensive and time-consuming economic analysis).

47. Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 830 (2009).

48. Feldman, *Defensive Leveraging in Antitrust*, *supra* note 7, at 2112–13 (1999) (suggesting that for defensive leveraging cases involving tying, plaintiffs should be required to make the following four-part showing:

- (1) [T]he defendant has market power in the tying product;
- (2) the defendant has engaged in tying;
- (3) the behavior eliminates rivals in the second market;
- and (4) the elimination of rivals protects the original monopoly. Plaintiffs could satisfy the fourth part of the test by showing either that the second market presents a direct threat to the primary monopoly or that the second market is a way station likely to significantly ease entry into the primary market.

Id. at 2113 (citations omitted).

49. *See* 8 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* § 1633, at 385–86 (3d ed. 2010) (presenting a formulation of a particular structured rule of reason); Stucke, *supra* note 46, at 1384 (noting that a structured version of the rule of reason exists in some lower courts); Christine A. Varney, *A Post-Leegin Approach to Resale Price Maintenance Using a Structured Rule of Reason*, 24 ANTITRUST, Fall 2009, at 22 (advocating for a structured rule of reason in certain cases); *cf.* Feldman, *Defensive Leveraging in Antitrust*, *supra* note 7, at 2109–12 (describing the per se rule in tying cases, which falls somewhere between the requirements of the rule of reason and the requirements of per se rules in non-tying cases).

50. *Leegin Creative Leather Prods, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

Leegin, the Court abandoned per se treatment for vertical price restraints, but offered a glimmer of potential for a more workable rule of reason with the following language: “As courts gain experience considering the effects of these restraints by applying the rule of reason over the course of decisions, they can establish the litigation structure to ensure the rule operates to eliminate anticompetitive restraints from the market and to provide more guidance to businesses.”⁵¹

In *Actavis*, once again, the Court has signaled its interest by noting, somewhat enigmatically, that structuring could be developed for the rule of reason.⁵² In typical fashion, however, the Court did not specify how the rule of reason inquiry might be structured, leaving it to the lower courts to develop, test, and sort out approaches.

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.⁵³

Any structuring, of course, will have to steer clear of the so-called “quick look” test, relief that the government prayed for in this case but was denied by the Court.⁵⁴ As described by the Court, the quick look test would have shifted the burden to the defense to show pro-competitive effects in the event of reverse payments of the type described in the case.⁵⁵ Despite the government’s plea, the Court soundly rejected that option, and courts and commentators would be wise to avoid structuring that appears to resurrect the quick look test.⁵⁶

One model for a potential structuring of the rule of reason can be found in the seminal antitrust treatise by Professor Hovenkamp.⁵⁷ In the context of resale price maintenance, Professor Hovenkamp suggests structuring the rule of reason inquiry by allowing plaintiffs to establish their case through

51. *Id.* at 898.

52. *See* *FTC v. Actavis, Inc.*, 133 S. Ct. 2223, 2238 (2013).

53. *Id.* (internal citations omitted).

54. *Id.* at 2237.

55. *Id.* (citing *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 775 n.12 (1999)).

56. *Id.*

57. *See* 8 AREEDA & HOVENKAMP, *supra* note 49, §1633.

proving one of a series of factors dealing with market concentration, how widespread the restraints are in the industry, market power, geographic area, or need for promotional efforts.⁵⁸

Resale price maintenance concerns agreements between manufacturers and distributors regarding constraints on the price at which the product must be sold to the distributor's customers. The factors appropriate for a resale price maintenance inquiry would not be appropriate for the complex, patent-laden inquiry necessary to evaluate a Hatch-Waxman settlement. The general approach is instructive, nevertheless. By identifying factors that plaintiffs could choose among to establish anticompetitive behavior and ones that defendants could choose among to show procompetitive effects for particular kinds of cases, one could develop a rational process for identifying and curbing anticompetitive behavior—not to mention signaling companies about where the line falls. In fact, a good place to begin could be the Supreme Court opinion in *Actavis* itself. There, the Court identified five sets of important considerations, including the following: 1) the restraint has the potential for genuine adverse effects; 2) the anticompetitive consequences will sometimes prove unjustified; 3) the patent holder likely has the power to bring about that harm in practice; 4) an antitrust action is feasible administratively; and 5) other settlement options are available.⁵⁹ Although the considerations were designed to explain why the FTC should be given the opportunity to present its antitrust case, rather than proving the antitrust case itself, and corresponding categories of proof to support even those considerations would have to be developed, the five considerations could offer a clue to the type of structured inquiry the Court would find acceptable in a rule of reason inquiry for reverse payment settlements.

In short, the current all-or-nothing approach—per se you are dead, rule of reason you go free—is less than satisfying from either an intellectual or an operational perspective. Most important, none of this activity—neither the Federal Trade Commission's effort in bringing the *Actavis* case nor the Supreme Court's effort in opening the door to examining reverse payments—is worth a candle unless the courts actually

58. *Id.* §1633, at 385–86.

59. *FTC v. Actavis, Inc.*, 133 S. Ct. 2223, 2226 (2013).

develop a model for a successful demonstration under the rule of reason.

Although the Court has opened the door ever so slightly, one should not lose sight of the opportunity offered. It will become increasingly important to flesh out the rule of reason as competition authorities look more closely at behavior involving patents. Whether that behavior is in the context of Hatch-Waxman litigation, patent trolling, or other circumstances, we must be able to separate use of the intellectual property right from use of the intellectual property system—as well as to identify when the intellectual property system is being used in an anticompetitive manner.

Most important, society cannot simply turn away whenever the word “patent” is uttered. Such patent exceptionalism flows from misconceptions about both the patent system itself and the policy implications embedded in its design. This misguided homage to a deity that does not exist undermines the functioning of both the patent system and antitrust law.