Conduct Is Always a Threshold Requirement: Step Zero of the Antitrust Rule of Reason in Cases under Actavis

BRYAN GANT

IS IT POSSIBLE FOR CONDUCT TO HARM competition, and potentially violate the antitrust laws, if the offending conduct never actually happened? In some cases brought under *FTC v. Actavis, Inc.*,[1] the answer has been, unexpectedly, "yes." The reason for this surprising result is that a minority of courts skip the threshold requirement of the antitrust rule of reason: identifying and proving the conduct at issue.

Antitrust practitioners are familiar with the three-step rule-of-reason analysis: (1) determine the anticompetitive effects of the alleged restraint, (2) determine whether there are offsetting procompetitive benefits, and (3) determine whether the procompetitive benefits could have been achieved through reasonably available, substantially less restrictive means.[2] But there is an implicit, threshold "Step Zero": identify the restraint of trade, and determine if it *happened*. If not, the rule of reason—which assesses the "reasonableness" of the challenged restraint—has no role to play.[3]

The same steps apply in a case brought under *Actavis*.[4] *Actavis* held that a so-called "reverse payment," i.e., a payment from a patent holder (patentee) to the patent challenger, when made in connection with a patent settlement, could "*sometimes* violate the antitrust laws" if it seeks to "prevent the risk of competition" inherent in the patent suit.[5] The conduct in such cases is not simply a "reverse payment," however, but specifically what the Supreme Court called a *large* and *unexplained* reverse payment.[6] The reason for this distinction is that *Actavis* relies on what the Court called a "workable surrogate,"[7] or what has come to be known as the "*Actavis* inference." If a patentee makes a large, otherwise-unexplained sacrifice in connection with a patent settlement, that unexplained sacrifice might suggest that it is payment for some reduction in expected competition.[8] By contrast, if a reverse payment is not large enough to support the *Actavis* inference, or if the payment is not unexplained but rather explained (for example) by the fact that it allows the patentee to avoid paying an even larger amount in litigation costs or by fair value received in return, then no *Actavis* inference is available.[9] In other words, without a large and unexplained reverse payment, there is no "conduct" to analyze. Step Zero, under *Actavis*, is thus to find a large, unexplained reverse payment—conduct amounting to a large patentee sacrifice.

However, a minority of courts refuse to take this threshold step before beginning the rule-of-reason analysis, instead deferring the question of whether a payment is "large" and "unexplained" to Step Two of the analysis.[10] As shown below, this approach creates false positives by effectively assuming the existence of the conduct, i.e., a patentee sacrifice, at Step One of the analysis, and from it potential harm to competition. Moreover, under the minority approach, Step Two then treats the fact that the payment may ***not*** be large and may ***not*** be unexplained (i.e. that the offending conduct at issue may never have happened) only as a "procompetitive benefit."[11] A court making this error would thus balance the "harm" from non-existent conduct against the procompetitive benefits of its non-existence.[12] In short, under the minority approach, it may be possible to conclude that the antitrust laws were violated by conduct that . . . never actually happened.

The Structured Rule-of-Reason Analysis: Identify and Prove the Conduct First, Then Apply an Antitrust Standard

Antitrust standards are not tools to determine whether conduct occurred, but rather are used to assess the effect of that conduct on competition.[13] Thus, it should not be controversial to say that in any antitrust analysis, a court must first determine whether potentially actionable conduct actually occurred, and only then apply the appropriate antitrust standard to determine that conduct's impact on competition. If there was no price-fixing, for example, then the per se rule has no application to the non-fixed prices.[14] Similarly, if there was no below-cost pricing, there is no role for the rule of reason to assess the non-predatory prices. And the quick look standard requires some conduct at which to, well, quickly look.[15] Thus, identifying and proving the existence of the challenged conduct, which, in the case of a claim under Section One of the Sherman Act is an agreement in restraint of trade, is always a "threshold" issue, and a necessary "Step Zero" to applying the rule of reason.

Nor does this conclusion depend on the "academic" question of whether a restraint of trade must be shown *before* the

Bryan Gant is a partner in the Antitrust group at White & Case LLP and represents defendants in antitrust litigation brought under FTC v. Actavis. White & Case also represented one of the defendants in FTC v. Actavis. He would like to thank Efat Elsherif, Alanna Kane, and Helen J. Gant for their invaluable assistance. Any views expressed in this publication are strictly those of the author and should not be attributed in any way to White & Case LLP or its clients.

rule-of-reason analysis applies, or whether it may be assessed as *part of the first step* of the rule of reason (i.e., whether showing the existence of the restraint is "Step Zero," or the first part of Step One).[16] Courts and commentators may disagree as to whether a court, when assessing whether the conduct at issue occurred, is acting within the rule-of-reason analysis or prior to it—i.e., whether the rule-of-reason analysis has formally started at that point. But as a practical matter, whether the restraint must be shown first and *before* the rule-of-reason analysis, or must be shown first and *within* the rule-of-reason analysis, the point is simply that the conduct alleged to restrain trade must be shown *first*.

If the challenged conduct is shown to exist, the rule of reason can then be applied to assess its impact on competition. The Supreme Court in *Ohio v. American Express Co.* described a three step, structured approach to applying the rule of reason:[17]

Step One: The plaintiff must prove that the restraint harmed competition.[18] If the plaintiff fails to carry this burden, the analysis stops here.

Step Two: If the plaintiff succeeded in proving at Step One that there were harms to competition from the challenged restraint of trade, at Step Two the defendant may then show procompetitive benefits that can be weighed against the anticompetitive harms.[19]

Step Three: The plaintiff may then seek to show that those procompetitive benefits reasonably could have been achieved without the anticompetitive harms by structuring the agreement in a substantially less restrictive way.[20] If the plaintiffs can meet this "demanding standard,"[21] then the procompetitive benefits can in some cases be weighed less heavily or even discounted entirely in a particularly extreme case.[22]

Properly Applying the Structured Rule-of-Reason Analysis to *Actavis*

The same fundamental analysis applies to cases involving so-called "reverse payment" settlements under the Supreme Court's decision in *Actavis*. *Actavis* held that a "reverse payment" in connection with a patent settlement—i.e., a payment, with certain characteristics,[23] from the patent holder to the patent challenger—might suggest that the patentee was paying the patent challenger to stay off the market for a period of time, i.e., to delay.[24] The Supreme Court made clear, however, that it was *not* rewriting the rule of reason—and thus the same rule-of-reason framework applies in cases brought under *Actavis* as in any other case.[25] How, then, should a court apply the rule of reason under *Actavis*?

We start with Step Zero: identify (and prove) the existence of a restraint of trade. But what *is* the "restraint of trade" under *Actavis*? It is not the payment itself; a payment standing alone restrains nothing. Instead, *Actavis* requires that the payment be exchanged for some reduction in competition,[26] for example, a payment *for delay* in the patent challenger's market entry.[27] But "delay" in this context also has a very specific meaning. It does not mean any settlement where the patent challenger does not enter immediately, as *Actavis* was explicit that parties may lawfully agree to a future entry date.[28] Nor did *Actavis* outlaw *compromises* between the parties' respective litigation positions; parties can still meet in the middle under *Actavis*.[29] Rather, *Actavis* held only that a reverse payment might harm competition when it prevented the "risk of competition" the patentee perceived in the patent litigation.[30] Thus, as explained in detail elsewhere, "delay" in this context means delay relative to the competition the patentee expected from the patent suit.[31]

How, though, can a court distinguish (1) a payment for delay relative to the competition the patentee expected from the patent suit, on the one hand, from (2) a compromise between the parties' litigation positions, on the other? This is where the "*Actavis* inference" comes in. As explained in more detail elsewhere, the "*Actavis* inference" assumes that a patentee would not make a substantial and facially-irrational sacrifice in connection with a patent settlement if it received nothing of value in return—meaning that when a court sees such an unexplained sacrifice by the patentee, it can sometimes infer that what the patentee received in return might have been the elimination of some risk of competition it perceived in the patent suit.[32] However, the only type of reverse payment that contains such a sacrifice, and that would support the *Actavis* inference, is specifically a "large" and "unexplained" reverse payment.[33]

First, a reverse payment must be "unexplained"—i.e., not explained by avoided litigation costs or other benefits from the agreement.[34] For example, the *Actavis* inference does not arise from a payment to the patent challenger that is less than the patentee's avoided litigation costs, for there, while there is a payment, there is no sacrifice because the patentee is out less money than it would have been by litigating.[35] Likewise, an agreement where the patentee will receive fair value—such as services worth what it paid the patent challenger—contains no sacrifice or irrationality, as the patentee again suffers no loss.[36] In these cases, there is no unexplained payment from which a court could infer the possibility of delayed competition, as the agreements make perfect sense to the patentee regardless of their impact on the patent challenger's entry date.[37]

For similar reasons, the agreement must not be explainable as a traditional or commonplace form of settlement.[38] For example, although a compromise of a damages claim could be portrayed as "one-sided" or a "sacrifice" or "payment" in some sense—because the party with a damages claim walks away with less than it theoretically could have won—courts understand that settling parties may take less than a full measure of their claimed damages to reach agreement.[39] Thus, it is not possible to infer from the simple fact that a settlement payment was made that such a "payment" was for delay.

Finally, to conduct the *Actavis* inference a court needs a payment that is "large" relative to the value of the patent and other considerations, because in order to infer that a payment was intended to delay competition, the amount of that payment must be large enough to actually purchase some not-insubstantial delay. To take an extreme example, it may be a "sacrifice" for a patentee to make a payment of one dollar to a patent challenger in connection with a settlement—but such a payment offers no basis for the *Actavis* inference.[40]

A court applying the rule of reason in a case under *Actavis* must therefore start with Step Zero: identify a large, unexplained reverse payment from which it might be possible to apply the *Actavis* inference. This conduct is the threshold requirement in any *Actavis* case.

Skipping Step Zero Leads to Erroneous Results, Including Finding Harm to Competition from Non-Existent Restraints

However, a minority of courts—wrongly concluding that identifying a large, unexplained reverse payment is an improper "threshold" requirement—have skipped "Step Zero" when applying *Actavis*.[41] Doing so is far from an "academic" problem; on the contrary, this error can transform lawful agreements into false positives, and potentially huge liability, simply by skipping the requirement to identify the specific conduct at issue. Here's how it happens:

Step One. Step One of the rule of reason is to determine whether the restraint of trade harmed competition. But if a court begins the rule-of-reason analysis without first identifying the conduct at issue, what "restraint"—what "conduct"—does that court consider? The answer, unfortunately, is that courts taking the minority view consider a fictionalized, one-sided version of the agreement, containing *only* the value received by the patent challenger—which they term a "reverse payment"—and ignoring, at this step, any value flowing back to the patent holder, on the theory that the question of whether a payment is large and unexplained is an issue for later in the analysis.[42]

By doing so, a court applying the minority view can manufacture the very conduct it tries to identify. As explained above, under *Actavis* a court must identify a one-sided agreement in which the patentee makes a large, unexplained reverse payment to the patent challenger but appears to receive nothing of substance in return. But under the minority view, a court simply *makes* the agreement one-sided, by, well, cutting off consideration of the other side of it—by ignoring, at least at Step One, any analysis of whether the payment is fully explained by value received by the patentee. Such a court would then conclude, under the *Actavis* inference, that the fact that the patentee made a payment (again, the court is *ignoring* what is received in return) suggests that the patentee might have received a delay in the competition the patentee expected in the patent case. The minority view's approach thus can conclude that a patent settlement "harmed" competition even though the relevant conduct under *Actavis*—a ***large***, ***unexplained*** reverse payment—has not actually been shown to be present.

Step Two. Step Two of the rule of reason asks the defendant to show procompetitive benefits from the challenged agreement, and it is only at this point that these courts ask if the payment was large and if it is explained by saved litigation costs or "fair value" for the patentee.[43]

But rather than conduct a normal procompetitive benefits analysis, courts taking the minority view typically start by looking to the other side of the agreement they sliced in half at Step One and now asking whether, by providing value to the ***patentee***, the agreement produced procompetitive benefits. Nevertheless, you might think that the problem created at Step One can be cured at Step Two, by determining that there was actually no large, unexplained reverse payment, that the relevant conduct under *Actavis* thus never occurred, and that the agreement was lawful. Not necessarily. Because harm to competition has already been purportedly "proven" at Step One, courts taking this approach have not always, at Step Two, revisited the question of whether there was a restraint of trade, and whether that restraint harmed competition.[44] Instead, because the rule of reason is a balancing test, some courts taking the minority view have treated the fact that there actually was no restraint of trade, and thus no harm to competition in the first place, as a "procompetitive benefit" to be *balanced against* Step One's (non-existent) "harms."[45]

To try to illustrate this brainteaser of an approach, imagine someone is stopped by police for leaving a dealer's lot with a car. The officer asks the person to justify his theft, and he protests that he *paid* for the car, and immediately produces the paperwork and title. But can the fact that the person paid for the car justify the harm he did to society by stealing it—i.e., do the societal benefits of not stealing a car offset the harm he caused by stealing that same car? The question is absurd. The elements of theft—taking a car without paying for it—are not present. He need not "justify" his theft because there was no theft. But at least one court has answered the equivalent question "no" under *Actavis*, concluding that the fact that a payment was neither large nor unexplained, and thus that there was no basis to infer any delay in competitive entry or restraint of trade, was not a "silver bullet" against antitrust liability.[46]

Step Three. The approach of treating the non-existence of a restraint of trade as a mere procompetitive benefit can further create false positives at Step Three of the rule of reason. As noted, at Step Three, procompetitive benefits can be weighed less heavily in some cases, or even discounted entirely in a particularly extreme case, if the restraint was not "reasonably necessary," i.e., if there are "substantially less restrictive alternatives."[47] But under the minority view, the conduct that is being weighed less heavily is conduct that has not been shown to exist in the first place. Thus, a court taking this view might conclude, for example, that it can ignore the fact that a payment is a fully explained, fair value business deal, and thus not the conduct at issue under *Actavis*, if the plaintiff can show that the patentee could have entered an identical business deal with someone else. Such courts can thus wind up ignoring the conduct's non-existence on the theory that there were alternative ways it could have not existed. That the conduct never happened would thus be no impediment to antitrust liability.

Having assumed a restraint of trade into existence at Step One, transformed that restraint's non-existence into a mere procompetitive benefit at Step Two, and potentially then ignored that non-existence at Step Three, a court taking the minority view has little chance of reaching the right answer—and instead can find an antitrust violation based on conduct that never actually existed.

The Minority View's Objections Appear Based on a Misunderstanding of Step Zero and Step Two

How, then, does the minority reach this misguided result? Some advocates of the minority view have argued that it would be "inconsistent" to determine whether a payment was "large" and "unexplained" at Step Zero.[48] Their argument appears to be that (1) plaintiffs may not initially have the information necessary to determine whether the alleged payment was "large" and "unexplained," (2) the burden of production for such information should therefore be on defendants, and, because they appear to assume that defendants can only have burdens at Step Two of the rule of reason, (3) it would be impossible to require a large, unjustified reverse payment to be shown before beginning the rule-of-reason balancing.[49] But even accepting for argument's sake the first two legs of this argument, the third is faulty—in other areas of the law, the Supreme Court or even Congress have imposed burdens of production on the defendant before requiring the plaintiff to come forward with proof on key issues at trial.[50] While not conceding that defendants actually have such a burden of production here, if they do it would logically come at Step Zero. In other words, if the plaintiff can show the existence of a reverse payment, the defendant would have a burden of production to come forward with evidence regarding the size and explanation or justification for the challenged payment, and the plaintiff would have the ultimate burden of proof to show that it was still a restraint of trade in light of that evidence, all before applying the rule of reason.[51] The minority view thus offers no basis for skipping Step Zero.

Conclusion

Step Zero of any antitrust analysis is to identify the conduct at issue. Courts that circumvent this threshold requirement will create false positives, including finding harm to competition from conduct that never actually happened. The key challenge for courts in avoiding this pitfall is to understand that in a case brought under *Actavis*, the conduct at issue is a large, unexplained reverse payment of the type described by the Supreme Court. Without a threshold demonstration of conduct, a weighing analysis under the rule of reason is meaningless and prone to error.

Defense practitioners facing these issues should focus the court's attention on identifying the challenged conduct, including the alleged payments made to the patent challenger and the consideration received for those payments. While plaintiffs ultimately bear the burden of demonstrating that any alleged payment by the patentee exceeded the fair value rendered in return, in practice defendants should be prepared to come forward with evidence that any alleged payment is explained by fair value.

By the same token, plaintiffs bringing these cases should be mindful that, under the majority view, it will be their burden to plead and eventually prove that the threshold element of a "reverse-payment" claim exists—that is, a large and unexplained payment from the patentee to the patent holder—and should therefore be prepared to explain why the alleged payment was not explained by value received by the patent holder, and why any such payment remains "large" in light of that value. ■

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[1] 570 U.S. 136 (2013).

[2] *See, e.g.*, Ohio v. Am. Express Co. ("*AmEx*"), 585 U.S 529, 541-42 (2018); NCAA v. Alston, 594 U.S. 69, 100 (2021) ("[A]nticompetitive restraints of trade may wind up flunking the rule of reason to the extent the evidence shows that substantially less restrictive means exist to achieve any proven procompetitive benefits.").

[3] *See, e.g.*, *Actavis*, 570 U.S. at 174 (Roberts, J. dissenting) ("The purpose of the rule of reason is to determine whether, on balance, a practice is reasonably likely to be anticompetitive or competitively harmless . . . ." (quoting 1 Herbert Hovenkamp et al., IP and Antitrust: An Analysis of Antitrust Principles Applied to Intellectual Property Law §7.3 at 7-13 to 7-15 (2d ed. 2003))); FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 458 (1986) (purpose of rule of reason is to discover "whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition" (quoting Chi. Bd. of Trade v. United States, 246 U.S. 231, 238 (1918))).

[4] *Actavis*, 570 U.S. at 159 ("the FTC must prove its case as in other rule-of-reason cases"); *id.* at 160 ("We . . . leave to the lower courts the structuring of the present rule-of-reason antitrust litigation.").

[5] *Id.* at 141 (emphasis added), 157.

[6] *See id.* at 157.

[7] *Id.* at 158 ("[T]he size of the unexplained reverse payment can provide a workable surrogate for a patent's weakness . . . .").

[8] Aaron Edlin, Scott Hemphill, Herbert Hovenkamp & Carl Shapiro, *The* Actavis *Inference: Theory and Practice*, 67 Rutgers U.L. Rev. 585, 594 (2015) (explaining the "economic logic underlying the *Actavis* Inference: if the settlement involves the patent holder's sacrifice of something with greater value to it than its own prospective litigation costs, it is reasonable to presume that that patent holder is paying for some protection from competition").

[9] *Actavis*, 570 U.S. at 156 ("Where a reverse payment reflects traditional settlement considerations, such as avoided litigation costs or fair value for services, there is not the same concern that a patentee is using its monopoly profits to avoid the risk of patent invalidation or a finding of noninfringement.").

[10] *See, e.g.*, King Drug Co. of Florence, Inc. v. Cephalon, Inc., 88 F. Supp. 3d 402, 413 (E.D. Pa. 2015) (stating that *Actavis* does not explicitly establish a "threshold" requirement of a large and unexplained reverse payment); *see also In re* Nexium (Esomeprazole) Antitrust Litig., 42 F. Supp. 3d 231, 262-64 (D. Mass. 2014) (establishing fair market value for the reverse payment is not a "silver bullet" against antitrust liability). *See also* Michael A. Carrier, *Why a "Large and Unjustified" Payment Threshold Is Not Consistent With* Actavis, 91 Wash. L. Rev. 109, 110 (2016) [hereinafter Carrier, *"Large and Unjustified" Payment Threshold*] (advocating the minority view, and asserting that it would be "a new framework" for courts to first identify, as a "threshold," the restraint of trade at issue).

[11] *See, e.g.*, *Cephalon*, 88 F. Supp. 3d at 415-16.

[12] *See e.g.*, *Nexium*, 42 F. Supp. 3d at 262 (concluding that *Actavis* calls for courts to balance the harms of a "reverse payment" against the "procompetitive justifications" of that payment being explained by litigation costs or fair value for services); *id.* at 263-64 (concluding that the fact that a reverse payment is explained by fair value is not a "silver bullet" against antitrust liability because "establishing fair market value is just one of

many possible defenses available to a Defendant seeking to demonstrate procompetitive justifications for a reverse payment").

[13] *See, e.g.*, 7 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 1512 ("First, one wishes to identify an action with the potential for competitive harm."); Lawrence A. Sullivan, Handbook of the Law of Antitrust § 68 at 187 (1977) ("To apply the rule [of reason], one must first identify specifically the practice involved.").

[14] Ironically, if the Supreme Court in *Actavis* had applied a per se standard, there could be no doubt that the first step would be to determine if the conduct at issue actually occurred.

[15] *See, e.g.*, Realcomp II, Ltd. v. FTC, 635 F.3d 815, 826 (6th Cir. 2011) (quick look inquiry must be "tailored to the suspect conduct in each particular case") (quoting Polygram Holding, Inc. v. FTC, 416 F.3d 29, 35 (D.C. Cir. 2005)).

[16] *See, e.g.*, *In re* Zetia Ezetimibe Antitrust Litig., No. 2:18-md-2836, 2022 U.S. Dist. LEXIS 171241, at *59-62 (E.D. Va. Sept. 2, 2022) (describing the parties' dispute about the "threshold" requirements of an *Actavis* case as "more an academic debate about precisely *when* the Court should consider the *Actavis* inference") (cleaned up).

[17] 585 U.S at 541-42.

[18] *Id.*

[19] *Id*.

[20] *See, e.g.*, *Alston*, 594 U.S. at 100-01.

[21] *Id.*

[22] Sullivan v. NFL, 34 F.3d 1091, 1103 (1st Cir. 1994). The Ninth Circuit in *Epic Games, Inc. v. Apple, Inc.* discussed a fourth step of balancing the anticompetitive effects against the procompetitive benefits after the other steps of the rule-of-reason analysis had been completed—and concluded that such a step was required under Ninth Circuit precedent, but largely duplicated the other steps. 67 F.4th 946, 993-94 (9th Cir. 2023).

[23] Including that the payment was "large" and "unexplained." *See Actavis*, 570 U.S. at 141, 152, 156-59.

[24] *Id.* at 154.

[25] *See supra* note 4.

[26] *See, e.g.*, *Actavis*, 570 U.S. at 156.

[27] *See, e.g.*, King Drug Co. of Florence, Inc. v. Smithkline Beecham Corp., 791 F.3d 388, 405 (3d Cir. 2015) (describing "pay-for-delay" agreements).

[28] *Actavis*, 570 U.S. at 158 ("They may . . . settle in other ways, for example, by allowing the generic manufacturer to enter the patentee's market prior to the patent's expiration . . . .").

[29] *See, e.g.*, Bryan Gant, *Understanding* Actavis*: How Courts Misinterpret* FTC v. Actavis, Inc.*, and How to Get It Right*, 22 Harv. Negot. L. Rev. 111, 125-30 (2016) [hereinafter Gant, *Understanding* Actavis] (explaining that *Actavis* did not outlaw payments that "expand the pie" to bridge gaps in litigation positions).

[30] *Actavis*, 570 U.S. at 157 ("[T]he payment (if otherwise unexplained) likely seeks to prevent the risk of competition. And, as we have said, that consequence constitutes the relevant anticompetitive harm."); *id.* at 147 (restraint at issue was the patentee paying the patent challenger "many millions of dollars to stay out of its market").

[31] Gant, *Understanding* Actavis, *supra* note 29, at 119 (explaining that *Actavis* looks for delay relative to the "risk-adjusted entry date the patentee would have expected from litigation"); Aaron Edlin, Scott Hemphill, Herbert Hovenkamp & Carl Shapiro, *Activating* Actavis, Antitrust, Fall 2013, at 18 (explaining the "inference" of delay).

[32] *See Actavis*, 570 U.S. at 156; *see also* Bryan Gant, *"Sacrifice and Recoupment" in the Antitrust Analysis of Patent Settlements:* Actavis *Through the Lens of* Brooke Group*,* Aspen Skiing*, and* Trinko, 10 Am. Univ. Bus. L. Rev. 235 (2021) [hereinafter Gant, *Sacrifice and Recoupment*] (explaining the role of the sacrifice in *Actavis*).

[33] *See, e.g.*, *Actavis*, 570 U.S. at 141, 152, 156-59.

[34] *See id*. at 156.

[35] *See generally* Gant, *Sacrifice and Recoupment*, *supra* note 32, at 278-82.

[36] *See id.* at 263-76.

[37] *See, e.g.*, Gant, *Understanding* Actavis, *supra* note 29, at 125-30.

[38] *Actavis*, 570 U.S. at 152.

[39] *See id.*

[40] *See* Gant, *Sacrifice and Recoupment*, *supra* note 32, at 281-82.

[41] *See, e.g.*, *Cephalon*, 88 F. Supp. 3d at 414-15; *see also* Carrier, *"Large and Unjustified" Payment Threshold*, *supra* note 10, at 110 (arguing that *Actavis* "instructed lower courts to apply the rule of reason, not a new framework with a threshold it never mentioned").

[42] *See, e.g.*, *Nexium*, 42 F. Supp. 3d at 263-64 (evidence that payments exceeded fair market value for the services rendered was not required to support an inference of an improper reverse payment); *but see In re* Niaspan Antitrust Litig., 42 F. Supp. 3d 735, 752 (E.D. Pa. 2014) (parts of agreement cannot be read in isolation); MLB Props., Inc. v. Salvino, Inc., 542 F.3d 290, 338 (2d Cir. 2008) (Sotomayor, J., concurring) ("the competitive effects of an individual restraint are intertwined with the effects of the remainder of the venture").

[43] *See, e.g.*, *Cephalon*, 88 F. Supp. 3d at 416. *Cephalon* based its conclusion on a passage of *Actavis* that the court read as treating fair value business deals as a procompetitive benefit. *See id.* (citing *Actavis*, 570 U.S. at 156 (internal citations omitted)). However, the Supreme Court was instead asking whether there were anticompetitive effects in the first place—noting that where a payment was not large and unexplained, "there is not the same concern" because in "such cases, the parties may have provided for a reverse payment *without having sought or brought about the anticompetitive consequences we mentioned above*." *Actavis*, 570 U.S. at 156 (emphasis added); *see also id.* at 159 ("the likelihood of a reverse payment *bringing about anticompetitive effects* depends upon its size, its scale in relation to the payor's anticipated future litigation costs, its independence from other services for which it might represent payment, and the lack of any other convincing justification" (emphasis added)).

[44] *See Nexium*, 42 F. Supp. 3d at 262-64.

[45] *See, e.g.*, King Drug Co. of Florence, Inc. v. Cephalon, Inc., No. 06-cv-1797, 2015 U.S. Dist. LEXIS 150151, at *28-29 (E.D. Pa. Nov. 5, 2015) (deferring question until second step of the rule of reason); *In re* K-Dur Antitrust Litig., No. 01-cv-1652 (SRC)(CLW), 2016 U.S. Dist. LEXIS 22982, at *44-45, 51-63 (D.N.J. Feb. 25, 2016) (treating lack of a restraint as mere procompetitive benefit); *Nexium*, 42 F. Supp. 3d at 262-64 (same).

[46] *Nexium*, 42 F. Supp. 3d at 262-64.

[47] *See, e.g.*, *Alston*, 594 U.S. at 102.

[48] *See, e.g.*, Carrier, *"Large and Unjustified" Payment Threshold*, *supra* note 10, at 115-17; *see also* Michael A. Carrier, *Payment After* Actavis, 100 Iowa L. Rev. 7, 24 (2014) ("Given the complexity of these arrangements and their greater access to the information, the defendants should have the burden of showing that the payment is justified.").

[49] *See, e.g.*, Carrier, *"Large and Unjustified" Payment Threshold*, *supra* note 10, at 115-17.

[50] *See, e.g.*, Ruan v. United States, 597 U.S. 450, 463-65 (2022) (holding that federal law, which shifts the burden of production on an element of the Controlled Substances Act to the defendant prior to the prosecution proving the elements of the claim, "merely shifts the burden of production to the defendant, following the satisfaction of which the ultimate burden of persuasion returns to the prosecution" (cleaned up)).

[51] *See, e.g.*, *K-Dur*, 2016 U.S. Dist. LEXIS 22982, at *47 ("The defendants bear the burden . . . of coming forward [i.e., production] with evidence of litigation costs or valuable collateral products or services that might explain the compensation; if the defendants do so, the plaintiff has the burden of demonstrating [i.e., proof] the compensation exceeds the reasonable value of these." (quoting (with one alteration) *In re* Cipro Cases I & II, 348 P.3d 845, 871 (Cal. 2015))); Microsoft Corp. v. i4i Ltd. P'ship, 564 U.S. 91, 100 n.4 (2011) (explaining burden of proof/persuasion ("specifying which party loses if the evidence is balanced") and of production ("specifying which party must come forward with evidence at various stages in the litigation")); *cf.* Carrier, *"Large and Unjustified" Payment Threshold*, *supra* note 10, at 116-17 (arguing that identifying the conduct at issue should not be a "threshold" step because the plaintiff may not have "possession of evidence" on certain issues).