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Health Insurer Antitrust Claim Against Drug Company Remanded to State Court

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Over the last several years, several health insurers have brought antitrust claims against drug companies, contending that they were overcharged for drugs as a result of agreements reached by the drug companies in the settlement of patent infringement lawsuits between branded and generic drug makers. Specifically, the purchasers of these drugs (including but not limited to insurers), have claimed that the terms of these patent infringement lawsuits, which typically resulted in a payment by the patent holding manufacturer to the generic drug maker (which was the alleged infringer), in return for the generic agreeing not to continue making the generic drug for a period of years, were anticompetitive. Because it was the allegedly infringing generic manufacturer (the defendant in the patent infringement suit) that received the payment in the settlement, these settlements have been referred to as "reverse payment" settlements. The FTC has been quite concerned about "reverse payment" patent infringement settlements for several years, contending that a delay in the introduction of generic alternatives to branded drugs has slowed the reduction in price for the branded drug that increased competition typically brings. After a series of lawsuits by the FTC over this practice resulted in conflicting rulings on the issue of whether these settlements could constitute an antitrust violation, the Supreme Court weighed in on the issue in 2013, ruling in *FTC v. Actavis* that, in some circumstances, such settlements could be found to be anticompetitive.

In light of the Actavis decision, purchaser challenges to these settlements have continued all across the country, typically in federal court. However, in a bit of a departure from common practice, earlier this year Time Insurance (doing business as Assurant Health), commenced such an action in state court, not federal court, asserting claims under state antitrust laws. By filing its action – *Time Insurance v. AstraZeneca* – in the Philadelphia Court of Common Pleas, Time sought to avoid consolidation of its case with a series of similar federal cases that had already been consolidated before the District Court in Massachusetts (In re Nexium Antitrust Litigation).

AstraZeneca removed the case to federal court, arguing that the matter necessarily raised a federal issue under patent law, and thus was required to be heard in federal court (and then consolidated into the Massachusetts proceeding). However, Eastern District of Pennsylvania District Court Judge Gerald McHugh Jr. disagreed. Instead, Judge McHugh held that Time's antitrust claim would not necessarily require Time to litigate the validity of the patent, and thus the case did not raise a federal issue. Accordingly, Judge McHugh remanded the case to state court. The decision, if followed by other state courts across the country, has the potential to greatly increase the

number of courts grappling with these “reverse payment” claims. And, given that even the small number of federal courts that have interpreted the Supreme Court’s ruling in Actavis have been unable to reach agreement on the circumstances in which such conduct raises antitrust concerns, increasing the number of courts considering such issues will only add to the confusion. As such, it would not be surprising if the Supreme Court is forced before long to revisit its decision in Actavis, and if it does, insurers, being among the largest purchasers of prescription drugs, will be watching with interest.

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