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Institutions and Incentives in Antitrust Enforcement*

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ABSTRACT: The United States Supreme Court has decided in a number of cases how Section One 1 of the Sherman Act should apply to agreements that potentially harm competition. In recent key cases, the Court stated that the rule of reason is the default rule in antitrust. Second, *per se* condemnation (or some rebuttable presumption) is reserved for a limited group of practices that economics and experience show that the type of agreement under consideration is inevitably destructive of competition with little or no redeeming features. Third, reasonable people can disagree about the likely competitive effects of a particular type of agreement. Therefore, lower courts going forward should apply the rule of reason on a case by case basis to determine whether there is any likelihood of competitive harm and any likelihood of significant procompetitive benefits. However, lower courts should structure and streamline their analysis by applying one or more rules of thumb.

The Supreme Court followed this basic approach in *Leegin*, applying the rule of reason to resale price maintenance agreements (vertical price fixing), and in *Actavis*, applying the rule of reason to pay-for-delay agreements involving branded and generic pharmaceutical manufacturers. This essay explores where this strategy has been successful (*Actavis*) and where it has not (*Leegin*). I focus not on the substantive law but instead on the institutions and incentives in antitrust enforcement that ensure that the

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pronouncements of the law on the books by the Supreme Court gets translated into the law in action in the lower courts and the real world.

KEYWORDS: Antitrust, Competition, Institutions, Incentives, Enforcement.

I. Introduction

One of the most vexing questions in U.S. antitrust law is the meaning of the rule of reason under Section 1 of the Sherman Act. The U.S. Supreme Court has struggled for over a century to give meaning to the broad language of the Sherman Act banning contracts, combinations, and conspiracies in restraint of trade.[1] The modern Supreme Court has a relatively new interpretative strategy to consider what legal standard should apply to agreements that potentially harm competition.

The Court's methodology can be paraphrased as follows. First, the Court states that the rule of reason is the default rule in antitrust. Second, *per se* condemnation (or some rebuttable presumption) is reserved for a limited group of practices that economics and experience show to be inevitably destructive of competition with little or no redeeming features. Third, reasonable people and lower courts disagree about the likely competitive effects of the type of agreement under consideration. Therefore, lower courts going forward should apply the rule of reason on a case by case basis to determine whether there is any likely competitive harm and any likely significant procompetitive benefits. However, lower courts also should structure and streamline their analysis by applying a number of guidelines that the Court identifies. The Supreme Court then moves onto the next case on its docket and assumes that the lower courts will work things out.

The Supreme Court followed this basic approach in the 2007 *Leegin* case,[2] applying the rule of reason to resale price maintenance agreements (vertical price fixing), and in the 2013 *Actavis* decision,[33] applying the rule of reason to pay-for-delay agreements (reverse payments) involving branded and generic pharmaceutical manufacturers. These two very different cases represent the most recent cases discussing *how* to apply the rule of reason under Section One of the Sherman Act.

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[1] 15 U.S.C. § 1 (2012).

[2] Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

[3] FTC v. Actavis, 570 U.S. 136 (2013).

This essay explores where this strategy has been successful (*Actavis*) and where it has not (*Leegin*) and what best explains these divergent results. I focus less on the substantive law and instead emphasise the institutions and incentives in antitrust enforcement that determine when the pronouncements of the law on the books by the Supreme Court gets translated into the law in action in the trenches in the lower courts. I conclude with suggestions for the Court in future antitrust cases to best ensure that its pronouncements are taken seriously and that adequate litigation develop to apply this type of structured rule of reason analysis in the real world.

II. The rule of reason in antitrust

The rule of reason has become the default rule in analysing the legality of agreements under Section 1 of the Sherman Act.[4] While a handful of types of hard-core cartel agreements between competitors remain categorically unlawful (*per se* unreasonable),[5] the remainder of horizontal and vertical agreements are analysed on a case by case basis to determine whether they unreasonably harm competition.[6]

The Supreme Court has returned time and time again to whether certain types of agreements should be considered categorically unreasonable or whether they must be analysed under a full rule of reason analysis on a case by case basis. Once horizontal price fixing agreements were declared *per se* unreasonable in *Socony Vacuum*,[7] the Court over the next thirty years held a wide variety of both horizontal and vertical agreements to

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[4] Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911).

[5] Palmer v. BRG of Georgia, Inc., 498 U.S. 46 (1990); FTC v. Superior Ct. Trial Lawyers Association, 493 U.S. 411 (1990); Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1982); Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980); United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 150 (1940).

[6] Continental TV, Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977); *see also* Ohio v. American Express Co., 138 S. Ct. 2274 (2018); Texaco, Inc. v. Dagher, 547 U.S. 1 (2006); State Oil Co. v. Khan, 522 U.S. 3 (1997); Northwest Wholesale Stationers v. Pac. Stationery, 472 U.S. 284 (1985); NCAA v. Board of Regents, 468 U.S. 85 (1984); Broadcast Music, Inc. v. CBS, Inc., 441 U.S. 1 (1979); National Society of Professional Engineers v. United States, 435 U.S. 679 (1978); Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320 (1961). Tying agreements remain *quasi-per se* unlawful and a partial exception from this trend, *see* Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2 (1984).

[7] 310 U.S. 150 (1940).

be *per se* unreasonable.[8] Beginning with the *GTE* case in 1977,[9] the Court reversed course, finding most type of agreements other than hard-core cartels subject to the rule of reason and establishing no new *per se* rules.[10]

In the modern era, the Court usually begins with the notion that agreements should be judged under the rule of reason unless it is manifestly clear that from an economic perspective such agreements are inevitably destructive of competition and devoid of legitimate procompetitive justifications. The Court has described the legal standard for agreements under Section 1 as a spectrum running from an irrebuttable presumption to a full rule of reason analysis where the plaintiff bears the burden of pleading and proving that the agreement, on balance, significantly harms competition and that outweighs any legitimate procompetitive justifications the defendants may offer. From time to time, the Court has adopted in deed, if not words, a middle ground where inherently suspicious agreements are presumed harmful and the burden shifts to the defendant to offer a legitimate procompetitive justification or risk losing under the rule of reason.[11] Regardless of the legal standard, the courts only rarely get to the final stage of balancing harm against the legitimate procompetitive justifications offered by the defendants.[12]

The Supreme Court also has addressed when a defendant's asserted procompetitive justifications are legitimate. From the earliest days of the Sherman Act, it has rejected defences that competition itself is harmful for a particular industry and that anticompetitive agreements were necessary to survive.[13] It similarly has rejected attempts to justify hard-core cartel agreements on the grounds that the defendants lacked market power or that the price agreed upon was a reasonable one.[14] More controver-

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[8] United States v. Topco Associations, Inc., 405 U.S. 596 (1972); United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967); United States v. Sealy, Inc., 388 U.S. 350 (1967); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959); Northern Pacific Railroad Co. v. United States, 356 U.S. 1 (1958); International Salt Co. v. United States, 332 U.S. 392 (1947).

[9] Continental TV, Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

[10] See cases cited in note 5.

[11] California Dental Association v. FTC, 526 U.S. 756 (1999); FTC v. Indiana Federation of Dentists, 476 U.S. 447 (1986); Board of Regents v. NCAA, 468 U.S. 85 (1984).

[12] *See* Michael A. Carrier, "The four-step rule of reason", *Antitrust* 33, no. 2 (2019): 50; Michael A Carrier, "Rule of reason: An empirical update for the 21st century", *George Mason Law Review* 16, no. 4 (2009): 827; Michael A. Carrier, "The real rule of reason: Bridging the disconnect", *BYU Law Review* 1999, no. 4 (1999): 1265.

[13] United States v. Trans-Missouri Freight Association, 166 U.S. 290, 547-48 (1897).

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

sially, the Court further has rejected arguments that agreements harmed competition, but nonetheless promoted other aspects of social welfare, whether health or safety or other societal norms.[15]

It is therefore fairly easy to determine whether the *per se* rule or the full rule of reason applies in a particular case or which party has the burden of pleading and proof at a particular stage of the case. However, the Court has not spent anywhere near the same amount of time setting forth the standards of what is supposed to actually happen once the full rule of reason applies. As a result, the full rule of reason has been criticised as meaning little more than everything is relevant and nothing is determinative.[16] Some critics have gone further and contended that the rule of reason violates the rule of law.[17]

III. The diverging paths of Actavis *and* Leegin

The Supreme Court has only just begun to address what a plaintiff must establish to show a violation of the rule of reason and whether there are any meaningful guideposts or rules of thumb along the way. In the past twelve years, the Court has decided two Section 1 Sherman cases in very different areas of antitrust. In both cases, the Court defaulted to its traditional view that the rule of reason applies in the absence of hard-core cartel activity. However, the Court also went further and offered guidelines for the lower courts to use in applying the rule of reason to future cases in the area.

The two cases in question were *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* (Leegin)[18] and *FTC v. Actavis*.[19] *Leegin* dealt with one of the traditional topics of antitrust law, resale price maintenance (vertical price fixing). The decision overturned a century of precedent to hold that the rule of reason would apply in future cases and offered certain guidelines for future litigation. In *Actavis*, the Court dealt with the far more recent phenomenon of "pay-for-delay," or "reverse payments", by branded pharmaceutical makers to keep or delay generic entrants from entering the market. Here too, the Court adopted the rule of reason as the appropriate legal standard and offered certain guidelines for future cases.

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[15] FTC v. Superior Ct. Trial Lawyers Association, 493 U.S. 411 (1990); National Society of Professional Engineers v. United States, 435 U.S. 679 (1978).

[16] Frank Easterbrook, "The limits of antitrust", *Texas Law Review* 63, no. 1 (1984): 1.

[17] Maurice E. Stucke, "Does the rule of reason violate the rule of law?", *U.C. Davis Law Review* 42, no. 1 (2009): 1375.

[18] 551 U.S. 877 (2007).

[19] 570 U.S.136 (2013).

Implicit in the Court's analysis in both cases is the notion that there would be substantial subsequent public and/or private lower court decisions to flesh out the guidelines the Court adopted which would provide greater guidance to enforcers and private actors and develop a more complete body of antitrust jurisprudence. In reality, the law of resale price maintenance (RPM) more or less ended with the *Leegin* decision, thereby making the practice *de facto* legal at the federal level contrary to the wording of the decision. In contrast, a robust lower court case law developed in *Actavis* fleshing out the guidelines established by the Court and exploring many new fact patterns as defendants sought to structure real world conduct in the shadow of *Actavis*.

A. Mismatched incentives and missed opportunities

The Supreme Court's decision in *Leegin* did much more than change the legal standard for RPM, it effectively killed all enforcement of the law in this area. *Leegin* dealt with the practice of RPM agreements where a manufacturer sought to establish the selling price of the item down the distribution chain. The Supreme Court initially held in 1911 that such agreements were *per se* illegal.[20] Over the years, the scope of that ban waxed and waned.[21] In more recent times, the Court made it more difficult to prove such agreements and held in 1996 that maximum resale price maintenance agreements were subject to case by case analysis under the rule of reason.[22] The 5-4 *Leegin* decision held that all RPM agreements would be subject to the full rule of reason.[23]

The Court noted the rule of reason was the default rule under Section 1 of the Sherman Act for most agreements outside of hard-core cartels agreements between competitors.[24] Categories of agreements would be treated as *per se* unlawful only if they inevitably harmed competition and had no meaningful procompetitive justifications.[25]

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[20] Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

[21] State Oil v. Khan, 522 U.S. 3 (1997); Business Electronics. Corp. v. Sharp Electronics. Corp., 485 U.S. 717 (1988); Monsanto Co. v. Spray-Rite Service Corporation, 465 U.S. 752 (1984); Albrecht v. Herald Co., 390 U.S. 145 (1968); United States v. Parke, Davis & Co., 362 U.S. 29 (1960); Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

[22] State Oil v. Khan, 522 U.S. 3 (1997).

[23] Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

[24] *Id*. at 885.

[25] *Id*. at 886.

The Court then identified several potential procompetitive justifications for minimum resale price maintenance agreements. Most of these justifications related to the prevention of free riding by distributors or retailers taking advantage of services, investments and efforts being expended by competing distributors or retailers.[26]

At the same time, the Court identified possible scenarios where resale price maintenance agreements could harm competition. These scenarios mostly revolved around the use of such agreements being facilitating devices for horizontal cartel agreements at either the manufacturer or the downstream distribution level.[27]

Since such agreements had the potential for either pro-or-anti-competitive effects, the Court held that the rule of reason should apply, abandoning the nearly one-hundred-year-old precedent to the contrary. To guide the application of the rule of reason in future cases, the Court provided some guidelines. The Court stated that RPM agreements were most problematic when used by firms with market power, when most firms in the industry used such agreements, or where the impetus for the agreements came from the distribution, rather than the manufacturing level.[28]

Following *Leegin*, one would assume that the lower courts would build out this structured rule of reason along the guidelines suggested by the Supreme Court, with cases eventually returning to the appellate courts and the Supreme Court for review and fine tuning. Instead, virtually all RPM litigation ceased. Congress considered, but never enacted, legislation which would have repealed the holding in *Leegin* and restored the *per se* rule.[29] Some states enacted or maintained *per se* rules against RPM in their state antitrust laws.[30]

Since *Leegin*, there have been no cases brought by either the Department of Justice Antitrust Division (DOJ) or the Federal Trade Commission (FTC) under either the Bush, Obama, or Trump Administrations, and there is no public information suggesting any current investigations of such practices. The last such RPM case by either agency appears to be the

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[26] *Id*. at 889-892.

[27] *Id*. at 892-84.

[28] *Id*. at 897-99.

[29] Leiv Blad and Margaret Sheer, "A look back at the attempts to repeal Leegin", *CPI Antitrust Chronicle*, November 2013 (1), https://www.morganlewis.com/news/2013/11/~/media/files/docs/2013/bladsheernov-13(1).ashx.

[30] Michael A Linday, "Overview of State RPM Laws", *Antitrust Source*, April 2017, https://www.dorsey.com/-/media/files/newsresources/publications/2017/apr17_lindsay_chart.pdf?la=en.

DOJ complaint against Playmobil in 1995,[31] and an FTC modification of a consent decree against Nine West Shoes in light of *Leegin* in 2008.[32] There have been a handful of cases brought by State Attorneys General,[33] half a dozen private cases (none successful),[34] and only one federal appellate decision since *Leegin*.[35] The lack of enforcement has not escaped the attention of scholars, who can only speculate how *Leegin* would apply to future challenges to RPM agreements.[36]

The degree to which private firms use explicit RPM agreements following *Leegin* is difficult to determine. Undoubtedly some additional firms

[31] Complaint, United States v. Playmobil USA, Inc., Case No. 1:95CV00214 (D.D.C. 1995), https://www.justice.gov/atr/case-document/complaint-183.

[32] *See* Nine West Group Inc., FTC Matter/File Number: 9810386, Docket Number: C-3937 (2008) (modifying consent decree in light of Leegin).

[33] See e.g., California v. Bioelements, Inc., case no. 10011659 (2011); New York v. Tempur-Pedic International, Inc., 30 Misc.3d 986 (2011).

[34] Babyage.com, Inc. v. Toys "R" Us, Inc., 558 F.Supp.2d 575, 583-84 (E.D. Pa. 2008) (discussing firm market power); Toledo Mack Sales & Service, Inc. v. Mack Trucks, Inc., 530 F.3d 204 (3rd Cir. 2008) (examining a situation in which distributors use vertical restraints to enforce a horizontal agreement among themselves); Major League Baseball Properties, Inc. v. Salvino, Inc., 542 F.3d 290, 315-16, 334 (2nd Cir. 2008) (finding R/R applies to vertical agreements and rejecting "quick look" approach); McDonough v. Toys "R" Us, Inc., 638 F.Supp.2d 461, 480-89 (E.D. Pa. 2009) (discussing all three factors); O'Brien v. Leegin Creative Leather Products, Inc., 294 Kan. 318, 341-49 (2012) (considering and rejecting reasonableness approach under KA law); *but see* Kansas Restraint of Trade Act, K.S.A. § 50-163 (2013) (passed after O'Brien and requiring harmonization with federal antitrust law).

[35] See Toledo Mack Sales & Service, Inc. v. Mack Trucks, Inc., 530 F.3d 204 (3rd Cir. 2008) (examining a situation in which distributors use vertical restraints to enforce a horizontal agreement among themselves).

[36] Thomas A. Lambert, "Dr. Miles is dead. Now what?: Structuring a rule of reason for evaluating minimum resale price maintenance", *William. & Mary Law Review* 50, no. 6 (2009): 1937 (collecting proposed interpretations of the R/R under Leegin); James Mulcahy and Filemon Carillo, "Leegin, ten years later: Did vertical agreements remain unlawful per se where adopted to facilitate a price-fixing horizontal scheme?", *Franchise Law Journal* 38, no. 1 (2018): 129-136 (discussing the development of R/R analysis in the area of hybrid vertical/horizontal restraints); Marina Lao, "Internet retailing and "free-riding:" A post-Leegin antitrust analysis", *Journal of Internet Law* 14, no. 9 (2011): 20 (discussing the difficulty of prevailing on an RPM claim post-Leegin); Heather M. Cooper, "What baby products can teach us about successful distribution strategies", *The Federal Lawyer* 57, February (2010): 25 (discussing the Babyage case in light of Leegin); Stephen J. Marietta, "An apple a day doesn't keep Doctor Miles away: The second circuit's misuse of the per se rule in United States v. Apple", *Rutgers Law Review* 69, no. 1 (2016): 372-77 (discussing the Apple decision in light of Leegin and Toledo Mack Trucks); Wan Cha, "A new post-Leegin dilemma: Reconciliation of the third circuit's Toledo Mack case and the second circuit's Apple E-Books case", *Rutgers Law Review* 67, no. 6 (2015): 1561-1574 (discussing Apple and Toledo Mack Trucks); Theodore Voorhees, Jr., "Reasoning Through the Rule of Reason for RPM", *Antitrust* 28, Fall (2013): 59-61 (discussing the lack of development in case law).

utilize such agreements in the wake of *Leegin* who would not have done so before on advice of counsel. Others seem content to use other types of vertical agreements or so-called *Colgate* policies, designed to avoid even constituting an agreement, thus avoiding the scope of Section 1 altogether.[37] Empirical information is hard to obtain, particularly for firms which operate in international markets, where RPM is often still regarded as a hard core offense.[38] What is more certain is that there is no substantial post-*Leegin* jurisprudence to develop the rule of reason in line with the framework provided by the Court.

B. A robust law of pay-for-delay

The precise opposite occurred during roughly the same time frame with respect to so-called "reverse payments" or "pay-for-delay" agreements in the pharmaceutical industry. This issue largely arose because of the unintended consequences of the Hatch-Waxman Act of 1984, which sought to create easier entry for generic drugs and create more competition for high priced branded pharmaceutical products.[39]

The Hatch-Waxman Act created a pathway for quicker entry by generic drugs by establishing an abbreviated regulatory approval process for generic drugs which were bioequivalent to their branded competitors. To increase the incentives for generic entrants and force litigation of weak patents, the first such generic competitor would receive 180 days of exclusive market access before any further generic entry could take place. At the same time, the branded pharmaceutical producer was given a set period to file a patent infringement suit against the new generic entrant. The new entrant could then defend on the basis that the patent was invalid, unenforceable, or otherwise not infringed (a very difficult argument for a chemically identical compound).[40]

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[37] United States v. Colgate & Co., 250 U.S. 300, 307 (1919).

[38] See e.g., James Killick, "European Commission fines for resale price maintenance in e-commerce", *White & Case*, 2018, https://www.whitecase.com/publications/insight/european-commission-fines-resale-price-maintenance-e-commerce.

[39] *Drug Price Competition and Patent Term Restoration Act*, Public Law 98-417, *U.S. Statues at Large* 98 (1984): 1585.

[40] See generally Herbert Hovenkamp et. al, *IP and Antitrust: An Analysis of Antitrust Principles Applied to Intellectual Property Law*, 3rd edition (United States of America: Wolters Kluwer Legal & Regulatory U.S., 2017), § 16.01A; Glynn S. Lunney, Jr., "FTC v. Actavis: The Patent-Antitrust Intersection Revisited", *North Carolina Law Review* 93, no. 2 (2015): 375 (discussing incentives in Hatch-Waxman for generic entry).

Unlike an ordinary patent infringement suit where settlement normally involved the defendant paying the plaintiff to avoid liability, a different practice arose in patent litigation under the Hatch-Waxman Act. The plaintiff branded pharmaceutical manufacturers began offering the allegedly infringing generic producer defendant increasingly large sums of money and other consideration to refrain or delay from entering the market and avoid possible invalidation of the weak patents.

These payments had several troubling effects. They leave the branded pharmaceutical producer as the sole maker of the drug in question for the full length of the patent and allowing it to price much higher than would have been the case once generic entry took place. Second, the generic was effectively barred from the market for the period specified in the settlement agreement. Third, other generic competitors were effectively barred by the misdrafted statutory provisions of the Hatch-Waxman Act granting the initial generic entry of 180 days of exclusivity *following* its entry, where the clock never begins to run because of the settlement agreement.

These agreements had the effect of allowing the branded pharmaceutical maker to retain whatever market power it obtained from an often legally questionable patent in return for sharing a portion of its monopoly profits with the first generic entrant. At the same time such agreements effectively blocked the initial generic entry and all further generic entry for the remainder of the life of the patent. Antitrust challenges shortly followed.

The lower courts split as to whether such agreements were *per se* unlawful, subject to the rule of reason, or presumptively lawful if within the scope of the patent held by the branded pharmaceutical manufacturer.[41] The Supreme Court granted *certiorari* to resolve this split in the lower court in *FTC v. Actavis*.[42] In its 5-4 opinion, the Court held that such agreements were subject to the full rule of reason.

Once again, it offered some guidelines for the application of the rule of reason in the lower courts. The Court stated that such agreements were most suspect where there were 1) unjustifiably large payments flowing from the plaintiffs to the defendants in the patent litigation; 2) the plaintiff's

[41] In re K-Dur Antitrust Litigation, 686 F.3d 197 (3d Cir. 2012); In re Ciprofloxacin Hydrochloride Antitrust Litigation, 544 F.3d 1323 (Fed. Cir. 2008); In re Tamoxifen Citrate Antitrust Litigation, 466 F.3d 187 (2d Cir. 2006); Schering-Plough v. FTC, 402 F.3d 1056 (11th Cir. 2005); In re Cardizem CD Antitrust Litigation, 332 F.3d 896 (6th Cir. 2003).

[42] 570 U.S. 136 (2013).

patent claims were weak; and 3) there was a lack of other procompetitive justifications for the agreements in question.[43]

Actavis led to the flowering of subsequent public and private litigation. The FTC continued to bring cases normally resulting in consent decrees or victory in administrative litigation and on appeal.[44] Private treble damage class actions increased in number and scope despite *Actavis* requiring a rule of reason, rather than a *per se* or quick look approach.[45] State attorneys general continued to investigate and litigate pay-for-delay and related health

[43] *Id*. at 154-58.

[44] Impax Laboratories, Inc., FTC, 2017 WL 5171124, (2017); F.T.C. v. AbbVie Inc., 107 F.Supp.3d 428, 435-36 (E.D. Pa. 2015) (finding that neither a settlement allowing a competitor to produce a generic 6 years earlier, nor one granting a favourable supply deal constituted a reverse payment); F.T.C. v. Cephalon, Inc., 36 F.Supp.3d 527, 531-32 (E.D. Pa. 2014) (rejecting FTC's argument that under Actavis the relative strength or weakness of the patent is irrelevant to the analysis of the settlement).

[45] In re Nexium (Esomeprazole) Antitrust Litigation, 968 F.Supp.2d 367, 390-93 (D. Mass. 2013) (considering factors and defining the Court's use of "payment" to include non-monetary consideration); In re Nexium (Esomeprazole) Antitrust Litigation, 42 F.Supp.3d 231, 262-65, 285-86 (D. Mass. 2014) (applying burden-shifting analysis for reverse payments); In re Niaspan Antitrust Litigation, 42 F.Supp. 735, 750-53, 755-56 (E. D. Pa. 2014) (concluding that reverse payments can include non-monetary consideration and discussing the strength of the underlying patent litigation); In re Lipitor Antitrust Litigation, 46 F.Supp.3d 523, 542-549 (D.N.J. 2014) (collecting cases in defining "payment" and "large payment"); Time Ins. Co. v. Astrazeneca AB, 52 F.Supp.3d 705, 709-712 (E. D. Pa. 2014) (collecting cases on cash vs. non-cash settlements and discussing whether decision in a reverse-payment case requires litigation of the underlying patent issue); United Food and Commercial Workers Local 1776 & Participating Employers Health and Welfare Fund v. Teikoku Pharma USA, Inc., 74 F.Supp.3d 1052, 1066-75 (N.D. Cal. 2014) (proposing and applying 4-step test); King Drug Co. of Florence, Inc. v. Cephalon, Inc., 88 F.Supp.3d 402 (E.D. Pa. 2015) (applying burden-shifting test); In re Aggrenox Antitrust Litigation, 94 F.Supp.3d 224, 241-45 (D. Conn. 2015) (defining "large," "unjustified," and "payment"); In re Cipro Cases I & II, 348 P.3d 845, 865-69 (2015) (proposing factors and applying burden-shifting test); King Drug Co. of Florence, Inc. v. Smithkline Beecham Corp., 791 F.3d 388, 399-413 (3rd Cir. 2015) (holding that a no-AG settlement could constitute a reverse-payment); In re Wellbutrin XL Antitrust Litigation, 133 F.Supp.3d 734, 751 (E.D. Pa. 2015) (concluding that even a partial settlement agreement can be subject to Actavis scrutiny); In re Opana ER Antitrust Litigation, 162 F.Supp.3d 704, 716-721 (N.D. Ill. 2016); In re Loestrin 24 Fe Antitrust Litigation, 814 F.3d 538 (1st Cir. 2016) (holding that non-cash reverse payments fall under the scope of Actavis); In re Aggrenox Antitrust Litigation, 199 F.Supp.3d 662, 663-69 (D. Conn. 2016) (discussing market power); In re Asacol Antitrust Litigation, 233 F.Supp.3d 247, 261-264 (D. Mass. 2017) (pleading large and unjustified payment); In re Lipitor Antitrust Litigation, 855 F.Supp.3d 126, 146 (3rd Cir. 2017) (concluding that reverse payment allegations didn't present question of patent law vesting jurisdiction in the Fed. Cir.); In re Loestrin 24 Fe Antitrust Litigation, 261 F.Supp.3d 307, 329-338 (D.R.I. 2017) (discussing the 5 factors and proposing and applying a 4-step analysis for reverse payments); In re Wellbutrin XL Antitrust Litigation, 868 F.3d 132, 160-63 (3rd Cir. 2017) (concluding that even a partial settlement agreement can be subject to Actavis scrutiny); In re Lipitor Antitrust Litigation, 868 F.3d 231,

care cases individually and in coalitions through the National Association of Attorneys General (NAAG).[46] Congress considered numerous legislative fixes but has not eliminated the basic flaws in the institutional design of Hatch-Waxman and continues to ponder additional legislative fixes.[47] These antitrust issues have become part of the public discourse and the 2020 presidential campaign proposals by leading candidates.[48]

Business practices have evolved as well in the wake of *Actavis*. The pharmaceutical industry has resorted to a variety of additional techniques beyond the type of reverse payments specifically at issue in *Actavis* to protect monopoly profits for high priced blockbuster drugs facing the prospect of generic entry. These have included non-cash payments to generic competitors, agreements structured as payments for services as distributors and otherwise to such firms, as well as unilateral use of so-called branded generics, product hopping, evergreening, use of citizen petitions to delay entry, and so-called patent thickets.[49]

As a result, the federal trial and appellate courts have had a steady flow of government and private cases to address and apply the rules of the road set forth in *Actavis*. Not every factor has been comprehensively addressed, and lower courts continue to be split on certain key issues. But the spirit of *Actavis* has been honoured and there has developed an antitrust common law for the Supreme Court and Congress to consider moving forward.

IV. Every cause of action must have a champion

Someone must be willing to bring a case for effective enforcement to ensue. More colloquially, there must be a champion ready to take on the quest. In U.S. competition law there are multiple potential champions for all the available causes of actions. However, not all are ready for a particular quest for any number of reasons including ideology, institutional commitment, publicity, resource allocation, or risk aversion.

249-262 (3rd Cir. 2017) ; In re Namenda Direct Purchaser Antitrust Litigation, 331 F.Supp.3d 152, 197-99 (S.D.N.Y. Aug. 16, 2018) (applying burden-shifting analysis).

[46] See *infra* notes 57-61 and accompanying text.

[47] *Id*.

[48] *Id*.

[49] Michael Carrier, "Statement by Michael A. Carrier to Health Subcommittee of House Committee on Energy & Commerce", 2019, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3352629; Michael Carrier, "Five Years After Actavis: A Brief Case Study", *IP Watchdog*, June 18, 2018, https://www.ipwatchdog.com/2018/06/18/ftc-v-actavis-stand-5-years/id=98536/.

As a result, there have been many champions bringing pay-for-delay cases both before and after *Actavis*. In contrast, none of the likely enforcers has been willing to take up the RPM challenge, and *Leegin* effectively meant the end of meaningful enforcement rather than its continued development.

A. The many champions taking on pay-for-delay

The first and foremost champion of attacking pay-for-delay agreements has been the U.S. Federal Trade Commission. The FTC has been the traditional antitrust enforcer for health care antitrust issues involving the pharmaceutical industry and hospitals, while the Antitrust Division has focused more on the antitrust aspects of health care insurance and medical devices. This informal allocation of enforcement responsibility led the FTC to focus on pay-for-delay agreements in the wake of the passage and unintended consequences of the Hatch-Waxman Act.

This interest and experience was the result of research, hearings, and reports,[50] litigation,[51] and later amicus briefs in support of private litigation.[52] The FTC brought several cases which were litigated or settled by consent decrees prior to *Actavis* and ably litigated *Actavis* all the way to a close victory in the Supreme Court. Since *Actavis*, the FTC has continued to pay close attention to the pay-for-delay field, continued to bring cases,[53] filed *amicus* briefs,[54] monitored agreements that seek to delay generic

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[50] Federal Trade Commission. *Pay-For-Delay: How Drug Company Pay-Offs Cost Consumers Billions: A Federal Trade Commission Staff Study* (2010), https://www.ftc.gov/reports/pay-delay-how-drug-company-pay-offs-cost-consumers-billions-federal-trade-commission-staff; Federal Trade Commission, *Generic Drug Entry Prior to Patent Expiration: An FTC Study* (2002), https://www.ftc.gov/sites/default/files/documents/reports/generic-drug-entry-prior-patent-expiration-ftc-study/genericdrugstudy_0.pdf.

[51] *See e.g.*, FTC v. Watson Pharmaceuticals, Inc., 677 F.3d 1298, 1312 (2012); Schering-Plough Corp. v. FTC, 402 F.3d 1056, 1074-1075 (C.A.11 2005).

[52] Brief of Federal Trade Commission as Amicus Curaie in Support of Plaintiff-Appellants, King Drug Co. of Florence v. Smithkline Beechum Corp., 791 F.3d 388 (3rd Cir. 2015); Brief of Federal Trade Commission as Amicus Curaie in Support of Defendants, Takeda Pharmaceutical Co. v. Zydus Pharmaceuticals, 358 F.Supp.3d 389 (D.N.J. 2018), available at https://www.ftc.gov/news-events/media-resources/mergers-competition/pay-delay.

[53] See cases cited in notes 44, 45.

[54] In re Wellbutrin Antitrust Litigation, 868 F.3d 132 (3rd Cir. 2017).

entry,[55] and identified pay-for-delay as an enforcement priority on its website[56] and to Congress.[57]

Congress has shown great interest in this topic and has conducted hearings on pay-for-delay agreements and subsequent variations. Numerous bills have been considered to prohibit or limit such practices.[58] In addition, generic entry and the high price of pharmaceutical products is a hot topic in the 2020 presidential campaign.[59] While the proposed legislation

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[55] "Agreements Filed with the Federal Trade Commission under the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 Overview of Agreements Filed in FY 2016 A Report by the Bureau of Competition", https://www.ftc.gov/system/files/documents/reports/agreements-filled-federal-trade-commission-under-medicare-prescription-drug-improvement/mma_report_fy2016.pdf.

[56] "Pay for delay", *Federal Trade Commission*, https://www.ftc.gov/news-events/media-resources/mergers-competition/pay-delay; Joshua D. Wright, "FTC v. Actavis and the Future of Reverse Payment Cases", *Federal Trade Commission*, September 26, 2013, https://www.ftc.gov/sites/default/files/documents/public_statements/ftc-v.actavis-future-reverse-payment-cases/130926actavis.pdf.

[57] See e.g., "Prepared Statement of the Federal Trade Commission Before the United States Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights", *Federal Trade Commission*, September 17, 2019, at 6-8, https://www.ftc.gov/system/files/documents/public_statements/1544480/senate_september_competition_oversight_testimony.pdf.

[58] *See e.g.*, U.S. Congress, Senate, *Affordable Medications Act*, S. 1801, 116th Congress, introduced in Senate June 12, 2019, https://www.congress.gov/bill/116th-congress/senate-bill/1801; U.S. Congress, Senate, *Food and Agribusiness Merger Moratorium and Antitrust Review Act of 2019*, S. 1596, 116th Congress, introduced in Senate May 22, 2019, https://www.congress.gov/bill/116th-congress/senate-bill/1596/text; U.S. Congress, House, *Strengthening Health Care and Lowering Prescription Drug Costs Act*, H.R. 987, 116th Congress, introduced in House February 6, 2019, https://www.congress.gov/bill/116th-congress/house-bill/987; U.S. Congress, House, *Creating and Restoring Equal Access to Equivalent Samples Act of 2019 (CREATES Act of 2019)*, H.R. 965, 116th Congress, introduced in House February 5, 2019, https://www.congress.gov/bill/116th-congress/house-bill/965/text; U.S. Congress, House, *Protecting Consumer Access to Generic Drugs Act of 2019*, H.R. 1499, 116th Congress, introduced in House March 5, 2019, https://www.congress.gov/bill/116th-congress/house-bill/1499?q=%7B%22search%22%3A%5B%22s+485%22%5D%7D; U.S. Congress, Senate, *Affordable Prescriptions for Patients Act of 2019*, S. 1416, 116th Congress, introduced in Senate May 9, 2019, https://www.congress.gov/bill/116th-congress/senate-bill/1416; U.S. Congress, House, *Stop Significant and Time-wasting Abuse Limiting Legitimate Innovation of New Generics Act (Stop STALLING Act)*, H.R. 2374, 116th Congress, introduced in House April 29, 2019, https://www.congress.gov/bill/116th-congress/house-bill/2374/text; U.S. Congress, Senate, *Stop Significant and Time-wasting Abuse Limiting Legitimate Innovation of New Generics Act (Stop STALLING Act)*, S. 1224, 116th Congress, introduced in Senate April 29, 2019, https://www.congress.gov/bill/116th-congress/senate-bill/1224/text.

[59] *See e.g.*, Emmarie Hutteman, "Klobuchar wants to stop pay-for-delay deals that keep drug prices high", *Politifact*, April 25th, 2019, https://www.politifact.com/health-check/statements/2019/apr/25/amy-klobuchar/klobuchar-wants-stop-drugmakers-bad-practice-keeps/; "Healthcare", *Joe Biden*, https://joebiden.com/healthcare/ ("Generics help reduce health care spending, but brand drug corporations have succeeded in preserving a number of strategies to help them delay the

and campaign proposals have not yet been enacted, the issue remains a hot topic of great political salience and a spur to both public and private enforcement.

State Attorneys General also have stepped into the arena to challenge agreements delaying generic entry. The issues of drug pricing has great political resonance for an elected State Attorney and the public. While the scope of these cases probably limits enforcement to the larger and most committed states to tackle on their own,[60] the states have been able to coordinate their activities and resources through the National Association of Attorneys General to form a credible team to undertake such complex litigation.[61] As a result, coalitions of States have investigated and challenged pay-for-delay agreements and also joined with the FTC on key cases.[62]

Private enforcers have been eager to bring treble damage cases usually in the form of class actions.[63] Many of the cases have been brought by union welfare funds and municipalities directly affected by the continued high prices of branded pharmaceutical products. Private cases constituted the majority of the pre-*Actavis* cases which created the split in the lower courts as to the proper standard of legality for such agreements leading up to the *Actavis* decision by the Supreme Court and continue to dominate the docket of current pay-for-delay cases.

Finally, businesses seem to be willing to risk antitrust challenge in order to deter generic entry because of the enormous sums of money involved in prolonging the period prior to generic entry. Generic entry is the single greatest factor in declining prices for branded pharmaceutical products

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entrance of a generic into the market even after the patent has expire); "Affordable Medicine for All:A Plan to Slash Drug Prices and Boost Pharmaceutical Innovation", *Pete for America*, https://storage.googleapis.com/pfa-webapp/documents/PFA_Affordable%20Medicines%20for%20All_%20white%20paper.pdf ("Pete will end the pay-for-delay deals.")

[60] "Attorney General Becerra Secures Nearly $70 Million against Several Drug Companies for Delaying Competition and Increasing Drug Prices", *National Association of Attorneys General*, July 29, 2019, https://members.naag.org/assets/files/Antitrust/files/07-29-2019%20Attorney%20General%20Becerra%20Secures%20Nearly%20%2470%20Million%20against%20Several%20Drug%20Companies.pdf (California settlement in pay-for-delay case).

[61] "Edo Agrees to State Enforcement of Injunctive Relief After Attempting to Block Generic Drugs: States create enforcement fund to stop future anticompetitive conduct", *National Association of Attorneys General*, July 19, 2019, https://members.naag.org/assets/files/Antitrust/files/7-19-19%20Utah%20Lidoderm%20settlement.pdf (describing antitrust settlement with coalition of seventeen State Attorneys General).

[62] *Id*.

[63] Federal Rule Civil Procedure 23.

following the expiration of the relevant patents.[64] The stakes involved seem to justify the legal risks of suspect strategies to disguise pay-for-delay agreements or their equivalents through non-cash payments, provisions of minor services by the generic entrant, thin joint ventures, outright acquisitions, and various unilateral marketing strategies to accomplish the same goals of maintaining monopoly profits as long as possible.

B. The failed search for a champion to take on resale price maintenance

The story for life after *Leegin* reads very differently. Resale price maintenance became the orphan of antitrust enforcement, ignored by its former champions or so far down the list of priorities that it essentially vanished in terms of enforcement and meaningful lower court decisions.

The Antitrust Division has been ideologically averse to challenging this type of vertical restraint since the 1980s. It had to be restrained by Congress from filing amicus briefs against the *per se* treatment of RPM in the *Monsanto* case in the 1980s.[65] In *Leegin* itself, the Justice Department actually filed an *amicus* brief (along with the FTC) on behalf of the defendants once the case reached the Supreme Court.[66]

The Antitrust Division's priorities remain hard-core cartel prosecutions and merger enforcement. The Division further investigates the occasional Section 2 case and from time to time brings civil horizontal rule of reason cases. Given these priorities and virtually unlimited discretion as to what type of case the Division chooses to pursue, there is little reason to expect that any new RPM cases any time soon. In the more recent Apple e-books litigation, the Antitrust Division chose to focus on a horizontal agreement by book publishers by the downstream e-book distributor rather than the vertical RPM type elements of the case.[67] There has been nothing recently in this area from the FTC either as it has pursued its own other priorities including its heavy investment in research, advocacy, and litigation in the

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[64] Aaron S. Kesselheim, Michael S. Sinha, and Jerry Avorn, "Determinants of market exclusivity for prescription drugs in the United States", *JAMA Internal Medicine* 177, no. 11 (2017): 1658-1664.

[65] See also Monsanto Co. v. Spray-Rite Svc. Corp., 465 U.S. 752 (1984).

[66] Brief of Federal Trade Commission as Amici Curiae Supporting Petitioner, Leegin Creative Leather Products, Inc., v. PSKS, INC., 551 U.S. 877 (2007), *available at* https://www.ftc.gov/sites/default/files/documents/amicus_briefs/leegin-creative-leather-products-inc.v.psks-inc.d/b/kays-kloset...kays-shoes/070122leegin06-480amicuspdc.pdf.

[67] U.S. v. Apple, Inc., 791 F.3d 290 (2d Cir. 2015), cert. denied, 136 S. Ct. 1376 (2016). *See generally* Chris Sagers, *United States v. Apple: Competition in America* (United States of America: Harvard University Press, 2019).

pharmaceutical sector as well as its other antitrust, consumer protection, and privacy enforcement activities.

Congress also has lost interest in restoring the *per se* rule for RPM or pressing the enforcers to do more under the structured rule of reason. Several unsuccessful bills were introduced to reverse the *Leegin* decision.[68] Congress then turned its attention to other aspects of antitrust law and enforcement often relating to big tech or specific mergers of interest to rankings committee members. Even with the renewed interest in antitrust as a political and election interest, RPM has not been a significant component of the current spate of bills, campaign platforms, or the political debate.

The states were the closest thing to a champion that emerged. Certain states enacted or maintained statutory or common law per se prohibitions on RPM.[69] State Attorneys General brought a handful of cases against RPM agreements,[70] but enforcement remained sporadic and subject to resource constraints and competing priorities of individual states and NAAG coalitions.

Few private cases emerged. The expected value of such litigation is low versus other types of antitrust cases and other types of litigation that clients and class action lawyers choose to bring. Lengthy, expensive, uncertain, and relatively low damage cases such as RPM will be rarely worth the risk that cautious profit maximizing plaintiffs and their counsel choose to bring. There will rarely be a single purchaser with enough at stake to make such litigation attractive. These same factors also make class actions unlikely given the more winnable and larger damage cases available elsewhere.

Most potential defendants also avoid pressing the envelope by either flouting the law or creating creative but legally risky workarounds that are likely to attract new enforcement efforts or new legislative attention. The possibility of litigation in states where RPM remains *per se* unlawful is one such deterrent. The more general hostility to RPM outside the U.S. is another deterrent to businesses who seek a single global marketing

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[68] See e.g., *Discount Pricing Consumer Protection Act*, S.B. 148, 11th Cong. (2009); *Discount Pricing Consumer Protection Act*, S.B. 75, 112th Cong. (2011); *Discount Pricing Consumer Protection Act*, H.R. 3406, 112th Cong. (2011).

[69] See Lindsay, *supra* note 30.

[70] *Id*.

plan.[71] So-called *Colgate* plans which unilaterally announce desired resale prices and then cease doing business with discounters without any agreement at all are a third option since such plans, if well-structured, are not deemed agreements at all, thus falling outside the purview of Section 1 of the Sherman Act.[72] Fourth, firms can use non-price vertical restraints to accomplish much of the legitimate goals of RPM in preventing free riding by distributors or retailers. Finally, firms can directly impose the service, warranty, technical knowhow, sales force training, and other desired requirements for effective marketing and terminate firms for documented failures to comply.

Without any of the obvious champions to take up the cause, RPM has not just become subject to the rule of reason, it approaches *per se* legality. No significant enforcement has ensued despite the apparent prediction of the Supreme Court to the contrary.

V. Every champion needs an incentive

Every champion still needs the incentive in order to take on the quest of bringing a structured rule of reason under Section 1 of the Sherman Act. There is no obligation for either public or private enforcers to bring this type of case versus the myriad of other antitrust cases or other types of litigation.

Public enforcers have not brought many rules of reason Section One cases in recent years. The Antitrust Division has prioritized *per se* unreasonable criminal hard-core cartel cases and major merger cases in recent years.[73] The Division has invested additional resources in new investigations of the tech sector under Section 2 of the Sherman Act. The FTC has emphasised health care cases (including pay-for-delay), major mergers, and increasingly devoted resources to monopolization investigation and litigation such as the pending case against Qualcomm and current investigations of Google and Facebook.[74]

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[71] See generally D. Daniel Sokol, Daniel Crane, and Ariel Ezrachi, *Global Antitrust Compliance Handbook* (United Kingdom: Oxford University Press: 2014) (surveying antitrust provisions of numerous jurisdictions).

[72] United States v. Colgate & Co., 250 U.S. 300, 307 (1919).

[73] "2019 ABA Antitrust Spring Meeting: Federal and state antitrust enforcement takeaways", *Perkins Coie LLP*, Apr. 8, 2019, https://www.perkinscoie.com/en/news-insights/2019-aba-antitrust-spring-meeting-federal-and-state-antitrust-enforcement-takeaways.html.

[74] *Id*. The FTC also has responsibilities for consumer protection cases, privacy cases, and a variety of legislative mandates to report on and enforce a variety of statutes. See generally Stephanie W. Kanwit, *Federal Trade Commission* (USA: Thomson Reuters, 2019).

At the margins, both agencies have ideological and resource constraints that affect any decisions at the margin about opening a new investigation or bringing a case outside these existing priorities. Vertical cases of any kind are few and far between. When they have been brought, the vertical restraints more often consisted of exclusive dealing arrangements in the context of monopoly maintenance or attempted monopolization cases such as *Microsoft*,[75] *Intel*,[76] and *Qualcomm*.[77]

For private litigation, cases normally need to have a positive expected value. Most clients and lawyers bring cases for money damages based on the probability of winning and the likelihood and amount of the damages and/or attorney fees. Ideologically driven legal reform litigation is rare in the antitrust area.

The shrinking *per se* rule, even with the rise of a structured rule of reason in some cases, has led to important changes in the number and types of private antitrust litigation. Most private antitrust cases are in some way related to hard-core cartels because they are easier to win and more likely to result in a victory or settlement for the clients and attorney's fees for the lawyers. If the government has prevailed in a criminal prosecution, then Section 5 of the Clayton Act creates a presumption of violation that private plaintiffs can rely on, although they normally still have to plead and proof causation and damages.[78] The effect of the Justice Department's amnesty and leniency programme further requires cooperating defendants to cooperate with private plaintiffs as a condition of immunity from criminal prosecution.[79]

Even here, such cases are lengthy, expensive, and uncertain. But they are less expensive and more likely to result in a win than cases under the rule of reason where the plaintiff's burden is higher and the defendant's justifications more numerous.

Unless a client is able to pay for a lengthy, expensive, uncertain rule of reason case through hourly fees, such cases are normally brought on a

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[75] United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).

[76] Intel Corp., FTC, 2009 WL 5576196 (2009).

[77] FTC v. Qualcomm Inc., Findings of Fact and Conclusions of Law (S.D.N.Y. May 21, 2019), available at https://www.ftc.gov/system/files/documents/cases/qualcomm_findings_of_fact_and_conclusions_of_law.pdf.

[78] 15 U.S.C. §16(a) (2011).

[79] In return, the successful amnesty applicant is only liable for single damages on its portion of the sales of the price fixed products or services. *See The Antitrust Criminal Penalty Enhancement and Reform Act of 2004*, Public Law 111-190, *U.S. Statutes at Large* 124 (2010): 1275.

contingent fee basis. Private counsels normally shrewdly evaluate all such potential cases carefully to determine not just whether the case is likely to produce a positive expected value but whether it is likely to produce a *greater* expected value than the universe of other types of antitrust cases and all the other types of cases the lawyers are already handling or considering taking on. If the firm or firms seek to finance a case through external litigation funding, the funder will similarly be making this kind of calculation if deciding whether to invest in this case or some other antitrust case or type of litigation.[80]

The lack of incentive is an important reason why no existing champion has come forward to develop the case law of *Leegin* and many have done so in the pay-for-delay area. The public enforcers have prioritised other areas of the law and have to some degree an ideological aversion to the very theory behind an antitrust challenge to vertical resale price maintenance. Private enforcers have simply put their money elsewhere in search of greener pastures.

In pay-for-delay cases, the FTC (in both Democratic and Republican administrations) has put its institutional prestige behind cases building on the legacy of *Actavis*. State attorneys general find such cases appealing both on the merits and in terms of the favourable publicity they generate. Private antitrust counsel find *Actavis* type class actions a potentially profitable positive expected value type of class, on a par with straight ahead *per se* horizontal price fixing cases, because of the ability of specialised lawyers, law firms, and expert witnesses to rely on the *Actavis* presumptions and the enormous potential damages for such cases.

VI. Rules of thumb for the real world

Given the dynamics of how institutions and incentives affect how lower courts and parties develop the general principles outlined by the Supreme Court in these cases, the question remains: how can we do better? In part, the problem is with the composition of the Court itself. The Court in recent years has been dominated by Justices who previously worked in the Executive Branch, as appellate lawyers, and/or as appellate judges prior to their nomination to the Supreme Court.

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[80] "A brief introduction to litigation Finance", *LexShares*, https://www.wealthforge.com/hubfs/LexShares-Litigation-Finance-Whitepaper.pdf.

There have been few recent members of the Supreme Court who made their living litigating in the federal or state trial courts prior to their entering the judiciary. Justice Stevens was the last, and only member of the Court since the 1970s, who practiced as a litigator and trial lawyer in the antitrust area.[81] Few, if any, more recent Justices worked in the trenches applying these types of general and vague antitrust principles in the real world where the law is often easy but the facts are devilishly hard to determine, plead, and prove. In addition, almost none of the current or recent Justices have served as district court judges engaged in the process of applying general principles to new and challenging factual settings.[82]

The result has been a Court with a kind of Olympian detachment with broad oracular pronouncements where the mere mortals of the bar and the lower courts have to decipher the application of these antitrust rules of thumbs in new settings without any further guidance. These rules of thumbs are an improvement of merely establishing that the rule of reason applies to a category of agreements, but no further guidance. However, if the Supreme Court is serious about establishing a structured version of the rule of reason, rather than one where everything is relevant and nothing determinative, it needs to do better. Rules of thumb require more than simply directions to the lower courts to consider a checklist.

Even if the composition of the Court is unlikely to change, the Court needs a more nuanced understanding of who is most likely to bring these cases and what incentives exist for them to do so. The Court further must have some understanding of the trend line they seem to have established in these cases. If the Court has over time loosened the substantive rules in a way that favours defendants, continued doctrinal development is less likely. In addition, if the Court has over time tightened the procedural requirements for successful plaintiffs (for antitrust or in general), continued doctrinal development is similarly less likely to occur. More generally, anything that lessens the expected value of a claim by a public or private plaintiff will produce less litigation in that area and more litigation in other antitrust or unrelated areas.

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[81] Spencer Weber Waller, "Justice Stevens and the rule of reason", *SMU Law Review* 62, no. 2 (2009): 693.

[82] In addition, the lower courts often engage in a form of a guerrilla warfare willfully ignoring or subverting Supreme Court precedent in antitrust and other areas of the law. See William L. Reynolds and Spencer Weber Waller, "Legal process and the past of antitrust", *SMU Law Review* 48, no. 5 (1995): 1811.

The Court can do better in several ways. First, with respect to case selection, the Court has virtually unlimited discretion of which cases it wishes to hear through the *certiorari* process. It may simply be better for the Court to decline to hear antitrust cases where the only likely outcome is the selection of the rule of reason as the substantive standard and a token effort as establishing rules of thumb. Without some further detail or analysis of what is likely to happen next and how lower court cases will actually be brought, the lower courts may be better off just working out these matters on their own.

If the Court does take *certiorari*, the Court, the parties, and *amici* can address the issues of the likely real-world impact of the Court's decision in their briefs and arguments. Alternatively, the Court can ask for supplemental briefing as to what rules of thumb should apply in a subsequent rule of reason case and who are the most likely parties to bring such cases.

Members of the Court can ask these questions to the parties, *amici* who have been granted oral argument, the general counsel of the Federal Trade Commission, or the United States Solicitor General, who is often invited to express the view of the Executive Branch in private antitrust cases before the Court. The Court further has the power to appoint counsel to advocate positions not taken by the parties. Such steps would serve the traditional purposes of oral argument in the Supreme Court is to explore the real-world policy impact of potential new legal rules and give guidance in other cases.[83]

In the hour of oral argument normally granted in most cases, some member of the Court has time to ask whether the federal enforcement agencies plan to make such cases a future priority, whether the States are likely to do so, and whether there is a likely private plaintiff or plaintiff class who will bring the cases necessary to develop and apply the structured rule of reason being developed by the Court. Finally, the Supreme Court needs to regularly follow up over time with cases in the area to ensure that litigants, businesses, and the lower courts adhere to and develop the framework established in the initial landmark case.

Lower courts can embrace, rather than duck, the opportunity provided by the Supreme Court in developing a structured rule of reason by faithfully analysing and applying the soft presumptions provided by the Supreme

[83] Stephen M. Shapiro (author, ed.), Kenneth S. Geller, Timothy S. Bishop, Edward A. Hartnett, and Dan Himmelfarb (eds.), *Supreme Court Practice*, 10th edition (USA: Bloomberg BNA, 2013), 816.

Court and the developing law throughout the lower courts. In government cases, the lower courts can insist that such issues be addressed in proposed consent decrees settling such cases.[84] In private cases, the lower courts need heightened awareness of the role they have been asked to play and provide deep analysis, and not just lip service, to the structured rule of reason they are being asked to apply at the district court and appellate level. Magistrate judges, special masters, and even court appointed experts can be enlisted to ensure that the parties make the necessary record when the right case presents itself to apply the rule of reason in the manner dictated by the Supreme Court. This will in turn create a more fully developed and sophisticated record for the Supreme Court to analyse for the next such antitrust case it chooses to hear and decide in this manner.

Congress can also support the courts in ensuring that there are proper champions and incentives to develop the rules of thumb and structured rule of reason developed by the Court. Congress can reinforce or revise the legal standards and soft presumptions developed by the Court in both legislation and hearings. Even if Congress does not change the substantive outcome of cases like *Leegin* and *Actavis*, it can examine the issue of the enforcement priorities of the FTC and Antitrust Division through hearings on appointments, budget, and oversight. In addition, committees and members of Congress can request information from the agencies about what cases they bring, what cases they choose not to bring, and about future enforcement priorities.[85]

VII. Conclusion

Bringing meaning to the rule of reason in U.S. competition law is an enduring, but difficult, task. The Supreme Court should be commended when it develops rules of thumb or soft presumptions to guide rule of reason cases in the lower courts. However, the Court and the many other institutions that comprise U.S. competition policy need to be aware that rules of thumbs without new cases are not enough. Without understanding when and how new cases are forthcoming and when they are not, the Court's pronouncements produce unintended consequences like the wholesale abandonment of areas of case law and continued guerrilla warfare by renegade lower courts.

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[84] Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b) (1974).

[85] See generally Spencer Weber Waller, "Antitrust and Democracy", *Florida State University Law Review* 46, no. 4 (2019): 807-860.

Every cause of action needs a champion, and every champion needs the incentive to go into battle. The Supreme Court needs to understand this simple but vital notion of what happens, and why, once rules and presumptions are established and the Court has moved on to other matters. Only then will the Court ensure that its antitrust holdings contribute to the development of competition policy as intended and do not wither for lack of future enforcement.

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