Payment After Actavis

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One of the most pressing issues in patent and antitrust law involves agreements by which brand-name drug companies pay generic firms to delay entering the market. In *FTC v. Actavis*, the Supreme Court held that these settlements could violate the antitrust laws. In the wake of the decision, courts, the parties, and commentators have been fiercely debating the question of what constitutes a payment, with courts reaching divergent outcomes. This Article offers a framework that answers this question. It first articulates two justifications based on litigation costs and brand payments for generic services. It then introduces a test based on whether the brand conveys to the generic a type of consideration not available as a direct consequence of winning the lawsuit. Such a showing - accompanied by a finding of an exclusion payment that violates the antitrust laws - demonstrates that the generic's exclusion from the market is based on the payment rather than the patent. And because the brand would not be able to provide such consideration even if a court found that the patent was valid and infringed, the test allows courts to (as Actavis instructed) avoid wading into the patent merits in the vast majority of cases. Applying the framework, the Article finds that the test is satisfied when generics delay entering the market after receiving cash, "poison pill" clauses allowing the acceleration of generic entry, and brand agreements not to introduce their own generics. In contrast, the test is not satisfied when the brand forgives damages accrued by a generic that has entered the market. The test, in other words, solves the puzzle articulated by Judge Posner that every settlement provides something of value to the generic. And it offers a framework that resolves a contentious issue with significant consequences for health care and the economy while being consistent with common sense, economics, and the policies underlying the relevant legal regimes.

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