

Pay for Delay in the Third Circuit

By Shubha Ghosh

In an August 21 decision, the United States Court of Appeals for the Third Circuit resolved a conflict between two blockbuster US Supreme Court precedents. The decision involved claims by pharmacies against Pfizer and Wyeth alleging illegal agreements with generic drug companies to delay entry of generic versions of Lipitor and Effexor.

In its 2014 *FTC v. Actavis* decision, the United States Supreme Court ruled that settlement agreements between patent owners and generic drug companies to delay entry by generics are potentially illegal under antitrust laws. However, in 2007, in *Bell Atlantic v. Twombly*, the Supreme Court ruled that a plaintiff must plead its claim with “enough particularity” to give the defendant notice of the “precise misconduct with which they are charged.” The district court in the case brought by the pharmacies dismissed their claims for failure to plead with particularity its allegations. Bottom line for the plaintiffs: more expense to investigate and file in order to get their day in court.

Fortunately for the pharmacies and future plaintiffs, the Third Circuit reversed, finding enough particularity in the pleadings. In its thorough one hundred page plus opinion, the Court of Appeals identified several specific factual allegations that would support the plaintiffs’ pleadings. The dollar amount of the settlement, the pattern of conduct, and the timing of the delayed entry by the generics all would be sufficient for the case to move forward.

The Third Circuit’s decision does not conclude the dispute. But it is an important one for challenges to “pay for delay” settlements like the one against Pfizer and Wyeth. The Court of Appeals has removed a hurdle that could potentially have made these antitrust challenges more difficult to bring in the Third Circuit, where most of the large pharmaceutical companies have their headquarters.

Professor Ghosh is on the Executive Board of the American Antitrust Institute, which filed an amicus brief in this case.