

COMPULSORY LICENSING UNDER *ACTAVIS*

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This Article examines the implications of the Supreme Court's 2013 decision in *FTC v. Actavis* for patent law and policy. In *Actavis*, the Court held that “reverse payment” settlements of patent litigation between brand-name and generic drug manufacturers are subject to antitrust scrutiny and that only those settlements that effectively incorporate compulsory patent licensing can avoid liability for anticompetitive effects. The Article contends that *Actavis*'s embrace of probabilistic patent theory and compulsory licensing is problematic for several reasons. First, by discounting patent term based on the likelihood that a patent is invalid or not infringed, probabilistic patent theory limits a patent holder's ability to use their patents. Second, the rule announced in *Actavis* is based on questionable inferences and assumptions about the motives and incentives of parties in pharmaceutical patent litigation. Finally, by routinely subjecting valuable patents to compulsory licensing, *Actavis* risks undermining the security that patents are meant to provide.

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