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To our clients and colleagues:

In this issue of our Newsletter, we discuss a broad range of issues that are attracting considerable interest in the corporate, pharmaceutical and litigation fields.

The power of the internet to connect large groups of people has given rise to a new method for enterprises to raise capital, known as "equity crowdfunding." DSSV associate Vijay Shroff discusses the promises and perils of equity crowdfunding in our opening article.

We also discuss in this issue two recent decisions of the United States Supreme Court that are likely to have significant consequences. In *Federal Trade Commission v. Actavis*, the Supreme Court held that the FTC may challenge, on antitrust grounds, "reverse payment" settlement agreements whereby brand name pharmaceutical companies pay rivals to keep less expensive generic drugs off the market. DSSV associate Pat Downes discusses this decision and its likely impact on the pharmaceutical industry. In *Oxford Health Plan LLC v. Sutter*, the Supreme Court deferred to an arbitrator's ruling permitting a broad "class arbitration" to proceed. In our final article, I discuss this decision and its likely consequences.

All of us at DSSV wish our friends, clients and colleagues an enjoyable and productive summer.

Bruce Handler
Partner

Equity Crowdfunding: Can You Raise Capital The New Fashioned Way?


Vijay Shroff

The power of the internet to efficiently connect people continues to redefine the way individuals and businesses interact with one another.

With the enactment of the Jumpstart Our Business Startups ("JOBS") Act in April 2012, Congress sought to allow companies to market and sell securities to investors through an online platform. This potentially revolutionary method of raising capital, known as "equity crowdfunding," may someday substantially reduce the cost of capital for our clients. However, we and most other commentators believe that the regulatory burdens and organizational risks which currently accompany equity crowdfunding are too high for most companies seeking efficient sources of capital.

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Connect With DSSV

We are excited to announce that we have launched a firm Facebook and LinkedIn presence to keep our clients up to date with the latest legal and firm news. Please "Like" us on Facebook and "Follow" us on LinkedIn to keep up with the firm.

Equity Crowdfunding: Can You Raise Capital The New Fashioned Way?

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The success of companies like Kickstarter ($631 million raised for over 61,000 projects) that allow innovators to efficiently and cheaply solicit individuals to fund projects in exchange for a gift or reward speaks to the potential impact that crowdfunding could have on equity financing. However, companies have historically been prohibited by federal securities laws from offering equity through crowdfunding platforms. The prospect that startups and small businesses could utilize crowdfunding to offer equity motivated Congress to include Section III of the JOBS Act which provides an exemption from the high-cost burdens of registration with the SEC for crowdfunded offerings of up to $1 million in any twelve month period. To date, companies are unable to take advantage of equity crowdfunding because the SEC has yet to promulgate the necessary regulations to implement the crowdfunding provisions of the JOBS Act.

Unfortunately, the statutory limitations and conditions imposed on such offerings by the JOBS Act may make equity crowdfunding impractical and unattractive for most of our clients. These include a limit on the maximum amount an individual may invest based upon income or net worth, a prohibition on advertisements and general solicitations, filing disclosure documents with the SEC prior to the sale of equity (including audited financial statements for capital raises over $500,000), and annual filings of operational and financial reports. The SEC's as yet unannounced additional regulations are expected to further increase the burdens of equity crowdfunding on issuers.

Clients considering equity crowdfunding should also be aware that the new rules present organizational risks and burdens. For example, the JOBS Act places personal liability on officers and directors of issuing companies for investor disclosures which contain untrue statements or omit material facts. Additionally, after a successful crowdfunded capital raise, issuers will find themselves with a slew of additional equity owners who will have statutory or contractual rights, including a possible right to vote on certain matters, and who will expect regular communications from (and possible access to) management.

Over the years, we have helped many of our clients raise capital through existing laws which allow issuers to sell equity without the need for registration with the SEC to a limited number of investors who are considered "accredited" pursuant to statutory criteria. A number of online securities brokerages (e.g., SharesPost and SecondMarket) now provide fee-based services that connect businesses seeking capital with a pre-screened pool of accredited investors. While selling equity to accredited investors typically requires substantial negotiation and documentation, the ability to leverage the internet to reach such investors appears to us to have as much, if not more, promise for streamlining the capital raising process as the crowdfunding initiatives included in the JOBS Act.

We note that, in response to criticism of the hurdles which the JOBS Act places upon equity crowdfunding, certain members of Congress recently announced their plan to move forward with a "JOBS Act 2.0" which will attempt to ensure that crowdfunding is a practical option for businesses in need of capital. We will continue to monitor the new rules as they evolve and keep our clients informed of important developments, but our current view is that equity crowdfunding is an app still in "beta testing" and of only limited potential use.

Legal intern Vincent Di Forte assisted in the preparation of this article.

The Supreme Court Permits The FTC To Challenge "Reverse Payment" Agreements Between Pharmaceutical Companies Under A "Rule of Reason" Analysis

Patrick Downes

On June 17, 2013, the United States Supreme Court issued its decision in *Federal Trade Commission v. Actavis, Inc., et al.*, 2013 U.S. LEXIS 4545 (June 17, 2013), a case involving the FTC's antitrust challenge to the agreement settling a patent infringement lawsuit between generic manufacturer Actavis (formerly known as Watson), and Solvay (currently AbbVie), the patentee of the brand name drug AndroGel.

In his decision, Justice Breyer resolved a circuit split concerning the validity of certain "reverse payment" settlement agreements, whereby a defendant generic manufacturer agrees not to bring a competing product to the market for some period of time, and a plaintiff brand name manufacturer agrees to pay the defendant a sum of money (typically in consideration for some service or product that the generic company provides to the brand company). In *Actavis*, the Supreme Court established a new framework for examining reverse payment agreements under the "rule of reason." The application of

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The Supreme Court Permits A "Class Arbitration" Based On An Arbitrator's Interpretation Of A Broad Arbitration Clause

Bruce Handler

In entering into commercial contracts, parties frequently agree to broad arbitration clauses, seeking to avoid the time and expense of formal litigation. On June 10, 2013, the United States Supreme Court issued a decision that likely will make it easier for an individual party commencing an arbitration under a broad arbitration clause to assert claims on behalf of a class of similarly situated claimants, thereby increasing a company's exposure (and the complexity of the arbitration) substantially. Companies would be well advised to bear this decision in mind when negotiating future arbitration provisions, and to attempt to include language in their contracts expressly precluding class arbitrations.

In *Oxford Health Plans LLC v. Sutter*, 2013 U.S. LEXIS 4358 (June 10, 2013), the Supreme Court articulated the standard of review to be applied by federal courts under the Federal Arbitration Act ("FAA") when reviewing an arbitrator's ruling to permit a class arbitration to proceed. (The FAA applies to arbitration agreements affecting interstate commerce.) In essence, the Supreme Court held that, if an arbitrator's ruling that class claims may proceed in arbitration is based on the interpretation of the language and intent of the parties' arbitration clause, the arbitrator has acted within his or her authority under the FAA. Accordingly, the arbitrator's ruling permitting a class arbitration will likely be upheld.

In *Oxford*, Dr. John Sutter filed a class action lawsuit against Oxford alleging that the company had engaged in a practice of improperly denying, underpaying and delaying reimbursement of physicians' claims. Oxford successfully moved to compel arbitration of Sutter's claims based on the arbitration clause contained in the parties' contract. The parties agreed in the ensuing arbitration that the arbitrator should decide whether their contract authorized class arbitration. A broad arbitration clause contained in the parties' agreement read as follows:

> **No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration in New Jersey. . .**

The arbitrator determined that the "intent of the clause" was "to vest in the arbitration process everything that is prohibited from the court process." Because a class action is one of the possible forms of civil action that could be brought in a court absent the parties' agreement, the arbitrator concluded that "on its face, the arbitration clause. . . expresses the parties' intent that class arbitration can be maintained."

The Supreme Court, rejecting Oxford's argument that the arbitrator exceeded his powers under the FAA, held that the parties had bargained for the arbitrator's authority to construe their agreement. Thus, although the Court suggested that it did not agree with the arbitrator's interpretation, the parties were bound by the arbitrator's ruling permitting the class arbitration to proceed. As Justice Kagan stated in her majority opinion:

> **All we say is that convincing a court of an arbitrator's error – even his grave error – is not enough. So long as the arbitrator was "arguably construing" the contract – which this one was – a court may not correct his mistakes under §10(a)(4) [of the FAA].**

In so deciding, the Supreme Court distinguished its 2010 decision in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010). In *Stolt-Nielsen*, the Court reversed a Second Circuit decision that had permitted an antitrust class arbitration to proceed based on an arbitrator's ruling. In that case, however, the parties had stipulated that their arbitration clause was silent on their intent with respect to class arbitrations. In setting aside that arbitrator's decision in *Stolt-Nielsen*, the Supreme Court held that the decision had not been based on a construction of the parties' agreement, and that the arbitrator lacked any contractual basis for ordering class arbitration.

The lesson of *Oxford* for parties negotiating arbitration clauses is a stark one and applies to essentially all contracts affecting interstate commerce. Should a claimant attempt to bring an arbitration on behalf of a class, there is a distinct possibility that an arbitrator will construe a broad, vaguely worded arbitration clause as permitting a class arbitration to proceed. Even if that is not the most reasonable interpretation of the contract, the federal courts likely will defer to the arbitrator's decision to the extent it is based on a textual construction of the arbitration clause. Accordingly, a party who wishes to avoid being subject to the sweeping scope and substantial potential liability of a class arbitration is advised to insist on clear and specific language in its arbitration clause indicating that it does not agree to arbitrate class claims.

The Supreme Court Permits the FTC To Challenge "Reverse Payment" Agreements Between Pharmaceutical Companies Under A "Rule of Reason" Analysis

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the rule was left to the lower courts, however, and it remains to be seen what impact it will have on the form and substance of future settlement agreements (not to mention the dynamics of the underlying patent litigation). It is clear, however, that the FTC will continue to challenge these settlement agreements, and they will no longer be presumptively valid in any Circuit.

By way of background, the Hatch-Waxman Act of 1984, which establishes the framework for the approval and market entry of branded and generic drug products, provides a generic drug manufacturer with the option of filing an Abbreviated New Drug Application prior to the expiration of the patent on the equivalent brand name product, if it certifies that the patent covering the brand name drug is invalid. This typically leads to patent litigation, triggering an automatic 30-month hold on FDA approval of the generic product. Frequently, these lawsuits are settled by means of a "reverse payment" arrangement like the one at issue in this case.

These arrangements are subject to challenge by the FTC, which has taken the position that they are presumptively unlawful. The parties to these agreements, on the other hand, have argued that they should generally be immune from antitrust attack. The Third Circuit Court of Appeals, in *In Re K-Dur Antitrust Litig.*, 686 F.3d 197, 214-218 (3d Cir. 2012), sided with the government, while the Federal Circuit, Second Circuit and Eleventh Circuit, have sided with the manufacturers. *See, e.g., FTC v. Watson Pharms., Inc.*, 677 F. 3d 1298, 1312 (11th Cir. 2012) (absent sham litigation or fraud in obtaining the patent, such an agreement is immune from antitrust attack "so long as its anticompetitive effects fall within the scope of the exclusionary potential of the patent").

Essentially, the Eleventh Circuit in the *Actavis* matter had held that the settlement agreement did not violate the antitrust laws because it would have permitted Actavis to market its version of AndroGel before the expiration of the brand name patent. In other words, the agreement's anticompetitive effects did not exceed the scope of the legitimate anticompetitive effects of the AndroGel patent monopoly itself.

On appeal, the Supreme Court has laid out a more complicated middle path. The Court declined to accept the government approach which would start with the presumption that such agreements are unlawful, and shift to the defendant manufacturers the burden of showing procompetitive effects (i.e., the "quick look" approach). *Actavis*, 2013 U.S. LEXIS 4545, at *38. But it also rejected the Eleventh Circuit's holding. *Id.* at *8-9.

Rather, noting that an invalid patent provides no legitimate patent monopoly (and that the settlement precludes the determination of the patent's validity), the Court held that reverse payment agreements may sometimes have significant adverse effects on competition and that courts should apply the more searching "rule of reason" standard to determine whether any particular agreement violates the antitrust laws. *Id.* "In short," the Court found that "rather than measure the length or amount of a restriction solely against the length of the patent's term or its earning potential, … [courts should consider] traditional antitrust factors such as likely anticompetitive effects, redeeming virtues, market power, and potentially offsetting legal considerations present in the circumstances, such as here those related to patents." *Id.* at *21.

The Court considered objections that its ruling might discourage settlements, and/or require the parties to engage in the complex and expensive process of litigating the validity of the underlying patent in order to validate the settlement. However, it ultimately rejected those concerns, noting, among other things, that it may not be necessary to litigate patent validity to answer the antitrust question, particularly where an unusually "large" and "unexplained" settlement payment might suggest that the patentee has doubts about the patent's survival. *Id.* at *35-36.

It remains to be seen how the lower courts will apply the rule of reason, but it is certain that these reverse payment agreements will no longer be presumptively valid in any Circuit, particularly where a settlement payment is unusually "large" or "unexplained" (e.g., if the payment does not approximate litigation expenses saved, or does not reflect fair value for other services performed by the generic manufacturer or lacks some other compelling justification). For its part, the FTC has indicated that it intends to continue to challenge agreements that it views as problematic. As FTC Chairwoman Edith Ramirez noted in her statement following the decision, "[t]he court has made it clear that pay-for-delay agreements between brand and generic drug companies are subject to antitrust scrutiny. We look forward to moving ahead with the *Actavis* litigation and showing that the settlements violate antitrust law." *See id.* at *33-34.

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