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case, while gratifying from the FTC's standpoint for its simple existence – considering the hard slog it took to get to the Supreme Court on this issue – shed scant light on which way the Court will go.[7] I expect that, depending on the outcome of the case, we may see increased activity on the reverse payment issue. Time will tell.

Former FTC BC Bureau Director Susan Creighton and her co-author Jonathan Jacobson address another area of Supreme Court jurisprudence in their article called "*Twenty Five Years of Access Denials.*"[8] They focus in particular on lower courts' interpretation of the Supreme Court's *Trinko* decision as requiring a prior course of dealing as a liability screen, and ask the question whether this requirement is the best screen under sound antitrust policy.[9] They argue that it is not. [10] In so doing, they describe their counseling experience, and how they believe that "firms have avoided initiating new business relationships that would have been beneficial for both the firm and the prospective partner for fear that the firm will never be able to extricate itself if circumstances change or things do not otherwise go as planned." [11] The authors conclude that, as a consequence, "some valuable and efficient arrangements are not being pursued as a result of this interpretation of *Trinko*."[12]

The prior course of dealing requirement is something that we Commissioners at the FTC also grapple with. Just last month, the FTC filed an amicus brief – in which we cite Creighton and Jacobson's article – in a case involving Actelion Pharmaceuticals and allegations that it is using certain FDA mandated distribution requirements (known as REMs) to prevent generic rivals from accessing drug samples needed to perform the testing required under FDA generic drug approval rules.[13] In that case, Actelion cited *Trinko* for the proposition that without allegations of a "prior history of dealing with the antitrust plaintiff, there can be no antitrust liability."[14] The Actelion case is in the Third Circuit, which has not yet held that a prior course of dealing is an essential element in an access denial or – as we call it in our brief – a refusal to deal case. The FTC therefore determined that an amicus brief on this important issue was appropriate. We will be watching the case closely as it moves forward through the courts.

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[7] Transcript of Oral Argument, FTC v. Actavis, Inc., et al., 133 S. Ct. 787 (2012) (No. 12-416).

[8] Susan A. Creighton & Jonathan M. Jacobson, *Twenty-Five Years of Access Denials*, ANTITRUST MAG., Fall 2012, at 50.

[9] *Id*. at 50.

[10] *Id*.

[11] *Id*. at 53.

[12] *Id*. at 54.

[13] Brief for FTC as Amicus Curiae, Actelion Pharm. Ltd., et al. v. Apotex Inc., et al., No. 1:12-cv-05743 (D. N.J. filed Mar. 13, 2013), *available at* _____