

# 2012 Term: Four Supreme Court Decisions

## **FTC v. Actavis**

Justice Breyer (5-3): reverse payment settlements can violate antitrust law.

## **American Express Co. v. Italian Colors Restaurant**

Justice Scalia (5-3): contractual waiver of class arbitration bars Sherman Act class action.

## **Comcast v. Behrend**

Justice Scalia (5-4): Failure to establish class-wide damages model dooms Sherman Act class action.

## **Amgen v. Connecticut Retirement Plans**

Justice Ginsburg (6-3): Certification of Rule 23(b)(23) class for Securities law (10b-5) suit does not require proof of materiality.

# General Observations

- Court fractured in all four decisions: Three of four decisions had 5-member majority (only Amgen had 6-member majority).
- Plaintiffs successful in two actions in which Government was a party (FTC) or government filed an amicus (Amgen).
- This is still a judicially active Court showing a bias against private enforcement.

# Neutral Measures of Judicial Activism?

- Disregard for justice to the parties.
- Decision broader than required.
- Lack of sensitivity to the democratic polity.
- Overruling or disregard of precedent.
- Inattentive to statutory intent.

# Indicators Applied

- American Express triggers at least two (maybe three) of indicators (I, IV, and V).
- Comcast triggers two of the indicators (I and V).
- If one looks at all Roberts Court decisions, judicial activism on antitrust issues even more apparent.
- Does Government involvement make a difference?

# How they voted

- Pro-enforcement justices:
  - Breyer 4-0
  - Ginsburg 4-0
  - Kagan 4-0
  - Sotomayor 3-0
- Pro-Defense justices
  - Scalia 4-0
  - Thomas 4-0
  - Roberts 3-1
  - Kennedy 3-1
  - Alito 2-1

# Actavis Observations

- 5-member majority stopped short of rule of presumptive anticompetitiveness sought by the FTC.
- Size of the payment as a measure of anticompetitiveness. Workable?
- Given substantial incentives, will pharma find ways around Actavis? (will the decision be an effective enforcement tool?)