

beyond the expiration of the patents, however, there are unanticipated deadweight losses to society in the form of higher prices. Whether Congress has chosen the optimal parameters for the patent system is a separate question. Once those parameters are set, behaviors that cause additional deadweight losses for society are contrary to the system's incentive structure, and the damage to society should not be tolerated.

The Hatch-Waxman manipulations also are damaging to society in the form of activities that are wasteful for companies and institutions alike. Hide-and-seek games that the courts, the FDA, the FTC, and the Patent and Trademark Office are forced to play are wasteful to all. The games are particularly burdensome on the court system, with pharmaceutical litigation regarding generic competition now joining patent troll litigation as a major component of new patent lawsuit filings.⁵ Sadly, given the amount of money at stake, the behaviors are likely to continue unless the legal system finds a way to change the incentives or to create sufficient disincentives. This is not to suggest that progress has been negligible. The shift from simple pay-for-delay agreements to side deals and then to microobstructions reflects the progress that regulatory agencies have begun to achieve in the courts. In addition, although microobstructions can create a valuable delay in competition, they are more difficult to achieve and often less lengthy than pay-for-delay.

Nevertheless, although the form of the behavior may have shifted, the behavior remains. Moreover, although changes such as the Supreme Court decision in *Actavis* and various congressional amendments have been important, by the time the changes are implemented, the market has moved beyond. The question is, what should happen next.

The following discussion explores new directions for the legal system in its continuing efforts to alleviate the gamesmanship that the Hatch-Waxman system has wrought. The discussion is not intended to provide a blueprint for legislation or a description of specific doctrinal provisions. Rather, it is an attempt to suggest the contours of how new approaches could be structured, and to generate discussion of a shift in approach.

B SYSTEMS, SIMPLIFICATION, SUNSHINE, AND STANDARDS-BASED DOCTRINES

In addition to the approaches that have been undertaken so far, managing the evolution of the Hatch-Waxman games will require a systems approach. One could use an

⁵ See Jacqueline Bell, *Smartphone, Pharma Giants Dominate List of Top IP Targets*, LAW360 (Feb. 10, 2016), www.law360.com/articles/756254/smartphone-pharma-giants-dominate-list-of-top-ip-targets (noting that the number of new patent lawsuits filed in 2015 increased by 15 percent over the prior year and that generic pharmaceutical companies were frequent targets of those lawsuits, along with technology companies); *2015 Patent Dispute Report*, UNIFIED PATS. <http://unifiedpatents.com/2015-year-end-report/> (showing the prevalence of lawsuits filed by nonpracticing entities in 2015).