enter the market – along with any other competitor who wishes to enter. As the first generic, your profits would be limited to what you could secure in the short amount of time before other competitors joined the market, with the price dropping quickly as more competitors enter. Today, this lead time is unlikely to be long, given that many generics are ready to submit applications as soon as such applications can be accepted for a drug.

When the six-month exclusivity period is available, suddenly the generic has the incentive to be the first entrant – but the kicker is that it does not really matter when that entry takes place! The alignment of incentives occurs because, in most cases, the actual entry date does not matter as much to the generic as does securing the entirety of the six-month marketing exclusivity period.[7] If annual sales are unlikely to fall sharply before the expiration of the patent term, selling the generic a few years later is unlikely to dramatically change the sales the first generic will garner during the six months of duopoly. In fact, as Professor Scott Hemphill notes, the case of increasing sales for a drug would present the scenario in which a generic would *prefer* later entry in order to enjoy a more profitable exclusivity period.[8]

In all, if a generic does not need to *win* its Paragraph IV challenge to hold on to the first-filer exclusivity period, and if a settlement does not lead to forfeiture of the exclusivity period, the generic might be willing to enter into a pay-for-delay agreement and guarantee its exclusivity.

Now, add in the complication that the uncertainty of litigation also applies to the branded firm under attack. Some patents are weak and some have stronger claims – so the actual picture is more complex. There are information asymmetries here in how much each party knows about the weakness or strength of the patents at hand.

In particular, the brand-name company in our example also faces uncertainty in the patent infringement suit it has brought against the prospective generic applicant. If it wins, the brand-name company will maintain its stream of monopoly profits through the end of its patent term, barring any challenges brought by other manufacturers. If it loses and patents are invalidated, duopoly competition will begin almost immediately, and both the brand-name price and sales volume will drop in the presence of the other competitor. If years of the patent term remain, this additional time could easily be worth of billions of dollars. A comparatively small payment – hundreds of millions of dollars or less – can guarantee that generic entry will be pushed back and the patents emerge unscathed.

Thus, the brand-name company's risk leads to additional payment under a pay-for-delay scheme. The brand-name company has much more to lose than the generic; that is why we see payment in the direction of brand to generic.

7 Hemphill, *Paying for Delay*, *supra* note 1, at 139.

8 *Ibid*.