

What is so clever about this form of agreement is the following: having created authorized generics, the brand-name company now stands up and faithfully swears not to engage in the practice. This, however, is when authorized generics can truly be used in an anticompetitive way. What matters is the context. The brand-name company is agreeing to shun this practice in exchange for an agreement that the generic will delay its entry. The value of forgoing authorized generic entry – the fact that the first generic’s revenue will now no longer drop 40 percent to 52 percent – becomes the payment for delay. Once again, the brand-name company can provide something of value to the generic in exchange for staying off the market. The deal benefits both, but harms consumers by delaying the entry of *any* generic drug.

In short, having developed strategic behaviors, the brand-name company can now agree to forgo them, using the value of what would have been its additional sales to pay the generic. All of this is wrapped in the guise of a boy-scout-like promise to be on good behavior. It is a little like the schoolyard bully who agrees to stop hitting the younger kids in exchange for their lunch money. When hauled into the principal’s office, he says in great seriousness, “But didn’t you want me to stop hitting them?” In this case, however, the lunch money is mostly coming from consumers, who pay in the form of higher prices.

A later version of a boy scout clause appears in the Generation 3.0 tactics in the form of no-product-hopping agreements.<sup>52</sup> In that case, the comparison is even more apt because product hopping – a change in a drug product meant to obstruct generic substitution – is much more clearly an anticompetitive behavior than are authorized generics.

One silver lining of no-authorized-generic agreements, as other commentators and academics have pointed out, is that they may offer an easier argument to courts that noncash agreements violate antitrust laws. Instead of needing to demonstrate how much co-promotion or licensing deals are worth, the penalty to the brand-name company (and reward reaped by the generic) are more readily valued. Plus, an agreement *not to launch* a generic certainly seems to be a “straightforward promise not to compete.”<sup>53</sup>

At first, two post-Actavis class action lawsuits on this issue, *In re Lamictal Direct Purchaser Antitrust Litigation* and *In re Loestrin 24 FE Antitrust Litigation*, were dismissed in lower courts, with both opinions focusing on what they believed to be the

<sup>52</sup> See Chapter 3 for more on product hopping.

<sup>53</sup> Laura S. Shores, *Pharmaceutical Patent Life Extension Strategies: Are REMS Next?* ANTITRUST HEALTH CARE CHRON. 20, 25 (2012); see also Michael A. Carrier, *Eight Reasons “No-Authorized-Generic” Promises Constitute Reverse Payment*, 67 RUTGERS U. L. REV. 697, 716 (2016), <http://ssrn.com/abstract=2533720> (“It does not make economic sense to preclude antitrust scrutiny when a brand, instead of paying with cash ... agrees not to compete with the generic in some other market. Or agrees not to launch an authorized generic”); see also Carrier, *Payment after Actavis*, *supra* note 8, at 41–44.