

these generic delay agreements, the two parties agree to provide services for each other, frequently referred to as “side deals,” that are frequently related to other drugs in one of the firms’ portfolios. Cash is often still exchanged, but it is disguised as a payment for the other services mentioned in the agreement.

These services can include 1) promises to promote or market other drugs (the “co-promote deal” seen in *Actavis*); 2) licensing deals as in *K-Dur* that allow the brand-name drug company or the generic to manufacture the other party’s drug; 3) “authorized generic” agreements permitting the generic to manufacture and/or sell the brand-name formulation as a generic without filing for generic approval, with profit-sharing or royalty deals attached; 4) agreements to share research and development duties on a future project; 5) deals to supply the brand-name company with raw materials for manufacturing; and more.<sup>7</sup>

In most cases, the result is that the brand-name company “overpays” the generic for the services the generic supposedly furnishes to the brand – with the difference between the market value and the actual payment constituting the cash consideration for the delay.<sup>8</sup> In the alternative, the generic may “underpay” for something of value it receives from the brand-name drug company, such as the right to make or sell other pharmaceuticals from the brand-name drug company’s portfolio.<sup>9</sup> In this case, the generic has received a “deal” elsewhere in exchange for delaying entry of the drug currently under discussion.

A particularly questionable aspect of these side deals is that the services promised are often beyond the generic’s capability. These generic-brand relationships are rarely, if ever, found outside the context of a settlement. For example, a generic company generally does little marketing and advertising, instead relying on the fact that pharmacists will automatically substitute a generic drug when filling a prescription listing the brand-name drug. In fact, this leaner organizational structure is what allows a generic to offer medication at substantially lower prices.

How, then, could a generic manufacturer offer marketing and promotion services that a brand-name company would find desirable? Further, it is rarely obvious that a generic firm would be the most effective manufacturing and supply partner for a large brand-name company.<sup>10</sup> Consider the example of Provigil, the narcolepsy drug for which Teva eventually paid \$1.2 billion to settle assorted antitrust litigation that resulted from the pay-for-delay deals.<sup>11</sup> In one of the deals, the company agreed to purchase Provigil’s active ingredient from Ranbaxy, a generic, in an agreement that

<sup>7</sup> See Hemphill, *Aggregate Approach to Antitrust*, *supra* note 1, at 663–66.

<sup>8</sup> See *ibid.* at 663–64. See generally Michael A. Carrier, *Payment after Actavis*, 100 IOWA L. REV. 7 (2014).

<sup>9</sup> See Hemphill, *Aggregate Approach to Antitrust*, *supra* note 1, at 665–66.

<sup>10</sup> See *ibid.* at 668.

<sup>11</sup> See Chapter 1 for more on the Provigil settlements.