

later-filing generic. In turn, the chance that the first generic will be able to launch as the only generic on the market – with the six-month exclusivity period intact – is increased. (Of course, keeping other generics out also means that the brand-name drug company is more likely to enjoy the full delay period as the monopoly seller, as well as the full six-month duopoly period when the first filer finally enters.) In essence, the brand-name firm pays the generic by reducing the risk of competition in exchange for a commitment to delay.

The success of this strategy relies on other manufacturers’ having knowledge that the acceleration clause exists. Unsurprisingly, this is precisely what we see happening. In some cases, the clauses are revealed as part of press releases announcing settlements. For example, acceleration clauses were mentioned in public statements regarding four Provigil settlements. Teva, as one of the generics, included in its press release “An earlier entry by Teva in any of the territories may occur based upon the entry of another generic version of Provigil.”⁴¹ Identical language was used by the brand-name company in its statements announcing settlements with Ranbaxy, Mylan, and Barr.⁴²

One recent example shows how this strategy might work. In settling with three generics wishing to sell Actos, an antidiabetic drug, Takeda allegedly included acceleration clauses in each of the settlements.⁴³ All three generics filed on the same day, making all eligible for the six-month exclusivity. What was Takeda’s impetus behind the clauses? A complaint in the case alleges that Teva, a fourth generic, wanted to enter the market by arguing that Takeda had inaccurately listed its patent information in the Orange Book. If successful, Teva might have been able to enter before the other generics.⁴⁴ Thus, the inclusion of the acceleration clauses served as a disincentive for Teva to pursue its case, as Teva would know it would face three other competitors if it managed to reach the market. And there was another clue that this was the intent: while the remainder of the three settlements were confidential,

⁴¹ See Press Release, Teva Pharm. Indus. Ltd., Teva Announces Agreement with Cephalon Regarding Settlement of Provigil Patent Litig. (Dec. 9, 2005), www.tevapharm.com/news/teva_announces_agreement_with_cephalon_regarding_settlement_of_provigil_patent_litigation_12_05.aspx.

⁴² See Press Release, Cephalon, Inc., Cephalon, Inc. Announces Agreement with Ranbaxy Labs, Ltd., Regarding Settlement of Provigil Patent Litig. (Dec. 22, 2005), www.prnewswire.com/news-releases/cephalon-inc-announces-agreement-with-ranbaxy-laboratories-limited-regarding-settlement-of-provigil-patent-litigation-55651172.html; Press Release, Cephalon, Inc. Announces Agreement with Mylan Pharm., Inc., Ltd. Regarding Settlement of Provigil Patent Litig. (Jan. 10, 2006), www.prnewswire.com/news-releases/cephalon-inc-announces-agreement-with-mylan-pharmaceuticals-inc-regarding-settlement-of-provigil-patent-litigation-53379057.html; Press Release, Cephalon, Inc., Cephalon, Inc. Announces Agreement with Barr Labs., Inc. Regarding Settlement of Provigil and Actiq Patent Litigs. (Feb. 1, 2006), www.secinfo.com/d11MXs.v5b4.c.htm.

⁴³ Consolidated Class Action Complaint and Jury Demand at paras. 214–216., *In re Actos Direct Purchaser Antitrust Litig.*, No. 1:15-cv-03278, 2015 WL 4600605 (S.D.N.Y. June 4, 2015).

⁴⁴ *Ibid.* at paras. 212–213.