

they might have the long-term effect of disincentivizing competition, the short-term effect of *increasing* competition will actually reduce prices for consumers.

The FTC explored these issues in a 2011 report, in which the agency concluded that authorized generics are generally procompetitive and price reducing, noting only limited cases in which the anticipated presence of authorized generic competition could have been a disincentive for generic entry. The FTC’s model found that generics launched at an average 14 percent discount when no authorized generic was present, compared to a slightly larger 18 percent discount when an authorized generic was also launched.<sup>48</sup> The bigger hit results from decreased market share, however. In all, the FTC estimated that a generic’s revenue drops between 40 percent and 52 percent when facing competition from an authorized generic during the exclusivity period.<sup>49</sup> Nevertheless, the FTC concluded that authorized generics are mostly procompetitive, given that the presence of authorized generics does not seem to deter patent challenges. In particular, authorized generics are often limited to best-selling drugs that are so lucrative they would incite generic challenges with or without an authorized generic present. Yes, the brand-name company makes more, but the generics are pouring in the door anyway. Perhaps this is one area where brand-name strategy generally benefits consumers: prices decrease without preventing generics from adding their own competition to the market.

Against this backdrop, however, what Big Pharma giveth, Big Pharma may taketh away. With the threat of authorized generics looming over generics, brand-name generics can entice generics to enter settlements by promising not to launch an authorized generic. This is exactly the type of “boy scout clause” found in many advanced pay-for-delay settlements today: a “no-authorized-generic agreement.” In a no-authorized-generic agreement, a brand-name firm agrees not to launch a generic form of its drug until the first filer’s six-month exclusivity period has expired. In return, the potential generic manufacturer delays entry. The brand-name company, of course, retains the right to continue selling the more expensive branded version of the drug throughout both the generic delay period and the six months of exclusivity. The FTC found that 39 of 157 settlements between fiscal years 2004 and 2010 included no-authorized-generic clauses, involving a total drug market exceeding \$23 billion.<sup>50</sup> A full 60 percent of agreements in the last year of the study, 2010, contained some sort of no-authorized-generic clause.<sup>51</sup>

<sup>48</sup> *Authorized Generic Drugs: Short-Term Effects and Long-Term Impact* FED. TRADE COMM’N (2011), [www.ftc.gov/os/2011/08/2011genericedrugreport.pdf](http://www.ftc.gov/os/2011/08/2011genericedrugreport.pdf), at ii and iii.

<sup>49</sup> *Ibid.* at iii.

<sup>50</sup> *Ibid.* at vi.

<sup>51</sup> *Ibid.* at vi, n. 14.