Nexium launched, Nexium was the number two selling drug with just below $6 billion in sales. And do not forget, a whopping $2.5 billion of that amount is paid by the government and its beneficiaries under Medicare Part D.[33]

Multiple patents still protect Nexium capsules as of early-2017. One patent will not expire until November 2019, with pediatric exclusivity pushing the cliff back to May 2020.[34] It is hard to value the savings that consumers and insurers might have enjoyed had Nexium never received additional exclusivities, but it would likely be in the tens of billions of dollars.

C NEW EXAMPLES OF PRODUCT HOPPING

Other recent cases have even more alarming fact patterns. Take Asacol, a drug used for the treatment of chronic ulcerative colitis. As the 2013 expiration of the Asacol patents approached and at least two generic companies planned to enter, the brand-name manufacturer, Warner Chilcott, undertook a number of extraordinary actions to extend its monopoly franchise.[35]

First, it developed a higher-dose, extended-release version of the Asacol tablet.[36] The new version of Asacol received two new patents, which will both expire in 2021.[37] The company then attempted a product hop before the 2013 expiration of the Asacol patents through a marketing and promotion campaign.

However, the new form of Asacol was only approved for moderately active ulcerative colitis.[38] The older form of Asacol was approved for both the moderate form and the mild form of the disease.[39] Thus, despite continued efforts to switch all patients to the new form, engendering multiple allegations that these actions represented unlawful off-label marketing (because the drug was not actually approved for all patients), the new form of Asacol did not gain substantial market share.[40]

[33] *U.S. Pharmaceutical Sales 2013*, *supra* note 2; Katie Thomas & Robert Pear, *Medicare Releases Detailed Data on Prescription Drug Spending*, N.Y. Times (Apr. 30, 2015), http://mobile.nytimes.com/2015/05/01/business/medicare-releases-detailed-data-on-prescription-drug-spending.html.

[34] U.S. Patent No. 6,428,810 (issued Aug. 6, 2002) (giving information about the patent that expires in 2020), www.google.com/patents/US6428810?dq=6428810&hl=en&sa=X&ved=0ahUKEwip3NDk79rNAhXJMyYKHQhpAZcQ6AEIHDAA; FDA, Orange Book: Approved Drug Products with Therapeutic Equivalence Evaluations, Patent and Exclusivity for: N021153 (last visited Sept. 1, 2016), www.accessdata.fda.gov/scripts/cder/ob/patent_info.cfm?Appl_type=N&Appl_No=021153&Product_No=001 (listing other remaining patents for Nexium).

[35] End-Payor Plaintiffs' Class Action Complaint at paras. 115–18, *Teamsters Union 25 Health Servs. & Ins. Plan v. Allergan*, PLC, No. 15-cv-12730, 2015 WL 3856331 (D. Mass. June 22, 2015).

[36] *Ibid*. at paras. 38–41.

[37] *Ibid*. at para. 40.

[38] *Ibid*. at para. 39.

[39] *Ibid*.

[40] *Ibid*. at paras. 52–57