that side deals constitute a reverse payment, particularly in the context of renewed debate after *Actavis* over the definition of what constitutes a "large, unjustified" payment deserving of further antitrust scrutiny.[38]

Other Generation 2.0 settlements, however, do not hinge on contracts for actual services or settling multiple cases. Instead, contract clauses themselves can serve as indirect payments and bottlenecks that prevent later generics from entering.

One popular contract item is an "acceleration clause," also known as a "coordination clause." An acceleration clause stipulates that the generic, which has agreed to delay entry, may immediately *speed ahead* to enter the market if another generic is able to jump the queue and get into the market before the first filer enters and enjoys its exclusivity period. These clauses have also been called "most favored nation" clauses, taking a page from international trade.[39] This nomenclature also makes sense, because the brand-name drug company is essentially offering more favorable terms to the first generic than it is to any other generic.

Beating an acceleration clause by cutting the line is possible through a couple of strategies that later-filing generics may be able to use in certain circumstances. We'll discuss further in Chapter 4. To simplify, with an acceleration clause, the first filer is not locked into its agreed-upon entry date if another generic is able to break through the exclusivity period fence, roadblock, bottleneck, or whatever other metaphorical barrier you prefer.

The true benefit of an acceleration clause, however, is not the reassurance it provides to the delaying generic entrant with fears that another company could somehow steal its exclusivity. Rather, it is the disincentive the clause creates for other prospective generics – what Professor Michael Carrier has called the "poison pill" effect.[40] After an acceleration clause is put in place, any generic looking for a way onto the market does so with the knowledge that, if they are successful, they will immediately face generic competition from the first filer. Each additional competitor leads to declining revenue and market share for everyone in the market, including the new competitor. Thus, entrance is less attractive, especially given the extensive legal battles necessary to secure an earlier place on the market for a

showing that the payment exceeded anticipated litigation costs is enough to sustain an *Actavis* claim. Edlin et al., *supra*, at 600–01.

[38] *See generally In re Effexor XR Antitrust Litig.*, No. 11–5479, 2014 WL 4988410 (D.N.J. Oct. 6, 2014) (granting in part and denying in part motion to dismiss); *In re Loestrin 24 FE Antitrust Litig.*, 45 F. Supp. 3d 180 (D.R.I. 2014) (granting motion to dismiss), vacated, No. 14–2071, 2016 WL 698077 (1st Cir. Feb. 22, 2016).

[39] *See* Complaint for Injunctive Relief at para. 58, *FTC vs. Cephalon, Inc.* (settlement approved E.D. Pa. June 17, 2015) (No. 2:08-cv-2141), complaint filed D.D.C. Feb. 13, 2008, www.ftc.gov/sites/default/files/documents/cases/2008/02/080213complaint.pdf.

[40] Carrier, *Payment after Actavis*, *supra* note 8, at 37.