

launching “at-risk.”<sup>28</sup> At-risk launches sometimes occur when a generic is confident it will prevail in litigation. Ranbaxy’s case looked unfavorable at this point, however, given that another generic had already lost its case regarding Accupril patents. Despite the apparent strength of Pfizer’s position, Pfizer mysteriously asked for only \$1 million to settle the Accupril litigation.

Thus, in exchange for letting the generic company go on the Accupril litigation for a trivial \$1 million payment, the brand-name company was able to delay the launch of a far more important generic drug, Lipitor. While the Lipitor settlement involved no cash exchange, and the Accupril settlement involved only \$1 million, complainants alleged that Pfizer’s stunning and unexpected act of generosity regarding Accupril was actually a “massive [reverse] payment worth hundreds of millions of dollars to [the generic].”<sup>29</sup> In other words, Pfizer paid for the delay by giving up another case likely to be worth hundreds of millions of dollars.

Here is where the tactics get particularly crazy. To put an obfuscating bow around the entire deal, Pfizer allegedly initiated a separate sham lawsuit in order to create the illusion of a lawful settlement. At the time of the Accupril settlement, Pfizer did not have pending litigation against Ranbaxy regarding Lipitor.<sup>30</sup> However, if Pfizer wanted to get a settlement that included the delay of Lipitor, there had to be a pending Lipitor case to settle in the first place. Thus, Pfizer sued the generic over infringement of two small patents not even listed in the Orange Book for Lipitor – two patents for which a court had already said Pfizer had no standing to assert against the generic.<sup>31</sup>

One reason that the patents could not be legitimately asserted in a Hatch-Waxman suit is that they were not “Hatch-Waxman” patents listed in the Orange Book. Recall that under Hatch-Waxman, the act of filing a generic application is treated as an artificial act of patent infringement against the patents listed in the Orange Book, so that patent issues can be resolved well before a generic company directly infringes by launching its product. Ranbaxy had not entered the Lipitor market – a fact often forgotten in scrutinizing these delay settlements – so there was no direct infringement. Given that the patents were not listed in the Orange Book, no infringement – real *or artificial* – could have taken place.<sup>32</sup>

<sup>28</sup> End-Payor Amended Complaint, *supra* note 20, at paras. 314–18.

<sup>29</sup> End-Payor Amended Complaint, *supra* note 20, at para. 314.

<sup>30</sup> But it was waiting on the results of a pending citizen petition and an application for reissuance of one of its Lipitor patents. Plus, Ranbaxy was already enjoined from receiving ANDA approval and entering the market until 2010. *In re Lipitor*, 2013 WL 4780496, at \*7.

<sup>31</sup> End-Payor Amended Complaint, *supra* note 20, at paras. 270–82.

<sup>32</sup> In more technical terms, there was no “justiciable case or controversy” since the “mere threat of [future] litigation” could not support the case for Pfizer’s preliminary injunction. *In re Lipitor Antitrust Litig.*, No. 3:12-cv-2389, 2013 WL 4780496, at \*10; Hemphill, *Aggregate Approach to Antitrust*, *supra* note 1, at 639 n. 39.