

delayed its entry for more than two years.⁶⁶ However, this significant drop in sales would likely occur only if there was a product hop away from the brand-name drug; thus, the agreement essentially functioned as a promise to pay the generic in the event Endo decided to product hop.⁶⁷

On its face, this agreement appears to promote competition by deterring a brand name from product hopping before the generic could enter. The circumstances of the *Opana* settlement, however, were actually designed to effectuate Endo's product hop. Complainants have alleged that the two companies knew before entering into the agreement that the brand-name company would product hop – and in fact, Endo began the FDA approval process for a new version of the brand-name drug just one month after the agreement.⁶⁸ Therefore, knowing that a product hop was on the horizon, the \$102 million payment effectively served as a simple reverse payment to the generic in return for delaying entry until Endo had a chance to complete its product hop.⁶⁹ By the time the generic launched, 90 percent of the product's market had already switched to the new formulation.⁷⁰

In sum, Endo's boy scout clause was only one part of a strategy in which a product hop triggered a side deal that essentially served as a reverse payment for delay. Put another way, Endo's generous invocation of scout's honor was in fact an excuse to use a new Generation 3.0 strategy to enter into a Generation 2.0 deal masking a simple Generation 1.0 reverse payment. The weapons may differ – and may be used simultaneously – but the games remain the same.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.* at paras. 3, 143–52.

⁶⁸ *Ibid.* at para. 3.

⁶⁹ *Ibid.* at para. 149.

⁷⁰ *Ibid.* at para. 158. The generic also secured a no-AG agreement with regard to Opana ER as well as other side deal considerations, allowing the company to recover some of the profits it lost by allowing a product hop. In the absence of the settlement, the generic may have faced competition from an Endo authorized generic when it launched. Instead, it was able to launch as the sole generic product although it faced a market that had shifted to a new version of Opana. The no-AG agreement also helped to make the deal worthwhile for the generic even in the case where Endo failed to product hop and did not trigger the \$102 million payment. *Ibid.* at paras. 156–57.