DOES THE FTC’S THEORY OF PRODUCT-HOPPING PROMOTE COMPETITION?

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ABSTRACT

This article evaluates the effect on competition of adopting the FTC’s product hopping theory as an antitrust doctrine. Courts have disagreed on the merits of the theory. According to this theory, a pharmaceutical manufacturer of a brand name drug can violate the antitrust laws by introducing a new product that reduces demand for rival legacy generic therapies and offers consumers no significant incremental therapeutic benefits over these legacy products. Under these circumstances, generic manufacturers are harmed because they lose sales to the new product and consumers are also harmed, because while they gain no significant therapeutic benefits from the new product they must pay a higher price. The FTC has applied the theory to the pharmaceutical industry because, in the FTC’s view, the purpose of product hopping is to evade aspects of the Hatch-Waxman Act which was designed to promote competition between generics and brand name drugs. Although the FTC so far has applied the theory only to pharmaceuticals, nothing in the theory limits its application only to the drug industry. The article explains that the theory is at best a misguided attempt to use antitrust law to fix a regulatory problem in the pharmaceutical industry associated with the Hatch-Waxman Act and is premised on the proposition that competition does not work. Using antitrust law to fix such a regulatory problem, assuming one indeed exists, will not only potentially make things worse in pharmaceutical markets, but also create an undesirable antitrust precedent for other industries.

JEL: K21; L4; L5; L40; L41; L50; I18; O34; O38

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I. INTRODUCTION

The FTC’s novel “product hopping” theory has recently appeared in court cases and has led to publically reported FTC investigations.¹ Courts have disagreed on the merits of the theory.² According to this theory, under certain circumstances explained in more detail below, a firm can violate the antitrust laws by introducing a new product that harms its rivals and consumers. Rivals are supposedly harmed because they lose sales to the new product. Consumers are supposedly harmed because they are assumed to gain no significant therapeutic benefits from the new product compared to the old one but must pay a higher price for the new product. Although the FTC so far has applied the theory only to pharmaceuticals, nothing in the theory limits its application to the drug industry. The theory is at best a misguided attempt to fix a regulatory problem in the pharmaceutical industry associated with the Hatch-Waxman Act³ and is premised on the proposition that competition does not work. Using antitrust law to fix such a regulatory problem, assuming one exists, would not only potentially cause consumer harm in pharmaceutical markets, but also create an undesirable antitrust precedent for other industries.

Assuming for sake of argument that there is a problem to be fixed in pharmaceutical markets, the appropriate remedy would be to alter the regulation, as opposed to applying the antitrust laws, which is designed to address harm to competition and not harm caused by ineffective regulations. The objective of the antitrust laws is to promote market competition, based on the underlying assumption that such competition benefits rather than harms consumers. The creation, introduction, and promotion of new products and the protection of investments by limiting “free-riding” off these investments by other competing firms is desirable competitive behavior. To use the antitrust laws to condemn such behavior would therefore misuse antitrust law. Creating disincentives for firms to introduce new branded products, under the guise of “fixing” problems that exists only when viewed by the FTC in the context of Hatch-Waxman’s regulatory objectives, contradicts the


antitrust law’s ultimate goal of promoting competition. Even worse, the consequence of attempting to fix the problem, if one indeed exists, through antitrust enforcement will be to chill incentives for product innovation in an industry where the most important health advances come from product innovations. Furthermore, such an attempt could also chill product innovation in other industries, because antitrust law applies broadly to all industries, and not merely the pharmaceutical industry.

In Part II, we discuss the FTC’s definition of product hopping and its rationale for using antitrust as a remedy to fix a problem that the FTC perceives in the Hatch-Waxman Act. Part III discusses how, with rare exceptions, there is a fundamental theoretical flaw in the economic theory of product hopping as a basis for antitrust intervention. Part IV explains why, if there is a problem to be fixed, the appropriate response is to fix the regulation and not use antitrust law. Part V discusses the practical problems of implementing the FTC’s theory and the adverse consequences if it were to be implemented.

II. WHAT IS PRODUCT HOPPING?

We begin by defining the FTC’s product-hopping theory and its underlying motivation. We base our understanding of the FTC’s theory in its amici briefs in the Warner Chilcott,4 on the Actavis litigations,5 and various other sources, such as academic writings.6 The FTC begins with the observation that there are very large costs of obtaining FDA approval for a new drug. The FDA approval process typically requires a new drug to go through very expensive and comprehensive tests. However, for a generic drug, one whose active ingredients are the same as an existing approved drug (such a drug is called “AB equivalent”), the Hatch-Waxman Act allows the FDA to reduce the amount of testing required for approval and allows the generic drug to use or “free-ride” on the past testing experience of the brand name drug. By allowing this free riding, more generic drugs enter the marketplace and competition is increased. In addition to allowing generics to “free-ride,” the

5 New York v. Actavis PLC, 787 F.3d 638 (2d Cir. 2015).
Hatch-Waxman Act also encourages generic entry by granting an initial exclusivity period to the first generic to gain entry to the marketplace.\textsuperscript{7} The Act also gives existing brand name drugs some benefits, such as the ability to obtain, under certain conditions, an automatic 30-month stay when a rival challenges whether a patent is valid.\textsuperscript{8} During this 30-month period, the generic is not allowed to enter. Once a generic is approved and enters, competition for the brand name drug is increased because consumers have more alternatives, often at much lower prices than the brand name drug price. Moreover, this competition is typically enhanced by state requirements of automatic substitution, which require that generics be dispensed in most circumstances even when the consumer has a prescription for the brand name drug.

With this background of how the Hatch-Waxman Act operates, we can now explain the FTC’s theory of product hopping. We are not completely certain on the exact articulation of how the FTC perceives its theory applied in every instance, but the essentials are clear. At a minimum, the FTC’s theory of harm would include a firm’s introduction of a new pharmaceutical product, which provides no significant additional therapeutic benefits over the legacy products. This theory further assumes that the brand name seller can and does use “detailing” (that is, advertising and sales calls) to persuade health providers to prescribe the new product instead of the legacy product even though the price for the new product is much higher than for the therapeutically equivalent legacy generic products. Because the new products are not AB equivalent to the legacy products, there is not yet a generic for the new product. Moreover, if the new product is patented, there can be no generic without the consent of the brand name drug producer until the patent reaches its statutory limit. Thus, according to the FTC’s theory, consumers must buy the new product at prices higher than they would have paid for the therapeutically equivalent legacy products including the associated generics.

Under the FTC’s theory, the consequences of the brand name seller’s conduct are to capture some portion of the sales that otherwise would be made by the generics of the legacy products and, at least initially, the brand name seller does not face the threat of automatic substitution from an AB-rated generic version of the new product. There are two reasons why this theory postulates that the new product does not face strong generic competition immediately from generic offerings. First, the legacy generic products are assumed not to be viewed by consumers (or health care providers) as close substitutes to the new product because their formulations differ (that is, the legacy products and the new product are not AB equivalent), the detailing of the brand name firm has persuaded health care providers to prescribe the new product instead of legacy generics, and generic producers are incapable

\textsuperscript{8} 21 U.S.C. § 355(c)(3)(C).
of effectively detailing the legacy generic products to show consumers (or health care providers) that the new branded products offer no significant overall advantages despite their higher costs. Second, it takes time for the FDA to authorize a new generic equivalent for the new branded product. Hence, state automatic substitution requirements are not triggered by a prescription for the new product because there are no generic equivalents. The FTC’s theory also appears to rely on intent, although from an economic view, all firms “intend” to make profits and hope their success harms their rivals (takes away sales), so including the intent to harm rivals to the theory adds little to the economic analysis. That is, from an economic viewpoint, the actual consequences of conduct are what matter.

As described above, the FTC’s theory of product hopping centers on a branded drug seller introducing and detailing a new product that is nearly identical to existing products, with the intent to avoid generic competition for the new product (at least for some time). Under this framework, there are many other activities that might also be considered anticompetitive under the product hopping theory, though it is unclear exactly which activities the FTC might find objectionable. For example, one potential way to eliminate the benefits that generic producers receive from the marketing of legacy products would be for the brand name firm to remove the branded legacy products from the NDA reference listings by falsely claiming that the removal is motivated by safety concerns. Every drug product has an NDA listing and cannot be sold without one. The withdrawal of the NDA listing for a legacy product would trigger the immediate withdrawal from the market of the AB-rated generics to the legacy products and the legacy products from the marketplace. Such conduct would thereby accelerate the shift of demand away from the legacy products and to the new product. Of course, a generic drug maker could seek to reinstate the listing but, the reinstatement could require considerable resources. We return to this example later.

There are other types of conduct that could be subject to liability under the product hopping theory. Such conduct could include whether the brand name firm ceased to produce the legacy products at the levels that it had in the past, whether it ceased to detail the legacy products as much as it had in the past, whether it disparaged the legacy products, whether it raised its prices on the legacy products, and whether it withdrew legacy products from retail inventory so as to get doctors out of the habit of remembering to prescribe the legacy products. All these acts could possibly support a brand supplier’s product hopping strategy to limit generic competition. For example, the FTC alleges in its amicus brief in Warner Chilcott some of these actions as part of its product hopping theory applied to that case. Notice how all of

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9 For a discussion of this theory of harm and its application to the drug industry, see Hovenkamp, Janis, Lemley & Leslie, IP AND ANTITRUST, supra note 5, § 15.3.

10 FTC Amicus Brief (2012), supra note 4.
these acts would usually be considered normal competitive behavior in other industries, with no requirement that a new product be “sufficiently better” to avoid antitrust scrutiny. Note also how difficult it is to precisely define wrongful conduct under this theory of harm. For example, would it be wrongful conduct for a branded drug seller to reduce detailing on a legacy product two years after the new product is introduced? And, if so, how much of a reduction would be allowed before that firm’s conduct constituted wrongful conduct? In *Actavis*, the plaintiff successfully used the product hopping theory to attack Warner Chilcott’s withdrawal of a product coming off patent and its replacement with a new patented product. Once doctors were switched to the new patented product, the claim was that it would have been difficult for the generic producers of the legacy (now unpatented) product to capture a doctor’s prescription.

The importance of understanding the imprecision in the exact definition of product hopping is that the consequences of using the antitrust laws to attack product hopping will depend on what firms believe the theory to be. Before explaining some of the potential adverse consequences, we first explain the fundamental theoretical problem with using the antitrust laws to limit product innovation in pharmaceuticals.

III. FUNDAMENTAL THEORETICAL PROBLEM WITH THE USE OF ANTITRUST TO ADDRESS PRODUCT HOPPING EXCEPT IN RARE CIRCUMSTANCES

Antitrust law is premised on the assumption that competition among firms is desirable. Although firms are not obligated to help their rivals, they are not allowed to use their market power to impede them. For example, a dominant firm has no obligation to assist a rival in perfecting the rival’s manufacturing process. However, the dominant firm may not use its market power to enter into an exclusive dealing arrangement with distributors of manufacturing equipment for the sole purpose of preventing entry of competitive rivals. That is, to establish from an economic viewpoint an antitrust violation, there must be harm to the competitive process.

The harm according to the FTC’s theory of product hopping is that the introduction and detailing of the new product prevents generic producers from competing with an AB-rated generic version of the new product. The theory assumes that the therapeutically equivalent and cheaper legacy generic products are not viewed as close substitutes in the marketplace, because the new product will be prescribed instead of the cheaper legacy ones. Put differently, without an AB-rated generic version of the new product and the regulatory mandates (for example, automatic state substitution laws) that come from such a product, generic producers cannot compete. Furthermore, generic

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11 New York v. Actavis PLC, 787 F.3d 638 (2d Cir. 2015).
producers will not be able to compete for some period of time after the new brand product introduction, because it takes time to obtain regulatory approval to produce an AB-rated generic of the new branded product. But that delay has nothing to do with antitrust. It has to do with the Food and Drug Administration (FDA), which presumably serves the public interest by requiring such an approval process.

What the FTC’s product hopping theory critically assumes is that demand for AB-rated generics for the legacy products would essentially vanish after the brand detailing for legacy products ceases (or falls significantly), thereby depriving the generic producer of the ability to free-ride on the brand name firm’s detailing efforts. The key insight is that nothing prevents a generic producer from engaging in detailing efforts itself, if it were profitable to do so, even though free-riding on the brand’s detailing would be more profitable for the generic producer than to detail itself. Indeed, in the theory of product hopping, there is no impediment that the brand name firm places on the generic producers to gain access to and purchase the relevant resources in order to perform detailing themselves. That is, because no brand name drug producer is assumed to have market power to influence the competitive costs of detailing and other marketing efforts, it is not possible for any of these producers to misuse market power to interfere with the competitive process by foreclosing access to detailing and marketing resources.

Instead of foreclosure of the competitive process, the FTC’s theory hinges on branded drug manufacturers interfering with the ability of generic producers to free-ride off their detailing and other marketing efforts, and this interference with generic producers free-riding is the purported cause of harm. For this reason, it is simply illogical to use the antitrust laws to attack this behavior. Product hopping does not interfere with the ability of generic producers to use the same marketing resources as those used by the brand name firms, but only interferes with the generic producers’ ability to free-ride on the brand name producers’ investments in these resources. In other words, generic producers can purchase these marketing resources in the same markets as their branded competitors, and thus face the same costs, which means that generic producers are not disadvantaged vis-à-vis the brand name producers in the competitive process. Because brand name producers have not harmed the competitive process, the FTC’s product hopping theory provides no economic basis to impose antitrust liability on brand name producers who introduce new products. Moreover, this logic applies regardless of whether the brand name firm uses a “hard switch” in which patients are switched to the new product and then have to be switched back if they are to consume the legacy generic, or a “soft switch” in which the legacy generic has a chance to convince the health provider not to switch the patient to the new drug.\textsuperscript{12}

\textsuperscript{12} The Actavis decision uses such language. See Actavis, 787 F.3d at 648, 654–55.
In neither case does the brand name firm deny access to marketing resources to the producer of the legacy generic products.

There is little doubt that the cessation or partial withdrawal of detailing of the legacy products prevents generics from free-riding to the same extent as before, but that has nothing to do with harm to the competitive process. No economic conception of competition requires a firm to allow a rival to free-ride on its investments and other business efforts. The FTC apparently believes that there is a problem in the pharmaceuticals industry, because the Hatch-Waxman act, together with state substitution laws, encourages such free-riding yet the actions taken by brand producers in product hopping limit such free-riding and thus harm consumers. Even if this theory were true for some new product introductions, the FTC’s main complaint is with the Hatch-Waxman Act, which does not prohibit branded providers from taking actions to limit free-riding, and indeed even encourages such behavior. Therefore, the regulatory solution should be to fix Hatch-Waxman, rather than misuse antitrust law to impose an obligation on firms to assist rivals’ efforts to free-ride. As far as we are aware, no similar obligation exists in any unregulated markets.

Even if the FTC were correct that in a specific case consumers are harmed because they pay a higher price for basically the same product as they would have paid had there been no new product introduction (that is, the price of the legacy generics would have been lower than the price of the new product), it would be odd to term that a “harm to competition.” It is better described as a harm caused by the predictable consequence of a regulation that itself impedes generic competition to a new product. Not all acts that raise price are “harms to competition.” For example, taxes raise prices, but no one refers to such a phenomenon as harm to competition, even if that is the predictable consequence of tax legislation.

There are, however, some rare circumstances in which we would agree that a product hopping theory of harm could apply—though we would label it differently. In the example discussed earlier, where the brand name firm fraudulently withdrew legacy products from the NDA listings by citing (falsely) safety and efficacy concerns, the firm has engaged in fraud, with the result being that AB-rated generic substitutes for the legacy products disappear. Even if it were possible for the generics to detail for themselves and compete with their legacy generic products, the actions of the brand name firm have prevented such competition. In this situation, we would use the antitrust laws to impose liability and thereby remove the economic incentive of the brand name firm to create market power through fraud. Notice how this use of the antitrust laws promotes competition. It enables the generics to compete by relying on their own promotion even if the brand name ceases production (but does not fraudulently withdraw the NDA listing).

Another example where the product-hopping theory could apply as an antitrust violation (though, again, we would label it differently) is the
fraudulent claim that a new product is covered by a patent even though the legacy products are not. In that case, even if the new product is superior to legacy products, to the extent that the fraudulent claim of a patent prevents future generic competition, it would impair the competitive process and harm consumers. Absent those rare circumstances, the theory of product hopping should not trigger antitrust liability in the drug industry.

IV. ALTERING REGULATION, AND NOT THE USE OF ANTITRUST LAW, PROVIDES THE SOLUTION TO THE EXTENT A PROBLEM EXISTS

According to the FTC’s theory of harm, a branded drug producer can completely abide by the rules of the regulatory process yet circumvent the supposed underlying purpose of the Hatch-Waxman legislation. It is the possible circumvention of the intent of the Hatch-Waxman Act that seems to concern the FTC. As a result, the remedy, if one is needed, should not be a prohibition or limitation on new product innovation and detailing. Rather, the remedy should be in the form of changes to regulations that govern both generic entry and the substitution of generic prescriptions for branded drugs (that is, granting of AB-rated equivalency). If the FTC believes that a new product is therapeutically not superior to existing legacy products, yet the market cannot figure that out, one remedy is for the FDA to declare that (in such cases) the legacy generics are therapeutically equivalent to the new product, thereby triggering generic substitution. Another possible remedy is for the FDA to alter its approval process, so that the FDA approves only those new drugs that are significant improvements over legacy products. Presumably the FDA is in a better position to identify therapeutic efficacy than the FTC and the courts. The FTC appears to want to use the courts to determine whether the new product generates “sufficient” benefits to absolve the innovating firm of antitrust liability, apparently rejecting the alternative approach of allowing the FDA to make that decision.

The insight that regulation, not antitrust, should be used to correct the problem can be illustrated by a simple example. Assume that the market for cars is initially competitive but a regulation is introduced that confers the exclusive right to market all cars for a year on the first firm that produces a red car. This incentive structure would motivate firms to compete to be the first producer of a red car to monopolize the entire car market. Given such a regulation, the production of a red car would reduce competition and consumer welfare. However, it would be nonsensical to argue that that conduct constitutes an antitrust offense. It is instead the predictable outcome that results from firms responding to the incentives of a poorly designed regulation. The remedy in that situation is to fix the regulation, not make the innovator liable for an antitrust offense because of its response to the incentives created by the poorly devised regulation. This example shows that, when conduct does not violate any industry regulations and does not trigger
an antitrust offense in an unregulated environment, then such conduct should not trigger an antitrust-based remedy in the regulated environment. This approach is consistent with Trinko.13

Furthermore, there is an odd feature to the FTC’s theory of consumer harm from product hopping, which suggests that the promotion of competition in drug markets may be misguided, because the FTC assumes under this theory of harm that markets misallocate productive resources. Specifically, under the FTC’s theory, the generic producer cannot convince potential buyers — even large sophisticated ones, such as Kaiser Permanente — to purchase the AB-rated generic substitutes instead of the new product, despite that the new product is not an improvement over legacy ones and that the new product is sold at an elevated price compared to the legacy generics. In other words, the FTC’s theory assumes that the market simply does not work even when large savings from buying the generic versions of the legacy products exist.

Such a situation could exist, but even then, antitrust law, premised on the belief that competition benefits consumers, is a strange remedy. That is, the FTC’s theory of product hopping relies on the assumption that detailing can switch an entire market from a low price to a high price equivalent product, even when all agents are informed. If markets work so poorly, then the entire pharmaceutical industry should be regulated differently, perhaps by broadening the scope of FDA regulation. That is, the fundamental premise of the FTC’s theory is that pharmaceutical markets do not work. If so, the proper solution is to change the regulation of those markets to allow them to operate more efficiently. The wrong solution is to use the antitrust law, which applies to all firms, to condemn behavior, such as the introduction and detailing of new products, when such behavior would be generally applauded in other industries.

In sum, the competitive process is not harmed by the new branded product innovation, because generic producers have the same access to key inputs as before, and thus absent unusual circumstances there is no reliable economic basis supporting the use of antitrust law to address product hopping. If the FTC believes that Hatch-Waxman (and other drug regulation) creates incentives for branded drug producers to develop, introduce, and detail new products that lead to anticompetitive outcomes, then the regulation should be altered directly and not “fixed” through misuse of antitrust law.

V. PRACTICAL PROBLEMS WITH IMPLEMENTATION OF PRODUCT HOPPING AND POTENTIAL ADVERSE CONSEQUENCES

Aside from the theoretical problems of applying antitrust law to address the perceived harm from product hopping, there are also practical problems of implementation, which imply that such use of antitrust law will lead to adverse consequences. As we explain below, the FTC’s theory, if

implemented, would act like a tax on new product innovations and detailing. The unambiguous consequence is less investment in research and development, fewer new products, and less detailing in the pharmaceutical industry. Innovation in the pharmaceutical industry typically involves large upfront investments, long time delays between product development and actual market sales, and significant uncertainty during each step of the process. As a result, any antitrust standard to address product hopping that requires a brand name drug producer to launch new products only when the expected consumer benefits offset any expected consumer harm from diminished competition would be extremely difficult to implement and contentious. Specifically, if the act of product innovation can avoid antitrust liability only after a court’s weighing of the ex-ante consumer benefits and costs justifies the innovation, such a standard would impose a great deal of uncertainty on firms and reduce their incentive to innovate. Yet, this is the precise standard that the FTC advocates.

If the FTC implements this standard, the additional costs imposed on innovative firms would act as a tax on innovation. Namely, brand name drug producers could be exposed to potential antitrust liability, simply because the antitrust enforcement agency was unable to measure accurately new product benefits or because the agency disagreed with the innovating firm’s estimates. Such a standard would act as a tax on product innovation and reduce the incentives of firms to invest in innovation, which would result in harm to consumers.14

The uncertainty over measuring consumer benefits from new product innovation is only one way that applying antitrust law to address product hopping would tax procompetitive activities. Detailing, promotions, and other marketing activities undertaken by brand name drug producers would also be implicitly taxed. For example, a competitive requirement that branded firms continue to promote legacy products to increase consumer demand for the generic versions of these legacy products would lower the ex-ante returns associated with those promotional activities. Specifically, brand name drug producers would now face higher costs of promotions, because any detailing done in support of new products today would need to continue

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14 See, e.g., Dennis W. Carlton & Ken Heyer, Extraction vs. Extension: The Basis for Formulating Antitrust Policy Towards Single-Firm Conduct, 4 COMPETITION POL’Y INT’L 285 (2008). We understand that if one hypothesizes that the evidence unambiguously shows (1) that the new product was known to be no better than the old, (2) that the new product is no better than the old, and (3) that its introduction will harm competition, then it would be socially beneficial to stop the introduction of the new product, all else equal. But that hypothetical evades the relevant policy issue, since such an "unambiguous" case will be rare (or nonexistent), as the evidence will almost certainly be disputed. Further, stopping new product introductions even in these "unambiguous" cases would likely create legal uncertainty in the minds of other innovating firms and increase their perception of their legal liability from introducing a new product. Therefore, the pursuit of antitrust liability for new product introductions is likely to raise costs to innovation, resulting in the harm of reduced product innovation.
into the future, even after the returns to such promotional efforts make it unprofitable. This requirement imposes incremental costs on such business efforts, and would act as a tax on procompetitive activities. Similarly, any requirement that firms must continue to manufacture products once they have been introduced to the marketplace would act like a tax on new products and would thereby affect competition adversely.

Finally, and perhaps most importantly, because antitrust law applies generally to all markets, the use of antitrust law to address product hopping could potentially retard new product innovation in many markets other than pharmaceuticals. New product innovation is a form of competition that can generate ex-post market power for the innovating firm. It is well known that new product innovations do not necessarily increase consumer welfare. Yet, we are unaware that anyone has suggested the adoption of a general policy that a firm that innovates is liable for an antitrust offense if the new product fails to produce net benefits to society. Yet, that idea is the basis of the FTC’s product hopping theory — and therefore implementation of such a theory — would raise the specter of antitrust liability for new product innovation in industries other than pharmaceuticals. By creating a general standard that imposes antitrust liability for new product innovation, and by imposing duties to continue to supply and promote legacy products in some unspecified way as new products are introduced, the FTC would reduce firms’ incentives to introduce and promote new products in every industry.

VI. CONCLUSION

The FTC’s theory of product hopping is premised on the belief that markets for drugs do not work. According to the theory, by introducing new products, even ones with no net benefit over legacy offerings, brand name drug producers can evade the Hatch-Waxman regulation that promotes generic competition. Nowhere does the FTC theory claim that a generic producer of the legacy drug is denied market access to marketing resources. Instead, its ability to free-ride off the marketing efforts of the brand name drug producer is eliminated. The FTC’s solution is to impose antitrust liability on the brand name producer unless it sufficiently helps its rival generic firms compete. Such an approach is a misguided use of antitrust law and will likely lead to litigation nightmares in which courts attempt to figure out whether the benefits of a new drug are sufficiently high that the innovating firm can escape antitrust liability. The proper solution, if a problem does exist, is to remedy the regulation that is the source of the problem. Adopting a general antitrust doctrine that imposes antitrust liability on firms that innovate is the surest way to chill creative activity in all industries including pharmaceuticals.