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Patent Abuses

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IF YOU think class-action lawsuits can sometimes go too far, consider a species of suit that is regularly filed by pharmaceutical companies -- suits that enrich the drug firms at the expense of ordinary workers and taxpayers. It is a species that ought to be endangered.

The drug firms deploy suits of this kind when the patent is about to run out on a blockbuster drug. If a rival firm plans to market a cheap copy of the drug, the patent holder files a suit objecting -- and the cheap copy is automatically banned for 30 months. Because the arrival of competition usually pushes drug prices down by more than half, this delay transfers eye-popping sums from consumers to the patent holder. In one example, AstraZeneca is shutting out competition for Prilosec, a heartburn drug. As The Post's Ceci Connolly reported on Monday, a year's extension to Prilosec's monopoly could cost state Medicaid programs \$300 million. It could cost the employee health plan of a single company, General Motors, more than \$15 million. In total, a year's delay would enrich AstraZeneca to the tune of \$2 billion -- and impoverish consumers commensurately.

This is not an attack on drug patents. The pharmaceutical industry needs an incentive to create wonderful new cures and to spend billions on research to do so. But patents are supposed to last for a fixed term, after which the inventor is deemed to have been adequately rewarded. Once that happens, competition must be allowed to drive prices down and make health care more affordable. Pharmaceutical costs are the fastest-rising segment of health care spending, according to a study released yesterday; the price of the average prescription jumped 10 percent in 2001, despite a general inflation rate of around 1 percent. Extending patents beyond their intended life amounts to robbery, and the consequence is that even more Americans will join the ranks of the uninsured and even more seniors won't be able to afford the drugs they need.

The drug companies say they don't mean to stretch patents out for longer than the law intends. Rather, they point out that many drugs are covered by more than one patent, so that even if one of them expires the others might live on, making it legitimate to keep copies off the market. This may sometimes be fair; AstraZeneca, for example, makes the claim that the patent for the active ingredient in Prilosec has run out but the patents covering the crucial delivery technology remain operative. The trouble is that, under the Hatch-Waxman Act of 1984, drug companies do not need to sound plausible in order to keep competitors at bay. The 30-month stay is automatically triggered as soon as the inventor files suit, whether that suit has merit or not.

Congress needs to fix this. Sens. Charles Schumer (D-N.Y.) and John McCain (R-Ariz.) have introduced a useful bill; other lawmakers are mulling the issue, prompted by a coalition of state governors and corporations fed up with fast-rising drug costs. A sensible reform would trigger the 30-month stay only if patent holders convince a judge in a preliminary hearing that their suit has merit; it might also require patent holders to post bonds, thus deterring frivolous filings. Moreover, Congress should consider ruling out more than one 30-month stay per drug and restricting the range of patents that inventors can use to fend off competition. A new tamper-proof bottle ought not prevent the copying of the pills that are inside it.

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