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WLF Asks California High Court to Reject State-Law Antitrust Challenge to Patent Litigation Settlement

(In re Cipro I & II)

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WASHINGTON, DC—The U.S. Supreme Court’s 2013 decision in *FTC v. Actavis, Inc.* held that antitrust challenges to patent infringement lawsuit settlements are subject to “rule of reason” analysis, like most antitrust claims, not heightened *per se* or “quick look” review sought by the Federal Trade Commission. The Washington Legal Foundation (WLF) has asked the California Supreme Court to also apply the rule of reason to similar claims under California antitrust law.

The California proceeding is a challenge to a settlement agreement in which Bayer, a pharmaceutical patent holder, agreed to allow Barr, a generic manufacturer, to begin selling a generic version of Cipro several years before its patent expired. In addition, Bayer agreed to pay Barr and Barr agreed to drop a claim that Bayer’s patent is invalid. Two federal courts later rejected claims (by other generic companies) that the patent was invalid, and two other federal appeals courts rejected claims that the settlement was anti-competitive. Nonetheless, the California plaintiffs assert California antitrust law violations and urge the court to adopt a “focused *per se* ban” on any patent settlement where the patent holder pays the alleged infringer.

WLF, which filed its supplemental brief in response to the court’s request for briefs addressing the impact of *Actavis*, argues that federal law preempts the plaintiffs’ bar’s efforts to apply a heightened antitrust standard under California law. The U.S. Supreme Court held in *Actavis* that Congress created a “balance” between antitrust law, which seeks to maximize competition, and patent law, which grants exclusive sales rights to the inventor of a novel product as a means of encouraging research and development. WLF argues that subjecting patent settlement agreements to heightened antitrust scrutiny would upset Congress’s mandated balance.

After the filing, WLF issued the following statement by Chief Counsel Richard Samp: “The U.S. Supreme Court recently rejected efforts to impose heightened federal antitrust scrutiny to so-called reverse payment patent litigation settlements. That decision also bars California from adopting heightened scrutiny under state antitrust law. A higher degree of scrutiny would interfere with the rights of patent holders and thereby undermine the incentives Congress created to foster research and development.”

WLF is a public interest law firm and policy center that regularly advocates against state-law regulation that stands as an obstacle to the purposes of federal patent law.