Press Release

Washington Legal Foundation
Advocate for Freedom and Justice®
2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302 wlf.org

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Media Contact: Mark Chenoweth | mchenoweth@wlf.org | 202-588-0302

WLF Asks Supreme Court to Overturn Decision that Would Prevent Settlement of Drug-Patent Lawsuits

(SmithKline Beecham Corp. v. King Drug Co. of Florence, Inc.)

"Settling lawsuits ought to be encouraged … [y]et, the appeals court's misguided application of antitrust law in this case will render it virtually impossible to settle drug-patent litigation."—Richard Samp, WLF Chief Counsel

WASHINGTON, DC—Washington Legal Foundation today called on the U.S. Supreme Court to review and overturn a decision by the U.S. Court of Appeals for the Third Circuit that requires exacting antitrust scrutiny for virtually any agreement between a brand-name drug company and a generic drug company to settle patent-infringement litigation. In a brief filed in *SmithKline Beecham Corp. v. King Drug Co. of Florence, Inc.*, WLF argues that the appeals court decision expands antitrust law dramatically and makes it almost impossible for litigants to settle drug-patent disputes. WLF's brief was joined by the Allied Educational Foundation.

As a reward for developing a new prescription drug, federal patent law grants a brand-name drug company the exclusive right to market the drug for several years. When the patent term expires, generic drug companies are permitted to produce copycat versions of the drug, and retail prices then drop sharply as a result. If a generic company initiates litigation and wins a judgment declaring the patent invalid, it can enter the market immediately—under conditions likely to produce enormous profits. The parties often end up settling such high-stakes patent disputes, with generic companies dropping their patent-invalidity claims in return for some consideration.

The U.S. Supreme Court's 2013 decision in *FTC v. Actavis* held that a patent-litigation settlement is subject to antitrust scrutiny if the settlement includes a large and unexplained "payment" from the brand-name company to the generic company. It held such payments may be an indication that the brand-name company is unreasonably restraining trade by paying a potential competitor to stay out of the market. The Third Circuit dramatically expanded that ruling by holding that *any* benefit (even exclusive patent licenses) provided by the brand-name company triggers antitrust scrutiny. WLF argues that the appeals court's decision conflicts with *Actavis* and will make it virtually impossible for parties to settle drug-patent disputes.

Upon filing its brief, WLF issued the following statement by Chief Counsel Richard Samp: "Settling lawsuits ought to be encouraged because it is more economically efficient than having trials and saves judicial resources. Yet, the appeals court's misguided application of antitrust law in this case will render it virtually impossible to settle drug-patent litigation. The decision conflicts with a 2013 Supreme Court decision that addressed this very issue."

WLF is a free-market, public-interest law firm and policy center that devotes substantial resources to advocating for limited government and fighting the scourge of excessive litigation.

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