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WLF URGES COURT TO REJECT STATE-LAW CHALLENGE TO PATENT SETTLEMENT

(In re Cipro I & II)
California Supreme Court

The Washington Legal Foundation (WLF) this week urged the California Supreme Court to reject the claim that a routine agreement to settle a patent dispute amounts to a violation of California antitrust law.

In a brief filed in *In re Cipro I & II*, WLF argued that any state court decision imposing liability on such patent settlements would be preempted by federal patent laws because it would interfere with the objective Congress sought to achieve in adopting the patent laws—namely, to encourage innovation by rewarding those who expend the resources necessary to develop new products.

WLF also argued that, far from being exposed to liability, parties ought to be encouraged to settle their patent disputes. By raising the possibility that such settlements will routinely be subject to condemnation under state antitrust law, the plaintiffs seek the imposition of a rule that would strongly discourage settlements, WLF argued.

The case arose in the aftermath of a patent dispute between Bayer Corporation (Bayer) and Barr Laboratories, Inc. (Barr). Bayer held the patent for an antibiotic drug known as Cipro, which contains the active ingredient ciprofloxacin hydrochloride. After Barr sought permission to produce a generic version of Cipro, Bayer filed a patent infringement suit in 1992, alleging that Barr's proposed generic drug violated Bayer's patent, which was not scheduled to expire for more than a decade. The patent dispute was eventually settled, with Barr agreeing to delay its entry into the market until 2003.

In 2000, various plaintiffs brought suit in California state court challenging the Cipro settlement on the basis that it violated California antitrust and consumer protection laws. In 2009, the trial court granted summary judgment for the defendant drug manufacturers, holding that conduct falling within the scope of a patent is not an antitrust violation under California law. On appeal, the California Court of Appeal unanimously affirmed on the grounds that an agreement is not unlawful under California antitrust law if it restrains competition only within the exclusionary scope of a patent. The plaintiffs have appealed that ruling to the California Supreme Court.

In its brief urging affirmance, WLF argued that the relief sought by plaintiffs in this case, if granted, would conflict with federal patent law and thus would violate the Supremacy Clause. WLF argued that Congress has carefully calibrated the rewards that ought to be conferred on successful inventors; that calibration has encompassed such steps as changing the number of years a patent stays in effect, adopting procedures that allow a drug manufacturer to obtain an extension of the patent term under certain circumstances, and adopting procedures that allow generic drug manufacturers to bring competing drugs to market relatively quickly. WLF argued that such measures indicate that Congress attempted to strike a careful balance between rewarding successful inventors and providing low-cost drugs to consumers; that balance should not be upset by a contrary rule imposed under state law.

WLF also noted that courts have long encouraged the settlement of litigation and that the approach urged by the plaintiffs would discourage settlements by undermining their finality. Further, WLF reasoned, by calling into question the legality of virtually all patent settlements, plaintiffs' approach would actually discourage meritorious challenges by generic companies who are reluctant to undertake expensive litigation of indeterminate duration and outcome knowing that pre-trial settlement may no longer be available. A robust patent system cannot operate under such a cloud of uncertainty, WLF argued.

WLF is a public interest law and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending economic liberty, free enterprise, and a limited and accountable government.

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For further information, contact WLF Senior Litigation Counsel Cory Andrews, (202) 588-0302. A copy of WLF's brief is posted on its web site, www.wlf.org.