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WLF Urges Fifth Circuit to Overturn FTC Decision that Prevents Settlement of Drug-Patent Lawsuits

(Impax Laboratories LLC v. Federal Trade Commission)

“Settling lawsuits ought to be encouraged because it is more economically efficient than trials and saves judicial resources. Yet the FTC’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 (WLF) today called on the U.S. Court of Appeals for the Fifth Circuit to overturn a Federal Trade Commission decision that applies exacting antitrust scrutiny to virtually any agreement between a brand-name drug company and a generic drug company to settle patent-infringement litigation. In an *amicus curiae* brief filed in *Impax Laboratories LLC v. FTC*, WLF argued that the FTC decision expands antitrust law dramatically and will make it almost impossible for litigants to settle drug-patent disputes.

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 drop sharply. 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 their patent dispute, with generic companies agreeing to drop their patent invalidity claim 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 Court *rejected* the FTC’s argument that such payments should be presumptively illegal; instead, it held that reviewing courts should apply a rule-of-reason analysis that looks at all factors to determine whether the settlement harms consumers. WLF argues that in this case, involving a settlement between Endo Pharmaceuticals and Impax Laboratories, the FTC found an antitrust violation after applying the very “presumptively illegal” standard of review disapproved by the *Actavis* decision.

Celebrating its 42nd year, WLF is America’s premier public-interest law firm and policy center advocating for free-market principles, limited government, individual liberty, and the rule of law.

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