Press Release

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COURT URGED TO REJECT *PER SE* TEST IN CHALLENGES TO PATENT SETTLEMENTS

***(Andrx Pharmaceuticals, Inc. v. Kroger Co.,* No. 03-779)**

The Washington Legal Foundation (WLF) this week urged the U.S. Supreme Court to review (and ultimately overturn) a lower-court ruling that agreements to settle patent disputes can amount to *per se* violations of the antitrust laws.

In a brief filed in *Andrx Pharmaceuticals, Inc. v. Kroger Co.*, WLF argued that parties ought to be encouraged to settle their patent disputes. By raising the possibility that settlements will be subjected to *per se* condemnation under the antitrust laws, the courts are unnecessarily discouraging settlements, WLF argued.

The case arose in the aftermath of a patent dispute between Hoechst Marion Roussel ("HMS," now known as Aventis Pharmaceuticals) and a generic drug manufacturer, Andrx Pharmaceuticals, Inc. Andrx had announced plans to market a generic version of one of HMS's drugs, Cardizem CD; HMS responded by suing Andrx, claiming that Andrx's plans violated one of HMS's patents on Cardizem CD. The patent dispute was eventually settled, with Andrx agreeing to delay by nine months its entry into the market and in return receiving a payment from HMS.

A number of drug purchasers thereafter filed antitrust claims against HMS and Andrx, alleging that the patent settlement violated the antitrust laws because it amounted to an illegal horizontal market allocation agreement. Without listening to any evidence regarding the reasonableness of the patent settlement, the U.S. Court of Appeals for the Sixth Circuit in Cincinnati agreed, finding that the settlement was a *per se* violation of the antitrust laws for which there could be no defense. The case continues in the trial court on other issues, including the amount of damages (if any) suffered by the plaintiffs as a result of higher prices attributable to the market allocation agreement. Andrx is seeking Supreme Court review of the Sixth Circuit's decision, which directly conflicts with a

decision of the U.S. Court of Appeals for the Eleventh Circuit in Atlanta.

In its brief, WLF argued that *per se* condemnation under the antitrust laws of the defendants' patent settlement is wholly inappropriate. WLF noted that the Supreme Court has held that business arrangements should be branded as *per se* antitrust violations with great caution and only in the few cases where sufficient experience has shown that the challenged conduct "always or almost always tend[s] to restrict competition and decrease output." WLF argued that an absolute prerequisite to *per se* treatment is a long history of courts analyzing the challenged activity under the "rule of reason" and uniformly concluding that the activity is anticompetitive. WLF argued that the type of patent settlement entered into in this case has *never* been subject to a rule-of-reason analysis by any court; until courts have had extensive experience with these types of settlements, they have no business short-circuiting the process of determining whether the settlements are truly anticompetitive.

WLF also argued that there were numerous valid business reasons for the settlements entered into between HMS and Andrx. WLF argued that patents are, by their very nature, to a certain extent anticompetitive and that courts should not permit the antitrust laws to undermine the numerous benefits derived from the patent system.

WLF is a nonprofit pubic interest law and policy center with supporters in all 50 states. WLF devotes a significant portion of its resources to efforts designed to protect the economic and civil liberties of individuals and businesses.

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