

Press Release

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FOR IMMEDIATE RELEASE

October 2, 2002

FTC URGED TO REJECT PER SE TEST IN CHALLENGES TO PATENT SETTLEMENTS

(In the Matter of Schering-Plough Corp.)

The Washington Legal Foundation (WLF) this week asked the Federal Trade Commission (FTC) to reject claims that agreements to settle patent disputes can amount to per se violations of the antitrust laws.

In a brief filed in *In the Matter of Schering-Plough Corp.*, 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 FTC is unnecessarily discouraging settlements, WLF argued.

The case arose in the aftermath of a patent dispute between Schering-Plough Corp. (the initial manufacturer of a drug known by the brand name K-Dur 20) and two generic drug manufacturers, Upsher-Smith Laboratories, Inc. and ESI Lederle, Inc. Upsher-Smith and ESI had announced plans to produce a generic version of K-Dur 20, but Schering insisted that it still had exclusive patent rights to the drug. The patent dispute was eventually settled, with Upsher-Smith and ESI agreeing to delay their entry into the market. Schering's patent ran until September 2006; the parties agreed that Upsher-Smith could enter the market in September 2001 and that ESI could enter the market in January 2004.

The FTC thereafter filed a complaint against Schering, Upsher-Smith, and American Home Products Corp. (ESI is a division of AHP), alleging that the patent settlement violated the Federal Trade Commission Act because it amounted to an illegal horizontal market allocation agreement. The FTC alleges that because money flowed from Schering to Upsher-Smith and ESI in connection with the patent litigation settlement, the settlement is a per se violation of the antitrust laws for which there could be no defense. An Administrative Law Judge disagreed, finding (in the case of the Schering/Upsher-Smith agreement) that money paid by Schering was solely in return for separate licenses granted to Schering by Upsher-Smith and (in the case of the Schering/ESI agreement) that the settlement should be judged under the "rule of reason" and that, under that rule, the settlement should be sustained as pro-competitive.

The FTC staff has appealed to the full Commission. WLF filed its brief in connection with that appeal.

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 any sort analysis by either the FTC or the federal courts; until courts and the FTC 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 Schering and its generic competitors. WLF noted in particular that the FTC staff had failed to present any evidence that the Schering patent was not valid and/or infringed, and thus had failed to demonstrate that the generic companies, in the absence of a settlement, could have entered the market prior to September 2006. WLF argued that patents are, by their very nature, to a certain extent anticompetitive and that courts and the FTC should not permit the antitrust laws to undermine the numerous benefits derived from the patent system.

WLF is a nonprofit public 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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