News Release

Washington Legal Foundation
Advocate for freedom and justice®
2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302

FOR IMMEDIATE RELEASE **November 15, 2007**

COURT URGED TO REIN IN USE OF CALIFORNIA'S ANTI-SLAPP STATUTE

(Schering Corp. v. First DataBank, Inc.)

The Washington Legal Foundation (WLF) this week urged the U.S. Court of Appeals for the Ninth Circuit in San Francisco to rein in use of California's anti-SLAPP statute, a device often used by attorneys to prevent litigants from obtaining a fair and prompt hearing on their legal claims.

In a brief filed in *Schering Corp. v. First DataBank, Inc.*, WLF argued that the interests of justice are not served when defendants in commercial suits are permitted to disrupt the normal litigation process by filing an anti-SLAPP motion and then bringing the lawsuit to a halt while they appeal the denial of their motion. WLF argued that motions to dismiss, for summary judgment, and for sanctions under Fed.R.Civ.P. 11 are the appropriate alternative vehicles for protecting the interests of defendants in avoiding frivolous litigation.

SLAPP is an acronym for "strategic lawsuits against public participation." The term was coined in the 1980s by activist law professors who viewed SLAPP suits as an illegitimate tool used by powerful business interests to silence individuals who publicly voiced criticism of those interests. Claims made in SLAPP suits often include defamation and tortious interference with economic advantage; critics contend that businesses bring such suits in the hopes that their critics will stop speaking rather than incur the costs of defending the lawsuits. In response to these alleged abuses, a number of States (including California) adopted anti-SLAPP statutes; the statutes allow defendants in alleged SLAPP suits to win expedited dismissal and an award of attorney fees.

In its brief filed in the Ninth Circuit, WLF argued that many attorneys have been abusing the anti-SLAPP statute by invoking it in an effort to obtain expedited dismissal of suits that are far afield of the statute's intended purpose. The case at issue is a commercial dispute between a pharmaceutical company (Schering Corp.) and a company that supplies data to pharmacies (FDB). Schering contends that FDB is conveying inaccurate information about one of its products and that, as a result, many pharmacies are filling prescriptions with alternative products even when a doctor has written a prescription for Schering's product. Schering filed suit in an effort to require FDB to correct the erroneous information. FDB filed an anti-SLAPP motion, seeking expedited dismissal of the case. When that motion was denied, FDB appealed to the Ninth Circuit.

WLF argued that commercial suits of this sort are not the types of suits the California legislature had in mind when it adopted the anti-SLAPP statute. WLF argued that California amended its anti-SLAPP statute in 2003 to make clear that the statute was largely inapplicable to commercial disputes.

WLF asserted that Schering's lawsuit raises substantial claims. WLF noted that the drugs being substituted for Schering's product have not been deemed "therapeutically equivalent" to the product. In most States, pharmacists are prohibited from substituting one drug for the prescribed drug if the drugs are not therapeutically equivalent. Schering argues that pharmacists would not be doing so but for information being conveyed by FDB; pharmacists apparently interpret the information as meaning that the three drugs at issue are therapeutically equivalent. WLF argued that Schering's claims are sufficiently substantial that they should not be resolved in connection with the abbreviated proceedings established by the anti-SLAPP statute. Rather, the case should be resolved at the summary judgment stage, after the parties have had an opportunity to engage in discovery, WLF argued.

WLF stressed that it was not taking sides on the merits of the dispute between Schering and FDB, and that it supports efforts to protect the First Amendment rights of data publishers such as FDB. But the issue in this lawsuit is whether the California legislature intended FDB's First Amendment rights to be vindicated via the anti-SLAPP statute or by means of the regular rules of civil procedure applicable in California and federal courts. WLF argued that the California legislature chose the latter course.

WLF is a public interest law and policy center with supporters in all 50 States, including many in California. WLF regularly appears before federal and state courts to promote economic liberty and a limited and accountable government.

* * *

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