News Release

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2009 Massachusetts Ave., NW
Washington, D.C. 20036
202.588.0302

FOR IMMEDIATE RELEASE **March 21, 2002**

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

(In re Terazosin Hydrochloride Antitrust Litigation)

The Washington Legal Foundation (WLF) this week asked the U.S. Court of Appeals for the Eleventh Circuit in Atlanta 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 re Terazosin Hydrochloride Antitrust Litigation*, 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 Abbott Laboratories (the initial manufacturer of a drug known by the brand name Hytrin) and two generic drug manufacturers, Geneva Pharmaceuticals, Inc. and Zenith Goldline Pharmaceuticals. Geneva and Zenith had announced plans to produce a generic version of Hytrin, but Abbott Laboratories insisted that it still had exclusive patent rights to the drug. The patent dispute was eventually settled, with Geneva and Zenith agreeing to delay their entry into the market and in return receiving a payment from Abbott Laboratories.

A number of drug purchasers thereafter filed antitrust claims against Abbott Laboratories, Geneva, and Zenith, 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, a federal district judge in Florida 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 district 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.

The defendants filed an interlocutory appeal and have filed a petition with the Eleventh Circuit to hear their appeal. (Normally, district court rulings cannot be appealed until all district court proceedings have been completed.) WLF filed its brief in support of the defendants' petition for review.

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 Abbott Laboratories and its generic competitors. 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 prepared its brief with the *pro bono* assistance of Stephen Paul Mahinka, Scott A. Stempel, Penelope M. Lister, and John F. Terzaken III of the Washington, D.C. office of Morgan, Lewis & Bockius LLP.

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.