# Press Release

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# WLF Asks Third Circuit to Clarify "Duty to Deal" Under Federal Antitrust Law

*(Mylan Pharmaceuticals, Inc. v. Celgene Corp.)*

**"This case serves as a prime example of why Congress authorized interlocutory review—to eliminate a wasteful, protracted trial in a case where there should be no liability to begin with."—Cory Andrews, WLF Senior Litigation Counsel**

WASHINGTON, DC—Washington Legal Foundation (WLF) yesterday asked the U.S. Court of Appeals for the Third Circuit to review a district court ruling that would require businesses to litigate refusal-to-deal antitrust claims brought by potential rivals in the absence of any prior, voluntary course of dealing. As no Third Circuit precedent answers the certified question in this case, and five other circuits have ruled the other way, WLF urged the court to hear an interlocutory appeal in the matter.

In its brief filed in *Mylan Pharmaceuticals, Inc. v. Celgene Corp.*, WLF emphasizes the enormous uncertainty the decision below would create if allowed to stand. In the absence of a bright-line rule, the lingering uncertainty would chill competition and spur more speculative antitrust litigation against other patent-holders in the industry. WLF's brief also argues that the enormous expense the Defendant would incur in defending this untenable suit through the discovery phase warrants interlocutory appeal. Antitrust litigation is particularly notorious for imposing extraordinary costs on defendants.

The case presents an issue of first impression for the Third Circuit: whether a refusal-to-deal claim under § 2 of the Sherman Antitrust Act requires a prior, voluntary course of dealing. In refusing to dismiss Plaintiff's § 2 claims, the district court held that, despite the objective business reasons Defendant gave for refusing to sell samples of its patented drug to Plaintiff, the Defendant might still owe Plaintiff a duty to deal if a jury finds that Defendant's desire to obtain a long-term anticompetitive gain motivated its refusal. The Second, Ninth, Tenth, Eleventh, and D.C. Circuits have all independently rejected the novel theory of antitrust liability which the district court accepted here.

WLF issued the following statement today by Senior Litigation Counsel Cory Andrews: "Celgene would have obtained immediate dismissal, before burdensome and expensive discovery, had the Plaintiff brought this case in any of the five circuit courts with controlling precedent. This case serves as a prime example of why Congress authorized interlocutory review—to eliminate a wasteful, protracted trial in a case where there should be no liability to begin with."

*WLF is a national public interest law firm and policy center that regularly litigates to defend patent-holders' intellectual property rights and ensure pro-competitive application of the antitrust laws.*

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