Press Release

Washington Legal Foundation
Advocate for Freedom and Justice®
2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302 wlf.org

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Media Contact: Rich Samp | 202-588-0302

WLF Seeks to Reverse Government Antitrust Attack on Apple for Bringing Competition to E-book Market

(United States et al. v. Apple, Inc. et al.)

"The trial court's legally and economically flawed decision, if allowed to stand, would create new challenges for would-be market entrants as well as chill pro-competitive conduct by established firms."—Richard Samp, WLF Chief Counsel

WASHINGTON, DC—The Washington Legal Foundation (WLF) has asked the U.S. Court of Appeals for the Second Circuit to overturn a federal district court decision which incorrectly applied antitrust principles to condemn as *per se* unlawful market behavior that ultimately benefitted consumers. The Southern District of New York's high-profile ruling in favor of the U.S. and some 30 states, WLF argues in its brief, contradicts the entire purpose of antitrust law.

Anticipating the iPad tablet computer's launch in January 2010, Apple eyed entering an e-book market dominated by one retailer with a 90% market share. Publishers eager to promote competition signed agreements with Apple that contained three key terms: (i) an agency model whereby Apple would receive a 30% commission to sell e-books at a publisher-determined price; (ii) a most-favored-nation clause allowing Apple to match other e-bookstores' prices; and (iii) price caps to prevent publishers from raising e-book prices too high. After entering into the contracts with Apple, the publishers convinced the dominant retailer to adopt agency pricing too. E-book sales subsequently exploded, overall prices decreased, and retail competition increased. WLF argues that the trial court should have evaluated Apple's conduct under the "rule of reason," which takes into account any pro-competitive benefits of antitrust defendants' conduct.

In deeming the conduct by Apple and the book publishers a "horizontal price-fixing conspiracy," the trial judge misconstrued antitrust law and basic economics. Voltaire famously remarked that the Holy Roman Empire was neither holy, nor Roman, nor an empire. Likewise, this alleged horizontal price-fixing conspiracy was neither horizontal (Apple did not directly compete with the publishers), nor price-fixing (the contracts merely dictated an agency pricing model), nor a conspiracy (the object of the agreements was not illegal). The trial judge simply failed to understand the nature and role of most-favored-nation clauses, which businesses utilize to assure their customers will not be offered less favorable terms than their competitors offer.

Upon filing its brief, WLF issued the following statement by Chief Counsel Richard A. Samp: "It is ironic that a federal judge would read antitrust law to condemn as *per se* unlawful business conduct that broke a monopolist's grip on sales. The trial court's legally and economically flawed decision, if allowed to stand, would create new challenges for would-be market entrants as well as chill pro-competitive conduct by established firms."

WLF is a public interest law firm and policy center that frequently participates in litigation where courts and antitrust authorities have misapplied antitrust law to consumers' detriment.

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