



FOR IMMEDIATE RELEASE

August 4, 2015

Media Contact: Mark Chenoweth | mchenoweth@wlf.org | 202-588-0302

WLF Advises Third Circuit to Reconsider Decision that Prevents Settlement of Drug Patent Lawsuits

(*King Drug Co. of Florence, Inc. v. SmithKline Beecham Corp.*)

“Settling lawsuits ought to be encouraged because it is more economically efficient than trials and saves judicial resources. Yet, the appeals court’s misguided application of antitrust law in this case will render it virtually impossible to settle drug patent litigation.”

—Richard Samp, WLF Chief Counsel

WASHINGTON, DC—Washington Legal Foundation (WLF) yesterday evening called on the U.S. Court of Appeals for the Third Circuit to rehear *en banc* (and ultimately reverse) its recent decision that requires exacting antitrust scrutiny for virtually any agreement between a brand-name drug company and a generic drug company to settle patent-infringement litigation. In a brief filed in *King Drug Co. of Florence, Inc. v. SmithKline Beecham Corp.*, WLF argues that the decision expands antitrust liability dramatically and makes it almost impossible for litigants to settle drug-patent disputes.

As a reward for developing a new, life-saving prescription drug, federal patent law grants a brand-name drug company the exclusive right to market its drug for a term of years. When the patent term expires, generic drug companies may produce copycat versions, and retail prices drop sharply. If a generic company wins a court judgment declaring that a drug patent is invalid, it can enter the market immediately—under conditions likely to produce enormous profits. The parties often end up settling their patent disputes, with generic companies agreeing to drop their patent invalidity claims in return for some consideration from the brand-name companies.

The U.S. Supreme Court’s 2013 decision in *FTC v. Actavis* held that a patent litigation settlement is subject to rigorous antitrust scrutiny if the settlement includes a large and unexplained payment from the brand-name company to the generic company. It held that such payments may indicate that the brand-name company is unreasonably restraining trade by paying a potential competitor to stay out of the market. The Third Circuit dramatically expanded that ruling last month by holding that *any* benefit the brand-name company provides triggers antitrust scrutiny. WLF argues that the appeals court’s decision conflicts with *Actavis* and will make it virtually impossible for parties to settle drug patent disputes.

Upon filing its brief, WLF issued the following statement by Chief Counsel Richard Samp: “Settling lawsuits ought to be encouraged because it is more economically efficient than trials and saves judicial resources. Yet, the appeals court’s misguided application of antitrust law in this case will render it virtually impossible to settle drug patent litigation. The decision conflicts with a 2013 Supreme Court decision that addressed this very issue.”

WLF is a free-market, public-interest law firm and policy center that devotes substantial resources to advocating for limited government and fighting the scourge of excessive litigation.