Press Release

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WLF Seeks to Persuade First Circuit Not to Second-Guess Settlements of Drug-Patent Lawsuits

(In re Loestrin 24 FE Antitrust Litigation)

> **"Settling lawsuits should be encouraged because it saves judicial resources and produces more economically efficient outcomes. Yet, FTC's misguided reading of antitrust law would render it virtually impossible to settle drug-patent litigation."—Richard Samp, WLF Chief Counsel**

WASHINGTON, DC—Washington Legal Foundation today called on the U.S. Court of Appeals for the First Circuit to reject demands to apply exacting antitrust scrutiny to virtually any agreement between a brand-name drug company and a generic drug company to settle patent infringement litigation. In a brief filed in *In re Loestrin 24 FE Antitrust Litigation*, WLF argues that the Federal Trade Commission (FTC) and plaintiffs' bar are advocating a dramatic expansion of antitrust law that would make settling drug-patent disputes practically impossible.

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 the drug for a term of years. As soon as the patent term expires, generic drug companies are permitted to produce copycat versions of the drug, and retail prices drop sharply. If a generic company challenges the patent and wins a court judgment declaring it invalid, the company can enter the market immediately—with a profitable first-mover advantage. Such suits often end up settling, with the generic company agreeing to drop its patent invalidity claim in exchange for some recompense from the brand-name company.

The U.S. Supreme Court's 2013 decision in *FTC v. Actavis* held that a patent litigation settlement is subject to antitrust scrutiny if the settlement includes a large *cash* payment from the brand-name company to the generic company; the Court held that large, unexplained cash payments may be an indication that the brand-name company is unreasonably restraining trade by paying a potential competitor to stay out of the market. The FTC urges the First Circuit to expand that ruling by holding that *any* large benefit (even non-cash benefits) provided by the brand-name company triggers antitrust scrutiny. WLF argues that the FTC's view conflicts with *Actavis* and would 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 should be encouraged because it saves judicial resources and produces more economically efficient outcomes. Yet, FTC's misguided reading of antitrust law—which conflicts with a 2013 Supreme Court decision that addressed this very issue—would render it virtually impossible to settle drug-patent litigation."

WLF is a free-market, public-interest law firm and policy center that devotes substantial resources to advocating for limited government and defending intellectual property rights.

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