News Release

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COURT URGED TO REJECT ANTITRUST CHALLENGES TO PATENT SETTLEMENTS

(*Merck & Co. v. Louisiana Wholesale Drug Co.)*
(*Upsher-Smith Laboratories, Inc. v. Louisiana Wholesale Drug Co*.)

The Washington Legal Foundation (WLF) yesterday urged the U.S. Supreme Court to review (and ultimately overturn) an appeals court decision holding that routine agreements to settle patent disputes can amount to violations of the antitrust laws.

In a brief filed in support of two separate petitions seeking review of a decision by the U.S. Court of Appeals for the Third Circuit, WLF argued that parties ought to be encouraged to settle their patent disputes. By raising the possibility that settlements will routinely be subjected condemnation under the antitrust laws, the courts are unnecessarily discouraging settlements, WLF argued. WLF filed its brief with the significant *pro bono* assistance of Steven G. Bradbury and Irene Ayzenberg-Lyman, attorneys with the Dechert law firm.

The case arose in the aftermath of a patent dispute between Schering-Plough Corp. (a pharmaceutical company that is now part of Merck & Co.) and Upsher-Smith Laboratories. Schering was the initial manufacturer of a drug known as K-Dur 20. After Upsher-Smith announced plans in 1995 to produce a generic version of K-Dur 20, Schering filed a patent infringement suit, alleging that Upsher-Smith's generic drug violated Schering's patent, which was not scheduled to expire until 2006. The patent dispute was eventually settled, with Upsher-Smith agreeing to delay its entry into the market until 2001.

Several drug purchasers thereafter filed a complaint against Schering and Upshur-Smith, alleging that the patent settlement violated federal antitrust laws because it amounted to an illegal horizontal market allocation agreement. The plaintiffs alleged that because money flowed from Schering to Upsher-Smith in connection with the patent litigation settlement, the settlement should be presumed to have anticompetitive effects. They alleged that if no "reverse payment" had been made from Schering to Upsher-Smith, the parties would have reached a settlement that would have permitted Upsher-Smith to enter the market at an earlier date – thereby driving down prices paid by consumers.

A federal district court in New Jersey dismissed the lawsuit, finding that "reverse payment" patent settlements do not violate antitrust laws so long as the settlement does

not expand the scope of the patent by prohibiting marketing by the generic company even after the date on which the patent is set to expire. The plaintiffs appealed that dismissal to the Third Circuit. Both the Federal Trade Commission (which has repeatedly criticized "reverse payment" patent settlements) and the U.S. Department of Justice filed briefs in support of the appeal. In a decision issued this July, the Third Circuit reversed, siding with the plaintiffs and the FTC and thereby creating a conflict with decisions from three other appeals courts.

In its brief, WLF argued that any blanket criticism of reverse-payment patent litigation settlements is unwarranted under the antitrust laws. WLF argued that patents are, by their very nature, anticompetitive and that courts should not permit the antitrust laws to undermine the numerous benefits derived from the patent system. A patent holder who believes in good faith that another firm is violating its patent has every right both to sue for infringement and to settle the litigation on whatever terms best protects its patent rights – even if the settlement terms entail the payment of funds to the alleged infringer, WLF argued. WLF noted that the courts have long encouraged the settlement of litigation and that the antitrust rules proposed by the plaintiffs would discourage settlements by undermining their finality.

WLF also noted that the FTC previously challenged this very same patent litigation settlement. In 2005, the U.S. Court of Appeals for the Eleventh Circuit in Atlanta overturned an FTC judgment and held that Schering's settlement with Upsher-Smith did not violate antitrust laws. WLF urged the Supreme Court to review the Third Circuit decision and thereby eliminate the confusion that has arisen now that two federal appeals courts have reached opposing legal conclusions arising from a single set of facts.

WLF is a nonprofit public 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. A copy of WLF's brief is posted on its web site, www.wlf.org.