Press Release

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

FOR IMMEDIATE RELEASE December 4, 2015

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

First Circuit to Hear Oral Argument in Antitrust Suit that Seeks to Second-Guess Drug Patent Settlement

(In re Loestrin 24 FE Antitrust Litigation)

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

WASHINGTON, DC—The U.S. Court of Appeals for the First Circuit in Boston will hear oral argument this coming Monday, December 7, 2015 at 9:30 a.m., to consider if exacting antitrust scrutiny applies to virtually any agreement between a brand-name drug company and a generic drug company to settle patent-infringement litigation. In an *amicus* 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. WLF Chief Counsel Richard Samp will be available following the oral argument to discuss the case and potential outcomes.

As an incentive to develop prescription drugs, federal patent law grants brand-name drug companies the exclusive right to market a new drug for a term of years. When the patent term expires, generic drug companies may produce copycat versions that reduce retail prices sharply. If a generic company challenges the patent in court and invalidates it, the company can copy the drug sooner—with a profitable first-mover advantage. Generic companies often settle such suits, dropping patent-invalidity claims in exchange for recompense from brand-name companies.

The 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 a brand-name company to a generic company. The Court held large, unexplained cash payments may indicate a brand-name company is unreasonably restraining trade by paying a potential competitor to stay out of the market. FTC urges the First Circuit to expand that ruling by holding *any* large (even non-cash) benefit a brand-name company provides triggers antitrust scrutiny. WLF argues FTC's view conflicts with *Actavis* and would make settling drug-patent disputes nearly impossible—because no generic company will drop its potentially lucrative lawsuit in exchange for nothing.

Prior to the argument, 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, the FTC's misguided reading of antitrust law 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.

###