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SDNY Federal Judge Relies on NCLA's *Amicus Curiae* Brief in Key Ruling Limiting Antitrust Liability

In re Bystolic Antitrust Litigation

Washington, DC (March 24, 2023) – Today, Judge Lewis J. Liman of the U.S. District Court for the Southern District of New York unsealed an opinion in *In re Bystolic Antitrust Litigation*, dismissing a major antitrust lawsuit for failing to state a claim against eight pharmaceutical companies including Forest Labs (now a part of AbbVie). The decision marked a victory for NCLA, which filed an *amicus curiae* brief urging dismissal. Judge Liman's opinion highlighted NCLA's net-payment argument as a main reason for ruling that the antitrust plaintiffs failed to show that Forest's payments were "unjustified," given the services it received in return:

> The Court agrees with the argument in the amicus brief from the New Civil Liberties Alliance and the International Center for Law and Economics that the appropriate question is the "net" benefit conferred by the reverse payment and not its gross size *vel non.*

Hence, Judge Liman held that payments by a patent holder to potential infringers (net of value received in return) are neither "large" nor "unjustified" so long as they do not exceed expected litigation costs saved by settling the lawsuit. NCLA is particularly gratified that the *amicus* brief was cited since it helped to win the day.

In connection with its settlement of patent-infringement litigation, Forest Labs (the patent holder) had paid a substantial amount of cash to seven other drug companies (the alleged patent infringers). In subsequent litigation, the antitrust plaintiffs asserted that Forest's large payments proved that Forest had paid the other companies in return for their agreement not to compete with the marketing of its patented blood-pressure medication (Bystolic) and thus had violated the antitrust laws. Judge Liman disagreed, noting that the other drug companies agreed to perform substantial services for Forest in return for the payments. The judge agreed with NCLA that an antitrust plaintiff seeking to show that a patent owner has made a prohibited "large" payment to potential competitors must show a large *net* payment (the cash paid minus the value of services provided), not merely a large *gross* payment.

Forest and affiliated companies invented and developed Bystolic and thus were awarded patents granting them the exclusive right to market the blood-pressure medication. In 2011, seven generic-drug manufacturers filed applications with FDA, seeking authority to market generic forms of Bystolic. All seven claimed that the patents were invalid and that their generic formulations would not infringe the patents. Those claims essentially forced Forest to file patent-infringement suits against these generic manufacturers. Over the course of the next 20 months, Forest entered into separate settlement agreements with each of the seven generic manufacturers. The plaintiffs in the *Bystolic* antitrust litigation—a putative class of direct purchasers of Bystolic, as well as several individual retail purchasers—allege that this arrangement violated federal antitrust law by conspiring to restrain trade.

In its *amicus* brief, NCLA argued that Congress has long mandated that courts should strive to maintain a balance between the sometimes-competing claims of the patent law and antitrust law, and that antitrust law should not be used to shortchange the rights of patent holders. NCLA's successful *amicus curiae* brief was joined by the International Center for Law and Economics.

NCLA released the following statements:

"Judge Liman correctly recognized that patent owners are entitled to settle lawsuits in a manner designed to protect their property rights. Unless the courts impose reasonable limits on antitrust law, patent rights will be significantly undermined, and would-be inventors will have far less incentive to devote the energy and resources necessary to develop new and useful inventions."
— **Rich Samp, Senior Litigation Counsel, NCLA**

"While we hope that NCLA's *amicus curiae* briefs are always helpful to the court, it's quite rare for a federal judge to single out an *amicus* by name and credit an argument in its brief as key to the court's resolution of the case. My colleague Rich Samp deserves credit for the notable expertise he has developed over the years in these kinds of cases. NCLA lauds Judge Liman's openness to our *amicus* argument and his willingness to cite the brief."
— **Mark Chenoweth, President and General Counsel, NCLA**

For more information, visit the *amicus* brief page here.

ABOUT NCLA

NCLA is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar Philip Hamburger to protect constitutional freedoms from violations by the Administrative State. NCLA's public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans' fundamental rights.

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