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NCLA Amicus Brief Asks Second Circuit Appeals Court to Uphold Decision Limiting Antitrust Liability

In re Bystolic Antitrust Litigation

Washington, DC (July 25, 2023) – In a major March victory, Judge Lewis J. Liman of the U.S. District Court for the Southern District of New York [dismissed](#) the *In re Bystolic* antitrust lawsuit, citing a powerful argument in NCLA’s district court [amicus curiae brief](#) joined by the International Center for Law and Economics (ICLE). NCLA argued that an antitrust plaintiff seeking to prove that a patent owner has made a prohibited “large” payment to potential competitors must show it was a large *net* payment (the cash paid minus the value of services provided), not merely a large *gross* payment. Judge Liman cited the NCLA/ICLE *amicus* brief in his opinion.

Now, NCLA and ICLE have partnered again in the case to file an [amicus curiae brief](#) at the U.S. Court of Appeals for the Second Circuit. Congress has long mandated that courts should strive to maintain a balance between the sometimes-competing claims of patent law and antitrust law, which should not be used to shortchange the rights of patent holders. So, before Plaintiffs’ lawyers are permitted to get into court to challenge the legality of a patent-litigation settlement, the NCLA/ICLE brief argues that, at a minimum, they ought to bear the burden of demonstrating a “large” and “unjustified” *net* payment made for the purpose of restraining trade.

Plaintiffs’ antitrust lawsuit alleges that the decision of the patent holder, Forest Labs (now a part of AbbVie), to settle its patent-infringement litigation against several generic competitors amounted to a conspiracy in restraint of trade—in violation of antitrust laws. NCLA’s *amicus curiae* brief encourages the appeals court to affirm the district court’s dismissal, arguing that appellants failed to show Forest’s settlement payments to generic-drug manufacturers were “unjustified” under the Supreme Court’s *FTC v. Actavis, Inc.* precedent. The pharmaceutical at issue in the case is Bystolic, a breakthrough drug proven effective in treating high blood pressure.

As part of the settlement with seven generic-drug manufacturers, Forest agreed to permit the generic companies to begin competition several months before the expiration of Forest’s patent, and the generics agreed not to enter the market before that date. The settling parties also entered into “side deals,” whereby Forest paid the generic companies in return for providing substantial goods and services. Plaintiffs allege that Forest made these payments for the sole purpose of inducing the generics not to compete (thereby violating antitrust law) and that Forest ought to bear the burden of proving it paid no more than fair value for the goods and services it received.

NCLA released the following statement:

“The Supreme Court has long recognized that settling lawsuits should be encouraged. Settlement permits parties to devote their time and resources to more productive activities. But if plaintiff antitrust lawyers prevail in this case, there will be no more settlements of pharmaceutical patent-infringement litigation.”

— **Rich Samp, Senior Litigation Counsel, NCLA**

For more information visit the *amicus* 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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