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**In NCLA *Amicus* Win, and FTC *Amicus* Loss, Second Circuit Upholds Decision Dismissing Antitrust Suit**

*In re Bystolic Antitrust Litigation*

**Washington, DC (May 13, 2024)** – Today the U.S. Court of Appeals for the Second Circuit unanimously [upheld](#) a district court decision dismissing the *In re Bystolic* antitrust lawsuit over reverse payments. The New Civil Liberties Alliance encouraged this outcome in its *amicus curiae* [brief](#) supporting the Defendants, but the Federal Trade Commission filed an *amicus* brief for the Plaintiffs even though FTC itself had declined to file suit. NCLA argued that an antitrust plaintiff seeking to prove that a patent owner has made a prohibited “large and unjustified” 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. The Second Circuit affirmed the district court’s dismissal, deciding Plaintiffs failed to state a claim on which relief could be granted. NCLA celebrates this correct antitrust liability ruling alongside *amicus* co-signer, the International Center for Law and Economics (ICLE).

Plaintiffs’ lawsuit alleged that the Bystolic patentholder, Forest Labs (now a part of AbbVie), settled its patent-infringement litigation against several generic competitors via a conspiracy in restraint of trade—in violation of antitrust laws. Judge Lewis Liman of the U.S. District Court for the Southern District of New York [dismissed](#) the suit in February 2023, citing NCLA and ICLE’s first *amicus* [brief](#) in the case. As NCLA advised, the Second Circuit affirmed the district court’s dismissal, finding appellants failed to show Forest’s settlement payments to generic-drug manufacturers were “unjustified” under the Supreme Court’s *FTC v. Actavis, Inc.* precedent.

NCLA and ICLE pointed out that Congress has long required courts to 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. The Second Circuit was convinced, concurring that before Plaintiffs’ lawyers are permitted to get into court to challenge the legality of a patent litigation settlement, they ought to bear the burden of demonstrating a “large” and “unjustified” net payment made for the purpose of restraining trade.

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, such as ingredients for the drug’s manufacture. Plaintiffs alleged 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 commends the Second Circuit for rejecting this specious argument.

**NCLA released the following statements:**

“Today’s decision was a stunning rebuke of the Federal Trade Commission, which sought to overturn the district court’s dismissal. The FTC has for years worked to undermine patent rights by using its authority under the

antitrust laws to prevent drug companies from agreeing to reasonable settlements of their patent-infringement disputes.”

— **Richard Samp, NCLA Board of Advisors Member**

“The Second Circuit’s unanimous decision is not only an important vindication of the property rights of patent holders, but a much-needed corrective to the FTC. America is a leader in intellectual innovation, and the rewards of such innovation should not be held hostage to an agency’s misuse of its enforcement power under the antitrust laws.”

— **Peggy Little, 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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