

Fred Bartlit, Peter Bensinger and Mike Valaik Win Federal Circuit Appeal on Behalf of Bayer in Leading Patent-Antitrust Case, In re Ciprofloxacin Hydrochloride Antitrust Litigation

November 2008

In Re Ciprofloxacin Hydrochloride Antitrust Litigation, Case No. 2008-107 in the Court of Appeals for the Federal Circuit, on Appeal from the United States District Court for the Eastern District of New York, Case No. 1:00-MDL-1383 (Judge David G. Trager).

Bartlit Beck represents Bayer AG and Bayer Corporation in nationwide class action antitrust litigation related to Bayer's settlement of patent litigation against Barr Laboratories.

Bayer owns the patent on Cipro, one of the world's leading antibiotics. Barr brought a generic challenge to the Cipro patent and Bayer initiated "Hatch-Waxman" litigation in the Southern District of New York. On the eve of trial, Bayer paid Barr to settle and thereafter submitted the Cipro patent to the U.S. Patent Office for re-examination. The patent reissued and Bayer defeated three later generic challenges.

The antitrust plaintiffs consist of a class of direct purchasers of Cipro (like drug store chains) and a class of indirect purchasers (consumers). They allege that it is an antitrust violation for a brand to pay a generic challenger to settle Hatch-Waxman litigation.

The MDL proceeding was before Judge David G. Trager in the Eastern District of New York. Plaintiffs moved for summary judgment on the ground that Bayer's settlement payment to Barr was a *per se* antitrust violation. Judge Trager ruled in Bayer's favor and adopted Bayer's analytical framework for analyzing Hatch-Waxman settlements. Thereafter, the Eleventh and Second Circuits adopted Judge Trager's reasoning. Following his *per se* ruling, Judge Trager invited Bayer to file a motion for summary judgment, which Judge Trager granted.

Plaintiffs appealed to the Second Circuit, which transferred the Indirect Plaintiffs' appeal to the Federal Circuit. (The Second Circuit retained the Direct Purchasers' appeal. The Direct Purchaser appeal in the Second Circuit is fully briefed and awaiting argument.)

On October 15, 2008, the Federal Circuit affirmed Judge Trager's decision and adopted his reasoning. The decision represents a complete victory for Bayer in the Federal Circuit.

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