WilmerHale

District of Columbia Prescription Drug Excessive Pricing Act of 2005 Successfully Challenged, Declared Unconstitutional

2006-01-05

WilmerHale secured an important victory in federal court for its client the Pharmaceutical Research and Manufacturers of America (PhRMA), successfully challenging the District of Columbia Prescription Drug Excessive Pricing Act of 2005 (the Act), a new pharmaceutical price control regime enacted by the District of Columbia City Council.

The stakes in the case were very high. The new DC law purported to impose price controls on all sales of patented pharmaceuticals by manufacturers and wholesalers, regardless of where they took place, as long as the sale was upstream from an eventual retail sale in DC. The law left the administration of the price caps in the hands of the DC courts, which would examine benchmark prices in select foreign countries and weigh a handful of other factors in determining what price level to permit. If the court found a price "excessive," the law purported to authorize the imposition of fines and treble damages and an injunction against future sales at that price. The law's lack of specificity regarding what prices would be allowed by the DC courts meant that companies would be vulnerable to suit, whatever their price. And, prior to the court's decision striking down the law, the threat of suit for PhRMA's members was substantial: the DC law purported to authorize the district itself and any private citizen or organization to sue.

Although the law was sweeping and draconian, the case involved substantial litigation challenges. Most significantly, it was necessary to obtain a final judgment declaring the law unconstitutional soon after its effective date because preliminary injunctive relief could stop the district, but not private litigants, from attempting to enforce the law. Yet the law, which was passed by the DC Council on September 20, 2005, and signed by the mayor on October 4, 2005, would go into effect at the expiration of a 30-day congressional review period mandated under the DC Home Rule Act. We therefore had only 30 legislative days--less than two and one-half months--to litigate the entire case and obtain judgment. The task was made more difficult when the district sought intrusive discovery soon after we filed suit, issuing demands that called for the production of potentially sensitive marketing information from PhRMA's members.

We filed suit in the United States District Court for the District of Columbia on October 12, 2005, shortly after the mayor signed the law. Pressing to expedite the case, we successfully urged the

court to consolidate our preliminary injunction motion with summary judgment proceedings. As a result, the court set oral argument on our motion for summary judgment for November 23, just six weeks after we filed suit and prior to the expiration of the congressional review period on December 10. The district court issued its judgment invalidating the Act on December 22, 2005, less than three months after the mayor signed the Act into law and less than two weeks after it took effect. By obtaining the judgment in this very short timeframe, we successfully opposed the district's efforts to slow down the case with intrusive discovery. Ultimately the case was decided without discovery.

In its December 22 judgment, the district court enjoined the district from enforcing the Act, and declared it invalid on two grounds: it was preempted on its face under the federal patent laws, and violated the Interstate Commerce Clause as applied to transactions occurring outside the district.

To obtain a copy of the district court's opinion or for more information on this or other litigation matters, contact the authors listed above.

Authors

David W. Ogden

PARTNER

Chair, Government and Regulatory Litigation Practice Group

david.ogden@wilmerhale.com

+1 202 663 6440