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Former Clinton Deputy Solicitor General sheds light on flaws in Federal Trade Commission's case in FTC v. Actavis Inc.

New White Paper from Paul Bender questions parallel legislative efforts in the Senate

WASHINGTON, DC – On the day the U.S. Supreme Court hears oral arguments in *FTC v. Actavis*, a case that challenges the rights of brand-name and generic drug manufacturers to settle patent litigation out of court, Paul Bender, who served as Principal Deputy Solicitor General under President Bill Clinton, has released [a new white paper](http://www.gphaonline.org/media/cms/S.214_Is_Harmful_and_Inappropriate_Legislation_3-22_.pdf) (http://www.gphaonline.org/media/cms/S.214_Is_Harmful_and_Inappropriate_Legislation_3-22_.pdf) on the topic. Bender, currently professor of law and Dean Emeritus of the University of Arizona Law School, wrote the paper with colleagues Christopher A. Mohr and Michael R. Klipper. Entitled, "Inappropriate Interference With the Fundamental Right to Settle Litigation," the paper identifies a number of ways that the law supports the right of companies to include considerations in the settlement of these cases.

"There is no one more qualified to comment on these matters than Paul Bender," said Ralph G. Neas, President and CEO of the Generic Pharmaceutical Association. "From the time that he clerked for Judge Learned Hand and then for Justice Felix Frankfurter until today, Paul has had a deep understanding of constitutional law. That, coupled with his decades of experience with the impact that policy can have on citizens, is what makes his analysis so salient. Bender's paper confirms that not only should the court uphold the fundamental right of companies to include consideration in settling these cases, but that Congress should, too."

The white paper examines legislation currently before the Senate, S.214, that raises many of the same issues as the case facing the Court today. The bill seeks to restrict the right of brand and generic pharmaceutical companies to settle out of court. Bender finds the premise of the law— and the FTC case— "hopelessly flawed," due to interfering with litigant rights to settle, unfair burdens of proof, conflict with the statutory presumption of patent validity, frustration of the pro-litigation provisions of Hatch-Waxman, and precluding pro-consumer settlements.

Specifically, Bender's paper takes aim at the idea that settlements are anti-competitive, stating instead that the patent is by design an anti-competitive legal measure to protect intellectual property. The paper states that "By addressing the presence of consideration in patent settlements entirely from the perspective of whether or not competition is increased, S. 214 ignores the fact that patents are themselves 'anti-competitive': the inventor has a monopoly in the inventions as a reward for innovation. That is why courts have generally held patent licenses immune from antitrust review."

He goes on to recommend that the Government use its current statutory authority to ensure that settlements are in the interest of consumers. In discussing the FTC's preferred solution of the presumptive prohibition of consideration, Bender says, "Rather than adopting that unusual and dangerous solution, the government should utilize the tools it has in hand under the Medicare Modernization Act of 2003 that require the FTC to review and prove the illegality of settlements on a case-by-case basis."

Neas said the paper represents a primer for those interested in learning more about patent settlements. "We firmly believe the Court will rule favorably for our position, as have three of four circuit courts of appeal, because patent settlements allow the introduction of the generic drug before brand patents expire. Further, they save the federal government and consumers billions of dollars annually. This new paper provides a useful roadmap for legislators, addressing point-by-point why interfering with this legal right is the wrong thing to do."

[White paper: S. 214's Inappropriate Interference With the Fundamental Right to Settle Litigation](http://www.gphaonline.org/media/cms/S.214_Is_Harmful_and_Inappropriate_Legislation_3-22_.pdf)
(http://www.gphaonline.org/media/cms/S.214_Is_Harmful_and_Inappropriate_Legislation_3-22_.pdf)

[Patent Settlements Fact Sheet](http://www.gphaonline.org/media/cms/Updated_1-pager_on_Settlements_3.12.13.pdf)
(http://www.gphaonline.org/media/cms/Updated_1-pager_on_Settlements_3.12.13.pdf)

[Summary of GPhA Amicus in FTC v. Actavis](http://www.gphaonline.org/media/cms/Summary_of_GPhA_Amicus_in_FTC_v_Actavis_FINAL.PDF)
(http://www.gphaonline.org/media/cms/Summary_of_GPhA_Amicus_in_FTC_v_Actavis_FINAL.PDF)

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