Washington Legal Foundation
Advocate for Freedom and Justice®
2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302 wlf.org

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WLF Month in Review

This WLF Litigation Division feature highlights WLF's court and agency filings, as well as decisions issued in response to WLF's filings. In this edition, we list December 2018 filings and results.

New Filings

- The First Amendment protects the truthful, non-misleading advertising of alcoholic beverages. (*Missouri Broadcasters Association v. Taylor*)
- The federal government may not compel drug manufacturers to list prices in their advertising. (*In Re: Regulation to Require Drug-Price Transparency*)
- Antitrust liability under a refusal-to-deal theory should be narrowly construed. (*Viamedia v. Comcast*)
- The federal courts should adhere to congressional limitations on venue for patent-infringement lawsuits. (*Erfindergemeinschaft UroPep GbR v. Eli Lilly and Co.*)

Decisions

- U.S. Court of Appeals for the District of Columbia Circuit refuses to enforce an NLRB ruling under which a company was deemed a "joint employer" of its independent contractor's employees. (*Browning-Ferris Industries of California, Inc. v. NLRB*)
- FDA withdraws 2013 proposed labeling-change rule that threatened generic drug makers with increased product liability. (*In Re: Proposed Labeling Changes for Approved Drugs)*

Litigation is the backbone of WLF's public-interest mission. We litigate nationally before state and federal courts and agencies. Our team, often with the *pro-bono* assistance of leading private attorneys, litigates original actions, files *amicus* briefs, participates in the regulatory process, and provides constitutional analysis before federal agencies and Congress.

If you become aware of a pending legal or regulatory matter in which WLF's unique public-interest participation would advance economic liberty, please contact WLF Chief Counsel Richard Samp.

WLF Litigation Division

Richard Samp, Chief Counsel
rsamp@wlf.org

Cory Andrews, Senior Litigation Counsel
candrews@wlf.org

Corbin Barthold, Litigation Counsel
cbarthold@wlf.org

Marc Robertson, Staff Attorney
mrobertson@wlf.org

NEW FILINGS

The First Amendment protects the truthful, non-misleading advertising of alcoholic beverages.
Missouri Broadcasters Association v. Taylor

On December 13, WLF urged the U.S. Court of Appeals for the Eighth Circuit to affirm a district court's ruling that invalidated on First Amendment grounds portions of a Missouri law that restricts truthful, non-misleading commercial speech. The case arises from a constitutional challenge to Missouri's "tied-house" law. Enacted in the wake of the repeal of Prohibition, the law prohibits alcohol manufacturers and distributors from giving any advertising-related support to alcohol retailers. Repeating the now-familiar claim of government regulators everywhere, Missouri argues on appeal that its tied-house law regulates conduct, not speech, and so is exempt from First Amendment scrutiny. But, as WLF's brief shows, even laws aimed at proper regulatory concerns can unduly chill speech protected by the First Amendment. By restricting the funding of speech, WLF contends, Missouri restricts speech. WLF's brief was joined by the Show-Me Institute, a Missouri nonprofit.

The federal government may not compel drug manufacturers to list prices in their advertising.
In Re: Regulation to Require Drug-Price Transparency

On December 17, WLF urged the Centers for Medicare and Medicaid Services (CMS) to withdraw a proposed rule that would require drug makers to convey the wholesale acquisition cost, or "list price," of any prescription drug advertised in direct-to-consumer (DTC) television ads. As WLF's comment makes clear, no matter how well-meaning its intentions, CMS may exercise only the limited regulatory authority that Congress granted to it by statute. Yet *no* statute authorizes CMS to require disclosure of list prices in DTC television ads. WLF's comment also shows that CMS's list-price disclosure mandate would violate drug makers' First Amendment right to speak truthfully about their products. In light of these deficiencies, WLF has asked CMS to withdraw the proposed rule in its entirety.

Antitrust liability under a refusal-to-deal theory should be narrowly construed.
Viamedia v. Comcast

On December 17, WLF filed a brief with the U.S. Court of Appeals for the Seventh Circuit, urging it to uphold the dismissal of an antitrust refusal-to-deal claim. Refusal-to-deal liability arises only when an alleged monopolist ends an established course of dealing without any rational business reason for doing so. Here, the defendant, which runs a clearing house for cable-television advertising, cut ties with the plaintiff, an advertising broker, because the defendant wanted to move into the plaintiff's market. Moving into that market, and thereby cutting out the middleman, allowed the defendant to lower costs and create other efficiencies. In its brief, WLF defends the "no rational reason" refusal-to-deal legal standard. This standard ensures that courts do not try to grapple with questions they are not equipped to answer—that is, complex questions about ambiguous business behavior. WLF also explains the benefits of "vertical integration"—the defendant's effort to bundle two distinct services—and shows that these benefits have in fact been obtained.

The federal courts should adhere to congressional limitations on venue for patent-infringement lawsuits.
Erfindergemeinschaft UroPep GbR v. Eli Lilly and Co.

On December 11, WLF filed a brief in the U.S. Court of Appeals for the Federal Circuit, urging it to grant rehearing in a case in which a three-judge panel substantially undermined restrictions on where plaintiffs are permitted to file patent-infringement suits. The panel affirmed a district court ruling (from the plaintiff-friendly Eastern District of Texas) that the defendant "waived" objections to having the suit heard in Texas—even though the defendant voiced its objections throughout the district court proceedings. WLF charged that the Federal Circuit is inappropriately invoking waiver arguments to evade the Supreme Court's recently announced limitations on patent venue. The Supreme Court ruled that venue is proper only in a district in which an alleged infringer maintains "a regular and established place of business." That ruling overturned a longstanding Federal Circuit rule that allowed infringement suits to be filed virtually anywhere in the country.

DECISIONS

U.S. Court of Appeals for the District of Columbia Circuit refuses to enforce an NLRB ruling under which a company was deemed a "joint employer" of its independent contractor's employees.
Browning-Ferris Industries of California, Inc. v. NLRB

On December 28, the U.S. Court of Appeals for the District of Columbia Circuit issued a decision refusing to enforce a 2015 National Labor Relations Board (NLRB) employment ruling under which regulated entities could be deemed "joint employers" of another company's employees—and then held fully liable for any obligations owed to those employees. The decision was largely favorable to WLF, which filed a brief urging rejection of the NLRB ruling. The court agreed with WLF that Congress did not authorize NLRB to designate a company the "joint employer" of the employees of its independent contractors simply because the company exerts control over the manner in which the independent contractors operate. Rather, such designation is permissible only if the company controls the "essential terms and conditions of employment" for the contractor's employees—albeit the court recognized that such controls are a relevant consideration even if only "indirect."

FDA withdraws 2013 proposed labeling-change rule that threatened generic drug makers with increased product liability.
In Re: Proposed Labeling Changes for Approved Drugs

On December 13, the Food and Drug Administration (FDA) announced withdrawal of a controversial proposed rule that would have permitted generic drug companies to make unilateral changes to their product labeling. The decision marked a major victory for WLF, which repeatedly urged FDA to abandon the rule. WLF argued that alternative procedures could ensure that new safety information about FDA-approved drugs reaches doctors and consumers much more quickly than under the proposed rule. WLF explained that the chief result of FDA's proposal would be consumer confusion, brought on because different versions of the same drug would bear conflicting safety warnings. WLF charged that the proposed rule's only purpose was to placate the plaintiffs' bar. Lawyers supported the rule because it would have facilitated the filing of lawsuits against generic drug manufacturers. If they are permitted to change their labels unilaterally, they can be sued for failing to do so.

