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WLF and Antitrust Scholars Urge Second Circuit to Vacate FTC Order Misapplying Quick-Look Standard

(1-800 Contacts, Inc. v. Federal Trade Commission)

“The FTC summarily punished 1-800 Contacts for trying to protect itself from rivals free riding on its advertising. The FTC says it has thereby promoted competition. All it has really done is discourage innovation.”
—Corbin K. Barthold, WLF Litigation Counsel

WASHINGTON, DC—Washington Legal Foundation today filed an *amicus curiae* brief urging the Second Circuit to vacate an FTC order misapplying the “quick look” antitrust standard. WLF filed the brief on behalf of both itself and prominent antitrust scholars Richard A. Epstein, Keith N. Hylton, Thomas A. Lambert, Geoffrey A. Manne, and Hal Singer.

1-800 Contacts pioneered the online contact lens market. And it continues to spend heavily on television, radio, and print advertising to draw new customers online. It has attracted many competitors. Some of these firms have tried to free ride on 1-800’s offline advertising by buying the advertising space at the top of internet-search results for terms like “1-800 Contacts.” 1-800 sued or threatened to sue these firms for trademark infringement. Each dispute settled, and as part of each settlement, the allegedly infringing firm agreed not to buy advertisements keyed to 1-800’s trademark terms.

The FTC condemned these settlements as an antitrust violation. Instead of conducting an extensive analysis of the evidence, however, it applied the “quick look” standard, under which the conduct at issue is *presumed* anticompetitive.

The antitrust scholars and WLF contend that this was error. The quick-look standard governs only when the conduct at issue is obviously anticompetitive. Internet-search advertising is a relatively new phenomenon, so there is little that is “obvious” about its impact on competition.

Further, there are solid procompetitive factors supporting the settlements. Key among these—and the focus of the scholars’ and WLF’s brief—is the settlements’ discouragement of advertisement free riding. The settlements helped ensure that when 1-800’s broad (and expensive) advertising attracted new customers specifically to 1-800, competitors could not use internet-search advertising to poach those customers on the cheap. By reducing free riding, the settlements likely maximized the *net* amount of advertising for online contact lenses—to the benefit of consumers.

Celebrating its 42nd year, WLF is America’s premier public-interest law firm and policy center advocating for free-market principles, limited government, individual liberty, and the rule of law.

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