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October 2, 2019

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WLF Urges Supreme Court to Review Ninth Circuit's Retreat from Sound Antitrust Analysis

(Swisher International v. Trendsetta USA)

“If left to stand, the Ninth Circuit’s decision will sow confusion about what antitrust law is even for.”

—Corbin K. Barthold, WLF Senior Litigation Counsel

WASHINGTON, DC—Washington Legal Foundation today filed an amicus curiae brief urging the U.S. Supreme Court to review a Ninth Circuit decision that badly erodes modern antitrust law’s focus on consumer welfare.

A California federal jury was told that the defendant before it violated the antitrust laws if its only purpose, in refusing further dealings with the plaintiffs, was to harm a competitor. The Ninth Circuit approved this instruction even though the jury, by following it, could stand an antitrust violation solely on the defendant’s subjective intent.

Stripping objective criteria from the antitrust refusal-to-deal standard, WLF explains in its brief, is a major departure from settled antitrust law. In antitrust’s early days, bad intent was often closely linked to liability. It eventually became clear, however, that what matters, when a business’s conduct is scrutinized under the antitrust laws, is not what the business intended in theory, but what its conduct accomplished in reality. It is precisely by setting out to harm a rival that a business often ends up doing the most good for consumers and society at large. This became the uniform position of the federal courts. The Ninth Circuit’s ruling is a drastic step backwards.

WLF’s brief urges the Supreme Court to grant review and clarify that economic effects, not subjective intent, are the cornerstone of antitrust law.

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

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