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WLF Asks D.C. Circuit to Uphold Block on List-Price-Disclosure Mandate for Drug Maker's TV Ads

(Merck & Co. v. HHS)

“Not only does HHS lack the statutory authority to compel drug makers to display irrelevant and misleading list prices for drugs in their television ads, but doing so would run roughshod over manufacturers’ well-established First Amendment right not to speak.”

—Cory Andrews, Vice President of Litigation

WASHINGTON, DC—Washington Legal Foundation (WLF) today urged the U.S. Court of Appeals for the D.C. Circuit to affirm a decision blocking an agency rule that would allow the Secretary of Health and Human Services (HHS) to require drug makers to convey the wholesale acquisition cost, or “list price,” of any prescription drug advertised in direct-to-consumer (DTC) television ads. WLF was joined on its *amicus curiae* brief by the Allied Educational Foundation.

The DTC Rule is touted as part of the administration’s effort to reduce overall healthcare costs. But as WLF’s brief makes clear, no matter how well-meaning its intentions, HHS may exercise only the limited regulatory authority that Congress granted it by statute. Yet *no* statute authorizes the Centers for Medicare and Medicaid Services (CMS) to require disclosure of list prices in DTC television ads.

Its lack of statutory authority is not the only fatal flaw in the DTC Rule. The list-price-disclosure mandate would also violate drug makers’ First Amendment rights. The First Amendment protects a speaker’s choices about both what to say and what *not* to say. And by compelling drug makers to speak a particular message in their DTC ads, the proposed rule seeks to alter the content of their speech. Under Supreme Court precedent, HHS’s controversial DTC Rule violates the First Amendment because it misleads consumers about their likely out-of-pocket costs for prescription drugs.

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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