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WLF Urges Delaware Supreme Court to Enforce Contracts as Written

(*Glaxo Group Limited v. DRIT LP*)

“In the end, only the parties themselves can draft clear, thorough, workable contracts.”

—Corbin K. Barthold, WLF Senior Litigation Counsel

WASHINGTON, DC—Washington Legal Foundation today filed an *amicus curiae* brief urging the Delaware Supreme Court not to use the implied covenant of good faith and fair dealing to rewrite contracts.

The implied covenant bars contracting parties from exploiting each other in ways that could not possibly have been foreseen when the contract was signed. Delaware’s courts often correctly note that the implied covenant does not override a contract’s explicit terms. On occasion, however, those courts also say that the implied covenant can be used to create new terms the parties could have, but did not, think to place in their contract. In this case, a trial court let a jury add such terms to a contract involving drug-patent royalties.

WLF’s brief urges the Delaware Supreme Court not to let the implied covenant drift too far from the text of the contract. Especially where, as in this case, the contract at issue is an agreement between sophisticated companies, a court’s core assumption should be that parties can, and may be expected to, negotiate for what they want and then write it down.

Holding parties closely to their written agreements, WLF explains, keeps the courts out of the business of trying to “fix” contracts, something they cannot possibly do well. It also discourages implied-covenant litigation. Above all, it benefits the contracting parties, by encouraging them to draft well-written contracts. As Judge Learned Hand wrote: “If parties wish more certainty, they must use more certain words.”

WLF is grateful to Nicholas E. Skiles, of Swartz Campbell LLC, for his *pro bono* assistance with the filing of WLF’s brief.

Celebrating its 43rd 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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