

MONTH IN REVIEW

February 2025

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Washington Legal Foundation

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WLF.org



Washington Legal Foundation's *Month in Review* report is a Litigation Division feature that highlights WLF's court and regulatory filings each month, as well as decisions issued in response to WLF's filings.

To learn more about WLF's litigation work, visit our website at WLF.org.

New Filings

Cisco Systems v. Doe I

Eli Lilly & Co. v. Becerra

Johnson & Johnson v. HRSA

*Johnson & Johnson v. Fortis
Advisors LLC*

Decisions

*Wisconsin Bell v. United
States ex rel. Heath*

*Dewberry Group, Inc. v.
Dewberry Engineers Inc.*
victory

NEW FILINGS

Cisco Systems v. Doe I

WLF asks the Supreme Court to clarify that federal courts may not imply a cause of action for aiding and abetting under the Alien Tort Statute.

On February 28, WLF asked the U.S. Supreme Court to review, and ultimately to overturn, an appeals court decision that would allow activists to impose liability on U.S. entities for aiding and abetting a third-party's alleged human rights violations overseas. In its brief urging review, WLF contends that the Ninth Circuit, by permitting such suits to proceed, has disregarded both the Constitution's and the Supreme Court's crucial limits on a federal court's ability to imply a new cause of action under the ATS. As WLF's brief shows, whether the ATS implicitly supplies a remedy for aiding and abetting is a decision best left to Congress, not the Judiciary.

On February 14, WLF urged the District Court for the District of Columbia to reject HRSA's position that drug manufacturer Eli Lilly cannot use a cash-replenishment model to provide 340B pricing to certain covered entities. In its amicus brief supporting Eli Lilly, WLF argued that HRSA's recent rejection of Eli Lilly's cash-replenishment model improperly expands 340B's well-intended cost-reduction program far beyond anything its statutory text can sustain. According to HRSA, a drug manufacturer must receive pre-approval from the agency before employing a 340B pricing model. But this claim is belied by the text of 340B, which requires no such pre-approval. Moreover, HRSA's argument goes against its own historical 30-year practice of tacitly approving various 340B-compliant pricing models without requiring pre-approval. WLF's amicus brief was prepared with generous pro bono assistance from Thad Westbrook and Jeff Wald of Nelson Mullins.

Eli Lilly & Co. v. Becerra

WLF asks district court to correct agency's misinterpretation of 340B statute.

Johnson & Johnson v. HRSA

WLF urges district court to reject agency's rewrite of federal drug-discount program.

On February 10, WLF urged the District Court for the District of Columbia to reject HRSA's position that drug manufacturer Johnson & Johnson cannot use a rebate model to provide 340B pricing to certain hospitals. In its amicus brief supporting Johnson & Johnson, WLF argued that HRSA's recent threatened enforcement action improperly expands 340B's well-intended cost-reduction program far beyond anything its statutory text can sustain. According to HRSA, a drug manufacturer must receive pre-approval from the agency before employing a 340B pricing model. But this claim is belied by the text of 340B, which requires no such pre-approval. Moreover, HRSA's argument goes against its own historical 30-year practice of tacitly approving various 340B-compliant pricing models without requiring pre-approval. WLF's amicus brief was prepared with generous pro bono assistance from Thad Westbrook and Jeff Wald of Nelson Mullins.

On February 7, WLF asked 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. Sometimes, 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 include in their contract. Here a trial court added such terms to an earnout provision in a merger-and-acquisition contract. WLF's brief supports reversal of that rewrite and urges the Delaware high court not to let the implied covenant drift too far from the contract's text. WLF is grateful to Nicholas E. Skiles of Swartz Campbell LLC for his pro bono assistance in filing of WLF's brief.

Johnson & Johnson v. Fortis Advisors LLC

WLF asks Delaware high court to enforce contracts as written.

DECISIONS

Wisconsin Bell v. United States ex rel. Heath

The Supreme Court holds that a qui tam relator may invoke the False Claims Act if the government provided any portion of the money sought.

On February 21, the Supreme Court affirmed a Seventh Circuit decision that held that qui tam relators may sue under the FCA so long as the government “provided”—supplied, furnished, or made available—any portion of the money sought. The decision was a setback for WLF, which filed a brief explaining how the Court’s decision in this case would negatively impact other privately administered programs that do not place the federal fisc directly at risk.

On February 26, the Supreme Court reversed a Fourth Circuit decision allowing district courts to require infringing defendants to disgorge the profits of non-party corporate affiliates. The Supreme Court explained that in awarding the “defendant’s profits” to the prevailing plaintiff in a trademark infringement suit under the Lanham Act, a district court can award only profits ascribable to the “defendant” itself. The decision was a victory for WLF, which filed a brief in the case arguing that when Congress invokes equity, it limits the types of recovery available to plaintiffs. Here, that means courts cannot award disgorgement of profits earned by non-parties.

Dewberry Group, Inc. v. Dewberry Engineers Inc.

The Supreme Court limits damages in trademark cases to profits attributable to party defendants.

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Litigation is the backbone of WLF’s public-interest mission. We litigate nationally before state and federal courts and agencies. Our team, at times 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 our General Counsel and Vice President of Litigation, Cory Andrews.

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