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WLF Asks California Appeals Court To Reject Novel Liability Theory For Prescription Drugs

(Gilead Sciences, Inc. v. Superior Court)

“Imposing liability for non-defective products would be devastating to manufacturers and consumers alike.”

—Cory Andrews, WLF General Counsel and Vice President of Litigation

WASHINGTON, DC—Today Washington Legal Foundation (WLF) again urged California’s First District Court of Appeal to reject a radical new theory of liability for manufacturers of non-defective prescription drugs. WLF joined the U.S. Chamber of Commerce, the California Chamber of Commerce, and the Alliance for Automotive Innovation on the supplemental amicus brief, which was drafted by Justin Sarno and Ben Fabens-Lassen of DLA Piper LLP.

The case arises from Gilead Sciences’ successful HIV/AIDS drug, tenofovir disoproxil fumarate (TDF). Plaintiffs allege injury from TDF but do not allege any defect with the design, manufacture, marketing, or labeling of TDF. In denying Gilead’s summary judgment motion, the trial court held that Gilead could be held liable in tort for not developing and selling tenofovir Alafenamide (TAF)—a completely different drug. Yet plaintiffs do not argue that Gilead should be liable for not implementing a reasonable alternative design of the same drug under well-settled California product liability law. Rather, they contend that Gilead should be liable in tort for not developing and selling an entirely different product.

As WLF explained in its supplemental amicus brief, the plaintiffs’ novel theory of liability makes a hash of California tort law. Under longstanding principles governing product-based injuries, a concession that the product at issue is not defective should end the litigation. Eliminating the defect element from product-based claims would open the door to untethered liability and undermine product innovation. Under such a regime, any business-related justification for delaying a product’s release will be transformed into a basis for tort liability.

Celebrating its 46th 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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