



March 18, 2008

COURT OF APPEALS REVERSES INSIDER TRADING CONVICTION *(United States v. Nacchio)*

The U.S. Court of Appeals for the Tenth Circuit in Denver, Colorado reversed the conviction of Joseph P. Nacchio, former CEO of Qwest Communications, for insider trading and took the rare step of ordering the case to be retried before a different federal judge. The decision yesterday was a victory for business civil liberties and the Washington Legal Foundation (WLF), which filed a brief in the case urging the court to reverse the conviction and the six-year prison sentence.

At his trial last year, Nacchio was acquitted on 23 counts of securities fraud but convicted on 19 other counts for trading on inside information. The trial judge sentenced Mr. Nacchio to six years' imprisonment and fined him \$19 million. On appeal, Nacchio's attorneys argued that the evidence was insufficient to convict him, that the jury was improperly instructed, and that the judge improperly excluded expert testimony relevant to Qwest's business prospects and Nacchio's trading patterns.

In the 2-1 decision, Circuit Judge Michael McConnell ruled that the district court improperly excluded the key defense expert witness at trial, who would have provided an economic analysis showing that Nacchio's sales were inconsistent with trading on inside information. He would have also testified that, in any event, Qwest stock was not significantly affected when the alleged non-public information was released.

The appeals court took U.S. District Court Chief Judge Edward Nottingham to task for not allowing Nacchio's defense attorneys to argue against the government's so-called "Daubert" motion to exclude the expert, stating "A judge does not necessarily have to let lawyers 'argue later on,' [after issuing a ruling to exclude the expert] but he has to let them argue *sometime*." As for Judge Nottingham's facile conclusion that the expert was not needed because the jury could use its common sense and knowledge, the court of appeals again criticized the judge, stating "Armchair economics is not the way to decide complex securities cases." Because it appeared that Judge Nottingham could not be fair and objective, the court ordered that the case be retried before a different judge.

WLF's brief was filed with the *pro bono* assistance of David S. Hoffner, Andrew J. Levander, Jason O. Billy, and David P. Staubitz of Dechert LLP in New York, and Michael L. Kichline of Dechert's Philadelphia office.

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For additional information, contact Paul Kamenar, WLF's Senior Executive Counsel at 202-588-0302. A copy of WLF's brief is posted on its website at www.wlf.org.

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