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## **COURT URGED NOT TO REVIEW DISMISSAL OF SUIT AGAINST MALT BEVERAGE SALES**

*(Kiley v. Calif. Dept of Alcoholic Beverage Control)*

The Washington Legal Foundation (WLF) today urged the California Supreme Court to uphold an appeals court decision that dismissed a suit designed to impose significant restrictions on flavored malt beverage (FMB) sales by increasing taxes and prohibiting their sale in convenience and grocery stores statewide.

In a brief filed in *Kiley v. Calif. Dept of Alcoholic Beverage Control*, WLF argued that California's long-standing policy of classifying FMBs as "beer" for regulatory purposes fully complies with California law. WLF further argued that the appeals court properly deferred to the Department of Alcoholic Beverage Control's (ABC) interpretation of relevant statutes. WLF argued that further review of the case is particularly unwarranted in light of the California legislature's ongoing review of FMB sales regulations; WLF argued that it makes little sense for the Court to review the ABC's compliance with existing statutes given that those statutes may be amended in the near future.

The plaintiffs argue that California law requires FMBs to be classified as "distilled spirits" instead of as "beer." If that reclassification is undertaken, the price paid by consumers for FMBs will increase significantly (due to a higher tax burden), and as many as 35,000 small retailers across the State would be forced to discontinue FMB sales because they are licensed to sell only beer and wine, and not distilled spirits. The plaintiffs argue that further restrictions on FMB sales are required to prevent them from being sold to those under 21.

The California Court of Appeal dismissed the lawsuit, finding no merit in the plaintiffs' misclassification claims. The plaintiffs have petitioned the California Supreme Court to review that decision.

"This suit is nothing more than a neo-prohibitionist assault on the business community. Contrary to the plaintiffs' claims, there is simply no evidence that sales of these beverages are targeted toward those under 21, or that underage drinking of flavored malt beverages is a particular problem," said WLF Chief Counsel Richard Samp after filing WLF's brief. "WLF takes a back seat to no one in supporting legitimate steps to reduce underage drinking, but this

lawsuit is not such a step but rather would simply make it much more difficult for adults to purchase an increasingly popular product," Samp said.

WLF noted that all available evidence suggests that flavored malt beverages, which represent only 2.6% of the entire beer market, are no more subject to underage drinking abuse than any other category of alcoholic beverage. WLF called on state officials to concentrate instead on steps that can make a real difference in reducing underage consumption, including increased law enforcement and alcohol education programs directed at youth.

WLF noted that flavored malt beverages have the same alcohol content as beer (5% by volume), underage drinking is lower than when flavored malt beverages first hit the market in 1999, and that recent increases in underage drinking have occurred at a time when advertising for flavored malt beverages has been decreasing. WLF further noted that after being requested by consumer groups to investigate the issue, the Federal Trade Commission concluded that there is no evidence that the flavored malt beverage industry has been targeting underage drinkers.

WLF charged that if the suit is successful, the 35,000 small retailers that now sell flavored malt beverages will be hurt financially by no longer being permitted to carry a popular product. WLF stated that there is no reason to penalize the many adults who prefer the taste of flavored malt beverages over other types of beer, when doing so will do nothing to combat underage drinking. WLF's brief further argued that the California legislature has indicated that it agrees with the ABC's interpretation of relevant classification statutes.

"State officials have acted correctly in rejecting these neo-prohibitionist efforts to impose significant restrictions on sales of a legitimate product. There is no sound reason for the courts to second-guess that decision," Samp said.

WLF is a public interest law and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government. In particular, WLF has appeared in numerous federal and State courts in cases raising issues related to the right of businesses to market legitimate products without unwarranted government interference.

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For further information, contact WLF Chief Counsel Richard Samp, 202-588-0302. A copy of WLF's brief is posted on its website, [www.wlf.org](http://www.wlf.org).