

COURT DECLINES TO REVIEW LARGEST-EVER AWARD UNDER ANTITRUST LAWS *(United States Tobacco Co. v. Conwood Co., No. 02-603)*

The U.S. Supreme Court this week declined to review the largest damages award ever granted in the history of antitrust law enforcement: \$1.05 billion.

The decision was a setback for the Washington Legal Foundation, which (on behalf of four eminent economists and statisticians) had filed a brief in the case, *United States Tobacco Co. v. Conwood Co.*, asking that review be granted. WLF argued that the plaintiff used "junk science" to calculate its alleged damages in this garden-variety business dispute.

WLF filed its brief on behalf of four of the nation's leading experts in using economic models to calculate damages, including a Nobel laureate. Its clients are: Franklin M. Fisher (a professor of economics at MIT who served as the government's chief economic witness in *U.S. v. Microsoft*); Daniel L. McFadden (a professor of economics at the University of California, Berkeley, who received the 2000 Nobel Prize in economics for his work in econometrics); Daniel L. Rubinfeld (a professor of law and economics at the University of California, Berkeley, who served as Deputy Assistant Attorney General in the Justice Department's Antitrust Division during the Clinton Administration); and Stephen E. Fienberg (a professor of statistics and social science at Carnegie Mellon University who served as the editor for *The Evolving Role of Statistical Assessments As Evidence in the Courts*, a standard reference work for lawyers and judges).

The Court denied review in a one-sentence order and did not explain its decision. A small silver lining is that at the same time as it denied review, it granted WLF's motion for leave to file its brief. The plaintiffs had objected to WLF's brief, asserting that the arguments WLF was asserting were outside the scope of the defendant's petition for review.

"The quality of decision-making in the federal courts on economic issues is largely dependent on the willingness of judges to take seriously their responsibility as gatekeepers, to ensure that unsound scientific evidence is not presented to the jury," said WLF Chief Counsel Richard Samp after the Court denied review. "The record in this case suggests strongly that judges are not doing enough to ensure that only sound science is being admitted into evidence," Samp said.

The case involves a dispute between United States Tobacco Co. ("USTC"), the dominant player in the market for moist snuff (a form of smokeless tobacco), and Conwood Co., one of its competitors. Conwood alleges that between 1990 and 1997, USTC engaged in a series of unfair business practices designed to inhibit Conwood's sales growth. Among other things, USTC is alleged to have induced many retailers to display USTC's products more prominently than Conwood's. During the 1990-97 period, overall moist snuff sales increased considerably, as did Conwood's market share, sales, and profits. Nonetheless, Conwood contends that its market share would have increased even more quickly but for USTC's marketing practices.

In 2000, a jury found that USTC's conduct amounted to an antitrust violation and awarded Conwood \$1.05 billion in damages, the largest award in the history of antitrust law enforcement. Virtually the only evidence introduced by Conwood regarding its damages was the testimony of its economic expert, Richard Leftwich, who testified that Conwood's sales growth was slowed considerably by USTC's practices. The jury verdict was later affirmed by the U.S. Court of Appeals for the Sixth Circuit in Cincinnati.

WLF's brief asked the Supreme Court to review the Sixth Circuit's decision. The brief asked the Court to review the damages award only, not the finding of antitrust liability.

WLF's four clients reviewed Mr. Leftwich's testimony and concluded that his economic model was wholly deficient and did nothing to demonstrate that Conwood's alleged damages were caused by USTC's conduct. WLF's brief argued that expert testimony, such as Mr. Leftwich's, that fails to conform to basic norms of economic and statistical analysis should be excluded from evidence under Rule 702 of the Federal Rules of Evidence. WLF argued that the Supreme Court should grant review in this case to emphasize to lower federal courts the importance of their roles as "gatekeepers" who are charged with ensuring that junk science is excluded from the courtroom.

WLF is a public interest law and policy center with supporters in all 50 States. It devotes a considerable portion of its resources to tort reform and to combatting excessive tort judgments.

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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 web site, www.wlf.org.