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## WLF Presses California Supreme Court to Rein in Erroneous Award for Prospective Lost Profits

*(Asahi Kasei Pharma Corp. v. Actelion Ltd.)*

**“If the California Supreme Court allows this \$400 million judgment to stand, it will discourage companies from investing in California for fear of opening themselves up to crippling tort awards on the thinnest of speculative claims.”**

**– Richard Samp, WLF Chief Counsel**

WASHINGTON, DC—The Washington Legal Foundation (WLF) today pressed the California Supreme Court to reverse an appeals court decision that would lift virtually all restrictions on the award of damages for prospective lost profits. A trial court awarded nearly \$400 million in lost-profits damages to a small drug company which claimed that, but for the defendants’ actions, a drug it had begun to develop would have received FDA approval and become a huge commercial success. In its brief supporting the petition for review, WLF argued that lost profits should never be awarded unless it is “reasonably certain” that they would have been earned but for the defendants’ conduct—a standard the plaintiff here came nowhere close to meeting.

The plaintiff Asahi Kasei Pharma Corp., a Japanese drug company, claims that Actelion Ltd. and its top executives induced drug-development firm CoTherix to breach a contract under which CoTherix was to conduct clinical trials of Fasudil (one of Asahi’s drugs). The trials were designed in hopes of gaining eventual FDA approval to market Fasudil for treatment of stable angina and pulmonary arterial hypertension. After CoTherix backed out, Asahi was unable to find an American licensee willing to assume CoTherix’s developmental responsibilities.

Seven years elapsed, yet no one else agreed to conduct a double-blind clinical study designed to determine Fasudil’s safety and effectiveness. The trial court nonetheless awarded Asahi nearly \$400 million in damages, concluding that the jury could decide the likelihood that FDA would have approved Fasudil and that the drug would have become a commercial success. WLF argued that it is impossible for a manufacturer whose drug is at very early stages of development to demonstrate “reasonable certainty” of eventual FDA approval because FDA never approves the great majority of drugs that reach a similar developmental stage.

Upon filing its brief, WLF issued the following statement by Chief Counsel Richard Samp: “The appeals court opened the floodgates to lottery-like damages awards by upholding the \$400 million prospective profits award in this case. If the California Supreme Court allows this judgment to stand, it will discourage companies from investing in California for fear of opening themselves up to crippling tort awards on the thinnest of speculative claims.”

*WLF is a public interest law firm and policy center that regularly litigates in support of civil justice reform, to ensure that unwarranted lawsuits do not drive up costs for all consumers.*