# Press Release

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# WLF Asks Court to Reject New Liability Theory that Would Drive Prescription Drug Costs Higher

*(T.H. v. Novartis Pharmaceutical Corp.)*

**"The lower court's decision in this case appears to be driven by a search for deep pockets and does not consider the ruling's critical legal or health consequences. The decision would stifle innovation and run headlong into the interests of patients, while serving only the plaintiffs' bar."**
**—Cory Andrews, WLF Senior Litigation Counsel**

WASHINGTON, DC—In an *amicus curiae* brief filed with the California Supreme Court today in support of the Respondents in the *T.H. v. Novartis* case, Washington Legal Foundation rebuts the Plaintiffs' suggestion that federal preemption of state-law tort claims against generic drug manufacturers somehow justifies the radical imposition of liability on former branded manufacturers of the same drug. WLF's brief argues that the lower court decision should be overturned as it marks a sharp and unwarranted break from longstanding theories of liability and principles of tort law.

In this case, a lower court held that branded pharmaceutical manufacturer Novartis could conceivably be found liable for injuries suffered by twins in utero after their mother took a generic version of an asthma medication (terbutaline) made by another company. It did so despite the facts that (a) Novartis had manufactured only the name-brand version of the drug; (b) it had divested itself of even the branded drug six years before the generic medication here was taken; and (c) Novartis had developed the original drug to treat a condition other than the off-label use of delaying pre-term labor for which the generic drug was prescribed in this case. Hence, the lower court startlingly embraced a little-known doctrine of "innovator liability" by concluding that plaintiffs could state failure-to-warn and misrepresentation claims against Novartis for injuries stemming from drugs that Novartis did not sell and no longer makes.

The brief points out that a finding for the defendant here would not leave injured consumers without legal recourse. It also explains that pre-empting state tort liability is necessary to accomplish the policy objectives Congress wrote into federal law. State courts are in no position to re-evaluate and balance the various conflicting concerns that drove Congress to the carefully calibrated liability regime that it has created for generic and branded drug manufacturers.

After filing its brief, WLF issued a statement by WLF Senior Litigation Counsel Cory Andrews:"The lower court's decision in this case appears to be driven by a search for deep pockets and does not consider the ruling's critical legal or health consequences. The decision would stifle innovation and run headlong into the interests of patients, while serving only the plaintiffs' bar."

*WLF is a free-market, public-interest law firm and policy center that seeks to ensure that economic liberty is not impeded by excessive litigation. WLF's legal studies division has published articles concerning pharmaceutical liability, including the novel theory of "innovator liability" at issue in this case.*

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