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WLF Asks U.S. Supreme Court to Prevent States from Penalizing Commercial Free Speech They Disapprove

(Ortho-McNeil-Janssen Pharmaceuticals, Inc. v. South Carolina ex rel. Wilson)

“Much valuable speech will be chilled if States are permitted to impose massive civil penalties on drug companies for providing doctors with information about their drugs. The First Amendment protects the right of companies to communicate with doctors, even if a State disagrees with what is being said.”
—Richard Samp, WLF Chief Counsel

WASHINGTON, DC—Washington Legal Foundation today filed an *amicus* brief urging the U.S. Supreme Court to review (and ultimately overturn) a South Carolina Supreme Court decision that imposed a massive \$124 million penalty on a drug manufacturer for telling doctors about potential side effects of its drugs. WLF notes that the drug manufacturer stands by the accuracy of its 2003 “Dear Doctor” letter. WLF’s brief argues that even if South Carolina could demonstrate that the letter contained inaccuracies, the First Amendment bars South Carolina from imposing a civil penalty without proof that the company knew of the alleged falsehoods.

The drug at issue, Risperdal, is an antipsychotic medication widely prescribed by doctors to treat schizophrenia and bipolar disorder. Because antipsychotic medications frequently have major side effects, there is significant public interest in an open exchange of information about the side effects most often experienced by people who use them. The 2003 “Dear Doctor” letter described Risperdal’s side effects and pointed to medical studies suggesting that Risperdal users experience fewer side effects than users of other antipsychotics. The lawsuit filed by South Carolina’s Attorney General (via private counsel working on a contingency-fee basis) alleges that the letter was inaccurate, but it does not contend the alleged inaccuracies injured anyone.

In nonetheless upholding the massive civil penalty, the South Carolina Supreme Court held that the manufacturer was not entitled to raise a First Amendment defense because, it ruled, the First Amendment does not protect allegedly false speech. WLF’s brief urges the U.S. Supreme Court to rule that the First Amendment prohibits States from imposing civil penalties on a speaker in the absence of evidence that the speaker knew that its speech was false.

After filing its brief, WLF issued the following statement by Chief Counsel Richard Samp: “Much valuable speech will be chilled if States are permitted to impose massive civil penalties on drug companies for providing doctors with information about their drugs. The First Amendment protects the right of companies to communicate with doctors, even if a State disagrees with what is being said. If inaccurate speech leads to injuries, compensation may be appropriate, but South Carolina never contended that anyone was injured by the speech here.”

WLF is a national, public-interest law firm and policy center that regularly litigates in support of free speech rights, including where violations of commercial free speech rights harm patients.