

WRF Files *Amicus* Brief in *Galfano v. Pfizer Inc*

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Washington, DC - John E. Barry, a partner in WRF's Appellate Practice, with the assistance of founding partner Bert W. Rein and associates William S. Consovoy and Thomas R. McCarthy, has filed an amici curiae brief with the California Court of Appeal in *Galfano v. Pfizer Inc.*, a case of substantial importance to California advertisers. WRF's brief supports of the position of Pfizer Inc. in connection with Pfizer's appeal of a trial court decision certifying a class action under California's amended Unfair Competition Law, notwithstanding the class representative's failure to establish that every member of the class has suffered injury-in-fact. The brief was filed on behalf of the U.S. Chamber of Commerce, the Association of National Advertisers, Inc. and the Coalition for Healthcare Communication.

In 2004, California voters approved Proposition 64, which amended California's Unfair Competition Law (Bus. & Prof. Code, §§ 17200 *et seq.*) to require that actions may be commenced and maintained in the name of a private citizen only if the putative plaintiff "has suffered injury in fact and has lost money or property as a result of such unfair competition." Proposition 64 also barred private citizens from filing representative actions on behalf of the public, conferring exclusive authority to bring such actions on duly elected or appointed government attorneys. Despite the plain language of Proposition 64 and the unmistakable intent of California voters, the trial court's decision effectively undoes Proposition 64 by certifying a class action suit against Pfizer without any consideration of whether the class representative has made a threshold showing that each member of the class has suffered actual economic injury.

WRF's brief argues that the trial court's construction of Proposition 64 turns the Unfair Competition Law on its head by ignoring the prohibition on private actions for general public benefit and

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permitting class membership to extend to individuals who could not maintain claims on their own. WRF's brief further argues that the trial court's decision should be reversed on the separate and independent ground that, following the analysis endorsed by the Solicitor General's Office and at least five justices of the U.S. Supreme Court in *Nike, Inc. v. Kasky* 539 U.S. 654 (2003), it puts the Unfair Competition Law in jeopardy under the First Amendment to the U.S. Constitution (incorporated against the States by the Fourteenth Amendment) and the Free Speech Clause of the California Constitution. By permitting suit to be brought in the name of claimants who have not suffered injury-in-fact, the trial court's decision upsets the delicate balance between the competing interests inherent in protecting free expression, on the one hand, and policing the integrity of commercial transactions, on the other, and unconstitutionally chills the speech rights of California advertisers.