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WLF Month in Review

This WLF Litigation Division feature highlights WLF's court and agency filings, as well as decisions issued in response to WLF's filings. In this edition, we list October 2018 filings and results.

New Filings

- The Federal Communications Commission acted properly when it repealed its controversial "net neutrality" rule.
- Those who claim copyright infringement must wait for the U.S. Copyright Office to act on their copyright application before they may sue alleged infringers.
- Implanted medical devices qualify as "unavoidably unsafe" products, and thus manufacturers should not be subject to strict design-defect liability for products approved for marketing by FDA.
- The U.S. Constitution bars States from requiring an out-of-state business, as a prerequisite to being permitted to conduct business within the State, to consent to state-court jurisdiction over all lawsuits filed against the business.
- Oil and gas platforms located on the Outer Continental Shelf are governed by federal law, and thus the federal Fair Labor Standards Act—not the wage-and-hour laws of adjoining states—exclusively governs claims asserted by OCS employees.
- The First Amendment protects a business's right to control the message it conveys to the public, including the right to prohibit employees who deal with customers from wearing pins expressing political views.

Cases Decided

- First Circuit holds that Rule 23 bars certification of a plaintiff class when, as here, the evidence demonstrates that more than a handful of members of the proposed class cannot establish liability because they suffered no injury.
- Florida Supreme Court, in conflict with the U.S. Supreme Court and virtually every other state court, declines to adopt *Daubert*—a rule designed to prevent scientifically unreliable expert evidence from ever reaching the jury.
- Ninth Circuit reinstates claims filed by human rights activists under the federal Alien Tort Statute; they seek to hold U.S.-based chocolate manufacturers (who purchased cocoa from farmers in the Ivory Coast) liable for "aiding and abetting" the farmers' alleged abuse of child laborers.
- U.S. Supreme Court requests that the Solicitor General weigh in on a pending certiorari petition that seeks review of a decision that threatens expanded liability under CERCLA, the "Superfund" statute. Such requests are a strong indication that the Supreme Court is giving very serious consideration to the petition.
- U.S. Supreme Court declines WLF's request that it review a massive California judgment imposed on lead paint manufacturers.
- U.S. Supreme Court declines WLF's request that it review a Federal Circuit decision that invoked the controversial "inequitable conduct" doctrine to invalidate a valuable patent.

Litigation is the backbone of WLF's public-interest mission. We litigate nationally before state and federal courts and agencies. Our team, often with the *pro-bono* assistance of leading private attorneys, litigates original actions, files *amicus* briefs, participates in the regulatory process, and provides constitutional analysis before federal agencies and Congress.

If you become aware of a pending legal or regulatory matter in which WLF's unique public-interest participation would advance economic liberty, please contact WLF Chief Counsel Richard Samp.

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NEW FILINGS

The Federal Communications Commission acted properly when it repealed its controversial "net neutrality" rule.
Mozilla Corp. v. FCC

WLF filed a brief in the U.S. Court of Appeals for the D.C. Circuit, urging it to uphold the FCC's decision to rescind its 2015 rules that imposed massive new regulations on Internet providers. WLF argued that the FCC had vastly exceeded its statutory authority in 2015 when it adopted extensive rules requiring providers to grant equal access to all Internet users. At issue is whether Congress intended to define Internet service as an "information service" or a "telecommunications service." If the latter, then the FCC is entitled to impose significant regulations similar to those imposed on common carriers. WLF argued, however, that the current FCC correctly concluded that broadband Internet access is properly classified as an "information service" under federal law and thus should be regulated far more lightly.

Those who claim copyright infringement must wait for the U.S. Copyright Office to act on their copyright application before they may sue alleged infringers.
Fourth Estate Public Benefit Corp. v. Wall-Street.com

WLF filed a brief with the U.S. Supreme Court, urging it to affirm an Eleventh Circuit decision confirming that § 411(a) of the Copyright Act allows a plaintiff to sue for infringement only after the Register of Copyrights approves or denies an application to register a copyright. The Supreme Court has agreed to resolve a circuit split over whether copyright "registration" means, as the plaintiff here claims, merely *applying* for registration. The Fifth and Ninth Circuits have adopted that view. The Eleventh Circuit joined the Tenth Circuit, however, in holding that registration under § 411(a) occurs only when the Copyright Office *acts* on the application—either by issuing a certificate or by refusing one. WLF's brief argues that the plaintiff's reading of § 411(a) severely disrupts Congress's broad public goals behind the Copyright Act.

Implanted medical devices qualify as "unavoidably unsafe" products, and thus manufacturers should not be subject to strict design-defect liability for products approved for marketing by FDA.
Burningham v. Wright Medical Group

WLF filed an *amicus curiae* brief in the Utah Supreme Court, urging it to find that implanted medical devices are "unavoidably unsafe" and thus not subject to strict products-liability suits alleging that they were defectively designed. Utah state law, which recognizes § 402A of the Restatement (Second) of Torts, applies that legal designation from Restatement Comment k to prescription drugs. WLF's brief argues that like drugs, implanted medical devices can impact different patients in different ways, and yet, the potential life-saving and life-altering benefits outweigh the attendant risks. Extending Comment k to implanted medical devices supports the policy objectives of making life-saving products affordable and available.

The U.S. Constitution bars States from requiring an out-of-state business, as a prerequisite to being permitted to conduct business within the State, to consent to state-court jurisdiction over all lawsuits filed against the business.
Mallory v. Norfolk Southern Railway Co.

WLF asked the Superior Court of Pennsylvania to enforce constitutional limits on Pennsylvania state courts' exercise of general personal jurisdiction over nonresident defendants. In an *amicus* brief filed in the case, WLF argued that Pennsylvania's long-arm statute, which provides that any out-of-state corporation that registers to do business in Pennsylvania may be sued there for any dispute arising from anywhere, violates the Due Process Clause. WLF's brief urged strict adherence to the U.S. Supreme Court's holding in *Daimler AG v. Bauman*, which reinforced the Constitution's due-process limits on the judiciary's exercise of personal jurisdiction over out of-of-state defendants. WLF believes that Pennsylvania's statutory rationale for personal jurisdiction—if allowed to stand—will erode the due-process rights of defendants and render *Daimler* a dead letter in all cases brought in Pennsylvania.

Oil and gas platforms located on the Outer Continental Shelf are governed by federal law, and thus the federal Fair Labor Standards Act—not the wage-and-hour laws of adjoining states—exclusively governs claims asserted by OCS employees.
Newton v. Parker Drilling Management Services, Inc.

WLF filed a brief in the U.S. Supreme Court, urging it to overturn a U.S. Court of Appeals for the Ninth Circuit wage-and-hour ruling that could expose oil and gas companies to massive back-pay liability. WLF argued that the Ninth Circuit improperly rejected a half-century of federal case law governing the wages paid to employees stationed on off-shore oil platforms. Congress decreed in a 1953 statute that federal law governs on drilling platforms. Workers generally remain on those remote platforms for several weeks at a time. Applying federal wage-and-hour law, other federal courts have consistently held that employers need not pay drilling-platform workers for their sleep and rest time. But the Ninth Circuit held that drilling platforms off the California coast are also subject to California wage-and-hour laws (which require payment for sleep time), thereby exposing the industry to massive retroactive liability. WLF argued that the Ninth Circuit misinterpreted the 1953 statute.

The First Amendment protects a business's right to control the message it conveys to the public, including the right to prohibit employees who deal with customers from wearing pins expressing political views.
In-N-Out Burger, Inc. v. National Labor Relations Board

WLF filed a brief urging the U.S. Supreme Court to review a U.S. Court of Appeals for the Fifth Circuit ruling that stifles commercial speech by enforcing an unconstitutional agency rule. The National Labor Relations Act gives employees a constrained statutory right to free speech in the workplace on labor issues. Employers, meanwhile, enjoy a robust constitutional right, under the First Amendment, to free commercial speech. The NLRB regularly favors the employees' statutory speech right over the employers' constitutional one. It did so here by declaring that In-N-Out Burger—a popular West Coast burger chain—may not prohibit its employees from adding political buttons to their uniforms. In its brief, WLF argues that the NLRB has turned the First Amendment and the NLRA upside down.

CASES DECIDED

First Circuit holds that Rule 23 bars certification of a plaintiff class when, as here, the evidence demonstrates that more than a handful of members of the proposed class cannot establish liability because they suffered no injury.
In re Asacol Antitrust Litigation

The U.S. Court of Appeals for the First Circuit overturned certification of a near-nationwide class action involving antitrust claims against a drug manufacturer. The decision was a major victory for WLF, which filed a brief arguing that certification was improper because many members of the class were not injured by the defendant's alleged wrongdoing—yet the plaintiffs did not demonstrate a method of separating the injured from the uninjured by means of common proof. The appeals court agreed, holding that the plaintiffs failed to demonstrate the requisite "predominance" of common issues of fact—because whether class members were injured by the alleged misconduct would need to be determined on an individualized basis. The court held that when, as here, more than a negligible number of class members were not injured by the alleged misconduct, an antitrust defendant is entitled to challenge *every* individual plaintiff on the issue of liability.

Florida Supreme Court, in conflict with the U.S. Supreme Court and virtually every other state court, declines to adopt *Daubert*—a rule designed to prevent scientifically unreliable expert evidence from ever reaching the jury.
Delisle v. Crane Co.

The Florida Supreme Court jettisoned the *Daubert* standard, the most reliable standard for admitting expert evidence, in favor of the outdated *Frye* test. The decision was a setback for WLF, which asked the court to retain *Daubert* as the superior evidentiary standard for Florida courts. Although the Florida Legislature adopted the *Daubert* standard by statute in 2013, the court ruled 4-3 that the statute was "procedural" and therefore unconstitutional. As WLF explained in its brief, the *Frye* test examines only the methodology used by an expert witness, but *Daubert* goes further by requiring judges to also look at the expert's application of that methodology. *Daubert* is also superior, WLF's brief explained, because it requires judges to examine the reliability of all expert evidence, not just evidence derived from "new or novel" methodologies.

Ninth Circuit reinstates claims filed by human rights activists under the federal Alien Tort Statute; they seek to hold U.S.-based chocolate manufacturers (who purchased cocoa from farmers in the Ivory Coast) liable for "aiding and abetting" the farmers' alleged abuse of child laborers.
Doe I v. Nestlé, S.A.

The U.S. Court of Appeals for the Ninth Circuit reinstated a lawsuit claiming that chocolate manufacturers aided and abetted human rights violations by farmers in the Ivory Coast. The decision was a setback for WLF, which filed a brief urging the court to affirm dismissal of the suit. WLF argued that Alien Tort Statute claims require evidence that the defendants' conduct was "specifically directed" toward assisting human rights violations, and that such conduct may not be inferred simply because the manufacturers purchased cocoa from Ivory Coast farmers and provided other aid. WLF argued that the lawsuit is particularly unwarranted because the Supreme Court has ruled that the ATS applies only to conduct within the U.S.

U.S. Supreme Court requests that the Solicitor General weigh in on a pending certiorari petition that seeks review of a decision that threatens expanded liability under CERCLA, the "Superfund" statute. Such requests are a strong indication that the Court is giving very serious consideration to the petition.
Atlantic Richfield v. Christian

WLF had filed a brief urging the U.S. Supreme Court to review a Montana Supreme Court ruling that allows private landowners to challenge the EPA's cleanup plan at one of the nation's largest Superfund sites. In its brief, WLF argued that the Montana Supreme Court should have treated the case as a classic instance of conflict preemption. Instead, in allowing the landowners' case to proceed, the state court gutted at least five discrete parts of CERCLA, including a provision that bars legal challenges to an EPA cleanup plan and a provision that bars cleanups conducted without EPA approval.

U.S. Supreme Court declines WLF's request that it review a massive California judgment imposed on lead paint manufacturers.
ConAgra Grocery Products Co. v. The People of California

The U.S. Supreme Court declined to review a California Court of Appeal ruling that imposes massive liability in the absence of the fundamental tort element of causation. The decision was a setback for WLF, which filed a brief asking the Court to review the case and undo the California courts' radical expansion of tort liability. The Court of Appeal ordered three companies to find and abate lead-paint hazards in countless California homes, even though the plaintiffs failed to identify a single specific home containing a hazard caused by the companies. In its brief, WLF argued that the Court of Appeal should have required the plaintiffs to identify which homes, if any, contain lead-paint hazards *because of* the companies' conduct.

U.S. Supreme Court declines WLF's request that it review a Federal Circuit decision that invoked the controversial "inequitable conduct" doctrine to invalidate a valuable patent.
Regeneron Pharmaceuticals, Inc. v. Merus N.V.

The U.S. Supreme Court declined to review a decision by the U.S. Court of Appeals for the Federal Circuit that substantially expanded the "inequitable conduct" defense. WLF had filed a brief urging that the Court grant review, arguing that the inequitable-conduct doctrine is being invoked far too frequently to strike down patents for relatively trivial errors. WLF asserted that patents should never be invalidated on inequitable-conduct grounds in the absence of "clear and convincing" evidence that the patentee withheld documents from its patent application with "intent to deceive" the Patent and Trademark Office. The alleged infringer presented no such evidence in this case because the trial judge used her sanctioning power as a substitute for a trial on the merits: she ruled that the patentee's counsel engaged in misconduct during trial and, as a sanction, declared the patentee guilty of inequitable conduct.

