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August 5, 2019

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 July 2019 filings and results.

WLF News

In July, WLF and the Chairman of its Legal Policy Advisory Board, **Jay B. Stephens**, announced the appointment of six new legal professionals to the Board: **Lisa S. Blatt**, Williams & Connolly LLP; **Michael J. Lotito**, Littler Mendelson P.C.; **Leah L. Lorber**, GlaxoSmithKline; **Stephen McManus**, State Farm Mutual Automobile Insurance Co.; **Maureen K. Ohlhausen**, Baker Botts L.L.P.; and **Joshua D. Wright**, George Mason University, Antonin Scalia School of Law.

New Filings

- Class-action status is inappropriate when half the proposed class members in an antitrust suit never purchased products from the defendants and thus lack antitrust standing. (*Ahold U.S.A., Inc. v. Warner Chilcott PLC*)
- The Class Action Fairness Act permits removal of "mass actions" in which thousands of identical claims are coordinated by a single state-court judge, even if the decision to coordinate the cases was made by the judge, not by the plaintiffs' lawyers. (*Pfizer, Inc. v. Adamyan*)
- Indirect purchasers may not evade limits on antitrust standing simply by alleging that everyone else in the supply chain conspired with the manufacturer to restrain trade. (*Marion Healthcare LLC v. Becton Dickinson & Co.*)
- The Americans with Disabilities Act does not require companies to ensure that their websites are accessible to the visually impaired. (*Domino's Pizza, LLC v. Robles*)

Decisions

- The Florida Supreme Court dismisses a challenge to an insurance industry practice of imposing limits on the assignment of policy benefits. (*Restoration 1 of Port St. Lucie v. Ark Royal Ins. Co.*)
- The California Supreme Court declares that class actions may be certified even in the absence of evidence that the identity of any class members is ascertainable. (*Noel v. Thrifty Payless, Inc.*)
- The U.S. Court of Appeals for the Ninth Circuit rejects a First Amendment challenge to a Berkeley ordinance that requires retailers to post highly controversial warnings about the supposed health dangers of cell-phone usage. (*CTIA – The Wireless Association v. City of Berkeley*)

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

Class-action status is inappropriate when half the proposed class members in an antitrust suit never purchased products from the defendants and thus lack antitrust standing.
Ahold U.S.A., Inc. v. Warner Chilcott PLC

On July 23, 2019, WLF filed an *amicus curiae* brief in the First Circuit, urging it to impose limits on who can sue for damages for alleged antitrust violations. WLF argued that antitrust standing should be limited to those who had direct financial dealings with an alleged antitrust violator. In this case, a district court certified a class action in which half of the class plaintiffs never had any direct business dealings with the defendants—two companies alleged to have conspired to raise prices. WLF argued that the Supreme Court has generally limited antitrust standing to those who purchase directly from the defendants because it is often impossible to determine whether the defendants were the actual cause of more remote injuries. WLF filed its brief on behalf of itself, the National Association of Manufacturers, and the Pharmaceutical Research and Manufacturers of America.

The Class Action Fairness Act permits removal of "mass actions" in which thousands of identical claims are coordinated by a single state-court judge, even if the decision to coordinate the cases was made by the judge, not by the plaintiffs' lawyers.
Pfizer, Inc. v. Adamyan

On July 25, 2019, WLF filed an *amicus curiae* brief in the U.S. Supreme Court, urging it to review, and ultimately overturn, a Ninth Circuit decision that blocked the right of out-of-state defendants to remove lawsuits from state court to federal court when the suit involves numerous plaintiffs. WLF argued that the appeals court's decision remanding a massive product-liability proceeding back to state court was inconsistent with the Class Action Fairness Act (CAFA), a 2005 federal law designed to permit removal of virtually all large class action lawsuits into federal court. The appeals court held that the suit did not qualify as a "mass action" and thus was not subject to CAFA, but WLF argued that Congress intended CAFA to apply whenever, as here, the state-court proceedings combine the claims of 100 or more plaintiffs. WLF argued that CAFA was designed to prevent precisely the sorts of gamesmanship employed by the plaintiffs' attorneys in this case in their effort to defeat federal jurisdiction.

Indirect purchasers may not evade limits on antitrust standing simply by alleging that everyone else in the supply chain conspired with the manufacturer to restrain trade.
Marion Healthcare LLC v. Becton Dickinson & Co.

On July 18, 2019, WLF urged the Seventh Circuit to affirm the dismissal of an antitrust lawsuit under the Supreme Court's direct-purchaser rule. The appeal arises from an action by three healthcare providers who purchase medical supplies indirectly (through brokers and distributors) from the defendant manufacturer. Under the plaintiffs' theory, an indirect purchaser can evade the direct-purchaser rule simply by alleging that distributors entered into anticompetitive contracts with manufacturers—regardless whether the distributor had any part in setting the allegedly inflated price or absorbed any of the alleged overcharge. As WLF's *amicus curiae* brief argues, not only would the plaintiffs' proposed "exception" swallow the rule, but adopting it would fly in the face of the Supreme Court's caution that it would be counterproductive to create a "series of exceptions" to *Illinois Brick*.

The Americans with Disabilities Act does not require companies to ensure that their websites are accessible to the visually impaired.
Domino's Pizza, LLC v. Robles

On July 15, 2019, WLF filed an *amicus curiae* brief urging the U.S. Supreme Court to review, and ultimately overturn, a Ninth Circuit decision that essentially rewrites the Americans with Disabilities Act of 1990 (ADA). The case arises from a suit by Guillermo Robles, a blind resident of California, who brought a suit seeking to extend the scope of ADA liability to Domino's Pizza—not for its brick-and-mortar restaurant, but for its Internet website and mobile app. The Ninth Circuit allowed that suit to go forward, deciding that the ADA's accessibility mandate extends to cyberspace. That holding conflicts with at least three other federal appeals courts. In its brief urging Supreme Court review, WLF argues that the Ninth Circuit's decision amounts to an impermissible rewrite of the ADA. Under our constitutional system, only Congress—not courts or federal agencies—may amend federal law. WLF contends that the Supreme Court's review is crucial to ensure that courts do not fill any statutory void in the ADA with judge-made legislation.

DECISIONS

The Florida Supreme Court dismisses a challenge to an insurance industry practice of imposing limits on the assignment of policy benefits.
Restoration 1 of Port St. Lucie v. Ark Royal Ins. Co.

On July 29, 2019, the Florida Supreme Court discharged its jurisdiction over this insurance dispute. That dismissal leaves in place a decision by Florida's Fourth District Court of Appeal upholding a homeowners insurance policy provision that conditions any assignment of claim benefits on the written consent of all insureds and mortgagees named in the policy. The Florida high court had earlier agreed to decide whether homeowners insurance policies may impose conditions on a post-loss assignment of benefits. But after the case was fully briefed, the Florida Legislature passed, and the Governor signed, a Florida law that resolves the question presented "on a going-forward basis" as of July 1. Under § 627.7153 of the Florida Statutes, insurers are permitted to offer "a policy that restricts in whole or in part an insured's right to execute an assignment agreement" if certain conditions are met. WLF had filed an *amicus curiae* brief in support of the Respondent.

The California Supreme Court declares that class actions may be certified even in the absence of evidence that the identity of any class members is ascertainable.
Noel v. Thrifty Payless, Inc.

On July 29, 2019, the California Supreme Court ruled that California lawsuits can proceed as class actions even when the plaintiff has not demonstrated a means of identifying members of the class. The decision was a setback for WLF, whose *amicus curiae* brief on behalf of the California Retailers Association argued that class actions are inappropriate under California rules (which are similar to the rule governing class actions in federal court) unless the members of the class are ascertainable. The court disagreed, holding that a class is "ascertainable" so long as its definition is clear. It held that trial courts should worry about how to identify (and thus notify) class members only after the class has been certified. The plaintiff urges certification of a class consisting of individuals who purchased inflatable swimming pools from a drug-store chain (she argues that the pools bore misleading labeling), but there are no records from which the identity of any other purchasers can be ascertained.

The U.S. Court of Appeals for the Ninth Circuit rejects a First Amendment challenge to a Berkeley ordinance that requires retailers to post highly controversial warnings about the supposed health dangers of cell-phone usage.

CTIA – The Wireless Association v. City of Berkeley

On July 2, 2019, the Ninth Circuit affirmed the denial of a preliminary injunction in a challenge to a Berkeley, California ordinance requiring all cell-phone retailers to post notices suggesting that normal cell phone usage is dangerous. The Court's decision was a setback for WLF, which filed an *amicus curiae* brief urging the Court to reverse the lower court's decision. After deciding *National Institute of Family and Life Advocates (NIFLA) v. Becerra,* the U.S. Supreme Court "GVR'd" a certiorari petition from the panel's earlier decision. But rather than apply the strict scrutiny that *NIFLA* calls for, the Ninth Circuit panel doubled down on what it calls "the *Zauderer* exception to the general rule of *Central Hudson*." Under that relaxed level of scrutiny, the panel concluded that CTIA had little chance of success on its First Amendment claim. As she had in the original panel opinion, Judge Friedland dissented. In her view, the challenged ordinance likely violates the First Amendment because it requires businesses to make false and misleading statements about their own products.

