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WLF Month in Review

This month, WLF's Litigation Division's filing schedule was disrupted by the ongoing COVID-19 pandemic. Nonetheless, in April 2020 WLF submitted the filing, and obtained the results, that follow.

New Filings

- WLF asks the full Seventh Circuit to review, then affirm, the dismissal of any class claim unrelated to a nonresident defendant's forum-state activities. (*Florence Mussat, M.D., S.C., v. IQVIA, Inc.*)

Decisions

- The U.S. Supreme Court interprets the Clean Water Act to cover both direct and indirect discharges of a pollutant from any "point source" into a "navigable water." (*County of Maui v. Hawaii Wildlife Fund*)
- The Fourth Circuit remands to the district court a dispute over the deadline by which e-cigarette companies must apply to the FDA for permission to continue selling their products. (*In re Cigar Ass'n of America*)
- The U.S. Supreme Court reverses a Montana Supreme Court ruling that allowed private landowners to impede the EPA's efforts to clean one of the nation's largest Superfund sites. (*Atlantic Richfield Co. v. Christian*)
- The *en banc* Seventh Circuit declines to rehear a novel refusal-to-deal claim in a major antitrust lawsuit. (*Viamedia v. Comcast*)
- The Alcohol and Tobacco Tax and Trade Bureau issues its final rule clarifying the limits on accepted and prohibited statements in alcohol labels and ads. (*In re Modernization of the Labeling and Advertising Regulations for Wine, Distilled Spirits, and Malt Beverages*)

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 Vice President of Litigation, Cory Andrews.

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NEW FILINGS

WLF asks the full Seventh Circuit to review, then affirm, the dismissal of any class claim unrelated to a nonresident defendant's forum-state activities.
Florence Mussat, M.D., S.C., v. IQVIA, Inc.

On April 15, WLF filed an *amicus curiae* brief asking the Seventh Circuit to rehear *en banc* an important personal-jurisdiction case. Although the Supreme Court's 2017 *Bristol-Myers* decision cut back on a court's exercise of jurisdiction over out-of-state defendants, a Seventh Circuit panel held that *Bristol-Myers* does not apply in federal court. As WLF's brief shows, the panel's deeply flawed analysis contravenes Supreme Court precedent and upends long-settled Seventh Circuit case law. Highlighting the flaws in the panel's analysis, WLF contends that the panel's opinion, if left to stand, would transform specific jurisdiction in a class action into "a loose and spurious form of general jurisdiction."

DECISIONS

The U.S. Supreme Court interprets the Clean Water Act to cover both direct and indirect discharges of a pollutant from any "point source" into a "navigable water."
County of Maui v. Hawaii Wildlife Fund

On April 23, the U.S. Supreme Court issued an opinion that expands the scope of the Clean Water Act (CWA) to cover both direct and indirect discharges of a pollutant from a "point source" into a "navigable water" (which includes the oceans out to the three-mile limit). The decision was setback for WLF, which in its *amicus curiae* brief had argued that the CWA does not apply to groundwater releases, even when a portion of the release eventually migrates into protected waters. While the Court listed several factors relevant to deciding whether a groundwater release qualifies as an indirect discharge, it held that "time and distance" are the most important factors. The Court remanded the case back to the Ninth Circuit to apply the new multi-factor test. That decision will almost certainly require the County of Maui to seek and obtain a discharge permit for all groundwater releases.

The Fourth Circuit remands to the district court a dispute over the deadline by which e-cigarette companies must apply to the FDA for permission to continue selling their products.
In re Cigar Ass'n of America

On April 21, the Fourth Circuit remanded to the district court a dispute over the deadline by which e-cigarette companies must apply to the FDA for permission to continue selling their products. All sides agreed that, in light of the COVID-19 pandemic, the district court should extend the deadline. WLF filed an *amicus curiae* brief urging the Fourth Circuit to vacate the trial court's earlier deadline, which in turn replaced a deadline set in an FDA guidance paper and which, WLF argued, amounted to a de facto administrative rulemaking. The lawsuit arose when a group of doctors and public-health groups attacked the FDA's guidance as procedurally defective. The trial court agreed and vacated the guidance. But rather than simply remand the matter to the agency, as the law usually requires, the trial court proceeded to set a new deadline—a very tight one—itself. WLF's brief argued that the trial court—which reviews agency action only as an appellate tribunal—had no authority to set a new deadline.

The U.S. Supreme Court reverses a Montana Supreme Court ruling that allowed private landowners to impede the EPA's efforts to clean one of the nation's largest Superfund sites.
Atlantic Richfield Co. v. Christian

On April 20, the U.S. Supreme Court reversed a Montana Supreme Court ruling that allowed private landowners to impede the EPA's efforts to clean a large hazardous-waste site. Federal law blocks states or private parties from interfering with the EPA-directed cleanup of such a site. The Montana high court nonetheless affirmed an order allowing landowners to seek money for a cleanup plan that conflicts with an EPA-directed cleanup plan. The U.S. Supreme Court agreed with the petitioner—and with an *amicus curiae* brief filed by WLF—that the landowners' suit could not proceed without EPA approval.

The *en banc* Seventh Circuit declines to rehear a novel refusal-to-deal claim in a major antitrust lawsuit.
Viamedia v. Comcast

On April 8, the full Seventh Circuit declined to rehear *en banc* an important antitrust refusal-to-deal case. Refusal-to-deal liability arises only when an alleged monopolist ends an established course of dealing without any rational business reason for doing so. Here, the defendant, which runs a clearing house for cable-television advertising, cut ties with the plaintiff, an advertising broker, because the defendant wanted to move into the plaintiff's market. Moving into that market, and thereby cutting out the middleman, allowed the defendant to lower costs and create other efficiencies. WLF filed *amicus curiae* briefs at both the panel and rehearing-petition stages. WLF's brief in support of the rehearing petition argued that at the panel stage, the court improperly strayed from the "no rational reason" refusal-to-deal legal standard. In addition, WLF contended that the defendant here had no reason to move into the pertinent market as an anticompetitive predator, and every reason to step forth as a procompetitive low-cost producer.

The Alcohol and Tobacco Tax and Trade Bureau issues its final rule clarifying the limits on accepted and prohibited statements in alcohol labels and ads.
In re Modernization of the Labeling and Advertising Regulations for Wine, Distilled Spirits, and Malt Beverages

On April 2, the Alcohol and Tobacco Tax and Trade Bureau (TTB) issued its final rule streamlining alcohol labeling rules and clarifying regulatory limits on accepted and prohibited statements in alcohol labels and ads. In particular, the TTB decided to eliminate its proposed ban on "strength" labeling. That decision was a victory for WLF, which had filed formal comments with the agency contending that the proposed ban was overbroad and would chill alcohol producers' First Amendment rights.

