



Washington Legal Foundation
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WLF Month in Review

This WLF Litigation Division feature highlights WLF's court filings, as well as decisions issued in response to WLF's filings. In this edition, we list October 2020 filings and results.

New Filings

- WLF reminds the FDA that its regulation of truthful manufacturer speech must comply with the First Amendment. (***In re FDA Amendments to "Intended Uses" Regulations***)
- WLF urges the Supreme Court to rein in refusal-to-deal antitrust liability. (***Comcast Corp. v. Viamedia, Inc.***)
- WLF asks the Supreme Court to correct a widespread misreading of an FTC Act remedy provision. (***AMG Capital Management, LLC v. FTC***)
- WLF urges the EPA to ensure an impartial and balanced scientific peer-review process. (***In re Membership on the Science Advisory Committee on Chemicals***)

Decisions

- The Superior Court of Pennsylvania transfers to the Supreme Court of Pennsylvania an important appeal that will decide the constitutionality of Pennsylvania's long-arm statute. (***Mallory v. Norfolk Southern Railway Co.***)
- The Supreme Court of Pennsylvania sidesteps the due-process bounds on state-court jurisdiction recognized by the U.S. Supreme Court. (***Hammons v. Ethicon, Inc.***)

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 reminds the FDA that its regulation of truthful manufacturer speech must comply with the First Amendment.

In re FDA Amendments to “Intended Uses” Regulations

On October 23, WLF filed formal comments with the Food and Drug Administration (FDA), calling on the agency to revise a proposed final rule to account for drug and device manufacturers’ First Amendment rights. The FDA’s proposed rule identifies many types of evidence of intended use that comprise constitutionally protected speech. Under this regulatory approach, almost any statement by a manufacturer *about* its product may seem like an *implicit* promotion of that product. WLF’s comments contend that, under multiple federal-court decisions interpreting the First Amendment, the FDA may not consider all scientific claims about a drug or device to be presumptively untruthful or misleading. Unfortunately, the FDA’s approach to intended-use misbranding comes dangerously close to doing just that, as it fails to distinguish between true and false claims or statements.

WLF urges the Supreme Court to rein in refusal-to-deal antitrust liability.

Comcast Corp. v. Viamedia, Inc.

On October 13, WLF asked the Supreme Court to take up an important antitrust refusal-to-deal case. Refusal-to-deal liability arises only when an alleged monopolist ends an established course of dealing without a 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’s *amicus* brief urging certiorari argues that the Supreme Court should intervene to prevent the lower courts from improperly straying from the “no rational reason” refusal-to-deal legal standard.

WLF asks the Supreme Court to correct a widespread misreading of an FTC Act remedy provision.

AMG Capital Management, LLC v. FTC

On October 2, 2020, WLF urged the Supreme Court to correct a widespread misreading of an FTC Act remedy provision. Section 13(b) of the FTC Act empowers the FTC to sue, in federal court, to obtain an injunction against deceptive trade practices. At least seven courts of appeals have said, however, that the word “injunction” in § 13(b) unlocks the entire vault of equitable remedies. In the mid-twentieth century, the Supreme Court briefly took to “implying” new rights and remedies into laws. Relying on that mid-twentieth century jurisprudence, the courts of appeals began stretching § 13(b) well beyond its text. But as WLF explained in its *amicus* brief urging review, the Supreme Court later reversed course. It came to recognize that it is solely for Congress to decide how, and by whom, its statutes are enforced. WLF’s brief asks the Supreme Court to instruct the lower courts to align their interpretation of § 13(b) with the modern and binding rules of statutory interpretation. WLF’s *amicus* brief was joined by the Allied Educational Foundation.

WLF urges the EPA to ensure an impartial and balanced scientific peer-review process.

In re Membership on the Science Advisory Committee on Chemicals

On October 30, WLF joined other civil-justice reform groups in calling on the EPA to ensure an objective and balanced peer-review process. The EPA recently invited comment on the experts under consideration for membership on the Toxic Substances Control Act (TSCA) Science Advisory Committee on Chemicals (SACC). The SACC’s role is to provide “scientific advice and recommendations to the EPA on the scientific and technical aspects of risk assessments, methodologies, and pollution prevention measures and approaches for chemicals regulated by TSCA.” EPA anticipates appointing approximately 15 members to the SACC by March 2021. WLF’s comment encourages the EPA to ensure that professionals with a diversity

of perspectives are appointed or reappointed to the SACC. The comment argues that if advocates for plaintiffs' interests in litigation are included out of the many nominees available to EPA for SACC selection, then experts who testify in litigation on behalf of defendants must also be included to achieve a balanced committee of experts.

DECISIONS

The Superior Court of Pennsylvania transfers to the Supreme Court of Pennsylvania an important appeal that will decide the constitutionality of Pennsylvania's long-arm statute.

Mallory v. Norfolk Southern Railway Co.

On October 30, 2020, the Superior Court of Pennsylvania transferred to the Supreme Court of Pennsylvania an important appeal that will decide the constitutional limits on Pennsylvania state courts' exercise of general personal jurisdiction over nonresident defendants. The transfer was welcome news for WLF, which filed an *amicus* brief 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-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. WLF filed its brief with substantial *pro bono* assistance from James M. Beck of the firm Reed Smith LLP in Philadelphia, Pennsylvania.

The Supreme Court of Pennsylvania sidesteps the due-process bounds on state-court jurisdiction recognized by the U.S. Supreme Court.

Hammons v. Ethicon, Inc.

On October 21, the Supreme Court of Pennsylvania declined to limit the personal jurisdiction of Pennsylvania courts over nonresident defendants to cases in which the plaintiff's claims are directly related to Pennsylvania. The decision was a setback for WLF, which argued that lower courts in Pennsylvania are inappropriately asserting nationwide jurisdiction over claims against nonresident businesses where the claims bear no relation to Pennsylvania. In his vigorous dissent, Chief Justice Saylor noted that the majority opinion contradicts existing U.S. Supreme Court precedent. The case involved an Indiana woman injured by a medical device implanted by her doctor in Indiana. She sued the New Jersey-based manufacturer, claiming that the device was defectively designed and that she received inadequate health warnings. WLF argued that Pennsylvania courts lack personal jurisdiction over the defendant. Although part of the defendant's manufacturing process occurred in Pennsylvania, WLF argued that state courts may not assert jurisdiction based on that activity because there is no claim that the medical device was defectively manufactured.