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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 **April 2021** filings and results.

New Filings

- WLF asks the Supreme Court to decide whether the Affordable Care Act authorizes disparate-impact liability. (***CVS Pharmacy, Inc. v. Doe***)
- WLF urges the Seventh Circuit to adopt the Supreme Court's *Safeco* test for willfulness in False Claims Act cases. (***United States ex rel. Proctor v. Safeway***)
- WLF calls on the Fourth Appellate Division of the California Court of Appeal to publish a recent opinion in an important products liability case. (***In re Letter Requesting Publication***)
- WLF asks the Department of Labor to let its previously promulgated independent-contractor rule take effect. (***In re Independent Contractor Status Under the Fair Labor Standards Act***)
- WLF urges the Massachusetts Supreme Judicial Court to bar a punitive-damages claim that was extinguished by the Massachusetts Attorney General in the 1998 Master Settlement Agreement. (***Laramie v. Philip Morris USA***)
- WLF asks the Sixth Circuit to vacate an FDIC order tainted by an unconstitutionally appointed Administrative Law Judge. (***Calcutt v. FDIC***)
- WLF urges the Department of Labor to provide much-needed guidance on joint-employer status. (***In re Rescission of Joint-Employer Rule***)
- WLF asks the Supreme Court to review a Missouri punitive-damages award that is 11 times greater than the amount of compensatory damages. (***Johnson & Johnson v. Ingham***)

Decisions

- The Florida Supreme Court agrees largely to replace the text of Florida's summary judgment rule with that of Federal Rule of Civil Procedure 56. (***In re Fla. R. Civ. P. 1.510***) ***Victory***
- The Supreme Court unanimously rejects the Ninth Circuit's attempt to give the FTC powers that Congress never granted it. (***AMG Capital Management v. FTC***) ***Victory***

Litigation is the backbone of WLF's public-interest mission. We litigate nationally before state and federal courts and agencies. Our team, at times 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 General Counsel and Vice President of Litigation, Cory Andrews.

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Decisions (cont.)

- The Seventh Circuit overturns a jury verdict in a case that unfairly imposed massive toxic-tort liability on lead-paint makers. (***Burton v. Armstrong Containers Inc.***) *Victory*
- The Ninth Circuit rejects class certification in a multi-district price-fixing case. (***In re Packaged Tuna Antitrust Litigation***) *Victory*
- The Second Circuit declines New York City's invitation to move the task of addressing climate change into the courts. (***City of New York v. Chevron***) *Victory*
- The Supreme Court adheres to textualist principles of statutory construction in refusing to expand the scope of the Telephone Consumer Protection Act. (***Facebook, Inc. v. Duguid***) *Victory*
- The Ninth Circuit declines to rehear *en banc* whether federal courts may adjudicate important separation-of-powers questions about federal agencies. (***Axon v. FTC***)
- The Fifth Circuit affirms an FTC ruling that condemned as anticompetitive an agreement by two pharmaceutical companies to settle a patent-infringement suit. (***Impax Laboratories v. FTC***)

NEW FILINGS

WLF asks the Supreme Court to decide whether the Affordable Care Act authorizes disparate-impact liability.
CVS Pharmacy, Inc. v. Doe

On April 30, WLF and the Independent Women's Law Center filed an *amicus* brief urging the Supreme Court to hear an important disparate-impact case. The Ninth Circuit, and three other circuits, have held that Section 504 of the Rehabilitation Act of 1973 permits disparate-impact claims. These holdings conflict with a recent Sixth Circuit decision. WLF argues that the Ninth Circuit's decision does not follow Section 504's plain language, nor does it make sense in light of Supreme Court decisions interpreting other nondiscrimination statutes. Because the Affordable Care Act greatly expanded who may be sued under the Rehabilitation Act, WLF urges the Supreme Court to decide this issue.

WLF urges the Seventh Circuit to adopt the Supreme Court's *Safeco* test for willfulness in False Claims Act cases.
United States ex rel. Proctor v. Safeway

On April 13, WLF filed an *amicus* brief urging the Seventh Circuit to affirm the District Court's order in an important False Claims Act case. Adopting the position taken by every court of appeals to consider the issue, the District Court held that the test for willfulness announced by the Supreme Court in *Safeco* applies in FCA actions. As WLF's brief shows, the District Court correctly held that the *Safeco* test applies in FCA cases when deciding if a defendant acted with reckless disregard for the truth or falsity of submitted claims. Violations of the FCA carry both punitive civil penalties and criminal liability. This means that defendants are entitled to heightened due-process protections. WLF contends that applying *Safeco* in FCA cases provides the necessary due-process protections while advancing Congress's goal of ensuring companies do not bury their heads in the sand.

WLF calls on the Fourth Appellate Division of the California Court of Appeal to publish a recent opinion in an important products liability case.
In re Letter Requesting Publication

On April 13, WLF asked the justices of the California Court of Appeal's Fourth Appellate Division, Second Division, to publish the court's recent opinion in *Bledsoe v. Monster Beverage Corp.*, No. E072569. As WLF's letter explains, the opinion provides much-needed guidance on an issue on which no on-point California authority exists: a trial court's discretion to bifurcate issues of liability and causation by trying causation first. It also reaffirms the trial court's "gatekeeper" role when reviewing scientific expert evidence on causation in a products liability case. *Bledsoe*'s discussion of both these important legal issues, WLF contends, merits a published opinion with precedential authority.

WLF asks the Department of Labor to let its previously promulgated independent-contractor rule take effect.
In re Independent Contractor Status Under the Fair Labor Standards Act

On April 12, WLF filed formal comments with the Department of Labor's Wage and Hour Division urging it to not withdraw the recently promulgated independent-contractor rule. Despite finalizing the rule in January, DOL now seeks to withdraw it. WLF's comments remind DOL that it issued the rule to promote regulatory certainty. But withdrawing the rule will cause regulatory uncertainty in an already uncertain economic climate. Because most experts agree that regulatory uncertainty stunts economic recovery, DOL should not go down that path. Rather, WLF urges DOL to not withdraw the rule.

WLF urges the Massachusetts Supreme Judicial Court to bar a punitive-damages claim that was extinguished by the Massachusetts Attorney General in the 1998 Master Settlement Agreement.
Laramie v. Philip Morris USA

On April 12, WLF urged the Massachusetts Supreme Judicial Court to reverse a trial court's decision to allow a previously resolved punitive-damages claim to go forward in a wrongful death case against Philip Morris USA. In its *amicus* brief urging reversal, WLF argues that failing to bar the plaintiff's punitive damages claim under settled *res judicata* principles would not only undermine the Commonwealth's public policy favoring litigation settlement, but would also discourage defendants from settling *parens patriae* suits in the future. That would be a calamity for litigants, the judiciary, and the Commonwealth. WLF submitted its *amicus* brief with the pro bono assistance of attorney Douglas S. Brooks of the Boston firm Libby Hoopes Brooks PC.

WLF asks the Sixth Circuit to vacate an FDIC order tainted by an unconstitutionally appointed ALJ.
Calcutt v. FDIC

On April 9, WLF filed an *amicus* brief urging the Sixth Circuit to vacate an FDIC order. WLF's brief focused on constitutional problems with the administrative proceeding. Both FDIC board members and FDIC administrative law judges enjoy unconstitutional for-cause removal protections. And after an unconstitutionally appointed ALJ previously heard this case, the new ALJ failed to hold the constitutionally required *de novo* hearing. Given these constitutional problems, WLF urges the Sixth Circuit to apply well-settled precedent and vacate the FDIC's order.

WLF urges the Department of Labor to provide much-needed guidance on joint-employer status.
In re Rescission of Joint-Employer Rule

On April 7, WLF filed formal comments with the Department of Labor's Wage and Hour Division urging it to not rescind the recently promulgated joint-employer rule. Despite defending the rule in January, DOL now seeks to rescind it. WLF's comments remind DOL of the negative consequences that will flow from rescinding the rule. It will not only decrease human-trafficking and sexual-harassment training but also lead to decreased State tax revenue. DOL should not go down that path. Rather, WLF urges DOL not to rescind the rule.

WLF asks the Supreme Court to review a Missouri punitive-damages award that is 11 times greater than the amount of compensatory damages.
Johnson & Johnson v. Ingham

On April 5, WLF asked the Supreme Court to review, and ultimately to overturn, a Missouri state court's staggering $2.1 billion punitive damages award against Johnson & Johnson. The case arises from a suit by 22 plaintiffs who allege that the defendant's talcum powder caused them to develop cancer. The jury calculated its $2.1 billion punitive damages award by multiplying the defendant's annual profits from talc sales by the number of years it allegedly sold talc while knowing it contained asbestos. But that verdict, WLF argues in its *amicus* brief urging review, improperly punishes the defendant for a whole range of nationwide conduct, not just the harm to the plaintiffs. Such constitutionally excessive punitive damages awards also reduce the pool of available funds for all those plaintiffs who have yet to see their day in court. WLF's *amicus* brief was prepared with the pro bono assistance of Douglas Dunham, Ellen Quackenbos, Matthew Steinberg, and Theodore Yale at Dechert LLP.

DECISIONS

The Florida Supreme Court agrees largely to replace the text of Florida's summary judgment rule with that of Federal Rule of Civil Procedure 56.
In re Fla. R. Civ. P. 1.510

On April 29, the Florida Supreme Court agreed to largely replace the text of Florida's summary judgment rule with that of Federal Rule of Civil Procedure 56. The amendment was a victory for WLF, which, in formal comments to the Court, argued that the amendment promotes consistency, stability, and predictability in the law by harmonizing state and federal standards in Florida. WLF's comment was drafted with the pro bono assistance of Mark Behrens at Shook, Hardy & Bacon LLP.

The Supreme Court unanimously rejects the Ninth Circuit's attempt to give the FTC powers that Congress never granted it.
AMG Capital Management v. FTC

On April 22, the Supreme Court corrected a widespread misreading of an FTC Act remedy provision. The unanimous ruling was a victory for WLF, which filed an *amicus* brief urging the Court to overturn a Ninth Circuit decision that granted the FTC powers Congress never gave it. 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 "injunction" in § 13(b) unlocks the entire vault of equitable remedies. The Supreme Court announced that all those decisions are wrong. As WLF explained in its brief, and the Supreme Court now confirms, it is solely for Congress to decide how, and by whom, statutes are enforced. The Court's ruling thus restores modern and binding rules of statutory interpretation to the FTC Act. WLF's brief was joined by the Allied Educational Foundation.

The Seventh Circuit overturns a jury verdict in a case that unfairly imposed massive toxic-tort liability on lead-paint makers.
Burton v. Armstrong Containers Inc.

On April 15, the Seventh Circuit overturned trial court rulings and jury verdicts in a case that unfairly imposed massive liability on lead-paint makers. The decision was a victory for WLF, which filed an *amicus* brief with the court urging reversal. In a meticulous 62-page opinion, the Seventh Circuit held that the district court committed "three significant legal errors about the scope of Wisconsin products liability law." These errors "shaped the trial and impermissibly expanded the defendants' potential liability." Although it remanded claims against some defendants for a new trial, the appeals court held that one defendant, Sherwin Williams, is entitled to judgment as a matter of law on all claims that went to trial.

The Ninth Circuit rejects class certification in a multi-district price-fixing case.
In re Packaged Tuna Antitrust Litigation

On April 6, the Ninth Circuit reversed a class-certification order in an appeal from an important multi-district antitrust case in which predominance was premised on an averaging of the alleged harm suffered by the class members. The decision was welcome news for WLF, which filed an *amicus* brief in the case urging reversal. Pressing antitrust claims on behalf of three classes of purchasers of packaged tuna, the plaintiffs had to establish that common issues "predominate" within each class. The plaintiffs convinced the trial court to find such predominance, and grant class certification, based on an averaging of the alleged anticompetitive overcharges suffered within each proposed class. Although agreeing in principle that statistical or "representative" evidence—finding class-wide impact based on averaging assumptions and pooled transaction data—can be used to establish predominance, the Ninth Circuit held that the district court abused its discretion when it failed to resolve disputed questions of fact necessary to find predominance. The panel vacated the district court's certification order and remanded for the district court to determine the number of uninjured parties in the proposed class.

The Supreme Court adheres to textualist principles of statutory construction in refusing to expand the scope of the Telephone Consumer Protection Act.
Facebook, Inc. v. Duguid

On April 1, the Supreme Court adhered to textualist principles of statutory interpretation in refusing to interpret a federal law as applying to fast-moving technology. The petitioner in the case, Facebook, argued that the plain words of the Telephone Consumer Protection Act require that an autodialer use "a random or sequential number generator." Some courts, however, had decided that the TCPA's definition of an autodialer requires merely that a device be able to store telephone numbers and then dial them.

Those courts have been all too quick to enlist the TCPA's overall "purpose" and Con-gress's general "intent" in their cause. In its *amicus* brief, WLF observed that the case fits within a larger pattern of unwarrantable expansion of the TCPA. Although it might seem like a good idea for a court to try to "fix" the TCPA to keep up with the times, doing so, WLF argued, simply invites Congress to put off the hard work of crafting solutions itself. The Supreme Court's decision, reversing the Ninth Circuit, will help to ensure that Congress cannot defer legislating to the courts.

The Second Circuit declines New York City's invitation to move the task of addressing climate change into the courts.
City of New York v. Chevron

On April 1, the Second Circuit affirmed a district court ruling that wisely declined to move the task of addressing climate change into the federal courts. The appeal arose from New York City's lawsuit seeking funding for sea-wall construction and other climate-change programs. As part of this search, it sued five companies that produce and sell oil and natural gas. The district court dismissed the City's claims because (1) they are displaced by federal common law, (2) the Clean Air Act displaces any federal common-law claim directed at domestic fossil-fuel emissions, and (3) any federal common-law claim directed at foreign emissions interferes with the separation of powers and the nation's foreign policy. The Second Circuit has now affirmed each of these holdings. As WLF's *amicus* brief explained, even if it could get to the merits of its lawsuit, the City would face many insurmountable obstacles. One such obstacle is the tort element of proximate cause—the requirement that a direct connection exist between the conduct of the defendant and the harm to the plaintiff.

The Ninth Circuit declines to rehear en banc whether federal courts may adjudicate important separation-of-powers questions about federal agencies.
Axon v. FTC

On April 15, the Ninth Circuit denied a petition to rehear *en banc* a case about federal courts' jurisdiction over pre-enforcement challenges to an agency's structure. The decision was a setback for WLF, which argued that the panel's decision raised serious due-process concerns. Supreme Court precedent requires lower courts to apply three *Thunder Basin* factors, the panel focused almost exclusively on one factor—whether Axon can receive meaningful judicial review of its challenge to the FTC's structure. It held that once-per-decade review suffices for "meaningful" judicial review. This denied Axon its rightful day in court.

The Fifth Circuit affirms an FTC ruling that condemned as anticompetitive an agreement by two pharmaceutical companies to settle a patent-infringement suit.
Impax Laboratories v. FTC

On April 13, the Fifth Circuit affirmed an FTC ruling that condemned as anticompetitive an agreement between a brand-name drug company and a generic drug company to settle patent-infringement litigation. The decision was a setback for WLF, which argued that the FTC decision dramatically expanded antitrust law and would make it almost impossible for litigants to settle drug-patent disputes. The

Supreme Court ruled in 2013 that a patent litigation settlement that includes a large payment to a generic drug company receives antitrust scrutiny because it suggests that the brand-name company is unreasonably restraining trade by paying a potential competitor to stay out of the market. Here, the Fifth Circuit held that the FTC's rule-of-reason analysis was supported by substantial evidence that "Impax could have obtained the proffered benefits by settling without a reverse payment for delayed entry—which is a practical, less restrictive alternative."

