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June 2, 2021

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 **May 2021** filings and results.

New Filings

- WLF asks the Fourth Circuit to adopt the Supreme Court's *Safeco* test for willfulness in False Claims Act cases. (***U.S. ex rel. Sheldon v. Allergan***)
- WLF urges the Ninth Circuit to affirm a decision permanently enjoining California from forcing private speakers to utter false, misleading, and controversial speech. (***Nat'l Ass'n of Wheat Growers v. Bonta***)
- WLF tells the Fifth Circuit that companies should have the ability to bring declaratory-judgment actions against federal agencies to clarify their federal-law obligations. (***Walmart Inc. v. U.S. Drug Enforcement Administration***)
- WLF encourages the U.S. District Court for the District of New Jersey to adopt a proposed local rule requiring the disclosure of third-party litigation funding. (***In re Proposed Local Civil Rule 7.1.1***)
- WLF asks the Supreme Court to review, and ultimately reverse, a First Circuit decision that refused to read the Federal Arbitration Act's transportation-worker exemption in line with the statute's text and context. (***Amazon.com v. Waithaka***)

Decisions

- The Supreme Court holds that the federal-officer removal statute confers jurisdiction on federal appeals courts to review any issue encompassed in a district court's remand order. (***BP plc v. Mayor & City Council of Baltimore***) ***Victory***
- The Supreme Court declines to hear an important pharmaceutical preemption case. (***Janssen Pharmaceuticals v. A.Y.***)
- The Department of Labor repeals its recent rule for determining whether a worker is an employee or an independent contractor. (***In re Independent Contractor Status Under the FLSA***)

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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NEW FILINGS

WLF asks the Fourth Circuit to adopt the Supreme Court's *Safeco* test for willfulness in False Claims Act cases.
U.S. ex rel. Sheldon v. Allergan

On May 20, WLF filed an *amicus* brief urging the Fourth Circuit to affirm the District Court's order in an important False Claims Act case. Like every court of appeals to consider the issue, the District Court in this FCA action applied the test for willfulness announced by the Supreme Court in *Safeco*. 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 even civil 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 urges the Ninth Circuit to affirm a decision permanently enjoining California from forcing private speakers to utter false, misleading, and controversial speech.
Nat'l Ass'n of Wheat Growers v. Bonta

On May 19, WLF asked the Ninth Circuit to affirm a trial court decision permanently enjoining the State of California from requiring a safety warning under the State's controversial Prop 65 regime. Glyphosate is a popular herbicide used worldwide in the cultivation of crops. In 2018, California added glyphosate to Prop 65's list of chemicals "known to cause cancer." But no government regulator on the planet has uncovered evidence that glyphosate causes cancer at use levels. At best, any claim of a causal link between exposure to glyphosate and cancer is misleading and thus highly controversial. As WLF's *amicus* brief explains, longstanding Supreme Court precedent interpreting the First Amendment does not permit the government to force private speakers to utter false, misleading, or controversial speech.

WLF tells the Fifth Circuit that companies should have the ability to bring declaratory-judgment actions against federal agencies to clarify their federal-law obligations.
Walmart Inc. v. U.S. Drug Enforcement Administration

On May 14, WLF filed an *amicus* brief urging the Fifth Circuit to reverse the Eastern District of Texas in an important sovereign-immunity case. Walmart sued DEA and DOJ to clarify its legal obligations under the Controlled Substances Act. The District Court dismissed the case as barred by sovereign immunity. As WLF's brief shows, however, DEA and DOJ took agency action sufficient to waive sovereign immunity under Fifth Circuit precedent. Alternatively, WLF explains why the Fifth Circuit should reconsider its outlying precedent. Either way, WLF urges the Fifth Circuit to allow Walmart's suit to proceed to merits adjudication.

WLF encourages the U.S. District Court for the District of New Jersey to adopt a proposed local rule requiring the disclosure of third-party litigation funding.
In re Proposed Local Civil Rule 7.1.1

On May 13, WLF filed a comment with the U.S. District Court for the District of New Jersey in support of a proposed local rule requiring the disclosure of third-party litigation funding (TPLF). In its comment, WLF explained that disclosure of a third-party funder's role in a case will help ensure that lawyers satisfy their ethical obligations. TPLF disclosure would also provide crucial information for any court navigating the questions of undue burden and cost in discovery disputes. Many courts already have rules requiring disclosure of TPLF, so adopting this rule would put New Jersey federal courts in the legal mainstream.

WLF asks the Supreme Court to review, and ultimately reverse, a First Circuit decision that refused to read the Federal Arbitration Act's transportation-worker exemption in line with the statute's text and context.
Amazon.com v. Waithaka

On May 7, WLF asked the Supreme Court to review, and ultimately reverse, a First Circuit decision that refused to read section 1 of the Federal Arbitration Act (known as the "transportation worker exemption") in line with the statute's text and context. Although some judge-made tests purport to expand the exemption beyond national and international transportation of goods, WLF argues that these contrived standards defy statutory text and context, produce inconsistent results, and serve no end set forth by Congress. Because the plaintiff in this case made only local deliveries purely intrastate, he falls outside the section 1 exemption. WLF's *amicus* brief was joined by the Allied Educational Foundation.

DECISIONS

The Supreme Court holds that the federal-officer removal statute confers jurisdiction on federal appeals courts to review any issue encompassed in a district court's remand order.
BP plc v. Mayor & City Council of Baltimore

On May 17, the Supreme Court corrected a widespread misconception about the scope of appellate review of a remand order. The 7-1 ruling was a victory for WLF, which filed an *amicus* brief urging the Court to overturn a Fourth Circuit decision that refused to consider all of B.P.'s arguments for why removal to federal court was appropriate. As WLF's brief showed, the Fourth Circuit's ruling did not comport with the 230-year history of removal jurisdiction. Moving forward, courts of appeals must consider all removal grounds when a case is removed under the federal-officer or civil-rights removal statute.

The Supreme Court declines to hear an important pharmaceutical preemption case.
Janssen Pharmaceuticals v. A.Y.

On May 17, the Supreme Court declined to hear an important pharmaceutical preemption case. This was a setback for WLF, which had argued in its *amicus* brief that the Superior Court of Pennsylvania's decision applied a non-existent presumption against preemption. WLF's brief also explained how the Superior Court's decision conflicted with federal court decisions on the same issue. The denial of cert will likely narrow the availability of federal preemption in prescription-drug cases.

The Department of Labor repeals its recent rule for determining whether a worker is an employee or an independent contractor.
In re Independent Contractor Status Under the FLSA

On May 6, the Department of Labor's Wage and Hour Division withdrew the recently promulgated independent-contractor rule. Only two months after promulgating the rule, DOL delayed the rule's implementation so the new administration could review it. WLF had reminded DOL that it issued the rule to promote regulatory certainty and delaying the rule would cause regulatory uncertainty in an already tumultuous economic climate. It also challenged the DOL's consideration of distributional consequences. DOL, however, chose to consider those distributional consequences and stunt economic growth by withdrawing the independent-contractor rule.

