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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 **June 2021** filings and results.

New Filings

- WLF asks the Second Circuit to decide that a suit alleging negligent CERCLA remediation belongs in federal court. (***Abbo-Bradley v. City of Niagara Falls***)
- WLF urges the Supreme Court, yet again, to provide more FAA guidance to California courts. (***Viking River Cruises v. Moriana***)
- WLF asks the Supreme Court to review, and ultimately overturn, a California Court of Appeal decision that runs afoul of the FAAAA. (***Cal Cartage Transp. Express v. California***)
- WLF urges the FTC to scrutinize pharmaceutical mergers no more or less than mergers in other industries. (***In re Antitrust Standards for Pharmaceutical Mergers***)
- WLF reminds the FTC to consult the FTC Act's legislative history when deciding what counts as an unfair method of competition. (***In re Rescission of 2015 FTC Statement on Unfair Methods of Competition***)

Decisions

- The Supreme Court clarifies that every class member must satisfy Article III's injury-in-fact requirement. (***TransUnion LLC v. Ramirez***) ****Victory****
- The Supreme Court further limits the Alien Tort Statute's reach. (***Nestlé USA, Inc. v. Doe***) ****Victory****
- The Supreme Court clarifies that a defendant may rebut the presumption of class-wide reliance in a securities class action by showing that an alleged misrepresentation did not actually affect the stock's market price. (***Goldman Sachs Group v. Arkansas Teacher Retirement System***) ****Victory****
- The Second Circuit vacates an FTC order misapplying the "quick look" antitrust standard to trademark-infringement settlements. (***1-800 Contacts v. FTC***) ****Victory****
- The U.S. District Court for the District of New Jersey adopts a proposed local rule requiring the disclosure of third-party litigation funding. (***In re Proposed Local Civil Rule 7.1.1***) ****Victory****
- The Texas Supreme Court decides that the Communication Decency Act's immunity does not apply to affirmative acts in violation of state statute. (***In re Facebook, Inc.***)

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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- The Supreme Court declines to rein in refusal-to-deal antitrust liability. (***Comcast Corp. v. Viamedia, Inc.***)
- The Second Circuit denies interlocutory review of a decision making class certification a virtual certainty in securities cases. (***Pearlstein v. Blackberry Ltd.***)
- The Supreme Court declines an opportunity to clarify when federal courts may abstain from deciding important disputes implicating federal law. (***Bristol-Myers Squibb Co. v. Connors***)
- The Supreme Court declines to review a First Circuit decision that refused to read the FAA's transportation-worker exemption in line with the statute's text and context. (***Amazon.com v. Waithaka***)
- The Supreme Court declines to review a Missouri punitive-damages award that is 11 times the amount of compensatory damages. (***Johnson & Johnson v. Ingham***)

NEW FILINGS

WLF asks the Second Circuit to decide that a suit alleging negligent CERCLA remediation belongs in federal court.
Abbo-Bradley v. City of Niagara Falls

On June 23, WLF filed an *amicus* brief urging the Second Circuit to reverse a decision remanding to state court a suit filed by residents of Niagara Falls. WLF's brief focused on why the Second Circuit should join the Fifth, Seventh, and Tenth Circuits in recognizing the revival doctrine, which permits removal when the plaintiff substantially changes the suit by amending the complaint. Because the defendants here remedied the four CERCLA sites under four different consent decrees, the case both raises a federal question and was removable under the federal-officer removal statute. To prevent plaintiffs from gaming the system by holding back meritorious claims, WLF urges the Second Circuit to join its sister circuits by applying the revival doctrine.

WLF urges the Supreme Court, yet again, to provide more FAA guidance to California courts.
Viking River Cruises v. Moriana

On June 11, WLF filed an *amicus* brief asking the U.S. Supreme Court to review a California Court of Appeal ruling that is inconsistent with the Federal Arbitration Act. The decision, which holds that public and *qui tam* claims occupy a unique FAA-free zone, is the latest in a long line of decisions from California refusing to follow the FAA's directive that arbitration contracts be enforced as written. In its brief, WLF argues that Supreme Court review is needed to ensure uniform application of the FAA nationwide so that arbitration achieves its basic purpose: resolving disputes efficiently, predictably, individually, and cost-effectively. The decision below thwarts those aims. WLF's brief was prepared with the pro bono assistance of Peder Batalden, Felix Shafir, and John Querio of Horvitz & Levy LLP.

WLF asks the Supreme Court to review, and ultimately overturn, a California Court of Appeal decision that runs afoul of the FAAAA.
Cal Cartage Transp. Express v. California

On June 3, WLF urged the Supreme Court to hear an important FAAAA preemption case. California uses the ABC test to classify workers as employees or independent contractors. Despite the FAAAA's preempting any state law affecting trucking prices, routes, or services, the California Court of Appeal held that the FAAAA does not bar

California from applying the ABC test to truck drivers. WLF's *amicus* brief explains why applying the FAAAA's preemption provision advances federalism and vindicates Congress's intent in passing the FAAAA. Warning of the potential consequences of not ensuring that California courts follow its decisions, WLF urges the Supreme Court to hear this case and reaffirm the supremacy of federal law. WLF's brief was joined by the Allied Educational Foundation.

WLF urges the FTC to scrutinize pharmaceutical mergers no more or less than mergers in other industries.
In re Antitrust Standards for Pharmaceutical Mergers

On June 25, WLF filed formal comments with the Federal Trade Commission urging it to scrutinize pharmaceutical mergers no more or less than mergers in other industries. Despite no statutory or case law support, the FTC has requested input on whether it should treat pharmaceutical mergers differently than mergers in other industries. WLF's comments remind the FTC how focusing on competition, not competitors, has been central to American antitrust law for decades. Changing that focus would likely lead to unintended and disastrous results for pharmaceutical innovation. FTC should stay the course and use the same antitrust standards across the board.

WLF reminds the FTC to consult the FTC Act's legislative history when deciding what counts as an unfair method of competition.
In re Rescission of 2015 FTC Statement on Unfair Methods of Competition

On June 28 WLF submitted a comment to Federal Trade Commission (FTC) Chair Lina Khan addressing an item scheduled for discussion during a July 1, 2021 public meeting. The FTC is set to discuss whether to rescind a 2015 Commission "Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act." WLF's comment expresses support for Chair Khan's general goal of greater transparency, but argues that allowing a mere 6 days of public comment on such a significant enforcement-policy decision undermines that laudable goal. We also explain that the legislative history underlying the FTC Act's passage supports the principles expressed in the 2015 Statement, and we attach to our comment a 2014 WLF WORKING PAPER entitled "'Unfair Methods of Competition': The Legislative Intent Underlying Section 5 of the FTC Act" which supports our argument.

DECISIONS

The Supreme Court clarifies that every class member must satisfy Article III's injury-in-fact requirement.
TransUnion LLC v. Ramirez

On June 25, the Supreme Court reaffirmed the importance of separation of powers. The Court held that uninjured class members cannot vindicate the public interest by suing for violating federal law absent an injury-in-fact. As WLF's *amicus* brief explained, the Ninth Circuit's ruling contravened foundational separation-of-powers principles by improperly transferring the authority to enforce federal laws from the Executive Branch to the plaintiffs' bar. The Supreme Court's decision will ensure that, moving forward, the plaintiffs' bar cannot bring suits to redress nonexistent injuries.

The Supreme Court further limits the Alien Tort Statute's reach.
Nestlé USA, Inc. v. Doe

On June 17, the Supreme Court overturned a Ninth Circuit decision that would have allowed activists to impose liability on U.S. entities for aiding and abetting a third-party's alleged human rights violations overseas. The decision was a victory for WLF, which filed an *amicus* brief in the case on behalf of itself and the Allied Educational Foundation. Citing evidence that the defendants, U.S.-based cocoa processors and chocolate manufacturers, exploited the lower prices available for cocoa harvested from Ivory Coast farms, the Ninth Circuit held that the defendants must stand trial for aiding and abetting human rights abuses under the Alien Tort Statute (ATS). In an 8-1 opinion, the Supreme Court reversed. The Court reiterated that nothing in the ATS rebuts the presumption of domestic application in federal law. And since the ATS does not apply extraterritorially, the plaintiffs must show that the relevant conduct occurred in the United States. Yet nearly all the relevant conduct in the plaintiffs' complaint occurred in the Ivory Coast.

The Supreme Court clarifies that a defendant may rebut the presumption of class-wide reliance in a securities class action by showing that an alleged misrepresentation did not actually affect the stock's market price.
Goldman Sachs Group v. Arkansas Teacher Retirement System

On June 21, the Supreme Court vacated a Second Circuit decision in an important securities class action. The decision was a victory for WLF, which filed an *amicus* brief in the case. The Court clarified that, under its precedents, a defendant can rebut the presumption of class-wide reliance in a securities class action by showing, at the class-certification stage, that an alleged misrepresentation did not actually affect the stock's market price. The Second Circuit violated that rule in this case. The Supreme Court rejected the appeals court's rationale that such an inquiry would necessarily reach the merits of materiality. As WLF contended in its *amicus* brief, the Second Circuit's view would undermine Congress's intent to limit the proliferation of meritless securities class actions. WLF's *amicus* brief was prepared with the pro bono assistance of Lyle Roberts and Daniel Sachs at Shearman & Sterling LLP.

The Second Circuit vacates an FTC order misapplying the "quick look" antitrust standard to trademark-infringement settlements.
1-800 Contacts v. FTC

On June 11, the Second Circuit vacated an FTC order misapplying the "quick look" antitrust standard to a leading contact lens maker's trademark settlements. The decision was a victory for WLF, which, joined by five prominent antitrust scholars, filed an *amicus* brief in the case urging vacatur. 1-800 Contacts accused rivals of violating its trademarks by buying internet-search advertisements keyed to 1-800's trademark terms. As part of 1-800's settlements with them, the firms agreed to cease buying ads keyed to such terms. The FTC condemned the settlements as an antitrust violation. Instead of conducting an extensive analysis of the evidence, however, the FTC applied the "quick look" standard, under which the conduct at issue is *presumed* anticompetitive. The antitrust scholars and WLF contended that this was error. The Second Circuit agreed. It held that although trademark settlements are not immune from antitrust scrutiny, the FTC erred by (1) considering the agreements to be "inherently suspect" and (2) incorrectly concluding that the agreements violated the FTC Act under the rule of reason.

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

On June 21, the U.S. District Court for the District of New Jersey adopted a proposed local rule requiring the disclosure of third-party litigation funding (TPLF). The new rule's adoption was welcome news for WLF, which filed a formal comment explaining that disclosure of a third-party funder's role in a case will help ensure that lawyers satisfy their ethical obligations. TPLF disclosure will 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 puts New Jersey federal courts in the legal mainstream.

The Texas Supreme Court decides that the Communication Decency Act's immunity does not apply to affirmative acts in violation of state statute.
In re Facebook, Inc.

On June 25, the Texas Supreme Court held that section 230 of the Communications Decency Act does not bar claims alleging Facebook engaged in affirmative acts in violation of a state statute. The decision was a disappointment for WLF, which filed an *amicus* brief in the case in support of Facebook. Section 230 generally protects anyone on the web from being held liable for the speech of a third party. WLF asked the Texas high court to apply section 230 as written in a case in which the lower courts effectively set the statute aside. Instead, the Texas high court held that section 230 bars only common law claims like negligence and products liability, not claims alleging a violation of human trafficking laws. WLF is grateful to Scott Keller of Lehotsky Keller for his pro bono assistance in the case.

The Supreme Court declines to rein in refusal-to-deal antitrust liability.
Comcast Corp. v. Viamedia, Inc.

On June 28, the Supreme Court declined to take up an important antitrust refusal-to-deal case. The decision was a setback for WLF, which filed an *amicus* brief urging certiorari. 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 brief argued that the Supreme Court should intervene to prevent the lower courts from improperly straying from the "no rational reason" refusal-to-deal legal standard.

The Second Circuit denies interlocutory review of a decision making class certification a virtual certainty in securities cases.
Pearlstein v. Blackberry Ltd.

On June 23, the Second Circuit declined to hear an important securities case. Despite Supreme Court precedent holding that defendants have a right to rebut the *Basic* presumption of reliance as the class

certification stage, the District Court made rebutting the presumption futile. As WLF's brief showed, under the District Court's order plaintiffs' attorneys can plead creatively to avoid showing reliance at the class-certification stage. The Second Circuit's decision to not hear the case will increase pressure on companies to settle meritless claims.

The Supreme Court declines an opportunity to clarify when federal courts may abstain from deciding important disputes implicating federal law.
Bristol-Myers Squibb Co. v. Connors

On June 21, the Supreme Court declined to hear an important federal-jurisdiction case. This was a setback for WLF, which had argued in its *amicus* brief that the Ninth Circuit's erred by holding that federal courts lacked jurisdiction to hear a challenge to Hawaii's consumer-protection statute. The decision ignored the key differences between consumer-protection suits filed by contingency-fee lawyers and state criminal cases, which are generally entitled to abstention. WLF also argued that Bristol-Myers Squibb's compelled-speech claims were meritorious. The denial of cert will likely lead to more federal courts abstaining from hearing free-speech cases.

The Supreme Court declines to review a First Circuit decision that refused to read the FAA's transportation-worker exemption in line with the statute's text and context.
Amazon.com v. Waithaka

On June 21, the Supreme Court declined to review a First Circuit decision that misapplied section 1 of the Federal Arbitration Act (known as the "transportation worker exemption"). The decision was a disappointment for WLF, which filed an *amicus* brief in the case urging review. Although some judge-made tests purport to expand the exemption beyond national and international transportation of goods, WLF argued 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 exemption. WLF's brief was joined by the Allied Educational Foundation. The denial of certiorari ensures that the issue will remain a source of confusion for the lower courts.

The Supreme Court declines to review a Missouri punitive-damages award that is 11 times the amount of compensatory damages.
Johnson & Johnson v. Ingham

On June 1, the Supreme Court declined to review a Missouri state court's staggering $2.1 billion punitive damages award against Johnson & Johnson. The case arose from a suit by 22 plaintiffs who alleged that the defendant's talcum powder caused them to develop cancer. The jury calculated its 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 argued in its *amicus* brief, improperly punished 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 brief was prepared with the pro bono assistance of Douglas Dunham, Ellen Quackenbos, Matthew Steinberg, and Theodore Yale at Dechert LLP.

