



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 **July 2021** filings and results.

New Filings

- WLF asks the First Circuit to reverse, on First Amendment grounds, the criminal convictions of two medical-device company executives under the FDCA. (***United States v. Facticeau***)
- WLF urges the Eleventh Circuit to overturn a \$10 million jury award under the Torture Victim Protection Act. (***Mamani v. Berzain***)

Decisions

- The Supreme Court agrees to decide whether the Rehabilitation Act allows disparate-impact claims. (***CVS Pharmacy, Inc. v. Doe***) ***victory***
- The California Court of Appeal for the Fourth District declines to publish a recent opinion in an important products liability case. (***In re Letter Requesting Publication***)
- After allowing only six days for public comment, the FTC votes to rescind a 2015 statement providing clarity on "unfair methods of competition" under Section 5 of the FTC Act. (***In re Rescission of 2015 FTC Statement on Unfair Methods of Competition***)

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 First Circuit to reverse, on First Amendment grounds, the criminal convictions of two medical-device company executives under the FDCA.

United States v. Facteau

On July 28, WLF urged the First Circuit to reverse, on First Amendment grounds, the criminal convictions of two medical-device company executives under the FDCA. Bill Facteau and Patrick Fabian, former executives of Acclarent, were convicted of misdemeanor adulteration and misbranding under the FDCA for distributing a medical device for an “off-label” use. At trial, however, the jury found that no defendant made false or misleading statements, nor had any intent to defraud or mislead, and so acquitted on all charges requiring mens rea. As WLF’s *amicus* brief explains, the defendants’ convictions cannot stand. As applied here, the FDCA’s misbranding and adulteration regulations, are content-, viewpoint-, and speaker-based restrictions on speech that cannot withstand strict scrutiny. WLF’s *amicus* brief was prepared with substantial pro bono assistance from Joel Kurtzberg, Adam Mintz, John MacGregor, and Jason Rozbruch of Cahill Gordon & Reindel LLP.

WLF urges the Eleventh Circuit to overturn a \$10 million jury award under the Torture Victim Protection Act.

Mamani v. Berzain

On July 28, WLF urged the Eleventh Circuit to overturn a \$10 million jury verdict awarded under the Torture Victim Protection Act. Congress incorporated parts of 1992 international law into U.S. law when it passed the TVPA. But it limited liability to those who act deliberately. WLF’s *amicus* brief explains that the District Court erred by allowing the jury to find liability under a civilian command-responsibility theory that did not become part of international law until 1998. It also erred by allowing the jury to impose liability for the defendants’ mere negligent oversight of military forces. Because international relations problems will follow if the Eleventh Circuit affirms, WLF urges the Eleventh Circuit to overturn the jury’s verdict and apply the TVPA’s language as written.

DECISIONS

The Supreme Court agrees to decide whether the Rehabilitation Act allows disparate-impact claims.

CVS Pharmacy, Inc. v. Doe

In a victory for WLF, on July 2, the U.S. Supreme Court agreed to hear an important disparate-impact case. WLF, joined by the Independent Women’s Law Center, filed an *amicus* brief urging the Supreme Court to resolve a circuit split about whether Section 504 of the Rehabilitation Act of 1973 permits disparate-impact claims. WLF argued that the Ninth Circuit’s decision did not follow Section 504’s plain language, nor did it make sense in light of Supreme Court decisions interpreting other nondiscrimination statutes. WLF intends to file a merits brief urging the Supreme Court to reject judicially created causes of action by reversing the Ninth Circuit’s decision.

The California Court of Appeal for the Fourth District declines to publish a recent opinion in an important products liability case.*In re Letter Requesting Publication*

On July 1, The California Court of Appeal for the Fourth District, Division Two, declined to publish the court's recent opinion in *Bledsoe v. Monster Beverage Corp.*, No. E072569. The decision not to publish was a disappointment for WLF, which explained in a letter that 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. Unfortunately, the court's refusal to publish ensures that *Bledsoe's* discussion of both these important legal issues will lack any precedential authority.

After allowing only six days for public comment, the FTC votes to rescind a 2015 statement providing clarity on "unfair methods of competition" under Section 5 of the FTC Act.*In re Rescission of 2015 FTC Statement on Unfair Methods of Competition*

On July 1, the Federal Trade Commission (FTC) voted to rescind a 2015 Commission "Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act." WLF filed comments with the Commission arguing that allowing a mere 6 days of public comment on such a significant enforcement-policy decision undermines that laudable goal. We also explained that the legislative history underlying the FTC Act's passage supports the principles expressed in the 2015 Statement, and we attached 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.