



Washington Legal Foundation
Advocate for Freedom and Justice
2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302 wlf.org

September 1, 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 **August 2021** filings and results.

New Filings

- WLF asks the Supreme Court to clarify that the PSLRA's mandatory discovery stay applies equally in state and federal court. (***Pivotal Software, Inc. v. Superior Court of Cal.***)
- WLF asks the Supreme Court to halt California's attempt to regulate trucking nationwide. (***California Trucking Association v. Bonta***)
- WLF asks the Texas Supreme Court to grant mandamus relief by limiting the scope of discovery to the threshold question of foreseeability in a major premises-liability case. (***In re Walmart, Inc.***)
- WLF urges the Third Circuit to vacate a class-certification order in an ERISA case due to lack of Article III standing. (***Boley v. Universal Health Services***)
- WLF asks the Supreme Court to clarify when (and where) regulated parties may challenge an agency's structure. (***Axon v. FTC***)

Decisions

- The Seventh Circuit aligns with its sister circuits in adopting the Supreme Court's *Safeco* test for willfulness in False Claims Act actions. (***U.S. ex rel Yarberry v. Supervalu***) ****victory****
- The Ninth Circuit dismisses, as moot, an appeal from an overbroad order that blocked all new oil-and-gas pipeline projects, nationwide. (***Northern Plains Resource Council v. U.S. Army Corps of Engineers***)
- The Ninth Circuit votes to vacate, and rehear en banc, a panel's decision decertifying a class-certification order in an important multi-district antitrust case. (***In re Packaged Tuna Antitrust Litigation***)
- The FDA issues its final rule amending its medical-product "intended use" regulations, giving short shrift to manufacturers' First Amendment rights. (***In re FDA Amendments to "Intended Uses" Regulations***)

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.

WLF Legal Staff Contacts

Cory Andrews
General Counsel | Vice President of Litigation
candrews@wlf.org

John Masslon II
Senior Litigation Counsel
jmasslon@wlf.org

Glenn Lammi
Executive Director | Vice President of Legal Studies
glammi@wlf.org

NEW FILINGS

WLF asks the Supreme Court to clarify that the PSLRA's mandatory discovery stay applies equally in state and federal court.

Pivotal Software, Inc. v. Superior Court of Cal.

On August 25, WLF asked the Supreme Court to vacate a decision of the Court of Appeal for the State of California in a securities class action with far-reaching implications. As a key component of Congress's overall statutory scheme for private securities actions, the PSLRA stays discovery during the pendency of a motion to dismiss in "any private action" under the Securities Act of 1933. Congress was concerned that plaintiffs bringing meritless securities suits were using abusive discovery as leverage to bolster their cases, avoid dismissal, and force settlements. The California court failed to apply the PSLRA's mandatory discovery stay in this case. It held that the PSLRA's discovery stay is procedural, not substantive, and so does not apply in state court. But as WLF explains in its *amicus* brief, the PSLRA's plain language, overall statutory scheme, and animating public-policy concerns all confirm that the mandatory stay applies in *all* Securities Act cases, including those brought in state court. WLF's *amicus* brief was prepared with the pro bono assistance of Lyle Roberts and George Anhang (Washington, DC), and Stephen Janick (New York, NY) of Shearman & Sterling LLP.

WLF asks the Supreme Court to halt California's attempt to regulate trucking nationwide.

California Trucking Association v. Bonta

On August 16, 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. The FAAAA preempts any state law affecting trucking prices, routes, or services. Even so, the Ninth Circuit 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 the Ninth Circuit follows its decisions, WLF urges the Supreme Court to hear this case and reaffirm the supremacy of federal law.

WLF asks the Texas Supreme Court to grant mandamus relief by limiting the scope of discovery to the threshold question of foreseeability in a major premises-liability case.

In re Walmart, Inc.

On August 13, WLF filed an *amicus* brief urging the Texas Supreme Court to grant mandamus relief by directing the trial court to limit discovery to the threshold question of foreseeability in a major premises-liability case. Under Texas law, a premises-liability plaintiff can subject a defendant to free-ranging and burdensome discovery only after showing that the defendant could have reasonably foreseen her injury. The trial court here refused to apply that principle. It derided the rule as "too restrictive" and faulted the Texas Supreme Court for what it viewed as inadequate guidance. In short, it refused to apply the law. In its brief, WLF urges the Texas Supreme Court to step in now and relieve Walmart of the need to produce massive amounts of burdensome discovery unrelated to the threshold issue of foreseeability. WLF's brief was prepared with the generous pro bono assistance of Allyson N. Ho and Elizabeth Kiernan of Gibson, Dunn & Crutcher LLP in Dallas, TX.

WLF urges the Third Circuit to vacate a class-certification order in an ERISA case due to lack of Article III standing.

Boley v. Universal Health Services

On August 9, WLF urged the Third Circuit to overturn a class-certification order for lack of Article III standing. The Supreme Court’s recent standing precedent is clear: Class representatives must have standing to pursue claims on behalf of a class. The District Court, however, allowed 401(k) plan participants to sue about investments in which they did not participate. WLF’s *amicus* brief explains that, although the named plaintiffs had standing to challenge fees charged for their investments, they lacked standing to sue for charges affecting other investment options. Because this lack of standing deprived the District Court of subject-matter jurisdiction over those claims, WLF urges the Third Circuit to reverse the class-certification order.

WLF asks the Supreme Court to clarify when (and where) regulated parties may challenge an agency’s structure.

Axon v. FTC

On August 6, WLF filed an *amicus* brief urging the Supreme Court to hear an important separation-of-powers case. Despite Supreme Court precedent requiring lower courts to apply three *Thunder Basin* factors when deciding whether district courts may hear pre-enforcement challenges to an agency, the Ninth Circuit 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. As WLF’s brief shows, this decision follows a pattern among lower courts of applying *Thunder Basin* in a manner that violates defendants’ due-process rights. WLF urges the Supreme Court to grant the petition and reaffirm that only federal courts can hear cases and controversies.

DECISIONS

The Seventh Circuit aligns with its sister circuits in adopting the Supreme Court’s *Safeco* test for willfulness in False Claims Act actions.

U.S. ex rel Yarberry v. Supervalu

On August 12, the Seventh Circuit adopted the position taken by every court of appeals to consider the issue and held that the test for willfulness announced by the Supreme Court in *Safeco* applies in False Claims Act actions. The decision was a victory for WLF, which filed an *amicus* brief urging the Seventh Circuit to affirm the District Court’s ruling. WLF explained 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. Moving forward, companies can rest assured that they won’t face treble damages under the FCA for mere negligent conduct.

The Ninth Circuit dismisses, as moot, an appeal from an overbroad order that blocked all new oil-and-gas pipeline projects, nationwide.

Northern Plains Resource Council v. U.S. Army Corps of Engineers

On August 11, the Ninth Circuit dismissed, as moot, an appeal concerning the propriety of a wildly overbroad district court order that blocked all new oil-and-gas line projects, nationwide. As WLF contended in its *amicus* brief, the plaintiffs here lacked standing to obtain nationwide relief. Rather than issue a nationwide injunction, the trial court should have simply remanded to the agency and its experts to fix the supposed procedural defect. But now the U.S. Army Corps' issuance of a new nationwide permit supersedes the agency action that was at issue on appeal. As a result, the Ninth Circuit held that the interlocutory appeal and the underlying claims are moot.

The Ninth Circuit votes to vacate, and rehear en banc, a panel's decision decertifying a class-certification order in an important multi-district antitrust case.

In re Packaged Tuna Antitrust Litigation

On August 4, the Ninth Circuit voted to vacate a prior panel's decision decertifying a class-certification order in an important multi-district antitrust case. The decision to rehear the case en banc was a disappointment for WLF, which filed an *amicus* brief in the case urging decertification. 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 statistical or "representative" evidence—finding class-wide impact based on averaging assumptions and pooled transaction data—can be used to establish predominance, the district court abused its discretion here when it failed to resolve disputed questions of fact necessary to find predominance. WLF will monitor the en banc proceeding for any additional briefing opportunity.

The FDA issues its final rule amending its medical-product "intended use" regulations, giving short shrift to manufacturers' First Amendment rights.

In re FDA Amendments to "Intended Uses" Regulations

On August 2, the Food and Drug Administration (FDA) issued its final rule amending its medical-product "intended use" regulations. The new rule fails to adequately account for drug and device manufacturers' First Amendment rights. The FDA's 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 now be deemed by the agency to be an *implicit* promotion of that product. WLF had filed formal comments on the proposed rule reminding FDA 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.