



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

November 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 **October 2021** filings and results.

New Filings

- WLF asks the Ninth Circuit to affirm a finding of federal preemption in products-liability litigation for a leading diabetes therapy. (***Adams v. Merck Sharp & Dohme***)
- WLF urges the Ninth Circuit to hold that parties to a contractual dispute still must honor their bargained-for agreement to arbitrate. (***Caremark v. Chickasaw Nation***)
- WLF asks the Supreme Court to hold that plaintiffs cannot recover emotional-distress damages under Section 504 of the Rehabilitation Act. (***Cummings v. Premier Rehab Keller***)
- WLF urges the Supreme Court to rein in the Ninth Circuit's wayward expert-evidence caselaw. (***Monsanto Co. v. Hardeman***)

Decisions

- The Second Circuit vacates a decision permitting states to sue over the Department of Labor's previous joint-employer rule and dismisses as moot an appeal from that decision in light of a new rule. (***New York v. Walsh***)
- At the behest of settling parties, the Supreme Court dismisses the petition in a prominent excessive-fines case. (***Stars Interactive Holdings v. Kentucky***)
- The Supreme Court declines to review a California Court of Appeal decision that misapplied the FAA. (***Cal Cartage Transp. Express v. California***)

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 Ninth Circuit to affirm a finding of federal preemption in products-liability litigation for a leading diabetes therapy.

Adams v. Merck Sharp & Dohme

On October 25, WLF filed an *amicus* brief urging the Ninth Circuit to affirm a lower court’s ruling that federal law preempts the plaintiffs’ state-law failure-to-warn claim because it was impossible for the manufacturer to change the drug’s label under federal law. The case arises from a multi-district litigation (MDL) combining lawsuits by users of incretin-based therapies for type-2 diabetes. Novo Nordisk Inc. manufactures and markets Victoza (liraglutide). The plaintiffs complain that Victoza’s FDA-approved labeling failed to warn of an increased risk of pancreatic cancer. But as WLF argues in its brief, and the MDL court rightly found, the FDA’s “changes-being-effected” regulation allows a manufacturer to change its labeling *only* when it possesses some “newly acquired information”—material information not previously presented to the FDA but that significantly alters the drug’s risk profile. When, as here, no such information exists, that is the end of the matter. Under the Supremacy Clause, the plaintiffs’ state-law claims are preempted. WLF’s brief also argues that the decision below should be affirmed because the plaintiffs offered no reliable evidence to establish general causation.

WLF urges the Ninth Circuit to hold that parties to a contractual dispute still must honor their bargained-for agreement to arbitrate.

Caremark v. Chickasaw Nation

On October 7, WLF filed an *amicus* brief urging the Ninth Circuit to enforce the parties’ contract as written in an important arbitration case. The parties’ contract included a delegation clause, which requires the arbitrator to decide any issues about the arbitration provision’s scope. But a group of pharmacies ignored the contract and sued in federal court. In its brief, WLF argues that the Supreme Court’s and Ninth Circuit’s precedent requires that the arbitrator decide the scope of an arbitration agreement when the parties have a delegation clause. The brief also explains that Congress’s providing a federal cause of action does not exempt those claims from the FAA. As the parties bargained for arbitration, that is what the Ninth Circuit should order.

WLF asks the Supreme Court to hold that plaintiffs cannot recover emotional-distress damages under Section 504 of the Rehabilitation Act.

Cummings v. Premier Rehab Keller

On October 5, WLF filed an *amicus* brief urging the Supreme Court not to imply a remedy for emotional distress under Section 504 of the Rehabilitation Act of 1973. The Fifth Circuit held that Section 504 does not allow for emotional-distress damages. In its brief, WLF argues that the Fifth Circuit’s decision is correct. The tort of intentional infliction of emotional distress already allows for recovery in the same cases that plaintiffs seek to recover emotional-distress damages for breach of contract under common law. Implying a remedy for emotional distress under Section 504 would also raise separation-of-powers concerns because the Court, not Congress, created the private cause of action. As companies deserve to know their potential liability when accepting federal funds, WLF urges the Supreme Court to affirm the Fifth Circuit’s decision.

WLF urges the Supreme Court to rein in the Ninth Circuit's wayward expert-evidence caselaw.*Monsanto Co. v. Hardeman*

On October 4, WLF asked the Supreme Court to review, and ultimately to reverse, a Ninth Circuit decision that requires trial-court judges to abdicate their gatekeeping duty to keep unreliable expert evidence from ever reaching the jury. The case arises from a lawsuit alleging that exposure to Monsanto's popular herbicide Roundup caused the plaintiff's non-Hodgkin's lymphoma. After hearing expert testimony on causation, the jury awarded the plaintiff \$80 million in damages, which was later reduced to \$25 million. In its *amicus* brief supporting Monsanto's petition, WLF argues that the Ninth Circuit erred by allowing the plaintiff to establish causation on the basis of unreliable expert opinions. As WLF shows in its brief, the decision below is the merely the latest in a long line of Ninth Circuit decisions that give wide berth to medical-causation experts who say they have performed a scientific analysis but have failed to do so reliably. WLF's *amicus* brief was prepared with generous pro bono assistance from Jonathan S. Tam and Matthew P. Steinberg of Dechert LLP.

DECISIONS

At the behest of settling parties, the Supreme Court dismisses the petition in a prominent excessive-fines case.*Stars Interactive Holdings v. Kentucky*

On October 4, the Supreme Court dismissed a case about outsized judgments unmoored from any actual harm after the parties settled the case. Both the Excessive Fines Clause and Due Process Clause of the Constitution limit the permissible size of civil penalties. The Kentucky Supreme Court, however, held that the Constitution allows any civil penalty so long as it is calculated using a mathematical formula. WLF's *amicus* brief explained how that holding deepens a split amongst state courts of last resort and federal courts of appeals while ignoring Supreme Court precedent. The \$300 million settlement in this case shows the power States can exert on companies by not complying with the Constitution's requirements.

The Second Circuit vacates a decision permitting states to sue over the Department of Labor's previous joint-employer rule and dismisses as moot an appeal from that decision in light of a new rule.*New York v. Walsh*

On October 29, the Second Circuit vacated the Southern District of New York's decision and remanded with instructions to dismiss the case as moot. This was a setback for WLF, which had urged the Court to reverse the decision. A group of States sued the Department of Labor after it issued a revised joint-employer rule. After finding the States had standing, the lower court invalidated the rule. WLF's *amicus* brief showed that a State's choice to update state rules is not a direct Article III injury. Because the Second Circuit did not address the standing argument, more States will not sue to block rules that do not cause them an Article III injury.

The Supreme Court declines to review a California Court of Appeal decision that misapplied the FAAAA.

Cal Cartage Transp. Express v. California

On October 4, the Supreme Court declined to hear an important FAAAA preemption case. This was a setback for WLF, which had filed an *amicus* brief urging the Court to hear the 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 brief explained why applying the FAAAA's preemption provision advances federalism, The Court's action allows California to impede Congress's intent in passing the FAAAA. WLF's brief was joined by the Allied Educational Foundation.