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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 2022** filings and results.

## New Filings

- WLF urges the Supreme Court to reject California's attempt to impose upstream economic effects beyond its own borders. (***Nat'l Pork Producers Council v. Ross***)
- WLF asks the Supreme Court of Pennsylvania to cap punitive-damages awards consistent with due process. (***Bert Co. v. Turk***)
- WLF urges the Supreme Court to resolve an important dispute about the scope of the attorney-client privilege. (***In re Grand Jury***)
- WLF asks the Seventh Circuit to reverse a federal trial-court ruling that seizes on a statute's silence alongside its "overarching purpose" to grant a federal agency broad extra-statutory authority. (***Eli Lilly Co. v. Becerra***)

## Decisions

- The Supreme Court denies review in an important preemption case affecting interstate trucking. (***California Trucking Association v. Bonta***)
- The Supreme Court grants review in an important arbitration case and remands for further consideration in light of its recent holding in *Viking River Cruises v. Moriana*. (***Coverall N. Am. v. Rivas***) *victory*
- The Supreme Court declines to hear an important federal-preemption case. (***Monsanto v. Pilliod***)
- The Supreme Court declines to review an important dormant Commerce Clause case. (***Title Max v. Vague***)
- The Supreme Court declines to review a Ninth Circuit decision that dilutes trial-court judges' gatekeeping duty to exclude unreliable expert evidence. (***Monsanto Co. v. Hardeman***)
- The Supreme Court holds that a rule of California law that precludes the individualized arbitration of claims under California's Private Attorneys General Act is inconsistent with the FAA. (***Viking River Cruises, Inc. v. Moriana***) *victory*
- The Judicial Conference Committee on Rules of Practice and Procedure approves amendments to Rule 702 of the Federal Rules of Evidence. (***In re Proposed Amendments to Federal Rule of Evidence 702***) *victory*
- The Sixth Circuit holds that the FDIC's administrative structure, which includes two layers of for-cause removal protections, complies with Article II of the Constitution. (***Calcutt v. FDIC***)
- The Supreme Court holds that an airline's ramp-agent supervisor is subject to the FAA's "transportation-worker exception." (***Southwest Airlines v. Saxon***)
- The Third Circuit affirms an ERISA class-certification order that allows class members to challenge plans in which they never invested. (***Boley v. Universal Health Services***)

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 urges the Supreme Court to reject California's attempt to impose upstream economic effects beyond its own borders.**
*National Pork Producers Council v. Ross*

On June 17, WLF urged the Supreme Court to reject California's attempt to impose its will on the rest of its sister States. The Ninth Circuit held that California could allow pork to be sold in the State only if the pig's mother was kept in a group pen with at least 24 square feet of space per sow. WLF's *amicus* brief explains how this de facto extraterritorial application of California law violates horizontal federalism principles. The brief also explains how it could lead to increased food prices and hunger worldwide.

**WLF asks the Supreme Court of Pennsylvania to cap punitive-damages awards consistent with due process.**
*Bert Co. v. Turk*

On June 10, WLF urged the Supreme Court of Pennsylvania to cap punitive-damages awards. The Superior Court of Pennsylvania held that States have almost unlimited authority to authorize punitive damages—here, over eleven times the compensatory-damages award. WLF's *amicus* brief explains why the Fourteenth Amendment's Due Process Clause limits punitive damages to the amount of compensatory damages when the compensatory-damages award is substantial. The brief also explains why the ratio cannot go above 1:1 based on potential harm.

**WLF urges the Supreme Court to resolve an important dispute about the scope of the attorney-client privilege.**
*In Re Grand Jury*

On June 1, WLF urged the Supreme Court to hear an important case about the attorney-client privilege. The Ninth Circuit held that a document containing legal advice is not privileged if the primary purpose of the document is to provide tax advice. WLF's *amicus* brief explains how this rule will cause companies to curtail internal investigations. Next, the brief argues that even if the holding is limited to tax advice, it exemplifies tax exceptionalism. Finally, the brief explains that review is necessary to ensure uniform application of Rules 26 and 501.

**WLF asks the Seventh Circuit to reverse a federal trial-court ruling that seizes on a statute's silence alongside its "overarching purpose" to grant a federal agency broad extra-statutory authority.**
*Eli Lilly Co. v. Becerra*

On June 1, WLF asked the Seventh Circuit to reverse a federal trial-court ruling that seizes on a statute's silence alongside its "overarching purpose" to grant the Health Resources Services Administration (HRSA) broad gap-filling authority that Congress never gave it. The appeal arises from a suit by prescription-drug manufacturer Eli Lilly against HRSA challenging the agency's recent enforcement action under the 340B Program. While it overturned HRSA's violation letter as arbitrary and capricious under the APA, the district court nonetheless ratified HRSA's expansive statutory interpretation. That error, WLF contends in its *amicus*

 

brief, warrants reversal. As WLF shows, the district court's statutory construction, if allowed to stand, would allow HRSA to unilaterally transform the 340B Program from a sensible cost-saving measure into a constitutionally dubious wealth-transfer scheme. This it cannot do.

## DECISIONS

**The Supreme Court denies review in an important preemption case affecting interstate trucking.**
*California Trucking Association v. Bonta*

On June 30, the Supreme Court declined to hear an important FAAAA preemption case. This was a disappointment for WLF, which filed an *amicus* brief urging the Court to resolve a circuit split. 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 brief explained why applying the FAAAA's preemption provision advances federalism and vindicates Congress's intent in passing the FAAAA. The brief also warned of the consequences of letting the Ninth Circuit follows its decisions.

**The Supreme Court grants review in an important arbitration case and remands for further consideration in light of its recent holding in *Viking River Cruises v. Moriana*.**
*Coverall N. Am. v. Rivas*

On June 27, the Supreme Court vacated a Ninth Circuit ruling and remanded the case for further consideration in light of the high court's recent holding in *Viking River Cruises v. Moriana*. The decision to grant Coverall North America's petition, vacate the Ninth Circuit's ruling, and remand for further action was a victory for WLF, which filed an *amicus* brief in the case. In its brief, WLF argued that Supreme Court review was 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 thwarted those aims. WLF's brief was prepared with the pro bono assistance of Peder Batalden, Felix Shafir, and John Querio of Horvitz & Levy LLP.

**The Supreme Court declines to hear an important federal-preemption case.**
*Monsanto v. Pilliod*

On June 27, the Supreme Court declined to hear an important preemption case. The denial of review was a setback for WLF, which filed an *amicus* brief urging the Court's review. The California Court of Appeal held that the Federal Insecticide, Fungicide, and Rodenticide Act does not preempt state-law failure-to-warn claims, even though EPA has rejected glyphosate warnings. WLF's brief explained how glyphosate's listing as a possible carcinogen is based not on science but on rent-seeking by the plaintiffs' bar. Next, the brief described how deciding the preemption issue in this case would resolve issues about warning-label preemption under other statutes. Finally, the brief explained why the Court should have granted review and limited punitive damages to the amount of compensatory damages. Allied Educational Foundation joined WLF on the brief.

 

**The Supreme Court declines to review an important dormant Commerce Clause case.**
*Title Max v. Vague*

On June 27, the Supreme Court declined to hear an important case about the dormant Commerce Clause. The denial of review was a setback for WLF, which filed an *amicus* brief urging the Court's review. The Third Circuit held that Pennsylvania may apply its usury laws to a Delaware corporation doing business in Delaware if the loan is serviced in Pennsylvania. WLF's brief explained how this extraterritorial application of Pennsylvania law violates horizontal federalism principles. The brief also explained why this was a good case to pair with *National Pork Producers* and described the real-life consequences of the Third Circuit's decision. Online Lenders Alliance joined WLF on the brief.

**The Supreme Court declines to review a Ninth Circuit decision that dilutes trial-court judges' gatekeeping duty to exclude unreliable expert evidence.**
*Monsanto Co. v. Hardeman*

On June 21, the Supreme Court declined to review 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 decision was a disappointment for WLF, which filed an *amicus* brief in the case urging review. The case arose 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, WLF argued that the Ninth Circuit erred by allowing the plaintiff to establish causation on the basis of unreliable expert opinions. As WLF demonstrated, the decision below was 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.

**The Supreme Court holds that a rule of California law that precludes the individualized arbitration of claims under California's Private Attorneys General Act is inconsistent with the FAA.**
*Viking River Cruises, Inc. v. Moriana*

On June 15, the Supreme Court held that a rule of California law that precludes dividing claims under California's Private Attorneys General Act (PAGA) is inconsistent with the FAA. The decision was welcome news for WLF, which filed an *amicus* brief in the case urging reversal. Here the California Court of Appeal declined to enforce a representative-action waiver in the parties' arbitration agreement based on the California Supreme Court's decision in *Iskanian v. CLS Transportation Los Angeles*. In *Iskanian*, the court held that because PAGA claims are not divisible into constituent claims, courts need not enforce PAGA representative-action waivers. The U.S. Supreme Court reversed the California Court of Appeal, explaining that a "state rule imposing an expansive rule of joinder in the arbitral context would defeat the ability of parties to control which claims are subject to arbitration." That, in turn, would allow parties to add "new claims to the proceeding," effectively coercing parties into withholding PAGA claims from arbitration. WLF's brief was prepared with the pro bono assistance of Peder Batalden, Felix Shafir, and John Querio of Horvitz & Levy LLP.

 

**The Judicial Conference Committee on Rules of Practice and Procedure approves amendments to Rule 702 of the Federal Rules of Evidence.**
*In re Proposed Amendments to Federal Rule of Evidence 702*

On June 7, the Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee) approved amendments to Rule 702 of the Federal Rules of Evidence. If approved by the Judicial Conference, the Supreme Court, and Congress, the amendments will take effect on December 1, 2023. This was welcome news for WLF, which filed comments with the Standing Committee explaining how district courts and circuit courts continue to misapply Rule 702. The proposed amendments clarify some aspects of Rule 702 that would limit the ability of courts to circumvent the rule's requirements. WLF's comments also explain how tweaking the proposed amendments would help to eliminate current problems with courts' application of the rule and prevent further attempts at skirting the rule's requirements.

**The Sixth Circuit holds that the FDIC's administrative structure, which includes two layers of for-cause removal protections, complies with Article II of the Constitution.**
*Calcutt v. FDIC*

On June 10, the Sixth Circuit held that the FDIC's administrative structure complies with the Appointments Clause. This decision was a setback for WLF, which filed an *amicus* brief in the case arguing that both FDIC board members and FDIC administrative law judges enjoy unconstitutional for-cause removal protections. The brief also argued that after an unconstitutionally appointed ALJ previously heard this case, the new ALJ failed to hold the constitutionally required *de novo* hearing.

**The Supreme Court holds that an airline's ramp-agent supervisor is subject to the FAA's "transportation-worker exception."**
*Southwest Airlines v. Saxon*

On June 6, the Supreme Court unanimously affirmed a Seventh Circuit decision construing section 1 of the Federal Arbitration Act, also known as the "transportation-worker exemption." The decision was a disappointment for WLF, which filed an *amicus* brief in the case arguing that because the plaintiff in this case—a ramp agent supervisor for Southwest Airlines—does not physically transport goods interstate or even supervise others who do, she falls outside the section 1 exemption. Although some judge-made tests purport to expand the exemption beyond those actively engaged in the interstate 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. Fortunately, the Court carved out other industries from its narrow holding and rejected the plaintiff's argument that virtually all airlines workers are covered by the exemption.

 

**The Third Circuit affirms an ERISA class-certification order that allows class members to challenge plans in which they never invested.**
*Boley v. Universal Health Services*

On June 1, the Third Circuit affirmed the class certification order in this ERISA case. This was a setback for WLF, which filed an *amicus* brief in the case arguing that the named plaintiffs lacked 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 decision, however, allows 401(k) plan participants to sue about investments they did not make. WLF's brief explained 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.

 