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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 2022** filings and results.

New Filings

- WLF asks the Third Circuit to reject a federal agency's attempt to exercise broad extra-statutory authority. (***AstraZeneca Pharms. v. HHS***)
- WLF urges the Ninth Circuit to review an order certifying an unwieldy consumer class. (***In re JUUL Marketing Sales Practices***)
- WLF asks the Supreme Court to hear an important jurisdictional case about greenhouse-gas litigation. (***Suncor v. County of Boulder***)
- WLF urges the Supreme Court to confirm that executive agencies may not exercise judicial power. (***SEC v. Cochran***)
- WLF asks a California appeals court to review a novel liability theory for prescription drugs. (***Gilead Sciences v. Superior Court***)
- WLF opposes FDA's misguided ban on flavored cigars and menthol cigarettes. (***In re Proposed Rules Banning Flavored Cigars and Menthol Cigarettes***)

Decisions

- The Eighth Circuit largely affirms a federal trial-court ruling that imposed liability on corporate defendants without requiring the plaintiff to identify whose product caused the plaintiff's injury. (***Bader Farms, Inc. v. BASF Corp.***)

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 Third Circuit to reject a federal agency's attempt to exercise broad extra-statutory authority.
AstraZeneca Pharms. v. HHS

On August 28, 2022, WLF asked the Third Circuit to affirm a trial-court decision rejecting the Health Resources Services Administration's (HRSA) claim to broad regulatory authority Congress never gave it. The appeal arises from a suit by prescription-drug manufacturer AstraZeneca against HRSA, challenging the agency's recent enforcement action under the 340B Program. As the District Court rightly found, HRSA's recent regulatory overreach has improperly expanded the 340B Program well beyond anything its statutory text can sustain. In its *amicus* brief, WLF argues that the agency's extra-statutory overreach, if embraced on appeal, 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.

WLF urges the Ninth Circuit to review an order certifying an unwieldy consumer class.
In re JUUL Marketing Sales Practices

On July 14, WLF filed an *amicus* brief urging the Ninth Circuit to hear an important class-certification case. In multi-district litigation alleging fraud against JUUL, the District Court held that it was immaterial that each plaintiff had a different nicotine journey and saw different ads. As WLF's brief explains, that holding conflicts with Rule 23's requirement that common issues predominate over individualized questions. WLF's brief also explains how the District Court erred by not conducting a full Rule 702 analysis of the Plaintiffs' expert witnesses before certifying the class.

WLF asks the Supreme Court to hear an important jurisdictional case about greenhouse-gas litigation.
Suncor v. County of Boulder

On July 11, WLF filed an *amicus* brief urging the Supreme Court to hear an important case about greenhouse-gas litigation. Splitting from the Second Circuit, the Tenth Circuit held that claims about climate change arising from greenhouse-gas emissions are not exclusively governed by federal common law. The court also held that plaintiffs may artfully plead around federal jurisdiction by invoking state law. WLF's brief explains why the Tenth Circuit's decision will have devastating consequences and why federal common law governs Boulder County's claims. The brief also explains why the Court should not allow parties to plead around federal jurisdiction.

WLF urges the Supreme Court to confirm that executive agencies may not exercise judicial power.
SEC v. Cochran

On July 7, WLF filed an *amicus* brief urging the Supreme Court to confirm that a constitutional challenge to the structure of a federal agency need not start in the agency. Lower courts continue to apply the Supreme Court's *Thunder Basin* precedent to punt these challenges to federal agencies. The Fifth Circuit, however, broke from ten other courts of appeals and held that district courts have jurisdiction to hear these challenges. As WLF's brief shows, it is time for the Supreme Court to overturn *Thunder Basin*. The decision is unworkable, does not fit with recent legal developments, and was poorly reasoned. As there are also no reliance interests, all the stare decisis factors support overruling *Thunder Basin*.

WLF asks a California appeals court to review a novel liability theory for prescription drugs.
Gilead Sciences v. Superior Court

On July 7, WLF urged California's First District Court of Appeal to review, and ultimately to overturn, a trial court ruling that advances a radical new theory of liability for manufacturers of non-defective prescription drugs. As WLF explained in its *amicus* brief, the trial court's theory of liability makes a hash of California tort law. Under longstanding principles governing product-based injuries, a concession that the product at issue is not defective should end the litigation. Eliminating the defect element from product-based claims would open the door to untethered liability and undermine product innovation. And because nothing in the trial court's decision limits this new tort theory to prescription drugs, the ruling invites a torrent of abusive lawsuits against the manufacturers of other beneficial and non-defective products as well.

WLF opposes FDA's misguided ban on flavored cigars and menthol cigarettes.
In re Proposed Rules Banning Flavored Cigars and Menthol Cigarettes

On July 6, WLF submitted formal comments to the Food and Drug Administration on its proposed menthol cigarette and flavored cigar bans. The comments explain why the bans would merely inconvenience smokers and not cause smokers to quit. The bans would also create a thriving black market for illegal cigars, cigarettes, and accessories that the FDA could not regulate. These unregulated products would be more dangerous than those on the market now. Finally, WLF's comments explain how the bans would disproportionately affect marginalized groups.

DECISIONS

The Eighth Circuit largely affirms a federal trial-court ruling that imposed liability on corporate defendants without requiring the plaintiff to identify whose product caused the plaintiff's injury.
Bader Farms, Inc. v. BASF Corp.

On July 7, the Eighth Circuit largely affirmed a federal trial-court ruling that imposed massive liability on corporate defendants without requiring the plaintiff to identify whose product caused the plaintiff's injury. The decision was disappointing for WLF, which filed an *amicus* brief in the case arguing that, under Missouri law, the district court should have required the plaintiff to identify which herbicides, if any, damaged its commercial peach orchards. Removing this basic causation requirement, WLF contended, violates the Due Process Clause. Because the jury was not instructed to "separately assess" punitive damages for each defendant, the Eighth Circuit reversed and remanded for a new trial solely on punitive damages. WLF submitted its brief on behalf of itself and DRI-The Voice of the Defense Bar.

