



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 **October 2022** filings and results.

New Filings

- WLF asks the Supreme Court to confirm that the government may, at any time, dismiss a qui tam suit under the False Claims Act. (***U.S. ex rel. Polansky v. Executive Health Resources***)
- WLF asks the Ninth Circuit to review erroneous class-certification orders that improperly inflate the size and scope of the litigation. (***In re HIV Antitrust Litigation***)
- WLF cautions the FTC to adhere carefully to the law when promulgating a federal data-privacy rule. (***In re Trade Regulation Rule***)
- WLF urges the West Virginia Supreme Court to adopt common-sense limits on discovery. (***In re Amendments to West Virginia Rules of Civil Procedure***)
- WLF asks the Fifth Circuit to affirm a district court order declaring the Consumer Product Safety Commission's structure unconstitutional. (***Consumers' Research v. CPSC***)
- WLF urges the California Court of Appeal to reverse a trial court's radical new theory of liability for manufacturers of non-defective prescription drugs. (***Gilead Sciences, Inc. v. Superior Court***)
- WLF asks the Supreme Court to clarify the scope of liability in an important securities case. (***Slack Technologies, LLC v. Pirani***)

Decisions

- The Fourth Circuit vacates a district court judgment and remands for reconsideration in light of intervening Supreme Court precedent. (***Alig v. Quicken Loans***) *victory*
- The Ninth Circuit agrees to hear an important class-certification appeal. (***In re JUUL Marketing Sales Practices***) *victory*
- The Supreme Court declines to review an acknowledged circuit split over whether qui tam plaintiffs must identify a specific fraudulent claim for payment at the pleading stage. (***Molina Healthcare of Illinois v. Prose***)
- The Supreme Court agrees to clarify the scope of the attorney-client privilege for communications containing both legal and non-legal advice. (***In re Grand Jury***) *victory*
- The Supreme Court calls for the views of the solicitor general on a pending petition about greenhouse-gas litigation. (***Suncor v. County of Boulder***)

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 Supreme Court to confirm that the government may, at any time, dismiss a qui tam suit under the False Claims Act.

U.S. ex rel. Polansky v. Executive Health Resources

On October 24, WLF asked the Supreme Court to affirm a Third Circuit decision that confirms the government's right to dismiss a qui tam suit under the False Claims Act (FCA). The case asks the Court to interpret the FCA to mean that the Executive Branch has no authority to dismiss an FCA action after declining to intervene. In its *amicus* brief, WLF explains why adopting that interpretation would undermine the Constitution's separation of powers. The FCA's enlistment of private prosecutors already pushes the limits of Article II near the breaking point. While the statute has survived previous constitutional challenges, it has done so only because of the significant control that the dismissal power provides to the Executive. Taking that power away would undermine the Executive Branch and violate the Constitution's separation of powers. WLF's *amicus* brief was drafted with the pro bono assistance of Kristin Graham Koehler, Joshua J. Fougere, Christopher S. Ross, and Alexandria T. Mushka of Sidley Austin LLP.

WLF asks the Ninth Circuit to review erroneous class-certification orders that improperly inflate the size and scope of the litigation.

In re HIV Antitrust Litigation

On October 14, WLF joined NAM and PhRMA in urging the Ninth Circuit to review, and ultimately to overturn, class certification orders that contravene settled law. In its *amicus* brief urging Rule 23(f) review, WLF argues that the district court's clearly erroneous class certification orders improperly inflated the size and scope of the litigation. A named plaintiff alleging injury in a single state under that state's laws lacks standing to sue on behalf of class members from thirty other states suing under those states' laws. Yet the district court certified classes asserting claims in 31 states. What's more, settled law makes clear that courts are not to certify classes based on the sales of products by the defendant's arms-length competitors. Here, many class members who never bought products from the defendants should have been excluded from the class. Had those purchasers been excluded, the claims would not have been numerous enough to warrant class treatment. The brief was drafted by Philip Goldberg and Andrew Trask of Shook, Hardy & Bacon LLP.

WLF cautions the FTC to adhere carefully to the law when promulgating a federal data-privacy rule.

In re Trade Regulation Rule

On October 14, WLF filed a formal comment with the FTC, urging the agency not to exceed its narrow rulemaking authority in promulgating a new federal privacy-data rule. WLF's comment emphasizes three main points. First, if the Commission's final rule is to pass muster in federal court, it will need to closely adhere to the statutory limits Congress has imposed on the agency's rulemaking. Second, the unprecedented breadth and depth of the Advanced Notice of Proposed Rulemaking suggest that the "major questions doctrine," which presumes that Congress intends to make major policy decisions itself rather than leave those decisions to agencies, will likely pose a formidable obstacle to any final rule. And third, classifying targeted advertising as an unfair or deceptive practice would harm both consumers and competition.

WLF urges the West Virginia Supreme Court to adopt common-sense limits on discovery.

In re Amendments to West Virginia Rules of Civil Procedure

On October 13, Washington Legal Foundation joined a coalition of civil-justice reform and business trade groups on a formal comment to the Supreme Court of Appeals of West Virginia concerning the proposed rewriting of the State's rules of civil procedure. As the comments explain, West Virginia should adopt the federal requirement that all discovery in a case be proportional to the needs of the case. Along with technical corrections, the comments also urge West Virginia state courts to require the disclosure of third-party litigation funding, recognize the unique discovery needs in products-liability cases, and provide more limits on the preservation and production of electronically stored information.

WLF asks the Fifth Circuit to affirm a district court order declaring the Consumer Product Safety Commission's structure unconstitutional.

Consumers' Research v. CPSC

On October 7, WLF filed an *amicus* brief urging the Fifth Circuit to affirm a District Court order declaring the Consumer Product Safety Commission's structure unconstitutional. WLF's *amicus* brief explains that the plaintiffs suffered an injury traceable to the unconstitutional structure that could be remedied by a favorable decision. The brief also explains that plaintiffs raised three distinct claims in the case so the order granting partial summary judgment could be certified as final. Finally, the brief highlights that principal officers of the United States cannot enjoy for-cause removal protections except in limited circumstances not present here.

WLF urges the California Court of Appeal to reverse a trial court's radical new theory of liability for manufacturers of non-defective prescription drugs.

Gilead Sciences, Inc. v. Superior Court

On October 3, WLF asked California's First District Court of Appeal to reverse a trial court ruling that advances a radical new theory of liability for manufacturers of non-defective prescription drugs. Joining the U.S. Chamber of Commerce, the California Chamber of Commerce, and the Alliance for Automotive Innovation on an *amicus* brief, WLF contends that 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 makers of other beneficial and non-defective products as well. The *amicus* brief was drafted by Ilana Eisenstein and Justin Sarno of DLA Piper LLP.

WLF asks the Supreme Court to clarify the scope of liability in an important securities case.

Slack Technologies, LLC v. Pirani

On October 3, WLF asked the Supreme Court to review—and ultimately to overturn—a Ninth Circuit decision that drastically expands liability under federal securities law. For more than fifty years, the federal courts of appeal have uniformly held that to prove a violation of Section 11 of the Securities Act, a plaintiff first must “trace” their shares to the offering that made the alleged misrepresentations or omissions. But in a 2-1 panel decision, the Ninth Circuit swept aside that longstanding rule in favor of an expansive rule that far exceeds anything Section 11's text can justify. In its *amicus* brief urging review, WLF asked the Court to intervene to ensure that the task of making law and policy is performed by Congress, not the courts. WLF's *amicus* brief was drafted with the pro bono assistance of James N. Kramer and Sunny Hwang of Orrick Herrington & Sutcliffe LLP.

DECISIONS

The Fourth Circuit vacates a district court judgment and remands for reconsideration in light of intervening Supreme Court precedent.

Alig v. Quicken Loans

On October 28, the U.S. Court of Appeals for the Fourth Circuit vacated a district court judgment and remanded for reconsideration in light of intervening Supreme Court precedent. This outcome was a victory for WLF, which filed an *amicus* brief in the case. As WLF's brief showed, the District Court's decision was inconsistent with the Supreme Court's recent *TransUnion* decision. There, the Court said that allowing uninjured class members to maintain suit in federal court violates core separation-of-powers principles.

The Ninth Circuit agrees to hear an important class-certification appeal.

In re JUUL Marketing Sales Practices

On October 24, 2022, the Ninth Circuit agreed to hear an important class-certification case. The decision was a victory for WLF, which filed an *amicus* brief urging the court's review. 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 explained, that holding conflicts with Rule 23's requirement that common issues predominate over individualized questions. WLF's brief also explained how the District Court erred by not conducting a full Rule 702 analysis of the Plaintiffs' expert witnesses before certifying the class.

The Supreme Court declines to review an acknowledged circuit split over whether qui tam plaintiffs must identify a specific fraudulent claim for payment at the pleading stage.

Molina Healthcare of Illinois v. Prose

On October 17, the Supreme Court declined to review a Seventh Circuit decision allowing vague, generalized, and speculative allegations to survive a motion to dismiss in False Claims Act (FCA) cases. The decision was a disappointment for WLF, which filed an *amicus* brief urging review in the case. As WLF's brief explained, the decision below deepens an acknowledged circuit split over whether FCA plaintiffs must identify any specific fraudulent claim for payment at the pleading stage entrenched circuit split is untenable. Allowing the lower courts to abdicate their responsibility to apply Rule 9(b) as a check on FCA relators who allege no specific false claims with particularity gives a green light to abusive litigation. Defendants targeted by these dubious lawsuits will face hydraulic pressure to settle, yielding in *terrorem* settlements that are a deadweight loss to the economy.

The Supreme Court agrees to clarify the scope of the attorney-client privilege for communications containing both legal and non-legal advice.

In re Grand Jury

On October 3, the Supreme Court agreed to hear an important case about the attorney-client privilege. The grant of certiorari was a victory for WLF, which filed an *amicus* brief urging the Court's review. 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 explained how this rule will cause companies to curtail internal investigations. Next, the brief argued that even if the holding is limited to tax advice, it exemplifies tax exceptionalism. Finally, the brief explained that review is necessary to ensure uniform application of Rules 26 and 501.

The Supreme Court calls for the views of the solicitor general on a pending petition about greenhouse-gas litigation.

Suncor v. County of Boulder

On October 3, the Court called for the views of the Solicitor General in this case. WLF's July 11 *amicus* brief urged 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.