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October 3, 2022

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 **September 2022** filings and

New Filings

- WLF asks the Supreme Court to hear an important case about appellate jurisdiction in the federal courts. (***Trendsetta USA v. Swisher Int'l***)
- WLF urges the Second Circuit to affirm the exclusion of scientifically unreliable evidence in an important pharmaceutical case. (***Daniels-Feasel v. Forest Pharmaceuticals***)
- WLF asks Supreme Court to put an end to plaintiffs' averaging of injuries to satisfy predominance in class certification. (***StarKist Co. v. Olean Wholesale Cooperative***)
- WLF urges the Supreme Court to reaffirm due-process limits on general personal jurisdiction. (***Mallory v. Norfolk Southern Railway Co.***)

Decisions

- The en banc Fourth Circuit affirms a district court's dismissal of a *qui tam* action against a pharmaceutical company. (***U.S. ex rel. Sheldon v. Allergan***) ***victory***
- Ignoring a confession of error by the FDIC, the Sixth Circuit denied en banc rehearing in an important administrative law case. Justice Kavanaugh, however, recalled the Sixth Circuit's mandate and stayed that ruling after the Solicitor general conceded that the Supreme Court is likely to grant certiorari and reverse. (***Calcutt v. FDIC***)

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 hear an important case about appellate jurisdiction in the federal courts.

Trendsetta USA v. Swisher Int'l

On September 22, WLF filed an *amicus* brief urging the Supreme Court to hear an important appellate-jurisdiction case. Despite the Supreme Court's *Microsoft v. Baker* decision holding that plaintiffs may not manufacture finality for an appeal, the Ninth Circuit found that it had jurisdiction to review an interlocutory order because the plaintiffs voluntarily dismissed their case. As WLF's brief shows, the Ninth Circuit's decision conflicts with *Baker*, conflicts with other circuits' precedent, and was issued without subject-matter jurisdiction. So there are three compelling reasons for the Supreme Court to hear this case.

WLF urges the Second Circuit to affirm the exclusion of scientifically unreliable evidence in an important pharmaceutical case.

Daniels-Feasel v. Forest Pharmaceuticals

On September 14, WLF asked the Second Circuit to affirm a federal trial court's grant of summary judgment in favor of a pharmaceutical manufacturer. The appeal arises from a lawsuit over the FDA-approved drug Lexapro[®], an antidepressant therapy in the class of selective serotonin reuptake inhibitors (SSRIs). Plaintiffs are six women who allege that using Lexapro[®] while pregnant ultimately caused their minor children to develop autism spectrum disorder. Because Plaintiffs adduced no admissible, reliable expert evidence to prove general causation, the district court granted summary judgment for the manufacturer and dismissed Plaintiffs' claims. In its *amicus* brief supporting affirmance, WLF rebuts the suggestion that the flaws in Plaintiffs' experts' testimony go to the weight that testimony should be given, rather than to its reliability. WLF's brief also explains why relaxing the reliability threshold for expert evidence of causation in pharmaceutical-liability cases would significantly harm public health.

WLF asks Supreme Court to put an end to plaintiffs' averaging of injuries to satisfy predominance in class certification.

Starkist Co. v. Olean Wholesale Cooperative

On September 8, WLF asked the Supreme Court to review—and ultimately to overturn—an en banc Ninth Circuit decision that stands class certification on an averaging of the alleged harm suffered by the class members. Seeking to press antitrust claims on behalf of three classes of purchasers of packaged tuna, the plaintiffs convinced the Ninth Circuit to find predominance based on an averaging of the alleged anticompetitive overcharges suffered within each proposed class. WLF's *amicus* brief gives the Supreme Court four reasons why it should intervene and hear the case. First, averaging a class's damages improperly hides the fact that many class members have no injury under Article III of the Constitution. Second, to retreat to an averaging method that obscures individual class members' lack of injury is, in effect, to admit a lack of predominance under Rule 23. Third, averaging injuries violates due process by depriving the defendant of the chance to raise individual defenses against each party the defendant has not harmed. Finally, the Rules Enabling Act prohibits using the class mechanism to relieve class members of the need to show that they each suffered an injury under the antitrust laws.

WLF urges the Supreme Court to reaffirm due-process limits on general personal jurisdiction.

Mallory v. Norfolk Southern Railway Co.

On September 2, WLF urged the Supreme Court to reject Pennsylvania's nearly limitless long-arm statute. The Supreme Court of Pennsylvania correctly held that exercising general jurisdiction over every company that registers to do business in the Commonwealth violates the Fourteenth Amendment's Due Process Clause. WLF's *amicus* brief explains why this was the correct decision and how the *stare decisis* factors support

overruling the Court's 1917 *Pennsylvania Fire* decision. The brief also explains why the Court should not address Mallory's newfound (and belatedly raised) appreciation for the Fourteenth Amendment's original public meaning.

DECISIONS

The en banc Fourth Circuit affirms a district court's dismissal of a *qui tam* action against a pharmaceutical company.

U.S. ex rel. Sheldon v. Allergan

On September 23, the en banc Fourth Circuit affirmed the District Court's decision in this False Claims Act case. The District Court had held that the test for willfulness announced by the Supreme Court in *Safeco* applies in FCA actions. The decision was a victory for WLF, which filed an *amicus* brief urging the Fourth 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.

Ignoring a confession of error by the FDIC, the Sixth Circuit denied en banc rehearing in an important administrative law case. Justice Kavanaugh, however, recalled the Sixth Circuit's mandate and stayed that ruling after the Solicitor general conceded that the Supreme Court is likely to grant certiorari and reverse.

Calcutt v. FDIC

On September 15, the Sixth Circuit ignored the confession of error by the Federal Deposit Insurance Corporation and declined to rehear en banc a case in which the three-judge panel affirmed an FDIC order. The case raised an important question of administrative law. WLF's *amicus* brief explained how the panel erred by affirming the FDIC despite holding that the FDIC's decision was infected with legal errors. The brief also described how the panel's decision will allow unconstitutional agency structures to survive and will discourage administrative-law litigation in the Sixth Circuit. On September 29, Justice Kavanaugh recalled the mandate and stayed the Sixth Circuit's decision after the Solicitor General conceded that the Supreme Court is likely to grant certiorari and reverse the Sixth Circuit's decision.