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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 **November 2022** filings and results.

New Filings

- WLF urges the Supreme Court to clarify the First-Amendment limits of government-compelled speech. (***NetChoice, LLC v. Attorney General of Florida***)
- WLF asks the Supreme Court to recognize that some communications including both legal and non-legal advice are protected by attorney-client privilege. (***In re Grand Jury***)
- WLF urges California privacy regulators to cure procedural and administrative defects in a proposed privacy rule. (***In re Proposed California Privacy Rights Act Regulations***)
- WLF asks the Supreme Court to hear an important case about jurisdiction over greenhouse-gas litigation. (***BP v. Mayor and City Council of Baltimore***)
- WLF urges the Supreme Court to review, and ultimately to reverse, the Ninth Circuit's holding that the federal Tobacco Control Act does not preempt state and local sales bans of FDA-authorized tobacco products. (***RJ Reynolds Tobacco Co. v. Los Angeles County***)
- WLF submits comments to Regan-Udall Foundation on ways to improve FDA regulation of tobacco and vaping. (***In re Regan-Udall Foundation Operational Evaluation of FDA's Tobacco Program***)
- WLF asks a federal trial court to reject FDA's claim of deliberative-process privilege in an important FOIA dispute. (***Vanda Pharmaceuticals v. FDA***)
- WLF urges the NLRB to abandon plans to overhaul the agency's joint-employer rule. (***In re Standard for Determining Joint-Employer Status***)

Decisions

- The Fifth Circuit rejects class certification for uninjured plaintiffs. (***Earl v. The Boeing Co.***) ***Victory***
- The Supreme Court declines to review a controversial class certification bottomed on an averaging of the class members' alleged antitrust harms. (***Starkist Co. v. Olean Wholesale Cooperative***)

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 clarify the First-Amendment limits of government-compelled speech.
NetChoice, LLC v. Attorney General of Florida

On November 23, WLF filed an *amicus* brief urging the Supreme Court to review—and ultimately to strike down—an Eleventh Circuit decision upholding certain “transparency rules” in Florida’s new social media law, SB7072. WLF joined TechFreedom’s *amicus* brief, which was prepared in house by Corbin K. Barthold and Berin Szóka. Although the Eleventh Circuit correctly struck down SB7072’s intrusive “content moderation” rules, it largely upheld the transparency rules under the relaxed undue burden standard of *Zauderer v. Office of Disciplinary Counsel*. As WLF’s brief explains, the Eleventh Circuit’s decision glosses over the immense confusion and controversy that the *Zauderer* test has produced. Because such compelled-speech requirements bring the state into an unhealthy entanglement with the editorial process, there is no logical limit to governmental demands to supervise how platforms decide what speech to disseminate.

WLF asks the Supreme Court to recognize that some communications including both legal and non-legal advice are protected by attorney-client privilege.
In re Grand Jury

On November 22, WLF urged the Supreme Court to protect 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 would cause companies to curtail internal investigations. And rather than object to the Ninth Circuit’s rule without providing an alternative, WLF’s brief gives two alternatives that better protect the attorney-client privilege. The brief also argues that even if the holding is limited to tax advice, it exemplifies tax exceptionalism, which the Court has recently rejected.

WLF urges California privacy regulators to cure procedural and administrative defects in a proposed privacy rule.
In re Proposed California Privacy Rights Act Regulations

On November 18, WLF filed its second comment with the California Privacy Protection Agency (CPPA), which recently modified its proposed privacy regulations under the California Privacy Rights Act. In response to WLF’s August 17 comment, the CPPA removed 19 of the 46 compliance burdens flagged by WLF. While WLF commends the CPPA for eliminating these 19 compliance burdens, the administrative and procedural defects identified by WLF remain for the 27 remaining burdens highlighted by WLF. As WLF explains, these burdens should be eliminated, or else their procedural and administrative defects remedied before final notice and comment. WLF’s supplemental comment was drafted with the pro bono assistance of David Zetoony and Andrea Maciejewski of Greenberg Traurig LLP.

WLF asks the Supreme Court to hear an important case about jurisdiction over greenhouse-gas litigation.
BP v. Mayor and City Council of Baltimore

On November 16, WLF filed an *amicus* brief urging the Supreme Court to hear an important case about greenhouse-gas litigation. Splitting from the Second Circuit, the Fourth 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 Fourth Circuit’s decision will have devastating consequences and why federal common law governs Baltimore’s claims. The brief also explains why the Court should not allow parties to plead around federal jurisdiction.

WLF urges the Supreme Court to review, and ultimately to reverse, the Ninth Circuit’s holding that the federal Tobacco Control Act does not preempt state and local sales bans of FDA-authorized tobacco products.

RJ Reynolds Tobacco Co. v. Los Angeles County

On November 14, WLF urged the Supreme Court to review, and ultimately to reverse, the Ninth Circuit’s holding that the federal Tobacco Control Act (TCA) does not preclude localities like Los Angeles County from banning the sale of certain FDA-authorized tobacco products. In 2020 Los Angeles County banned the sale of all flavored tobacco products, including menthol cigarettes. That flavor ban clashes with the TCA’s preemption clause, which prohibits state and local governments from banning the sale of tobacco products for failure to conform to state or local standards that differ from the TCA’s. In its *amicus* brief urging review, WLF argues that the County cannot escape federal preemption simply by recasting its flavor ban as a regulation of tobacco “sales” rather than tobacco “manufacturing.” Under the TCA, a standard is a standard for preemption purposes no matter how it is enforced or described. Contrary to the view of the panel majority, Congress’s ability to safeguard the federal interests at stake in the TCA does not turn on such wordplay.

WLF submits comments to Regan-Udall Foundation on ways to improve FDA regulation of tobacco and vaping.

In re Regan-Udall Foundation Operational Evaluation of FDA’s Tobacco Program

On November 7, WLF submitted comments to a five-member Independent Expert Panel of the Reagan-Udall Foundation, a nonprofit Congress created to support FDA’s mission. FDA’s Commissioner asked the Foundation to conduct a comprehensive evaluation of its tobacco center. Focusing on three topic areas, WLF’s comments first urged the expert panel to examine the influence tobacco prohibitionists maintain over CTP staff and leadership and how that influence has undermined FDA’s harm-reduction mission. The comment next briefly identified instances where CTP failed to comply with the Constitution and federal statutes when reviewing Electronic Nicotine Delivery System applications. Finally, WLF critiqued FDA’s communication with the public and other stakeholders and demanded that the agency convey facts about non-combustible nicotine products and where they fit into the continuum of risk in a neutral, scientific manner.

WLF asks a federal trial court to reject FDA’s claim of deliberative-process privilege in an important FOIA dispute.

Vanda Pharmaceuticals v. FDA

On November 4, WLF asked a federal trial court to reject FDA’s claim of privilege in denying a FOIA request. The case arises from Vanda Pharmaceuticals’s supplemental new drug application for Hetlioz[®], a drug that has been shown as effective for treating jetlag. When FDA did not approve that application, Vanda sought, under FOIA, the scientific reviews underlying the agency’s Complete Response Letter. Asserting the deliberative-process privilege, FDA denied the FOIA request. In an *amicus* brief urging the court to grant summary judgment on Vanda’s FOIA request, WLF argued that disclosing the reviews will not chill frank discussion within FDA because agency staff have no reason to expect that these documents will be withheld in the first place. WLF’s brief also explained why the deliberative-process privilege is the most widely abused FOIA exemption among government agencies.

WLF urges the NLRB to abandon plans to overhaul the agency’s joint-employer rule.

In re Standard for Determining Joint-Employer Status

On November 3, WLF filed formal comments with the National Labor Relations Board urging it to not rescind the recently promulgated joint-employer rule. WLF’s comments show why the NLRB should not focus on non-common law authorities. Rather, the NLRB should look to common-law decisions, which support the 2020 final rule. The comments also remind NLRB of the negative consequences that will flow from rescinding the final rule.

DECISIONS

The Fifth Circuit rejects class certification for uninjured plaintiffs.

Earl v. The Boeing Co.

On November 21, the Fifth Circuit reversed a class certification order in a case where plaintiffs failed to plausibly allege any cognizable injury in fact. The decision was a victory for WLF, which had filed an *amicus* brief with the court urging reversal. The case arose from a putative class action against The Boeing Company and Southwest Airlines following two tragic overseas accidents involving Boeing’s 737 MAX 8 airplane. In a case unrelated to those tragedies, the district court certified four classes comprising 200 million claims after determining that the plaintiffs’ lone damages expert could ultimately “fix” demonstrable flaws in his conjoint survey as evidence of class-wide damages. But, as WLF’s brief argued and the Fifth Circuit ultimately held, a district court may not certify any class without first resolving whether the plaintiffs have introduced reliable evidence of class-wide injury and damages. Here the Fifth Circuit panel concluded that “the plaintiffs in this suit have not plausibly alleged that they’re any worse off financially” because defendants kept flying the MAX 8 during the class period. And because they alleged no concrete injury, the plaintiffs lacked standing to sue in federal court.

The Supreme Court declines to review a controversial class certification bottomed on an averaging of the class members’ alleged antitrust harms.

StarKist Co. v. Olean Wholesale Cooperative

On November 14, the Supreme Court declined to review an en banc Ninth Circuit decision that stood class certification on an averaging of the alleged harm suffered by the class members. The decision was a setback for WLF, which filed an *amicus* brief urging review. 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 gave 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, 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 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.