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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 **December 2022** filings and results.

## New Filings

- WLF asks the Supreme Court to rein in California's consumer protection regime, which fails to give the business community fair notice of liability. ([\*Johnson & Johnson v. California\*](#))
- WLF urges the Wisconsin Supreme Court to clarify the reliability threshold for admitting expert evidence. ([\*Vanderverter v. Hyundai\*](#))

## Decisions

- The Supreme Court agrees to clarify the scope of liability in an important securities class action. ([\*Slack Technologies, LLC v. Pirani\*](#)) **\*Victory\***
- The Supreme Court declines to hear an important case about appellate jurisdiction in the federal courts. ([\*Trendsetta USA v. Swisher Int'l\*](#))
- An oversight panel's report urges FDA's Center for Tobacco Products to establish and consistently apply transparent standards for vaping-product applications and improve its communications on the benefits of such products. ([\*In re Reagan-Udall Foundation Operational Evaluation of FDA's Tobacco Program\*](#))
- The Ninth Circuit declines review of erroneous class-certification orders that improperly inflate the size and scope of the litigation. ([\*In re HIV Antitrust Litigation\*](#))

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 rein in California’s consumer protection regime, which fails to give the business community fair notice of liability.**

*Johnson & Johnson v. California*

On December 15, WLF urged the U.S. Supreme Court to review, and ultimately reverse, a California court’s decision imposing \$344 million in civil penalties on a medical-device manufacturer for marketing its pelvic mesh product within the State. WLF’s *amicus* brief details how a series of statutory and prosecutorial overreaches have radically transformed California’s well-intentioned consumer-protection laws into a trap for the wary and unwary alike. As applied today, California law fails to put the public on fair notice of what kind of conduct constitutes a violation. With no definition of a “violation” for purposes of assessing penalties, courts are left to interpret and apply amorphous, elastic, and imprecise language—such as whether a practice is “unlawful,” “unfair,” or “fraudulent”—on a case-by-case basis. WLF’s brief was prepared with the pro bono assistance of Elizabeth Andrews, Dane Chanove, Kaitlin O’Donnell, and Moses Tincher of Troutman Pepper Hamilton Sanders LLP.

### **WLF urges the Wisconsin Supreme Court to clarify the reliability threshold for admitting expert evidence.**

*Vanderventer v. Hyundai*

On December 8, WLF filed an *amicus* brief urging the Wisconsin Supreme Court to clarify the standard for admission of expert evidence. In 2011, Wisconsin legislators adopted the federal *Daubert* standard for the admission of expert evidence. But as WLF’s brief explains, lower courts have continued to apply pre-2011 Wisconsin law when deciding whether to admit expert evidence. The Wisconsin Supreme Court’s intervention is necessary to instruct lower courts that (1) flawed methodology goes to the admissibility of proposed expert testimony, not its weight; (2) experts must be qualified in a field to testify about that field; and (3) *Daubert* requires applying reliable methods to the facts of a case. The brief was filed with the generous pro bono assistance of Matthew M. Fernholz of Cramer, Multahauf & Hammes LLP.

## DECISIONS

### **The Supreme Court agrees to clarify the scope of liability in an important securities class action.**

*Slack Technologies, LLC v. Pirani*

On December 13, the Supreme Court agreed to review a Ninth Circuit decision that drastically expands liability under federal securities law. The grant of certiorari was a victory for WLF, which filed an *amicus* brief in the case urging review. 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 successful 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.

**The Supreme Court declines to hear an important case about appellate jurisdiction in the federal courts.***Trendsettah USA v. Swisher Int'l*

On December 5, the Supreme Court declined to hear an important appellate-jurisdiction case. The decision was a setback for WLF, which filed an *amicus* brief urging the Court's review. 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 showed, the Ninth Circuit's decision conflicts with *Baker*, conflicts with other circuits' precedent, and was issued without subject-matter jurisdiction.

**An oversight panel's report urges FDA's Center for Tobacco Products to establish and consistently apply transparent standards for vaping-product applications and improve its communications on the benefits of such products.***In re Reagan-Udall Foundation Operational Evaluation of FDA's Tobacco Program*

On December 19, a five-member Independent Expert Panel of the Reagan-Udall Foundation issued a 39-page report on the panel's evaluation of FDA's Center for Tobacco Products (CTP). While the report did not directly address the specific concerns WLF raised in its November 7 comment, the panel generally noted CTP's failure to establish and adhere to clear standards for its review of Electronic Nicotine Delivery System applications and recommended CTP develop a clearer and more predictable framework that can reduce delays and minimize costs. The panel also urged FDA to communicate the risks of underage non-combustible-product use in a manner that does not deter adult cigarette smokers from switching to such products.

**The Ninth Circuit declines review of erroneous class-certification orders that improperly inflate the size and scope of the litigation.***In re HIV Antitrust Litigation*

On December 8, the Ninth Circuit declined to review class-certification orders that contravened settled law. This decision was a disappointment for WLF, which together with the NAM and PhRMA, filed an *amicus* brief urging the court to hear the appeal. WLF's brief argued 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 met Rule 23's numerosity requirement. The brief was drafted by Philip Goldberg and Andrew Trask of Shook, Hardy & Bacon LLP.