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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 **February 2023** filings and results.

New Filings

- WLF asks the Third Circuit to rehear en banc an important bankruptcy case. (*In re LTL Management, LLC*)
- WLF urges the FDA to abandon proposed changes to regulations governing which foods may be labeled "healthy." (*In re Food Labeling: Nutrient Content Claims; Definition of Term "Healthy"*)
- WLF calls on the Biden administration to withdraw a proposed rule that would require federal contractors to disclose greenhouse-gas emissions and climate-related risks and to set emissions-reduction targets. (*In re Federal Acquisition Regulation*)
- WLF urges the Ninth Circuit to uphold Rule 23's rigorous requirements for class certification. (*In re JUUL Marketing Practices Litigation*)
- WLF asks the Supreme Court to confirm federal securities law's tracing requirement. (*Slack Technologies, LLC v. Pirani*)

Decisions

- The Supreme Court declines to review a Los Angeles ordinance that imposes a different tobacco-product standard from the FDA's federal tobacco-product standard. (*RJR Tobacco Co. v. Los Angeles*)
- The Supreme Court declines to consider whether California's consumer protection regime fails to give the business community fair notice of liability. (*Johnson & Johnson v. California*)
- The Supreme Court of Wisconsin declines to ensure lower courts apply the expert-evidence rules that the Wisconsin Legislature enacted. (*Vanderventer v. Hyundai*)

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 rehear en banc an important bankruptcy case.
In re LTL Management, LLC

On February 20, WLF urged the Third Circuit to rehear en banc a critical bankruptcy case. The panel reversed a bankruptcy court's decision that Chapter 11 is the optimal means for redressing harms alleged against Johnson & Johnson by a group of talc personal-injury claimants. In its amicus brief supporting LTL, WLF emphasizes that the panel failed to analyze the Fourth Circuit's case law reaching the opposite conclusion. The brief also explains why it is more equitable to have bankruptcy courts handle mass tort cases.

WLF urges the FDA to abandon proposed changes to regulations governing which foods may be labeled "healthy."
In re Food Labeling: Nutrient Content Claims; Definition of Term "Healthy"

On February 15, WLF filed formal comments with the Food and Drug Administration urging it to abandon proposed changes to regulations governing which foods may be labeled "healthy." WLF's comment details the First Amendment problems with the Proposed Rule; it fails the *Central Hudson* test. WLF also explains why the Proposed Rule is arbitrary and capricious under the APA. It conflicts with the dietary guidelines that it is allegedly meant to promote.

WLF calls on the Biden administration to withdraw a proposed rule that would require federal contractors to disclose greenhouse-gas emissions and climate-related risks and to set emissions-reduction targets.
In re Federal Acquisition Regulation

On February 13, WLF urged the Biden Administration to withdraw a proposed rule that would amend the Federal Acquisition Regulation to require federal contractors to disclose greenhouse-gas emissions and climate-related financial risks and to set emissions-reduction targets. In formal comments, WLF argues that the mandated disclosures, if adopted, would far exceed the administration's authority under the Procurement Act. Moreover, by compelling companies to speak publicly on a matter when they would prefer not to, the proposed rule unconstitutionally compels speech. For these reasons, WLF urges the Biden administration to withdraw the proposed rule.

WLF urges the Ninth Circuit to uphold Rule 23's rigorous requirements for class certification.
In re JUUL Marketing Practices Litigation

On February 8, WLF filed an amicus brief urging the Ninth Circuit to reverse a class-certification order in an important MDL. In multi-district litigation alleging RICO violations, the plaintiffs conceded that Altria was not involved with the alleged enterprise during much of the class period. As WLF's brief explains, certifying a class under those circumstances ignores Article III's standing requirement and 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 confirm federal securities law's tracing requirement.
Slack Technologies, LLC v. Pirani

On February 3, WLF urged the Supreme Court to overturn a Ninth Circuit decision that drastically expands the scope of 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 of 1933, a plaintiff first must "trace"

their shares to the offering that made the alleged misrepresentations or omissions. But a divided opinion of the Ninth Circuit swept aside that longstanding tracing requirement in favor of an expansive rule that far exceeds anything Section 11's text can justify. In its amicus brief urging reversal, WLF asked the Court to ensure that the tasks of crafting public policy and amending federal law are performed by Congress, not the courts. This constitutional limit is even more important here because Congress, by actively amending the Securities Act nearly thirty times over the past fifty years without negating the tracing requirement, has tacitly ratified the uniform construction of the other federal courts. WLF's amicus brief was drafted with pro bono assistance from James N. Kramer of Orrick Herrington & Sutcliffe LLP.

DECISIONS

The Supreme Court declines to review a Los Angeles ordinance that imposes a different tobacco-product standard from the FDA's federal tobacco-product standard.
RJR Tobacco Co. v. Los Angeles

On February 27, the Supreme Court declined to review 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 argued 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.

The Supreme Court declines to consider whether California's consumer protection regime fails to give the business community fair notice of liability.
Johnson & Johnson v. California

On February 21, the Supreme Court declined to review 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. The decision was a setback for WLF, which filed an amicus brief in the case detailing 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 WLF's brief showed, 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.

The Supreme Court of Wisconsin declines to ensure lower courts apply the expert-evidence rules that the Wisconsin Legislature enacted.
Vanderventer v. Hyundai

On February 21, the Supreme Court of Wisconsin declined to clarify the standard for admission of expert evidence. This was a disappointment for WLF, which filed an amicus brief supporting review. In 2011, Wisconsin legislators adopted the federal *Daubert* standard for the admission of expert evidence. But as WLF's brief explained, lower courts have continued to apply pre-2011 Wisconsin law when deciding whether to admit expert evidence. The Wisconsin Supreme Court's intervention was 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.

