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WLF Month in Review

This WLF Litigation Division feature highlights WLF's court and regulatory filings, as well as decisions issued in response to WLF's filings. In this edition, we list **July 2023** filings and results.

New Filings

- WLF urges the Supreme Court to eliminate *Chevron* deference. (***Loper Bright v. Raimondo***)
- WLF asks the Second Circuit to affirm a decision dismissing a baseless antitrust complaint. (***In re Bystolic Antitrust Litig.***)
- WLF urges the Fifth Circuit to affirm a decision vacating on First Amendment grounds FDA's compelled-speech mandate on tobacco products and advertising. (***R.J. Reynolds v. FDA***)
- WLF asks the Supreme Court to declare CFPB's funding method unconstitutional. (***CFPB v. Community Financial Services Association***)
- WLF urges the Delaware Supreme Court to enforce a partnership agreement between sophisticated parties according to its plain terms. (***Ainslie v. Cantor Fitzgerald***)
- WLF asks the Supreme Court to review, and ultimately to overturn, a Second Circuit interpretation of federal securities law that splits with every other circuit that has decided the issue. (***Macquarie Infrastructure Corp. v. Moab Partners***)

Decisions

- The Second Circuit affirms the exclusion of unreliable expert evidence in an important pharmaceutical case. (***Daniels-Feasel v. Forest Pharmaceuticals***)
victory
- Over WLF's objections, the DOJ and the FTC issued draft merger guidelines that read more like a command-economy roadmap than a serious government policy. (***In re Merger Guidelines***)
- The Supreme Court of Pennsylvania upholds an excessive punitive-damages award. (***Bert Co. v. Turk***)
- The Second Circuit affirms a decision remanding to state court a toxic-tort suit filed by residents of Niagara Falls. (***Abbo-Bradley v. City of Niagara Falls***)
- The en banc Eleventh Circuit remands to the panel to decide whether, under ordinary principles of statutory construction, an EPA action under the Federal Insecticide, Fungicide, and Rodenticide Act preempts the requirements of Georgia tort law. (***Carson v. Monsanto***)

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 eliminate *Chevron* deference.

Loper Bright v. Raimondo

On July 24, WLF joined the Independent Women’s Law Center in filing an amicus brief urging the Supreme Court to eliminate *Chevron* deference. The D.C. Circuit used *Chevron* to uphold a rule requiring fishing companies to pay for federal monitors. As WLF’s amicus brief shows, federal agencies overreach their statutory mandates by invoking *Chevron*. This leads to more regulations, which invariably harm small businesses because they face disproportionately high costs complying with regulations. The brief was authored by Kathryn E. Tarbert, Gene C. Schaerr, and Annika Boone Barkdull of Schaerr | Jaffe LLP.

WLF asks the Second Circuit to affirm a decision dismissing a baseless antitrust complaint.

In re Bystolic Antitrust Litig.

On July 21, WLF filed an amicus brief urging the Second Circuit to affirm a decision dismissing the plaintiffs’ baseless antitrust complaint. WLF’s brief explains why the court should disregard an amicus brief filed by the FTC, which lacks credibility. The Commission continues to advance arguments that the Supreme Court has rejected, ignores its own legal and ethical guidance, and overlooks its actions on the deals at issue in the case. WLF’s brief also explains that, contrary to its averments, the FTC lacks any expertise in construing Federal Rule of Civil Procedure 12.

WLF urges the Fifth Circuit to affirm a decision vacating on First Amendment grounds FDA’s compelled-speech mandate on tobacco products and advertising.

R.J. Reynolds v. FDA

On July 17, WLF asked the Fifth Circuit to affirm a decision declaring unconstitutional an FDA requirement that tobacco manufacturers and retailers prominently display a series of graphic warning labels on cigarette packages and advertisements. In its amicus brief urging affirmance of the trial court’s ruling, WLF emphasized that the First Amendment fully protects the right both to speak and not to speak. WLF’s brief explained why the graphic warnings at issue here do not qualify as ordinary disclosures akin to those that the Supreme Court has upheld. Rather, they are the very sort of controversial, ideological messages that have nothing to do with preventing consumers from being misled.

WLF asks the Supreme Court to declare CFPB’s funding method unconstitutional.

CFPB v. Community Financial Services Association

On July 10, WLF filed an amicus brief urging the Supreme Court to confirm that Congress must appropriate money for independent agencies on an annual basis. The Fifth Circuit held that the Consumer Financial Protection Bureau’s ability to decide its funding level each year violates the Appropriations Clause. As WLF’s brief explains, this holding is consistent with founding-era practice. Contrary to the CFPB’s argument, no past agency had a funding mechanism comparable to the CFPB’s funding mechanism. WLF’s brief also explains why the courts are the appropriate venue to resolve these separation-of-powers disputes.

WLF urges the Delaware Supreme Court to enforce a partnership agreement between sophisticated parties according to its plain terms.*Ainslie v. Cantor Fitzgerald*

On July 5, WLF asked the Delaware Supreme Court to reverse a Chancery Court decision that invalidated part of a routine partnership agreement on public policy grounds. The appeal arises from a suit by former partners of Cantor Fitzgerald over their partnership agreement that contained a “forfeiture for competition” (FFC) provision. In its amicus brief urging reversal, WLF argues that the Chancery Court’s holding is at odds with Delaware law’s strong preference for freedom of contract. WLF also highlights the many salutary purposes served by FFC provisions—namely, that they enable employers to offer generous benefits to employees and can ensure corporate stock grants do not go to waste. WLF’s brief was prepared and filed with assistance from Kenneth Gage and Daniel Richards of Paul Hastings LLP and Michael Vild and David Holmes of Cross & Simon LLP.

WLF asks the Supreme Court to review, and ultimately to overturn, a Second Circuit interpretation of federal securities law that splits with every other circuit that has decided the issue.*Macquarie Infrastructure Corp. v. Moab Partners*

On July 3, WLF asked the Supreme Court to review, and ultimately to overturn, the Second Circuit’s novel interpretation of federal securities law that splits with every other circuit that has decided the issue. Concluding that Item 303 of Regulation S-K creates a privately enforceable duty to disclose, the Second Circuit allowed a shareholder to sue a company for omitting Item 303 information from its financial statement—even though that omission did not render any portion of the filing misleading. WLF’s brief details how the Second Circuit’s reasoning is at odds with the plain meaning of the SEC Rule, the common law of fraud-by-omission, and longstanding Supreme Court precedent. WLF’s brief argues that expanding the court-created private right of action under Rule 10b-5 to cover omitted Item 303 information would expand liability far beyond anything contemplated by Congress. WLF’s brief was prepared with generous pro bono support from Lyle Roberts, George Anhang, and William Marsh of Shearman & Sterling LLP.

DECISIONS

The Second Circuit affirms the exclusion of unreliable expert evidence in an important pharmaceutical case.*Daniels-Feasel v. Forest Pharmaceuticals*

On July 28, the Second Circuit affirmed a federal trial court’s grant of summary judgment for the manufacturer of a leading prescription antidepressant. The decision was a victory for WLF, which filed an amicus brief in the case urging affirmance. The appeal arose from a lawsuit over the FDA-approved drug Lexapro®, an antidepressant therapy in the class of selective serotonin reuptake inhibitors (SSRIs). The Second Circuit held that, because Plaintiffs adduced no admissible, reliable expert evidence to prove general causation, the district court did not err in granting summary judgment for the manufacturer and dismissing Plaintiffs’ claims. WLF’s amicus brief explained why relaxing the reliability threshold for expert evidence of causation in pharmaceutical-liability cases would significantly harm public health.

Over WLF's objections, the DOJ and the FTC issued draft merger guidelines that read more like a command-economy roadmap than a serious government policy.

In re Merger Guidelines

On July 19, the Department of Justice's Antitrust Division and Federal Trade Commission issued draft merger guidelines for public comment that ignore all Supreme Court precedent and read more like a command economy roadmap than a serious government document. This was a setback for WLF, which filed formal comments urging the FTC and DOJ to issue guidelines that follow current law. WLF's comments explained why rapid innovation in digital markets cautions against antitrust enforcement in those markets. The comments also showed that econometrics makes antitrust enforcement more precise. Finally, WLF countered the agencies' suggestions that market definition is unnecessary for antitrust enforcement.

The Supreme Court of Pennsylvania upholds an excessive punitive-damages award.

Bert Co. v. Turk

On July 19, the Supreme Court of Pennsylvania declined to cap punitive-damages awards. This was a setback for WLF, which filed an amicus brief supporting the defendants. In deepening a split, the court held that the punitive-damages ratio relevant to the Fourteenth Amendment is calculated per defendant rather than per judgment. WLF's brief explained why the Fourteenth Amendment's Due Process Clause limits punitive damages to the amount of compensatory damages when the compensatory-damages award is substantial. The brief also explained why the ratio cannot go above 1:1 based on potential harm.

The Second Circuit affirms a decision remanding to state court a toxic-tort suit filed by residents of Niagara Falls.

Abbo-Bradley v. City of Niagara Falls

On July 14, the Second Circuit affirmed a decision remanding to state court a suit filed by residents of Niagara Falls. This was a setback for WLF, which filed an amicus brief supporting the defendants and reversal. In its brief, WLF focused on why the Second Circuit should join the Fifth, Seventh, and Tenth Circuits in recognizing the revival doctrine, which permits removal when the plaintiff substantially changes the suit by amending the complaint. The Second Circuit declined to adopt or reject the revival doctrine. It held that, even if it were to adopt the revival doctrine, removal was still inappropriate under the case's facts.

The en banc Eleventh Circuit remands to the panel to decide whether, under ordinary principles of statutory construction, an EPA action under the Federal Insecticide, Fungicide, and Rodenticide Act preempts the requirements of Georgia tort law.

Carson v. Monsanto

On July 10, the en banc Eleventh Circuit remanded back to the panel the question whether, under ordinary principles of statutory construction, an EPA action under the Federal Insecticide, Fungicide, and Rodenticide Act preempts the requirements of Georgia tort law. The case arises from a failure-to-warn claim by a plaintiff who contends that his cancer was caused by his exposure to the popular herbicide Roundup. But EPA has rejected any cancer-related warning on Roundup as scientifically unwarranted, false, and misleading. In its amicus brief supporting Monsanto, WLF argued that state tort law should not be allowed to flout express preemption provisions in federal law by undermining the congressionally mandated, science-based regulation of herbicide labeling. WLF joined the amicus brief of Atlantic Legal Foundation, authored by Larry Ebner of Capital Appellate Advocacy.