



Washington Legal Foundation  
*Advocate for Freedom and Justice*<sup>®</sup>  
2009 Massachusetts Avenue, NW  
Washington, DC 20036  
202.588.0302 wlf.org

**October 2, 2023**

# 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 **September 2023** filings and results.

## New Filings

- WLF asks Supreme Court to clarify the scope of federal preemption over tobacco flavors. (***R.J. Reynolds Tobacco Co. v. Bonta***)
- WLF urges California Court of Appeal to reject novel liability theory for prescription drugs. (***Gilead Sciences, Inc. v. Superior Court***)
- WLF asks California Appeals Court to uphold ERISA preemption in a state-law subrogation suit. (***LHC Group, Inc. v. Bayer Corp.***)
- WLF urges Kentucky Appeals Court to limit punitive damages unmoored from actual harm. (***Carey v. CSX***)

## Decisions

- Parties voluntarily dismiss an Eleventh Circuit appeal about the scope of the Torture Victim Protection Act. (***Mamani v. Berzain***)
- The Supreme Court agrees to review the Second Circuit's novel interpretation of federal securities law. (***Macquarie Infrastructure Corp. v. Moab Partners, LP***) **\*victory\***
- Parties voluntarily dismiss Ninth Circuit appeal after class decertification. (***In re Google Play Store 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.

### WLF Legal Staff Contacts

#### **Cory Andrews**

General Counsel | Vice President of Litigation  
[candrews@wlf.org](mailto:candrews@wlf.org)

#### **John Masslon II**

Senior Litigation Counsel  
[jmasslon@wlf.org](mailto:jmasslon@wlf.org)

#### **Glenn Lammi**

Executive Director | Vice President of Legal Studies  
[glammi@wlf.org](mailto:glammi@wlf.org)

## **NEW FILINGS**

### **WLF asks Supreme Court to clarify the scope of federal preemption over tobacco flavors.**

*R.J. Reynolds Tobacco Co. v. Bonta*

On September 29, 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 States like California from banning the sale of certain FDA-authorized tobacco products. In 2020, California banned the sale of all flavored tobacco products, including menthol cigarettes. That flavor ban clashes with the TCA’s preemption clause, which prohibits States and localities 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 California 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.

### **WLF urges California Court of Appeal to reject novel liability theory for prescription drugs.**

*Gilead Sciences, Inc. v. Superior Court*

On September 28, WLF urged California’s First District Court of Appeal to reject a radical new theory of liability for manufacturers of non-defective prescription drugs. As explained in WLF’s supplemental amicus brief, the trial court’s theory of liability makes a hash of California tort law. Under longstanding principles governing product-based injuries, a concession that the product at issue is not defective should end the litigation. Eliminating the defect element from product-based claims would open the door to untethered liability and undermine product innovation. WLF joined the U.S. Chamber of Commerce, the California Chamber of Commerce, and the Alliance for Automotive Innovation on the supplemental amicus brief, which was drafted by Justin Sarno and Ben Fabens-Lassen of DLA Piper LLP.

### **WLF asks California Appeals Court to uphold ERISA preemption in a state-law subrogation suit.**

*LHC Group, Inc. v. Bayer Corp.*

On September 19, WLF urged the California Court of Appeal to affirm a trial-court’s holding that a plan administrator’s state-law subrogation suit is preempted under the Employee Retirement Income Security Act (ERISA). In its amicus brief urging affirmance, WLF emphasized that reversing the trial court’s preemption ruling would upend settled preemption principles and undermine Congress’s strong interest in uniformity for employee-benefit plans. WLF’s brief also argued that an ERISA plan—even one with a subrogation clause—cannot function as a *de facto* class action. WLF’s brief was filed with the pro bono assistance of Andrew D. Silverman of Orrick Herrington & Sutcliffe LLP.

### **WLF urges Kentucky Appeals Court to limit punitive damages unmoored from actual harm.**

*Carey v. CSX*

On September 15, WLF urged the Kentucky Court of Appeals to reverse an unreasonable punitive-damages award. WLF’s brief shows that the evidence did not support punitive damages because the defendants’ overzealous pursuit of potential fraud did not amount to oppression, fraud, malice, or gross negligence. WLF’s brief also explains why the Fourteenth Amendment’s Due Process Clause limits punitive damages to the amount of compensatory damages when the compensatory-damages award is substantial. Here, the \$21 million punitive-damages award was over 15 times the compensatory-damages award. WLF’s brief was filed with the pro bono assistance of Byron N. Miller of Thompson Miller & Simpson PLC.

## DECISIONS

### **Parties voluntarily dismiss Ninth Circuit appeal after class decertification.**

#### *In re Google Play Store Antitrust Litigation*

On September 18, the parties in a contested Ninth Circuit class action voluntarily dismissed a Ninth Circuit appeal after the Northern District of California decertified the class of injured plaintiffs. This result was welcome news for WLF, which had filed an amicus brief urging the Ninth Circuit to reverse the original class-certification order. Tracking arguments made in WLF's Ninth Circuit brief, the District Court correctly held that the plaintiffs' expert witness's testimony was inadmissible. Without that testimony, the plaintiffs could not show an Article III injury on a class-wide basis.

### **Parties voluntarily dismiss an Eleventh Circuit appeal about the scope of the Torture Victim Protection Act.**

#### *Mamani v. Berzain*

On September 29, at the parties' request, the Eleventh Circuit dismissed an appeal about the scope of the Torture Victim Protection Act. Congress incorporated parts of 1992 international law into U.S. law when it passed the TVPA. But it limited liability to those who act deliberately. WLF's brief explained that the District Court erred by allowing the jury to find liability under a civilian command-responsibility theory that did not become part of international law until 1998. It also erred by allowing the jury to impose liability for the defendants' mere negligent oversight of military forces. Because affirming would have caused international relations problems, WLF urged the Eleventh Circuit to overturn the jury's verdict.

### **The Supreme Court agrees to review the Second Circuit's novel interpretation of federal securities law.**

#### *Macquarie Infrastructure Corp. v. Moab Partners, LP*

On September 29, the Supreme Court agreed to review 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 an omission that rendered no portion of its filing misleading. WLF's brief detailed 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 was prepared with generous pro bono support from Lyle Roberts, George Anhang, and William Marsh of Shearman & Sterling LLP.