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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 **December 2023** filings and results.

### New Filings

- WLF reminds the Seventh Circuit to take seriously the False Claims Act's materiality and scienter requirements. (***United States ex rel. Streck v. Eli Lilly***)
- WLF asks the Supreme Court to confirm that the FAA's "transportation worker" exemption covers only workers in the transportation industry. (***Bissonnette v. LePage Bakeries Park St., LLC***)
- WLF opposes the FCC's latest proposal to classify broadband internet access as a telecommunications service under Title II of the Communications Act. (***In re Safeguarding and Securing the Open Internet***)
- WLF urges the Supreme Court to apply the correct First Amendment test for compelled-speech regulations. (***Moody v. NetChoice***; ***NetChoice v. Paxton***)

### Decisions

- The California Court of Appeal reverses the trial court's finding of ERISA preemption in an important federal preemption case. (***LHC Group Inc. v. Bayer Corp.***)
- The Fifth Circuit holds that the FTC's structure is constitutional. (***Illumina v. FTC***)
- The First Circuit affirms the criminal convictions of two medical-device company executives under the FDCA. (***United States v. Facticeau***)
- Congress and the Supreme Court approve amendments to Rule 702 that make it harder for courts to circumvent the Rule's requirements ensuring reliability of expert evidence. (***In re Proposed Amendments to Federal Rule of Evidence 702***) **\*victory\***

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 reminds the Seventh Circuit to take seriously the False Claims Act’s materiality and scienter requirements.**  
*United States ex rel. Streck v. Eli Lilly*

On December 27, 2023, WLF filed an amicus brief urging the Seventh Circuit to properly limit the False Claims Act’s scope. As WLF’s brief describes, defendants are entitled to heightened due-process protections in FCA cases. WLF’s brief also explains why allowing private relators to pursue claims the federal government cannot pursue is unconstitutional. WLF’s brief was prepared with the pro bono assistance of Shane A. Pennington of Porter Wright Morris & Arthur LLP.

**WLF asks the Supreme Court to confirm that the FAA’s “transportation worker” exemption covers only workers in the transportation industry.**  
*Bissonnette v. LePage Bakeries Park St., LLC*

On December 18, WLF asked the Supreme Court to affirm a Second Circuit decision that properly reads Section 1 of the FAA, known as the “transportation worker exemption,” in line with its text and historical context. Although some judge-made tests purport to expand the exemption beyond transportation-industry workers who carry goods or passengers across borders, WLF argues that these contrived standards defy statutory text and context, produce inconsistent results, and serve no end set forth by Congress.

**WLF opposes the FCC’s latest proposal to classify broadband internet access as a telecommunications service under Title II of the Communications Act.**  
*In re Safeguarding and Securing the Open Internet*

On December 11, WLF joined former FCC Commissioner Harold Furchgott-Roth and Kirk R. Arner on formal comments in response to the FCC’s latest proposal to classify broadband internet access service as a telecommunications service subject to common carrier regulation under Title II of the Communications Act. As the comments make clear, the FCC lacks any statutory authority to regulate broadband providers. What’s more, even if the FCC had statutory authority to regulate broadband providers, doing so would do more harm than good.

**WLF urges the Supreme Court to apply the correct First Amendment test for compelled-speech regulations.**  
*Moody v. NetChoice; NetChoice v. Paxton*

On December 5, WLF asked the Supreme Court to hold that Texas House Bill 20’s and Florida Senate Bill 7072’s individualized-explanation requirements are unconstitutional. Both the Fifth and Eleventh Circuits erred by applying the *Zauderer* test for four reasons: (1) *Zauderer* cannot be applied to statutes that compel speech outside the context of advertising; (2) *Zauderer* cannot be applied to statutes that compel speech on controversial topics; (3) *Zauderer* does not govern when a speech requirement seeks to promote consumer welfare in general instead of seeking to correct a commercial entity’s false or deceptive statements; and (4) *Zauderer* cannot be applied to necessarily subjective regulations. WLF’s brief also noted the evidence showing that Florida and Texas are attempting to impose content-based restrictions on political speech.

## DECISIONS

### **The California Court of Appeal reverses the trial court’s finding of ERISA preemption in an important federal preemption case.**

*LHC Group Inc. v. Bayer Corp.*

On December 22, 2023, the California Court of Appeal reversed a trial-court’s holding that a plan administrator’s state-law subrogation suit was preempted under the Employee Retirement Income Security Act (ERISA). The decision was a setback for WLF, which filed an amicus brief in the case urging affirmance. Among other things, 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.

### **The Fifth Circuit holds that the FTC’s structure is constitutional.**

*Illumina v. FTC*

On December 15, the Fifth Circuit vacated a Federal Trade Commission order finding a merger illegal. Although Illumina—the party WLF supported on appeal—was victorious, the decision was a disappointment for WLF. WLF’s brief explained that FTC commissioners cannot enjoy for-cause removal protection because the FTC is (1) comprised of three members of the same political party; (2) has at least one non-expert commissioner; and (3) exercises executive power. The brief also argued that the FTC’s procedures violate due process. But the Fifth Circuit disagreed, holding that the FTC’s structure is constitutional and that most of the FTC’s legal analysis was correct.

### **The First Circuit affirms the criminal convictions of two medical-device company executives under the FDCA.**

*United States v. Facteau*

On December 14, the First Circuit affirmed the criminal convictions of two medical-device company executives under the FDCA. The decision was a disappointment for WLF, which filed an amicus brief in the case urging reversal. Bill Facteau and Patrick Fabian, former executives of Acclarent, were convicted of misdemeanor adulteration and misbranding under the FDCA for distributing a medical device for an “off-label” use. At trial, however, the jury also found that no defendant made false or misleading statements, nor had any intent to defraud or mislead, and so acquitted on all charges requiring mens rea. WLF’s amicus brief argued that the FDCA’s misbranding and adulteration regulations, are content-, viewpoint-, and speaker-based restrictions on speech that cannot withstand strict scrutiny. WLF’s brief was prepared with substantial pro bono assistance from Joel Kurtzberg, Adam Mintz, John MacGregor, and Jason Rozbruch of Cahill Gordon & Reindel LLP.

**Congress and the Supreme Court approve amendments to Rule 702 that make it harder for courts to circumvent the Rule's requirements ensuring reliability of expert evidence.**

*In re Proposed Amendments to Federal Rule of Evidence 702*

On December 1, amendments to Rule 702 of the Federal Rules of Evidence took effect. This was welcome news for WLF, which filed comments with the Standing Committee explaining how district courts and circuit courts continue to misapply Rule 702. The proposed amendments clarify some aspects of Rule 702 that would limit the ability of courts to circumvent the rule's requirements. WLF's comments also explain how tweaking the proposed amendments would help to eliminate current problems with courts' application of the rule and prevent further attempts at skirting the rule's requirements.