

MONTH IN REVIEW

March 2024

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Washington Legal Foundation

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WLF.org



Washington Legal Foundation's *Month in Review* report is a Litigation Division feature that highlights WLF's court and regulatory filings each month, as well as decisions issued in response to WLF's filings.

To learn more about WLF's litigation work, visit our website at www.wlf.org.

New Filings

Gulden v. Exxon Mobil

*In re The Cordish Company
and Bayou Limited
Partnership*

*Lotus Vaping Technologies
v. FDA*

*In re Gilead Tenofovir
Cases*

Decisions

*In re The Cordish Company
and Bayou Limited
Partnership*

RJ Reynolds v. FDA

*In re Climate-Related
Disclosure Rule*

Gulden v. Exxon Mobil

WLF files a supplemental amicus letter with the Third Circuit explaining why federal trial courts lack jurisdiction to enforce OSHA's nonfinal orders.

On March 26, WLF filed a supplemental amicus letter with the Third Circuit, asking it to affirm the dismissal of a suit by two former Exxon employees to enforce a preliminary order of the Occupational Safety and Health Administration. WLF joined the U.S. Chamber of Commerce, the Association of American Railroads, and the National Manufacturers Association on the letter, which was drafted by David Morrell, Jacqueline Holmes, and Ryan Proctor of Jones Day. The amicus letter explained that the Secretary's power to order "affirmative action" under relevant law encompasses only remedial actions, not punitive actions like sanctions. And besides, preliminary reinstatement orders under Sarbanes-Oxley have concrete legal effect no matter if the Secretary has authority to issue sanctions. WLF originally filed an amicus brief in the case on October 18, 2023.

On March 15, WLF filed an amicus brief urging the Supreme Court of Texas to properly apply the apex doctrine. A district court gave the plaintiffs permission to depose a company's CEO. As WLF's brief explains, this decision violates the apex doctrine because the CEO lacks any unique knowledge relevant to the plaintiffs' claims. The brief also describes how the apex doctrine is critical to promoting a pro-business environment. The brief was prepared with the pro bono assistance of Randall W. Miller of Munsch Hardt Kopf & Harr, P.C.

In re The Cordish Company and Bayou Limited Partnership

WLF asks the Supreme Court of Texas to properly apply the apex doctrine.

Lotus Vaping Technologies v. FDA

WLF urges the Supreme Court to hear an important case about basic fairness in the regulatory process.

On March 11, WLF urged the Supreme Court to hear an important case about the regulatory process. The Ninth Circuit held that the Food and Drug Administration could tell companies they need not include information in applications and then deny those applications for failing to include that very information. WLF's brief argues that this regulatory bait-and-switch violates the petitioner's due-process rights. The brief also details how FDA's denial orders are arbitrary and capricious because FDA did not consider the petitioner's evidence. Finally, the brief explains why FDA's action could harm Americans' health.

On March 4, WLF urged the Supreme Court of California to review, and ultimately to overturn, an appeals court ruling that blesses a radical new theory of liability for manufacturers of non-defective prescription drugs. As WLF explained in its amicus brief, the appeals 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 beyond the drug and device space.

In re Gilead Tenofovir Cases

WLF asks the Supreme Court of California to review a radical new theory of liability for pharmaceutical manufacturers.

In re The Cordish Company and Bayou Limited Partnership

The Supreme Court of Texas denies mandamus in a case implicating the apex doctrine.

On March 25, the Supreme Court of Texas denied a mandamus petition asking the court to enforce its apex-doctrine precedent. The denial was a disappointment for WLF, which filed an amicus brief supporting the relators. As WLF's brief explained, allowing the plaintiffs to depose a defendant's CEO violated the apex doctrine because the CEO lacked any unique knowledge relevant to the plaintiffs' claims. The brief also described how the apex doctrine is critical to promoting a pro-business environment. The brief was prepared with the pro bono assistance of Randall W. Miller of Munsch Hardt Kopf & Harr, P.C.

On March 21, the Fifth Circuit held that a series of graphic warning labels an FDA rule imposes on tobacco manufacturers and retailers are "factual and uncontroversial," thus satisfying the First Amendment. The decision was a setback for WLF, which filed an amicus brief urging affirmance of the trial court's ruling. Emphasizing 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.

R7 Reynolds v. FDA

The Fifth Circuit upholds the FDA's graphic warnings regime for tobacco products and advertising against a First Amendment challenge.

In re Climate-Related Disclosure Rule

The SEC adopts a rule requiring many American companies to publicly disclose their greenhouse-gas emissions.

On March 6, the SEC adopted climate-reporting standards that will require many American companies to publicly disclose their greenhouse-gas emissions. Companies will not be required to report the so-called Scope 3 emissions of their suppliers as the SEC originally proposed. WLF had filed comments contending that the proposed rule lacked any investor-protection justification, exceeded the Commission's statutory authority, and raised serious First Amendment concerns. For these reasons, WLF urged the Commission to withdraw the proposed rule.

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 our General Counsel and Vice President of Litigation, Cory Andrews.

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