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WLF Month in Review

This WLF Litigation Division feature highlights WLF's court and agency filings, as well as decisions issued in response to WLF's filings. In this edition, we list November 2018 filings and results.

New Filings

- The First Amendment protects the right of employers to ask job applicants about their past salaries. (*Chamber of Comm. of Greater Phila. v. City of Phila.*)
- The Class Action Fairness Act broadly protects the right of *any* defendant to remove a class action from state court to federal court. (*Home Depot U.S.A. v. Jackson*)
- A state court may not exercise personal jurisdiction over a nonresident defendant for claims arising outside the State if the plaintiff suffered no injuries within the State, even if the plaintiff lives in the State. (*First Advantage Background Serv. Corp. v. Sup. Court of Calif.*)
- The FTC should adopt a more forward-looking approach when defining the "relevant markets" that form the bases for its antitrust review of proposed mergers. (*In re: FTC Study of Digital Technology Market Merger Review*)
- The FTC should exercise restraint when considering whether and how to regulate new Artificial Intelligence applications. (*In re: FTC Investigation of Artificial Intelligence*)
- The SEC is applauded for continuing to focus on serious issues raised by proxy voting services, including their conflicts of interest and lack of transparency. (*In re: SEC Staff Roundtable on the Proxy Process*)

Cases Decided

- U.S. Supreme Court holds that property owners may file cost-benefit challenges to the federal government's designation of their property as "critical habitat" for an endangered species—a designation that greatly diminishes the property's market value. (*Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*)
- U.S. Court of Appeals for the District of Columbia Circuit vacates an SEC enforcement action, finding that the SEC Administrative Law Judge who conducted the enforcement proceedings was appointed in a constitutionally improper manner. (*Timbervest LLC v. SEC*)

Litigation is the backbone of WLF's public-interest mission. We litigate nationally before state and federal courts and agencies. Our team, often 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 Chief Counsel Richard Samp.

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NEW FILINGS

The First Amendment protects the right of employers to ask job applicants about their past salaries.

Chamber of Comm. of Greater Phila. v. City of Phila.

WLF filed a brief in the U.S. Court of Appeals for the Third Circuit, urging it to enjoin enforcement of a Philadelphia ordinance that prohibits employers from asking job applicants about their past salaries. WLF argued that the First Amendment prohibits the speech restriction in the absence of substantial evidence that wage-history inquiries perpetuate salary discrimination against women and racial minorities, and that a ban on such inquiries would reduce discrimination. WLF noted that the speech restriction is both content-based (it applies to only one subject) and speaker-based (it applies only to employers and no other category of speakers). WLF argued that content-based speech restrictions are presumptively unconstitutional and are upheld only under the most compelling of circumstances. It further argued that “strict scrutiny” applies to *all* content-based restrictions, without regard to whether the speech being restricted arises in a commercial context.

The Class Action Fairness Act broadly protects the right of *any* defendant to remove a class action from state court to federal court.

Home Depot U.S.A. v. Jackson

WLF filed a brief in the U.S. Supreme Court, urging it to overturn a ruling that undermines the Class Action Fairness Act. Congress passed CAFA in 2005 to ensure that defendants in state-court class actions are permitted to remove the cases to federal court. WLF argued that plaintiffs’ lawyers are seeking to avoid the removal rights CAFA guarantees. To prevent removal to federal court, plaintiffs’ lawyers are now filing their class actions as counterclaims in existing lawsuits—and then arguing that the cases are not removable because the targets of the counterclaims should not be deemed “defendants.” The lower court agreed and remanded the case to state court. WLF’s brief argued that counterclaim defendants are still “defendants.”

A state court may not exercise personal jurisdiction over a nonresident defendant for claims arising outside the State if the plaintiff suffered no injuries within the State, even if the plaintiff lives in the State.

First Advantage Background Serv. Corp. v. Sup. Court of Calif.

WLF filed an *amicus curiae* brief in the United States Supreme Court, urging it to review a personal-jurisdiction objection that California’s appellate courts failed to meaningfully review. In its brief, WLF argues that the Supreme Court is the only tribunal that can provide meaningful review of the petitioner’s legitimate objection to personal jurisdiction. The Court, WLF argues, should step in and ensure that the petitioner receives the due process that California’s appellate courts failed to provide.

The FTC should adopt a more forward-looking approach when defining the “relevant markets” that form the bases for its antitrust review of proposed mergers.

In re: FTC Study of Digital Technology Market Merger Review

WLF filed comments with the Federal Trade Commission as part of its ongoing *Hearings on Competition and Consumer Protection in the 21st Century*. The comment focused on one particular question posed during the series’ third hearing on Acquisitions of Nascent and Potential Competitors in Digital Technology Markets: What is the appropriate antitrust framework to evaluate acquisitions of potential or nascent competitors in high-technology markets? WLF argued that while FTC should only utilize their existing tools and review methodologies when considering such combinations, they should do so in an appropriately forward-looking manner. A failure to consider future changes in the market in which the merger is occurring, WLF explained, can have a deleterious impact on competition, and, in turn, consumer welfare.

The FTC should exercise restraint when considering whether and how to regulate new Artificial Intelligence applications.

In re: FTC Investigation of Artificial Intelligence

WLF contributed to the Federal Trade Commission’s ongoing *Hearings on Competition and Consumer Protection in the 21st Century*. WLF submitted a formal comment on Hearing #7, an investigation of the “consumer protection issues associated with the use of algorithms, artificial intelligence, and predictive analytics in business decisions and conduct.” Because the benefits of artificial intelligence are concrete, while the potential harms are largely speculative, the FTC should not rush to regulate new AI applications. WLF’s comment offers guidelines the FTC should follow in order to avoid doing more harm than good. The core theme of the guidelines is restraint. The FTC should, wherever possible, let companies and consumers determine for themselves the best uses of AI and the optimal balance of performance, transparency, and privacy. The FTC should be careful not to disrupt immensely useful AI innovation.

The SEC is applauded for continuing to focus on serious issues raised by proxy voting services, including their conflicts of interest and lack of transparency.

In re: SEC Staff Roundtable on the Proxy Process

WLF contributed to the docket of a Securities and Exchange Commission roundtable on the proxy voting process for public-company annual meetings. The roundtable focused in part on the role of professional firms that advise institutional money-manager and investment-adviser clients on how they should vote on shareholder proposals. WLF’s comment applauded SEC for withdrawing two staff no-action letters that expanded advisory firms’ authority and allowed them to pursue relationships that gave rise to conflicts of interest. It also urged the Commission to take further action to address such conflicts of interest and the advisory firms’ refusal to allow access to the models and methods they use to reach their recommendations.

CASES DECIDED

U.S. Supreme Court holds that property owners may file cost-benefit challenges to the federal government’s designation of their property as “critical habitat” for an endangered species—a designation that greatly diminishes the property’s market value.

Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.

The U.S. Supreme Court reinstated challenges to a decision by the U.S. Fish and Wildlife Service to designate private property in Louisiana as “critical habitat” for an endangered species of frog, even though the frog does not live in Louisiana and might be unable to do so without substantial land modifications. The decision was a victory for WLF, which filed a brief arguing that the appeals court wrongly concluded that Congress barred cost-benefit challenges to such designations. The Supreme Court agreed with WLF that precluding a court challenge would be inconsistent with the strong presumption that all federal administrative actions are subject to judicial review.

U.S. Court of Appeals for the District of Columbia Circuit vacates an SEC enforcement action, finding that the SEC Administrative Law Judge who conducted the enforcement proceedings was appointed in a constitutionally improper manner.

Timbervest LLC v. SEC

The U.S. Court of Appeals for the D.C. Circuit overturned the SEC’s draconian enforcement sanctions against an investment advisory firm and remanded the case back to the Commission for it to initiate an entirely new enforcement action. The decision was a victory for WLF, which filed a brief arguing that the SEC Administrative Law Judge (ALJ) who imposed the sanctions was appointed unconstitutionally and lacked authority to decide the case. In June 2018, the U.S. Supreme Court’s ruling in a separate case, *Lucia v. SEC*, endorsed WLF’s argument. In response to that ruling, the appeals court vacated the ALJ’s sanctions against Timbervest and ordered a rehearing before a new SEC official.