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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 January 2019 filings and results.

New Filings

- A court should not defer to an agency's interpetation of its own regulation. (*Kisor v. Wilkie*)
- Congress intended the Federal Employers' Liability Act to serve as the exclusive vehicle for considering compensation claims filed by injured railroad workers against their employers. (*BNSF Railway Co. v. Montana Eighth Judicial District Court*)
- The National Labor Relations Board should rescind its 2015 ruling that greatly expanded the circumstances under which a company may be deemed the "joint employer" of another company's workers. (*In re Standards for Determining Joint-Employer Status*)
- A private party should not be allowed to invoke the False Claims Act's ten-year statute of repose, which is intended for use only by the government. (*U.S. ex rel. Hunt v. Cochise Consultancy, Inc.*)

Decisions

- The U.S. Court of Appeals for the Ninth Circuit holds that the First Amendment bars San Francisco from requiring soft-drink manufacturers to include controversial health warnings in their ads. (*American Beverage Ass'n v. City and County of San Francisco*)
- The New Mexico Court of Appeals refuses to rewrite the State's unfair practices law to allow for statutory damages in class actions on behalf of uninjured consumers. (*Arguedas v. Seawright*)
- The plaintiff voluntarily dismisses its First Amendment challenge to a New York law that restricts how retailers can characterize their prices, but only after the New York courts significantly restrict the scope of the law. (*Expressions Hair Design v. Schneiderman*)
- The U.S. Supreme Court agrees to review an appeals court decision that upended industry expectations regarding wage-and-hour laws applicable to employees stationed off-shore. (*Newton v. Parker Drilling Management Services, Inc.*)
- The U.S. Supreme Court declines to review an appeals court decision that reinstated massive claims under the False Claims Act against a drug company, but only after the United States told the Supreme Court that it plans to intervene in the lawsuit and order its dismissal. (*Gilead Sciences v. U.S. ex rel. Campie*)

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

A court should not defer to an agency's interpretation of its own regulation.
Kisor v. Wilkie

On January 31, WLF urged the U.S. Supreme Court to overturn *Auer v. Robbins*, a precedent that violates the separation of powers by instructing the judiciary to adopt, as binding law, the executive's interpretations of its own regulations. Under *Auer*, a court defers to an agency's interpretation of its own ambiguous regulation, so long as that interpretation is not "plainly erroneous or inconsistent with the regulation" itself. *Auer* enables an agency, flush with power delegated by the legislature, to issue open-ended rules, and then to contort those rules as it sees fit. WLF's brief offers concrete examples of agencies' efforts aggressively to expand, or abruptly to alter, the import of their regulations. Agencies, WLF shows, often use *Auer* as cover for highhanded, unpredictable, and nakedly political behavior. WLF therefore urges the Court to overturn *Auer* and restore the separation-of-powers principle by which it is "the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177 (1803).

Congress intended the Federal Employers' Liability Act to serve as the exclusive vehicle for considering compensation claims filed by injured railroad workers against their employers.
BNSF Railway Co. v. Montana Eighth Judicial District Court

On January 25, WLF filed a brief in the Montana Supreme Court, urging it to eliminate court rules that unfairly hamstring railroads in their efforts to defend personal-injury suits filed by employees. WLF argued that the federal law governing railroad-worker injury claims is the exclusive vehicle for raising such claims and preempts the bad-faith tort system that Montana courts have superimposed on the claims-processing established by Congress. Ever since 1908, the Federal Employers' Liability Act (FELA) has provided railroad workers with an effective means of obtaining compensation for on-the-job injuries. Montana law permits employees to supplement their FELA claims with a second suit alleging bad-faith in settling FELA claims. WLF argued that when Congress adopted FELA it intended to preempt the entire field of railroad injury claims and thus that the state-law claims routinely recognized by Montana courts are barred under the Constitution's Supremacy Clause.

The National Labor Relations Board should rescind its 2015 ruling that greatly expanded the circumstances under which a company may be deemed the "joint employer" of another company's workers.
In re Standards for Determining Joint-Employer Status

On January 14, WLF filed formal comments with the National Labor Relations Board, urging it to overturn the *Browning-Ferris* standard it adopted in 2015, under which regulated entities can be deemed "joint employers" of another company's employees—and then held fully liable for obligations owed to those employees. WLF argued that Congress has not authorized the NLRB to expand the definition of "employer"—an expansion that threatens to impose new, unanticipated liability on a broad range of entities. *Browning-Ferris* held that a company can be deemed the "joint employer" of workers employed by one its independent contractors, even when it plays no direct role in establishing their terms and conditions of employment. Last month, the D.C. Circuit rejected the NLRB's petition to enforce *Browning-Ferris*, but the decision left unclear what the joint-employer standard should be going forward. WLF filed its comments in response to a September 2018 NLRB proposal to rescind *Browning-Ferris.*

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A private party should not be allowed to invoke the False Claims Act's ten-year statute of repose, which is intended for use only by the government.
U.S. ex rel. Hunt v. Cochise Consultancy, Inc.

On January 9, WLF urged the U.S. Supreme Court to foreclose private parties from invoking a False Claims Act limitation period intended solely for use by the government. The False Claims Act contains a two-pronged statute of limitations. One section ensures that both a private party—called a "relator"—and the government may sue within six years of an alleged fraud against the United States. The other section ensures that the government may sue within three years of discovering fraud, but in no event more than ten years from when the fraud occurred. False Claims Act complaints filed by relators remain under seal while the government considers whether to intervene. Although they are supposed to last around 60 days, these government investigations often stretch for years. Letting a relator invoke the False Claims Act's ten-year repose period, WLF explains in its brief, would exacerbate government abuse of the law's seal provision. WLF contends also that letting the government conduct one-sided discovery on decade-old allegations does not square with due process.

DECISIONS

The U.S. Court of Appeals for the Ninth Circuit holds that the First Amendment bars San Francisco from requiring soft-drink manufacturers to include controversial health warnings in their ads.
American Beverage Ass'n v. City and County of San Francisco

On January 31, the U.S. Court of Appeals for the Ninth Circuit enjoined enforcement of a San Francisco ordinance that required advertisements for sugar-sweetened beverages (SSBs) to include prominent health warnings linking SSB consumption to obesity, diabetes, and tooth decay. The 11-judge *en banc* court held that requiring advertisers to include the controversial warning violated First Amendment protections against government-compelled speech. The decision was a victory for WLF, which filed a brief urging the court to strike down the ordinance. The court agreed with WLF that while governments may require companies to include noncontroversial statements in their advertising, the city ordinance was "unduly burdensome" because it required the warning to occupy at least 20% of the area of the advertisement—and thereby discouraged companies from advertising at all. The court did not address whether the warning was "noncontroversial."

The New Mexico Court of Appeals refuses to rewrite the State's unfair practices law to allow for statutory damages in class actions on behalf of uninjured consumers.
Arguedas v. Seawright

On January 28, the New Mexico Court of Appeals rejected efforts by class-action attorneys to rewrite state law through litigation. The decision was a victory for WLF, which filed a brief in the case urging the court not to alter the plain meaning of New Mexico's Unfair Practices Act (UPA) to provide the plaintiffs with the relief they sought. The UPA expressly limits class-wide recovery to *actual* damages, but the plaintiffs here sought to recover *statutory* damages on a class-wide basis—relief that the trial court rightly denied. WLF argued that if the appeals court were to alter the statute, it would violate the separation of powers under New Mexico's constitution, undercut the state legislature's public-policy goals, and impose unbearable liability on businesses throughout the state. The appeals court agreed. Harold ("Hal") D. Stratton, Jr. and Veronica C. Gonzales-Zamora of Brownstein Hyatt Farber Schreck, LLP provided valuable *pro bono* assistance to WLF in filing WLF's *amicus* brief.

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The plaintiff voluntarily dismisses its First Amendment challenge to a New York law that restricts how retailers can characterize their prices, but only after the New York courts significantly restrict the scope of the law.
Expressions Hair Design v. Schneiderman

On January 14, the U.S. Court of Appeals for the Second Circuit, acting at the plaintiffs' request, dismissed (without comment) a First Amendment challenge to a New York law that prohibited merchants from informing their customers that a "surcharge" is being imposed on customers who use credit cards. WLF filed a brief in support of the challenge, arguing that the law violates the First Amendment rights of merchants, many of whom wish to inform customers of the extra costs incurred any time they use credit cards. The plaintiffs (several small merchants) likely dropped their challenge because New York, in response to their lawsuit, adopted an interpretation of the statute that imposed far fewer restrictions on their speech rights. The law was adopted at the urging of credit-card companies, who fear that consumers will be less likely to use credit cards if they know that doing so will result in a "surcharge" above the regular price.

The U.S. Supreme Court agrees to review an appeals court decision that upended industry expectations regarding wage-and-hour laws applicable to employees stationed off-shore.
Newton v. Parker Drilling Management Services, Inc.

On January 11, the U.S. Supreme Court agreed to review a U.S. Court of Appeals for the Ninth Circuit wage-and-hour ruling that could expose oil and gas companies to massive back-pay liability. WLF filed a brief last October in support of Parker Drilling, arguing that the Ninth Circuit improperly rejected a half-century of federal case law governing the wages paid to employees stationed on off-shore oil platforms. Congress decreed in a 1953 statute that federal law governs on drilling platforms. Applying federal wage-and-hour law, other federal courts have consistently held that employers need not pay drilling-platform workers for their sleep and rest time. But the Ninth Circuit held that drilling platforms off the California coast are also subject to California wage-and-hour laws (which require payment for sleep time), thereby exposing the industry to massive retroactive liability. WLF argued that the Ninth Circuit misinterpreted the 1953 statute.

The U.S. Supreme Court declines to review an appeals court decision that reinstated massive claims under the False Claims Act against a drug company, but only after the United States told the Supreme Court that it plans to intervene in the lawsuit and order its dismissal.
Gilead Sciences, Inc. v. U.S. ex rel. Campie

On January 7, 2019, the U.S. Supreme Court declined to review an appeals court decision that authorizes private individuals to sue drug manufacturers for government-contracting fraud based on technical violations of federal regulations—even if the FDA approved the drugs and the government continued to purchase them after investigating the allegations. While the denial was a disappointment for WLF (which filed a brief urging review), the outcome of the case was favorable. In response to WLF's brief, the Court asked the government to weigh in—and it responded that the suit was unwarranted and that it would move for dismissal. WLF's brief argued that the appeals court's decision facilitates the filing of unwarranted claims under the False Claims Act (FCA) against government contractors. It argued that the government's response to the whistleblower's fraud claims demonstrated that the regulatory violation was not "material," an FCA prerequisite.

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