



Washington Legal Foundation
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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 February 2019 filings and results.

New Filings

- The Outer Continental Shelf is under the exclusive jurisdiction of the federal government, so state-law wage-and-hour standards do not apply to workers employed on off-shore oil rigs. (*Newton v. Parker Drilling Management Services, Inc.*)
- To establish liability for a false statement in either a tender offer or a proxy statement, plaintiffs should be required to show fraudulent intent. (*Emulex Corp. v. Varjabedian*)
- Tort claims seeking to hold oil and gas companies responsible for climate change must fail if plaintiffs cannot prove "proximate cause." (*City of New York v. Chevron Corp.*)
- When a company is required to produce a deposition witness to address the company's knowledge of specified topics, the company (not opposing counsel) should have the right to choose who will testify. (*In re Proposed Amendment to Rule 30(b)(6)*)
- "Fail-safe" classes—in which class membership is based on whether a plaintiff's claim succeeds on the merits—are unfair to defendants and absent class members and so should not be certified. (*Vogt v. State Farm Life Insurance Co.*)
- Limitations on personal jurisdiction over nonresident defendants fully apply in the class-action context. (*Whole Foods Marketing Group v. Molock*)

Decisions

- The Third Circuit holds that the Federal Trade Commission may not file suit to enjoin unfair trade practices unless it can show that the defendant is "about to" violate the law; it is not enough to show merely that the defendant has violated the law in the past or might do so at some indefinite future date. (*FTC v. Shire ViroPharma Inc.*)
- The U.S. Supreme Court declines to review a First Amendment challenge to an NLRB order that requires an employer to allow employees, even those dealing directly with customers, to wear buttons conveying political speech with which the employer disagrees. (*In-N-Out Burger, Inc. v. NLRB*)
- The Federal Circuit declines to rehear a troubling appeals court decision that undermines limits on forum shopping by plaintiffs in patent-infringement lawsuits. (*Erfindergemeinschaft UroPep GbR v. Eli Lilly and Co.*)

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 Outer Continental Shelf is under the exclusive jurisdiction of the federal government, so state-law wage-and-hour standards do not apply to workers employed on off-shore oil rigs.

Newton v. Parker Drilling Management Services, Inc.

On February 27, WLF filed an *amicus* brief in the U.S. Supreme Court, urging it to overturn a Ninth Circuit wage-and-hour ruling that could result in oil and gas companies facing hundreds of millions of dollars in back-pay liability. WLF argued that the Ninth Circuit improperly rejected federal law governing the wages paid to employees stationed on off-shore oil platforms. The issue is whether federal law or California law should govern wage payments to employees working on platforms off the coast of California. Before the Ninth Circuit's ruling, all courts agreed that federal law applied. The Ninth Circuit applied California law, under which employees who do not leave their job site at night must be paid for all 24 hours in a day, including time spent sleeping. WLF argued that a 1953 federal law dictates application of federal law and that employers have complied fully with federal wage-and-hour standards.

To establish liability for a false statement in either a tender offer or a proxy statement, plaintiffs should be required to show fraudulent intent.

Emulex Corp. v. Varjabedian

On February 26, WLF asked the U.S. Supreme Court to reverse a Ninth Circuit decision that, alone among federal appeals courts, holds that a stockholder need plead only negligence to state a claim under Section 14(e) of the Securities Exchange Act of 1934. Despite the over 30-year gap between the passage of Section 14(a) and Section 14(e), WLF's *amicus* brief shows that the two provisions are closely related. Both sections provide a means of accomplishing the same end—a change in corporate control. While neither provision contains an express mental-state requirement, the legislative history confirms that a private action brought under either provision should be subject to the same intent threshold. As WLF shows, a coherent interpretation of both sections will obviate the existing lower-court divisions and disparate standards that brought this case to the Court. Lyle Roberts, George Anhang, and Daniel Sachs of Shearman & Sterling LLP provided WLF with substantial *pro bono* assistance in preparing its brief.

Tort claims seeking to hold oil and gas companies responsible for climate change must fail if plaintiffs cannot prove “proximate cause.”

City of New York v. Chevron Corp.

On February 14, WLF urged the Second Circuit in an *amicus* brief to affirm a ruling that declines to move the task of addressing climate change into the courts. The City of New York is searching for funding for sea-wall construction and other climate-change programs. As part of this search, it sued five companies that produce oil and natural gas. The district court dismissed the claims because (1) they are displaced by federal common law, (2) the Clean Air Act displaces any federal common-law claim directed at domestic fossil-fuel emissions, and (3) any federal common-law claim directed at foreign emissions interferes with the separation of powers and the nation's foreign policy. As the companies explain in their brief, the Second Circuit should affirm these holdings. But even if it could get to the merits of its lawsuit, the City would face many insurmountable obstacles. One such obstacle is proximate cause—the requirement that a direct connection exists between the conduct of the defendant and the harm to the plaintiff. In its brief, WLF shows (1) that the City cannot establish proximate cause and (2) that the Court should not deviate from the traditional proximate-cause rule.

When a company is required to produce a deposition witness to address the company's knowledge of specified topics, the company (not opposing counsel) should have the right to choose who will testify.

In re Proposed Amendment to Rule 30(b)(6)

On February 11, WLF submitted comments to the Advisory Committee on Civil Rules in response to the Committee's preliminary draft of its proposed amendment to Rule 30(b)(6) of the Federal Rules of Civil Procedure. That rule requires organizations (including corporations, associations, and government agencies) to designate one or more persons to testify on the organization's behalf about specific matters raised in litigation. The Advisory Committee's proposed amendment not only requires the requesting and responding parties to confer on such depositions, but it obligates the responding company to confer with opposing counsel on the *identity* of the witness who will speak for the company. That sweeping change, WLF warns, threatens to sweep aside settled law that a noticing party has no right to dictate the witness who will testify for the company. It would also invite an avalanche of costly and time-consuming satellite litigation.

“Fail-safe” classes—in which class membership is based on whether a plaintiff's claim succeeds on the merits—are unfair to defendants and absent class members and so should not be certified.

Vogt v. State Farm Life Insurance Co.

On February 5, WLF asked the Eighth Circuit to reverse a \$34 million jury award made possible by the trial court's deeply flawed certification of an unwieldy class of insurance policyholders. The appeal arises from a class action by Missouri life-insurance policyholders who allege that State Farm breached their policies by including unlisted factors in their cost-of-insurance rates during the class period. In its *amicus* brief, WLF argues that, by defining class membership based on whether a policyholder ultimately prevails on the merits of her claims, the district court created an impermissible “fail-safe” class. Fail-safe classes raise serious due-process concerns. They are unfair to defendants because they allow class members to evade the bar of *res judicata*, as plaintiffs are bound only by a favorable judgment. And they are unfair to absent class members, who too often are deprived of the requisite notice and ability to opt out of the class prior to final judgment. WLF's brief contends that both of those defects are present in this case.

Limitations on personal jurisdiction over nonresident defendants fully apply in the class-action context.

Whole Foods Marketing Group v. Molock

On February 4, WLF filed an *amicus* brief in the D.C. Circuit, urging it to rule that a defendant may not be forced to defend a nationwide class action outside of its home State. WLF argued that although the Supreme Court has cut back on the power of state courts to exercise jurisdiction over out-of-state corporations, the lower court is attempting an end-run around that restriction by declaring it inapplicable to class actions. This lawsuit involves five employees of Whole Foods stores in the District of Columbia who contend that they were not paid all of the employee bonuses to which they were entitled. They seek to represent a class consisting of thousands of employees in 26 other States who allegedly were similarly shortchanged. WLF argues that due process protects a business from being forced to defend a lawsuit outside of its home State unless the claim actually arose within the forum, and that those protections apply in the class-action context.

DECISIONS

The Third Circuit holds that the Federal Trade Commission may not file suit to enjoin unfair trade practices unless it can show that the defendant is “about to” violate the law; it is not enough to show merely that the defendant has violated the law in the past or might do so at some indefinite future date.

FTC v. Shire ViroPharma Inc.

On February 25, the Third Circuit sharply curtailed the Federal Trade Commission’s (FTC) enforcement powers, ruling that Congress has strictly limited the FTC’s statutory authority to file lawsuits for injunctive relief against those it accuses of having engaged in unfair competition. The decision was a victory for WLF, which filed a brief arguing that Congress limited the FTC’s authority to file suit to those instances in which a defendant “is violating, or is about to violate” the Federal Trade Commission Act. Quoting directly from WLF’s brief, the court agreed with WLF that the about-to-violate standard requires the FTC to provide evidence of the defendant’s near-term plans. The FTC’s lawsuit contended that a drug company filed a “sham” petition with the FDA for the purpose of delaying approval of generic versions of its brand-name drug. But the FTC did not file its suit until 2017, five years after the company had ceased its petitioning activity.

The U.S. Supreme Court declines to review a First Amendment challenge to an NLRB order that requires an employer to allow employees, even those dealing directly with customers, to wear buttons conveying political speech with which the employer disagrees.

In-N-Out Burger, Inc. v. NLRB

On February 25, the U.S. Supreme Court declined to review a Fifth Circuit ruling that stifles commercial speech by enforcing an unconstitutional agency rule. The National Labor Relations Act gives employees a constrained statutory right to free speech in the workplace on labor issues. Employers, meanwhile, enjoy a robust constitutional right, under the First Amendment, to free commercial speech. The NLRB regularly favors the employees’ statutory speech right over the employers’ constitutional one. It did so here by declaring that In-N-Out Burger—a popular West Coast burger chain—may not prohibit its employees from adding political buttons to their uniforms. In its brief, WLF argued that the NLRB has turned the First Amendment and the NLRA upside down.

The Federal Circuit declines to rehear a troubling appeals court decision that undermines limits on forum shopping by plaintiffs in patent-infringement lawsuits.

Erfindergemeinschaft UroPep GbR v. Eli Lilly and Co.

On February 5, the Federal Circuit denied a petition that it rehear a case in which a three-judge panel substantially undermined restrictions on where plaintiffs are permitted to file patent-infringement suits. The decision was a setback for WLF, which filed a brief urging rehearing. The panel affirmed a district court ruling (from the plaintiff-friendly Eastern District of Texas) that the defendant waived objections to having the suit heard in Texas—even though the defendant voiced its objections throughout the district court proceedings. WLF charged that the court is inappropriately invoking waiver to evade the Supreme Court’s recently announced limitations on patent venue. The Supreme Court ruled that venue is proper only in a district in which an alleged infringer maintains an established place of business. That ruling overturned a longstanding Federal Circuit rule that allowed infringement suits to be filed virtually anywhere in the country.