Washington Legal Foundation
Advocate for Freedom and Justice®
2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302 wlf.org

April 2, 2019

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 March 2019 filings and results.

New Filings

- Courts should enforce homeowner insurance contracts conditioning any assignment of benefits on the approval of all insureds and mortgagees. (*Restoration 1 of Port St. Lucie v. Ark Royal Insurance Co.*)
- Property owners are entitled to compensation under the Fifth Amendment when the government adopts land-use restrictions that deprive the owners of all economically beneficial use of their land. (*Love Terminal Partners v. U.S.*)
- The Federal Trade Commission's statutory authority to seek an injunction in federal court does not also authorize the Commission to seek monetary penalties. (*FTC v. AMG Capital Management, LLC*)
- State courts may not exercise general personal jurisdiction over an out-of-state company simply because the company has registered to do business in the State. (*Murray v. American LaFrance, LLC*)

Decisions

- The U.S. Supreme Court rules that when an alien is convicted of a serious felony and is later released from state prison, immigration officials must continue to detain the felon while he awaits deportation. (*Nielsen v. Preap*)
- The U.S. Supreme Court declines to review a troubling California state-court decision that authorizes the exercise of personal jurisdiction over nonresident defendants, despite the lack of any meaningful connection between California and the plaintiff's claims. (*First Advantage Background Services Corp. v. Superior Court of California*)
- The Montana Supreme Court declines to reconsider its ruling that state-law personal-injury claims by railroad workers against their employers are not preempted by the Federal Employers' Liability Act. (*BNSF Railway Co. v. Montana Eighth Judicial District Court*)
- Sitting en banc, the U.S. Court of Appeals for the Eleventh Circuit affirms dismissal of an anititrust class action against auto insurance companies, ruling that allegations that insurers engaged in "parallel conduct" are insufficient to plead a conspiracy to violate antitrust laws. (*Quality Auto Painting Ctr. of Roselle, Inc. v. State Farm Indem. Co.*)
- The U.S. Supreme Court rules that a copyright-infringement claim is not ripe for review until the Register of Copyrights has acted on the plaintiff's copyright application. (*Fourth Estate Public Benefit Corp. v. Wall-Street.com*)

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.

WLF Litigation Division

Richard Samp, Chief Counsel
rsamp@wlf.org

Cory Andrews, Senior Litigation Counsel
candrews@wlf.org

Corbin Barthold, Litigation Counsel
cbarthold@wlf.org

Marc Robertson, Staff Attorney
mrobertson@wlf.org

NEW FILINGS

Courts should enforce homeowner insurance contracts conditioning any assignment of benefits on the approval of all insureds and mortgagees.
Restoration 1 of Port St. Lucie v. Ark Royal Insurance Co.

On March 15, 2019, WLF asked the Florida Supreme Court to reject an effort by the plaintiffs' bar to upend Florida contract law. The case will decide whether homeowners insurance policies may condition a post-loss assignment on the consent of all insureds and mortgagees named in the policy. The plaintiff, a purported assignee under the policy, asks the court to invalidate the policy's condition requiring written consent of the named mortgagee for any post-loss assignment. But as WLF argues in its *amicus* brief, a judicially created rule barring *any* contractual condition on the post-loss assignment of insurance benefits would ultimately erode the freedom of contract for all Floridians. Absent some great prejudice to the public interest, Florida courts must enforce the plain terms of a contract. Not only is deviating from that settled rule unwise, WLF contends, but deciding major questions of public policy is a role reserved to the Legislature, not the Judiciary.

Property owners are entitled to compensation under the Fifth Amendment when the government adopts land-use restrictions that deprive the owners of all economically beneficial use of their land.
Love Terminal Partners v. U.S.

On March 15, 2019, WLF filed an *amicus* brief in the U.S. Supreme Court, urging it to review a Federal Circuit ruling that undermines the ability of property owners to obtain compensation from the government when regulations deprive their property of economic value. WLF argued that the ruling bars compensation under the Fifth Amendment's Takings Clause in the many cases in which the regulated property's precise value is disputed. The Plaintiffs were owners of an air-passenger terminal at Love Field, a Dallas airport. In an effort to aid a rival airport, Congress passed a 2006 law that prohibited the Plaintiffs from using the terminal for commercial passenger services, thereby depriving the property of all value. WLF asserted that the Federal Circuit misapplied controlling precedent in denying compensation; it argued that regulations that deprive landowners of all economic value are *per se* Takings Clause violations. WLF's brief was joined by the Allied Educational Foundation.

The Federal Trade Commission's statutory authority to seek an injunction in federal court does not also authorize the Commission to seek monetary penalties.
FTC v. AMG Capital Management, LLC

On March 8, 2019, WLF urged the Ninth Circuit to rehear *en banc* an appeal challenging a restitution judgment awarded without statutory authority. Section 13(b) of the FTC Act empowers the FTC to sue, in federal court, to obtain an injunction against deceptive trade practices. The Ninth Circuit has repeatedly said, however, that the word "injunction" in § 13(b) unleashes all equitable remedies. It bases this loose statutory construction on a 73-year-old Supreme Court case, *Porter v. Warner Holding Co.* In its *amicus* brief, WLF argues that *Porter* is obsolete. Its endorsement of judicial statutory revision resembles the ancient—and defunct—doctrine of "the equity of the statute." In the mid-twentieth century, the Supreme Court briefly adopted a version of the equity of the statute to "imply" new rights and remedies into laws. But the Court later reversed course. It came to recognize that it is solely for Congress to decide how, and by whom, its statutes are enforced. WLF's brief urges the Ninth Circuit to rehear the case *en banc* so that it can align its interpretation of § 13(b) with the modern and binding rules of statutory interpretation.

State courts may not exercise general personal jurisdiction over an out-of-state company simply because the company has registered to do business in the State.
Murray v. American LaFrance, LLC

On March 4, 2019, WLF filed an *amicus* brief in Pennsylvania Superior Court, urging it to overturn rulings that have authorized courts in that State to exercise broad personal jurisdiction over nonresident defendants. WLF argued that due process protects a nonresident company from being haled into a state court merely because the company registered to do business in the State; registration does not constitute consent to jurisdiction. WLF filed its brief with substantial *pro bono* assistance from James M. Beck, an attorney with Reed Smith LLP in Philadelphia. The court, along with several other three-judge Superior Court panels, initially ruled that a company can be sued in Pennsylvania on any and all claims ("general" jurisdiction) because it "consented" to suit by registering to do business—a step required of any company that sells products in the State. The court later agreed to rehear this case *en banc.* WLF argued that such "consent" jurisdiction is barred by recent Supreme Court rulings.

DECISIONS

The U.S. Supreme Court rules that when an alien is convicted of a serious felony and is later released from state prison, immigration officials must continue to detain the felon while he awaits deportation.
Nielsen v. Preap

On March 19, 2019, the U.S. Supreme Court overturned an appeals court decision that eviscerated enforcement of a 1996 federal statute that requires the detention of aliens convicted of serious crimes while they contest the government's efforts to deport them. The decision was a victory for WLF, which (on behalf of a group of 10 Members of Congress) filed an *amicus* brief urging reversal. The Court agreed with WLF that the mandatory-detention statute, 8 U.S.C. § 1226(c), applies even if immigration officials do not manage to take custody immediately following the alien's release from criminal incarceration. The Court held that Congress reasonably concluded that unless criminal aliens are detained while they await removal, there exists too great a danger that they will abscond and/or commit new felonies. To emphasize the danger of recidivism, WLF's brief noted that one of the six criminal aliens released by order of the lower courts was later convicted of first-degree murder.

The U.S. Supreme Court declines to review a troubling California state-court decision that authorizes the exercise of personal jurisdiction over nonresident defendants, despite the lack of any meaningful connection between California and the plaintiff's claims.
First Advantage Background Services Corp. v. Superior Court of California

On March 18, 2019, the Supreme Court denied review in *First Advantage Corp. v. Superior Court of California*. This was a setback for WLF, which filed an *amicus* brief in the U.S. Supreme Court, urging it to grant cert to review California's writ-of-mandate procedure in a jurisdictional objection. WLF's brief argued that California's procedure for objecting to personal jurisdiction is deficient and does not provide defendants with meaningful review. WLF asserted that defendants must have a fair opportunity to appeal jurisdictional rulings, rather than the rubber-stamping that currently occurs.

The Montana Supreme Court declines to reconsider its ruling that state-law personal-injury claims by railroad workers against their employers are not preempted by the Federal Employers' Liability Act.
BNSF Railway Co. v. Montana Eighth Judicial District Court

On March 12, 2019, the Montana Supreme Court denied a petition to hear a case in order to rein in court rules that unfairly hamstring railroads in their efforts to defend personal-injury suits filed by employees. The denial was a setback for WLF, which filed an *amicus* brief urging that the petition be granted. WLF argued that the federal law governing railroad-worker injury claims (FELA) 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 law has provided railroad workers with a means to seek 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.

Sitting en banc, the U.S. Court of Appeals for the Eleventh Circuit affirms dismissal of an anititrust class action against auto insurance companies, ruling that allegations that insurers engaged in "parallel conduct" are insufficient to plead a conspiracy to violate antitrust laws.
Quality Auto Painting Ctr. of Roselle, Inc. v. State Farm Indem. Co.

On March 4, 2019, the Eleventh Circuit affirmed the dismissal of several antitrust claims in *Quality Auto Painting Ctr. of Roselle, Inc. v. State Farm Indem. Co*. The decision was a victory for WLF, which filed an *amicus* brief in the case cautioning the court that adopting the plaintiffs' position would permit antitrust plaintiffs to cite mere parallel conduct among competitors as a sufficient basis for pleading an antitrust violation. In its brief, WLF urged the appeals court to affirm the lower court's dismissal in light of the Supreme Court's holding in *Twombly v. Bell Atlantic Corp*., which requires antitrust plaintiffs to assert more than mere parallel conduct among competitors to plead the existence of a conspiracy. As the *en banc* court's decision makes clear, because parallel conduct, standing alone, can just as easily reflect a rational and competitive business strategy as it does an illicit conspiracy, it cannot serve as the basis for an antitrust complaint.

The U.S. Supreme Court rules that a copyright-infringement claim is not ripe for review until the Register of Copyrights has acted on the plaintiff's copyright application.
Fourth Estate Public Benefit Corp. v. Wall-Street.com

On March 4, 2019, the U.S. Supreme Court held that § 411(a) of the Copyright Act allows a copyright holder to sue for infringement only after the Register of Copyrights approves or denies that plaintiff's application to register a copyright. That decision marked another success for WLF, whose *amicus* brief argued that the plaintiff's reading of § 411(a) severely disrupts Congress's broad public goals behind the Copyright Act. By conditioning the right to sue for copyright infringement on the Copyright Register's review, Congress sought to maintain a public registry of copyright ownership, to conserve judicial resources, and to enlarge the Library of Congress's collection of copyrighted works. Contrary to the plaintiff's view, WLF argued, each of those ends is best advanced by the Eleventh Circuit's registration approach.

