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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 April 2019 filings and results.

## New Filings

- Congress intended the Federal Employers' Liability Act to be the exclusive vehicle for compensating claims by injured railroad workers against their employers. (*BNSF Railway v. Montana Eighth Judicial District Court*)
- Limits on personal jurisdiction over nonresident defendants apply fully to class actions. (*Mussat v. IQVIA, Inc.*)
- EPA's proposed revisions to Clean Water Act regulations—which very broadly define “waters of the United States”—impose appropriate limits and rein in overly expansive federal regulation. (*In re Revised Definition of 'Waters of the United States'*)
- To bring an antitrust claim, it is not enough to prove injury; the plaintiff must also show that its injury was caused by some anti-competitive aspect of the defendant's alleged conduct. (*Pulse Network, LLC v. Visa, Inc.*)
- A nationwide class should not be certified in an employment discrimination case if the plaintiffs cannot point to a company policy or practice that caused a common harm to the class. (*Moussouris v. Microsoft*)
- In products-liability litigation, a manufacturer's duty to warn should not extend to products made by others, particularly in those States in which a manufacturer can be held strictly liable regardless of its knowledge of potential safety risks. (*Whelan v. A.O. Smith Corp.*)

## Decisions

- The U.S. Supreme Court puts off for another day deciding when, if at all, the plaintiffs' bar may bring claims alleging securities-law violations in connection with tender offers directed to the shareholders of public corporations. (*Emulex Corp. v. Varjabedian*)
- The Advisory Committee on Civil Rules abandons a proposed change to Rule 30(b)(6) that would have obliged a company, when called upon to produce a deposition witness to address the company's knowledge, to give opposing counsel a role in identifying the witness. (*In re Proposed Amendment to Rule 30(b)(6)*)

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

### **Congress intended the Federal Employers' Liability Act to be the exclusive vehicle for compensating claims by injured railroad workers against their employers.**

*BNSF Railway v. Montana Eighth Judicial District Court*

On April 25, 2019, WLF filed a brief in the U.S. Supreme Court, urging it to invalidate Montana court rules that unfairly hamstringing 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.

### **Limits on personal jurisdiction over nonresident defendants apply fully to class actions.**

*Mussat v. IQVIA, Inc.*

On April 19, 2019, WLF filed an *amicus curiae* brief in the U.S. Court of Appeals for the Seventh 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, many lower courts are attempting an end-run around that restriction by declaring it inapplicable to class actions. This lawsuit involves an Illinois medical office that is suing a healthcare information company for sending it two unsolicited faxes. The plaintiff seeks to have its suit certified as a nationwide class action on behalf of anyone to whom the defendant sent a fax—and is seeking billions of dollars for the class. WLF argued 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.

### **EPA's proposed revisions to Clean Water Act regulations—which very broadly define “waters of the United States”—impose appropriate limits and rein in overly expansive federal regulation.**

*In re Revised Definition of 'Waters of the United States'*

On April 15, 2019, WLF filed formal comments with the Environmental Protection Agency and the Army Corps of Engineers (collectively, “Agencies”) in response to a request for stakeholder input on the new definition of “waters of the United States” in the Clean Water Act (CWA). WLF's comments applaud the Agencies' efforts to develop a clear and narrow definition that would provide clarity to landowners, replacing the current patchwork framework. WLF supports returning significant regulatory power to States and Tribes, who are in the best position to address pollution issues within their borders. WLF's comments urge the Agencies to provide very clear meanings so as to prevent spurious reinterpretation whenever an administrator seeks to regulate a body of water.

**To bring an antitrust claim, it is not enough to prove injury; the plaintiff must also show that its injury was caused by some anti-competitive aspect of the defendant’s alleged conduct.**

*Pulse Network, LLC v. Visa, Inc.*

On April 12, 2019, WLF asked the U.S. Court of Appeals for the Fifth Circuit to reject an effort by a competitor-plaintiff to weaken one of the core elements of antitrust standing: “antitrust injury.” The case arises from Pulse Network’s lawsuit against Visa, Inc., claiming that Visa’s debit-network-pricing strategies are exclusionary and violate federal antitrust laws. The district court rightly held that Pulse could not sue because it lacks antitrust injury—that is, even assuming that Visa’s conduct violates the antitrust laws (which Visa very much disputes), Pulse was not injured by any anti-competitive aspect of Visa’s conduct. In its brief, WLF argues that Pulse’s theory of antitrust injury, if adopted, would make it much easier for struggling competitors to pursue litigation as a business strategy, bogging down thriving companies in meritless but time-consuming and expensive antitrust litigation. WLF’s *amicus curiae* brief was joined by leading antitrust scholars Richard A. Epstein and Geoffrey A. Manne.

**A nationwide class should not be certified in an employment discrimination case if the plaintiffs cannot point to a company policy or practice that caused a common harm to the class.**

*Moussouris v. Microsoft*

On April 8, 2019, WLF filed an *amicus curiae* brief urging the Ninth Circuit to affirm the denial of a motion to certify a class of current and former employees of Microsoft. Under *Wal-Mart v. Dukes*, a class may not challenge an array of employment decisions as discriminatory unless “some glue” holds “the alleged reasons for all those decisions together.” Like the plaintiffs in *Wal-Mart*, the plaintiffs in *Moussouris v. Microsoft* seek to certify a class of employees who allegedly suffered sex discrimination in pay and promotions. Like the employees in *Wal-Mart*, however, the employees here participated in a discretion-based pay-and-promotion system. A discretion-based system usually cannot supply the “glue” needed for class certification, and the district court could find no such “glue” here. In its brief, WLF establishes that this case is legally indistinguishable from *Wal-Mart*. WLF also discusses the many benefits, to corporations and consumers, of dispersing authority to lower-level managers.

**In products-liability litigation, a manufacturer’s duty to warn should not extend to products made by others, particularly in those States in which a manufacturer can be held strictly liable regardless of its knowledge of potential safety risks.**

*Whelan v. A.O. Smith Corp.*

On April 3, 2019, WLF filed an *amicus curiae* brief in the Supreme Court of New Jersey, urging it to reverse an appeals court decision that greatly expands a manufacturer’s strict-liability duty to warn of asbestos dangers in third-party replacement parts. WLF’s brief asks the Supreme Court of New Jersey to reverse the Appellate Division’s decision and uphold long-standing New Jersey law. WLF argues that the Appellate Division’s decision could impose no-fault, absolute liability on any company with even the slightest connection to asbestos-containing products.

## DECISIONS

**The U.S. Supreme Court puts off for another day deciding when, if at all, the plaintiffs' bar may bring claims alleging securities-law violations in connection with tender offers directed to the shareholders of public corporations.**

*Emulex Corp. v. Varjabedian*

On April 23, 2019, the U.S. Supreme Court dismissed the petition in this case as improvidently granted. The dismissal leaves in place a circuit split on whether a stockholder need plead scienter or only negligence to state a claim under Section 14(e) of the Securities Exchange Act of 1934. As WLF's argued, despite the over 30-year gap between the passage of Section 14(a) and Section 14(e), 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 *amicus curiae* brief.

**The Advisory Committee on Civil Rules abandons a proposed change to Rule 30(b)(6) that would have obliged a company, when called upon to produce a deposition witness to address the company's knowledge, to give opposing counsel a role in identifying the witness.**

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

At its April 2-3 meeting in San Antonio, Texas, the Advisory Committee on Civil Rules decided to abandon a proposed amendment to Rule 30(b)(6) of the Federal Rules of Civil Procedure that would have obliged a company responding to a corporate-deposition request to confer with opposing counsel on the *identity* of the witness who will speak for the company. The Advisory Committee's decision was a victory for WLF and the larger civil justice community. After receiving feedback from hundreds of stakeholders critical of its earlier proposed rule, the Advisory Committee adopted a new proposal that merely requires the parties to confer in good faith "about the matters for examination," but contains no mention of the identity of the designated witness. The Judicial Conference Committee on Rules of Practice and Procedure will formally consider the new proposed Rule in June. If approved, the Rule will take effect on December 1, 2020.