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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 June 2019 filings and results.

New Filings

- Federal regulation of alcohol labeling and advertising should respect First Amendment rights. (*In re Modernization of TTB Labeling and Advertising Regulations*)
- The Department of Labor's proposed rule on when a business can face "joint employer" liability imposes appropriate limits under the Fair Labor Standards Act. (*In re Joint Employer Status under FLSA*)
- Nonresident defendants are not subject to the personal jurisdiction of a state court unless their forum activities are causally connected to the plaintiff' claims. (*Hammons v. Ethicon, Inc.*)
- California courts need a reminder that the Federal Arbitration Act prohibits States from discriminating against arbitration agreements. (*Winston & Strawn LLP v. Ramos*)
- The FTC improperly assumes that agreements among competitors about internet-search advertising violate the antitrust laws. (*1-800 Contacts, Inc. v. FTC*)
- Federal contractors sued in state court should be able to remove the action to federal court whenever they can articulate a plausible federal defense. (*Latiolais v. Huntington Ingalls, Inc.*)
- Certification of nationwide class actions is improper when the applicable laws of the 50 States vary significantly from one another. (*Stromberg v. Qualcomm Inc.*)

Decisions

- The U.S. Supreme Court declines to overrule the *Auer* deference doctrine, under which federal courts must defer to a federal agency's reasonable interpretation of its own regulations. (*Kisor v. Wilkie*)
- The U.S. Supreme Court declines to review a lower court's refusal to order compensation under the Takings Clause for owners whose property at a Dallas airport was rendered worthless by federal legislation. (*Love Terminal Partners, L.P. v. US*)
- The U.S. Supreme Court holds that property owners may file Takings Clause claims against local governments in federal court without first seeking compensation in a state-court proceeding. (*Knick v. Township of Scott*)
- The U.S. Court of Appeals for the Ninth Circuit declines to reconsider its holding that the Federal Trade Commission Act authorizes the FTC to impose financial penalties in a federal-court suit—by calling its request "equitable monetary relief." (*FTC v. AMG Capital Management, LLC*)

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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- The U.S. Supreme Court agrees to consider whether private parties may impose their own environmental clean-up plans on sites already subject to remediation under the federal "Superfund" law. (*Atlantic Richfield v. Christian*)
- The U.S. Supreme Court holds that employment issues for those working on the Outer Continental Shelf are governed by federal law, not the law of the adjacent State. (*Newton v. Parker Drilling Management Services, Inc.*)
- The U.S. District Court for the District of Columbia rules that human rights groups may not file claims under the Alien Tort Statute when the suit is likely to cause conflict with a foreign country's government. (*Doe I. v. Exxon Mobil Corp.*)

NEW FILINGS

Federal regulation of alcohol labeling and advertising should respect First Amendment rights.
In re Modernization of TTB Labeling and Advertising Regulations

On June 26, 2019, WLF filed formal comments with the Alcohol and Tobacco Tax and Trade Bureau (TTB) applauding the agency's streamlining of its labeling rules while also urging it to clarify the limits of accepted and prohibited statements in alcohol labeling and advertising. The proposed language is overbroad and may chill the First Amendment rights of businesses making truthful, non-misleading on-label statements. Before enacting the rule, TTB should take steps to clearly explain the prohibitions on labels and advertisements to ensure they provide all interested parties with adequate guidance. This will avoid overly subjective review of labels and advertisements and limit the number of lawsuits challenging agency decisions, WLF asserts.

The Department of Labor's proposed rule on when a business can face "joint employer" liability imposes appropriate limits under the Fair Labor Standards Act.
In re Joint Employer Status under Fair Labor Standards Act

On June 25, 2019, WLF filed formal comments with the Department of Labor (DOL), supporting DOL's proposal to adopt regulations that would narrow the circumstances under which regulated entities can be deemed "joint employers" of another company's employees—and then be held fully liable for obligations owed to those employees under the Fair Labor Standards Act (FLSA). WLF argued that the FLSA authorizes "joint employer" findings only in very limited circumstances: when a company possesses "substantial control over the terms and conditions of work" by another company's employees. WLF argued that Company A is not a "joint employer" simply because Company B maintains a close relationship with Company A—for example, as an independent contractor or a franchisee. If important employment decisions are made by Company B (*e.g.*, hours worked, pay rates, and hiring/firing decisions), then Company A is not a joint employer and cannot be held responsible for any FLSA violations by Company B.

Nonresident defendants are not subject to the personal jurisdiction of a state court unless their forum activities are causally connected to the plaintiff' claims.
Hammons v. Ethicon, Inc.

On June 21, 2019, WLF filed an *amicus curiae* brief in the Pennsylvania Supreme Court, urging it to restrict the personal jurisdiction of state courts over nonresident defendants to cases in which the plaintiff's claims are directly related to Pennsylvania. WLF argued that lower courts in Pennsylvania are inappropriately asserting nationwide jurisdiction over claims against nonresident businesses where the claims bear no relation to Pennsylvania. The case involves an Indiana woman injured by a medical device implanted by her doctor in Indiana. She sued the New Jersey-based manufacturer, claiming that the device was defectively designed and that she received inadequate health warnings. WLF argued that Pennsylvania courts lack personal jurisdiction over the defendant. Although part of the defendant's manufacturing process occurs in Pennsylvania, WLF argued that state courts may not assert jurisdiction based on that activity because there is no claim that the medical device was defectively manufactured.

California courts need a reminder that the Federal Arbitration Act prohibits States from discriminating against arbitration agreements.

Winston & Strawn LLP v. Ramos

On June 17, 2019, WLF filed an *amicus curiae* brief urging the U.S. Supreme Court to review a California Court of Appeal ruling inconsistent with the Federal Arbitration Act. *Armendariz v. Foundation Health Psychcare Services, Inc*. creates special contract defenses that govern only arbitration clauses. The federal Supreme Court has repeatedly declared that an arbitration clause must be treated like any other contract, yet the California courts have continued to apply *Armendariz*. The Court of Appeal here used *Armendariz* to void an arbitration agreement between a law firm and one of its former partners. In its brief, WLF reviews the California courts' history of failing to faithfully apply the Supreme Court's FAA rulings. WLF also explores the variety of ways in which the California courts exhibit bias against arbitration clauses. WLF asks the Supreme Court both to discard *Armendariz* and to remind California's courts of the FAA's demand that neutral rules be applied neutrally.

The FTC improperly assumes that agreements among competitors about internet-search advertising violate the antitrust laws.

1-800 Contacts, Inc. v. Federal Trade Commission

On June 14, 2019, WLF, joined by five prominent antitrust scholars, filed an *amicus curiae* brief with the U.S. Court of Appeals for the Second Circuit, urging it to vacate an FTC order misapplying the "quick look" antitrust standard. 1-800 Contacts accused rivals of violating its trademarks by buying internet-search advertisements keyed to 1-800's trademark terms. As part of 1-800's settlements with them, the firms agreed to cease buying ads keyed to such terms. The FTC condemned the settlements as an antitrust violation. Instead of conducting an extensive analysis of the evidence, however, the FTC applied the "quick look" standard, under which the conduct at issue is *presumed* anticompetitive. The antitrust scholars and WLF contend that this was error. The quick-look standard governs only when the conduct at issue is obviously anticompetitive. Internet-search advertising is a relatively new phenomenon; its impact on competition is not yet "obvious." Further, there are solid procompetitive factors supporting the settlements. Key among these—and the focus of the scholars' and WLF's brief—is the settlements' discouragement of advertisement free riding.

Federal contractors sued in state court should be able to remove the action to federal court whenever they can articulate a plausible federal defense.

Latiolais v. Huntington Ingalls, Inc.

On June 14, 2019, WLF filed an *amicus curiae* brief in the U.S. Court of Appeals for the Fifth Circuit, urging the Court (sitting *en banc*) to uphold the right of federal contractors to remove cases to federal court whenever, as here, the contractors have articulated a colorable federal defense. WLF argued that prior Fifth Circuit decisions have adopted an inappropriately narrow construction of the federal officer removal statute. In the 1960s, the U.S. Navy hired the defendant to refurbish one of its ships and directed it to use asbestos during the refurbishing process. The plaintiff (a sailor aboard the ship) later developed an asbestos-related illness and is suing the defendant for his injuries. The defendant asserts the federal-contractor defense, which grants immunity to federal contractors for work performed in compliance with detailed U.S. specifications. WLF argued that Congress recently broadened the federal officer removal statute to authorize contractors to remove such suits.

Certification of nationwide class actions is improper when the applicable laws of the 50 States vary significantly from one another.

Stromberg v. Qualcomm Inc.

On June 10, 2019, WLF filed an *amicus curiae* brief in the U.S. Court of Appeals for the Ninth Circuit, urging it to reverse a district court's nationwide class certification order in a suit involving antitrust claims against Qualcomm, a computer chip manufacturer. The certified class consists of 250 million cellphone purchasers—in other words, a significant majority of all Americans. WLF argued that the class action's massive size renders it unmanageable, and that the California district court improperly applied California antitrust law to the claims of cellphone purchasers in all 50 States. WLF noted that antitrust law in 22 States differs significantly from California law; those States limit antitrust claims to individuals who purchased products directly from the firm alleged to have engaged in anti-competitive conduct. Because cellphone purchasers do not buy directly from Qualcomm (which does not sell cellphones), purchases living in those 22 States should be excluded from the class, WLF argued.

DECISIONS

The U.S. Supreme Court declines to overrule the *Auer* deference doctrine, under which federal courts must defer to a federal agency's reasonable interpretation of its own regulations.

Kisor v. Wilkie

On June 26, 2019, the U.S. Supreme Court issued an opinion declining to overturn *Auer v. Robbins*, a precedent that damages the separation of powers by instructing the judiciary to adopt, as binding law, the executive's interpretations of its own regulations. The decision was a setback for WLF, which filed an *amicus curiae* brief in the case calling for the end of *Auer* deference. While reinforcing sound limits on the exercise of *Auer* deference (nearly all of which were grounded in earlier precedents), the majority insisted that *Auer* "retains an important role in construing agency regulations." WLF's brief had offered concrete examples of agencies' efforts aggressively to expand, or abruptly to alter, the import of their regulations—without ever employing the prescribed process for formally amending regulations.

The U.S. Supreme Court declines to review a lower court's refusal to order compensation under the Takings Clause for owners whose property at a Dallas airport was rendered worthless by federal legislation.

Love Terminal Partners, L.P. v. US

On June 24, 2019, the U.S. Supreme Court declined 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. The decision was a setback for WLF, which filed an *amicus curiae* brief urging the Court to grant review. WLF argued that the ruling bars compensation under the 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. To aid a rival airport, Congress passed a 2006 law that prohibited the Plaintiffs from using the terminal for passenger services, thereby depriving the property of all value. WLF asserted that the appeals court misapplied case law 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 U.S. Supreme Court holds that property owners may file Takings Clause claims against local governments in federal court without first seeking compensation in a state-court proceeding.

Knick v. Township of Scott

On June 21, 2019, the U.S. Supreme Court overruled a 1985 precedent that prevented individuals claiming a violation of their Fifth Amendment property rights from bringing their claims in federal court. The decision was a victory for WLF, which filed an *amicus curiae* brief urging that the 1985 precedent conflicted with historical understandings of the Fifth Amendment's Takings Clause. The Court agreed with WLF that the federal courts have traditionally been open to anyone asserting a violation of their constitutional rights and that there is no reason to deny that same privilege to property-rights claimants. The Court noted that the 1985 decision was based on an erroneous assumption: that claimants would be permitted to file in federal court after seeking (and being denied) compensation in state courts. Later decisions exposed the error: normal issue-preclusion rules barrred re-litigation after a state court rejected compensation claims. WLF's brief was joined by the Allied Educational Foundation.

The U.S. Court of Appeals for the Ninth Circuit declines to reconsider its holding that the Federal Trade Commission Act authorizes the FTC to impose financial penalties in a federal-court suit—by calling its request "equitable monetary relief."

FTC v. AMG Capital Management, LLC

On June 20, 2019, the Ninth Circuit denied a petition—supported by a WLF *amicus curiae* brief—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 section 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 brief, WLF argued that *Porter* is inconsistent with a string of later—and binding—cases in which the Supreme Court has recognized Congress's sole authority to decide how, and by whom, statutes are to be enforced. WLF is monitoring whether a petition for certiorari will be filed.

The U.S. Supreme Court agrees to consider whether private parties may impose their own environmental clean-up plans on sites already subject to remediation under the federal "Superfund" law.

Atlantic Richfield v. Christian

On June 10, 2019, the U.S. Supreme Court granted review of a Montana Supreme Court ruling that allows private landowners to challenge the EPA's cleanup plan at one of the nation's largest Superfund sites. WLF filed an *amicus curiae* brief urging review. WLF argued that the Montana Supreme Court should have treated the case as a classic instance of conflict preemption. Instead, in allowing the landowners' case to proceed, the state court gutted at least five discrete parts of CERCLA, including a provision that bars legal challenges to an EPA cleanup plan and a provision that bars cleanups conducted without EPA approval. In October 2018, the U.S. Supreme Court called for the views of the United States as to whether the Court should grant review. The United States recommended that review be denied. In disagreeing with the United States and granting review, the Court has confirmed the importance of reestablishing a uniform interpretation of CERCLA.

The U.S. Supreme Court holds that employment issues for those working on the Outer Continental Shelf are governed by federal law, not the law of the adjacent State.

Newton v. Parker Drilling Management Services, Inc.

On June 10, 2019, the U.S. Supreme Court overturned a Ninth Circuit wage-and-hour ruling that had exposed oil and gas companies to hundreds of millions of dollars in back-pay liability. The decision was a victory for WLF, which filed an *amicus curiae* brief urging reversal of the lower-court opinion. At issue was whether federal law or California law should govern wage payments to employees working on platforms located on the Outer Continental Shelf off the coast of California. Rejecting a half-century of prior case law, the Ninth Circuit chose 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. The Supreme Court unanimously reversed. It agreed with WLF that a 1953 federal statute dictates application of federal law to activities on the Outer Continental Shelf, and provides for incorporation of the law of the adjacent State only if doing so is necessary to fill a gap in federal law.

The U.S. District Court for the District of Columbia rules that human rights groups may not file claims under the Alien Tort Statute when the suit is likely to cause conflict with the government of a foreign country.

Doe I v. Exxon Mobil Corp.

On June 3, 2019, the U.S. District Court for the District of Columbia dismissed decades-old claims filed by human rights activists against a multinational corporation under the Alien Tort Statute (ATS). The decision was a victory for WLF, which filed an *amicus curiae* brief urging dismissal. The court agreed with WLF that Congress adopted the ATS in 1789 as a means of reducing the risks of diplomatic strife, and that ATS suits are impermissible when, as here, the suits are likely to increase strife between the United States and a foreign government. Exxon is accused of "aiding and abetting" human rights violations by the Indonesian government. Indonesia (which has not been sued) has repeatedly objected to the suit because it requires an American court to pass judgment on a foreign government's treatment of its own citizens. The court held that it is up to Congress, not the courts, to decide whether to permit ATS suits that are so likely to cause diplomatic strife—and Congress has not done so.

