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October 3, 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 September 2019 filings and results.

New Filings

- The compensation claims of injured railroad employees are governed exclusively by the Federal Employers Liability Act; States may not create alternative compensation schemes. (***Dannels v. BNSF Railway Co.***)
- Certifying a plaintiffs' class that may obtain billions of dollars in recovery without a showing of actual harm raises serious due process concerns. (***In re Facebook Biometric Information Privacy Litig.***)
- Without meaningful reform, multi-district litigation (MDL) in the federal courts will continue to erode public confidence in the value and fairness of MDL proceedings. (***In re Multi-District Litigation Reform***)

Decisions

- The Second Circuit refuses to rehear a First Amendment challenge to New York City ordinance that bans advertisements in for-hire vehicles. (***Vugo, Inc. v. City of New York***)
- The Utah Supreme Court rules that implantable medical devices (unlike prescription drugs) are not always deemed "unavoidably unsafe" products and thus are not automatically exempt from strict products-liability suits. (***Burningham v. Wright Medical Group***)

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

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NEW FILINGS

The compensation claims of injured railroad employees are governed exclusively by the Federal Employers Liability Act; States may not create alternative compensation schemes.

Dannels v. BNSF Railway Co.

On September 25, 2019, WLF filed an *amicus curiae* brief in the Montana Supreme Court, urging it to eliminate court rules that unfairly hamstringing railroads in their efforts to defend personal-injury suits filed by employees. WLF argued that the Federal Employers' Liability Act (FELA), 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, 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.

Certifying a plaintiffs' class that may obtain billions of dollars in recovery without a showing of actual harm raises serious due process concerns.

In re Facebook Biometric Information Privacy Litig.

On September 16, 2019, WLF filed an *amicus* brief with the Ninth Circuit, urging it to grant Facebook's petition for rehearing *en banc*. WLF's brief is highly critical of the appeals court's August 8, 2019 decision, which would permit large, no-harm class actions whenever plaintiffs can label the alleged statutory violation an "invasion of privacy." As WLF's brief explains, the panel's certification ruling throws open the door to class claims threatening draconian liability, creating irresistible pressure to settle even dubious claims. Such hydraulic settlement pressure, leveraging many billions of dollars in potential recovery, raises serious due-process concerns. What's more, a class action with so many inherent defects is not "superior" under Rule 23(b)(3).

Without meaningful reform, multi-district litigation (MDL) in the federal courts will continue to erode public confidence in the value and fairness of MDL proceedings.

In re Multi-District Litigation Reform

On September 23, 2019, WLF submitted comments to the Advisory Committee on Civil Rules in response to the Committee's review of the procedures used in multi-district litigation proceedings (MDLs). Created by Congress in 1968 to promote efficiency and conserve finite judicial resources, MDLs have not always lived up to their initial promise. To address MDLs' many deficiencies, WLF commends three concrete proposals to improve the efficiency and fairness of MDLs: (1) mandatory early vetting of claims, (2) the right of all parties to interlocutory appellate review, and (3) required disclosure of third-party litigation funding.

DECISIONS

The Second Circuit refuses to rehear a First Amendment challenge to New York City ordinance that bans advertisements in for-hire vehicles.

Vugo, Inc. v. City of New York

On September 23, 2019, the U.S. Court of Appeals for the Second Circuit denied Vugo, Inc.'s petition for rehearing or rehearing en banc. The decision was a setback for WLF, which filed a brief highly critical of a New York City ordinance banning all advertising in private ride-share vehicles (but not in city taxi cabs). In its brief urging rehearing or rehearing en banc, WLF addressed the panel's erroneous reading of the Supreme Court's landmark decision in *Sorrell v. IMS Health*, which mandates scrutiny stricter than intermediate scrutiny for all content- and speaker-based restrictions on truthful commercial speech. WLF will monitor the case for a likely petition for certiorari to the U.S. Supreme Court.

The Utah Supreme Court rules that implantable medical devices (unlike prescription drugs) are not always deemed “unavoidably unsafe” products and thus are not automatically exempt from strict products-liability suits.

Burningham v. Wright Medical Group

On September 4, 2019, the Utah Supreme Court ruled that the unavoidably unsafe exception to strict products liability in design defect claims recognized in Comment k to Section 402A of the Restatement (Second) of Torts applies to implanted medical devices on a case-by-case basis, rather than as a categorical bar to strict liability. The court held that the 510(k) clearance process is not sufficiently rigorous or focused on safety to justify a categorical bar to strict liability for all 510(k) cleared devices. This ruling was a setback for WLF, which argued that all implantable medical devices are “unavoidably unsafe” and thus not subject to strict products-liability suits alleging that they were defectively designed. Utah state law, which recognizes Section 402A of the Restatement (Second) of Torts, applies that legal designation from Restatement Comment k to prescription drugs. WLF's brief argued that, like drugs, implantable medical devices can impact different patients in different ways, and yet, the potential life-saving and life-altering benefits outweigh the attendant risks.