



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

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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 November 2019 filings and results.

New Filings

- Although some transportation workers are exempt from the Federal Arbitration Act's mandate that arbitration agreements must be enforced, that exemption should be narrowly construed. (***Waithaka v. Amazon***)
- Pension plan beneficiaries who are uninjured by plan administrators' alleged misconduct should not be allowed to sue under ERISA for that misconduct. (***Thole v. U.S. Bank***)
- A federal regulation requiring drug manufacturers to include misleading pricing data in their television ads exceeds the agency's statutory authority and violates manufacturers' First Amendment rights. (***Merck & Co. v. U.S. Dep't of Health and Human Services***)
- Congress has not authorized the FTC, when suing companies for allegedly deceptive trade practices, to seek "disgorgement" of allegedly ill-gotten gains. (***AMG Capital Management, LLC v. Federal Trade Commission***)
- The City of Berkeley violates the First Amendment rights of cell-phone retailers when it requires them to post misleading signs about the supposed health dangers of ordinary cell-phone use. (***CTIA—The Wireless Ass'n v. City of Berkeley***)

Decisions

- U.S. Court of Appeals for the Second Circuit substantially reduces mammoth penalty on UPS for shipping cigarettes for which the owners had not paid all taxes. (***New York v. UPS***)
- U.S. Supreme Court declines to consider whether property owners are entitled to compensation under the Takings Clause when a government arbitrarily delays their building projects. (***Bottini v. City of San Diego***)

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, Vice President of Litigation
candrews@wlf.org

Corbin Barthold, Senior Litigation Counsel
cbarthold@wlf.org

Marc Robertson, Staff Attorney
mrobertson@wlf.org

NEW FILINGS

Although some transportation workers are exempt from the Federal Arbitration Act’s mandate that arbitration agreements must be enforced, that exemption should be narrowly construed.

[*Waithaka v. Amazon*](#)

On November 20, WLF filed an *amicus curiae* brief urging the First Circuit to read section 1 of the Federal Arbitration Act, known as the “transportation worker exemption,” in line with its text and context. The FAA establishes a federal policy favoring arbitration. It requires, in section 2, that most people comply with their arbitration agreements. It contains a discrete exception, in section 1, for “seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.” The district court ruled that a driver who delivered packages locally for Amazon fits within this exemption. In its brief, WLF explains that section 1 is not the product of a legislative intent to excuse a few transportation workers—and, for some peculiar reason, them alone—from honoring arbitration agreements. Section 1 exists, rather, because Congress expected shipping-industry workers to engage in arbitration governed by *other* federal laws. And because section 1 fulfills this one focused purpose, there is no principled way to stretch its application. Because the plaintiff in this case made only local deliveries intrastate, WLF argues, he falls outside the section 1 exemption. The district court’s contrary ruling should therefore be reversed.

Pension plan beneficiaries who are uninjured by plan administrators’ alleged misconduct should not be allowed to sue under ERISA for that misconduct.

[*Thole v. U.S. Bank*](#)

On November 19, WLF filed an *amicus curiae* brief urging the U.S. Supreme Court to affirm dismissal of claims filed against administrators of a pension plan by two participants in the plan. The plaintiffs argued that the administrators acted imprudently by investing all of the plan’s assets in common stock, with the result that the assets’ value decreased 27% in 2008 following the stock-market crash that year. WLF argued that the plaintiffs lack standing to sue under the Employee Retirement Income Security Act (ERISA) because they were uninjured by the alleged misconduct—their receipt of future pension benefits was never at risk. WLF noted that the plaintiffs and other participants in “defined-benefit plans” have no property interests in the plans’ assets. Their only interest is in receiving promised pension benefits. In the absence of evidence that the alleged misconduct created any risk of nonpayment, the plaintiffs failed to show the injury-in-fact necessary for federal-court standing.

A federal regulation requiring drug manufacturers to include misleading pricing data in their television ads exceeds the agency’s statutory authority and violates manufacturers’ First Amendment rights.

[*Merck & Co. v. U.S. Dep’t of Health and Human Services*](#)

On November 19, WLF urged the U.S. Court of Appeals for the D.C. Circuit to affirm a decision blocking an administrative rule that would allow the Secretary of Health and Human Services (HHS) to require drug makers to convey the wholesale acquisition cost, or “list price,” of any prescription drug advertised in direct-to-consumer (DTC) television ads. As WLF’s *amicus curiae* brief makes clear, no matter how well-meaning its intentions, HHS may exercise only the limited regulatory authority that Congress granted to it by statute. Yet *no* statute authorizes the agency to require disclosure of list prices in DTC television ads. WLF’s brief also shows that the price-list-disclosure mandate would violate drug makers’ First Amendment rights. Under Supreme Court precedent, HHS’s controversial DTC Rule violates the First Amendment because it misleads consumers about their likely out-of-pocket costs for prescription drugs. WLF was joined on its brief by the Allied Educational Foundation.

Congress has not authorized the FTC, when suing companies for allegedly deceptive trade practices, to seek “disgorgement” of allegedly ill-gotten gains.

AMG Capital Management, LLC v. Federal Trade Commission

On November 18, WLF filed an *amicus curiae* brief urging the U.S. Supreme Court to correct a widespread misreading of an FTC Act remedy provision. Section 13(b) of the FTC Act empowers the FTC to sue, in federal court, to obtain an injunction against deceptive trade practices. At least seven courts of appeals have said, however, that the word “injunction” in section 13(b) unlocks the entire vault of equitable remedies. In the mid-twentieth century the Supreme Court briefly took to “implying” new rights and remedies into laws. The courts of appeals relied on that jurisprudence to justify stretching section 13(b). But as WLF explains in its brief, the Supreme 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 asks the Supreme Court to instruct the lower courts to align their interpretation of section 13(b) with the modern and binding rules of statutory interpretation.

The City of Berkeley violates the First Amendment rights of cell-phone retailers when it requires them to post misleading signs about the supposed health dangers of ordinary cell-phone use.

CTIA—The Wireless Ass’n v. City of Berkeley

On November 1, WLF filed an *amicus curiae* brief urging the U.S. Supreme Court to review—and ultimately to strike down—a Berkeley, California ordinance that requires all cell-phone retailers to warn their customers about the supposed dangers of ordinary cell-phone use. The petition marks CTIA’s second request for the high court to review the Berkeley ordinance. The Court granted an earlier petition in 2018, vacated the Ninth Circuit’s opinion upholding the ordinance, and remanded the case for reconsideration in light of a 2018 Court decision. Even so, the Ninth Circuit once again sustained the ordinance, holding that the city’s mandated warning qualifies as a purely factual and noncontroversial disclosure under *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio* (1985). In its brief, WLF explains that because the mandated warning is divorced from any need to remedy pre-existing commercial speech, it is not a traditional commercial-speech disclosure under *Zauderer*, but a freestanding speech compulsion subject to strict scrutiny. And even if *Zauderer* applies, WLF’s brief argues, Berkeley’s warning misleads readers into believing that ordinary cell-phone use may be dangerous; not only is that message intentionally misleading, it is highly controversial.

DECISIONS

U.S. Court of Appeals for the Second Circuit substantially reduces mammoth penalty on UPS for shipping cigarettes for which the owners had not paid all taxes.

New York v. UPS

On November 7, the Second Circuit substantially reduced a trial court’s huge damages award against common carrier UPS. The decision was a partial victory for WLF, which filed an *amicus curiae* brief arguing that the award (including a \$238 million civil penalty) was excessive under both federal common law and the U.S. Constitution. New York filed suit in 2015, claiming that UPS shipped untaxed cigarettes from Indian reservations to state consumers in violation of state and federal law—causing the government to lose \$19 million in tax revenues. The trial court held UPS liable based on UPS’s negligent failure to uncover the illegal shipments, even though New York presented no evidence that UPS knew that unmarked packages contained cigarettes. The Second Circuit agreed with WLF that the trial court’s penalty was excessive. It reduced the penalty to \$78.8 million, ruling that civil penalties generally should not exceed four times lost tax revenues.

U.S. Supreme Court declines to consider whether property owners are entitled to compensation under the Takings Clause when a government arbitrarily delays their building projects.

Bottini v. City of San Diego

On November 4, the U.S. Supreme Court declined to review a California Court of Appeal decision that gives short shrift to the federal Takings Clause. A California couple have been engaged in a years-long struggle to obtain a building permit for their land. When their case went to court, both the trial court and the court of appeal ruled that the city authorities had arbitrarily held up their building project. The courts further ruled, however, that the landowners are not owed just compensation for a taking. Applying the multi-factor “Penn Central” regulatory takings test, the courts concluded that the landowners could not recover from the government unless they knew, when they bought the land, whether they would keep a house already standing on it, or instead replace it with a new one. In its *amicus curiae* brief, WLF explained that the lower courts are applying the Penn Central test in many inconsistent ways. The lower courts need guidance in particular, WLF explained, about when a government delay in granting a land-use permit turns into a constitutional taking.