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

January 6, 2020

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 December 2019 filings and results.

New Filings

- To satisfy Article III's case-or-controversy requirement, a plaintiff must prove a concrete injury in fact, not merely an injury in law. (***Facebook, Inc. v. Patel***)
- The Consumer Financial Protection Act, which creates a bureau headed by a director who does not answer to the President, violates the Constitution's separation of powers. (***Seila Law v. CFPB***)
- 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. (***Wallace v. Grubhub***)
- Congress did not authorize the SEC to seek disgorgement—a penalty, not an equitable remedy—in securities enforcement actions in federal court. (***Liu v. SEC***)
- The California Supreme Court should review a lower-court decision that sows confusion about when a jurisdictional appeal deadline applies. (***State Farm v. Lara***)
- HHS's Office of Inspector General should expand the agency's safe harbor for drug and device makers trying to comply with the federal Anti-Kickback Statute. (***In re Proposed Revisions to Anti-Kickback Statute Regulations***)

Decisions

- The U.S. Supreme Court declines to review a Berkeley, California ordinance that requires all cell-phone retailers to warn their customers about the supposed dangers of ordinary cell-phone use. (***CTIA—The Wireless Ass'n v. City of Berkeley***)
- The U.S. Court of Appeals for the District of Columbia Circuit holds that the FDA's Deeming Rule for modified-risk tobacco products does not violate the First Amendment. (***Nicopure Labs, LLC v. FDA***)
- The U.S. Court of Appeals for the Ninth Circuit affirms the denial of class certification in an employment discrimination action in which putative class plaintiffs could not show common issues of fact or law. (***Moussouris v. Microsoft Corp.***)

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 Vice President of Litigation, Cory Andrews.

WLF Litigation Division

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

To satisfy Article III's case-or-controversy requirement, a plaintiff must prove a concrete injury in fact, not merely an injury in law.
Facebook, Inc. v. Patel

On December 13, WLF filed an *amicus curiae* brief in the U.S. Supreme Court, urging it to grant Facebook, Inc's petition for certiorari. WLF's brief is highly critical of a Ninth Circuit decision that threatens to permit large, no-harm class actions whenever plaintiffs can label the alleged statutory violation an "invasion of privacy." The case arises under the Illinois Biometric Information Privacy Act (BIPA), a 2008 law that provides a private right of action allowing a plaintiff to recover up to $5,000 for a single violation. Seeking to represent a class of six million Illinois Facebook users, the plaintiffs sued Facebook claiming that its Tag Suggestions feature—which uses facial-recognition software to suggest that Facebook users tag their friends in photos they upload to Facebook—violates BIPA. As WLF's brief explains, the panel's certification ruling all but eliminates Article III's standing requirement in "privacy" cases and 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—is corrosive to our civil justice system.

The Consumer Financial Protection Act, which creates a bureau headed by a director who does not answer to the President, violates the Constitution's separation of powers.
Seila Law v. CFPB

On December 16, WLF urged the U.S. Supreme Court to restore the president's power to remove principal officers at will. Article II's clauses vesting "the executive Power" in a single "President," who must "take Care that the Laws be faithfully executed," ensure that the president has a broad power to remove, at will, the high officers that serve him in the executive branch. In 1935, the Supreme Court arbitrarily declared that Congress may give certain principal officers for-cause removal protection. In the decades since, Congress has steadily pushed the boundary of this privilege, culminating in its creation of the Consumer Financial Protection Bureau, whose single director both wields extensive authority and enjoys for-cause protection. In its *amicus curiae* brief, WLF reviews the constitutional history, text, and structure supporting a broad removal power. This history, text, and structure clearly show, WLF argues, that the CFPB as designed is unconstitutional.

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.
Wallace v. Grubhub

On December 20, WLF filed an *amicus curiae* brief urging the Seventh 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." Two district courts ruled that drivers who deliver meals locally for Grubhub fall outside this exemption. 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 plaintiffs in these cases made only local deliveries intrastate, WLF argues, they fall outside the section 1 exemption. The district courts' rulings should therefore be affirmed.

Congress did not authorize the SEC to seek disgorgement—a penalty, not an equitable remedy—in securities enforcement actions in federal court.
Liu v. SEC

On December 23, WLF filed an *amicus curiae* brief urging the U.S. Supreme Court to rule that while federal law grants the SEC authority to seek substantial penalties on those found to have violated the securities laws, the SEC may not seek additional, non-statutory penalties in the form of a "disgorgement" award. Asking the Court to overturn a $27 million disgorgement judgment, WLF argued that separation-of-powers principles require that federal agencies be limited to the enforcement powers expressly granted to them by Congress. The district court entered broad injunctive relief and imposed multi-million-dollar statutory penalties on the defendants. It supplemented the penalties with an award not expressly authorized under the securities laws: a $27 million judgment designed to "disgorge" all of the defendants' ill-gotten gains. WLF argued that Congress has not authorized the SEC to engage in "double dipping" by supplementing the authorized penalties with a non-statutory disgorgement award.

The California Supreme Court should review a lower-court decision that sows confusion about when a jurisdictional appeal deadline applies.
State Farm v. Lara

On December 23, WLF joined an *amicus curiae* letter urging the California Supreme Court to review a crucial matter of appellate jurisdiction. The letter was submitted by the prominent California appellate law firm Horvitz & Levy LLP. The petitioner filed both a civil complaint and a writ petition in the trial court. The appeal deadline in such an action turns on whether the court's order addressing the writ petition also resolves all issues and leaves nothing else to be decided. Here, the trial court's order resolving the writ petition did not say whether the court would issue a further order resolving the as yet unaddressed complaint. Four months later, the court issued a judgment that explicitly resolved all issues "in full." The petitioner met the deadline for filing an appeal from that judgment. The Court of Appeal dismissed, however, ruling that the petitioner should instead have met the deadline for filing an appeal from the earlier order. Horvitz & Levy and WLF urge the California Supreme Court to grant the petition and make clear that, to be appealable, an order must *expressly* resolve all issues and leave nothing else to be decided.

HHS's Office of Inspector General should expand the agency's safe harbor for drug and device makers trying to comply with the federal Anti-Kickback Statute.
In re Proposed Revisions to Anti-Kickback Statute Regulations

On December 30, WLF urged a federal healthcare regulator to reverse its decision to exclude pharmaceutical and medical-device manufacturers from the protection of proposed Anti-Kickback Statute safe harbors. In formal comments filed with the Department of Health and Human Service's Office of Inspector General's (OIG), WLF applauds the agency's removal of regulatory barriers to care coordination and value-based care, but also expresses serious reservations with the proposed rule's discrimination against certain key players in federal healthcare programs.

DECISIONS

The U.S. Supreme Court declines to review a Berkeley, California ordinance that requires all cell-phone retailers to warn their customers about the supposed dangers of ordinary cell-phone use.
CTIA—The Wireless Ass'n v. City of Berkeley

On December 9, the U.S. Supreme Court issued an order declining to review a Berkeley, California ordinance that requires all cell-phone retailers to warn their customers about the supposed dangers of ordinary cell-phone use. The decision was set back for WLF, which filed an *amicus curiae* brief in the case urging review. The petition marked 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 *National Institute of Family and Life Advocates v. Becerra* (2018). Even so, the Ninth Circuit once again sustained the ordinance against a First Amendment challenge, 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).

The U.S. Court of Appeals for the District of Columbia Circuit holds that the FDA's Deeming Rule for modified-risk tobacco products does not violate the First Amendment.
Nicopure Labs, LLC v. FDA

On December 10, the D.C. Circuit rejected a challenge to an FDA regulation that restricts the truthful speech of e-cigarette manufacturers and retailers. The decision was a setback for WLF, which filed an *amicus curiae* brief filed in the case. When a coalition of vapor industry manufacturers and retailers brought a First Amendment challenge against FDA, the federal trial court granted judgment in FDA's favor. Although the court explicitly found that the Deeming Rule constitutes a "clear restriction on truthful and non-misleading speech," it nonetheless upheld the Rule. The latest ruling from the court of appeals affirms that decision. In its brief, WLF contended that FDA's Deeming Rule, which requires FDA's preapproval before manufacturers and retailers may inform the public of vapor products' uncontested health advantages over traditional tobacco products, constitutes a prior restraint on legally protected speech in violation of the First Amendment.

The U.S. Court of Appeals for the Ninth Circuit affirms the denial of class certification in an employment discrimination action in which putative class plaintiffs could not show common issues of fact or law.
Moussouris v. Microsoft Corp.

On December 24, the Ninth Circuit affirmed the denial of a motion to certify a class of current and former employees of Microsoft alleging gender discrimination. WLF filed an *amicus curiae* brief urging this affirmance. 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." In its brief, WLF established that this case is legally indistinguishable from *Wal-Mart*. Citing that decision, the Ninth Circuit concluded that the plaintiffs had failed to "identify a common mode of exercising discretion," at Microsoft, "that pervades the entire company."

