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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 January 2020 filings and results.

New Filings

- WLF urges the Massachusetts Supreme Judicial Court to ensure that civil litigation in the Commonwealth is procedurally fair to all parties. (***In re Mass. R. Civ. P. 51***)
- WLF urges the Fourth Circuit to vacate a trial-court order that amounted to a de facto administrative rulemaking. (***In re Cigar Ass'n of America***)

Decisions

- The Department of Labor issues its final Joint Employer Rule, which sets out a narrow, four-part test for whether a business may be deemed a "joint employer" of another company's employees. (***In re Joint Employer Status under FLSA***)
- The U.S. Supreme Court denies certiorari to the Ninth Circuit, which held that a bare procedural harm under a state privacy statute satisfies Article III's injury-in-fact requirement. (***Facebook, Inc. v. Patel***)
- The Ninth Circuit denies rehearing in a decision that misconstrues the Federal Arbitration Act's saving clause. (***Tillage v. Comcast***)
- The Eighth Circuit holds that Missouri's New Deal-era restrictions on the truthful commercial speech of alcohol makers, distributors, and retailers violate the First Amendment. (***Mo. Broadcasters Assoc. v. Taylor***)
- The California Supreme Court declines to review whether, to constitute an appealable, final order, a trial court order must expressly resolve all issues and leave nothing else to be decided. (***State Farm v. Lara***)

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.

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NEW FILINGS

WLF urges the Massachusetts Supreme Judicial Court to ensure that civil litigation in the Commonwealth is procedurally fair to all parties.
In re Mass. R. Civ. P. 51

On January 23, WLF joined a coalition of leading business, civil justice, and public-policy groups in urging the Massachusetts Supreme Judicial Court to adopt Rule 51(a)(2) of the Massachusetts Rules of Civil Procedure. By securing the right of defense counsel to respond in closing argument to a request by the plaintiffs' attorney for a specific amount of damages, the proposed rule would help to ensure that civil litigation in the Commonwealth is procedurally fair to all parties.

WLF urges the Fourth Circuit to vacate a trial-court order that amounted to a de facto administrative rulemaking.
In re Cigar Ass'n of America

On January 28, WLF filed an *amicus curiae* brief urging the Fourth Circuit to vacate a trial-court order that amounted to a *de facto* administrative rulemaking. The FDA used a guidance paper to set a deadline by which e-cigarette companies must apply for permission to continue selling their products. A group of doctors and public-health groups attacked the guidance in court, arguing among other things that the new deadline should have undergone notice and comment. The trial court agreed with this argument and vacated the guidance. But rather than simply remand the matter to the agency, as the law usually requires, the trial court proceeded to set a new deadline—a very tight one—itself. WLF's brief argues that the trial court—which reviews agency action only as an *appellate* tribunal—had no authority to set a new deadline.

DECISIONS

The Department of Labor issues its final Joint Employer Rule, which sets out a narrow, four-part test for whether a business may be deemed a "joint employer" of another company's employees.
In re Joint Employer Status under FLSA

On January 13, the Department of Labor (DOL) issued its final Joint Employer Rule, which sets out a four-part test to determine whether businesses may be deemed "joint employers" of another company's employees. Joint employers may be held fully liable for obligations owed to their employees under the Fair Labor Standards Act (FLSA). The final rule was a victory for WLF, which last June filed formal comments urging DOL to adopt a narrow definition of "joint employer." 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. Following the new rule, a company is not a joint employer simply because it exercises some oversight over another company's employees. Rather, the new test looks to whether the business makes important employment decisions (e.g., hours worked, pay rates, and hiring/firing decisions). DOL's rulemaking provides vital clarity to businesses by rolling back heavy-handed regulations from previous administrations. The final rule is set to take effect on March 16, 2020.

The U.S. Supreme Court denies certiorari to the Ninth Circuit, which held that a bare procedural harm under a state privacy statute satisfies Article III's injury-in-fact requirement.
Facebook, Inc. v. Patel

On January 21, the U.S. Supreme Court issued an order denying Facebook, Inc's petition for certiorari. The decision was a disappointment for WLF, which filed a brief criticizing a Ninth Circuit decision permitting large, no-harm class actions whenever plaintiffs can label the alleged statutory violation an "invasion of privacy." The case arose under the Illinois Biometric Privacy Information 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 explained, 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 Ninth Circuit denies rehearing in a decision that misconstrues the Federal Arbitration Act's saving clause.
Tillage v. Comcast

On Friday, January 17, the Ninth Circuit denied rehearing and rehearing *en banc* in *McCardle v. AT&T* and *Tillage v. Comcast*. Under the Federal Arbitration Act's saving clause, an arbitration agreement that is otherwise enforceable under federal law remains subject to any generally applicable state-law contract defense. The panel in these two appeals concluded that a state policy known as the "*McGill* Rule" is such a defense. As the panel acknowledged, however, the *McGill* rule arises from California Civil Code § 3513, a state "maxim of jurisprudence." WLF filed a brief contending that California's maxims of jurisprudence are not contract defenses that properly trigger the FAA's saving clause. In addition, WLF argued, the *McGill* rule is preempted because its only purpose is to serve as a tool for striking down arbitration clauses.

The Eighth Circuit holds that Missouri's New Deal-era restrictions on the truthful commercial speech of alcohol makers, distributors, and retailers violate the First Amendment.
Mo. Broadcasters Assoc. v. Taylor

On January 8, the Eighth Circuit affirmed a district court ruling that—with benefit of a bench trial—invalidated on First Amendment grounds portions of a Missouri law that restricted truthful, non-misleading commercial speech. The decision was a victory for WLF, which filed an *amicus curiae* brief in the case urging affirmance. The appeals court agreed with WLF that Missouri could not satisfy even the intermediate scrutiny prescribed by *Central Hudson*. Under that test, Missouri must present solid evidence that the law's speech restrictions directly advance its policy aims "to a material degree" and is narrowly tailored and no more restrictive than necessary. The trial record in this case contained no such evidence. WLF's brief was joined by the Show-Me Institute, a Missouri free-market nonprofit.

The California Supreme Court declines to review whether, to constitute an appealable, final order, a trial court order must expressly resolve all issues and leave nothing else to be decided.
State Farm v. Lara

On January 29, the California Supreme Court declined to review a crucial matter of appellate jurisdiction. The petitioner had 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. Washington Legal Foundation joined the prominent California appellate law firm Horvitz & Levy LLP in submitting an *amicus curiae* letter urging the California Supreme Court to grant review. The letter urged the 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.

