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

March 3, 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 February 2020 filings and results.

New Filings

- WLF urges the Ninth Circuit to enjoin a controversial new California law that imposes staggering liability on prescription-drug manufacturers for merely settling pending patent litigation. (***Ass'n for Accessible Medicines v. Becerra***)
- WLF asks the U.S. Supreme Court to review yet another California Supreme Court ruling that flouts the Federal Arbitration Act. (***OTO, LLC v. Kho***)

Decisions

- The Third Circuit reverses a trial court ruling and sustains, against a First Amendment challenge, a Philadelphia ordinance that prohibits prospective employers from asking job applicants about their salary history. (***Chamber of Commerce for Greater Philadelphia v. City of Philadelphia***)
- The California Supreme Court rules that Apple must pay its employees for time spent undergoing loss-prevention bag searches, even though Apple does not require employees to bring bags to work. (***Apple v. Frlekin***)
- Clarifying circuit precedent, the *en banc* Fifth Circuit aligns with its sister circuits to hold that federal contractors who present a colorable federal defense may remove cases to federal court under the Federal Officer Removal Statute. (***Latiolais v. Huntington Ingalls, Inc.***)
- The Seventh Circuit reverses the dismissal of a refusal-to-deal claim in a major antitrust suit in which a cable operator cut ties with a middleman in order to lower costs and create other efficiencies. (***Viamedia, Inc. v. Comcast Corp.***)
- The NLRB issues its final rule clarifying that a firm is a "joint employer" of another firm's employees only if it exercises "substantial direct and immediate control" over one or more of the "essential terms and conditions" of employment. (***In re Standards for Determining Joint-Employer Status***)

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.

Key WLF Staff Contacts

Cory Andrews, Vice President of Litigation
candrews@wlf.org

Corbin Barthold, Senior Litigation Counsel
cbarthold@wlf.org

Glenn Lammi, Legal Studies Chief Counsel
glammi@wlf.org

NEW FILINGS

WLF urges the Ninth Circuit to enjoin a controversial new California law that imposes staggering liability on prescription-drug manufacturers for merely settling pending patent litigation.
Ass'n for Accessible Medicines v. Becerra

On February 6 WLF urged the Ninth Circuit to enjoin a controversial new state law that imposes staggering liability on drug makers for merely carrying out federal policy. WLF's *amicus curiae* brief was joined by the National Association of Manufacturers and the U.S. Chamber of Commerce. As WLF's brief argues, by elevating state law over federal law, California's AB 824 erects several major obstacles to the accomplishment of federal law, frustrates the policy aims of Congress, and is thus preempted under the Supremacy Clause. In particular, the law poses discrete roadblocks to Congress's aims under federal food-and-drug law, federal patent law, and federal antitrust law.

WLF asks the U.S. Supreme Court to review yet another California Supreme Court ruling that flouts the Federal Arbitration Act.
OTO, LLC v. Kho

On February 14, WLF filed an *amicus curiae* brief urging the U.S. Supreme Court to review a California Supreme Court ruling inconsistent with the Federal Arbitration Act. The California high court struck down an arbitration agreement that, in its view, provided the parties *too much* procedure. It declared the agreement unconscionable on the ground that it set forth rules that look more like ordinary civil litigation than like California's administrative wage-dispute resolution process. WLF's brief argues that the California Supreme Court's ruling is nothing more than a thinly veiled attempt to ban wage-dispute arbitration altogether, in gross defiance of the FAA. The brief also places the ruling in context, showing that it is simply the latest in a long line of recent California high court decisions that discriminate against arbitration. Finally, the brief discusses the California courts' improper use, when looking at arbitration clauses, of a special, distorted version of the contractual unconscionability defense.

DECISIONS

The Third Circuit reverses a trial court ruling and sustains, against a First Amendment challenge, a Philadelphia ordinance that prohibits prospective employers from asking job applicants about their salary history.
Chamber of Commerce for Greater Philadelphia v. City of Philadelphia

On February 6, the Third Circuit overturned a trial court ruling and upheld, against a First Amendment challenge, a Philadelphia ordinance that prohibits employers from asking job applicants about their past salaries. The decision was a setback for WLF, which had argued in an *amicus curiae* brief that the First Amendment prohibits the City from restricting prospective employers' speech without ample evidence that wage-history inquiries perpetuate salary discrimination against women and racial minorities, and that a ban on such inquiries would reduce discrimination. WLF noted that the City's speech restriction is both content-based (it applies to only one subject, pay history) and speaker-based (it applies only to employers and to no other category of speaker). In a 67-page opinion, the appeals court held that the City's ban on pay-history inquiries satisfies intermediate scrutiny under *Central Hudson*.

The California Supreme Court rules that Apple must pay its employees for time spent undergoing loss-prevention bag searches, even though Apple does not require employees to bring bags to work.
Apple v. Frlekin

On February 13, the California Supreme Court ruled that Apple must pay its employees for time they spend having their bags searched. Although Apple does not require employees to bring bags to work (and allows them to do so as a benefit), the Court nonetheless concluded that the search time counts as time the employees are under their employer's "control," as that term is used in California's Wage Order No. 7. WLF submitted an *amicus curiae* brief arguing that because adopting the plaintiffs' construction of the wage order would render it unconstitutionally vague, the court should avoid that interpretation.

Clarifying circuit precedent, the *en banc* Fifth Circuit aligns with its sister circuits to hold that federal contractors who present a colorable federal defense may remove cases to federal court under the Federal Officer Removal Statute.
Latiolais v. Huntington Ingalls, Inc.

On February 24, the *en banc* Fifth Circuit reversed, under the Federal Officer Removal Statute, a trial court's decision denying removal to a former Navy contractor in a Louisiana asbestos-liability suit. The decision was a victory for WLF, which filed an *amicus curiae* brief asking the court not only to overturn the decision below but also to reconsider circuit precedent making it more difficult for federal officers and their contractors to remove cases to federal court. Writing for the *en banc* court without dissent (two of the 14 judges concurred in the judgment only), Judge Edith Jones seized the opportunity to reconsider the circuit's "extraordinarily confused" precedents in light of Congress's 2011 amendments to the statute. Relying on the plain language of those amendments, the court aligned with its sister circuits to hold that federal contractors who present a colorable federal defense may remove cases to federal court.

The Seventh Circuit reverses the dismissal of a refusal-to-deal claim in a major antitrust suit in which a cable operator cut ties with a middleman in order to lower costs and create other efficiencies.
Viamedia, Inc. v. Comcast Corp.

On February 24, the Seventh Circuit reversed the dismissal of a refusal-to-deal claim in a major antitrust lawsuit. Refusal-to-deal liability arises only when an alleged monopolist ends an established course of dealing without any rational business reason for doing so. Here, the defendant, which runs a clearing house for cable-television advertising, cut ties with the plaintiff, an advertising broker, because the defendant wanted to move into the plaintiff's market. The cable company argued that moving into that market, and thereby cutting out the middleman, allowed the company to lower costs and create other efficiencies. Nonetheless, the court of appeals concluded that an evidentiary dispute exists as to whether the company's conduct was predatory. In its *amicus curiae* brief, WLF defended the "no rational reason" refusal-to-deal legal standard. This standard ensures that courts do not try to grapple with questions they are not equipped to answer—that is, complex questions about ambiguous business behavior. WLF also explained the benefits of "vertical integration"—the defendant's effort to bundle two distinct services—and argued that these benefits were in fact obtained in this case. WLF is monitoring for an opportunity to support a petition for rehearing *en banc*, at the Seventh Circuit, or for certiorari, at the Supreme Court.

The NLRB issues its final rule clarifying that a firm is a "joint employer" of another firm's employees only if it exercises "substantial direct and immediate control" over one or more of the "essential terms and conditions" of employment.

In re Standards for Determining Joint-Employer Status

On February 25, the National Labor Relations Board issued a final rule defining when regulated entities are "joint employers" of another company's employees—and thus held fully liable for obligations owed to those employees. Under the standard the NLRB set forth in its 2015 Browning-Ferris decision, if one employer possessed the right to control the terms and conditions of another employer's employees, the Board considered that employer to be a joint employer. Consistent with WLF's comments, the final rule dictates that an entity is a joint employer of another business's employees if it possesses and actually exercises "substantial direct and immediate control" over one or more of the essential terms and conditions of employment.

