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## WLF Month in Review

This WLF Litigation Division feature highlights WLF's court filings, as well as decisions issued in response to WLF's filings. In this edition, we list **February 2021** filings and results.

### New Filings

- WLF urges the Department of Labor not to delay implementation of its recently-promulgated independent-contractor rule. (*In re Independent Contractor Status Under the FLSA*)
- WLF joins a coalition of civil-justice reform groups in asking the Florida Supreme Court to adopt the federal summary judgment standard for Florida courts. (*In re Fla. R. Civ. P. 1.510*)
- WLF calls on the Second Circuit to grant interlocutory review of a decision that would make class certification a virtual certainty in securities cases. (*Pearlstein v. Blackberry Ltd.*)
- WLF joins a coalition of civil-justice reform groups in asking the Massachusetts Supreme Judicial Court to limit the number and duration of depositions in civil litigation. (*In re Mass. R Civ. P. 30 & 30A*)
- WLF urges the Supreme Court to require that every class member satisfy Article III's injury-in-fact requirement. (*Trans Union LLC v. Ramirez*)
- WLF asks Supreme Court to reverse certification in closely watched securities class action. (*Goldman Sachs v. Arkansas Teacher Retirement System*)
- WLF urges the Fifth Circuit to reverse certification of a class that includes many members who suffered no loss or injury. (*Spegele v. USAA Life Insurance Co.*)

### Decisions

- The First Circuit upholds a preliminary injunction against a Maine law that infringes on the First Amendment rights of cable operators. (*Comcast v. Mills*)
- The Supreme Court denies review of a Ninth Circuit decision that misconstrued the Federal Arbitration Act's transportation-worker exemption. (*Amazon.com v. Rittmann*)
- The Eastern District of Texas dismisses a suit seeking to invalidate federal regulatory actions unmoored from any statute or regulation. (*Walmart v. U.S. Drug Enforcement Administration*)

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 General Counsel and Vice President of Litigation, Cory Andrews.

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## **NEW FILINGS**

### **WLF urges the Department of Labor not to delay implementation of its recently-promulgated independent-contractor rule.**

*In re Independent Contractor Status Under the FLSA*

On February 23, 2021, WLF filed formal comments with the Department of Labor's Wage and Hour Division urging it to allow the recently promulgated independent-contractor rule to go into effect on March 8, 2021. Despite having considered over 1,700 comments on the rule only two months ago, DOL wants to delay the rule's implementation so the new administration can review it. WLF's comments remind DOL that it issued the rule to promote regulatory certainty. But delaying the rule's effective date will cause regulatory uncertainty in an already uncertain economic climate. Because most experts agree that regulatory uncertainty stunts economic recovery, DOL should not go down that path. Rather, WLF urges DOL to stay the course and allow the rule to take effect as scheduled.

### **WLF joins a coalition of civil-justice reform groups in asking the Florida Supreme Court to adopt the federal summary judgment standard for Florida courts.**

*In re Fla. R. Civ. P. 1.510*

On February 15, 2021, WLF joined a coalition of civil-justice reform groups to support a proposed amendment to Florida Rule of Civil Procedure 1.510. Tracking the approach of the U.S. Supreme Court, the rule would adopt the federal standard for summary judgment in Florida courts. In a formal comment to the Florida Supreme Court, WLF explained that the amendment promotes consistency, stability, and predictability in the law by harmonizing the standard governing summary judgment in both federal and state courts in Florida. WLF's comment was drafted with the pro bono assistance of Mark Behrens at Shook, Hardy & Bacon LLP.

### **WLF calls on the Second Circuit to grant interlocutory review of a decision that would make class certification a virtual certainty in securities cases.**

*Pearlstein v. Blackberry Ltd.*

On February 10, 2021, WLF filed an *amicus* brief urging the Second Circuit to hear an important securities case. Despite Supreme Court precedent holding that defendants have a right to rebut the *Basic* presumption of reliance at the class-certification stage, the District Court's opinion makes any attempt at rebuttal futile. As WLF's brief shows, Plaintiffs bear the burden of proving the *Basic* presumption at the class certification stage. But under the District Court's order, plaintiffs' attorneys can avoid that burden through creative pleading. And given the enormous settlement pressure that follows class certification, this is almost certainly the only time that the Second Circuit has a chance to decide this issue. In short, WLF urges the Second Circuit to curtail baseless securities class actions by hearing this case.

**WLF joins a coalition of civil-justice reform groups in asking the Massachusetts Supreme Judicial Court to limit the number and duration of depositions in civil litigation.**

[\*In re Mass. R Civ. P. 30 & 30A\*](#)

On February 17, 2021, WLF joined a coalition of civil-justice reform groups to support proposed amendments to Massachusetts Rules of Civil Procedure 30 and 30A. Tracking the approach of the Federal Rules of Civil Procedure, the proposed amendments would limit each side in a dispute to ten depositions, with each deposition limited in duration to one day of seven hours. In a formal comment to the Massachusetts Supreme Judicial Court, WLF explained that the proposed revisions would modernize the Commonwealth's discovery rules and help to harmonize the deposition practice in both state and federal courts in Massachusetts. WLF's comment was drafted with the pro bono assistance of Mark Behrens at Shook, Hardy & Bacon L.L.P.

**WLF urges the Supreme Court to require that every class member satisfy Article III's injury-in-fact requirement.**

[\*Trans Union LLC v. Ramirez\*](#)

On February 8, 2021, WLF filed an *amicus* brief urging the Supreme Court to reverse the Ninth Circuit in an important separation-of-powers case. Despite Supreme Court precedent holding that private parties cannot enforce federal law, the Ninth Circuit held that the uninjured class members here could vindicate the public interest by suing TransUnion for violating federal law. As WLF's brief shows, the Ninth Circuit's ruling contravenes foundational separation-of-powers principles. The Founders gave federal courts constitutional jurisdiction over only cases and controversies. They did so to prevent the judiciary from governing the country through injunction. Similarly, the Take Care Clause gives the President the authority to enforce federal laws. But the Ninth Circuit's decision improperly transfers that authority to the plaintiffs' bar. WLF urges the Supreme Court to uphold the separation of powers by reversing the Ninth Circuit's decision.

**WLF asks Supreme Court to reverse certification in closely watched securities class action.**

[\*Goldman Sachs v. Arkansas Teacher Retirement System\*](#)

On February 1, 2021, WLF asked the Supreme Court to vacate a Second Circuit decision in a securities class action with far-reaching implications. Under Supreme Court precedent, a defendant can rebut the presumption of class-wide reliance in a securities class action by showing that an alleged misrepresentation did not actually affect the stock's market price. The Supreme Court has also made clear that a defendant is entitled to rebut the reliance presumption at the class-certification stage. The Second Circuit violated those rules in this case. Holding that such an inquiry would go to the merits of materiality, the appeals court barred the defendant from being able to rebut price impact by pointing to the generic nature of the alleged misstatements (*e.g.*, Goldman Sachs's aspirational mission statement). As WLF contends in its *amicus* brief, that decision, if ratified by the Supreme Court, would undermine Congress's intent to limit the proliferation of meritless securities class actions. WLF's *amicus* brief was prepared with the pro bono assistance of Lyle Roberts, Daniel Sachs, and Edmund Saw at Shearman & Sterling LLP.

**WLF urges the Fifth Circuit to reverse certification of a class that includes many members who suffered no loss or injury.**

*Spegele v. USAA Life Insurance Co.*

On February 1, 2021, WLF asked the Fifth Circuit to decertify an unwieldy class of USAA life insurance policyholders. Over USAA's objections, the trial court certified a class that included many policyholders who suffered no harm or loss from USAA's COI calculations. The court also allowed the plaintiffs to establish commonality of classwide damages based solely on expert testimony that would be inadmissible at trial. In its *amicus* brief urging reversal, WLF advances two arguments. First, by certifying a class that includes many uninjured policyholders, the district court far exceeded its jurisdictional reach under Article III, which requires every plaintiff to have suffered a cognizable injury in fact. Second, by declining to decide the admissibility of expert evidence at the certification stage, the district court contravened circuit precedent and dramatically lowered the bar for class certification.

## **DECISIONS**

**The First Circuit upholds a preliminary injunction against a Maine law that infringes on the First Amendment rights of cable operators.**

*Comcast v. Mills*

On February 24, 2021, the First Circuit upheld a preliminary injunction against a Maine law that forces cable-television providers to offer channels, and even individual programs, à la carte. A group of cable providers sued Maine, arguing that the new law violates their First Amendment rights and clashes with provisions of the federal Cable Act. The district court granted a preliminary injunction on First Amendment grounds. The First Circuit agreed that the law implicates the First Amendment and triggers heightened judicial scrutiny because it "singles out" cable operators. At this stage of the proceeding, the appeals court held, Maine could not survive such scrutiny on the limited record before the court. The case will be remanded to the district court for trial on the merits.

**The Supreme Court denies review of a Ninth Circuit decision that misconstrued the Federal Arbitration Act's transportation-worker exemption.**

*Amazon.com v. Rittmann*

On February 22, 2021, the Supreme Court issued an order declining to review a Ninth Circuit decision that failed to read section 1 of the Federal Arbitration Act (known as the "transportation worker exemption") in line with the statute's text and context. The denial of certiorari was a disappointment for WLF, which filed an *amicus* brief in the case urging review. Although some judge-made tests purport to expand the transportation-worker exemption beyond national and international transportation of goods, WLF argued that these contrived standards defy statutory text and context, produce inconsistent results, and serve no end set forth by Congress. Because the plaintiffs in this case made only local deliveries purely intrastate, WLF contended, they fall outside the section 1 exemption. WLF's *amicus* brief was joined by the Allied Educational Foundation.

**The Eastern District of Texas dismisses a suit seeking to invalidate federal regulatory actions unmoored from any statute or regulation.**

*Walmart v. U.S. Drug Enforcement Administration*

On February 8, 2021, the Eastern District of Texas dismissed a suit claiming that federal regulatory actions against Walmart pharmacies flout the rule of law. The decision was a setback for WLF, which argued in an *amicus* brief (joined also by the U.S. Chamber of Commerce, the National Retail Federation, and the Retail Litigation Center, Inc.) that a federal agency’s power to regulate private conduct exists only as authorized by Congress and may be exercised only in a manner consistent with federal law. Although no federal law or regulation requires a pharmacist to independently verify the medical justification for every drug prescription written by a licensed practicing physician, Department of Justice (DOJ) and Drug Enforcement Agency (DEA) officials had threatened an enforcement action against pharmacies for filling allegedly “suspicious” prescriptions. As WLF’s brief showed, however, DOJ and DEA cannot use vague, sub-regulatory guidance as the basis for an enforcement action. WLF’s brief was prepared with the pro bono assistance of Wiley Rein LLP.