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WLF Calls on Supreme Court to Clarify Scope of Disclosure Obligations Under Federal Securities Law

(Facebook, Inc. v. Amalgamated Bank)

“The Ninth Circuit has created an unworkable disclosure regime—one that forces companies to fill their risk disclosures with extraneous details of past incidents rather than focusing on the most important future risks.”

—Cory Andrews, WLF General Counsel and Vice President of Litigation

WASHINGTON, DC—Earlier today, Washington Legal Foundation urged the U.S. Supreme Court to review, and ultimately reverse, a decision of the U.S. Court of Appeals for the Ninth Circuit. Left to stand, that decision would hold companies liable for failing to include irrelevant and stale information in their forward-looking risk disclosures. WLF’s amicus brief was prepared with the pro bono assistance of Lyle Roberts, George Anhang, and William Marsh of Shearman & Sterling LLP.

The case arose from a securities class action on behalf of investors who bought Facebook stock before March and July 2018 price drops. The district court thrice dismissed their claims for failure to plead falsity, scienter, and loss causation under Federal Rule of Civil Procedure 9(b), which requires fraud allegations to be pleaded with particularity. After the third dismissal, plaintiffs appealed to the Ninth Circuit. Over a partial dissent by Judge Bumatay, a Ninth Circuit panel revived plaintiffs’ claims based on (1) risk-factor statements in Facebook’s 2016 10-K warning that Facebook could suffer business or reputational loss if a security breach exposed data to improper use by third parties and (2) statements that Facebook users could “control” how their data was shared. In reaching that conclusion, the panel applied Rule 8’s more lenient pleading standard instead of Rule 9(b)’s heightened requirements.

As WLF explains in its amicus brief urging review, the Ninth Circuit’s ruling will force companies to overdisclose risks about immaterial past incidents, which will confuse investors who must navigate a company’s SEC filings to find information relevant to their investment decisions. And under the Ninth Circuit’s lax pleading standard, companies will be vulnerable to frivolous securities litigation based on accurate forward-looking statements—an outcome Congress sought to avoid when passing the Private Securities Litigation Reform Act.

Celebrating its 47th year, WLF is America’s premier public-interest law firm and policy center advocating for free-market principles, limited government, individual liberty, and the rule of law.

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