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Supreme Court Agrees 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—The U.S. Supreme Court today agreed to review a decision of the U.S. Court of Appeals for the Ninth Circuit that holds companies liable for failing to include irrelevant and stale information in their forward-looking risk disclosures. The decision was welcome news for WLF, which filed an amicus brief with the Court urging review. WLF’s brief was prepared with the pro bono assistance of Lyle Roberts, George Anhang, William Marsh, and Danielle Vorbrodt of A&O Shearman.

Amalgamated Bank is the third private securities-fraud litigation case in which the Court has granted review in the past two Terms where WLF, with the assistance of A&O Shearman attorneys, supported the petition for certiorari. *Macquarie Infrastructure Corp. v. Moab Partners LP* and *Pivotal Software, Inc. v. Superior Court of California* were the other two cases.

Amalgamated Bank 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 explained in its amicus brief, if left in place the Ninth Circuit’s ruling would 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.

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.