MONTH IN REVIEW

August 2024

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Washington Legal Foundation
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WLF.org

Washington Legal Foundation's *Month in Review* report is a Litigation Division feature that highlights WLF's court and regulatory filings each month, as well as decisions issued in response to WLF's filings.

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New Filings

NVIDIA Corp. v. E. Ohman J:or Fonder AB

In re Proposed Amendments to Federal Rule of Appellate Procedure 29

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In re Growth in the Freight Rail Industry Hearings

Decisions

Calhoun v. Google

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NEW FILINGS

NVIDIA Corp. v. E. Ohman J:or Fonder AB

WLF asks the Supreme Court to reverse a sharply divided Ninth Circuit decision that diluted the heightened pleading standard of the PSLRA.

On August 20, WLF urged the Supreme Court to reverse a sharply divided Ninth Circuit decision that gutted the critical pleading requirements of the Private Securities Litigation Reform Act (PSLRA). WLF was joined on its amicus brief by the U.S. Chamber of Commerce, the National Association of Manufacturers, the National Retail Federation, and the Securities Industry and Financial Markets Association. The brief explains why allowing securities plaintiffs to rely on hired-gun expert reports to establish falsity and scienter would permit securities-fraud plaintiffs to circumvent the PSLRA by substituting *post hoc* expert speculation for particularized factual allegations of falsity and scienter. Affirming the Ninth Circuit's rule would therefore create an easy roadmap for future plaintiffs to engage in the kind of fishing expeditions the PSLRA was supposed to end. WLF's brief was drafted with pro bono assistance from James N. Kramer, Daniel A. Rubens, and Jodie C. Liu of Orrick Herrington & Sutcliffe LLP.

In re Proposed Amendments to Federal Rule of Appellate Procedure 29

WLF urges the Committee on Rules of Practice and Procedure to scrap proposed amendments to Rule 29 governing amici curiae.

On August 19, WLF filed comments urging the Committee on Rules of Practice and Procedure to scrap proposed amendments to Rule 29. Although the Supreme Court made it easier to file amicus briefs last year, the proposal makes it harder to file amicus briefs by requiring a motion in all cases. The Committee's rationales for departing from the Supreme Court's recent action are nonsensical. The comments explain how the motion requirement is unnecessary, will cause more work for judges, will cause uncertainty for amici, and will lead to less diverse perspectives. The comments also describe the First Amendment problems with the proposal to increase disclosure requirements. As the proposal neither advances a compelling governmental interest nor is narrowly tailored, it flunks strict scrutiny.

Facebook, Inc. v. Amalgamated Bank

WLF urges the Supreme Court to reverse a Ninth Circuit decision that held a company liable for failing to include irrelevant and stale information in its forward-looking risk disclosures.

On August 16, WLF asked the Supreme Court to reverse a Ninth Circuit decision that held a company liable for failing to include irrelevant and stale information in its forward-looking risk disclosures. WLF's amicus brief was prepared with the pro bono assistance of Lyle Roberts, George Anhang, and William Marsh of A&O Shearman. As WLF explains in its amicus brief urging reversal, affirming the Ninth Circuit's rule would force companies to overdisclose risks about immaterial past incidents, confusing investors who must navigate a company's SEC filings to find information relevant to their investment decisions. Under this 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.

On August 15, WLF filed a brief in an important False Claims Act case. The Seventh Circuit held that relators can sue under the FCA even when the federal fisc is not at risk. WLF's brief explains how the Court's decision in this case will affect other telecommunications programs, including those that provide services for hearing-impaired, low-income, and rural citizens. WLF's brief also explains how the FCA's history shows that it is solely aimed at protecting the federal fisc while discouraging parasitic suits.

Wisconsin Bell, Inc. v. United States ex rel. Heath

WLF asks the Supreme Court to restore the False Claims Act's limited scope.

In the Matter of Securing and Safeguarding the Open Internet

WLF asks the Sixth Circuit to reject the FCC's latest regulatory takeover of the Internet.

On August 14, WLF joined TechFreedom on an amicus brief urging the Sixth Circuit to vacate the FCC's latest effort to impose heavy-handed regulation on the Internet. As the brief explains, the FCC lacks the statutory authority to impose Title II common-carrier status on broadband service providers. Under the major questions doctrine, the people's representatives in Congress must make all important policy decisions themselves. With its latest power grab, the FCC is seeking to answer a major policy question—but it lacks clear authority to do so. Simply put, Congress has not granted the FCC clear authority to place broadband under Title II.

On August 14, WLF urged the Supreme Court to hold that employers must prove the applicability of FLSA exemptions by a preponderance of the evidence. Splitting from six other courts of appeals, the Fourth Circuit held that employers must prove the applicability of FLSA exemptions by clear and convincing evidence. WLF's brief argues that the Fourth Circuit's rule relied on the principle that FLSA exemptions must be construed narrowly. But the Supreme Court's *Encino Motorcars* decision rejected that principle. WLF's brief also explains why the Fourth Circuit's holding conflicts with the history and purpose of the FLSA. If the Supreme Court affirms, businesses will be less efficient, prices will increase, or unemployment will rise—all bad outcomes for employers, employees, and consumers.

EMD Sales v. Carerra

WLF urges the Supreme Court to hold that employers bear the burden of proving by a preponderance of the evidence the applicability of an exemption to the Fair Labor Standards Act.

In re Growth in the Freight Rail Industry Hearings

WLF asks the Surface Transportation Board to clarify the freight rail industry's common-carrier obligations.

On August 13, Washington Legal Foundation filed a comment with the U.S. Surface Transportation Board urging the Board to consider its enforcement of the Staggers Act's common-carrier obligation during an upcoming two-day hearing. The hearing will address STB's concern with perceived stagnating growth and the need for increased innovation in the freight rail industry. WLF's comment, drawing on a WLF *Legal Backgrounder* by regulatory expert Bernard Sharfman, argues that the Board's shifting position on when it can compel a rail carrier to haul a shipper's freight poses heightened regulatory risk and deprives carriers and shippers of the clear standards needed for growth and innovation. The Board's departure from the Staggers Act also exposes it to APA legal challenges, which could foment additional uncertainty.

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

To learn more about our new briefs and regulatory filings, visit our website at wlf.org/litigation.

DECISIONS

Calhoun v. Google

The Ninth Circuit reinstates a privacy class-action suit over Google's Chrome browser.

On August 20, the Ninth Circuit reversed a trial court's rejection of a privacy suit in which all plaintiffs consented to the receipt and use of their browsing data. The decision was a setback for WLF, which filed an amicus brief in the case urging affirmance. WLF's brief argued that allowing plaintiffs to impose liability on Google for data retention practices to which they've knowingly consented would invite disastrous, unintended consequences. The Ninth Circuit disagreed, holding that disputes of material fact remained over whether a reasonable user of Google's product would have realized what they were consenting to.

Union Pacific Railroad Co. v. Surface Transportation Board

In a victory for WLF, the Eighth Circuit vacates an unlawful Surface Transportation Board rule.

victory

On August 20, the Eighth Circuit vacated an unlawful rule issued by the Surface Transportation Board. WLF's amicus brief showed how the Surface Transportation Board lacked statutory authority to issue the rule, which would have required parties to arbitrate disputes. The brief also explained why the Final Rule was arbitrary and capricious. Among its many defects, the Final Rule incorporated the worst parts of Major League Baseball's salary-arbitration system and cast the best parts aside.

Litigation is the backbone of WLF's public-interest mission. We litigate nationally before state and federal courts and agencies. Our team, at times 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 our General Counsel and Vice President of Litigation, Cory Andrews.

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