



Washington Legal Foundation
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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 **May 2022** filings and results.

New Filings

- WLF urges SEC to abandon proposed climate-related disclosure rule. (*In re Climate-Related Disclosure Rule*)
- WLF asks Second Circuit to adhere to Supreme Court precedent in prominent securities class-action appeal. (*Arkansas Teachers Retirement System v. Goldman Sachs*)
- WLF urges Supreme Court to allow parties to challenge agencies' structure in federal court. (*Axon v. FTC*)
- WLF urges the Ninth Circuit to follow Supreme Court precedent on appellate jurisdiction. (*Trendsettah v. Swisher*)
- WLF asks the Supreme Court of Florida to adopt meaningful civil discovery reforms. (*In re Supreme Court of Florida's Workgroup on Improved Resolution of Civil Cases*)

Decisions

- The Ninth Circuit declines rehearing en banc in an important dispute over appellate jurisdiction. (*Trendsettah v. Swisher*)
- The Supreme Court holds that plaintiffs need not show prejudice to succeed on a waiver defense to a motion to compel arbitration. (*Morgan v. Sundance*)
- The Supreme Court declines to review a decision that drastically lowered the bar for admitting unreliable expert evidence in federal court. (*3M Co. v. Amador*)
- Granting rehearing en banc, the Fourth Circuit vacates a correctly decided panel opinion on scienter under the False Claims Act. (*U.S. ex rel. Sheldon v. Allergan*)

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

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NEW FILINGS

WLF urges SEC to abandon proposed climate-related disclosure rule.

In re Climate-Related Disclosure Rule

On May 20, WLF filed formal comments with the Securities and Exchange Commission, urging it to abandon a proposed rule that would compel registered companies to include certain climate-related information in their registration statements and periodic reports. Because the proposed rule lacks any investor-protection justification, WLF contends that it exceeds the Commission's statutory authority. Moreover, by compelling companies to speak publicly on a matter when they otherwise would prefer not to, the proposed rule raises serious First Amendment concerns. For these reasons, WLF urges the Commission to withdraw the proposed rule.

WLF asks Second Circuit to adhere to Supreme Court precedent in prominent securities class-action appeal.

Arkansas Teachers Retirement System v. Goldman Sachs

On May 18, WLF asked the Second Circuit to clarify the meaning of a recent U.S. Supreme Court precedent for securities class actions. The appeal arises on remand from the Supreme Court's 2021 decision in *Goldman Sachs Group v. Arkansas Teacher Retirement System*. There, the Supreme Court established a "mismatch" test to exclude from liability generic corporate statements made by virtually every public company. On remand, the district court misconstrued the "mismatch" test to require only a finding that the supposedly corrective disclosures generally "implicate" the same subject matter as the purported misrepresentations. And the district court expanded the inflation-maintenance theory by premising price impact on the effect of a disclosure differing in kind from the alleged misstatement itself. Urging reversal, WLF's brief contends that the district court's application of *Goldman* would leave defendants without the meaningful ability to defeat class certification for failure to prove price impact, thus undermining Supreme Court precedent and congressional policy aimed at limiting meritless securities class actions and coercive settlements. WLF's *amicus* brief was prepared with the pro bono assistance of Lyle Roberts, George Anhang, and William Marsh of Shearman & Sterling LLP.

WLF urges Supreme Court to allow parties to challenge agencies' structure in federal court.

Axon v. FTC

On May 10, WLF filed an *amicus* brief urging the Supreme Court to confirm that a constitutional challenge to the structure of a federal agency need not start in the agency. In applying the Supreme Court's *Thunder Basin* precedent, the Ninth Circuit focused almost exclusively on whether Axon can receive meaningful judicial review of its challenge to the FTC's structure. It held that once-per-decade review suffices for "meaningful" judicial review. As WLF's brief shows, this violates defendants' due-process rights. WLF's brief also argues that properly applying *Thunder Basin* would encourage parties to raise Appointments Clause challenges. Allied Educational Foundation joined WLF on the brief.

WLF urges the Ninth Circuit to follow Supreme Court precedent on appellate jurisdiction.*Trendsetta v. Swisher*

On May 3, WLF filed an *amicus* brief urging the Ninth Circuit to rehear en banc an important appellate-jurisdiction case. Despite the Supreme Court's *Microsoft v. Baker* decision holding that plaintiffs may not manufacture finality for an appeal, a three-judge panel found that it had jurisdiction to review an interlocutory order because the plaintiffs voluntarily dismissed their case. As WLF's brief shows, the panel's decision conflicts with *Baker*, conflicts with prior circuit precedent, and was issued without subject-matter jurisdiction. So there are three reasons that the Ninth Circuit should rehear the case en banc.

WLF asks the Supreme Court of Florida to adopt meaningful civil discovery reforms.*In re Supreme Court of Florida's Workgroup on Improved Resolution of Civil Cases*

On May 22, WLF submitted a comment to the Supreme Court of Florida in support of discovery rule changes proposed by the International Association of Defense Counsel. The IADC's proposal, which includes requiring proportionality and other more defined limits on discovery, would directly address significant sources of delay and high costs in civil discovery. WLF's comment explains that these reforms would align Florida with other jurisdictions that have updated their civil discovery rules in recent years to incorporate proportional discovery and other mainstream best practices.

DECISIONS

The Ninth Circuit declines rehearing en banc in an important dispute over appellate jurisdiction.*Trendsetta v. Swisher*

On May 25, the Ninth Circuit refused to rehear en banc an important appellate-jurisdiction case. This decision was a setback for WLF, which filed an *amicus* brief urging an eleven-judge panel to hear the case. Despite the Supreme Court's holding in *Microsoft v. Baker* that plaintiffs may not manufacture finality for an appeal, a three-judge panel found that it had jurisdiction to review an interlocutory order because the plaintiffs voluntarily dismissed their case. As WLF's brief showed, the panel's decision conflicts with *Baker*, conflicts with prior circuit precedent, and was issued without subject-matter jurisdiction.

The Supreme Court holds that plaintiffs need not show prejudice to succeed on a waiver defense to a motion to compel arbitration.*Morgan v. Sundance*

On May 23, the Supreme Court unanimously held that plaintiffs need not show prejudice to succeed on a waiver defense to a motion to compel arbitration. The decision was a setback for WLF, which argued in its *amicus* brief that prejudice is required when plaintiffs breach their contracts and sue in federal court. Despite this setback, the Supreme Court's decision once again rejected arbitration-specific rules that States like California continue to enforce. On remand, the Eighth Circuit should apply general legal principles and hold that Sundance did not waive its right to arbitration.

The Supreme Court declines to review a decision that drastically lowered the bar for admitting unreliable expert evidence in federal court.

3M Co. v. Amador

On May 16, the Supreme Court declined to review an Eighth Circuit decision that drastically lowered the bar for admitting unreliable expert evidence in federal court. The decision was a setback for WLF, which joined Atlantic Legal Foundation and DRI—The Voice of the Defense Bar in urging the Court to grant review. The case arose from long-running multi-district litigation over 3M Company’s Bair-Hugger patient warming system, which remains the most popular choice of surgeons for ensuring patient comfort and safety during surgery. Citing grievous flaws, weaknesses, and gaps in the Plaintiffs’ experts’ causation testimony, the district court excluded their reports as unreliable. But the Eighth Circuit reversed, holding that expert testimony must be admitted unless it is “so fundamentally unsupported by its factual basis that it can offer no assistance to the jury.” As WLF’s *amicus* brief explained, that is not the standard for reliability established by either Federal Rule of Evidence 702 or applicable Supreme Court precedent. WLF’s brief argued that the Eighth’s Circuit lax standard for admitting expert evidence places a heavy thumb on the side of admitting expert evidence with acknowledged flaws and deprives defendants of a fair trial and due process.

Granting rehearing en banc, the Fourth Circuit vacates a correctly decided panel opinion on scienter under the False Claims Act.

U.S. ex rel. Sheldon v. Allergan

On May 10, the Fourth Circuit granted the *qui tam* relator’s motion for rehearing *en banc* and vacated the three-judge panel’s January 25, 2022 decision. The now-vacated decision adopted the test for willfulness announced by the Supreme Court in *Safeco*. As the *amicus* brief WLF’s filed with the three-judge panel showed, the *Safeco* test applies in FCA cases when deciding if a defendant acted with reckless disregard for the truth or falsity of submitted claims. Violations of the FCA carry both punitive civil penalties and criminal liability. This means that even civil defendants are entitled to heightened due-process protections. WLF explained that applying *Safeco* in FCA cases provides the necessary due-process protections while advancing Congress’s goal of ensuring companies do not bury their heads in the sand.