



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 **April 2023** filings and results.

New Filings

- WLF urges Eighth Circuit to vacate unlawful Surface Transportation Board rule. ([Union Pacific Railroad Co. v. Surface Transportation Board](#))
- WLF asks the Fifth Circuit to hold that the FDIC's structure is unconstitutional. ([Burgess v. Whang](#))

Decisions

- The D.C. Circuit affirms a federal trial court's dismissal of antitrust claims against Facebook for denying its competitors the free use of its platform. ([State of New York v. Facebook, Inc.](#)) ***victory***
- The Ninth Circuit affirms in part and reverses in part the judgment in a prominent antitrust case. ([Epic Games v. Apple Inc.](#)) ***partial victory***
- The Third Circuit reaffirms its robust ascertainability standard for class actions. ([In re Niaspan Antitrust Litigation](#)) ***victory***
- The Supreme Court declines to review an important question about greenhouse-gas litigation. ([BP PLC v. Baltimore/Suncor Energy v. Boulder County](#))
- The Supreme Court holds that district courts may hear constitutional challenges to the SEC's and the FTC's structure. ([Axon v. FTC](#)) ***victory***

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 Eighth Circuit to vacate unlawful Surface Transportation Board rule.

Union Pacific Railroad Co. v. Surface Transportation Board

On April 17, WLF filed an amicus brief urging the Eighth Circuit to vacate an unlawful rule issued by the Surface Transportation Board. WLF's brief shows how the Surface Transportation Board lacked statutory authority to issue the rule. It requires parties to arbitrate disputes, something that even the Surface Transportation Board admits it cannot order parties to do. The brief also explains why the Final Rule is arbitrary and capricious. Among its many defects, the Final Rule incorporates the worst parts of Major League Baseball's salary-arbitration system and casts the best parts aside.

WLF asks the Fifth Circuit to hold that the FDIC's structure is unconstitutional.

Burgess v. Whang

On April 4, WLF filed an amicus brief urging the Fifth Circuit to affirm in part and reverse a part an injunction stopping an FDIC administrative proceeding. WLF's brief showed how the District Court had jurisdiction over the case. The brief also explained the constitutional problems with the administrative proceedings. Both FDIC board members and FDIC administrative law judges enjoy unconstitutional for-cause removal protections. Finally, the brief outlined why federal courts can grant relief on the plaintiff's claims that the FDIC structure is unconstitutional.

DECISIONS

The D.C. Circuit affirms a federal trial court's dismissal of antitrust claims against Facebook for denying its competitors the free use of its platform.

State of New York v. Facebook, Inc.

On April 27, the D.C. Circuit affirmed a federal trial court's dismissal of antitrust claims against Facebook for denying its competitors the free use of its platform to harm Facebook's core business. The decision was welcome news for WLF, which filed an amicus brief in the case urging affirmance. The appeal arose from a suit by a group of 46 States (plus Guam and the District of Columbia) against Facebook for alleged violations of Section 2 of the FTC Act. In its brief, WLF asked the appeals court to decline the States' effort to radically expand refusal-to-deal liability under Section 2. Among other things, judicial creation of a novel duty to deal with competitors in this fast-changing and highly competitive industry would threaten to harm competition and consumers. Writing for the panel, Judge Randolph agreed: "Many innovations may seem anti-competitive at first but turn out to be the opposite, and the market often corrects even those that are anti-competitive." WLF's brief was prepared with the generous pro bono assistance of Zack Tripp and Mark Pinkert at Weil, Gotshal & Manges LLP. Joining WLF's brief was the Information Technology and Innovation Foundation.

The Ninth Circuit affirms in part and reverses in part the judgment in a prominent antitrust case.

Epic Games v. Apple Inc.

On April 24, the Ninth Circuit affirmed in part and reversed in part the judgment in a prominent antitrust case. This was a partial victory for WLF, which filed an amicus brief supporting Apple. Epic argued that Apple's policies of requiring developers to sell apps only on the App Store and not to steer customers to outside

payment processors violated the Sherman Act. The Ninth Circuit held that Epic failed to prove that there was a less restrictive alternative way for Apple to achieve the procompetitive effects of the policies. The Ninth Circuit, however, affirmed a nationwide injunction against Apple on Epic's state-law claim.

Third Circuit reaffirms its robust ascertainability standard for class actions.

In re Niaspan Antitrust Litigation

On April 24, the Third Circuit upheld a federal trial court's refusal to certify a class for which no administratively feasible way existed to identify class members. The ruling was a victory for WLF, which filed an amicus brief with the court urging affirmance. WLF emphasized that the Third Circuit's robust ascertainability standard serves several vital interests. First, it eliminates heavy administrative burdens that are inconsistent with the efficiencies that Rule 23 requires in class actions. Second, it protects the opt-out rights of absent class members who have an interest in not having future claims diluted. And third, it safeguards defendants' interests in paying only legitimate claims and ensuring that persons bound by a final judgment are clearly identifiable.

The Supreme Court declines to review an important question about greenhouse-gas litigation.

BP PLC v. Baltimore/Suncor Energy v. Boulder County

On April 24, the Supreme Court declined to hear two important cases about greenhouse-gas litigation. This was a setback for WLF, which filed amicus briefs supporting two separate petitions. Splitting from the Second Circuit, the Tenth Circuit and the Fourth Circuit each held that claims about climate change arising from greenhouse-gas emissions are not exclusively governed by federal common law. The courts also held that plaintiffs may artfully plead around federal jurisdiction by invoking state law. WLF's briefs explained why the Tenth Circuit's and Fourth Circuit's decisions will have devastating consequences and why federal common law governs Boulder County's and Baltimore's claims. The briefs also explained why the Court should not allow parties to plead around federal jurisdiction.

The Supreme Court holds that district courts may hear constitutional challenges to the SEC's and the FTC's structure.

Axon v. FTC

On April 14, the U.S. Supreme Court held that parties may challenge the constitutionality of a federal agency's structure in federal court. This outcome was a victory for WLF, which filed amicus briefs supporting the challengers in both cases. In a decision that tracked one of WLF's briefs, the Court held that defendants have a right to have their constitutional challenges to an agency's structure adjudicated by an Article III tribunal. The ruling requires lower courts properly consider whether a claim is wholly collateral to the merits of a case and whether the agency has expertise on the question. The Court explained that illusory review does not satisfy the meaningful-judicial-review factor.