



Washington Legal Foundation
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WLF Month in Review

This WLF Litigation Division feature highlights WLF's court and regulatory filings, as well as decisions issued in response to WLF's filings. In this edition, we list **August 2023** filings and results.

New Filings

- WLF urges the Supreme Court to retain the Sarbanes-Oxley Act's intent requirement. (*Murray v. UBS*)
- WLF asks the Federal Railroad Administration to withdraw costly proposed rules. (*In re Certification of Dispatchers and Signal Employees*)
- WLF urges the Supreme Court to rein in MDL abuses. (*E.I. du Pont de Nemours & Co. v. Abbott*)

Decisions

- The Ninth Circuit agrees to review a class-certification order in an unwieldy civil-RICO case. (*Painters Fund v. Takeda Pharmaceutical Co.*) ***victory***
- The Second Circuit adheres to Supreme Court precedent in a prominent securities class-action appeal. (*Arkansas Teachers Retirement System v. Goldman Sachs*) ***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 the Supreme Court to retain the Sarbanes-Oxley Act's intent requirement.

Murray v. UBS

On August 14, WLF filed an amicus brief urging the Supreme Court to affirm a Second Circuit decision properly interpreting Sarbanes-Oxley's whistleblower provision. WLF's brief explains why intent is so important in anti-discrimination statutes. Congress has chosen its language carefully to require that plaintiffs prove intent to prevail under some causes of action while not requiring the same showing under other causes of action. And it did so for sound policy reasons. WLF's brief also explains how the Whistleblower Protection Act differs from Sarbanes-Oxley. The two statutes use different language, have different legislative histories, and have different purposes. Thus, they should not be interpreted as imposing the same requirements.

WLF asks the Federal Railroad Administration to withdraw costly proposed rules.

In re Certification of Dispatchers and Signal Employees

On August 10, WLF filed formal comments with the Federal Railroad Administration urging it to withdraw two proposed regulations. Recently, the FRA has begun proposing rules whose costs far exceed their benefits. Here, even the FRA admits that the two proposals' costs are higher than their benefits. But even this analysis does not consider all the costs, inflates the benefits, and ignores reasonable alternatives. So the actual gap between costs and benefits is much greater. All Americans will face increased prices at the store if the FRA does not withdraw these proposed rules.

WLF urges the Supreme Court to rein in MDL abuses.

E.I. du Pont de Nemours & Co. v. Abbott

On August 4, WLF urged the Supreme Court to review, and ultimately to overturn, a deeply flawed Sixth Circuit decision in a multi-district litigation (MDL) proceeding. In its amicus brief, WLF asks the Court to decide whether due process permits a district court overseeing an MDL to apply nonmutual offensive collateral estoppel to make the results of a handful of bellwether trials binding on every other pending or future case in the MDL. WLF's brief was prepared with generous pro bono support from Jonathan Tam, Matthew Steinberg, and Allison Ozurovich of Dechert LLP.

DECISIONS

The Ninth Circuit agrees to review a class-certification order in an unwieldy civil-RICO case.

Painters Fund v. Takeda Pharmaceutical Co.

On August 23, the Ninth Circuit agreed to review a federal trial court's certification order in an unwieldy class action. The case arose from a civil-RICO suit by a third-party payer and others to recover treble their prescription costs for Actos, an FDA-approved diabetes drug. As WLF's amicus brief explained, the plaintiffs' key evidentiary problem was how to distinguish Actos prescriptions that would have been written despite an increased-risk disclosure from those that would not have been written because of that disclosure. But making that distinction requires an individualized inquiry into the medical factors relevant to each patient's prescription. Class certification is never appropriate where, as here, individualized questions will predominate over common ones. WLF's amicus brief was prepared with generous pro bono assistance from Charles S. Dameron and Joseph E. Begun of Latham & Watkins LLP.

The Second Circuit adheres to Supreme Court precedent in a prominent securities class-action appeal.

Arkansas Teachers Retirement System v. Goldman Sachs

On August 10, the Second Circuit reversed a securities class-certification order, faithfully applying a recent Supreme Court precedent for securities class actions. The decision was a victory for WLF, which filed an amicus brief in the appeal urging reversal. The Second Circuit held that because Goldman's statements about its ability to prevent conflicts of interest were not closely linked to SEC and DOJ enforcement actions against Goldman in 2010, Goldman had established that those statements did not affect the stock price. As a result, Goldman had rebutted any presumption of reliance. WLF's brief was prepared with the pro bono assistance of Lyle Roberts, George Anhang, and William Marsh of Shearman & Sterling LLP.