



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 **January 2024** filings and results.

New Filings

- WLF asks Ninth Circuit to reverse a class-certification order in an unwieldy civil-RICO case. ([Painters Fund v. Takeda Pharmaceuticals](#))
- WLF urges the Supreme Court to uphold express federal preemption of state law under the National Bank Act. ([Cantero v. Bank of America](#))
- WLF asks the Supreme Court of Texas to properly apply the apex doctrine. ([In re Meta Platforms, Inc.](#))
- WLF opposes the FCC's latest proposal to classify broadband internet access as a telecommunications service under Title II of the Communications Act. ([In re Safeguarding and Securing the Open Internet](#))
- WLF joins a coalition of civil-justice reform groups in urging the Ohio Supreme Court to adopt proposed changes to Ohio Rule of Evidence 702. ([In re Proposed Amendments to Ohio Rule of Evidence 702](#))
- WLF reminds the FDA that it must comply with the First Amendment when restricting drug and device manufacturers' truthful scientific speech. ([In re Scientific Information on Unapproved Uses](#))

Decisions

- The Delaware Supreme Court agrees to enforce, as written, contracts between sophisticated parties. ([Cantor Fitzgerald, LP v. Ainslie](#))
victory
- The Supreme Court of Texas stays an order allowing Texas to depose a top business executive. ([In re Meta Platforms, Inc.](#)) ***victory***
- The Fifth Circuit reverses a district court order declaring the Consumer Product Safety Commission's structure unconstitutional. ([Consumers' Research v. CPSC](#))
- The Supreme Court declines to hear an important federalism case concerning California's unfair competition law. ([Apple Inc. v. Epic Games](#))
- California's Court of Appeal holds for the first time that a manufacturer can be held liable for a non-defective product. ([Gilead Sciences v. Superior Court](#))
- The Supreme Court declines to clarify the scope of federal preemption over tobacco flavors. ([RJ Reynolds Tobacco Co. v. Bonta](#))

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 asks Ninth Circuit to reverse a class-certification order in an unwieldy civil-RICO case. *Painters Fund v. Takeda Pharmaceuticals*

On January 25, WLF asked the Ninth Circuit to reverse a federal trial-court's certification order in an unwieldy class action. The case arises 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 makes clear, the plaintiffs' key evidentiary problem is how to distinguish those 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 urges the Supreme Court to uphold express federal preemption of state law under the National Bank Act. *Cantero v. Bank of America*

On January 23, WLF filed an amicus brief urging the U.S. Supreme Court to affirm a Second Circuit decision holding a New York banking law preempted by the National Bank Act. As WLF's brief explains, there are myriad federal laws that expressly preempt state and local laws regulating important industries. These express-preemption provisions help both consumers and businesses. A ruling for Plaintiffs, however, would chip away at the preemptive effect of all these statutory provisions. This would cause uncertainty for businesses and hurt our nation's economy.

WLF asks the Supreme Court of Texas to properly apply the apex doctrine. *In re Meta Platforms, Inc.*

On January 19, WLF filed an amicus brief urging the Supreme Court of Texas to properly apply the apex doctrine. A district court gave the plaintiff permission to depose Mark Zuckerberg, Meta's CEO. As WLF's brief explains, this decision violates the apex doctrine because he lacks any unique knowledge relevant to the plaintiff's claims. The brief also describes how the apex doctrine is critical to promoting a pro-business environment. The brief was filed with the pro bono assistance of Randall W. Miller of Munsch Hardt Kopf & Harr, P.C.

WLF opposes the FCC's latest proposal to classify broadband internet access as a telecommunications service under Title II of the Communications Act. *In re Safeguarding and Securing the Open Internet*

On January 17, WLF joined former FCC Commissioner Harold Furchgott-Roth and Kirk R. Arner of the Hudson Institute Center for Economics of the Internet on a reply comment in response to the FCC's latest proposal to classify broadband internet access service as a telecommunications service subject to common carrier regulation under Title II of the Communications Act. The reply comment advances two main points. First, the FCC and the federal government more broadly enjoy sufficient non-Title II authority to counter any threats to American national security in the internet sector.

Second, rather than supporting utility regulation, the internet's great economic importance shows why the FCC's proposal likely violates the "major questions" doctrine.

WLF joins a coalition of civil-justice reform groups in urging the Ohio Supreme Court to adopt proposed changes to Ohio Rule of Evidence 702.

In re Proposed Amendments to Ohio Rule of Evidence 702

On January 12, WLF joined a coalition of civil-justice reform groups in urging the Ohio Supreme Court to adopt proposed changes to Ohio Rule of Evidence 702, which governs the admissibility of expert evidence. Following the group's October 2023 comment encouraging the court to harmonize Ohio Rule 702 with new Federal Rule of Evidence 702(d), the court added the proposed language to the text of the rule. The proposed change aligns the Ohio rule with its federal analog by requiring the proponent of expert evidence to prove that it is "more likely than not" that the rule's reliability requirements are satisfied.

WLF reminds the FDA that it must comply with the First Amendment when restricting drug and device manufacturers' truthful scientific speech.

In re Scientific Information on Unapproved Uses

On January 5, WLF filed a formal comment with the FDA in response to the agency's latest revised draft guidance on the dissemination of published materials about off-label uses of medical products. Although the revised draft appropriately allows new forms of non-promotional communication—such as firm-generated presentations and clinical practice resources—WLF explains that it is still overbroad, ambiguous, and too restrictive. By chilling truthful, non-misleading scientific speech, the FDA's revised draft threatens to undermine public health while disregarding the Constitution. Given its ambiguity, the revised draft also ignores the unreasonable burdens it imposes on countless drug and device manufacturers, who must rely on FDA's guidance to ensure that their actions are lawful.

DECISIONS

The Delaware Supreme Court agrees to enforce, as written, contracts between sophisticated parties.

Cantor Fitzgerald, LP v. Ainslie

On January 29, a unanimous Delaware Supreme Court reversed a controversial Chancery Court decision that invalidated part of a routine partnership agreement on public policy grounds. The decision was welcome news for WLF, which filed an amicus brief in the case urging reversal. WLF's brief was prepared and filed with assistance from Kenneth Gage and Daniel Richards of Paul Hastings LLP and Michael Vild and David Holmes of Cross & Simon LLP. In its amicus brief urging reversal, WLF argued that the Chancery Court's holding is at odds with Delaware law's strong preference for freedom of contract. In its unanimous opinion today, the Delaware Supreme Court agreed, explaining that "absent unconscionability, bad faith, or other extraordinary circumstances," Delaware courts should hold sophisticated parties to their agreements.

The Supreme Court of Texas stays an order allowing Texas to depose a top business executive.

In re Meta Platforms, Inc.

On January 29, the Supreme Court of Texas stayed a decision giving Texas permission to depose Mark Zuckerberg, Meta's CEO. This was a victory for WLF, which filed an amicus brief supporting Meta. As WLF's brief explained, allowing Texas to depose Zuckerberg would violate the apex doctrine because he lacks any unique knowledge relevant to the plaintiff's claims. The brief also described how the apex doctrine is critical to promoting a pro-business environment. The brief was filed with the pro bono assistance of Randall W. Miller of Munsch Hardt Kopf & Harr, P.C.

The Fifth Circuit reverses a district court order declaring the Consumer Product Safety Commission's structure unconstitutional.

Consumers' Research v. CPSC

On January 17, the Fifth Circuit reversed a District Court order declaring the Consumer Product Safety Commission's structure unconstitutional. This was a disappointment for WLF, which filed an amicus brief supporting the challengers. WLF's brief highlighted that principal officers of the United States cannot enjoy for-cause removal protections except in limited circumstances not relevant to the CPSC.

The Supreme Court declines to hear an important federalism case concerning California's unfair competition law.

Apple Inc. v. Epic Games

On January 16, the Supreme Court declined to hear an important federalism case. This was a disappointment for WLF, which filed an amicus brief supporting Apple's certiorari petition. The Ninth Circuit affirmed a nationwide injunction for Apple's allegedly violating California's unfair competition law. WLF's brief showed that the Ninth Circuit opinion ignored federalism principles because it allows California laws to apply outside the State's borders. The decision also violated separation-of-powers and vertical federalism principles because it permits one federal judge to make laws for almost two dozen States. TechFreedom joined WLF's brief.

California's Court of Appeal holds for the first time that a manufacturer can be held liable for a non-defective product.

Gilead Sciences v. Superior Court

On January 9, California's First District Court of Appeal blessed a radical new theory of liability for manufacturers of non-defective prescription drugs. As explained in WLF's supplemental amicus brief, the trial court's theory of liability made a hash of California tort law. Eliminating the defect element from product-based claims would open the door to untethered liability and undermine product innovation. Even so, in allowing the negligence claim to proceed, the Court of Appeal held for the first time that a manufacturer can be liable for a non-defective product. WLF joined the U.S. Chamber of Commerce, the California Chamber of Commerce, and the Alliance for Automotive Innovation on the supplemental amicus brief, which was drafted by Justin Sarno and Ben Fabens-Lassen of DLA Piper LLP.

The Supreme Court declines to clarify the scope of federal preemption over tobacco flavors.

RJ Reynolds Tobacco Co. v. Bonta

On January 8, the Supreme Court declined to review the Ninth Circuit's holding that the federal Tobacco Control Act (TCA) does not preclude States like California from banning the sale of certain FDA-authorized tobacco products. The decision was a disappointment for WLF, which filed an amicus brief urging review. In 2020 California enacted a law banning the sale of all flavored tobacco products, including menthol cigarettes. In its amicus brief urging review, WLF argued that California's flavor ban clashes with the TCA's preemption clause, which prohibits States and localities from banning the sale of tobacco products for failure to conform to state or local standards that differ from the TCA's.