News Release

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COURT URGED TO REJECT CHALLENGE TO TOBACCO SETTLEMENT AGREEMENT

(Freedom Holdings, Inc. v. Spitzer)

The Washington Legal Foundation (WLF) today urged the U.S. Court of Appeals for the Second Circuit in New York to reject an antitrust challenge to the Master Settlement Agreement (MSA), the settlement that ended the massive product liability suits filed by many States against the tobacco industry.

In a brief filed in *Freedom Holdings, Inc. v. Spitzer,* WLF argued that the MSA was a reasonable means of addressing a significant public health concern and should not be subject to antitrust challenge by small tobacco companies seeking to increase their market shares.

"The district court correctly determined that the MSA does not restrict competition and thus that injunctive relief for the plaintiffs was unwarranted," said WLF Chief Counsel Richard Samp after filing WLF's brief in support of New York Attorney General Eliot Spitzer. "In the absence of evidence that the MSA restricts competition, there is no basis for invoking the antitrust laws to overturn an agreement that has obvious health benefits," Samp said.

Among other provisions, the MSA requires the four major tobacco companies to pay the States in excess of $200 billion over the first 25 years of the agreement; the payment is a per-cigarette fee, based on the number of cigarettes sold. The MSA also requires other, smaller manufacturers who elect not to participate in the MSA to place funds into escrow every year, to be used to pay any judgment that the States may obtain against those nonparticipating companies in a product liability action. After 25 years, any remaining escrow funds are returned to the payer. The per-cigarette escrow fee that non-participating manufacturers must pay is considerably less than the per-cigarette fee imposed on the four major tobacco companies.

The plaintiffs are two tobacco importers that import cigarettes manufactured overseas by companies other than the four major tobacco companies. The importers complain that the escrow fee is a device concocted by the States and the major tobacco companies to ensure that the major companies can maintain high prices and thus recoup the fees they pay pursuant to the MSA. The plaintiffs contend that in the absence of the escrow fee and several other features of the MSA to which they object, foreign tobacco companies could and would gain considerable cigarette market share by undercutting the prices of the major tobacco companies. The district court denied the plaintiffs' motion for a preliminary injunction against the MSA

(and all but one of the numerous provisions of New York State law designed to carry out the MSA). The plaintiffs then appealed to the Second Circuit.

In its brief filed with the appeals court, WLF argued that the plaintiffs' appeal should be denied because they lack "antitrust injury." WLF argued that the plaintiffs cannot claim to have suffered the requisite *direct* injury from New York's settlement agreement, because the MSA operates only against manufacturers, not importers; the most the plaintiffs can claim is that they are suffering *indirect* injury by virtue of the foreign manufacturers' alleged inability to sell as many cigarettes as they would sell in the absence of the escrow fee. WLF also argued that even the foreign manufacturers themselves lack antitrust injury because the only ones hurt by alleged price-fixing cartels are individual consumers, not would-be competitors. Indeed, the price increases caused by the MSA allowed non-participating manufacturers (such as the foreign manufacturers for which the plaintiffs imported tobacco) to increase their market shares more than ten-fold over the past five years, WLF argued.

WLF also urged the appeals court to reject claims that New York's activities should be deemed to constitute *per se* violations of the antitrust laws. WLF argued that the *per se* rule should be invoked only in those few cases where sufficient experience has shown that the practice in question always or almost always tends to restrict competition and decrease output. WLF argued that the courts have not had any experience dealing with the types of agreements challenged here.

WLF is a public interest law and policy center with supporters in all 50 states. It devotes a significant portion of its resources to promoting free enterprise, individual rights, and a limited and accountable government, and regularly appears in federal and state courts to argue against overly expansive interpretations of the antitrust laws.

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For further information, contact WLF Chief Counsel Richard Samp, 202-588-0302. A copy of WLF's brief is posted on its web site, www.wlf.org.