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## COURT DECLINES TO CRACK DOWN ON FRIVOLOUS SECURITIES LITIGATION

(*Gilead Sciences, Inc. v. St. Clare*, No. 08-1021)

The U.S. Supreme Court yesterday issued a one-sentence order declining to review an appeals court decision that permits a securities fraud lawsuit to go forward despite the absence of evidence that any loss suffered by shareholders was caused by the defendant's alleged misrepresentations. The decision was a setback for the Washington Legal Foundation (WLF), which filed a brief urging that review be granted. WLF argued that frivolous securities fraud litigation will continue to be a plague on the business community unless the courts are willing to weed out such lawsuits before defendants are required to respond to expensive and time-consuming discovery requests.

WLF argued that the decision by the U.S. Court of Appeals for the Ninth Circuit in *Gilead Sciences, Inc. v. St. Clare* essentially eliminates the "loss causation" requirement as a check on frivolous securities litigation alleging stock fraud. WLF argued that the appeals court's pleadings standard for securities fraud cases is not faithful to the intent of Congress in adopting the Private Securities Litigation Reform Act, a 1995 law designed to permit early dismissal of insubstantial securities fraud suits.

The case now returns to the lower courts, where the plaintiff most likely will have an immediate opportunity to begin rummaging through the defendant's files in search of evidence of wrongdoing. It is possible that, prior to the commencement of such discovery, the defendant will be given one more opportunity to explain why the complaint ought to be dismissed on the pleadings.

The defendant is Gilead Sciences, Inc., a biotechnology company based in California. Its stock price dipped slightly in October 2003 after it issued a somewhat disappointing earnings report. The stock price fully rebounded in less than five weeks and has tripled in the subsequent five years, even taking into account the recent stock market decline. The plaintiffs, two Gilead shareholders represented by William Lerach's former law firm, nonetheless filed suit two weeks after the initial stock decline, alleging that the company and its officers had defrauded shareholders by omitting important information about its business operations.

"If the plaintiffs really lost money when they bought the defendant's stock, they are among the very few who have ever done so, in light of Gilead's tremendous financial success," said WLF Chief Counsel Richard Samp in response to the Supreme Court's

order. "If even companies like Gilead have to endure years of expensive litigation every time their stock price takes a slight dip, that's a good sign that something is seriously amiss in the world of securities fraud litigation," Samp said.

Over the course of the past decade, Gilead's most successful product has been Viread, an anti-retroviral drug used to treat HIV/AIDS. It received a "Warning Letter" in July 2003 from FDA, which charged that a Gilead official had improperly promoted Viread for an "off-label" use during the course of oral statements made at a promotional booth in April 2003. Gilead responded to the Warning Letter by assuring FDA that it would make sure that its employees did not make similar claims in the future.

The securities fraud lawsuit alleges that Gilead failed to inform shareholders that its Viread sales were being driven in part by improper off-label promotion of the drug. The plaintiffs allege that Viread sales declined following release of the FDA Warning Letter, that the sales decline was reflected in Gilead's October 2003 earnings report, and thus that the October 2003 decline in stock price was a direct result of Gilead's failure to inform stockholders prior to July 2003 of its off-label marketing practices. Gilead responds that use of Viread actually increased in the relevant time period.

A federal district court dismissed the suit on the pleadings, finding that the plaintiffs failed to introduce facts sufficient to demonstrate that the October 2003 stock price drop was caused by the release of FDA's Warning Letter several months earlier. The Ninth Circuit reversed, ruling that such causation issues generally should not be decided until the plaintiff has had an opportunity to engage in extensive discovery. It ruled that a securities fraud lawsuit should survive a motion to dismiss so long as it is "plausible" that the stock price drop was caused by the disclosure of the defendant's alleged misrepresentation.

In its brief urging the Supreme Court to review the appeals court's decision, WLF argued that the Ninth Circuit's pleading standard conflicts with the standard adopted by other appeals courts. WLF asserted that under the Ninth Circuit's standard, no securities fraud defendant will ever be able to win dismissal on loss causation grounds before having to undergo expensive pretrial discovery.

WLF is a public interest law and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, and a limited and accountable government. In particular, WLF has appeared in numerous federal and state courts in cases raising securities law issues.

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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](http://www.wlf.org).