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COURT DECERTIFIES NATIONWIDE CLASS ACTION (*In re Simon II Litigation*)

The U.S. Court of Appeals for the Second Circuit in New York this week overturned a district court decision that certified a nationwide class action on behalf of smokers seeking punitive damages against the cigarette industry.

The decision in *In re Simon II Litigation* was a victory for the Washington Legal Foundation ("WLF"), which had filed a brief arguing that the suit would be wholly unmanageable if it proceeded as a class action on behalf of millions of smokers. The Court agreed with WLF that certification of the class violated federal court rules. WLF also argued that certification violated the constitutional rights of both absent class members and the defendants; the appeals court did not reach that issue. WLF filed its brief on behalf of itself and the National Association of Manufacturers.

"The plaintiffs' lawyers wanted this case to proceed as a class action solely because they know that defendants have no choice but to settle such unwieldy cases without regard to the cases' underlying merits," said WLF Chief Counsel Richard Samp in response to the decision decertifying the class. "Such abuse of class action procedures has become all too common in recent years; ending such abuse needs to be a top priority of the tort reform movement," Samp said.

The suit was filed in federal district court in Brooklyn by 13 smokers. They claim that the tobacco companies concealed from them the effects of smoking; they further claim that that concealment led them to smoke and that as a result they contracted a variety of diseases. They sought to represent *all* smokers nationwide who have contracted any one of 14 smoking-related illnesses. However, the *sole* purpose of the class action was to recover punitive damages; other smokers would be permitted to pursue their own lawsuits for any actual damages they suffered.

Federal district judge Jack Weinstein certified the case as a nationwide class pursuant to Rule 23(b)(1)(B) of the Federal Rules of Civil Procedure, which permits class actions when numerous people have claims against a specific pot of money that is insufficient to satisfy all claims. Judge Weinstein said that a "limited fund" exists in this case because recent Supreme Court decisions establish a cap on maximum punitive damages that may be imposed against a company based a single course of conduct. He said that this cap "creates a potential first-in-time problem," where the first plaintiffs may recover vast sums while others who arrive later are left

with a depleted fund against which they cannot recover. By certifying a "mandatory" class action (i.e., a class from which no one is permitted to opt out), Judge Weinstein claimed to have solved this "potential first-in-time problem."

In reversing that decision, the Second Circuit agreed with WLF that Rule 23(b)(1)(B) did not permit this case to proceed as a "limited fund" class action because the plaintiffs failed to demonstrate the existence of a "limited fund." The appeals court noted that neither the district court nor the plaintiffs made any determination regarding whether total punitive damage awards would in fact exceed the pot of funds available to pay punitive damage awards, or even regarding the size of that pot. The appeals court held that in the absence of such findings, certification of a "limited fund" class action is impermissible under Rule 23.

WLF's brief argued that certification in this case was particularly troublesome because the legal principles enunciated by the district court would justify certification of a nationwide Rule 23(b)(1)(B) class for recovery of punitive damages in virtually *any* mass tort case. WLF noted that scores of major American manufacturers have been targeted by lawsuits seeking huge punitive damage awards; WLF argued that if the Second Circuit had upheld class certification in this case, one could reasonably expect that nationwide punitive damages-only class actions would be certified within the Second Circuit in virtually every category of mass tort suit.

WLF is a public interest law and policy center with supporters in all 50 states. It devotes a significant portion of its resources to advancing the interests of the free-enterprise system and to ensuring that economic development is not impeded by excessive litigation.

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For further information, contact WLF Chief Counsel Richard Samp, (202) 588-0302. WLF's brief can be viewed on its web site, www.wlf.org.