

June 13, 2003

CALIFORNIA SUPREME COURT DECLINES “CY PRES” SETTLEMENT CASE

(In re Vitamin Cases/Phillion v. Lonza)

The California Supreme Court this week announced that it would not review a class action settlement in which the plaintiffs' lawyers will receive millions in fees, while consumers – their purported clients – will receive nothing.

The lower court in the case, the Court of Appeal of California, First Appellate District, had upheld the settlement, in which the consumers will have no opportunity to seek compensation of any kind. Instead, \$38 million will be paid "to charitable, governmental and non-profit organizations that promote the health and nutrition of consumer class members or otherwise further the purposes underlying the lawsuit." The plaintiffs' attorneys will receive an award of \$16 million in fees. The appeals court decision upholding the settlement was *In re Vitamin Cases*, 132 Cal. Rptr. 2d 425 (2003).

The Washington Legal Foundation filed a brief in the California Supreme Court in support of the objecting class members, arguing that the settlement violated California law and urging the High Court to grant review. The Court announced on June 11, 2003, that the Justices had voted not to hear the case. The Justices did not issue an opinion explaining that decision.

Payments to non-profit or governmental organizations in lieu of payments to class members are commonly known as *cy pres* payments, a term adapted from trust and estate law. Courts have long allowed the unpaid residue of class action awards – amounts unclaimed by class members – to be turned over to non-profit organizations as *cy pres* awards. In the California case, however, the *entire award* is to be handled on a *cy pres* basis for the sake of administrative simplicity. The appeals court said that the administrative costs of making individual payments to consumers would take up most of the \$38 million award. In theory, the payments to the third parties are for the indirect benefit of the class members.

A similar decision was handed down recently by the highest local court of the District of Columbia, the District of Columbia Court of Appeals. In that case, decided April 10, 2003, the court

approved a class action settlement that provided for a *cy pres* allocation of the entire award to a fund administered by the District of Columbia “for the improvement of the health and/or nutrition of the citizens of the District . . . and/or the advancement of nutritional, dietary or agricultural science in the District.” The opinion did not indicate the amount of the proposed settlement. *Boyle v. Giral*, 820 A.2d 561 (D.C. 2003). Also, in a class action case pending before the U.S. District Court for the Southern District of New York, *In re Magazine Antitrust Litigation*, WLF is objecting to a proposed award of \$1.1 million in attorneys' fees where the class members would receive neither monetary nor in-kind compensation, a situation similar to the case before the California Supreme Court

The policy implications of these decisions are a two-edged sword. They give corporate counsel a new tool with which to settle class actions. Yet by ratifying the use of class actions as essentially pure transfers to plaintiffs' lawyers (along with interested governmental or non-profit entities), the decisions also add to the existing incentives for greenmail suits against companies. In the California case, the pure *cy pres* award was barred, in WLF's view, by the terms of state statutory provisions governing class action awards and by state case law.

WLF is a public interest law and policy center with supporters in all 50 states. In addition to the California case and *In re Magazine Antitrust Litigation*, WLF has filed briefs in numerous cases regarding concerning class action abuses, including *Farmer v. Monsanto Corp.*, 2003 S.C. LEXIS 69 (S.C. April 7, 2003); *Ysbrand v. DaimlerChrysler Corp.*, pending before the Oklahoma Supreme Court; and *Gilchrist v. State Farm Mutual Automotive Ins. Co.*, pending before the U.S. Court of Appeals for the Eleventh Circuit.

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