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COURT URGED TO DECERTIFY MEDICAL MONITORING CLASS ACTION

(Wilson v. Brush Wellman Inc.)

The Washington Legal Foundation (WLF) this week urged the Ohio Supreme Court to overturn a lower-court decision that certified a class action consisting of thousands of individuals who worked at an Ohio manufacturing facility over the past half-century.

In a brief filed in *Wilson v. Brush Wellman Inc.*, WLF argued that certification of the class was wholly inappropriate given the widely disparate claims of each of the class members. WLF argued that the case is untriable as a class action and that the only reason the plaintiffs' lawyers sought class certification was to coerce the defendant into settling the case without regard to the merits of the plaintiffs' claims.

The case involves workers at an Elmore, Ohio plant operated by Brush Wellman Inc. for producing beryllium alloy. Because exposure to excessive levels of beryllium particles has long been associated with lung disease, Wellman has taken numerous steps to limit the exposure to airborne beryllium particles among those present at the plant. The plaintiffs claim that Wellman has not taken sufficient steps; they are asking the courts to require Wellman to establish a program that would regularly monitor the health of thousands of individuals who never worked for Wellman but were present at the Elmore plant for at least some period of time between 1953 and 1999.

Ordinarily, a case may be maintained as a class action only if the class is "cohesive"; *i.e.*, common issue of fact and law "predominate" over issues unique to individual class members. The court of appeals ruled, however, that no showing of cohesiveness is required in this case because: (1) the medical monitoring relief sought by the plaintiffs constitutes a claim for injunctive relief; and (2) cases stating claims for injunctive relief can be certified as class actions pursuant to Rule 23(b)(2), and plaintiffs seeking such certification need not demonstrate any class cohesiveness.

In its brief asking the Ohio Supreme Court to overturn the appeals court's class certification order, WLF argued that the relief sought by the plaintiffs does not qualify as "injunctive" relief. An injunction is a court order requiring a defendant to do (or refrain from doing) some specific action. WLF argued that the plaintiffs are not asking for specific injunctive relief; rather, they are

merely asking Wellman to place money in a pot to pay for medical monitoring, which is another way of saying that the defendants are being asked to pay damages. WLF argued that because Rule 23(b)(2) only permits certification of classes in which injunctive relief is being sought, the appeals court erred in certifying this class under that rule.

WLF also argued that, in any event, the appeals court erred in holding that Rule 23(b)(2) does not require the class proponent to demonstrate that the class is cohesive. WLF argued that because absent class members are not permitted to opt out of a Rule 23(b)(2) class action (as they are permitted to do in the more common Rule 23(b)(3) class action), it is all the more important that a court ensure that the class is cohesive before certifying a Rule 23(b)(2) class. Otherwise, WLF argued, class members whose claims are different from those of the class representatives will not be well represented in the class action.

WLF argued that in light of the huge variations of the circumstances under which individuals were present at the Elmore plant between 1953 and 1999, the class certified in this case cannot possibly qualify as a "cohesive" class, as required for Rule 23(b)(2) certification. WLF asked the Ohio Supreme Court to reverse the class certification order.

WLF is a public interest law and policy center with supporters in all 50 states, including many in Ohio. WLF devotes a substantial portion of its resources to promoting tort reform and reining in excessive litigation.

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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.