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WLF Asks High Court to Decertify Class Action in which Lower Courts Erroneously “Presumed” Harm to Many Class Members

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—Cory Andrews, Senior Litigation Counsel

WASHINGTON, DC—Washington Legal Foundation (WLF) today asked the U.S. Supreme Court to review, and ultimately overturn, a decision of the U.S. Court of Appeals for the Tenth Circuit that would allow reliance on “inferences” or “presumptions” of class-wide harm to certify a class that includes numerous members who never suffered an injury caused by the defendant.

In a brief filed in *Dow Chemical Co. v. Industrial Polymers, Inc.*, WLF argues that class certification based on a presumption of injury violates Article III of the U.S. Constitution by relieving plaintiffs of their burden to show a concrete injury to all class members. As a result, the appeals court erred as a matter of law by certifying a class that created liability to uninjured plaintiffs, contravening the injury-in-fact requirement of Article III. WLF’s brief demonstrates that, by relieving uninjured class members of their constitutional obligation to establish standing, the decision below improperly expanded the jurisdiction of the federal courts, wrongly eliminated the defendant’s right to dismiss the claims of uninjured persons, and unfairly inflated total damages.

The case arises from a \$400 million jury verdict (trebled under federal antitrust law to more than \$1 billion) in a nationwide class action on behalf of approximately 2,400 industrial purchasers of polyurethane products. Plaintiffs allege that Dow Chemical Company and other defendant polyurethane manufacturers conspired to issue coordinated price-increase announcements, and then tried to make those price increases “stick.” In upholding certification, not only did the panel recognize a “presumption” of class-wide harm from price fixing—even though prices were individually negotiated and many buyers avoided being overcharged—but it also allowed plaintiffs to prove class-wide damages by relying on statistical extrapolations that simply *assumed* all customers were harmed even though many were not.

Upon filing its brief, WLF issued a statement by Senior Litigation Counsel Cory Andrews: “The Tenth Circuit improperly used the class-action device to grant plaintiffs who did not satisfy the ‘irreducible constitutional minimum of standing’ access to federal court. Given the increasing willingness lower federal courts have shown to jettison the traditional standing requirements of Article III, review of the egregious class certification decision below is particularly warranted.”

WLF is a national, public-interest law firm and policy center that devotes a substantial portion of its resources to promoting civil justice reform and ending class-action lawsuit abuse.