

Press Release

Washington Legal Foundation

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FOR IMMEDIATE RELEASE

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MASSACHUSETTS HIGH COURT URGED TO DECERTIFY CLASS ACTION (*Aspinall v. Philip Morris, Inc.*)

The Washington Legal Foundation (WLF) today asked the Supreme Judicial Court of Massachusetts to overturn a trial judge's decision to certify a massive class action based on claims of fraud. The trial judge in the case, *Aspinall v. Philip Morris, Inc.*, had agreed with the plaintiffs' lawyers that the case could proceed and damages could be assessed without any evidence that individual consumers were defrauded.

The lawsuit is based on the phenomenon of compensatory smoking, that is, the phenomenon that some smokers who switch to lower-tar cigarettes may change their smoking practices so that they are still exposed to high levels of tar and nicotine. The plaintiffs' counsel in the case contend the existence of compensatory smoking means that phrases such as "light" or "low-tar" in cigarette advertisements and labels are deceptive, even where the cigarette brand has lower tar as determined by Federal Trade Commission standards. Plaintiffs' counsel have conceded that some consumers actually do receive less tar and nicotine from "low-tar" cigarettes. Plaintiffs' counsel argue, however, that they do not need to show that individual consumers were defrauded; rather, they claim they need only make a showing of a market-based price differential caused by defendants' offensive commercial practice.

WLF argued in its brief that any proper action for fraud based on these allegations requires individualized evidence to determine whether individual plaintiffs did, in fact, receive lower tar. WLF also argued that under the commonality requirement of Massachusetts class action law, plaintiffs who have not been injured cannot be lumped together into a class with plaintiffs who were allegedly injured. Finally, WLF argued that by sweeping aside any requirement of individual causation, the plaintiffs' theory would have disastrous effects, as it would allow the bootstrapping of essentially any fraud action into a mammoth statewide class action. WLF noted that the sheer scale of the potential compensatory damages in such cases would invite abusive

litigation in Massachusetts against makers of consumer products.

Evan Slavitt, a partner in the Boston law firm of Bodoff & Slavitt, represented WLF as local counsel in the case on a *pro bono* basis.

WLF is a public interest law and policy center with supporters in all 50 states. It has filed briefs in numerous cases involving the proper scope of class action litigation, including *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367 (1996); *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429 (2000); and *Diamond Multimedia Systems v. Superior Court*, 19 Cal. 4th 1036 (1999), cert. denied, 527 U.S. 1003 (2000).