

Press Release

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COURT URGED TO BAR COLLATERAL ATTACK ON CLASS ACTION JUDGMENTS *(Dow Chemical Co. v. Stephenson, No. 02-271)*

The Washington Legal Foundation (WLF) this week urged the U.S. Supreme Court to prevent absent members of a class action to relitigate final judgments entered in the lawsuit. In particular, WLF argued that they should not be permitted to relitigate the issue of whether their interests were adequately represented.

In a brief filed in *Dow Chemical Co. v. Stephenson*, WLF argued that so long as the adequacy of representation issue has been fully and fairly litigated in the trial court and has been affirmed on direct appeal, the issue may not be raised anew in connection with a collateral attack on the class action judgment.

The case before the Supreme Court is a challenge to the class action settlement entered into in 1984 between manufacturers of the herbicide Agent Orange and a class consisting of all Vietnam War veterans who were exposed to Agent Orange between 1961 and 1972 while in Vietnam. As part of the settlement, the manufacturers paid \$180 million into a settlement fund. The fund was used to establish a foundation to assist all Vietnam War veterans in dealing with medical and related problems; it also provided funds directly to disabled veterans and the families of deceased veterans, provided they died or were disabled before 1995 (*i.e.*, 10 years after the settlement). In return, future claims against Agent Orange manufacturers by veterans who did not opt out of the settlement were extinguished. In reliance on the terms of the settlement, the manufacturers paid out the full \$180 million.

A small number of Vietnam veterans opted out of the 1984 settlement. Their claims ultimately were dismissed as being without merit, and they recovered nothing. Indeed, because claims that Agent Orange injured *anyone* are so scientifically shaky, the sole reason that the manufacturers agreed to the settlement was to buy themselves litigation peace.

That peace was disturbed in 1998-99, when several Vietnam War veterans filed suit against the manufacturers, claiming to have developed cancer as a result of their exposure to Agent

Orange. The plaintiffs were diagnosed with cancer in the late 1990s -- several years after deadline for claiming disability benefits under the 1984 settlement. They asserted that they should not be bound by the 1984 settlement because the interests of those as-yet uninjured as of 1984 were not adequately represented when the settlement was approved.

The U.S. Court of Appeals for the Second Circuit in New York agreed, and reversed the trial court's dismissal of the plaintiffs' claims. The Supreme Court has agreed to review the Second Circuit's decision.

In its brief, WLF argued that the trial court approved the settlement in 1984 only after thoroughly considering whether the named plaintiffs in the original class action adequately represented the interests of *all* class members -- including those with no injuries as of 1984. The trial court determined in 1984 that all class members *were* adequately represented, and that decision was affirmed on appeal. Under those circumstances, WLF argued, the absent class members' constitutional rights to due process of law were fully protected -- they received all the "process" to which they were "due" before the courts determined that they should be bound by a judgment in a case in which they did not participate directly.

WLF argued that failure to enforce class action judgments under these circumstances would violate the rights of the class action defendants, who paid out a \$180 million settlement in reliance on a court judgment barring future claims. WLF noted that the chemical manufacturers in 1983 had strongly resisted certification of the case as a class action; WLF argued that when courts have forced involuntary defendants to defend against claims on a class-wide basis, it would be unfair to deprive the defendants of the fruits of any judgment entered in connection with those claims.

WLF acknowledged that the Supreme Court, in several recent cases, has questioned whether named plaintiffs in a class action who have suffered injury can ever adequately represent the interests of absent class members who have not yet been injured. But WLF argued that those Supreme Court decisions involved *direct* appeals of class action settlements and are irrelevant to cases, as here, in which a final judgment in a class action is being subjected to collateral attack.

WLF is a public interest law and policy center with supporters in all 50 states. WLF devotes a significant portion of its resources to promoting tort reform and defending the rights of businesses that have become the target of unwarranted government regulation.

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For further information, contact WLF Chief Counsel Richard Samp, (202) 588-0302. A copy of WLF's brief is available at its web site, www.wlf.org.