



FOR IMMEDIATE RELEASE

October 24, 2006

Paper Critiques Federal Judge's Ruling In "Light" Cigarette Class Action

After finding limited success suing tobacco companies under personal injury theories, plaintiffs' lawyers in recent years have turned to more flexible "consumer fraud" law, especially with "light" cigarettes. Those also met with little success until a jurist known for his creative application of class action rules, Senior Federal District Court Judge Jack Weinstein, recently injected himself into the courtroom debate. This new Washington Legal Foundation (WLF) WORKING PAPER critically analyzes Judge Weinstein's class action consolidation ruling and argues that it should be overturned on appeal.

The publication, **RESULTS-ORIENTED CLASS CERTIFICATION: SCHWAB V. PHILIP MORRIS**, was authored for WLF by **Brian C. Anderson** and **Andrew J. Trask**, a partner and Counsel, respectively, with the law firm O'Melveny & Myers LLP.

The authors state in the paper's introduction, "It is an axiom of American class action practice that merely bringing a lawsuit as a class action is not supposed to change the substantive rights of either the plaintiff or the defendant." As the introduction explains, Judge Weinstein has a long history of ignoring this axiom and, by combining together cases that plaintiffs' were unlikely to win individually, has once again dramatically swept away a defendant's rights.

Anderson and Trask next summarize the factual background of the *Schwab* lawsuit. The plaintiffs were seeking reimbursement for light cigarettes they purchased based upon defendants' allegedly fraudulent representations. Even though the class which Judge Weinstein certified could potentially contain millions of Americans, he ruled that the plaintiffs successfully showed that the class met all the tests under the federal rules for consolidation.

The paper devotes significant attention to one key issue in fraud-based class actions – did the plaintiffs rely upon the defendants' representations? In *Schwab*, Judge Weinstein applied a "fraud-on-the-market" theory to the issue of reliance, essentially making a legal determination which presumes the plaintiffs relied on the defendants' statements. As the authors argue, the U.S. Supreme Court strictly limited this fraud theory to the context of securities fraud.

After discussing the reliance issue, Anderson and Trask then analyze the number of other grounds on which Judge Weinstein justified the class consolidation. They challenge the legality of such decisions as allowing the use of statistical proof instead of actual, individualized proof; permitting plaintiffs to bypass statute of limitations problems through statistical evidence; and allowing the aggregation of the defendants into a single, common entity for purposes of proving a generalized deception on the cigarette market.

Such deep logical flaws and failure to follow established precedent, the authors argue, make it likely that Judge Weinstein will be overturned on appeal. They note, however, that Judge Weinstein has

refused to certify the class consolidation ruling for “interlocutory” appeal to the appeals court, and has put the trial schedule on a fast track. Such maneuvers are deeply regrettable, Anderson and Trask argue, because the judge’s opinion threatens not only the due process rights of the tobacco defendants, but creates a disturbing precedent that can be used against any industry currently in the cross hairs of a entrepreneurial plaintiffs’ bar.

Copies of this educational paper, WLF WORKING PAPER, Number 142 (October 2006), can be obtained by forwarding a request to: Publications Department, Washington Legal Foundation, 2009 Massachusetts Avenue, NW, Washington, D.C. 20036, or calling (202) 588-0302.

Washington Legal Foundation is a national, non-profit, public interest law and policy center. By utilizing a unique approach to forward its mission — publishing timely legal studies, engaging in innovative litigation, and communicating directly to the public — WLF has become the nation’s most effective advocate of free enterprise.