

April 4, 2003

## **SUPREME COURT REJECTS CHALLENGE TO CONFISCATORY IOLTA PROGRAMS**

*(Brown v. Legal Foundation of Washington)*  
*(Phillips v. Washington Legal Foundation)*

The U.S. Supreme Court this week rejected WLF's constitutional challenge to IOLTA (Interest on Lawyers' Trust Accounts) programs operated by the States of Washington and Texas. By a 5-4 margin, the Court declared that IOLTA programs do not violate the Fifth Amendment protection against the uncompensated taking of private property. IOLTA is a program under which Washington and Texas (and all other states) require attorneys and real estate professionals to turn over interest generated by their clients' trust funds to a fund used to finance legal aid organizations.

The ruling is a setback for WLF, which has been battling IOLTA programs on behalf of property owners since 1991. WLF argued that IOLTA violated its clients' Fifth Amendment rights by taking their property without just compensation. The Court majority disagreed. Although agreeing with WLF that interest on trust accounts belongs to those whose funds generated the interest and that government confiscation of the interest constitutes a "*per se* taking" of that property, the Court held that the plaintiffs were not entitled to any compensation because they could not demonstrate that they could have generated "net interest" (interest in excess of expenses that might be incurred in generating the interest) if not forced to participate in IOLTA.

Writing for four justices in dissent, Justice Antonin Scalia accused the majority of "brush[ing] aside 80 years of precedent on determining just compensation." Scalia stated, "Perhaps we are witnessing today the emergence of a whole new concept in Compensation Clause jurisprudence: the Robin Hood Taking, in which the government's extraction of wealth from those who own it is so cleverly achieved, and the object of the government's larcenous beneficence is so highly favored by the courts (taking from the rich to give to indigent defendants) that the normal rules of the Constitution protecting private property are suspended."

The Court's ruling came in connection with WLF's challenge to the Washington IOLTA

program, *Brown v. Legal Foundation of Washington*. WLF's challenge to the Texas IOLTA program, *Phillips v. Washington Legal Foundation*, was also before the Court but was not the subject of a detailed ruling. Rather, the Court remanded the Texas IOLTA case to the U.S. Court of Appeals for the Fifth Circuit, for reconsideration in light of the High Court's ruling in the Washington IOLTA case. The Fifth Circuit had issued a ruling in WLF's favor in October 2001, striking down the Texas IOLTA program as a violation of the Fifth Amendment.

IOLTA programs -- in existence in all 50 states and the District of Columbia -- annually generate more than \$150 million and are used to support legal services programs. WLF has been battling in the courts against IOLTA programs since 1991. The U.S. Supreme Court, in a landmark victory for WLF involving the Texas IOLTA program, ruled in 1998 that interest on IOLTA accounts belongs to those whose funds generated the interest; it also held that states may not redefine the meaning of property as a means of avoiding application of the Takings Clause. That WLF victory still stands; it was unaffected by this week's rulings.

The High Court's action leaves undecided another aspect of WLF's IOLTA challenges: whether IOLTA programs violate the First Amendment rights of those who are forced to fund lawsuits with which they disagree. WLF is consulting with its clients to determine whether they wish to continue to pursue their First Amendment claims in light of this week's rulings.

Besides WLF, other plaintiffs in the Washington lawsuit are Allen D. Brown and Greg Hayes (two Washington citizens who regularly engage in real estate transactions and object to the diversion of interest income from themselves to Washington authorities), and Dennis H. Daus and Dian Maxwell (two real estate professionals who object to being forced to participate in the IOLTA program). Other plaintiffs in the Texas suit include William Summers, a Texas resident whose funds have been tied up in IOLTA programs for more than a decade.

WLF is a public interest law and policy center with supporters nationwide, including many in Texas and Washington. It devotes a substantial portion of its resources to promoting economic liberty and a limited and accountable government.

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For further information, contact WLF Chief Counsel Richard Samp, (202) 588-0302. Copies of WLF's briefs in the Supreme Court are posted on its web site, [www.wlf.org](http://www.wlf.org).