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COURT DECLINES TO LIMIT USE OF CLASS ACTION SUITS *(General Electric Capital Corp. v. Thiessen)*

The U.S. Supreme Court yesterday declined to grant review in this tort-reform case, in which the Court was being asked to impose stricter limits on the certification of class action lawsuits in the federal courts.

The Court's decision in *General Electric Capital Corp. v. Thiessen* was a setback for the Washington Legal Foundation (WLF), which filed a brief in the case urging the Court to grant review. WLF argued that lower courts are certifying class actions too freely, which results in defendants being compelled to settle claims, even when they believe the cases lack merit. WLF filed the brief on behalf of itself and the National Association of Manufacturers.

In *Thiessen*, a federal appeals court certified as a class action a case brought by an employee who alleges that he was denied promotions because of his age, in violation of the Age Discrimination in Employment Act ("ADEA"). WLF's brief asked the Supreme Court to review that decision. WLF argued that an employment discrimination claim in which the plaintiff seeks an award of compensatory and punitive damages is virtually never appropriate for class action status, because the plaintiff's claim is likely to turn on facts that are unique to his circumstances. WLF noted that class action suits (in which the plaintiff sues on behalf of a class of individuals who are similarly situated to him) generally are not supposed to be certified unless issues common to members of the class "predominate" over any issues affecting only individual members.

"WLF is very concerned by the proliferation of class action lawsuits being filed in federal and state courts and the inhibiting effect that such suits can have on the development and expansion of business," WLF Chief Counsel Richard Samp said after learning of the Supreme Court's decision not to hear the case. "The lower court decision will exacerbate that trend by encouraging efforts to certify inappropriate, unwieldy classes that render the underlying lawsuits untriable. The Supreme Court needs to address this problem soon," Samp said. WLF is seeking

other cases that could serve as appropriate vehicles for Supreme Court examination of excessive class action certifications.

The plaintiff in this case alleges that GE Capital maintains a "pattern or practice" of discriminating against competent, older management employees who are thought to be blocking the advancement of younger, more promising employees. The plaintiff sought to include as plaintiffs 30 other older management employees who allegedly were subject to the same "pattern or practice" of discrimination. The trial court refused to certify the plaintiff class, finding that the plaintiff had not met the "predominance" requirement -- the issues of fact and law common to all plaintiffs did not predominate over issues applicable to individual employees.

The U.S. Court of Appeals for the Tenth Circuit in Denver reversed. It held that the case should be certified as a class or collective action on behalf of all 30 employees. The court said that the case should be divided into two stages, with the only issue in the first stage being whether GE Capital maintains a "pattern or practice" of discriminating against older employees. If the trial court determines that such a "pattern or practice" exists, it could then hold separate trials for each of the 30 plaintiffs to determine whether he/she was a victim of that "pattern or practice" and, if so, whether he/she is entitled to an award of compensatory or punitive damages, the appeals court held.

In its brief asking the Supreme Court to review the case, WLF argued that certifying the case as a class action will not serve any of the purposes the class action device was intended to serve -- in particular, the conservation of judicial resources. WLF noted that the same jury would be required to decide factual issues for each of the 30 plaintiffs, meaning that a single jury might end up having to sit for more than a year.

WLF argued that employment discrimination claims are virtually never appropriate for class action treatment when the chief plaintiff is seeking an award of compensatory and punitive damages (rather than mere equitable relief, such as reinstatement) or asks for a jury trial. WLF argued that many plaintiffs seek class action status not because they believe that the class action will lead to efficient consideration of outstanding issues, but because they hope to use class certification as a means of extracting a larger settlement from the defendant.

Because the federal appeals courts are divided about the propriety of class action certification in these kinds of cases, the Supreme Court will likely feel compelled in the near future to hear a case of this sort in order to resolve the conflict among the lower courts.

WLF is a public interest law and policy center with supporters in all 50 states. WLF devotes a significant portion of its resources to efforts designed to protect the economic and civil

liberties of individuals and businesses.

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