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COURT URGED TO DECERTIFY NATIONWIDE CLASS ACTION

(In re Simon II Litigation)

The Washington Legal Foundation (WLF) today asked the U.S. Court of Appeals for the Second Circuit in New York to overturn a district court decision that certified a nationwide class action on behalf of smokers seeking punitive damages against the cigarette industry.

In a brief filed in *In re Simon II Litigation*, WLF argued that the suit would be wholly unmanageable if it proceeds as a class action on behalf of millions of smokers. WLF argued that certification of the class violates federal court rules as well as the constitutional rights of both absent class members and the defendants. WLF filed its brief on behalf of itself and the National Association of Manufacturers.

"The plaintiffs' lawyers want this case to proceed as a class action solely because they know that defendants have no choice but to settle such unwieldy cases without regard to the cases' underlying merits," said WLF Chief Counsel Richard Samp after filing WLF's brief. "Such abuse of class action procedures has become all too common in recent years; ending such abuse needs to be a top priority of the tort reform movement," Samp said.

The suit was filed in federal district court in Brooklyn by 13 smokers. They claim that the tobacco companies concealed from them the effects of smoking; they further claim that that concealment led them to smoke and that as a result they contracted a variety of diseases. They sought to represent *all* smokers nationwide who have contracted any one of 14 smoking-related illnesses. However, the *sole* purpose of the class action is to recover punitive damages; other smokers would be permitted to pursue their own lawsuits for any actual damages they suffered.

Federal district judge Jack Weinstein certified the case as a nationwide class action pursuant to Rule 23(b)(1)(B) of the Federal Rules of Civil Procedure, which permits class actions when numerous people have claims against a specific pot of money that is insufficient to satisfy all claims. Judge Weinstein said that a "limited fund" exists in this case because recent Supreme Court decisions establish a cap on maximum punitive damages that may be imposed against a company based a single course of conduct. He said that this cap "creates a potential first-in-time problem," where the first plaintiffs may recover vast sums while others who arrive later are left

with a depleted fund against which they cannot recover. By certifying a "mandatory" class action (i.e., a class from which no one is permitted to opt out), Judge Weinstein claimed to have solved this "potential first-in-time problem."

In its brief filed with the Second Circuit, WLF argued that Rule 23(b)(1)(B) does not permit this case to proceed as a "limited fund" class action because the plaintiffs have failed to demonstrate the existence of a "limited fund." WLF noted that neither the district court nor the plaintiffs made any effort to determine whether total punitive damage awards would in fact exceed the pot of funds available to pay punitive damage awards, or even to determine the size of that pot. WLF argued that in the absence of such findings, certification of a "limited fund" class action is impermissible under both Rule 23 and the U.S. Constitution.

WLF argued that certification in this case was particularly troublesome because the legal principles enunciated by the district court would justify certification of a nationwide Rule 23(b)(1)(B) class for recovery of punitive damages in virtually *any* mass tort case. WLF noted that scores of major American manufacturers have been targeted by lawsuits seeking huge punitive damage awards; WLF argued that if the Second Circuit upholds class certification in this case, one can reasonably expect that nationwide punitive damages-only class actions will be certified within the Second Circuit in virtually every category of mass tort suit.

WLF is a public interest law and policy center with supporters in all 50 states. It devotes a significant portion of its resources to advancing the interests of the free-enterprise system and to ensuring that economic development is not impeded by excessive litigation.

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For further information, contact WLF Chief Counsel Richard Samp, (202) 588-0302. WLF's brief can be viewed on its web site, www.wlf.org.