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COURT DECLINES TO REIN IN ABUSIVE SECURITIES CLASS ACTIONS

(Amgen, Inc. v. Connecticut Retirement Plans and Trust Funds)

The U.S. Supreme Court today missed an important opportunity to curb abusive class action suits filed under the federal securities laws. In a 6 to 3 ruling, the Court upheld a trial court's decision to certify a plaintiff's class under a fraud-on-the-market theory even though the plaintiffs offered no evidence that the market was ever misled.

The decision was a setback for WLF, which filed a brief in *Amgen, Inc. v. Connecticut Retirement Plans and Trust Funds* arguing that the district court's order certifying a class was a prime example of the all-too-frequent willingness of courts to certify inappropriate and unwieldy classes in cases alleging that a corporation provided misleading information to investors. WLF asserted that the decision to certify a class is often outcome-determinative because it creates enormous pressure on the defendants to settle the suit without regard to the underlying merits. The Ninth Circuit subsequently affirmed the district court's order. WLF's brief asked the Supreme Court to overturn that opinion, but a majority of the Court agreed with the lower courts instead.

Justice Ginsburg, writing for six members of the Court, held that proof of materiality is not a prerequisite to class certification in a private securities-fraud class action seeking money damages under federal securities laws. The majority reasoned that because a failure to prove materiality at trial would end the case for the class, such proof need not be presented at the class certification stage to satisfy the burdens of Federal Rule 23. Justices Scalia, Thomas, and Kennedy dissented.

The defendant in this suit, Amgen, Inc., is a leading biotechnology company whose products include two drugs widely used for the treatment of anemia. The plaintiff purchased Amgen stock between 2004 and 2007 and alleges that, during that period, Amgen issued misleading statements regarding the safety of the two products, thereby causing the price of Amgen's stock to be artificially inflated. The plaintiff alleges that when the "truth" was disclosed in 2007, the price of Amgen's stock fell. It sought to represent a plaintiff class consisting of all investors who purchased Amgen stock during 2004-2007.

In a suit alleging stock fraud, the plaintiff must establish that he purchased the defendant corporation's stock in reliance on the corporation's misrepresentations. The Supreme Court has held that, under a "fraud-on-the-market" theory, reliance can

sometimes be presumed in an open and developed market. But in the absence of such a presumption of reliance, certification of a class consisting of all stock purchasers would never be appropriate, because individual issues of fact (*e.g.*, whether each shareholder relied on the alleged misrepresentation) would overwhelm common issues of fact. Federal court rules prohibit certification of a plaintiff class unless the plaintiff can demonstrate that common issues of fact “predominate.” Nevertheless, the Supreme Court decided that proof of materiality is not a prerequisite at the class certification stage.

In its brief urging the Supreme Court to reverse the appeals court’s affirmance of class certification, WLF argued that the district court erred by not permitting Amgen an opportunity to demonstrate that a “presumption of reliance” was inappropriate in this case. WLF argued that stock fraud defendants should be permitted to challenge certification by demonstrating that “the market” never relied on the alleged misrepresentations because they were not material. WLF charged that the Ninth Circuit’s decision in this case was based on its incorrect assumption that a presumption of reliance is appropriate in virtually all cases involving widely traded securities. Because Amgen proffered to the court substantial evidence that the market was well aware throughout the 2004-2007 period of potential safety problems with the two Amgen products, WLF argued that any of the information released by Amgen (which the plaintiff alleges was misleading) did not affect the market price of Amgen stock.

WLF is a public interest law and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government. In particular, WLF has appeared in numerous federal and state courts in cases raising securities law issues.

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For further information, contact WLF Senior Counsel Cory Andrews, 202-588-0302. A copy of WLF's brief is posted on its web site, www.wlf.org.