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COURT DECLINES TO IMPOSE LIMITS ON SECURITIES CLASS ACTIONS

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

The U.S. Court of Appeals for the Ninth Circuit held today that plaintiffs' lawyers bringing a securities fraud lawsuit are entitled to class-action status even in the absence of evidence that "the market" actually relied on the defendant's allegedly false statements. The court held that a defendant's evidence that the allegedly false statements were not material – and thus could not reasonably have been relied on – may not be introduced for the purpose of defeating class certification but rather is only relevant at later stages of the case (*e.g.*, at trial or in connection with a summary judgment motion).

The decision in *Connecticut Retirement Plans and Trust Funds v. Amgen, Inc.* was a setback for the Washington Legal Foundation (WLF), which filed a brief urging the court to overturn class certification. WLF argued that the district court's certification was a prime example of the too-frequent willingness of courts to certify 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 its merits.

In holding that evidence of materiality is not relevant to the class certification issue, the Ninth Circuit placed itself squarely in conflict with decisions from three other federal appeals courts. The existence of that conflict makes it highly likely that the Supreme Court will be forced to take up the issue in order to resolve the conflict.

"In certain limited circumstances, the fraud-on-the-market theory is an appropriate rationale for certifying a securities fraud case as a class action," said WLF Chief Counsel Richard Samp in response to the decision. "But where, as here, there is strong evidence that the market as a whole did not rely on the allegedly false statements on which the plaintiff claims to have relied, certification is unwarranted. Under those circumstances, individual issues of fact will predominate over common issues because the plaintiffs will need to demonstrate reliance on a shareholder-by-shareholder basis," Samp said.

The defendant in this suit is Amgen, Inc., a biotechnology company whose products include Epogen and Aranesp, widely used for the treatment of anemia. The plaintiff is a pension fund that purchased Amgen stock. The plaintiff alleges that Amgen issued misleading statements regarding the safety of the two products, and that the price of Amgen's stock was thereby inflated. It alleges that when the "truth" was disclosed to the investing public in 2007, the price of Amgen's stock fell. The pension fund seeks to represent a class consisting of all

investors who purchased Amgen stock during 2004-2007.

In a suit alleging stock fraud, the plaintiff needs to 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. The Supreme Court explained in a 1988 decision:

The fraud on the market theory is based on the hypothesis that, in an open and developed market, the price of a company's stock is determined by the available information regarding the company and its business. . . . Misleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misrepresentations.

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. Fed.R.Civ.P. 23 prohibits certification of a plaintiff class unless the plaintiff can demonstrate that common issues of fact "predominate."

In its brief urging the appeals court to overturn the district court's class certification order, WLF argued that the district court erred in not permitting Amgen an opportunity to demonstrate that a "presumption of reliance" was inappropriate in this case. The appeals court disagreed, finding that class certification is appropriate whenever the plaintiff demonstrates that: (1) the stock in question trades in an "efficient" market (which will always be true of any widely traded stock); and (2) the alleged misrepresentation was public. Even if the plaintiff merely alleges (but does not prove) that the alleged misrepresentation was material, the defendant is not permitted defeat class certification by introducing evidence to rebut materiality, the appeals court held. The court did not respond to WLF's assertion that forcing defendants to delay their rebuttal would force many defendants to settle even nonmeritorious class action suits.

WLF is a public interest law and policy center with supporters nationwide. It has appeared in numerous federal and state courts in cases raising securities law issues.

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