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COURT URGED TO CRACK DOWN ON ABUSIVE SECURITIES CLASS ACTIONS

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

The Washington Legal Foundation (WLF) this week urged the U.S. Court of Appeals for the Ninth Circuit to crack down on abusive class action suits filed under the securities laws, by refusing to certify plaintiff classes under a fraud-on-the-market theory when there is no evidence that the market was ever misled.

In a brief filed in *Connecticut Retirement Plans and Trust Funds v. Amgen, Inc.*, WLF argued that the district court's order certifying a class is 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 recently affirmed the district court's order. WLF's brief asked the appeals court to grant rehearing *en banc* in the case.

"A class action is appropriate when a large group of individuals have claims for which the operative facts and law are nearly identical – particularly where the recovery that any one plaintiff might receive is too small to make it worthwhile to file a separate lawsuit," said WLF Chief Counsel Richard Samp after filing WLF's brief. "But where, as here, there can be no presumption that any shareholder relied on the alleged misrepresentation – and thus reliance would need to be proven on a plaintiff-by-plaintiff basis – there is no legitimate basis for certifying a plaintiff class," Samp said.

The defendant in this suit is Amgen, Inc., a biotechnology company whose products include two drugs widely used for the treatment of anemia. The plaintiff purchased Amgen stock between 2004 and 2007. It alleges that, during the 2004-2007 period, 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 in 2007, the price of Amgen's stock fell. It seeks to represent a plaintiff 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. Federal court rules prohibit certification of a plaintiff class unless the plaintiff can demonstrate that common issues of fact "predominate."

In its brief urging the appeals court to rehear the case *en banc*, 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. WLF noted that four of the other five federal appeals courts that have addressed the issue have determined that stock fraud defendants are permitted to challenge certification by demonstrating that "the market" never relied on the alleged misrepresentation s because they were not material. WLF charged that the district court's order was based on its incorrect assumption that a presumption of reliance is appropriate in virtually all cases involving widely traded securities. WLF noted that 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, and thus 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 Chief Counsel Richard Samp, 202-588-0302. A copy of WLF's brief is posted on its web site, www.wlf.org.