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WLF Urges California Supreme Court to Bar Class Actions When Class Members Cannot Be Identified

(Noel v. Thrifty Payless, Inc.)

“When courts permit a case to proceed as a class action even when the identity of class members cannot be ascertained, only the plaintiffs’ lawyers win. The evidence demonstrates that the vast majority of consumers derive no benefit when a class of consumers is certified, primarily because they rarely ever find out about the lawsuit.”

—Richard Samp, WLF Chief Counsel

WASHINGTON, DC— Washington Legal Foundation (WLF) today called on the California Supreme Court to prohibit certification of a class action when there is no means of identifying members of the plaintiff class. In a brief filed in *Noel v. Thrifty Payless, Inc.*, WLF argues that Section 382 of the California Code of Civil Procedure (which is similar to the rule governing class actions in federal court) does not permit class certification when class members cannot be identified, because absent class members can derive no benefit from a lawsuit if (due to their unidentifiability) they are never notified of the suit.

The issue of whether a feasible method exists for identifying class members is often referred to as “ascertainability.” California courts agree that a plaintiff seeking class certification must demonstrate ascertainability, but they disagree on the meaning of that term. The plaintiff in this case argues that it is sufficient to demonstrate that the class is well-defined, so that individuals who learn about the lawsuit can easily determine whether they are members of the plaintiff class. WLF urges the California Supreme Court to adopt the definition employed by the lower courts in *Noel*: a proposed class is not ascertainable unless the named plaintiff demonstrates a means by which absent class members can be identified—so that they can be mailed the constitutionally mandated notice of the lawsuit and then decide whether to participate in the suit or opt out.

The case involves a claim that Rite Aid sold inflatable swimming pools that bore misleading labeling. The packaging accurately stated the pool’s dimensions (“8 FT X 25 IN”), but the plaintiff contends that the pool he purchased was smaller than the one depicted on the packaging.

WLF filed its brief on behalf of itself and the California Retailers Association. San Francisco attorney Paul Utrecht assisted WLF in preparing the brief.

Celebrating its 41st year, WLF is America’s premier public-interest law firm and policy center advocating for free-market principles, limited government, individual liberty, and the rule of law.

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