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Media Contact: Glenn Lammi | glammi@wlf.org | 202-588-0302

WLF Urges Ninth Circuit To Reject Use of Averaged Injuries as Basis for Class Certification

(In re: *Packaged Tuna Antitrust Litigation*)

“A group of plaintiffs clamoring to average their injuries calls to mind the man with his head in an oven and his feet in a freezer who says that, overall, he’s pretty warm.”

—Corbin K. Barthold, WLF Senior Litigation Counsel

WASHINGTON, DC—Washington Legal Foundation today filed an *amicus curiae* brief urging the Ninth Circuit to reverse an order that stands class certification on an averaging of the alleged harm suffered by the class members.

The plaintiffs seek to press antitrust claims on behalf of three classes of purchasers of packaged tuna. To do so, they must establish that common issues “predominate” within each class. The plaintiffs convinced the trial court to find such predominance, and grant class certification, based on an averaging of the alleged anticompetitive overcharges suffered within each proposed class.

WLF’s brief discusses four ways in which the adoption of this averaging technique created error. *First*, to have standing to sue under Article III of the Constitution, a plaintiff must have suffered an injury in fact. Averaging a class’s damages may improperly hide the fact that many class members have no injury.

Second, the Constitution’s Due Process Clause protects basic procedural rights, including the right to put on a defense and the right to be held liable only for harms one has caused. Averaging violates due process by depriving the defendant of the chance to raise individual defenses against each party the defendant has not harmed.

Third, the Rules Enabling Act ensures that a procedural rule such as the class mechanism cannot “enlarge or modify any substantive right.” Yet the class-certification order relieves class members of the need to show that they *each* suffered an injury under the antitrust laws.

Finally, the predominance requirement itself (Rule 23(b)(3)) does not tolerate an averaging of injuries. To retreat to an averaging method that obscures individual class members’ lack of injury is, in effect, to admit an *absence* of predominance.

Celebrating its 43rd year as America’s premier public-interest law firm and policy center, WLF advocates for free-market principles, limited government, individual liberty, and the rule of law.

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