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June 5, 2024

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WLF Urges Tenth Circuit To Adopt A Robust Ascertainability Requirement

(Dunn v. Santa Fe Natural Tobacco Co.)

“A robust ascertainability requirement is key to protecting the due-process rights of both plaintiffs and defendants.”

—John Masslon, WLF Senior Litigation Counsel

WASHINGTON, DC— Washington Legal Foundation (WLF) today urged the U.S. Court of Appeals for the Tenth Circuit to affirm in part and reverse in part a class-certification order in a large multi-district litigation case. In an amicus brief, WLF argues that the Tenth Circuit should join the First, Third, and Fourth Circuits in adopting a robust ascertainability requirement.

The case arises from Santa Fe Natural Tobacco Company’s alleged deceptive marketing of its Natural American Spirit cigarettes. Plaintiffs contend that the marketing of NAS cigarettes as all-natural and additive-free deceived consumers into purchasing and paying more for the cigarettes. Plaintiffs moved to certify twelve state-specific classes of all NAS cigarette purchasers and a nationwide class of consumers who bought NAS’s menthol cigarettes. Although largely denying the motion, the District Court certified six statewide classes of consumers who bought the menthol cigarettes.

WLF’s brief explains why the Tenth Circuit should join those circuits that require an administratively feasible way to identify who is a class member for a proposed class to be ascertainable. A class cannot be identified before a merits trial unless it is ascertainable. And under Supreme Court precedent, classes must be identified before a merits trial occurs.

WLF’s brief also describes how a robust ascertainability requirement protects the due-process rights of both plaintiffs and defendants. Absent class members’ due-process rights include the right to opt out of a class action and to pursue their individual claims separately from the class. But these due-process rights disappear if courts apply a lax ascertainability standard because the absent class members don’t learn of the case until it is too late to opt out and pursue claims individually. Similarly, a lax ascertainability standard essentially returns to the days of one-way intervention. So defendants cannot be assured that a merits victory will preclude future claims by absent class members without a robust ascertainability requirement.

Celebrating its 47th 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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