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WLF Urges Supreme Court to Reject Class Certification Without Proof of Injury (*Bayer HealthCare LLC v. Drake*)

“Rule 23 requires common proof of injury before certification, not a promise to look later.”

— Cory Andrews, WLF General Counsel & Vice President of Litigation

WASHINGTON, DC—Washington Legal Foundation (WLF) today urged the U.S. Supreme Court to grant review in a challenge to the Ninth Circuit’s certification of two damages classes. In its amicus brief, WLF contends that affirming those classes without evidence of Article III injury improperly lets class size, not proof of harm, dictate what a business must pay.

The case arises from claims that buyers of Bayer’s Natural Fruit Bites overpaid because the label said “Natural.” Bayer sold less than \$2 million of the product in New York and California combined. Plaintiffs seek \$36.2 million in statutory damages for the New York class alone. Their survey expert found that removing “Natural” had no statistical impact, and their damages expert never ran his model. The Ninth Circuit affirmed both classes anyway, and the panel never mentioned Article III.

In its amicus brief, WLF argues that Rule 23 requires proof of a common injury before certification, not a promise to look for one later. An unrun damages model is not evidence, and a “reasonable consumer” standard cannot stand in for actual buyers. If allowed to stand, the decision will reward the plaintiffs’ strategy of keeping injury vague and leave businesses unable to price a risk that tracks class size rather than harm.

Celebrating its 49th 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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