

**January 30, 2009**

COURT REINSTATES TORT SUIT ALLEGING INTERNATIONAL LAW VIOLATION

(Abdullahi v. Pfizer, Inc.)

The U.S. Court of Appeals for the Second Circuit today reinstated a lawsuit claiming that a pharmaceutical company violated international law when a team of its doctors provided emergency medical aid to children in Nigeria suffering from meningitis. The plaintiffs contend that they were provided a unproven drug without being fully informed of the potential risks of their treatment.

The decision to reinstate the suit was a setback for the Washington Legal Foundation, which filed a brief in the case, *Abdullahi v. Pfizer, Inc.*, urging that the trial court's dismissal be affirmed. WLF argued that the suit was unauthorized in the absence of evidence that there is a universally recognized, obligatory, and well-defined international norm prohibiting "medical experimentation" in the absence of informed consent. WLF had urged the court to reject claims that such suits are authorized by the Alien Tort Statute (ATS), a 1789 law that lay dormant for nearly 200 years before activists began seeking to invoke it in the past several decades.

The appeals court panel voted 2-1 to reinstate the suit. The majority rejected WLF's argument that an alleged failure to provide patients with informed consent is not actionable under the ATS because it does not rise to the level of a universally condemned violation of international law. WLF argued that suits under the ATS are limited to allegations akin to genocide, war crimes, or slave trading. The appeals court disagreed and held that there is a "firmly established" norm of international law that deems "medical experimentation" to be on a par with the most serious of international law violations. However, the court was unable to provide a single prior instance in which action had been taken against private parties under remotely similar circumstances.

"The ATS was adopted in 1789 to allow the federal courts to hear cases involving piracy and assaults on ambassadors," said WLF Chief Counsel Richard Samp in response to the appeals court's decision. "But this irresponsible decision transforms the ATS into a tool for second-guessing the overseas conduct of every American corporation. The Supreme Court needs to step in to bring a halt to this perversion of the ATS," Samp said. "The decision turns every medical malpractice case into an international law issue."

WLF has pledged to support any appeal that Pfizer may take from today's decision. WLF noted that the Second Circuit has been among the most activist in inventing new causes of action under the ATS.

In this case, Pfizer sent a team of doctors to Kano, Nigeria in 1996 to provide *pro bono* medical care to assist in dealing with a severe outbreak of meningitis in children. The doctors treated their patients with Trovan, an Pfizer-manufactured antibiotic that had not yet been approved by FDA for treating pediatric meningitis in the United States. The children treated by the Pfizer doctors had a survival rate superior that other Nigerian children receiving treatment. Nonetheless, plaintiffs' lawyers filed suit against Pfizer on behalf of some of the patients and their parents, alleging that Pfizer had failed to inform them, prior to commencing treatment, that Trovan was not yet fully approved by FDA. In its decision today, the appeals court agreed with the plaintiffs' assertion that Pfizer's alleged failure to obtain informed consent violated international law and is actionable in U.S. federal courts under the ATS. The appeals court returned the case to the trial court to provide the plaintiffs an opportunity to prove their claims.

Much of the legal dispute between the parties centered around the meaning of the U.S. Supreme Court's 2004 decision in *Sosa v. Alvarez-Machain*, which dismissed the claims of a Mexican doctor who sued under the ATS after he was kidnapped in Mexico at the instigation of U.S. law enforcement authorities and brought to this country to face criminal charges. The plaintiffs' bar has insisted that *Sosa* actually endorsed a broad reading of the ATS. In its brief, WLF argued that, to the contrary, *Sosa* made clear that alleged violations of international law only rarely are actionable in federal court. Among the three appeals court panel members, only dissenting judge Richard Wesley agreed with WLF's interpretation of *Sosa*.

WLF argued that *Sosa* stands for the proposition that, in general, it is up to Congress to decide whether to create private rights of action for alleged violations of international law. WLF noted that Congress has passed a law (the Torture Victim Protection Act) that permits victims of state-sponsored torture to file tort suits in U.S. courts even though the torture occurred overseas; WLF argued that Congress's failure to adopt similar legislation covering the types of medical misconduct alleged by plaintiffs is an indication that no right of action should be recognized in this case.

The Washington Legal Foundation is a public interest law and policy center with supporters in all 50 States. It devotes a substantial portion of its resources to defending free enterprise, individual rights, and a limited and accountable government.

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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.