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COURT URGED NOT TO PERMIT TORT SUIT ALLEGING INTERNATIONAL LAW VIOLATION (Abdullahi v. Pfizer, Inc.)

The Washington Legal Foundation (WLF) yesterday urged the U.S. Court of Appeals for the Second Circuit to dismiss claims that a pharmaceutical company violated international law when a team of its doctors provided emergency medical aid to children in Nigeria suffering from meningitis. In a brief filed in *Abdullahi v. Pfizer, Inc.*, WLF argued that federal law does not permit private parties to file tort suits in federal court asserting that doctors violated international law by allegedly treating patients without first obtaining the patients' informed consent. WLF 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 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 after filing WLF's brief. "It has been transformed by activist attorneys into a tool for second-guessing American foreign policy and for attacking the overseas conduct of corporations. The courts needs to step in to bring a halt to this perversion of the ATS," Samp said.

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, lawyers from Milberg Weiss (a well-known New York plaintiffs' law firm) 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. The plaintiffs allege that Pfizer's alleged failure to obtain informed consent violated international law and is actionable in U.S. federal courts under the ATS.

The district court dismissed the suit for failure to state a claim upon which relief could be granted. Milberg Weiss appealed that decision to the Second Circuit. WLF's brief urges the Second Circuit to affirm the district court's dismissal.

Much of the legal dispute between the parties centers 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.

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.

WLF argued that although *Sosa* acknowledged the *possibility* that the federal courts could recognize federal common law rights of action under the ATS for violations of international law, the Court was very clear that courts should go about doing so only with "great caution." In particular, any such rights of action should be recognized only when the international law right is clearly and universally acknowledged (*e.g.*, prohibitions against genocide) and when recognition of a right of action would not have negative "practical consequences," WLF argued. WLF argued that the practical consequences of the plaintiffs' proposed right of action would be extremely problematic; among other things, it would essentially federalize medical malpractice law, because both aliens and U.S. citizens would be permitted to file federal suits alleging that doctors and/or manufacturers provided inadequate warnings before providing medical services -- even if the services were provided in the U.S.

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.