Litigation Update

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Court Declines To Permit "Mass Action" Removal Of Cases To Federal Court

(Romo v. Teva Pharmaceuticals USA, Inc.)

(Corber v. Xanodyne Pharmaceuticals, Inc.)

U.S. Court of Appeals for the Ninth Circuit

The U.S. Court of Appeals for the Ninth Circuit issued a decision yesterday that declined to permit out-of-state defendants to remove lawsuits from state court to federal court when the suit involves numerous plaintiffs. The appeals court's 2-1 ruling enables plaintiffs' attorneys to exploit an apparent loophole in the Class Action Fairness Act (CAFA), a 2005 federal law designed to permit removal of almost all class action lawsuits into federal court.

The decision issued in the combined cases of *Romo v. Teva Pharmaceuticals USA, Inc.* and *Corber v. Xanodyne Pharmaceuticals, Inc.* was a setback for the Washington Legal Foundation, which filed a brief urging the Ninth Circuit to reverse the trial court's decision remanding a massive product liability suit back to state court. WLF urged the court to rule that the case was removable as a CAFA "mass action." The appeals court held that the suit did not qualify as a "mass action" and thus was not subject to CAFA. WLF had argued that Congress intended CAFA's "mass action" provision to apply whenever, as here, a suit combines the claims of 100 or more plaintiffs.

A silver lining in the decision was a forceful dissent written by Judge Ronald Gould, a member of the three-judge panel that heard the two cases. Judge Gould stated that the majority's decision directly conflicted with a decision of the U.S. Court of Appeals for the Seventh Circuit. The existence of an inter-circuit conflict makes this case a prime candidate for eventual review by the U.S. Supreme Court.

"The appeals court decision frustrates the will of Congress that cases of this sort be removable to federal court as a means of ensuring that out-of-state defendants can have their cases heard in an impartial forum," said WLF Chief Counsel Richard Samp following the Ninth Circuit decision. "If allowed to stand, the decision will serve as a roadmap for plaintiffs' lawyers seeking to keep their lawsuits out of federal court," Samp said.

The case involves the product liability claims of more than 1,500 individuals who claim to have suffered injuries after taking medications containing the active ingredient propoxyphene—a drug that was widely marketed in this country between 1957 and 2010. Named as defendants are nearly a dozen pharmaceutical manufacturers and wholesalers.

CAFA permits defendants to move cases from state court to federal court if there are more than 100 plaintiffs and certain other conditions are met. In an effort to defeat the defendants' removal rights, the plaintiffs' attorneys divided their 1,500 clients among 41 separate lawsuits filed in state

court in California, thereby ensuring that no one suit exceeded CAFA's 100-plaintiff threshold. The plaintiffs thereafter filed a petition asking the California court to coordinate the 41 lawsuits "for all purposes." The defendants asserted that the petition to coordinate effectively increased the number of plaintiffs above the 100-plaintiff threshold, and they thus sought to remove the 41 "coordinated" lawsuits to federal court. In response, the district court held that CAFA's "mass action" provision was inapplicable, and it remanded the cases to state court. Yesterday's appeals court ruling affirmed the remand order.

In its brief urging reversal of the remand order, WLF argued that Congress adopted CAFA to ensure that when a lawsuit is sufficiently large, out-of-state defendants can have their cases heard in federal courts, which are generally viewed as less susceptible to the sorts of home-state bias to which some state courts fall victim. WLF argued that CAFA was designed to prevent precisely the sorts of gamesmanship employed by the plaintiffs' attorneys in this case in their effort to defeat federal jurisdiction. The attorneys divided up their 1,500 clients into groups of less than 100 and then sought to bring them back together again by means of a coordination petition; WLF argued that the courts should honor substance over form and treat 41 lawsuits bound together by a coordination petition as the functional equivalent of a single 1,500-plaintiff lawsuit.

CAFA's "mass action" provision permits removal only if attorneys propose that the claims of at least 100 plaintiffs be "tried jointly." The trial court held that the "tried jointly" requirement is met only if attorneys propose that the jury *simultaneously* try the claims of 100 or more plaintiffs. The Ninth Circuit agreed with WLF that CAFA contains no simultaneous trial requirement. However, it disagreed with WLF that the plaintiffs' state-court motion that the cases be coordinated "for all purposes" indicated that they sought coordination of trials. Rather, the appeals court held, the plaintiffs most likely were seeking coordination of pretrial proceedings only.

WLF is a public interest law and policy center with supporters in all 50 states. It devotes a significant portion of its resources to reforming the tort liability system.

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.