Press Release

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Tenth Circuit Decision Puts Off Recognizing Removal Rights Under CAFA, Temporarily Thwarts WLF

(In re Johnson & Johnson)

"The plaintiffs' bar's antics should not be permitted to frustrate the will of Congress … If a 'mass action' before a single judge has 100 or more plaintiffs, removal under CAFA is warranted."—Rich Samp, WLF Chief Counsel

WASHINGTON, DC—The U.S. Court of Appeals for the Tenth Circuit this week declined to fully bless efforts by out-of-state defendants to remove related multi-plaintiff lawsuits from state to federal court. But the court suggested that the case (*In re Johnson & Johnson*) would likely return to federal court. The decision was a partial setback for WLF, which filed a brief arguing the case should proceed in federal court. WLF believes the district judge's order remanding the suit back to state court misconstrued the Class Action Fairness Act (CAFA), a 2005 federal law designed to permit removal of virtually all large class action and "mass action" lawsuits to federal court. The appeals court balked, noting that at least for now the plaintiffs remained in groups of fewer than 100 individuals per case, the numerical threshold for removal under CAFA.

CAFA permits defendants to remove most "mass actions"—cases with 100 or more plaintiffs and very large damage claims—from state court to federal court. The plaintiffs' bar uses numerous tactics to subvert removal, such as here dividing hundreds of virtually identical claims among several lawsuits, to keep them all below CAFA's 100-plaintiff minimum. WLF argued that Congress intended to permit CAFA removal whenever 100 or more claims are filed in coordinated legal proceedings before a single judge. The Court ruled that removal was premature because the plaintiffs had not yet taken any steps to "coordinate" the proceedings. The court added, however, that once the plaintiffs take steps to coordinate—as they surely will by, for example, asking the trial judge to issue a single decision on issues of law common to all 650 plaintiffs—then the defendants will be permitted to remove the cases to federal court.

The product liability cases against J&J and its Ethicon, Inc. subsidiary claim injuries from pelvic mesh surgical devices manufactured by Ethicon. Following the court's decision, WLF issued the following statement by Chief Counsel Richard Samp: "The plaintiffs' bar's antics should not be permitted to frustrate the will of Congress that large class and 'mass' actions be removable to federal court to ensure that out-of-state defendants can have their cases heard in an impartial forum. If a 'mass action' before a single judge has 100 or more plaintiffs, removal under CAFA is warranted. It should make no difference when attorneys game the system by dividing their coordinated claims into groups of fewer than 100 plaintiffs."

WLF is a public interest law firm and policy center. WLF devotes a substantial portion of its resources to legal reform and reining in excessive litigation, including defense of CAFA.

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