Press Release

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In WLF Victory, W.Va. High Court Rejects Radical Liability Theory for Drug Innovators

(McNair v. Johnson & Johnson)

"Innovator liability is a radical and unsound departure from traditional principles of tort law. If adopted by West Virginia, the theory would dramatically increase healthcare costs and have a devastating impact not only on innovator drug makers but on manufacturers in other industries as well."
—Cory Andrews, WLF Senior Litigation Counsel

WASHINGTON, DC—On May 11, 2018, the West Virginia Supreme Court of Appeals rejected a novel theory of liability that would hold pharmaceutical manufacturers liable for injuries allegedly caused by drugs they neither manufactured nor sold. The decision marked a victory for the Washington legal Foundation (WLF), which filed a brief in the case in support of Johnson & Johnson's Janssen Pharmaceuticals, Inc. (Janssen).

The case, *McNair v. Johnson & Johnson*, arose from a suit by Larry and Kimmy McNair alleging that Mrs. McNair's respiratory illness was caused by ingesting levofloxacin, an antibiotic drug marketed by Janssen under the trade name Levaquin®. But the McNairs' pharmacy records revealed that Mrs. McNair never took Levaquin®; rather, she took a generic version of levofloxacin. Nonetheless, simply because federal law requires levofloxacin's generic label to be identical to that of Levaquin®, the McNairs sought to hold Janssen liable in tort for injuries caused by the generic manufacturer's drug.

WLF's brief cautioned that adopting the plaintiffs' expansive theory of liability would mark a sharp and unwarranted break from longstanding principles of tort law by conflating the "foreseeability" of an injury with the existence of a legal duty in the first place. While the West Virginia Supreme Court of Appeals acknowledged that foreseeability of risk is an important consideration in establishing negligence, it emphasized that "broader policy considerations" weighed against expanding liability to other manufacturers.

Because preemption of liability for generic manufacturers is necessary to accomplish Congress's policy objectives, WLF further argued in its brief that state courts are in no position to second guess Congress's carefully calibrated regulatory regime for generic and branded drugs. Agreeing with WLF, the West Virginia Supreme Court of Appeals declined to alter the delicate policy balance that Congress has watchfully maintained for many decades, stating that "the remedy for persons allegedly harmed by the use of a generic drug must rest with Congress or the FDA."

WLF filed its brief with the *pro bono* assistance of Mark A. Carter and Forrest H. Roles of the Charleston, WV office of the law firm Dinsmore & Shohl LLP.

Celebrating its 41st 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.