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Court Urged To Protect Mass-Action Defendant's Right To Federal Forum

(Commonwealth of Kentucky ex rel. Conway v. GlaxoSmithKline)

The Washington Legal Foundation (WLF) this week urged the U.S. District Court for the Eastern District of Kentucky not to allow the Commonwealth of Kentucky to deprive an out-of-state business defendant of its right to a federal forum by filing a *parens patriae* suit in state court.

In a brief filed in *Commonwealth of Kentucky ex rel. Conway v. GlaxoSmithKline*, WLF argued that out-of-state defendants in interstate cases of national importance ought to be permitted to remove those cases from state to federal court. Congress adopted the Class Action Fairness Act ("CAFA") in 2005 to ensure that the right of removal is protected for most such defendants, particularly in cases seeking significant damages and in which the plaintiff (as here) is suing to collect for alleged injuries on behalf of numerous individuals. In its brief, WLF expressed concern that remanding such cases to state court will only allow plaintiffs' lawyers to game the system and avoid removal—the very thing that Congress sought to avoid when it adopted CAFA.

"Kentucky's remand motion seeks to frustrate the desire 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 Senior Litigation Counsel Cory Andrews after filing WLF's brief. "Under these circumstances, an order remanding the case back to state court would only serve as a roadmap for plaintiffs' lawyers seeking to keep their lawsuits out of federal court" Andrews said.

The suit was filed in state court by the Attorney General of Kentucky against GlaxoSmithKline ("GSK"), a leading national pharmaceutical company. The complaint alleges that GSK improperly promoted Avandia, a Type-2 diabetes drug, by making misleading and deceptive claims "in Kentucky and nationwide" about Avandia's efficacy and safety. The complaint further alleges that GSK's allegedly improper promotion of Avandia "caused the Commonwealth and its citizens to spend substantial sums for the purchase of and/or reimbursement for Avandia." The lawsuit asks that GSK be required to refund the substantial costs borne by "the Commonwealth of Kentucky and its citizens" in purchasing Avandia. GSK invoked CAFA to remove the case from state court to federal court, but the Commonwealth of Kentucky promptly moved to remand the case back to state court.

The suit is not a conventional "mass action," as that term is commonly used: the Kentucky Attorney General, suing on behalf of the Commonwealth of Kentucky, is the only named plaintiff in the lawsuit. But, WLF argued, the suit is functionally equivalent to a standard mass action in that the Attorney General seeks to obtain a recovery for hundreds of Kentucky consumers, identical to the recovery that would be available in a standard mass action. WLF emphasized that Congress intended CAFA to be interpreted broadly and to be applied to cases of this sort so as to permit

removal to federal court.

In its brief, WLF argued that the suit satisfies the requirements under CAFA of a mass action for purposes of removal: it is a civil action where the monetary claims of 100 or more persons are proposed to be tried jointly on the grounds that the claims involve common questions of law or fact; the aggregate amount in controversy is at least \$5 million; the claims arise from more than 100 Kentucky citizens who are minimally diverse from GSK. Those claims, WLF reminded the court, are being brought by the Commonwealth in a representative capacity on behalf of those citizens who allegedly suffered the harm.

WLF's brief was filed with the pro bono assistance of Scott McIntyre, a partner with the law firm Baker & Hostetler LLP.

WLF is a public interest law and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending the right of class-action defendants to have their disputes resolved in a federal forum.

For further information, contact WLF Senior Litigation Counsel Cory Andrews, (202) 588-0302. A copy of WLF's brief is posted on its web site, www.wlf.org.