News Release

Washington Legal Foundation
Advocate for Freedom and Justice®
2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302 wlf.org

FOR IMMEDIATE RELEASE August 14, 2013

Court Urged To Allow Nonresidents To Remove Cases To Federal Court

(Corber v. Xanodyne Pharmaceuticals, Inc.)

The Washington Legal Foundation (WLF) this week urged the U.S. Court of Appeals for the Ninth Circuit to uphold the right of out-of-state defendants to remove lawsuits from state court to federal court when the suit involves numerous plaintiffs.

In a brief filed in *Corber v. Xanodyne Pharmaceuticals, Inc.*, WLF argued that the trial court's decision remanding a massive product liability suit back to state court was inconsistent with the Class Action Fairness Act (CAFA), a 2005 federal law designed to permit removal of virtually all large class action lawsuits into federal court. The trial court held that the suit did not qualify as a "mass action" and thus was not subject to CAFA, but WLF argued that Congress intended CAFA to apply whenever, as here, the suit combines the claims of 100 or more plaintiffs.

"The trial 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 after filing WLF's brief. "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 any 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. In July, the Ninth Circuit agreed to hear an appeal from 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 district 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. WLF argued in response that CAFA contains no simultaneous trial requirement, noting that courts virtually never hear more than a handful of individual product liability claims at the same time. Rather, the "tried jointly" provision requires merely that the trials be coordinated before a single judge. WLF noted that when numerous similar claims are coordinated before a single judge, the judge will often allow the cases to proceed to trial two or three at a time, in the hope that initial, "bellwether" trials can facilitate settlement of later cases.

WLF devoted much of its brief to challenging the district court's statements that federal courts should very strictly construe the removal statutes and should always remand cases to state court whenever there is any serious doubt about the case's removability. WLF argued that the Supreme Court has never endorsed such a "presumption against removability," and that such a presumption undermines one of the central features of the federal system of government envisioned by the Framers of the Constitution: that federal courts be available to provide out-of-state litigants with an impartial judicial forum. WLF argued that those who view federal court removal jurisdiction as an affront to principles of federalism are simply uninformed about constitutional history.

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.