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Court Urged To End Expansion Of Civil RICO Claims

(Pfizer Inc. v. Kaiser Found. Health Plan, Inc., No. 13-289)

The Washington Legal Foundation (WLF) this week urged the U.S. Supreme Court to halt the seemingly endless expansion of civil lawsuits brought under RICO (the acronym for the federal Racketeer Influenced and Corrupt Organizations Act). In a brief filed in *Pfizer Inc. v. Kaiser Found. Health Plan, Inc.*, WLF argued that plaintiffs should not be able to recover in a civil RICO action unless they can demonstrate that their alleged injuries were “proximately caused” by the defendant’s conduct, and evidence that the injuries were “foreseeable” is insufficient to make that showing. WLF asked the Court to review (and ultimately overturn) a lower court judgment finding that proximate cause existed and awarding massive damages against a drug company, despite the fact that the alleged causal chain between the company’s actions and the alleged injury was highly attenuated.

“We are concerned that the reflexive invocation of RICO by civil litigants engaged in otherwise garden-variety commercial disputes does violence to the original purpose of RICO and unnecessarily burdens our federal judicial system,” WLF Chief Counsel Richard Samp said after filing WLF’s brief. “Congress adopted RICO as a tool to fight organized crime. It was not meant as an everyday tool for litigants hoping to take advantage of RICO’s generous treble-damage and attorney fee provisions,” Samp said.

The case involves an effort by several third-party health insurance payers (TPPs) to recover payments they made to their customers as reimbursement for the cost of Neurontin, an FDA-approved drug prescribed to the customers by their doctors. The TPPs contend that the prescriptions were not medically warranted. They further contend that the doctors wrote the Neurontin prescriptions in response to inaccurate medical information disseminated by Pfizer (Neurontin’s manufacturer) regarding Neurontin’s effectiveness. They further contend that dissemination of the inaccurate information (clinical studies that purported to demonstrate Neurontin’s effectiveness for certain “off-label” uses) constituted “racketeering activity” within the meaning of RICO. The U.S. Court of Appeals for the First Circuit affirmed a \$147 million RICO judgment against Pfizer even though: (1) the plaintiffs introduced no testimony from doctors indicating that they wrote Neurontin prescriptions in response to Pfizer’s studies; and (2) Pfizer introduced testimony from numerous doctors that they did not so rely.

In September, Pfizer filed a U.S. Supreme Court certiorari petition in the case. WLF this week filed a brief urging the Court to grant the petition and ultimately overturn the appeals court decision. WLF argued that the First Circuit decision conflicts both with decisions from the U.S. Supreme Court and with decisions from other appeals courts.

In a series of decisions over the past 20 years, the Supreme Court has determined that Congress intended that RICO plaintiffs demonstrate that the defendant's actions were not only the "but-for cause" of their injuries but also were the "proximate cause" – *i.e.*, that the actions were the "direct" cause without any need for intervening actions by independent third parties. WLF argued that Pfizer's allegedly improper promotional activities cannot be deemed a "direct" cause of the TPPs' injuries because they would not have had to pay any reimbursement were it not for the independent decisions of numerous doctors – professionals trained to evaluate clinical studies that purport to analyze the safety and efficacy of FDA-approved drugs – to prescribe Neurontin to their patients. WLF argued that, in light of the attenuated relationship between Pfizer's promotional activity and the TPPs' alleged injuries, the TPPs failed to demonstrate proximate cause.

WLF also asserted that the TPPs failed to demonstrate that Pfizer's activity was even a "but-for cause" of the alleged injuries. The TPPs' expert witness submitted a regression analysis that purported to demonstrate a direct causal relationship between Pfizer's dissemination of clinical studies and increased prescriptions for Neurontin. But she admitted that the analysis was based on aggregate evidence only and did not take into account that many doctors may have chosen to prescribe Neurontin based on their own clinical experiences rather than on what they might have heard from Pfizer. WLF argued that other federal appeals courts have held that a RICO plaintiff cannot establish but-for causation based solely on aggregate evidence. WLF stated that a finding of but-for causation is particularly inappropriate when (as here) the only testimony from doctors who testified at trial was that they did not rely the drug company's promotional activity when deciding to prescribe an FDA-approved drug.

WLF also argued that abuse of civil RICO by plaintiffs' lawyers will increase dramatically if the First Circuit's relaxed causation requirements are upheld. WLF is a public interest law and policy center with supporters in all 50 states. It devotes a significant portion of its resources to promoting civil justice reform, including efforts to rein in overly expansive theories of tort liability. WLF filed its brief on behalf of itself and the Allied Educational Foundation.

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.