Press Release

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

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Media Contact: Glenn Lammi | glammi@wlf.org | 202-588-0302

WLF Asks W.Va. High Court to Reject New Liability Theory that Would Drive Up Prescription Drug Costs

(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—Washington Legal Foundation yesterday urged the West Virginia Supreme Court of Appeals to reject a novel theory of liability that would hold pharmaceutical manufacturers liable for injuries allegedly caused by drugs they neither manufactured nor sold.

The case arises 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 Pharmaceuticals 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 previously prescribed for her husband and produced by a multinational pharmaceutical firm based in India. Nonetheless, because federal law requires levofloxacin's generic label to be identical to that of Levaquin®, the McNairs now seek to hold Janssen liable in tort for injuries caused by the generic manufacturer's drug.

In a brief filed in *McNair v. Johnson & Johnson*, WLF argues that imposing tort liability on a branded pharmaceutical manufacturer for harms allegedly caused by a generic competitor's drug would put West Virginia squarely at odds with every other jurisdiction in the country. 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.

As WLF's brief demonstrates, the plaintiffs' theory of liability marks 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. WLF also rebuts the plaintiffs' suggestion that federal preemption of certain state-law tort claims against generic drug manufacturers somehow justifies shifting the liability burden to the copied drug's original manufacturer.

Because pre-empting state tort liability for generic manufacturers is necessary to accomplish the policy objectives Congress wrote into federal law, WLF contends that state courts are in no position to second guess Congress's carefully calibrated regulatory regime for generic and branded drugs. Instead, WLF urges the court to reject the plaintiffs' call to alter the delicate policy balance that Congress has watchfully maintained for many decades.

Celebrating its 40th year as America's premier public-interest law firm and policy center, WLF advocates for free-market principles, limited government, individual liberty, and the rule of law.

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