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COURT URGED TO ALLOW NONRESIDENTS TO REMOVE CASES TO FEDERAL COURT

(American Home Products Corp. v. Collins)

The Washington Legal Foundation (WLF) this week urged the U.S. Supreme Court to review (and ultimately overturn) an appeals court decision that makes it much more difficult for out-of-state defendants to move their lawsuits from state court to federal court. The suit at issue is one filed against all the major childhood vaccine manufacturers, and threatens to drive even more manufacturers out of the market.

In a brief filed in *American Home Products Corp. v. Collins*, WLF argued that the lower court defined "fraudulent joinder" in an unnecessarily narrow manner. WLF argued that plaintiffs' lawyers regularly join fraudulent defendants to their lawsuits in an effort to prevent out-of-state corporations from moving lawsuits to federal court, which are generally considered less hostile to out-of-state corporations than are state courts.

"The appeals 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 could lead to significant increases in the costs of vaccines, and to even greater vaccine shortages," Samp said.

The case arises from the use of thimerosal as a preservative in vaccines. Thimerosal was used in nearly all vaccines until 1999, when its use was suspended because it contains mercury -- although scientific evidence (both then and now) suggests that small quantities of thimerosal pose no health risks. Thereafter, plaintiffs' lawyers filed large numbers of suits against vaccine manufacturers on behalf of parents of autistic children; they allege that the autism was caused by the presence of thimerosal in their children's vaccines.

The *Collins* case was filed by a group of Mississippi parents in Mississippi state court. Named as defendants were a large group of vaccine manufacturers and a thimerosal manufacturer, all of whom are headquartered outside of the state. When in-state plaintiffs sue out-of-state defendants, the defendants normally are entitled to "remove" the case from state court to federal court. In an effort to prevent removal, the plaintiffs' lawyers also included several in-state defendants: the doctors who administered the vaccines and the pharmacies that provided them.

Because such efforts to prevent removal are so common, the federal courts have developed the doctrine of "fraudulent joinder," which permits a case to be removed to federal court if all of the in-state defendants have been added to the lawsuit for the sole purpose of preventing removal to federal court. An in-state defendant is said to have been "fraudulently joined" if there is *no* possibility that the plaintiff could recover a judgment against the in-state defendant.

In this case, the appeals court agreed that there was no possibility that the plaintiffs could recover a judgment against the in-state doctors and pharmacies. The reason was that the plaintiffs had failed to exhaust available administrative remedies prior to filing suit. A 1986 federal law says that no one may file suit for an injury caused by a vaccine without first seeking compensation from the federal government pursuant to administrative proceedings established under the 1986 law. It is uncontested that the Mississippi parents filed their suit even though they have not sought compensation from the federal government. The trial court allowed the case to be removed to federal court on that basis.

However, the U.S. Court of Appeals for the Fifth Circuit in New Orleans reversed and ordered the case returned to state court. The appeals court did so by creating a new requirement for establishing fraudulent joinder. The court said that in addition to meeting the traditional requirement (a defense demonstrating no possibility of recovery against the in-state defendant), the out-of-state defendant must also show that the defense available to the in-state defendant is *not* similarly available to the out-of-state defendant. Because the failure-to-exhaust-remedies defense (pursuant to the 1986 law) was also available to the vaccine manufacturers, the court held that the case was not removable.

In its brief filed with the Supreme Court, WLF argued that the Fifth Circuit's decision was incorrect and conflicts with other appeals court decisions. WLF argued that it should make no difference, in determining whether in-state defendants were fraudulently joined, whether all of the defendants share a common defense. WLF argued that Congress intended to allow removal in cases of this sort to allow out-of-state defendants to avoid the prejudice often displayed by state courts to out-of-state parties. WLF also argued that unless the appeals court decision is reversed, the large number of thimerosal-related lawsuits pending in state courts around the country could drive even more manufacturers out of the vaccine business -- even though we already face a critical shortage of vaccines and even though thimerosal suits are based on junk science.

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.

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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.