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Update on U.S. Product Liability Law

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Introduction

Over the past three years, groundbreaking opinions in the area of product liability law made headlines. In *Wyeth v. Levine*, the Supreme Court of the United States significantly limited the preemptive effect of federal regulations on state law tort claims. In *Conte v. Wyeth, Inc.*, a California court became the first to impose liability on brand-name manufacturers for injuries involving generic drugs. With time for these seminal decisions to age, litigants have begun the process of testing their reach.

This past year has seen its share of important decisions, most notably in the area of class action litigation. The elements of consumer fraud claims have been refined in two jurisdictions which are hot beds of consumer fraud class actions, with long ranging impact on a putative class representative's standing to bring class action claims under those states' consumer fraud statutes. The Class Action Fairness Act continues to present challenges to plaintiffs who seek to have class action claims adjudicated in friendly state court settings, and to defendants who must contend with innovative class action pleadings constructed with the obvious intent to avoid the jurisdiction of federal courts. Finally, a recent appellate decision has dealt a blow to the practice of relitigating class action claims on behalf of the same class in different fora.

This chapter provides updates on each of these topics:

- Preemption.
- Brand-name Liability for Injuries Involving Generics.
- Consumer Fraud Class Actions.
- Federal Jurisdiction Under the Class Action Fairness Act.
- Re-Litigation of Class Action Claims.
- Forum *Non Conveniens*.

Preemption

Where state law conflicts with federal law, state law “must yield” to and is preempted by the supremacy of federal law. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824). In deciding whether a claim is preempted by federal law, courts determine whether Congress intended to displace state law in enacting the federal law. See *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) (“[The] purpose of Congress is the ultimate touchstone of pre-emption analysis.”). Preemption may be expressed in an explicit provision of federal law or implied from the application of the federal regulatory regime. See, e.g., *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001).

Litigation involving FDA-approved pharmaceuticals and medical devices has become a flashpoint for preemption questions, in part

because a broad system of FDA regulation exists alongside the states' tort regimes. Last year, the Supreme Court's decision in *Wyeth v. Levine*, 555 U.S. ___, 129 S. Ct. 1187 (2009), prompted a “sea change” in federal preemption law. *Mason v. SmithKline Beecham Corp.*, 596 F.3d 387 (7th Cir. 2010). *Levine* held that federal labeling requirements for prescription drugs did not impliedly preempt state law failure-to-warn claims. However, the Supreme Court did not categorically reject implied preemption defences in future cases involving prescription drugs. Instead, the Supreme Court held that there could be preemption if the manufacturer provided “clear evidence” that the FDA would have rejected the warning plaintiffs sought to impose. *Id.* at 1198-99. Over the past year, federal courts have taken up the challenge of deciding what constitutes “clear evidence” under *Levine*.

In a recent decision, *Mason v. SmithKline Beecham Corp.*, 596 F.3d 387 (7th Cir. 2010), the Seventh Circuit ruled that a failure-to-warn claim was not preempted under federal law because the defendant had not presented clear evidence that the FDA would have rejected a label change. Bonnie and William Mason sued the manufacturer of Paxil when their daughter committed suicide two days after she began taking the antidepressant. They alleged that the manufacturer should have warned that Paxil could increase the risk of suicide. Taking *Levine* as its “intellectual anchor,” the court reviewed the administrative history of the drug at issue in *Levine*, Phenergan, and then compared that history to the FDA's treatment of Paxil. The court concluded that the evidence presented by the manufacturer was no more compelling than that in *Levine*, and so rejected the preemption argument. Other courts have interpreted *Levine* similarly and rejected preemption arguments. See, e.g., *Prempro Prods. Liab. Litig.*, 586 F.3d 547 (8th Cir. 2009) (*petition for cert. filed* Mar. 16, 2010); but see *Longs v. Wyeth*, 621 F. Supp. 2d 504 (N.D. Ohio 2009) (limiting *Levine*'s application to claims that arise from manufacturer's actions after FDA approval of the drug at issue).

A question left open by *Levine* is whether its ruling applies to generic drug manufacturers, who must apply labels that are substantively identical to the name-brand label. See, e.g., 21 C.F.R. § 314.150(b)(10). Generic manufacturers have argued that because they do not have the ability to revise their labels, it is impossible for them to both comply with federal law and fulfill their state-law duty to warn. See *Mensing v. Wyeth, Inc.*, 588 F.3d 603 (8th Cir. 2009) (*petition for cert. filed* Feb. 19, 2010). However, this argument has not found success as a general matter, with courts reasoning that generic manufacturers have the power to propose a label change to the FDA and that *Levine*'s “clear evidence” standard requires more than a “hypothetical conflict,” such as the FDA's explicit rejection of a labeling proposal. *Id.* at 608, 610-11; see also *Demahy v. Actavis, Inc.*, 593 F.3d 428 (5th Cir. 2010); *Stacel v. Teva Pharm.*,

USA, 620 F. Supp. 2d 899 (N.D. Ill. 2009); *Kellogg v. Wyeth*, 612 F. Supp. 2d 437 (D. Vt. 2009); *but see Gaeta v. Perrigo Pharm. Co.*, 672 F. Supp. 2d 1017 (N.D. Ca. 2009) (holding that state-law tort claims against generic manufacturer were preempted even after *Levine*).

In the wake of *Levine*, courts appear reluctant to preempt state-law claims involving prescription drugs. Courts continue, however, to rule that claims involving medical devices approved through the pre-market approval process are expressly preempted under *Riegel v. Medtronic*, 552 U.S. 312 (2008). See, e.g., *Riley v. Cordis Corp.*, 625 F. Supp. 2d 769 (D. Minn. 2009) (finding claim preempted and ruling that where plaintiff alleged injury by a medical device, court would apply express preemption provisions of the FDCA rather than the implied preemption analysis of *Levine*); *Blunt v. Medtronic, Inc.*, 760 N.W.2d 396 (Wis. 2009) (holding that state tort claims regarding medical device were expressly preempted under *Riegel*). But the courts may not have the final word on express preemption because the United States House of Representatives is currently considering a bill that would supersede *Riegel*. See Medical Device and Safety Act of 2009, H.R. 1346, 111th Cong. (2009).

Moreover, the Supreme Court has not finished speaking on preemption. The Court recently granted *certiorari* in *Bruesewitz v. Wyeth, Inc.*, which held that the National Childhood Vaccine Injury Act expressly preempted both strict liability and negligent design defect claims. 561 F.3d 233 (3d Cir. 2009), *cert. granted*, No. 09-152, 2010 WL 757696 (U.S. Mar. 8, 2010). The question presented by *Bruesewitz* is whether the Act expressly preempts all design defect claims, or just those in which the injury resulted from “avoidable” side effects.

As the question of preemption is currently under scrutiny in both the legislative and judicial branches, defendants must ensure they are informed on the latest developments when raising a preemption defence, and carefully select the cases in which they choose to press the issue.

Brand-Name Liability for Injuries Involving Generics

In 2008, a California Appellate Court issued an unprecedented opinion making manufacturers of brand-name prescription medications amenable to liability for injuries allegedly caused by ingestion of generic versions of those drugs. In *Conte v. Wyeth, Inc.*, 85 Cal. Rptr. 3d 299 (Cal. Ct. App. 2008), a user of a generic drug brought fraud and negligent misrepresentation claims against Wyeth, the manufacturer of the brand-name counterpart. The appellate court reversed the lower court’s grant of summary judgment in favor of Wyeth, holding that “the common law duty to use due care owed by a name-brand prescription drug manufacturer when providing product warnings extends not only to consumers of its own product, but also to those whose doctors foreseeably rely on the name-brand manufacturer’s product information when prescribing a medication, even if the prescription is filled with the generic version of the prescribed drug.” More than a year has passed since the *Conte* decision, and the ruling has been met with acceptance in California and rejection in other jurisdictions.

California. In California courts, *Conte* has gained traction. In *Dorsett v. Sandoz, Inc.*, No. 06-7821, 2009 WL 3633874 (C.D. Cal. Oct. 28, 2009), for example, a California federal district court applied *Conte* to hold that an amended complaint, adding a brand-name manufacturer as a defendant after the statute of limitations had run, related back to the date of filing the original complaint to stop the statute of limitations from running. The court reasoned that before *Conte*, “every single court to address the issue of brand-

name-manufacturer liability for conduct leading to or arising out of the generic version of a drug had concluded that the brand-name manufacturer was not liable”. Thus, the plaintiff (and other plaintiffs in California) were unaware that a cause of action existed against the brand-name manufacturer until the *Conte* decision had been issued.

Other Jurisdictions. Outside of California, however, the *Conte* holding has been rejected by each court to consider it. See, e.g., *Mensing v. Wyeth, Inc.*, 588 F.3d 603 (8th Cir. 2009) (declining to apply *Conte*, holding that the *Conte* rule “stretch[es] the concept of foreseeability too far”) (internal citation omitted) (*petition for cert. filed* Feb. 19, 2010); *Levine v. Wyeth*, No. 8:09-cv-854, ___ F. Supp. 2d ___, 2010 WL 456773 (M.D. Fla. Feb. 10, 2010) (rejecting *Conte* and declining to “impose a duty of care on Defendants here where the generic manufacturers are responsible for the contents of their label, and where the Defendants lacked direct control as to the contents of that label”); *Meade v. Parsley*, No. 2:09-cv-00388, 2009 WL 3806716 (S.D. W.Va. Nov. 13, 2009) (granting summary judgment as to brand-name manufacturers, noting that “*Conte* . . . is the only decision in several like actions that has allowed the plaintiff to proceed against [a brand-name manufacturer] when only the generic version of the drug was ingested”); *Burke v. Wyeth, Inc.*, No. G-09-82, 2009 WL 3698480 (S.D. Tex. Oct. 29, 2009) (describing *Conte* as “anomalous”); *Moretti v. Wyeth, Inc.*, No. 2:08-cv-00396, 2009 WL 749532 (D. Nev. Mar. 20, 2009) (“*Conte* stands alone and is contrary to Nevada law and public policy”); and *Dietrich v. Wyeth, Inc.*, No. 50-2009-CA-021586, 2009 WL 4924722 (Fla. Cir. Dec. 21, 2009) (*Conte* remains “the lone outlier against the overwhelming weight of authority on this point No case before or after *Conte* has agreed with its reasoning”).

Though to date, courts outside California have been wary of assigning liability to brand-name manufacturers for injuries involving generic drugs, defendants should beware of attempts by plaintiffs to expand the scope of tort liability.

Consumer Fraud Class Actions

Consumer fraud class actions seek damages for economic injuries based on a manufacturer’s alleged misrepresentations about a product. Often, plaintiffs bring these actions in states where consumer protection laws do not require or arguably do not require a plaintiff to actually “rely” on the alleged misrepresentation in order to maintain the action. The lack of a reliance requirement is a departure from the traditional common law fraud approach (which requires plaintiffs to prove they actually relied on an alleged misrepresentation) and is critical to plaintiffs’ ability to bring class action suits because reliance is generally a highly individualised question that makes class certification improper. Though the law of each state will vary, two recent decisions – one from California, the other from Illinois – are of particular note.

California. Until 2004, “any person acting for the general public” could sue under California’s Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code § 17200 *et seq.*, even without “a showing of injury or damage.” *Californians for Disability Rights v. Mervyn’s LLC*, 138 P.3d 207, 209 (Cal. 2006). In November 2004, California voters approved Proposition 64, which limited standing under the UCL to persons who “suffered injury in fact and [] lost money or property as a result of the unfair competition.” Cal. Bus. & Prof. Code § 17204. Construing Proposition 64’s effect on the UCL, the California Supreme Court held in *In re Tobacco II Cases*, 207 P.3d 20 (Cal. 2009), that the law “imposes an actual reliance requirement on” the class representative to “show that the misrepresentation was an immediate cause of the injury-producing conduct” and a “substantial factor [...] in influencing his decision.” But the court

qualified that standing requirement by holding: (1) “a presumption, or at least an inference, of reliance arises wherever there is a showing that a misrepresentation was material;” (2) a plaintiff does not “need to demonstrate individualised reliance on specific misrepresentations to satisfy the reliance requirement” when he “alleges exposure to a long-term advertising campaign;” and (3) that the availability of alternative information – even information “as prominent as whether cigarette smoking causes cancer” – does not defeat an allegation of reliance on a manufacturer’s representations. Moreover, the court held that Proposition 64 “was not intended to, and does not, impose section 17204’s [reliance] standing requirements on absent class members.”

Notwithstanding the loose reliance requirement for UCL claims set forth in *In re Tobacco II*, certification of consumer fraud class actions in California is not a foregone conclusion. Plaintiffs must establish not only their standing as class representatives, but also the propriety of class certification. Several opinions issued subsequent to *In re Tobacco II* have reiterated this fundamental burden of putative class representatives. See *Kaldenbach v. Mutual of Omaha Life Insurance Co.*, 100 Cal. Rptr. 3d 637 (Cal. Ct. App. 2009) (denying certification because the alleged misrepresentations were not uniform as to all class members); *Cohen v. DirecTV, Inc.*, 101 Cal. Rptr. 3d 37 (Cal. Ct. App. 2009) (same); *Pfizer, Inc. v. Superior Court*, No. B188106, ___ Cal. Rptr. 3d ___, 2010 WL 660359 (Cal. Ct. App. Feb. 25, 2010) (*In re Tobacco II* “does not stand for the proposition that a consumer who was never exposed to an alleged false or misleading advertising or promotional campaign is entitled to restitution”).

Illinois. In *De Bouse v. Bayer AG*, No. 107528, 2009 WL 4843362 (Ill. Dec. 17, 2009), the Illinois Supreme Court held that a consumer fraud claim based on “deception by concealment” still requires a direct or indirect communication from the defendant to the plaintiff, and there is no implied representation of safety from marketing a prescription drug. In *De Bouse*, the consumer who was prescribed a drug that was later withdrawn from the market filed a putative class action against Bayer under the Illinois Consumer Fraud Act (“ICFA”). Dismissing the action and vacating the grant of class certification, the Illinois Supreme Court held that the facts established that the plaintiff could not maintain an action under the ICFA individually or as a class representative. The court concluded (1) to maintain an action under ICFA, the plaintiff must actually be deceived (directly or indirectly) by a statement or omission by the defendant, which the plaintiff had not been; (2) the mere sale of a prescription medication is not a representation that the drug is safe for its intended use, so as to serve as basis for action under ICFA; and (3) the general deception of consumers, the medical community, the healthcare insurance industry, and the public did not permit recovery on “indirect deception” theory in Illinois.

When defending putative class actions alleging violations of consumer fraud statutes, defendants must be cognisant of the particularities of the laws of the state in which the action is brought. Though some defences to such actions may be universally applicable, the viability of other defences will vary from state to state.

Federal Jurisdiction Under the Class Action Fairness Act

Where a defendant is faced with an action in a “plaintiff friendly” state court venue, the Class Action Fairness Act of 2005 (“CAFA”), Public Law 109-2, 119 Stat. 4 (2005), may provide a basis to remove the action to federal court. CAFA confers jurisdiction on federal courts over class actions and mass actions with over 100 class members or plaintiffs where, subject to certain exceptions, (a) any class member or plaintiff is diverse from any defendant, and (b)

the aggregate amount in controversy exceeds \$5 million. One of the principle goals of the legislation is to eliminate “abusive practices by plaintiffs and their attorneys” such as “forum shopping to take advantage of state court biases against foreign defendants.” In *re Hannaford Bros. Co. Customer Data Security Breach Litig.*, 564 F.3d 75 (1st Cir. 2009).

Case law construing CAFA continues to evolve, but plaintiffs have developed two principle strategies to avoid removal to federal court under CAFA: (1) filing substantively identical lawsuits, each naming less than 100 plaintiffs, to avoid qualifying as a mass action under CAFA (*see Tanoh v. Dow Chemical Co.*, 561 F.3d 945 (9th Cir. 2009), *cert. denied* 130 S. Ct. 187 (2009) (affirming remand of seven substantively identical actions, each naming 99 plaintiffs)); and (2) disclaiming recovery for amounts at or above the \$5 million minimum amount in controversy (*see Morgan v. Gay*, 471 F.3d 469 (3d Cir. 2006) (affirming remand of a putative class action where plaintiff expressly disclaimed recovery of \$5 million or more)).

Though many courts recognise plaintiffs as the masters of their own actions, some courts have attempted to curb manipulation aimed at avoiding CAFA jurisdiction by looking beyond the four corners of complaints. For example, where several cases are consolidated, none of which individually meet the statutory minimum for the amount in controversy, at least one court has concluded that the amounts in controversy may be aggregated. *See Freeman v. Blue Ridge Paper Prods., Inc.*, 551 F.3d 405 (6th Cir. 2008) (holding that the requested damages of five consolidated actions, each disclaiming damages above \$4.9 million, may be aggregated to \$24.5 million, making removal of the consolidated action proper under CAFA). In addition, where a complaint disavows recovery for amounts at or above \$5 million, or is silent as to the amount in controversy, some courts have accepted defendants’ contentions that the allegations contained in the complaint place the jurisdictional minimum at issue notwithstanding the prayer for relief contained in the complaint. *See, e.g., Lewis v. Ford Motor Co.*, 610 F. Supp. 2d 476 (W.D. Pa. 2009) (considering affidavit submitted by defendant and other extrinsic evidence in concluding that more than \$5 million was at stake, even though the complaint was silent on the amount in controversy); *but see Lowery v. Alabama Power Co.*, 483 F.3d 1184 (11th Cir. 2007), *cert. denied* 128 S. Ct. 2877 (2008) (refusing to extrapolate damages based on extrinsic calculations to find an amount in controversy exceeding \$5 million, where the four original plaintiffs sought \$1.25 million and 400 additional plaintiffs were later added to the complaint).

Removal under CAFA is not a guaranty that the case will remain in federal court throughout the proceedings. Some courts have concluded that an action properly removed under CAFA may cease to be properly in federal court at some point during the proceedings, for example when plaintiffs withdraw class action claims (*see Irish v. Burlington Northern Santa Fe Ry. Co.*, No. 08-cv-469, 2009 WL 1308429 (W.D. Wis. May 7, 2009) (granting remand after amended complaint withdrew class action claims)), or where discovery establishes that CAFA jurisdiction was improper in the first place (*see Delaney v. Landry’s Restaurants*, No. 09-1421, 2009 WL 3446807 (D.N.J. Oct. 21, 2009) (remanding action removed under CAFA where discovery established an amount in controversy less than \$5 million)). Moreover, there is a growing split over the issue of whether the denial of class certification after removal divests a federal court of the jurisdiction conferred by CAFA. *Compare Avritt v. Reliastar Life Ins. Co.*, No. 07-1817, 2009 WL 1703224 (D. Minn. June 18, 2009) (denial of class certification divests federal court of CAFA jurisdiction), *with Cunningham Charter Corp. v. Learjet, Inc.*, 592 F.3d 805 (7th Cir. 2010) (denial of class certification does not divest the court of jurisdiction where jurisdiction was proper originally under CAFA).

As consensus has not yet developed on these and other issues, defendants must ensure that they have a clear understanding of the current state of the law regarding CAFA in the jurisdictions in which they are defending against class action or mass action claims.

Re-Litigation of Class Action Claims

From time to time, plaintiffs attempt to relitigate unsuccessful class certification efforts on behalf of the same class of individuals, only in a different forum. Such was the case in *Smith v. Bayer Corp.*, 593 F.3d 716 (8th Cir. 2010), in which the Eighth Circuit Court of Appeals delivered a significant ruling limiting the relitigation of class action claims.

In *Smith*, the Eighth Circuit affirmed a federal injunction enjoining two plaintiffs in a West Virginia state court from relitigating class claims that had been denied certification in an earlier federal court proceeding brought by a different West Virginia plaintiff. The two plaintiffs in West Virginia state court had asserted claims for economic loss and sought to certify their claims as a class action on behalf of all individuals in West Virginia who purchased the drug Baycol. Prior to the state court plaintiffs' motion to certify their putative class, the United States District Court for the District of Minnesota denied certification of an identical class seeking the same recovery, even assuming the adequacy of the putative class representative, and granted summary judgment of the individual claim in federal multidistrict proceedings relating to Baycol, *In re Baycol Products Litig.* (MDL 1431).

On the defendant's motion, and relying on the relitigation exception to the Anti-Injunction Act (28 U.S.C. § 2283) and the All Writs Act (28 U.S.C. § 1651), the District of Minnesota issued an injunction blocking the state court plaintiffs from relitigating in West Virginia class claims that had been denied certification in the District of Minnesota. See *McCullins v. Bayer Corp.*, No. 02-199, 2008 WL 7425712 (D. Minn. Dec. 9, 2008). On appeal, the Eighth Circuit affirmed, holding that district court's injunction was necessary to "protect or effectuate" its prior denial of identical class claims and that the district court properly exercised personal and subject matter jurisdiction to enjoin absent class members from relitigating those claims. See *Smith v. Bayer Corp.*, 593 F.3d 716 (8th Cir. 2010).

The Eighth Circuit's decision extends the precedent of the Seventh Circuit Court of Appeals in *In re Bridgestone/Firestone*, 333 F.3d 763 (7th Cir. 2003), in which the Seventh Circuit blocked a similar attempt by plaintiffs to relitigate class claims. However, the *Smith* and *In re Bridgestone/Firestone* decisions diverge from the holdings of other circuits, which have concluded that class certification denied in federal court may nonetheless be proper in state court because state courts may have procedural rules that allow for class certification even if the Federal Rules of Civil Procedure do not. See *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 134 F.3d 133 (3d Cir. 1998); *J.R. Clearwater Inc. v. Ashland Chem. Co.*, 93 F.3d 176 (5th Cir. 1996). Defendants should be aware of this split in authority when evaluating their options with respect to defending against a relitigation of class action claims.

Forum Non Conveniens

Defendants may move to dismiss foreign plaintiffs' claims on grounds of forum *non conveniens* where: (1) an alternative forum is available and adequate, and (2) the balance of factors related to the parties' private interests and the public interest weighs in favor of adjudicating the matter in another forum. When engaging in a traditional forum *non conveniens* analysis, courts give less deference

to the forum choice of foreign plaintiffs, and consider, among other factors, the degree of deference that should be accorded to plaintiff's choice of forum, access to proof, burden on the court handling the case, and the home forum's interest in the litigation. See, e.g., *Abad v. Bayer Corp.*, 563 F.3d 663 (7th Cir. 2009) (affirming dismissal based on forum *non conveniens* of product liability suits filed by Argentine residents against American pharmaceutical companies because, in part, remaining discovery needed to be conducted in Argentina, documents would need to be translated into English if the case were tried in the United States, and Argentinean law would apply); *Chang v. Baxter Healthcare Corp.*, No. 09-2280, 09-3020, 2010 WL 1136521 (7th Cir. March 26, 2010) (parallel case to *Abad* in which the court affirmed dismissal based on forum *non conveniens* of case filed by Taiwanese citizen).

In determining adequacy, courts consider whether there is a "justifiable belief" that the alternative forum would provide the plaintiff access to a legal remedy. *Tang v. Synutra International, Inc.*, No. 8:09-cv-00088-DKC, slip op. (D. Md. March 29, 2010). In *Tang*, the court granted defendants' forum *non conveniens* motion to dismiss the claims of one hundred Chinese citizens. Plaintiffs had asserted claims against U.S. companies on behalf of themselves and 56 children who allegedly experienced adverse health conditions from ingesting melamine-contaminated milk products. The primary issue involved whether China was an adequate forum to adjudicate such claims. Plaintiffs did not dispute that a legal process was in place for handling their claims, but asserted that the Chinese courts had deviated from such process regarding melamine claims and had pressured lawyers to withdraw from representing claimants. The court, however, concluded that defendants met their burden of establishing that China was an adequate forum. The court found it persuasive that China's highest court had announced that the Chinese lower courts were "ready to accept" melamine cases from those citizens who opted out of a compensation programme established by the Chinese government. The Maryland district court concluded that even if the Chinese courts were not open to plaintiffs, they had another remedy available to them through the compensation programme. The court determined that it was not appropriate for it to compare the amount that plaintiffs may expect to receive through the Chinese compensation programme to the amount that they sought in U.S. court in determining whether an alternative forum was available.

A significant development in the area of forum *non conveniens* law is certain courts' willingness to reconsider traditional forum *non conveniens* principles in the context of mass tort proceedings. In *In re OxyContin II*, 881 N.Y.S.2d 812 (N.Y. Sup. Ct. 2009), the trial court denied a motion to dismiss the claims of hundreds of foreign plaintiffs with claims in a mass tort coordinated proceeding because "mass torts are different" -- the numerosity of plaintiffs with common defendants involving the same claims distinguished such proceedings from individual actions. The court concluded that "the overall savings of time and effort to the judicial system far outweighs the burdens because the issues are similar and the defendants' position on all of the cases is virtually identical."

The trial court's decision in *In re OxyContin II* appears at odds with the New York appellate opinion in *Avery v. Pfizer, Inc.*, 891 N.Y.S.2d 369 (N.Y. App. Div. 2009). There, the appellate court unanimously affirmed a trial court's order granting defendant's motion to dismiss a plaintiff's complaint on forum *non conveniens* grounds where the plaintiff, his treating physicians, and his witnesses were located in Georgia, the plaintiff ingested the drug that allegedly caused his injuries in Georgia, and the plaintiff suffered his injuries in Georgia. The court expressly declined to adopt the "mass tort litigation" approach to forum *non conveniens* espoused in *In re OxyContin II*.

Whereas *Avery* involved the dismissal of a single plaintiff's case, *In re OxyContin II* involves the claims of more than two hundred plaintiffs. An appellate court currently reviewing the *In re OxyContin II* decision will decide whether that distinguishing feature is a justifiable basis upon which to depart from traditional forum *non conveniens* principles. Defendants should be aware of efforts by plaintiffs and courts to "innovate solutions for both plaintiffs and defendants" in cases involving mass torts as the court in *In re OxyContin II* has.

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SARA J. GOURLEY is a litigation partner in the Chicago office and a member of the firm's Executive Committee. Ms. Gourley has substantial experience in pharmaceutical, medical device, and blood products liability litigation. Her practice is concentrated in the areas of pharmaceutical and medical device defence, especially multi-jurisdictional coordination and defence of class actions. She is national counsel for a producer of blood products in AIDS and Hepatitis C litigation, national counsel for a major pharmaceutical company defending a widely-used prescription drug, and represents numerous manufacturers in multidistrict and related state litigation and class actions.

Ms. Gourley is ranked as a leading lawyer nationally in Products Liability by *Chambers USA: America's Leading Lawyers for Business - The Client's Guide* (2006 - 2009). She is also included in the Product Liability Defence section of *The International Who's Who of Business Lawyers* (2006 - 2009). Ms. Gourley was named as "one of the leading authorities worldwide" in product liability defence in *Who's Who Legal*, 2009 and a National Products Liability "Litigation Star" in *Benchmark Litigation, 2010*. Additionally, *The International Who's Who of Life Sciences Lawyers* recently recognised Ms. Gourley as a leader in the field and she received a leading lawyer ranking in the *PLC Life Sciences Cross-Border Handbook 2009/2010*.

Ms. Gourley speaks frequently on topics relating to the defence of product liability claims. Recent presentations include: "Approaches to Causation in Mass Torts," "Transnational Product Liability Problems" and "The Role of Litigation in Regulating Drug Safety." Ms. Gourley also presented a paper to the Shanghai FDA on "Adverse Drug Reactions: A Discussion of United States and International Compensation Schemes," published a 2009 update on US product liability law and a chapter on "Emerging Issues for Products Manufactured Overseas," which was published in the fall of 2009.

Memberships & Affiliations:

- American Bar Association
- Illinois Bar Association
- The International Association of Defense Counsel (IADC)
- Defense Research Institute
- Member of DRI's Drug and Medical Device Steering Committee

Conclusion

Product liability litigation in the United States continues to be a fertile ground for novel rules of law, innovative legal theories and defences, and evolving legal doctrines. We expect this will continue in 2010, during which we expect important decisions on each of the issues discussed in this chapter.

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SHERRY A. KNUTSON is a partner in Sidley Austin LLP's Chicago office. Ms. Knutson's practice ranges from multi-plaintiff, multi-jurisdiction litigations to single plaintiff cases. Her mass tort experience includes complex multidistrict and related state litigation, class actions, and national coordination and defence of product liability and toxic tort cases, including Omnican, Trasylol, Baycol, Celebrex/Bextra, and latex gloves. She also has served as lead counsel in individual lawsuits involving a variety of personal injury claims.

Ms. Knutson has trial experience in product liability and toxic tort cases, including being part of a trial team that obtained a favorable result in a hydrogen sulfide exposure case. In addition, she has extensive experience in all phases of pretrial litigation on the national and local level. She has conducted all forms of pretrial discovery, including fact investigation, discovery requests and responses, depositions of fact and expert witnesses, and defence expert development. She has drafted and argued numerous pretrial motions, including motions to dismiss, summary judgment motions, *Daubert* motions, and post-trial motions. She also has authored several briefs and petitions filed in appellate courts across the country, and has argued multiple appeals.

Ms. Knutson is included in the Product Liability section of *Who's Who Legal: Illinois* (2006-09). Her publications include:

- S. Gourley and S. Knutson, *Update on U.S. Product Liability Law*, THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO: PRODUCT LIABILITY 2009, 2008
- J. Kellam & S. Knutson, *A corporation's worst nightmare: product liability claims around the world*, Australian Product Liability Reporter, vols. 14:1 & 14:2 (Mar. & April 2003).

Memberships & Affiliations:

- American Bar Association
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