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TRENDS

PRODUCT LIABILITY

The top product liability law developments of 2014 range from billion dollar awards to preemption findings, attorneys Anand Agneshwar and Paige H. Sharpe say. The authors offer their perspective on the most important developments shaping product liability law in the past year, including #1, the U.S. Supreme Court ruling in *Daimler v. Bauman* (2014 BL 9151), which drew new lines around the boundaries of personal jurisdiction.

Top 10 Product Liability Law Developments for 2014

By Anand Agneshwar and Paige H. Sharpe

The world of product liability litigation is ever changing, as plaintiffs test new theories of liability and defense attorneys counter with new strategies of their own. Last year was no different, offering a number of note-worthy developments. So with 2014 behind us, we set out on our list of the top 10 product liability law developments of the year.

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10. Actos Case Results in Stunning Punitive Damages Penalty

In one of the largest punitive damages verdicts in U.S. history, the jury in the first Actos bladder case to go to trial in federal court awarded $9 billion in April to New York couple Terrence and Susan Allen. That amount was about 6,000 times the $1.475 million in compensatory damages awarded, and it far exceeded the $5 billion penalty that an Alaska jury imposed on Exxon Mobil Corp. for the 1989 Exxon Valdez oil spill. Judge Rebecca Doherty of the Western District of Louisiana initially upheld the verdict on a post-trial motion for judgment as a matter of law.[1] However, defendants Takeda and Eli Lilly later challenged the award on due process grounds and won a 99 percent reduction in the verdict.[2] Still, they have promised further appeals. After all, 99 percent of $9 billion comes in at more than $36 million, and that would still rank among the largest punitive damages awards on record when compared to the compensatory damages in the case.

[1] *In re Actos (Pioglitazone) Prods. Liab. Litig.*, No. 6:12-cv-00064-RFD-PJH, 2014 BL 242658 (W.D. La. Sept. 2, 2014).

[2] No. 6:12-cv-00064-RFD-PJHm, 2014 BL 302183 (W.D. La. Oct. 27, 2014).

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9. Pennsylvania Gives Nod to Negligence Theories of Liability

Pennsylvania is known as the Independence State, and it certainly went its own way in *Lance v. Wyeth*.[3] In *Lance*, the Pennsylvania Supreme Court opened the door for plaintiffs to bring negligent design and marketing claims against pharmaceutical companies when ''untenably dangerous products [are] put into the marketplace.''[4] With Wyeth's now withdrawn diet drug Redux at issue, the court proclaimed that ''pharmaceutical companies violate their duty of care if they introduce a drug into the marketplace, or continue a previous tender, with actual or, constructive knowledge that the drug is too harmful to be used by anyone.''[5] While *Lance* at first sounds like a real boon to plaintiffs, the ruling is a limited one. First, the decision was on the pleadings, not the merits, and it remains to be seen what the trial court will do when the facts are developed. Second, in a case in which a prescription drug remained on the market with FDA approval, this theory of negligence likely would run afoul of preemption precedent.[6]

8. Branded Manufacturers Win Benefit of Design Defect Preemption

Speaking of design defect claims and preemption, we come to the next case in our countdown: *Booker v. Johnson & Johnson*.[7] In that case, an Ohio district court took Supreme Court precedent in *Mutual Pharmaceutical Co. v. Bartlett* to the next level by holding that just as design defect claims against generic manufacturers are preempted, so, too, do they fail against branded manufacturers. The opinion resolved a summary judgment motion brought by the defendants in the Ortho Evra MDL, who argued that design defect claims are preempted under *Bartlett* because a state tort law duty to adopt a different design conflicts with federal law mandating use of the FDA-approved design. The district court agreed: It ''was impossible for the [defendant] to comply with both its state-law duty to alter the composition of the drug, and its federal-law duty not to alter an FDA approved design.''[8]

7. Innovator Liability Rolls On in Alabama . . .

We continue to ride the seesaw of 2014 with the next couple of cases on our list and the issue of innovator liability. The theory was on the upswing in *Wyeth, Inc. v. Weeks*,[9] in which the Alabama Supreme Court doubled down on its outlier position and held that a branded manufacturer may be liable for injuries suffered by a plaintiff who ingested a generic version of the drug (affirming its previous ruling in the same case).[10] Most Other courts have overwhelmingly found no duty in such a situation—see item 6—, and therefore no basis to impose liability. But the Alabama court ruled that the plaintiff's fraud claim was not the same as ''a products-liability claim where privity is needed'' because the branded manufacturer ''authored the label with its warnings, and the generic manufacturers, as required by FDA regulations, copied that label verbatim.''[11]

6. . . . But the Tide Continues to Turn Elsewhere

Innovator liability otherwise continued its long, steady slide, with the Sixth Circuit rejecting the theory under the laws of 22 states in *In re Darvocet, Darvon, & Propoxyphene Products Liability Litigation*.[12] Plaintiffs argued that physicians had ''reasonably and foreseeably'' relied on representations of branded manufacturers when prescribing generics because physicians understand that generics are bioequivalent to and have the same labeling as branded drugs.[13] The court did not buy it. The claims failed either because (1) they were subject to the given state's ''product identification requirement'' rule (i.e., the defendant's product allegedly must have caused the plaintiff's injury) and/or (2) branded manufacturers do not have a legal duty to plaintiffs under the laws of their home states.[14] The opinion, which methodically marches through the laws of each of the 22 states, demonstrates just how far afield the *Weeks* opinion leaves Alabama.

5. Litigation Holds Pave Way to Painful Sanctions . . .

At the midpoint, we return to the Actos litigation with which we started our countdown, and to an opinion that set the course for the $9 billion jury verdict. *In re Actos (Pioglitazone) Products Liability Litigation*[15] is a cautionary tale for corporations about the conundrums that electronically stored information (''ESI'') can present. The Actos MDL was created in 2011, but the Takeda defendants had issued a broad litigation hold back in 2002 in connection with different injury claims that covered ''any and all documents and electronic data'' relating to Actos.[16] That hold was never lifted and in fact was refreshed several times, so the court held the defendant to its terms. Indeed, the very first witness to testify was in-house counsel for Takeda, who was cross-examined for a full week on the spoliation issue. The ultimate result was that evidence of the destruction of ESI and other documents went to the jury, which clearly did not take kindly to it.

4. . . . But Revised Rule Would Raise Sanctions Standard

We move now to amendments to the Federal Rules of Civil Procedure, which should put the kibosh on the sort of sanctions rulings issued in the Actos litigation. Under a proposed new Rule 37(e)(2),[17] a court could issue an adverse inference instruction as to ESI spoliation

[3] 85 A.3d 434 (Pa. 2014).
[4] *Id.* at 451.
[5] *Id.* at 461.
[6] *Id.* at 457 n.33; *see also Mutual Pharm. Co. v. Bartlett*, 2013 BL 166063, 133 S. Ct. 2466 (2013) (rejecting ''duty not to sell'' theories of liability).
[7] 2014 BL 285355 (N.D. Ohio Oct. 10, 2014).
[8] *Id.*
[9] 2014 BL 227432 (Ala. Aug. 15, 2014).
[10] *Wyeth, Inc. v. Weeks*, No. 1101397, 2013 BL 9709 (Ala. Jan. 11, 2013).
[11] 2013 BL 9709.
[12] 756 F.3d 917 (6th Cir. 2014).
[13] *Id.* at 936-37.
[14] *Id.* at 937-38.
[15] No. 6:12-cv-00064-RFD-PJH, 2014 BL 179175 (W.D. La. June 23, 2014).
[16] *Id.*
[17] See Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure (Sept. 2014), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2014.pdf.

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only upon a finding that a party ''acted with the ***intent*** to deprive another party of the information's use in the litigation'' (emphasis added). In other words, mere negligence or even gross negligence would not qualify. The Judicial Conference Committee on Rules of Practice and Procedure approved this and other proposed amendments to the Rules in September 2014; they are now pending before the Supreme Court and will be transmitted to Congress for review.

3. AGs Win Big Victory on Staying in State Court . . .

State attorneys general foreclosed a potential path for defendants to federal court with the decision in *Mississippi ex rel. Hood v. AU Optronics Corp.*[18] In that case, the U.S. Supreme Court held that a *parens patriae* action filed by the state of Mississippi on behalf of its citizens was not a ''mass action'' as defined by the Class Action Fairness Act (''CAFA''). Limiting use of CAFA's mass action provision to those actions that actually name ''100 or more persons,'' the Court rejected arguments that a state's citizens should be counted as unnamed parties in interest for purposes of the removal threshold. The decision did not come as a huge surprise to either side of the bar, but it did cement the incentives for private contingency fee counsel to pair with state attorneys general in bringing *parens patriae* cases, which can generate enormous verdicts in state courts.

2. . . . But Lose Big Verdicts Amid State Court Appeals

But not quite so fast. In a pair of rulings, the high courts of Louisiana and Arkansas reversed just such enormous verdicts in contingency fee-generated cases. In *Caldwell v. Janssen Pharmaceutica, Inc.*,[19] private lawyers had obtained a $330 million verdict for the state AG under state statutes, claiming that the defendants' marketing of Risperdal defrauded state benefit programs. The Louisiana Supreme Court wiped out that verdict by holding that a ''false or fraudulent claim'' required evidence that the defendants presented an actual false claim for payment to Louisiana. In other words, civil penalties cannot arise from misleading, misrepresentative, or deceitful statements in general. The verdict overturned in *Ortho-McNeil-Janssen Pharmaceutical, Inc. v. State*[20] was even bigger, topping out at $1.2 billion. There, the Arkansas Supreme Court limited the scope of the state's Medicaid false claims act to its face and held that the key FDA Warning Letter used by the state to prove its deceptive trade practices claim was inadmissible hearsay.

1. Personal Jurisdiction Opinion Puts Forum-Shopping on the Chopping Block

Our final case of the year lands at the top our list because it has major implications for a favorite tactic of plaintiffs' products lawyers: picking favorable jurisdictions in which to file their case inventories, even if the claims have little or no connection to the venue. The days of such forum-shopping may be numbered in the wake of *Daimler AG v. Bauman*,[21] as the U.S. Supreme Court has drawn new lines around the boundaries of personal jurisdiction. In *Bauman*, out-of-state plaintiffs filed suit in California and asserted general jurisdiction over Daimler AG, a Delaware corporation with its principal place of business in New Jersey, on the grounds that its products were sold throughout the United States, including California. Not so, said the Court. The relevant inquiry for general jurisdiction purposes is whether a corporation's ''affiliations with the State are so continuous and systematic as to render [it] essentially at home in the forum State.''[22] In all but the most exceptional cases, this ''home'' state is only two places: a corporation's principal place of business and its state of incorporation. So unless plaintiffs otherwise sue in their own home state or the place of injury—giving a court specific jurisdiction over the claims—their options in forums are now a lot fewer. For a sense of *Bauman*'s significance in the product liability sphere, look no further than *Bristol-Myers Squibb Company v. Superior Court*,[23] in which the California Supreme Court granted a petition for review in a pharmaceutical mass tort on the issue of personal jurisdiction. Will *Bauman* stymie the plaintiffs' attempts to keep the case in California? We'll have to wait to see what 2015 holds.

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[18] 2014 BL 10404, 134 S. Ct. 736 (2014).
[19] 144 So.3d 898 (La. 2014).
[20] 432 S.W.3d 563 (Ark. 2014).
[21] 2014 BL 9151, 134 S. Ct. 746 (2014).
[22] *Id.* (internal quotations and citations omitted).
[23] No. S221038 (Cal. Sept. 5, 2014).