ARNOLD & PORTER LLP

Lit Alerts

December 2015 A publication of the Litigation Practice Group

In This Issue

Product Liability: Texas Appellate Court Overturns US$1.2 Million Judgment in Pelvic Mesh Case on Causation Grounds

A Texas appellate court has overturned a US$1.2 million judgment against Johnson & Johnson in a pelvic mesh case, holding that the plaintiff did not offer legally sufficient evidence that a defect in Johnson & Johnson's TVT-O pelvic mesh caused her injuries. In *Johnson and Johnson v. Batiste*, No. 05-14-00864-CV, 2015 WL 6751063 (Tex. App.—Dallas Nov. 5, 2015, no pet. h.), the Dallas Court of Appeals applied Texas precedent requiring that a plaintiff in a strict liability design defect case establish a causal connection between her alleged injury and the defective condition of a product, rather than the product itself. While the parties did not dispute that the plaintiff suffered several of a number of potential complications of the implantation of the TVT-O device, the court concluded that she had not sufficiently tied her injuries to the alleged defects in the device and cautioned that "[t]he law of products liability does not guarantee that a product will be risk-free."

Batiste, the first pelvic mesh case to go to trial in Texas, provides added leverage for defendants confronted with allegations of causation framed in general (product-oriented) rather than specific (defect-oriented) terms. This spotlight on Texas's strict application of its causation standard also provides an important reminder that defendants in design defect litigation may find this to be a significant advantage of having a Texas venue.

Class Actions: Southern District of New York Declines To Certify Class of Systematically Overcharged Patients

The United States District Court for the Southern District of New York has declined to certify a statewide class of patients or their representatives who alleged they were systematically overcharged copying fees for patient medical records in violation of New York state laws. The complaint, *Ruzhinskaya v. Healthport Technologies, LLC*, No. 14 Civ. 2921 (S.D.N.Y. Nov. 9, 2015), asserts that the defendant copying service overcharged patients by assessing a 75 cent per page fee for copying, regardless of the actual costs of providing the service. Pursuant to New York Public Health Law, healthcare providers may charge only the provider's "costs incurred" for providing patients copies of their medical records, up to a maximum of 75 cents per page.

In declining certification, the court held that "because there are significant variations among healthcare providers in New York with regard to the cost of retrieving, copying, and distributing medical records," a determination of the "costs incurred" is "incapable of common resolution on a statewide basis." In this instance, the class, which included patients who requested medical records from more than 500 different providers, was simply too broad. The court noted, however, that a more narrowly defined class -- such as one limited to patients who sought records from the same healthcare provider -- might satisfy Rule 23's requirements. The *Healthport* decision highlights the increasing scrutiny plaintiffs' proposed classes face at the certification stage.

For more information, please contact your Arnold & Porter attorney or one of the following:

Kenneth Chernof, Partner
Washington, DC
tel: +1 202.942.5940
Kenneth.Chernof@aporter.com

David Weiner, Partner
Washington, DC
tel: +1 202.942.6702
David.Weiner@aporter.com

John Lombardo, Partner
Los Angeles
tel: +1 213.243.4120
John.Lombardo@aporter.com

Brussels | Denver | Houston | London | Los Angeles
New York | San Francisco | Silicon Valley | Washington DC

arnoldporter.com