ARNOLD & PORTER LLP

Product Liability Litigation Update

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Removal: Court Severs Medical Malpractice Claims from Product Liability Claims and Finds Valid Basis for Removal

In *Akin v. Stryker Corp.*, 2013 WL 6511855 (D. Minn. Dec. 12, 2013), the United States District Court for the District of Minnesota held that the plaintiff's claims against two non-diverse hospital defendants were improperly misjoined with his claims against diverse medical device manufacturing defendants.

In *Akin*, the plaintiff brought negligence, strict liability, misrepresentation and consumer protection claims in California state court against diverse manufacturers of a hip implant and local hospitals where plaintiff received the implant. 2013 WL 6511855, at *1. The manufacturers removed the case, arguing that the hospital defendants were misjoined with claims against the manufacturing defendants under federal Rule 20. Following transfer to a multidistrict litigation in Minnesota, the Court agreed. *Id*. at *4. Joinder was "inappropriate" because: (1) the claims against the hospital defendants would "require evidence regarding Plaintiff's care, treatment, and services provided by the Hospital Defendants and their staff, and representations made related thereto" while the claims against the manufacturing defendants would "require evidence as to the development, manufacture, and testing of such devices as well as the [manufacturing defendants'] knowledge, warnings, and disclosures regarding risks associated with its purportedly defective hip replacement products"; (2) any liability that may be found against either the manufacturing defendants or the hospital defendants would not be a basis for liability as to the other; and (3) the rights of the parties and interests of justice would be best served by severance. *Id*. at *4.

The Court severed and remanded the claims against the hospital defendants to preserve the manufacturing defendants' right to removal, noting "where a non-diverse party, such as the Hospital Defendants here, cannot be properly joined under the Federal Rules of Civil Procedure, other interests, such as a defendant's statutory right of removal, prevail over that of permitting a plaintiff's choice of forum." *Id*. at *4-5.

Plaintiffs in product liability cases often join local doctors and hospitals whose presence destroys diversity even though malpractice claims are premised on very different legal theories than those against manufacturer defendants. The *Akin* decision is a reminder to pharmaceutical and medical device defendants to thoroughly consider misjoinder arguments in such cases involving local health care providers.

Experts: Pennsylvania Court Rules That Expert Testimony Must be Backed by Science

In *Snizavich v. Rohm & Haas Co.*, 2013 PA Super. 315 (Pa. Super. Ct. Dec. 6, 2013), a three-judge panel of the Pennsylvania Superior Court ruled in a precedential decision that an expert witness's causation testimony must make reference to specific scientific authorities—including facts, empirical data, or the expert's own research—that the expert has applied to the facts at hand in order to support the expert's conclusions.

The Court's ruling stems from a product liability suit in which the plaintiff alleged that her deceased husband

was exposed to toxic chemicals while working for thirteen years as a contract pipefitter at the defendant's worksite and, as a result of the exposure, later died of brain cancer. 2013 PA Super. 315, at 1-2. In response to a summary judgment motion arguing that there was no basis for asserting that chemical exposure had caused the decedent's cancer, the plaintiff submitted an expert report from a doctor. *Id*. at 2. The expert relied on documents related to the decedent's medical and work history, as well as a University of Minnesota report that found there were statistically higher brain cancer rates in individuals who worked at the defendant's worksite, but was inconclusive as to the nexus between the chemicals at the worksite and brain cancer. *Id*. at 11.

The trial court granted the defendant's motion to preclude the expert's testimony under *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), finding that the expert had failed to rely on any relevant scientific authority in reaching his conclusion, and granted summary judgment in favor of the defendants. *Snizavich*, 2013 PA Super. 315, at 2-4. On appeal, the Superior Court affirmed, explaining that the expert's report was inadmissible because it was based entirely on subjective assessments of cause and effect and did not "point to, rely on or cite some scientific authority…that the expert has applied to the facts at hand and which supports the expert's ultimate conclusion." *Id*. at 12. In particular, the expert had relied only on medical records and the Minnesota report which itself had failed to draw any conclusions as to the causal relationship between exposure and brain cancer.

The *Snizavich* decision demonstrates that Pennsylvania courts, like many other state courts, are becoming more serious about excluding unreliable expert opinions even under the *Frye* standard. It provides defendants with another piece of ammunition to argue that an expert's mere statement that his methodology is generally accepted or that his conclusion is based on a "reasonable degree of scientific certainty" is not sufficient. Rather, courts will look past the expert's conclusions to assess whether it is supported by scientific authority applied to the facts at hand.

Primary Jurisdiction: California Court Defers Food Labeling Question to FDA

In *Watkins v. Vital Pharm., Inc.*, 2013 WL 5972174 (C.D. Cal. Nov. 7, 2013), the United States District Court for the Central District of California dismissed a class action complaint against a manufacturer and a retailer of a high-protein food supplement under the doctrine of primary jurisdiction.

Plaintiff sued defendant manufacturer Vital Pharmaceuticals and defendant retailer General Nutrition Center on behalf of himself and similarly situated consumers alleging that Vital's "ZERO IMPACT" high-protein meal replacement bar was falsely labeled and advertised because, contrary to the name, it had an impact on consumers' carbohydrate, sugar and overall caloric intake. Plaintiff brought claims under California's Unfair Competition Law (UCL) and Consumer Legal Remedies Act (CLRA). Defendants moved to dismiss arguing that the Court should defer the question of whether "ZERO IMPACT" is misleading to the Food and Drug Administration (FDA) under the doctrine of primary jurisdiction.

Citing the Ninth Circuit's decision in *Pom Wonderful LLC v. Coca-Cola Co.*, 679 F.3d 1170 (9th Cir. 2012), the Court agreed with the defendant and held that "[t]he primary jurisdiction doctrine is appropriate in this case because the FDA has yet to consider the nutritional import of the claim 'ZERO IMPACT' or in what context the claim might mislead consumers about a product's nutritional content." 2013 WL 5972174, at *3. The Court found it particularly relevant that neither party had presented any FDA rule, regulation, or guidance discussing how the words "Zero Impact" or "impact" can or should be used in food labeling, nor was there any evidence of FDA bringing its own enforcement action against defendants. *Id*. at *4. Without such guidance, "any determination on whether the term is misleading risks 'undermining, through private litigation, the FDA's considered judgments.'" *Id*. The Court further noted that it "lack[ed] the FDA's expertise in guarding against deception in the context of [food] labeling." *Id*. In choosing to dismiss without prejudice rather than stay the case, the Court noted that Plaintiff would not be "unfairly disadvantage[d]" by dismissal because there were several years remaining on the applicable limitations periods under the UCL and CLRA.

Federal preemption is often at the top of mind when defending companies which operate in arenas that the federal government heavily regulates. The *Watkins* decision emphasizes that the related doctrine of primary jurisdiction is also a powerful tool that defendants may employ when plaintiffs try to use the tort system to usurp the role of the responsible regulatory agencies.

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