

Product Liability Litigation Update

Recent Developments in the Law

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Personal Jurisdiction: Supreme Court Decision Offers Important Protections Against Forum-Shopping

On January 14, 2014, the U.S. Supreme Court ruled in *Daimler AG v. Bauman*, 571 U.S. ___, ___ (2014) (slip op., at 3), that non-resident plaintiffs could not sue a foreign corporation in California for alleged injuries stemming wholly from out-of-state conduct because the corporation could not fairly be regarded as "at home" in California.

In *Bauman*, twenty-two Argentine residents had sued DaimlerChrysler Aktiengesellschaft (Daimler AG) in 2004 in the United States District Court for the Northern District of California alleging violations of the Alien Tort Claims Act and California state law. Plaintiffs claimed that an Argentinian subsidiary of Daimler AG collaborated with state security forces against its workers, including Plaintiffs and their relatives, during Argentina's 1976-1983 "Dirty War." Plaintiffs claimed the California court had "general" personal jurisdiction over Daimler AG based on the California contacts of Daimler AG's subsidiary, Mercedes-Benz USA, LLC (MBUSA). Although MBUSA was incorporated in Delaware and had its principal place of business in New Jersey, it sold Daimler AG products throughout the United States, including California. A Ninth Circuit Panel agreed with Plaintiffs, reversing the District Court ruling and holding that general jurisdiction was appropriate.

The Supreme Court unanimously reversed the Ninth Circuit Panel's decision. Keeping with the narrow view of general jurisdiction it had established in prior decisions, the Supreme Court rejected the Ninth Circuit's "agency" rationale allowing jurisdiction over Daimler AG based on its subsidiary's contacts with California. Further, the Court held that even if it were to impute MBUSA's contacts to Daimler AG, there still would be no basis for general jurisdiction over Daimler AG in California. In reaching this result, the Court explained that the relevant inquiry is "whether that corporation's 'affiliations with the State are so 'continuous and systematic' **as to render [it] essentially at home in the forum State.**" *Id.* at 20 (emphasis added). In all but the most exceptional cases, the Court explained, this "home" state would be only two places: a corporation's principal place of business and its state of incorporation. *Id.* at 18-19.

Bauman should present a significant challenge to non-resident plaintiffs who attempt to establish general jurisdiction over a corporation in any state except those where the corporate defendant is incorporated or has its principal place of business. In light of *Bauman*, the days of plaintiffs creating sprawling, nationwide centers of product liability litigation in state courts may be numbered.

An in-depth advisory on *Bauman* published by Arnold & Porter attorneys is [available here](#).

Primary Jurisdiction: Supreme Court to Weigh In on FDA's Primary Jurisdiction Over Food Labeling

The Supreme Court granted certiorari on January 10, 2014 in *Pom Wonderful LLC v. Coca-Cola Company*, 679 F.3d 1170 (9th Cir. 2012), to decide whether the primary jurisdiction doctrine bars a private party from bringing a Lanham Act claim challenging a product label regulated under the Food, Drug, and Cosmetic Act

(FDCA).

In *Pom Wonderful*, Plaintiff, a juice manufacturer, brought an action against a competitor challenging the name, labeling, marketing, and advertising of the competitor's juice product as false advertising under the Lanham Act. 679 F.3d at 1174. Specifically, Plaintiff alleged that the name "Pomegranate Blueberry" misrepresented the actual contents of the beverage, and the phrase "Flavored Blend of 5 Juices" which appeared in the label was misleadingly less conspicuous than the beverage name. *Id.* at 1177. The Ninth Circuit held that the FDCA and its regulations—which govern food naming and labeling—"bar pursuit of both the name and labeling aspects of [plaintiff's] Lanham Act claim." *Id.* at 1176. The Court reasoned that "Congress and the FDA have . . . considered and spoken to what content a label must bear, and the relative sizes in which the label must bear it, so as not to deceive" and that "[i]f the FDA believes that more should be done to prevent deception, or that [defendant's] label misleads consumers, it can act." *Id.* at 1177. The Court found deference was appropriate in these circumstances because "to act when the FDA has not—despite regulating extensively in this area—would risk undercutting the FDA's expert judgments and authority." *Id.*

The Supreme Court's decision could well have broader implications than the Lanham Act. The Court's general approach to deference to FDA in areas where Congress has granted the agency extensive regulatory authority, as well as its treatment of the scope of the primary jurisdiction doctrine, could have important implications for product liability suits involving the broad range of FDA-regulated products.

First Circuit Upholds Dismissal of FCA Claims Against Drug Manufacturer

In *United States ex rel. Ge v. Takeda Pharmaceutical Co. Ltd.*, 737 F.3d 116 (1st Cir. 2013), the United States Court of Appeals for the First Circuit affirmed the dismissal of a *qui tam* complaint against a drug manufacturer on the ground that Relator's conclusory allegations were insufficient to plead fraud with particularity under Federal Rule of Civil Procedure 9(b).

Relator sued her former employer, drug manufacturer Takeda Pharmaceutical Co. and its North American subsidiary (collectively Defendants), on behalf of the United States and a number of states, alleging that Defendants delayed and under-reported adverse events to the Food and Drug Administration (FDA) in an effort to resist label changes to four of its drugs. Relator brought claims under the federal False Claims Act (FCA) and various analogous state statutes. Defendants moved to dismiss arguing that Relator had failed to plead fraud with particularity under Federal Rule of Civil Procedure 9(b) and that it failed to state a claim under Federal Rule of Civil Procedure 12(b)(6). The district court granted Defendants' motion on both grounds. *United States ex rel. Ge v. Takeda Pharm. Co. Ltd.*, Nos. 10-11043, 11-10343, 2012 WL 5398564 (D. Mass. Nov. 1, 2012).

On appeal to the First Circuit, Relator argued that her allegations satisfied the pleading requirements of Rules 9(b) and Rule 12(b)(6). Reaching only the district court's holding under Rule 9(b), the First Circuit affirmed the district court's dismissal. The court first faulted Relator for having "alleged next to no facts in support of the proposition that Takeda's alleged misconduct resulted in the submission of false claims or false statements material to false claims for government payment." 737 F.3d at 124. Specifically, the court explained that although Relator "alleges a conclusion that numerous claims for the four subject drugs would not have been submitted but for Takeda's misconduct, [she] alleges no more than that. What is missing are any supporting allegations upon which her conclusion rests and any particulars." *Id.* Second, the court rejected as inadequate the "aggregate expenditure data for one of the four subject drugs" because it was not accompanied by any "effort to identify specific entities who submitted claims or government program payers, much less times, amounts, and circumstances." *Id.* Finally, the court denied Relator's "attempt[] to satisfy the Rule 9(b) requirements with a per se rule that if sufficient allegations of misconduct are made, it necessarily follows that false claims and/or material false information were filed" because such a rule would "violate[] the specificity requirements of Rule 9(b)." *Id.* The court also denied Relator's request for leave to amend her second amended complaints.

Relators in FCA actions often assert expansive claims short on factual detail. The *Takeda* decision demonstrates the stringent pleading requirements of Rule 9(b) and should be useful precedent for challenging insufficient FCA pleadings.

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