

# Year In Review For Product Liability

This past year has seen a number of major decisions impacting product liability practice including a very active [U.S. Supreme Court](#) regarding the application of the Class Action Fairness Act of 2005. While the trend appears to somewhat favor manufacturers, consumer actions will continue to be fertile areas of litigation in the coming year. While it is not an exhaustive review of all product liability related decisions in 2013, the following highlights the major holdings throughout the nation.



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## Jurisdiction and Standing

Jurisdictional challenges to product liability cases appear to have found success in 2013. Courts generally sought to determine whether the defendant made a concerted effort to market and sell its products in the subject jurisdiction. In making this determination, the courts considered the defendant's knowledge of the market and the extent products were placed in commerce.

For example, a French helicopter parts manufacture was determined to have engaged in "Illinois-specific activity" given that its marketing in that state spanned seven years and was not made up of isolated sales events. Indeed, the manufacturer was considered to have "effectively operated as an American distributor" and therefore the court determined it had jurisdiction over the action. In contrast, another French manufacturer was dismissed from an action for lack of jurisdiction when the court determined that the manufacturer did not target the subject state (i.e., Tennessee) and made use of a separate, independent U.S. company for marketing purposes. Indeed, the court noted that the U.S. company made the decisions of where to market the products and the French manufacturer had no input in those decisions. Similar reasoning resulted in the dismissal of no less than 418 asbestos cases in a multidistrict litigation matter which had been ongoing since the 1980s. In dismissing these actions, the court not only cited to the lack of contacts with the forum, but the degradation of evidence given 25 year duration of the litigation.

Further, a number of courts struggled with the plurality decision of the U.S. Supreme Court in *J. McIntyre Machinery Ltd. v. Nicastro*. In *J. McIntyre Machinery*, the court ruled that a

foreign manufacturer could not be sued in New Jersey state court for an injury allegedly caused by a defective product. However, there was no clear majority for a single rationale supporting this result. Noting the failure of a strong majority decision from the high court, the Fifth Circuit ruled that its “stream of commerce” approach to personal jurisdiction remains valid. The case concerned a wrongful death claim resulting from the use of a forklift on a Mississippi farm. The forklift was the product of a manufacturer in Ireland. The Fifth Circuit held there was jurisdiction over the manufacturer because it placed the product in the stream of commerce knowing it would be used by consumers in the state.

Finally, two courts dealt with the slow administrative processes of the U.S. [Food and Drug Administration](#). The Second Circuit ruled that the [Natural Resources Defense Council](#) had standing to sue the FDA, seeking to compel the agency to finalize regulations regarding triclosan (a chemical used in over-the-counter antiseptic antimicrobial soap). In allowing the case to proceed, the court noted the extraordinarily long time the agency took to issue monographs to determine whether the product met recognized safety standards and yet allowed the product to enter the marketplace. In a similar case, a district court in New Hampshire denied a motion to dismiss based upon the argument that the FDA had primary jurisdiction over the factual questions regarding claims that antibacterial soaps were 99 percent effective against germs. The court reasoned that litigation looks backward while FDA monographs look forward so there was little likelihood that the FDA’s decision would affect litigation about past representations.

## **The Class Action Fairness Act of 2005**

Predictably, there were a number of important decisions in 2013 related to the application of CAFA to product liability claims. The most notable of these decisions is the U.S. Supreme Court’s ruling in *Standard Fire Ins Co. v. Knowles*.

In *Standard*, the Supreme Court dealt with a putative class action where the plaintiff filed a stipulation limiting both his and the alleged class’ recovery to an amount less than the \$5 million jurisdictional threshold under CAFA. Apparently, the jurisdiction — a county in Arkansas — had the reputation that the bench would not rule on class certification motions for years and would instead permit discovery to be conducted resulting in settlements when a class had not even been certified. Thus, the plaintiff’s bar would engineer methods to have their class actions remain in the state’s jurisdiction. One way was to artificially

determine the damage amount to avoid CAFA.

The U.S. Supreme Court, in a unanimous decision, ruled that a plaintiff could not avoid CAFA jurisdiction by manufacturing the amount in controversy. The court noted “stipulations must be binding ... and [b]ecause his precertification stipulation does not bind anyone but himself, Knowles has not reduced the value of the putative class members’ claims. For jurisdictional purposes, our inquiry is limited to examining the case ‘as of the time it was filed in state court.’” In noting that the plaintiff could not yet bind the uncertified class, the court left unanswered the question of whether a representative class plaintiff can bind the absent class to anything.

In a bit of a twist, the Ninth Circuit found that declarations from the defendant in a putative class action could establish CAFA jurisdiction. Watkins concerned claims that defendant misled consumers by its claims that its “ZERO IMPACT” protein bars had “little to no impact on blood sugar.” Plaintiffs alleged to have represented a national class with aggregate damages in the millions of dollars. The defendant submitted declarations to the court noting these facts and further noting that defendant’s product was sold to thousands of customers and that nationwide sales of the product exceeded \$5 million. Thus, the defendants argued the case should be in federal court under CAFA as the clear indication of these facts were that the aggregate damages exceeded the threshold minimum. The Ninth Circuit agreed with defendant’s contentions.

## **Generic Drug Warnings**

Courts also continued to struggle with the Supreme Court’s holding in PLIVA Inc. v. Mensing that state failure to warn claims could not be maintained against generic drug makers. In Fulgenzi v. PLIVA Inc. the Sixth Circuit held that a state law claim against a generic drug maker for inadequate warnings is not preempted by federal law in the case where a branded drug manufacturer changes its product labeling and the generic manufacturer fails to do so.

However, in Mut Pharm Co. Inc. v. Bartlett the Supreme Court, in a 5-4 decision, ruled that state law claims which rely upon the accuracy of the warning are preempted. In reversing a \$21.6 million judgment for plaintiff, the court noted that, the only way for the defendant to avoid liability in the state (i.e., New Hampshire) was to strengthen the warning label which,

in turn, would violate federal law. The court rejected this result as well as the argument that the defendant could simply stop selling the drug saying such a theory was incompatible preemption jurisprudence.

### **Duty to Warn vs. Defective Design**

A duo of cases from the Seventh Circuit resulted in an important distinction between claims for the violation of the duty to warn and defective design allegations. The cases concerned bodily injury claims stemming from experienced truck mechanics using a stand and failing to apply the pin on the product. The failure to use the pin resulted in the stand collapsing. The stand came with both written and pictorial warnings indicating that the pin should be employed when using the stand. The Seventh Circuit held that while the warnings were adequate and thereby eliminated the duty to warn claims, there were still issues regarding whether there was a defect in design which was not resulted by the adequate warnings. Thus, despite adequate warnings, the design defect claim remained viable.

Similarly, the Tenth Circuit affirmed the dismissal of strict product liability claims against a hydraulic press break manufacturer on the grounds that the machine was not “unreasonably dangerous” and given the fact that an ordinary consumer would understand the extreme danger of reaching into the machine without safety guards.

### **Evidence**

This year also saw a number of cases dealing with interesting evidentiary issues in product liability matters.

In *Stollings v. Ryobi Techs Inc.* the Seventh Circuit reviewed the trial conduct of defense counsel. Apparently, defense counsel argued to the jury, without admissible evidence, that the plaintiff’s counsel had a joint venture with a technology company which made products the defendant refused to incorporate in its product. The Seventh Circuit ruled that the argument was inappropriate and irrelevant. “The suggestion that the case was an intellectual property case ‘masquerading as a personal injury case’ did not bear on whether [the defendant] designed and sold a defective product. How does a statement about counsel’s motive help a jury decide whether there was an injury? A duty? A breach of that duty? Or causation?”

In *Cummins v. BIC USA Inc.*, the Sixth Circuit ruled that the defendant could submit evidence that the [Consumer Product Safety Commission](#) took no action on the safety feature in question in the case. The matter concerned a three year old who burned himself using a cigarette lighter whose safety guards had been removed. Plaintiff claimed the lighter did not meet safety standards because the guard could be easily removed. The court permitted defendant to show that the CPSC did not take any action relating to the product's guard.

Finally, in *Baugh v. Cuprum SA de CV*, the Seventh Circuit ruled that the defendant could not use an exemplar ladder in the trial of a product liability case. The ladder in question was new but was made of the same materials the subject product was made of at the time of the alleged accident (plaintiff was injured when the ladder collapsed). The ladder used during trial was used as a "demonstrative exhibit" and was marked as such. It was not entered into evidence.

Nevertheless, the jury was allowed to inspect the ladder during deliberations and even take the ladder into the jury room — all under objections by plaintiffs. The Seventh Circuit ruled that demonstrative exhibits which are not entered into evidence cannot be provided to the jury during deliberations.

## **Asbestos**

This past year also saw a number of decisions limiting the types of asbestos-related product cases that could be brought. For example, the Virginia Supreme Court ruled that claims for latent mesothelioma accrued when the plaintiff was first diagnosed with any independent asbestos related disease and, while the statute described a number of different asbestos-related diseases, the legislature did not create multiple causes of action for each such malady.

Similarly, the Third Circuit ruled that 12 plaintiffs in an MDL action failed to follow an administrative order requiring disclosure of exposure histories and asbestos-related disease and therefore dismissed their claims. The Maryland high court ruled that a plaintiff could not recover under a theory of secondhand asbestos exposure while the Pennsylvania high court declined to follow the "every breath" theory wherein it is argued that every exposure to asbestos, no matter how minimal, is considered substantively causative of the claimed

injuries and damages.

## **Misrepresentation/Advertising**

Manufacturer advertising and promotional materials continued to be a focus of product liability actions. In California, class certification was denied in a putative class action which contended that the products in question were advertised to reduce aging but plaintiffs did not experience that result. The class certification was denied because the court determined that individual issues predominated over common questions since the determination of the claims necessitated analysis of individual experience with the products.

Another California putative class action concerned whether bracelets allegedly contained technology which enhanced athletic performance. There, the district court denied a motion to dismiss holding that the plaintiff properly plead her claims for false advertising and unfair competition even though she relied upon advertisements and news reports obtained after she purchased the product. The court noted that the advertisements and news reports showed defendant knew its claims regarding the products were not based upon scientific evidence and therefore were evidence of plaintiff's claims.

## **Damages**

Courts also continued to review plaintiffs' claims for damages to determine whether viable product liability claims were asserted. In *Ricalde v. Evonik Degussa Corp.* the Louisiana District Court dismissed a False Claims Act and Consumer Protection Safety Act case, The matter was brought by a whistleblower who claimed he was fired as a result of complaining about the quality of the products produced and the labeling on those products. In dismissing the action the court noted that the FCA is intended to "redress breaches of contract or general allegations of fraud or to punish a manufacturer's decision to ignore governmental safety regulations." No such claims were made in the case. Further, as the plaintiff's claims were entirely economic in nature (i.e., the loss of his job, etc.) plaintiff could not recover under the CPSA as a physical injury is required.

The Kentucky Supreme Court reviewed a dispute between 431 product liability plaintiffs and their counsel. The case plaintiffs who used the diet drug Fen-Phen. The plaintiffs retained the same attorneys and had engagement letters wherein it was agreed that there would be

a 30 percent contingency fee. A settlement in the underlying action was reached whereby the defendants paid a total of \$200 million. Of this, \$73 million was distributed to plaintiffs, \$20 million to a non-profit the attorneys created, and \$106 million to the counsel as fees. The latter amount exceeded the 30 percent contingency agreement and the court found the attorneys thereby breached their fiduciary duty.

## **Issues To Look Out For In The Future**

Finally, there were a number of decisions which highlight some issues which are likely to be the subject of decisions in 2014.

First, the U.S. Supreme Court dealt with the scope of the Alien Tort Statute (“*ATS*”) this year limiting it, for the most part, to conduct in the United States. In *Kiobel v. Royal Dutch Petroleum Co.* the court ruled that the *ATS* does not apply to conduct committed on foreign soil in violation of the law of nations or a treaty of the U.S. unless the “claims touch and concern the territory of the United States [and] do so with sufficient force to displace the presumption.” Consequently, the Ninth Circuit dismissed an action against a London company which the plaintiffs claimed was responsible for the deaths of indigenous people of the island of Bougainville.

Second, there were a number of cases which concerned the extent of cy pres awards. One such case was considered by the Third Circuit. In considering a putative class action regarding claims concerning baby products, the Third Circuit reviewed a \$35.5 million settlement approved by the lower court. Of the total settlement amount, \$14 million was allocated to class counsel for fees and expenses, \$3 million was apparently due to be distributed to class members who had filed claims and the remainder, \$18.5 million, was allocated for distribution to one or more cy pres recipients chosen by counsel for the parties.

While the court approved the use of cy pres distributions, the court questioned whether the class was receiving sufficient direct benefit from the settlement noting that cy pres distributions should be small. The court was concerned that the lower court may not have focused upon the fact that most of the settlement claimants would fall in to the \$5 compensation category as a result of somewhat draconian claims submission requirements (requiring a great deal of paperwork that consumers were unlikely to have or retain). Given the difficult claim process constructed by counsel for the parties, the Third District

questioned whether agreement to the settlement terms was in the best interest of the class. The case was therefore remanded to the district court for further analysis.

The question of cy pres awards will continue to concern the courts in 2014 — particularly in large putative class actions which frequently involved product liability and consumer actions. While a cy pres awards may be appropriate, the courts are wary of comparatively large sums being allocated to cy pres targets which are developed by the parties to the suit.

## **Conclusion**

Product liability litigation continues to be very active and there is no indication that it will diminish in the next year. While the trend appears to be favoring manufacturers regarding jurisdictional and CAFA matters, the proliferation of class actions continues and manufacturers and distributors must continue to carefully monitor their market strategies and advertisements accordingly.

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