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The Products Liability and Warranty Practice Group at Wilson Turner Kosmo LLP consists of trial lawyers with extensive experience representing manufacturers and sellers in products liability and warranty matters. The firm's experience includes representing manufacturers and retail sellers of automobiles, industrial equipment, hand tools, lawn and garden equipment, pharmaceutical products, medical devices, and consumer goods in all aspects of complex litigation, including trial, arbitration, and mediation.

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California Supreme Court Mandates Use of *Daubert*-Like Standards for Experts

A recent California Supreme Court opinion will not only have a profound impact on the evidentiary landscape for expert testimony, but will also create a significant advantage for corporate defendants in the products liability context.

In *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747 ("Sargon"), the Supreme Court unanimously affirmed that state court judges are "gatekeepers" of expert testimony, and that they are required to examine such testimony as to its reliability, methodology, and assistance to the jury. Specifically, the Supreme Court held that California Evidence Code Sections 801 and 802 require state court judges to exercise essentially the same rigorous scrutiny that the U.S. Supreme Court imposed on federal court judges in *Daubert v. Merrell Dow Pharmaceuticals* (1995) 509 U.S. 579 to prevent the admissibility of speculative and unreliable expert testimony. (*Id.* at pp. 769-772.) In other words, California state court judges must apply *Daubert*-like standards to determine the admissibility of expert testimony.

Before the Supreme Court decided *Sargon*, there was considerable confusion in California law concerning the extent of trial courts' responsibility to assess the foundation of expert opinion testimony. Under *Sargon*, it is now clear that California trial courts "must" determine "whether, as a matter of logic, the studies and other information cited by experts adequately support the conclusion that the expert's general theory or technique is valid." (*Id.* at p. 772.) While emphasizing the need to exclude unreliable evidence, the Supreme Court also noted that a trial court's gatekeeping role does not involve choosing between competing expert opinions, resolving scientific controversies, weighing an opinion's probative value, or substituting its own opinion for the expert's opinion. (*Id.* at pp. 769-772.)

A trial court must focus on the principles and methodology underlying an expert's opinion and must determine whether the information and reasoning on which an expert relies logically and adequately support that opinion. (See *id.* at p. 772.) As such, an expert opinion must be excluded when the trial court's assessment reveals the opinion to be "invalid and unreliable." (*Ibid.*) Notably, in pharmaceutical and toxic tort cases, plaintiffs' medical experts often rely on case reports to support their general causation opinions. Plaintiffs typically argue that case reports, alone or in combination with other information, provide an adequate foundation for a causation opinion. Defendants usually disagree, and they now have added support for their position in *Sargon*.

United States Supreme Court Rejects Attempt to Circumvent CAFA

The Supreme Court's recent decision in *Standard Fire Insurance Co. v. Knowles*, No. 11-1450, 2013 U.S. LEXIS 2370 (U.S. Mar. 19, 2013) marks a victory for out-of-state corporate defendants facing state court class actions.

The Court addressed whether "a class-action plaintiff who stipulates, prior to certification of the class, that he, and the class he seeks to represent, will not seek damages that exceed $5 million in total" removes the case from the Class Action Fairness Act's ("CAFA") scope. (*Id.* at *5.) The Court unanimously ruled that it does not, and its reasoning was based on two straightforward legal principles: 1) stipulations must be binding; and 2) a named plaintiff cannot bind precertification class members. (*Id.* at *7-9.) The Court held that because Knowles' precertification stipulation did not bind anyone but himself, Knowles did not reduce the value of the putative class members' claims, and the stipulation therefore had no effect on the amount in controversy. This ruling bodes well for defendants facing putative class representatives' attempts to prevent removal under CAFA.

Victory and Setback for Medical Device Manufacturers

Court Of Appeal Case Reasserts General Rule Precluding Strict Liability for Design Defect for an Implantable Medical Device

Medical device manufacturers have another case they can rely upon to strengthen their argument that any strict liability design defect claims involving implantable medical devices should be dismissed. *Garrett v. Howmedica Osteonics Corp.* (2013) 214 Cal.App.4th 173, a recent California Court of Appeal decision out of the Second District, joins a line of appellate decisions throughout California excluding strict liability design defect claims for implantable medical devices.

The *Garrett* Court held that "the doctrine of strict products liability based on a design defect is inapplicable to implanted medical devices available only through the services of a physician . . . ." (*Id.* at p. 178.) The Court further stated that the design defect exemption applies to an implanted medical device regardless of whether it was available only by prescription and regardless of whether it is properly characterized as a "prescription" device. (*Id.* at p. 184.) Consequently, a court need not apply the risk-benefit test or the consumer expectations test; rather, the appropriate test for determining whether a manufacturer is liable for a design defect in an implantable medical device involves the application of the ordinary negligence standard.

Ninth Circuit Adds to Circuit Split on Preemption Issue in Medical Device Litigation

A recent Ninth Circuit ruling for plaintiffs could expose manufacturers of hundreds of high-risk medical devices to significant state tort damages. In *Stengel v. Medtronic Inc.* (2013) 704 F.3d 1224, the Court held that a state law tort claim for failure to warn about risky medical devices was not preempted by the Medical Device Amendments ("MDA") to the Food, Drug, and Cosmetic Act. (*Id.* at p. 1226.) The Ninth Circuit described the central issue as "whether the MDA preempts a state-law claim in which the state-law duty of care 'parallels' a federal-law duty imposed by the MDA." (*Ibid.*)

Plaintiffs brought their claim under "settled Arizona law that protects the safety and health of Arizona citizens by imposing a general duty of reasonable care on product manufacturers." (*Id.* at p. 1233.) The Court concluded that Plaintiffs' state-law claim was not preempted because that same duty of care is included in the MDA, albeit with lesser remedies. In so holding, the Ninth Circuit joins the Fifth and Seventh Circuits, "which reached the same conclusion with respect to comparable state-law claims." (*Ibid.*)

First Trial over Hip Replacement Device Results in $8.3 Million Jury Verdict, But No Punitive Damages

More than 10,000 lawsuits have been filed over the ASR XL ball-and-socket hip implant manufactured by Johnson & Johnson subsidiary DePuy Orthopaedics, Inc., and Plaintiff Loren Kransky's case was the first trial in the mass litigation (Case No. BC456086, Los Angeles County Superior Court). Kransky, a retired prison guard, claimed that the metal-on-metal device left residue in his hip socket, afflicting him with potentially lethal metal poisoning.

After a week of deliberations, the jury found that the ASR XL hip implant was defectively designed and awarded $8,338,000 in compensatory damages. However, the jury did not award any punitive damages—which had been estimated at as much as $179 million—and the jury also rejected Kransky's claim that DePuy failed to adequately warn of the risks associated with its product. Although Kransky's trial is instructive, what is perceived to be the first bellwether case will be tried in Ohio in May.

Food Labeling Lawsuits a Growing Trend

An increasing number of lawsuits have been filed over "natural" terms used to promote various food, beverage, and personal care products, particularly if the product contains genetically engineered ingredients. Recently filed complaints claiming as false or misleading a product that has been labeled, marketed, or otherwise promoted as "natural" include:

(D. Colo.) - class action complaint alleging Pepperidge Farm "mistakenly or misleadingly represented that its Cheddar Goldfish crackers . . . are 'Natural,' when in fact, they are not, because they contain Genetically Modified Organisms ('GMOs') in the form of soy and/or soy derivatives";

(D. N.J.) - class action complaint alleging Johnson & Johnson advertised its Aveeno Baby Wash and Shampoo and Baby Calming Comfort Bath "natural oat formula" products as all-natural when they include several synthetic chemicals;

(N. D. Cal.) - class action complaint alleging General Mills Inc.'s Green Giant 100 percent Natural Valley Fresh Steamers frozen vegetables are not, in fact, 100 percent natural; and

However. in a notable victory for defendants, a Northern District of California judge recently threw out a class action lawsuit which alleged that AriZona Beverage Co. misrepresented its iced teas as all-natural because they contained high fructose corn syrup and citric acid.

FOR COPIES of these opinions or further information regarding the issues raised, please contact WTK.