

2017 WL 471284

**Westlaw Journal Health Law**

Westlaw Journal Express

\*1

February 07, 2017

Expert Analysis

**THE NEW GOLD RUSH: STUDY REVEALS PHARMACEUTICAL PLAINTIFFS FLOCKING TO CALIFORNIA**

By Mark A. Behrens, Esq., and Christopher E. Appel, Esq., Shook Hardy & Bacon<sup>aa1</sup>

Copyright © 2017 Thomson Reuters.

Mark A. Behrens and Christopher E. Appel of Shook Hardy & Bacon discuss the implications of a recent study showing that “forum shopping” drug-injury plaintiffs are choosing to bring a disproportionate share of their lawsuits in California. The report comes just as the U.S. Supreme Court is preparing to review a broad reading of specific personal jurisdiction that the state’s highest court adopted in a ruling last year.

The Civil Justice Association of California, a prominent legal reform group, recently conducted a comprehensive study of product liability cases against pharmaceutical manufacturers in two bellwether state courts -- the Los Angeles and San Francisco Superior Courts -- between January 2010 and May 2016.<sup>1</sup>

The study’s purpose was to research the volume of pharmaceutical product liability cases filed in California state courts by out-of-state plaintiffs. It found that:

- 90 percent of the 25,503 plaintiffs in the study were from out-of-state.
- 67 percent of the 2,919 cases in the study involved only nonresident plaintiffs.
- A small group of 25 law firms represented more than 90 percent of the plaintiffs.

These results show the huge volume of nonresident plaintiffs -- so-called litigation tourists -- flocking to California to file lawsuits. This article examines the CJAC study results and explains why out-of-state pharmaceutical product liability plaintiffs may be drawn to California state courts.

***CJAC study: Methodology and findings***

To determine the proportion of cases filed in California state courts by out-of-state plaintiffs, CJAC attempted to capture every pharmaceutical product liability suit filed in the Los Angeles and San Francisco superior courts over nearly a 6 1/2-year period.

The group chose these jurisdictions because they host a significant portion of California’s overall civil litigation. The lengthy period studied was intended to capture as many cases filings as possible to eliminate any potential data anomalies.

CJAC’s research team compiled information from court pleadings and other sources. The massive data set ultimately included information on 2,919 cases and 25,503 individual plaintiffs.

As we have already noted, more than two-thirds of the pharmaceutical product liability cases filed in the two courts between January 2010 and May 2016 did not include any California residents as plaintiffs.

Those suits were filed by residents of other states, a practice that has been referred to as “forum shopping.” In almost 86 percent of the cases, more than half of the plaintiffs were from out of state. Of the 25,503 total plaintiffs studied, only 2,568 (10.1

percent) were California residents.

\*2 For some perspective, consider that California, the most populous state, is home to 12 percent of the U.S. population. Since California residents comprise only 10 percent of the plaintiffs involved in pharmaceutical litigation there, California residents are actually less represented in these lawsuits than they are in the population of the nation as a whole.

Another key finding of CJAC's study is that just 25 personal injury law firms represented 91 percent of the 25,503 plaintiffs in the cases surveyed. Of those firms, seven had California residents make up fewer than 7 percent of their plaintiffs. None of the top firms had California residents make up more than one-third of their plaintiffs.

This information suggests that the top law firms bringing pharmaceutical product liability cases in California are actively searching for plaintiffs in other states. Many of these law firms have their principal offices outside of California.

### ***Why out-of-state plaintiffs might choose to sue in California***

California's "plaintiff friendly" reputation no doubt attracts many out-of-state pharmaceutical plaintiffs. The state has been labeled a "Judicial Hellhole" by the American Tort Reform Foundation each year since 2010.<sup>2</sup>

In 2016, the report listed California as the nation's second-worst jurisdiction for litigation fairness -- just below the city of St. Louis. California consistently hosts many of nation's largest verdicts in tort cases generally<sup>3</sup> and in pharmaceutical cases in particular.<sup>4</sup>

California's courts have also adopted permissive tort liability theories that likely draw plaintiffs to the state. With respect to pharmaceutical liability, California is the birthplace of the so-called innovator liability theory, which holds a brand-name drugmaker liable for injuries caused by a generic version of its product.

A state appellate court adopted the theory in 2008 in *Conte v. Wyeth Inc.*, 168 Cal. App. 4th 89 (Cal. Ct. App., 1st Dist. 2008). Most other courts have rejected it.<sup>5</sup>

The California Supreme Court will likely decide the viability of innovator liability in the state later this year, when the court considers *H.T. v. Novartis Pharmaceutical Corp.*, No. S233898, review granted (Cal. June 8, 2016).

### ***Kelly-Frye vs. Daubert***

California is also among a shrinking minority of states that have not adopted the federal standard for the admissibility of expert evidence known as the *Daubert* rule, after the U.S. Supreme Court's ruling in *Daubert v. Merrill Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993).

Rigorous judicial scrutiny of the reliability of an expert's methodology and conclusions is particularly critical in pharmaceutical cases, when the outcome can turn on whether there is scientific evidence supporting the plaintiff's theory about how the drug caused her injuries.

\*3 The California Supreme Court said in *Sargon Enterprises Inc. v. University of Southern California*, 55 Cal. 4th 747 (Cal. 2012), that the state's trial court judges should act as "gatekeepers" with the responsibility of excluding speculative or irrelevant expert opinion.

But the *Sargon* court did not replace the state's approach to evaluating expert testimony, called the *Kelly-Frye* doctrine, after the federal appellate ruling in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), and the California high court's decision in *People v. Kelly*, 549 P.2d 1240 (Cal. 1976).

It remains uncertain, after *Sargon*, whether California's trial court judges will undertake the extensive review of reliability associated with the federal *Daubert* standard.<sup>6</sup>

California also provides plaintiffs with advantageous liability rules compared to many other states. For instance, while

California, like many other states, has abolished joint liability for noneconomic damages such as pain and suffering, the state has retained joint liability for economic damages.<sup>7</sup>

A civil defendant found 1 percent liable for a plaintiff's injury may have to pay all of the economic damages if another tortfeasor is insolvent or immune.

Moreover, California has no statutory cap on punitive damages, unlike many other states. This means large punitive damages awards -- judgments that would be automatically reduced by operation of statute in other states -- may stand in California, provided they are not unconstitutionally excessive.

The "shadow effect" of punitive damages can influence negotiations in the vast majority of cases that settle.

### *How nonresident plaintiffs 'forum shop' in California*

Another reason pharmaceutical plaintiffs from other states may choose to file in California instead of at home (or in other plaintiff-friendly jurisdictions) is that California courts appear to embrace out-of-state plaintiffs and their cases.

This welcoming tone is illustrated by a ruling the U.S. Supreme Court agreed to review Jan. 19: the California Supreme Court's 2016 decision in *Bristol-Myers Squibb Co. v. Superior Court of San Francisco*, 1 Cal. 5th 783 (Cal. 2016), which concerned whether California courts could exercise specific personal jurisdiction over a nonresident pharmaceutical manufacturer.

The case involved claims by 86 California residents and 592 nonresidents allegedly injured by Bristol-Myers' prescription blood thinner Plavix.

The drugmaker defendant, a Delaware corporation with headquarters in New York and substantial operations in New Jersey, argued that California's courts lacked personal jurisdiction because the drug was not manufactured, developed, labeled or packaged or marketed in the state. California sales of Plavix accounted for only 1.1 percent of total nationwide sales revenue, the company claimed.

The California Supreme Court held that, although the manufacturer was not "at home" in the state to permit the exercise of general personal jurisdiction, the manufacturer's "extensive contacts with California" with respect to marketing and distributing the drug established specific personal jurisdiction.

\*4 The court found that the manufacturer had exposed itself to being sued in California by advertising and selling the drug in the state, employing several hundred people in there, and conducting research in the state (although not of Plavix).

"The fact that the nonresident plaintiffs greatly outnumber the California plaintiffs does give us some pause," the justices wrote, but they nevertheless concluded that the state had a legitimate interest in deciding the out-of-state plaintiffs' claims.

### *An epicenter of plaintiff-friendly litigation*

The court's decision effectively cemented California's position as an epicenter for pharmaceutical and other mass tort litigation.<sup>8</sup>

If a manufacturer is subject to personal jurisdiction simply for advertising and selling its product in California -- which boasts the world's sixth largest economy -- there is little practical way for any large company to avoid a California courtroom, for claims by resident and nonresident plaintiffs alike.

As one commentator has observed, the California Supreme Court's decision "creates a form of 'specific' jurisdiction in mass tort cases that is every bit as 'grasping' and 'exorbitant' as [the one the Supreme Court] rejected as a due process violation" in *Daimler AG v. Bauman*, 134 S. Ct. 747 (2014).<sup>9</sup>

As Justice Kathryn Werdegar wrote for the three-justice dissent:

As California holds a substantial portion of the United States population, any company selling a product or service nationwide, regardless of where it is incorporated or headquartered, is likely to do a substantial part of its business in California. Under the majority's theory of specific jurisdiction, California provides a forum for plaintiffs from any number of states to join with California plaintiffs seeking redress for injuries from virtually any course of business conduct a defendant has pursued on a nationwide basis, without any showing of a relationship between the defendant's conduct in California and the nonresident plaintiffs' claims. The majority thus sanctions our state to regularly adjudicate disputes arising purely from conduct in other states, brought by nonresidents who suffered no injury here, against companies who are not at home here but simply do business in the state.

The U.S. Supreme Court now has the chance to correct the state court's error.

### *The role of plaintiff lawyers' advertising*

National law firms run ads around the country to generate leads on cases that often end up in California.

In 2015 the U.S. Chamber Institute for Legal Reform published a study on trial lawyer marketing<sup>9</sup> that reported legal advertising in the United States had increased by nearly 70 percent from \$531 million in 2008 to \$892 million (projected) in 2015.<sup>10</sup>

According to the report, trial lawyer advertising grew more than six times faster from 2008 to 2014 than all other ad spending. During this period, trial lawyer ads doubled as a share of local advertising and quadrupled as a share of syndicated advertising. The study also reported that nine of the top 10 and 23 of the top 25 most expensive Google keyword search terms are legal terms such as "personal injury."

\*5 Legal advertising with respect to pharmaceuticals is especially significant. Prescription drug claims made up the top individual category of television legal advertising in 2015, with an estimated \$57.3 million spent, the Chamber Institute study showed. Legal advertising related to medical devices came in second with \$45.7 million spent, followed by television advertising related to "asbestos/mesothelioma" with \$45.6 million spent.

Other studies have reported similar statistics. For example, X Ante, a firm that tracks mass tort litigation advertising, reported that there were around 360,000 ads focused on pharmaceuticals and medical devices in 2015, at a total cost of \$123 million.<sup>11</sup> Several plaintiffs' law firms each accounted for more than 30,000 ads, the company found.

Increasingly, funding for many of these nationwide advertising efforts may be coming from third parties.<sup>12</sup>

Hedge funds and specialized litigation finance firms have "bankrolled a wave of television advertising and online marketing that has helped stimulate tens of thousands of lawsuits" against pharmaceutical and medical device manufacturers, according to an October 2015 report in Forbes.

In many of these apparent David-and-Goliath situations, David may in fact be backed by big money investors.

### *Adverse impacts of out-of-state pharmaceutical filings*

Harm to patients is a potential byproduct of plaintiff-lawyer advertising utilized to generate a pipeline for pharmaceutical cases into California and other states.

Legal advertisements suggesting that a particular medication is unsafe may scare some patients into discontinuing a doctor-prescribed medical treatment on their own. The potential for injury is so significant that in 2016 the American Medical

Association adopted a policy to “advocate for a requirement that attorney advertising ... have appropriate and conspicuous warnings that patients should not discontinue medications without seeking the advice of their physician.”<sup>13</sup>

AMA board member Russell W. H. Kridel has observed that the “onslaught of attorney ads has the potential to frighten patients and place fear between them and their doctor.”<sup>14</sup>

“By emphasizing side effects while ignoring the benefits or the fact that the medication is FDA approved, these ads jeopardize patient care,” Kridel added.<sup>15</sup>

The influx of pharmaceutical litigation by nonresident plaintiffs may also jeopardize Californians’ access to courts by depleting the state’s limited judicial resources and causing in-state residents to wait for justice until earlier-filed nonresident claims are decided.

Since 2008, the California court system has been in a perpetual budget crisis, resulting in the closure of at least 52 courthouses and more than 200 courtrooms, as well as reduced services statewide.<sup>16</sup> The state judiciary estimates that closures and service reductions have deprived more than 2 million Californians of access to justice.<sup>17</sup>

\*6 California Supreme Court Chief Justice Tani Cantil-Sakauye has stated publicly that the judiciary’s budgets in recent years have represented only a fraction of the money needed for trial courts “just to tread water” and that the budgets were “not enough to provide timely, meaningful justice to the public.”<sup>18</sup>

### *Conclusion*

Ninety percent of pharmaceutical product liability plaintiffs in California state courts are residents of other states, according to 2016 CJAC data. These plaintiffs -- often represented by firms that have their main offices in other states -- have chosen to leave their “home courts” to sue in California because they anticipate a litigation advantage there.

These out-of-state plaintiffs are drawn by liberal rulings, favorable laws and large awards. Many of the cases are the result of advertising by plaintiffs’ lawyers.

But this model is leading to adverse societal consequences, including harm to patients who may stop taking medically necessary pharmaceuticals because of alarmist messages in lawyer ads.

Justice could also be delayed for Californians as a result of mass filings in California by nonresident pharmaceutical plaintiffs.

Just as the Supreme Court prepares to take up the issue of nonresident drug-liability filings in California, the CJAC study provides an essential starting point for analyzing the impact of a state judiciary that has effectively endorsed forum-shopping.

### Footnotes

<sup>1</sup> Ryan Tacher, *Out-of-State Plaintiffs: Are Out-Of-State Plaintiffs Clogging California Courts?*, Civil Justice Ass’n of Cal. (2016), <http://bit.ly/2kz9Usb>.

<sup>2</sup> See Am. Tort Reform Found., *Judicial Hellholes Report Archives*, available at <http://bit.ly/2kFd940>.

<sup>3</sup> See, e.g., Erin Coe, *Top Calif. Verdicts of 2014 -- And The Firms That Won Them*, Law360 (July 14, 2014); see also California Jury Verdicts, Jury Verdict Alerts, <http://www.juryverdictalert.com/>.

<sup>4</sup> See, e.g., Daniel Siegal, *J&J Unit Hit With \$5.6M Verdict Over Calif. Risperdal Death*, Law360 (Oct. 19, 2015); Jessica Dye, *Johnson & Johnson Ordered to Pay \$5.7 mln in California Mesh Trial*, Reuters, Mar. 5, 2015 (reporting on \$5.7 million jury award, including \$5 million in punitive damages, in one of the first trials over a specific transvaginal mesh medical device), <http://reut.rs/2kF8vCY>; Tom Moylan, *California State Jury Awards \$6.5 Million In 1st Actos Bladder Cancer Case To Go To Trial*, LexisNexis, Apr. 29, 2013.

- <sup>5</sup> See, e.g., *Huck v. Wyeth Inc.*, 850 N.W.2d 353, 355 (Iowa 2014) (referring to innovator liability theory as “law without principle”); Victor E. Schwartz et al., *Warning: Shifting Liability to Manufacturers of Brand-Name Medicines When the Harm was Allegedly Caused by Generic Drugs has Severe Side Effects*, 81 *Fordham L. Rev.* 1835 (2013).
- <sup>6</sup> See David L. Faigman & Edward J. Imwinkelried, *Wading into the Daubert Tide: Sargon Enterprises Inc. v. University of Southern California*, 64 *Hastings L.J.* 1665, 1694 (2013) (finding it unclear how closely the new California approach will track the federal approach).
- <sup>7</sup> See Cal. Civ. Code Ann. §§ 1431 and 1431.2.
- <sup>8</sup> See Emily Field, *Plavix Ruling Cements Calif. As Center for Mass Torts*, *Law360*, Aug. 30, 2016.
- <sup>9</sup> See James M. Beck, *California High Court Expands ‘Specific’ Personal Jurisdiction to Recreate ‘Exorbitant’ Personal Jurisdiction Rejected by Daimler v. Bauman*, *Drug & Device L.* (Aug. 29, 2016), <http://bit.ly/2byNTsy>.
- <sup>10</sup> See Ken Goldstein & Dhavan V. Shah, *Trial Lawyer Marketing 2*, U.S. Chamber Inst. for Legal Reform (October 2015) <http://bit.ly/1NAIrP4>.
- <sup>11</sup> See Jessica Karmasek, *AMA: Lawyer Ads Are Alarming Prescription Drug Users, Jeopardizing Health Care*, *Forbes*, July 21, 2016, <http://bit.ly/2kFfewzw>.
- <sup>12</sup> See Daniel Fisher, *Hedge Funds Pump Up Mass Torts With Loans, Advertising*, *Forbes*, Oct. 23, 2015, <http://bit.ly/2bgGYq>.
- <sup>13</sup> Am. Med. Ass’n House of Delegates Res. 208 (2016).
- <sup>14</sup> *Physicians Take on Timely Public Health Issues*, *AMA News*, June 15, 2016, <http://bit.ly/2jTYbra>.
- <sup>15</sup> *Id.*; see also Lisa A. Rickard, *Opinion, How Lawyers Scare People Out of Taking Their Meds*, *Wash. Post*, Aug. 5, 2016, available at <http://wapo.st/2jU89c3>; Jessica Karmasek, *AMA: Lawyer Ads Are Alarming Prescription Drug Users, Jeopardizing Health Care*, *Legal Newswire*, July 26, 2016, <http://bit.ly/2IguYE7>.
- <sup>16</sup> Cal. Jud. Branch, *In Focus: Judicial Branch Budget Crisis*, <http://bit.ly/2kiZWg2>.
- <sup>17</sup> *Id.*
- <sup>18</sup> Maura Dolan, *New California Budget Fails to Ease Court Woes, Chief Justice Says*, *L.A. Times*, June 20, 2014, available at <http://lat.ms/2kF16DC>.
- <sup>aa1</sup> Mark A. Behrens and Christopher E. Appel co-chair Shook Hardy & Bacon’s public policy group out of the firm’s Washington office.