

MASS TORTS LITIGATION

AMERICAN BAR ASSOCIATION SECTION OF LITIGATION



Fall 2016, Vol. 15 No. 1

TABLE OF CONTENTS

Articles »

[Third-Party Subpoenas and Personal Jurisdiction after *Daimler v. Bauman*](#)

By James M. Beck

Emerging precedent, while still relatively sparse, appears to support application of *Daimler* to third-party subpoenas.

[California Adopts the Sophisticated Intermediary Doctrine but Refuses to Apply It](#)

By W. Clay Massey and Ronnie A. Gosselin

The state supreme court ruled in *Webb v. Special Electric Co., Inc.*, a case involving the most toxic form of asbestos.

[The Plaintiffs' Perspective: Putting the Notion of "Woodshedding" to Rest](#)

By Danielle Gold

Defendants' attempts to restrict communications between plaintiffs' counsel and plaintiffs' physicians remain unsuccessful.

[Recent Developments in Aviation Litigation 2016: Preemption](#)

By Erika Maurice and Vincent Lesch

Courts continue to grapple with the boundaries of this preempted field and what claims or standards of care fall within it.

[Treating Physicians and Causation: How Far Can They Go?](#)

By Andrea Mahady Price

The new Rule 26(a)(2)(C) has been accepted by the courts—except when treating the physician's opinion goes beyond the medical records.

Practice Points »

[How to Take a Two-Step Approach to Preparing Your Expert Witness for Deposition](#)

With hectic schedules for both lawyer and client, timing is everything.

[Considering Where to Litigate an International Mass Tort Case](#)

Read about the latest turn in the long-running dispute between Chevron and Ecuadorian residents alleging environmental damages.

ARTICLES

Third-Party Subpoenas and Personal Jurisdiction after *Daimler v. Bauman*

By James M. Beck – September 21, 2016

In *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), the U.S. Supreme Court restricted the principle of general personal jurisdiction (whereby a defendant can be sued about anything) involving corporations, limiting this concept to where a corporation is “at home”—essentially its principal place of business or state of incorporation. *Id.* at 760–61. Plaintiffs may, of course, still sue corporations in the plaintiff’s domicile provided that the litigation satisfies the “minimum contacts” test for specific personal jurisdiction, but *Daimler* makes it extremely difficult for a court in any jurisdiction not home to either the plaintiff or the defendant to obtain jurisdiction.

Federal Rule of Civil Procedure 45(b), drafted prior to *Daimler*, authorizes the issuance of subpoenas to third parties—including corporations—“any place within the United States,” without regard to where the entity being subpoenaed is at home. Pre-*Daimler* law established, however, that courts must have personal jurisdiction over the target of a subpoena in order to enforce it. *E.g.*, *First Am. Corp. v. Price Waterhouse LLP*, 154 F.3d 16, 20 (2d Cir. 1998) (enforcement of subpoena must “comport with due process” including the “assertion of personal jurisdiction”); *In re Sealed Case*, 141 F.3d 337, 341 (D.C. Cir. 1998) (recognizing in Rule 45 context “[t]he principle that courts lacking jurisdiction over litigants cannot adjudicate their rights is elementary, and cases have noted the problem this creates for the prospect of transferring nonparty discovery disputes”); *In re Application to Enforce Admin. Subpoenas*, 87 F.3d 413, 418 (10th Cir. 1996) (nonparty target of administrative agency subpoena must have minimum contacts); *Reinsurance Co. of Am. v. Administratia Asigurarilor de Stat*, 902 F.2d 1275, 1281 (7th Cir. 1990) (“[a] court . . . , when authorized by statute or rule of court, may order a person subject to its jurisdiction to produce documents, objects, or other information relevant to an action”); *Ariel v. Jones*, 693 F.2d 1058, 1061 (11th Cir. 1982) (subpoena quashed “[i]n view of the minimal contacts of the [nonparty] with [the forum]”). See C. Wright & A. Miller, 9A *Federal Practice & Procedure* §2454, at 398–99 (3d ed. 2008) (“A corporation is amenable to service of a subpoena under Rule 45(b) in any forum in which it has sufficient minimum contacts.”); 16 *Moore’s Federal Practice* §108.125, at 108–48 (3d ed. 2008) (“[a] nonparty witness cannot be compelled . . . unless the witness is subject to the personal jurisdiction of the court”). This precedent indicates that *Daimler* should limit the enforceability of third-party subpoenas to the same extent that it restricts jurisdiction over corporate defendants.

The Second Circuit so held in *Gucci America, Inc. v. Weixing Li*, 768 F.3d 122 (2d Cir. 2014), in the context of discovery in aid of execution. The plaintiff in *Gucci* was seeking assets hidden by product counterfeiters, and it subpoenaed information from a Chinese overseas bank in the Southern District of New York, where the banks had offices but were not “at home” under *Daimler*. After being held in contempt for resisting discovery and execution, the banks appealed. The Second Circuit held that, while there was jurisdiction over the alleged counterfeiters sufficient to freeze their assets, *Gucci*, 768 F.3d at 129–30, personal jurisdiction was lacking over the bank itself, so that the subpoena was unenforceable against it. “A district court . . . must have personal jurisdiction over a nonparty in order to compel it to comply with a valid discovery request under [Rule] 45.” *Id.* at 141 (footnote omitted).

[A] district court can enforce an injunction against a nonparty such as [subpoena target] only if it has personal jurisdiction over that nonparty. Following oral argument in this case, the Supreme Court decided *Daimler*. . . . [The target] asserts, in post-argument letter briefs, that in light of *Daimler* the district court erred in concluding that [it] was properly subject to all-purpose general jurisdiction. We agree. We also conclude, however, that this matter should be remanded so that the district court may consider whether it has specific jurisdiction.

Id. at 134 (citation omitted).

© 2016 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

The target of the subpoena was not “at home” in the jurisdiction—it had only branch offices there—so “there is no basis consistent with due process for the district court to have exercised general jurisdiction over the Bank.” *Id.* at 135.

Gucci has been followed as controlling authority by other Second Circuit courts to prevent third-party discovery against nonresident corporate entities under *Daimler*. See *Tiffany (NJ) LLC v. China Merchs. Bank*, 589 F. App’x 550, 553 (2d Cir. 2014) (“a district court can enforce an injunction against a nonparty only if it has personal jurisdiction over that nonparty”); *Motorola Credit Corp. v. Uzan*, 132 F. Supp. 3d 518, 521 (S.D.N.Y. 2015) (third parties “are incorporated and maintain their principal places of business abroad, and no ‘exceptional circumstances’ exist that would otherwise support general jurisdiction”). But see *Vera v. Republic of Cuba*, 91 F. Supp. 3d 561, 571–71 (S.D.N.Y. 2015) (“permissive” post-judgment execution proceedings may proceed against nonparties even in the absence of personal jurisdiction), *appeal quashed*, 2016 WL 3135752 (2d Cir. June 3, 2016).

A similar result was reached in *Leibovitch v. Islamic Republic of Iran*, 2016 WL 2977273 (N.D. Ill. May 19, 2016), likewise initiated by plaintiffs who subpoenaed information from two foreign banks, for the purpose of executing on a judgment. Although both banks had branches in the forum state (which is probably why the plaintiffs chose that forum), they certainly did not have the kind of uniquely involved relationship with that state to be “at home.” *Id.* at *6. The plaintiffs argued that *Daimler* “only applies to defendants, and not to third parties.” *Id.* at *7.

Citing pre-*Daimler* precedent, the court rejected this argument. “[A] court must have personal jurisdiction to order compliance with a discovery request.” *Id.* at *5. Thus, discovery subpoenas could not be valid against those over which the forum could not exercise general jurisdiction (or specific jurisdiction, but that wasn’t the real point):

[T]he Court cannot discern any valid reason why *Daimler* would not apply any time the Court is called to decide personal jurisdiction. . . . This same rationale [requiring jurisdiction] applies to non-parties like the banks: they have been haled into a foreign court, required to obtain counsel to represent their interests, and risk the imposition of a judgment and/or sanctions if they fail to comply with Plaintiffs’ filings. For this reason, other courts have applied *Daimler* and earlier Supreme Court decisions addressing personal jurisdiction generally to cases involving third parties. If anything, one would think that a more restrictive standard should apply when assessing personal jurisdiction over non-parties, not a looser one, because unlike defendants they are not accused of violating the plaintiff’s rights and essentially have “no dog in the fight.”

2016 WL 2977273, at *7 (citations omitted). See also *Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.*, 770 S.E.2d 440, 443, 445–47 (Va. 2015) (concurring opinion) (subpoena against nonresident website operator unenforceable due to lack of personal jurisdiction).

Most of the cases applying *Daimler* have done so in the context of motions to dismiss brought by corporate defendants. However, under the generally accepted proposition that courts can only impose discovery sanctions against third parties over which they have personal jurisdiction, the restrictions on general personal jurisdiction recognized in *Daimler* would seem to be equally applicable to corporate targets of third-party subpoenas. Emerging precedent, while still relatively sparse, appears to support application of *Daimler* to third-party subpoenas. Because such subpoenas are commonplace in mass tort litigation, both plaintiffs and defendants in such litigation should pay close attention to *Daimler*’s jurisdictional limitations in choosing where, and how, to conduct third-party discovery.

Keywords: litigation, mass torts, general personal jurisdiction, third-party subpoena, *Daimler AG v. Bauman*

[James M. Beck](#) is counsel to Reed Smith LLP in the firm’s Philadelphia office. Mr. Beck is also editor of the *Mass Torts Litigation* newsletter.

California Adopts the Sophisticated Intermediary Doctrine but Refuses to Apply It

By W. Clay Massey and Ronnie A. Gosselin – September 21, 2016

On May 23, 2016, the California Supreme Court adopted the sophisticated intermediary doctrine in toxic tort matters. In *Webb v. Special Electric Co., Inc.*, 2016 WL 2956882 (Cal. May 23, 2016), the court recognized this affirmative defense to failure-to-warn claims for suppliers of raw materials, where a plaintiff claims injury from the supplier's raw material as a component part of a finished product manufactured by a third party. Specifically, the court confirmed that a supplier may discharge its duty to warn the final end user of a product that incorporates the supplier's raw material if the supplier (1) provides adequate warnings or sells to a sufficiently sophisticated buyer and (2) reasonably relies on the buyer to warn end users of the risk of harm. *Id.* at *9.

However, at the same time, the court refused to apply the doctrine as a legal bar to an asbestos plaintiff's claims against a company that supplied raw asbestos fiber to what the court and plaintiff's own experts acknowledged was the country's most sophisticated user of asbestos in the manufacture of products.

The Facts of *Webb*

The plaintiff, William Webb, worked in a distribution center for a product called Transite pipe, a product that Mr. Webb directly handled at the distribution center as part of his job. This product contained crocidolite asbestos, which the court explained "is the most toxic form of asbestos, several times more likely to cause cancer than the more common chrysotile form." *Id.* at *1. Transite pipe, which carried no asbestos warning, was manufactured by Johns-Manville. The court recognized Johns-Manville as "the oldest and largest manufacturer of asbestos-containing products in the country." *Id.* The court also recognized that Johns-Manville "owned and operated a mine in Quebec that was one of the world's largest sources of chrysotile asbestos." *Id.* Mr. Webb's own epidemiologist "knew of no company in the United States more knowledgeable about asbestos than Johns-Manville." *Id.* at *2.

As a result of Mr. Webb's exposure to asbestos from the Johns-Manville Transite pipe, he developed mesothelioma, which the court stated was a fatal form of cancer caused by exposure to asbestos fibers. Mr. Webb and his wife filed suit for his injury, but not against Johns-Manville. Rather, they sued Special Electric Company—a company that had brokered the bulk sale of the raw crocidolite asbestos (of which Special Electric never had possession) from a South African mine that Johns-Manville allegedly used as a component in the Transite pipe. The plaintiffs claimed that Special Electric was liable for not warning Mr. Webb of the health risks associated with the asbestos in Johns-Manville's product.

During litigation, Special Electric moved both for nonsuit and directed verdict on the basis that it had no duty to warn a sophisticated intermediary like Johns-Manville of the dangers of crocidolite asbestos. The trial judge delayed ruling on the motions until after the case went to verdict, where the jury found Special Electric to be 18 percent at fault. The trial court then granted Special Electric's sophisticated intermediary motions as a judgement notwithstanding the verdict. The plaintiffs appealed and the court of appeals reversed the trial court's ruling on both procedural and substantive grounds. The court of appeals held that there was "substantial evidence . . . that Special Electric breached a duty to warn Johns-Manville and other foreseeable downstream users like Webb about the risks of asbestos exposure." *Id.* at *3. Special Electric appealed and the California Supreme Court granted review.

The California Supreme Court's Decision and Analysis

In considering whether Special Electric had a duty to warn Mr. Webb about the asbestos contained in Johns-Manville's finished product, the supreme court discussed various supplier defenses to failure-to-warn claims in products liability actions based on strict liability or negligence. The court first considered the "sophisticated user doctrine." *Id.* at *5. Under this defense, the court explained, "sophisticated users [of a product] need not be warned about dangers of which they are already aware or should be aware." *Id.* (quoting *Johnson v. Am. Standard, Inc.*, 43

Cal. 4th 56, 179 P.3d 905, 74 Cal. Rptr.3d 108 (Cal. 2008)). The court explained that “[b]ecause sophisticated users already know, or should know, about the product’s dangers, the manufacturer’s failure to warn is not the legal cause of any harm.” *Id.* The court found this defense inapplicable to the facts of *Webb* because it applies only “when the *end user* of a product can be expected to know about the potential risks due to the user’s extensive training or professional experience.” *Id.* The court determined that the defense does not apply when the manufacturer or supplier sells a product to a sophisticated *purchaser*, which then passes the product on to other users.

The court then considered and ruled out application of the “component parts doctrine” and the “bulk supplier doctrine.” *Id.* at *6. Citing section 5 of the *Restatement (Third) of Torts, Products Liability*, the court noted that the component parts doctrine protects manufacturers and suppliers of component parts of another company’s finished product from liability for harm caused by the component in the finished product, “unless (1) the component itself was defective and caused injury or (2) the supplier participated in integrating the component into a product, the integration caused the product to be defective, and that defect caused injury.” *Id.* The court stated that

the rationale for this defense is that, while component part sellers should be responsible for defects in their own product, and must warn purchasers about risks associated with the use of their product, they cannot reasonably be expected to monitor the development of all potential products into which their components are integrated.

Id.

The court explained that the bulk supplier doctrine “describes a particular application of the component parts doctrine for raw materials supplied in bulk and intended for further processing.” *Id.* at *6. Citing comment c to section 5 of the *Restatement (Third) of Torts* for the “specific application of the component part doctrine to raw materials,” the court stated that “a bulk supplier is liable for harm caused by ‘contaminated or otherwise defective’ raw materials” but “a basic raw material . . . cannot be defectively designed.” *Id.* The court noted that “[i]nappropriate decisions regarding the use of such materials are not attributable to the supplier of the raw materials but rather to the fabricator that puts them to improper use.” *Id.* However, the court stated that, under California law, the bulk supplier defense is inapplicable to raw materials that are “inherently dangerous.” *Id.* at *7. Although the court recognized that “a basic raw material . . . cannot be defectively designed,” *id.* at *6, and “is not manufactured,” *id.* at *7, it reasoned that this exception “parallels the component part doctrine’s requirement that the component itself not be defective,” *id.* at *7. According to the court, the “defect” of an “inherently dangerous” raw material that would require a warning would be the absence of the very warning the doctrine is supposed to protect the supplier from having to provide. Apparently deciding that crocidolite asbestos was “inherently dangerous,” the court did not apply the component part doctrine or bulk supplier doctrine in the case.

The court ultimately turned to the “sophisticated intermediary doctrine.” *Id.* at *7. While the California Supreme Court had previously adopted the *learned* intermediary defense in the context of pharmaceutical and medical device suits, it had not, prior to *Webb*, addressed or adopted the sophisticated intermediary defense. The court recognized that a hazardous raw material supplier generally has a duty to warn persons who encounter the hazardous raw material after it has been incorporated into a finished product. The court also acknowledged, however, that “circumstances may make it extremely difficult, or impossible, for a raw materials supplier to provide warnings directly to the consumers of finished products.” *Id.* The court explained that the sophisticated intermediary doctrine defines the scope of a hazardous raw material supplier’s duty to warn in this context.

The court noted that the sophisticated intermediary doctrine allows a supplier to discharge its duty to warn end users of another company’s finished product incorporating the supplier’s material about known or knowable risks associated with its material in the product if the supplier “(1) provides adequate warnings to the product’s immediate purchaser or sells to a sophisticated purchaser that it knows is aware or should be aware of the specific danger, and (2) reasonably relies on the purchaser to convey appropriate warnings to downstream users who will encounter the product.” *Id.* at *9 (emphasis in original). The court proposed that this standard served “[t]he goal of products liability law,” which the

court explained “is not merely to spread risk but also ‘to induce conduct that is capable of being performed.’” *Id.* (quoting *Hoffman v. Houghton Chem. Corp.*, 751 N.E.2d 848 (Mass. 2001)).

Under the first prong of this doctrine, the court’s decision requires that the supplier must have provided a warning concerning the hazard to the immediate purchaser of its material. The court noted only one exception, where “the buyer was so knowledgeable about the materials supplied that it knew or should have known about the particular danger,” *id.*, citing as an example the Fifth Circuit’s decision in *Cimino v. Raymark Industries, Inc.*, 151 F.3d 297 (5th Cir. 1998), in which the court determined that a raw asbestos supplier did not need to warn “‘a sophisticated, expert, and knowledgeable manufacturer’ of insulation products, about asbestos risks.”

Under the second prong of this doctrine, the court’s decision requires that the supplier show that “it actually and reasonably relied on the intermediary to convey warnings to the end users.” The court stated that this question will typically be a question of fact for the jury, “unless critical facts establishing reasonableness are undisputed.” *Id.* at *11.

Citing the *Restatement (Third) of Torts*, the court outlined the categories of factors to be considered when determining it was reasonable for a supplier to rely on “an intermediary” to provide a warning: “[1] the gravity of the risks posed by the supplier’s product, [2] the likelihood that the intermediary will convey the information about the [supplier’s] product to the ultimate user, and [3] the feasibility and effectiveness of the supplier giving a warning directly to the [end] user.” *Webb*, at *8 (quoting *Restatement (Third) of Torts, Products Liability*, § 2, cmt. i (Am. Law Inst. 1998)) (quotations omitted). According to the court, “[t]he ‘gravity’ of risk factor encompasses both the ‘serious or trivial character of the harm’ that is possible and the likelihood that this harm will result.” *Id.* (quoting *Restatement (Second) of Torts* § 388, cmt. n. (Am. Law Inst. 1965)). The court explained that the reasonableness of the supplier’s conduct must be measured against the potential severity of harm from the supplier’s material. The “likelihood the intermediary will warn” factor focuses on the reliability of the intermediary. *Id.* at *11. The court explained that this factor concerns, for example, “the intermediary’s level of knowledge about the hazard, its reputation for carefulness or consideration, and its willingness, and ability, to communicate adequate warnings to end users.” *Id.* The court emphasized that it is “significant” if the intermediary itself had a legal duty to warn end users about the particular hazard at issue, a consideration the court said “may be especially relevant in the context of a raw material or other component supplied for use in making a finished product.” *Id.* at *12.

Last, the court stated that the third factor for assessing a supplier’s reasonableness in relying on an intermediary to warn an end user “explores whether it was feasible for the supplier to convey effective warnings directly to the end users.” *Id.* (citing *Restatement (Third) of Torts, Products Liability*, § 2, cmt. i). This factor “focus[es] on what the *supplier* can realistically accomplish.” *Id.* (emphasis in original). The court recognized that

[w]hen raw materials are supplied in bulk for the manufacture of a finished product, it may be difficult for the supplier to convey warnings to the product’s ultimate consumer. These suppliers likely have no way to identify ultimate product users and no ready means to communicate with them. “Bulk products often are delivered in tank trucks, box cars, or large industrial drums, and stored in bulk by the intermediary, who generally repackages or reformulates the bulk product. Even if the product *could* be labeled by the supplier, any label warnings provided to the intermediary would be unlikely to reach the end user.” . . . [A] raw material supplier can often do little more than furnish the manufacturer with appropriate warnings and rely on the manufacturer to pass them along.

Id. (quoting *Hoffman v. Houghton Chem. Corp.*, 751 N.E. 2d 848, 856 (Mass. 2001)).

Accordingly, the court instructed that “[a]lthough this factor is not dispositive, the infeasibility of direct warnings in the bulk supplier context may weigh in favor of finding it was reasonable for the supplier to rely on an intermediary to warn.” *Id.*

In applying this test to the facts in *Webb*, however, the court determined that Special Electric—as a broker of bulk raw asbestos fiber to Johns-Manville, “the oldest and largest manufacturer of asbestos-containing products in the country” and recognized by the plaintiffs’ expert as the company most knowledgeable about asbestos in the country—was not entitled to a judgment as a matter of law under the sophisticated intermediary doctrine. *Id.* at *13. Although it found a procedural defect in Special Electric’s ability to assert the defense because the court found Special Electric had failed to assert and preserve the issue in the trial court, the court also found that the record did not establish that Special Electric discharged its duty to warn by reasonably relying on Johns-Manville as a sophisticated intermediary. The court pointed to disputed evidence concerning whether Special Electric “consistently” provided warnings to Johns-Manville during the relevant time frame, and the court found that Special Electric could not rely on Johns-Manville’s knowledge of the risks of asbestos “*in general*” because there was no evidence that Johns-Manville knew about the “particularly acute risks posed by the crocidolite asbestos Special Electric supplied.” *Id.* On this point, the court referenced evidence that a Special Electric salesperson had told “customers” (not specifying whether Johns-Manville was one of these customers) that “crocidolite was safer than other types of asbestos fiber, when the opposite was true.” *Id.*

The court also found that the record did not establish as a matter of law that Special Electric actually and reasonably relied on Johns-Manville to warn end users of its asbestos-containing Transite pipe about the dangers of asbestos. The court found that there was no evidence in the record supporting an inference that Special Electric actually relied on Johns-Manville to warn users of Johns-Manville Transite pipe of crocidolite asbestos hazards. The court also determined that “the jury could have reasonably determined that any reliance on Johns-Manville would have been unjustified.” *Id.*

Absent from the court’s analysis is whether it was feasible for Special Electric to provide a warning directly to users of Johns-Manville’s Transite pipe. The court nevertheless determined that the jury was entitled to find that Special Electric had a duty to warn Mr. Webb about the crocidolite asbestos in Johns-Manville’s product, “and the trial court erred in granting [judgment notwithstanding the verdict].” *Id.* at *14.

Consequently, the California Supreme Court has now adopted the sophisticated intermediary doctrine in toxic tort cases—except, apparently, for Special Electric, for the reasons stated in the *Webb* decision.

Keywords: litigation, mass torts, sophisticated intermediary doctrine, failure to warn, end user, *Webb v. Special Electric Co.*

[W. Clay Massey](#) is a partner and [Ronnie A. Gosselin](#) is an associate at Alston & Bird LLP, in Atlanta, GA.

The Plaintiffs' Perspective: Putting the Notion of "Woodshedding" to Rest

By Danielle Gold – September 21, 2016

A constant subject of motion practice in pharmaceutical and medical device multidistrict litigation (MDL) practice concerns ex parte contact with plaintiffs' prescribing and treating physicians. Defendants consistently seek to limit the communication between plaintiffs' counsel and plaintiffs' physicians to a strict discussion of the physicians' diagnosis and treatment and of the medical conditions of the plaintiffs, yet they request permission to engage in their own ex parte communications with some of these very same doctors in the hope of retaining them as experts. In some cases, particularly with a limited expert pool, courts have granted defendants' motions permitting them to retain a finite number of plaintiffs' physicians as their own experts; however, defendants' attempts to restrict communications between plaintiffs' counsel and plaintiffs' physicians remain unsuccessful.

Three recent decisions reinforce existing case law, which rejects the limitations defendants seek to impose on plaintiffs' ex parte contacts with plaintiffs' physicians and discredits defendants' allegations that plaintiffs will use this as an opportunity to improperly influence physician testimony. In a recent one-month period, three different MDL courts addressed the issue of ex parte communications between plaintiffs' counsel and plaintiffs' prescribing and treating physicians. See generally *In re Xarelto (Rivaroxaban) Prods. Liab. Litig.*, MDL No. 2592, 2016 WL 915288 (E.D. La. Mar. 9, 2016); *In re Testosterone Replacement Therapy Prods. Liab. Litig.*, MDL No. 2545, 2016 WL 929343 (N.D. Ill. Mar. 7, 2016); *In re Benicar(Olmesartan) Prods. Liab. Litig.*, MDL No. 2026, 2016 WL 1370998 (D.N.J. Apr. 6, 2016). In each litigation, defendants sought entry of a court order barring plaintiffs' counsel from discussing liability issues or theories with plaintiffs' physicians. *In re Xarelto*, 2016 WL 915288, at *2; *In re Testosterone Replacement Therapy*, 2016 WL 929343, at *2; *In re Benicar*, 2016 WL 1370998, at *1.

As discussed, this is not an issue of first impression for the courts. Defendants in three cases attempted to introduce new arguments; however, no court found good reason to depart substantially from the rationale of one of the earliest rulings on this issue. *In re Xarelto*, 2016 WL 915288, at *4 (discussing the *Vioxx* decision; see below); *In re Benicar*, 2016 WL 1370998, at *4 (same); *In re Testosterone Replacement Therapy*, 2016 WL 929343, at *3. In *In re Vioxx Products Liability Litigation*, 230 F.R.D. 473, 474 (E.D. La. July 22, 2005), Judge Eldon Fallon issued an order requiring plaintiffs' counsel to provide notice to defense counsel five days in advance of an interview with the plaintiff's prescribing physician, and opposing counsel would then be permitted to attend and participate in the interview. The plaintiffs sought modification of this order, arguing its effect resulted in several unintended consequences, including plaintiffs' counsel's inability to conduct proper pre-filing case evaluations. *Id.* at 475. In granting the plaintiffs' motion, Judge Fallon determined the presence of defense counsel during these interviews, without the permission of the patient, would impair the sanctity of the confidential patient-physician relationship and potentially reduce the quality of medical care received by the plaintiffs. *Id.* at 477. Furthermore, because the defendants will receive each plaintiff's medical records as well as a profile form detailing the plaintiff's relevant medical history, and because they already have documentation of the information the company relayed to the treating physicians about Vioxx, Judge Fallon ruled that the defendants "do not need the doctors to tell them in ex parte conferences what they already know." *Id.*

The defendants acknowledge a need to preserve the patient-physician relationship but contend that giving plaintiffs' counsel unfettered access to the plaintiffs' treating and prescribing physicians will result in "woodshedding." In these so-called "woodshedding" motions, defendants use this term to describe a process by which plaintiff's attorneys' meetings with treating physicians result in impermissible coaching. *In re Xarelto*, 2016 WL 915288, at *1 n.1; *In re Testosterone Replacement Therapy*, 2016 WL 929343, at *2; *In re Benicar*, 2016 WL 1370998, at *1 n.2.

The defendants argued in these MDLs that if plaintiffs' counsel are entitled to review internal documents and discuss theories of liability with plaintiffs' physicians, this will undoubtedly have an improper influence on the physicians and could even deter physicians from prescribing the medication that is still on the market and known to have proven health benefits. *In re Xarelto*, 2016 WL 915288, at *3; *In re Testosterone Replacement Therapy*, 2016 WL 929343, at *2; *In re Benicar*, 2016 WL 1370998, at *3. In support of this notion, the defendants cited one purported example of "woodshedding" in the California ASR hip implant litigation. *In re Xarelto*, 2016 WL 915288, at *2, *6; *In re Benicar*, 2016 WL 1370998, at *3. In this anomalous situation, the plaintiff's physician was a personal friend of the attorney for over 20 years. The physician admitted to incorporating specific language in the record ("reasonable degree of medical certainty," etc.) at the request of plaintiff's counsel, but did so to "support ... eventually getting his total hip paid for, at least help in paying for it for him if he didn't have other coverage." Transcript of Hanson Deposition at 173 (lines 3–5), *Kransky v. DePuy Inc.*, No. BC456086 (Cal. Super. Ct. Nov. 30, 2012) (transcript on file). When viewed in context, this instance involved a distinct set of facts and is in no way representative of plaintiffs' counsel's conduct in mass tort litigation generally.

Aside from this example, the courts found little authority in support of the defendants' contentions. "The problem with defendant's argument is that there is no credible evidence to support it." *In re Benicar*, 2016 WL 1370998, at *3. For instance, after four years of unregulated ex parte contacts between plaintiffs' counsel and treating physicians in the *Kugel Mesh* litigation, the defendants in that litigation could not provide any substantial evidence of woodshedding to warrant imposition of additional restrictions. *In re Xarelto*, 2016 WL 915288, at *4, *6 (citing *In re Kugel Mesh Hernia Repair*, No. 07-184ML, slip. op. at 3 (D.R.I. Jan. 12, 2012)). As the courts came to agree, not only was there insufficient proof of routine abuses, but this is a problem that cannot be easily patrolled:

The Court lacks the ability to surgically remove delicate insinuations from the individual sentences of Plaintiff's counsel. . . . Simply put, the Defendants' request to cleanse advocacy from Plaintiffs' ex parte physician contacts may not be easily detectable and is not enforceable, and this Court will not issue a pretrial order which is impossible to police.

Id. at 5.

Moreover, the courts rejected the defendants' implication that plaintiffs' physicians, highly trained professionals, would be so easily influenced by plaintiffs' counsel. "The Court is doubtful that plaintiff's physicians can and will be duped, and they will defer to plaintiffs' lawyers about what drugs to prescribe." *In re Benicar*, 2016 WL 1370998, at *4. The plaintiffs thus believe that the term "woodshedding" should be removed from the legal lexicon because it demeans the integrity of both attorneys and physicians by suggesting that improper conduct by counsel representing their clients will overcome the independent medical judgment of physicians. Indeed, if we continue to use this term in our everyday practice, it should then also be referenced every time sales representatives or corporate witnesses are prepped by defense counsel.

While defendants may interpret these rulings as giving plaintiffs free rein to pit physicians against the pharmaceutical companies, the courts did not leave the defendants without meaningful recourse. "The opposing party may question the witness about his contacts with the other side to shed light on improper attempts to influence or mislead; may, with some limitations, obtain discovery regarding those contacts; and may, if the circumstances warrant, seek sanctions." *In re Testosterone Replacement Therapy*, 2016 WL 929343, at *1. Furthermore, each court implemented a strict deposition protocol that guarantees that the defendants receive adequate protections from the perceived ills of allowing plaintiffs' counsel to discuss topics outside plaintiff-specific treatment with the physician. Accordingly, prior to each physician's deposition, plaintiff's counsel must produce the following information concerning pre-deposition contacts: the date, approximate duration, the means (e.g., in person, by telephone), the participants, and the identity of the documents or any electronically stored information provided or described to the physician in connection with the communication. *In re Xarelto*, 2016 WL 915288, at *6; *In re Testosterone Replacement Therapy*, 2016 WL

929343, at *3; *In re Benicar*, 2016 WL 1370998, at *6. The remedy of disclosure of this information and the opportunity for cross-examination ameliorates the expressed concern for so-called woodshedding. The courts have achieved a proper balance by permitting plaintiffs' counsel to properly represent their clients in ex parte communications with physicians, while granting the defendants access to information about ex parte contacts.

These three decisions also touch on defendants' ability to engage in ex parte communications with plaintiffs' treating and prescribing physicians for the purpose of retaining their own experts. This practice began following the New Jersey Appellate Division's ruling in the New Jersey *Pelvic Mesh* litigation. In *In re Pelvic Mesh/Gynecare*, 426 N.J. Super. 167, 174 (App. Div. 2012), the trial court prohibited the plaintiffs from consulting with or retaining any physician who had at any time treated any plaintiff in the litigation. The defendants argued that with the number of plaintiffs continuing to increase and the limited number of urogynecologists with experience in the use of pelvic mesh, the trial court's ruling would prevent the defendants from retaining physician experts with the most specialized knowledge and expertise in the field. *Id.* at 175. The appellate court agreed, and we now see similar rulings in other MDL courts, each presiding over more than a thousand cases—*Xarelto*, *Testosterone*, and *Benicar*. In this regard, the number of cases in suit is quite significant. Courts should not readily grant similar motions in litigations involving fewer plaintiffs because defendants are more likely to find a qualified expert who has not treated a plaintiff.

As the court outlined in *In re Pelvic Mesh/Gynecare*, the three MDL courts agreed the defendants are permitted to retain a plaintiff's physician as an expert so long as the defendants do not discuss any matters related to any of the physician's current or former patients and the physician does not serve as an expert in a trial involving his or her patient. *In re Xarelto*, 2016 WL 915288, at *8; *In re Testosterone Replacement Therapy*, 2016 WL 929343, at *4; *In re Benicar*, 2016 WL 1370998, at *7. The *Xarelto* court added an interesting caveat to the established prerequisites of retaining plaintiffs' physicians as defense experts. The court required the physician expert to disclose the proposed arrangement with the defendants to all current patients who have taken or are presently taking *Xarelto*. *In re Xarelto*, 2016 WL 915288, at *8. The defendants filed a motion for reconsideration, arguing that this type of disclosure is unprecedented and that disclosure should be limited to patients of testifying experts with lawsuits pending. Brief for Defendantset al. at 1–2, *In re Xarelto (Rivaroxaban) Prods. Liab. Litig.*, MDL No. 2592 (E.D. La. 2016), ECF No. 2991-1. In support of their motion, the defendants attached a declaration from Dr. Arthur Z. Schwartzbard, M.D., affirming that this requirement would not only deter physicians from serving as defense experts but could also damage the physician-patient bond. *Id.* at 2, 6. Furthermore, the defendants urged that notice should only be given by defense counsel to plaintiffs' counsel on the previously agreed-upon deadline for disclosure of designated defendants' testifying experts. *Id.* at 10. The defendants sought to distinguish "testifying" experts from "non-testifying" experts or consulting experts. *Id.* at 10–11. As the existing order could be interpreted, the defendants argued that if any prospective expert were required to provide notice to his or her patients, the plaintiffs would unfairly learn the identities of the defendants' consulting experts, and this would run afoul of Rule 26(b)(4), which only requires disclosure of experts expected to testify at trial. *Id.*

The *Xarelto* parties subsequently proposed a joint pretrial order that was entered by the court. [Pretrial Order No. 28](#), *In re Xarelto (Rivaroxaban) Prods. Liab. Litig.*, MDL No. 2592 (E.D. La. Apr. 28, 2016), ECF No. 3156. The order establishes that defendants' counsel will disclose to plaintiffs' counsel the name of any testifying expert who has patients who are plaintiffs in the MDL on the previously agreed-upon date outlined in the bellwether scheduling order. Effectively, the physician is rid of any obligation to personally notify his or her patients of any potential involvement in the litigation. However, in an effort to balance the interests of the parties, the order further stipulates that the defendants are limited to engage in ex parte communications with up to 30 MDL plaintiffs' prescribing or treating physicians and may only retain up to 15 of these physicians. Importantly for the plaintiffs and the efficacy of the bellwether process, the order prohibits the defendants from retaining any physician expert who served as a prescribing or treating physician of any current discovery pool plaintiff until after the trial or disposition of the first four bellwether trials. Plaintiffs will and should continue to oppose defendants' request to retain plaintiffs' physicians as their own experts, but they can have some solace if the courts continue to impose similar restrictions on defendants.

In sum, these recent decisions should put to rest defendants' motions seeking to limit ex parte communications between plaintiffs' counsel and plaintiffs' physicians to case-specific medical treatment. No court was persuaded by defense allegations that plaintiffs' counsel will abuse this ability. While the courts had been primarily concerned with implementing measures to preserve the patient-physician relationship, this new wave of analysis in which the courts appreciate the integral role that prescribing and treating physicians will play in the plaintiff's case should, it is hoped, restore the long-standing legal principles of witness preparation and client advocacy.

Keywords: litigation, mass torts, woodshedding, ex parte communication, treating physician

[Danielle Gold](#) is an associate at Weitz & Luxenberg P.C. in New York City, New York.

Recent Developments in Aviation Litigation 2016: Preemption

By Erika Maurice and Vincent Lesch – September 21, 2016

Federal Aviation Act, General Aviation Safety, and Products Liability

U.S. courts consistently hold that the Federal Aviation Act of 1958, Pub. L. No. 85-726, recodified at 49 U.S.C. § 40101 et seq. (2006) (FAAct), and its corresponding regulations preempt individual state law standards of care in the context of claims related to aviation safety. Even though the statute originally contained no express preemption clause, many circuits have concluded that the realm of aviation safety is field-preempted. *See, e.g., Abdullah v. Am. Airlines, Inc.*, 181 F.3d 363 (3d Cir. 1999). Courts continue to grapple with how to determine the boundaries of this preempted field and what claims or standards of care fall within it.

***Sikkelee v. Precision Airmotive Corp.*, No. 14-4193, 2016 WL 1567236 (3d Cir. Apr. 19, 2016).** In *Sikkelee v. Precision Airmotive Corp.*, the Third Circuit held that the neither the FAAct nor the issuance of a type certificate per se preempt aviation design and manufacture claims. Instead, the court ruled that state law standards of care would continue to apply in these products liability cases, subject to conflict preemption principles and the specifications expressly set forth in the relevant type certificate. *Id.* at *5. Plaintiff Jill Sikkelee's husband died when his Cessna 172N lost power and crashed, allegedly because the engine's vibrations caused a defectively fastened carburetor throttle body to loosen from its float bowl. The defendant engine manufacturer argued that, because *Abdullah v. American Airlines* held that the entire field of "aviation safety" is preempted, federal design standards of care embodied in the Federal Aviation Regulations (FARs) preempt state law standards of care for the plaintiff's claims. Taking the argument one step further, the defendants argued that the issuance of a type certificate by the Federal Aviation Administration (FAA) conclusively demonstrated, as a matter of law, that they had met their federal standard of care. Brief of Appellee AVCO Corp. at 42–51, *Sikkelee v. Precision Airmotive Corp.*, No. 14-4193, 2015 WL 128864 (3d Cir. Mar. 11, 2015).

The trial court agreed with this reasoning and granted summary judgment on all but one of the plaintiff's claims. *Sikkelee v. Precision Airmotive Corp.*, 45 F. Supp. 3d 431, 456 (M.D. Pa. 2014). The Third Circuit, however, reversed the trial court, holding that *Abdullah* was "limited to in-air operations" and "does not govern products liability claims like those at issue here." *Sikkelee*, No. 14-4193, 2016 WL 1567236, at *18 (3d Cir. Apr. 19, 2016). Instead, the court reexamined the FAAct, its legislative history, and enabling regulations to determine whether it was Congress's intent to preempt the entire field of aviation products liability claims. *Id.* at *19, 23. Ultimately, the court concluded that there was no clear and manifest congressional intent to preempt the entire field of aviation design safety, and only traditional conflict preemption principles would apply to these types of cases. *Id.* at *32, 38, 46.

In so holding, the Third Circuit made numerous precedential findings on aviation preemption more generally. The court confirmed that the presumption against preemption applied in the aviation context, despite the federal government's long and deep involvement in regulating air travel. *Id.* at *22–23. It also found that the General Aviation Revitalization Act of 1994 (GARA) "necessarily implies that [state aviation products liability] suits were and are otherwise permitted." *Id.* at *33. The court even delved into which Supreme Court preemption precedents were most relevant to aviation products liability claims and found those cases addressing the automobile and boating contexts most applicable. *Id.* at *41 (citing *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000)).

Many of the practical implications of the *Sikkelee* ruling remain to be determined. The court did not “demarcate the boundaries of those tort suits that will be preempted as a result of a conflict between state law and a given type certificate, nor which FAA documents incorporated by reference in a type certificate might give rise to such a conflict.” *Id.* at *46. Instead, it left those issues to be decided on remand. *Id.* In its own view, the court held

only that . . . type certification does not itself establish or satisfy the relevant standard of care for tort actions . . . ; rather, because the type certification process results in the FAA’s preapproval of particular specifications from which a manufacturer may not normally deviate without violating federal law, the type certificate bears on ordinary conflict preemption principles.

Id. at *46–47 (citing *Wyeth v. Levine*, 555 U.S. 555, 576–77 (2000)).

The appellant-defendant’s motion for rehearing en banc was recently denied by the Third Circuit. *Sikkelee v. Precision Airmotive Corp.*, No. 14-4193 (3d Cir. June 7, 2016). Practitioners will anxiously wait to see how this ruling is addressed on remand and whether certiorari by the Supreme Court is sought by the parties.

***Blackwell v. Panhandle Helicopter, Inc.*, 94 F. Supp. 3d 1205 (D. Or. 2015).** The boundaries of the preempted field of aviation safety were also closely examined by the District of Oregon in *Blackwell v. Panhandle Helicopter, Inc.* The plaintiff, John Blackwell, worked at a tree farm that employed the defendant helicopter company to lift bundles of Christmas trees from one location to another. The plaintiff was injured numerous times when he became entangled with the bundles during helicopter lifts, the final time himself being lifted, flipped, and dropped onto a stump, severely injuring his spine. *Id.* at 1208. Blackwell brought suit against the outside helicopter company used by his employer and alleged three state law negligence theories of liability. In response, the defendant argued that the claims were impliedly field-preempted by the FAAAct and its accompanying regulations.

The court applied the two-part field preemption test established by the Ninth Circuit in *Martin ex rel. Heckman v. Midwest Express Holdings, Inc.*, the key inquiry of which is “whether the particular area of aviation safety implicated by the lawsuit is governed by pervasive federal regulations.” *Id.* at 1210 (citing *Wyeth*, 555 F.3d at 808). The court combed through each allegation of negligence under each of the remaining causes of action and compared them with any relevant FARs to ascertain whether the allegations correlated to any “pervasively” regulated areas of aviation safety.

After this comparison, the court found that only certain parts of the plaintiff’s complaint were field-preempted. *Id.* at 1212–13. The court found it clear that any state law allegations that the defendant failed to follow its own flight manual, flew too fast, or flew unsafely in general were preempted because the FAA pervasively regulated those areas of aviation safety. *Id.* at 1211. Those claims would need to be re-pled as violations of federal standards if the plaintiff wished to pursue them. The other allegations relating to negligent safety procedures and exercise of reasonable care when working with ground workers in tree harvesting, however, were not preempted. *Id.* at 1213. While the defendant was able to point to extensive federal regulations governing the safe operation of rotorcraft in general, these regulations are broadly written and leave a significant amount of discretion to the operator or operations manual author in particular situations. There was no indication of a “pervasive” regulatory scheme of aviation safety relating to ground workers or tree harvesting.

The court was not persuaded by the defendant's argument that because it was both required by the FAA to have a flight manual and addressed ground workers and tree harvesting in its manual, the FAA pervasively regulated this area. *Id.* at 1214. The court reasoned instead that "the FAA's requirement that Defendant create a manual does not mean that the content of Defendant's manual can be used to show Congress' intent to preempt any particular field of aviation safety." *Id.* The FAA mandated only the creation of a flight manual, not its contents. Therefore, the standard of care in these claims was not preempted by federal regulations and the plaintiff was free to pursue his claims under state common law as originally pled. *Id.*

Airline Deregulation Act

The Airline Deregulation Act (ADA) bars states from "enact[ing] or enforce[ing] a law, regulation, or other provision having the force and effect of law" relating to an air carrier's "prices, routes, or services." 49 U.S.C. § 41713(b)(1) (1978). Since its inception, one of the major issues facing courts is what types of "services" are preempted by the ADA. Some courts have adopted a broad definition of "services" that encompasses every amenity provided by a carrier, whereas other courts have adopted a more restrictive view of the term, limiting preemption to contractual provisions. Over the past year, courts have certainly been more divided on the definition of the term "service," which may require Supreme Court intervention in the near future.

Pipino v. Delta Airlines No. 15-cv-80330, 2015 WL 4450039 (S.D. Fla. July 20, 2015). The Southern District of Florida dealt directly with the issue of what constitutes a "service" in *Pipino v. Delta Air Lines, Inc.*, in which the court allowed a negligence claim to proceed over defendant Delta's objection that the plaintiff's claim was preempted by the ADA. *Id.* at *1. At issue in *Pipino* was whether Delta's decision to deny the plaintiff boarding privileges was connected to Delta's "services." The plaintiff alleged that when she tried to board a flight from New York to Tampa, Delta's employees claimed that she was intoxicated and would not allow her to board. The plaintiff conceded that she had emotional issues and was prone to panic attacks, but she claimed that she was not intoxicated. Rather, she asserted that she was suffering one of her panic attacks at the time and that Delta's employees were negligent for leaving her at the gate without calling for medical assistance. Delta moved to dismiss the action on the ground that the plaintiff's claim was related to Delta's "service" in providing boarding privileges and therefore was preempted by the ADA.

The court denied Delta's motion to dismiss because it disagreed with Delta's characterization of "services" under the ADA. The court found that the Eleventh Circuit adopted the Fifth Circuit's definition of "service" under the ADA, which construes services as a bargained-for exchange that refers to the contract between the carrier and the passenger. *Id.* at *2. Under this definition of "services," the court found that "it is these [contractual] features of air transportation that we believe Congress intended to deregulate as 'services' and broadly to protect from state regulation." *Id.* (quoting *Branche v. Airtran Airways, Inc.*, 342 F.3d 1248, 1256–57 (11th Cir. 2003)). Because only contractual features were protected under this definition of "services," the court held that the ADA "does not result in the preemption of state law personal injury claims arising from the allegedly negligent operation of an airplane." *Id.* The court further held that, because the plaintiff's claims did not arise from an economic or contractual aspect of boarding that the ADA sought to deregulate, but rather from Delta's alleged breach of the duty of care, the plaintiff's claims were not preempted by the ADA.

National Federation of the Blind v. United Airlines, Inc., 813 F.3d 718 (9th Cir. 2016). The scope of what "services" are preempted by the ADA was again reviewed when blind passengers filed a discrimination class action against United Airlines in the Ninth Circuit. The blind plaintiffs alleged that United violated two California statutes requiring equal accommodations for the blind by installing kiosks that could not be used by the blind without assistance from others. *Id.* at 722–23. In its defense, United raised numerous

preemption theories based on the ADA and the Air Carrier Access Act of 1986 (ACAA). *Id.* (citing 49 U.S.C. §§ 41713 and 41705).

The Ninth Circuit first addressed whether the express preemption provision of the ADA covered these kiosks as a “service” and decided that it did not. *Id.* at 725–29. The court analyzed this question using its previous understanding that the ADA uses “service” “in the public utility sense—*i.e.*, the provision of air transportation to and from various markets at various times[,]” and not in a way that would include the “various amenities provided by airlines, such as ‘in-flight beverages, personal assistance to passengers, the handling of luggage, and similar amenities.’” *Id.* at 726 (citing *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1266, 1261 (9th Cir. 1998)). The court found that check-in kiosks, “[w]hile they may be convenient for passengers,” were not essential to facilitating air transportation and were therefore not the type of “service” that Congress intended to include in the ADA’s preemption clause. *Id.* at 726, 729. Thus, the ADA did not expressly preempt the blind plaintiffs’ claims.

The court next analyzed whether the ACAA and its accompanying regulations impliedly field-preempted state regulation of these kiosks, ultimately concluding that they did. *Id.* at 734, 740. The Ninth Circuit analyzed the ACAA’s structure and noted that the presence of both an express preemption clause and a savings clause within the law did not mean that ordinary implied preemption principles cannot still apply. *Id.* at 731–32 (citing *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000)). Turning to field preemption, the question was whether federal regulation in this specific field was so “pervasive” that it indicated “state regulation within the same field will necessarily interfere with the federal regulatory scheme.” *Id.* at 733–34 (citing *Martin ex rel. Heckman v. Midwest Express Holdings, Inc.*, 555 F.3d 806, 809 (9th Cir. 2009)). After examining the federal statutory and regulatory scheme addressing kiosk accessibility, the court found that the field was thoroughly regulated by the federal scheme and was thus preempted from being regulated by the states. *Id.* at 733–34, 40. The ACAA addressed precisely the matters at issue, namely discrimination against individuals based on a physical or mental impairment, and the Department of Transportation issued a “new regulation [that] speaks directly to the concerns raised by the Federation’s suit.” *Id.* at 735. These regulations addressed in excruciating detail both what must be done to make kiosks accessible and when it must be done. These facts made it clear to the Ninth Circuit that the Department of Transportation “meant to pre-empt” the entire field, and once that determination was made, it did not matter whether the federation’s suit conflicted with the regulations—only whether it fell within the preempted field. *Id.* at 738. Therefore, the federation’s state law claims were dismissed for falling within the impliedly preempted field.

Keywords: litigation, mass torts, aviation safety, standard of care, field preemption

[Erika Maurice](#) is an associate at Condon & Forsyth LLP in New York City, New York. [Vincent C. Lesch III](#) is an associate at Kreindler & Kreindler LLP in New York City, New York.

Treating Physicians and Causation: How Far Can They Go?

By Andrea Mahady Price – September 21, 2016

In mass tort litigation, the plaintiff's treating physician is a critically important witness. Experienced trial lawyers know that juries listen to plaintiffs' treating physicians, often more closely than to paid experts or even to the plaintiffs themselves. For this reason, a treating physician's testimony about causation can be decisive. Yet, the rule governing advanced disclosure of treaters' opinions, Federal Rule of Civil Procedure 26, has never neatly defined when or how much must be disclosed about these witnesses.

Courts and litigants have struggled to draw the line between "treating" physicians, who are not required to submit detailed disclosures under Rule 26, and experts "retained and specially employed" to provide causation opinions. While treaters are rarely paid and thus "employed" to testify on behalf of their patients, arriving at an opinion on causation of any injury is not necessarily part of a physician's ordinary treatment and observation of a patient.

Treating Physician Expert Disclosure Pre-2010

It has never been entirely clear what disclosures Rule 26 requires of treating physicians. Since 1993, Rule 26(a)(2)(B) requires any witness who is "retained or specially employed to provide expert testimony in the case" to author a written expert report setting out the witness's opinions and the bases therefor. The rule doesn't define "retained or specially employed," though most courts have rejected arguments that this language means that a witness must have been paid.

The advisory committee notes to the 1993 amendments to Rule 26, which provide that "[a] treating physician . . . can be deposed or called to testify at trial without any requirement for a written report," likewise have not been deemed to excuse treating physicians from providing a Rule 26 report under all circumstances. Fed R. Civ. P. 26 advisory committee notes to 1993 amendments.

The majority of courts have held that a treating physician has not been "retained or specially employed" and may testify about his or her treatment, "based on what he or she learned through actual treatment and from the plaintiff's records up to and including that treatment" without producing a written expert disclosure. *Fielden v. CSX Transp., Inc.*, 482 F.3d 866, 871 (6th Cir. 2007); see also *Brown v. Best Foods, A Div. of CPC Int'l, Inc.*, 169 F.R.D. 385, 389 (N.D. Ala. 1996) (treating physician may testify as a non-retained expert witness—and therefore need not provide an expert report—if the testimony is confined to "facts disclosed during care and treatment of the patient"); *Sullivan v. Glock, Inc.*, 175 F.R.D. 497, 500–502 (D. Md. 1997) ("To the extent that the source of the facts which form the basis for a treating physician's opinions derive from information learned during the actual treatment of the patient—as opposed to being subsequently supplied by an attorney involved in litigating a case involving the condition or injury—then no Rule 26(a)(2)(B) statement should be required."); *In re Denture Cream Prods. Liab. Litig.*, No. 09-2051, 2012 WL 5199597 (S.D. Fla. Oct. 22, 2012) (holding that when a treating physician testifies regarding opinions "formed and based upon observations made during the course of treatment, the treating physician need not produce a Rule 26(a)(2)(b) report") (internal quotations omitted). The *Fielden* court described this kind of testimony as the "permissible core on issues pertaining to treatment," a formulation many other courts have followed.

Causation complicates the analysis of what testimony falls within *Fielden's* "permissible core." The Tenth Circuit has arguably taken the broadest position, concluding that a treating physician is not "limited to what is listed in his medical

records” as a foundation for his testimony, albeit in a brief opinion with meager factual detail. See *St. Vincent v. Werner Enters., Inc.*, 267 F.R.D. 344, 346 (D. Mont. 2010). In *Werner*, the court sustained the defendants’ objections to a treater’s consideration of photographs of the accident scene and a car involved, but it allowed his opinion on causation and the plaintiff’s prognosis because “[t]he relevant inquiry for a treating physician is not whether the testimony goes beyond his or her literal medical records. The relevant inquiry is whether the doctor acquires his or her [personal] knowledge through his or her ‘treatment’ of the patient.” *Id.* (internal citation omitted). The court concluded that

[a] treating physician’s opinion on matters such as causation, future treatment, extent of disability and the like are part of the ordinary care of a patient. If properly based on personal knowledge, history, treatment of the patient, and facts of his or her examination and diagnosis, then the treating physician may give an opinion as to the cause of the injury or degree of the injury in the future. *This is what doctors do: what is the problem; what caused the problem; how is the problem fixed; what does it mean to the patient.*

Werner, 267 F.R.D. at 345. (emphasis added)

Other courts take a context-specific view of whether a treater’s causation testimony is expert testimony under Rule 26, examining factors such as the following:

(1) whether the physician reached his conclusion at the time of treatment; (2) whether the opposing party would be surprised by the testimony; (3) whether the condition at issue leaves room for debate as to the specific ailment and its sources; (4) whether the physician relied upon ordinary medical training in drawing his conclusion; and (5) whether the physician will rely on tests, documents, books, videos, or other sources not relied upon during treatment.

Hinkle v. Ford Motor Co., No. 11-24, 2013 WL 1992834 (E.D. Ky. May 13, 2013) (quoting *Gaspar v. Dicks*, No. 08-13707, 2011 U.S. Dist. LEXIS 136571, at *11 (E.D. Mich. Nov. 29, 2011)).

In a case of first impression, the Ninth Circuit adopted the holding of the Sixth Circuit in *Fielden* with respect to a treater’s causation opinion. There, the plaintiff planned to present testimony from her treaters on the cause of a fall that injured her cervical spine and led to psychiatric problems, including depression, anxiety, and stress. *Goodman v. Staples The Office Superstore, LLC*, 644 F.3d 817, 819 (9th Cir. 2011). In this case, the plaintiff’s treating doctors not only rendered treatment, but after the treatment was concluded, these same doctors were provided with additional information by the plaintiff’s counsel and were asked to opine on matters outside the scope of the treatment they rendered. *Id.* The Ninth Circuit rejected the plaintiff’s argument that Rule 26 “does not require a written report before a treating physician testifies to virtually anything,” agreeing instead with the defendant’s argument that “written reports may not always be required of treating physicians, but . . . this exception to the written report requirement applies only when the treating physician formed his opinion *during the course of treatment.*” *Id.* at 824–25 (emphasis original). The Ninth Circuit agreed, holding that the plaintiff’s treating physician’s testimony on causation must be disclosed in a Rule 26(b)(2) report because it was based on materials provided by the plaintiff’s attorneys *after* treatment had ended. *Id.* at 826.

Most courts agree with *Fielden* and *Goodman*, holding that a treating physician who has prepared his or her opinions in anticipation of litigation or relies on sources other than those used in treatment acts more like a retained expert and must comply with Rule 26(a)(2)(B). See, e.g., *Wreath v. United States*, 161 F.R.D. 448, 450 (D. Kan. 1995) (observing that a treating physician “requested to review medical records of another health care provider in order to render

opinion testimony concerning the appropriateness of the care and treatment of that provider” would be required to comply with the report requirement of Rule 26(a)(2)(B)). Courts also consider the fairness of requiring litigants to proceed without the benefit of an expert report when determining whether to require a treating physician to provide an expert report. *See, e.g., Watson v. United States*, 485 F.3d 1100, 1107 (10th Cir. 2007) (noting that the rule makers “seemed concerned, for example, about the resources that might be diverted from patient care if treating physicians were required to issue expert reports as a precondition to testifying,” and observing that the Federal Rules “supply other mechanisms, besides formal reports, for extracting the views of an expert witness . . . ; sandbagging is not necessarily inevitable”); *Fielden*, 482 F.3d at 871 (noting that defendants were not surprised by the scope of the treating physician’s testimony). Some courts are more likely to require a treating physician to provide an expert report if the condition at issue leaves room for debate about the specific ailment and its sources. *See Gonzalez v. Exec. Airlines*, 236 F.R.D. 73, 81 (D.P.R. 2006) (discussing post-traumatic stress disorder).

The Sixth Circuit and other courts, moreover, have expressed concern with allowing treating physicians to testify without providing expert reports, as “this would permit circumvention of the policies underlying the expert report requirement. A party might attempt to avoid Rule 26(a)(2)(B)’s requirement by having a treating physician testify on an issue instead of having an expert do so.” *Fielden*, 482 F. 3d at 870, *as amended on denial of reh’g and reh’g en banc* (July 2, 2007); *see also Meyers v. Nat’l R.R. Passenger Corp.*, 619 F.3d 729, 734–35 (7th Cir. 2010) (affirming grant of summary judgment where no evidence in the record suggested that plaintiff’s doctors considered or determined the cause of his injuries during the course of treatment).

The Eighth Circuit has gone further, requiring disclosure of a written report any time a party seeks to have a treating physician testify as to the causation of a medical condition, as opposed to merely the existence of the condition. *Brooks v. Union Pac. R.R. Co.*, 620 F.3d 896, 900 (8th Cir. 2010). In *Brooks*, the plaintiff sought to introduce testimony from his treating physician that his claimed injury was caused by an accident at work, but the plaintiff had failed to provide the defendants with any expert disclosures at all under Rule 26. *Id.* at 899. After giving the plaintiff an opportunity to supplement his disclosures, the Eighth Circuit ultimately granted summary judgment, finding that that plaintiff had failed to produce admissible evidence of causation. “A treating physician’s expert opinion on causation is subject to the same standards of scientific reliability that govern the expert opinions of physicians hired solely for purposes of litigation.” *Id.* (citations omitted).

Treating Physician Expert Disclosure Post-2010

In an effort to address this predicament, the Supreme Court amended Rule 26 in 2010, specifically addressing treating physician disclosure requirements. The Court added Rule 26(a)(2)(C), requiring witnesses “not required to provide a written report” to make a disclosure of “(i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and (ii) a summary of the facts and opinions to which the witness is expected to testify.” The advisory committee explained that “[t]his amendment resolves a tension that has sometimes prompted courts to require reports under Rule 26(a)(2)(B) even from witnesses exempted from the report requirement. An (a)(2)(B) report is required only from an expert described in (a)(2)(B).” Fed. R. Civ. P. 26(a)(2)(C) advisory committee notes to 2010 amendment. The committee cautioned that “[t]his disclosure is considerably less extensive than the report required by Rule 26(a)(2)(B)” and that “[f]requent examples [of a witness subject to this requirement] include physicians or other health care professionals and employees of a party who do not regularly provide expert testimony.” *Id.* Finally, the committee directly warned courts to “take care against requiring undue detail” from treaters, as “these witnesses have not been specially retained and may not be as responsive to counsel as those who have.” *Id.*

Thus, after 2010, it was clear that parties must submit a summary report under Rule 26(a)(2)(C) for treating physicians whom they wished to call. But, while the language of the rule and the advisory committee notes strongly suggest that treating physicians are required to disclose only under (a)(2)(C), it still remains a challenge to predict when a treating physician may be required to produce a more detailed report. In particular, some courts have expressed concern that the Rule 26(a)(2)(C) disclosure does not adequately disclose the testimony of many treaters:

Notwithstanding the 2010 Amendments to Rule 26(a)(2) creating the less detailed report, there is no specific reference nor guidance as to how the various opinions from a treating physician should be captured. For treating physicians, opinions can be readily gleaned from the medical reports that generally encompass and expose the course of treatment and, thus, an abbreviated report makes sense. Generally speaking the parameters of that testimony are limited to the care and treatment of the patient. But where the doctor is rendering an opinion based upon a reasonable degree of medical certainty, it would seem that the abbreviated report falls short of adequate disclosure. When absent from the medical records, an inventive litigant could conceal a host of very critical opinions or analyses that require the accompanying standard of a reasonable degree of medical certainty, which would not be cured by the less detailed report. Because permanency is rarely disclosed in medical records, an opposing party could be blindsided by an underdevelopment of the disclosure and the scientific basis upon which it rests. And precisely for this reason, it is the standing order of this Court to require the much more detailed report so that all facts and opinions are known to the parties.

Bartnick v. CSX Transp., Inc., No. 1:11-1120, 2013 WL 1113991, at *2 (N.D.N.Y. Mar. 18, 2013) (citing *Robinson v. Suffolk Cty. Police Dep't*, 2011 WL 4916709, at *1 (E.D.N.Y. Oct. 17, 2011) (requiring a Rule 26(a)(2)(A) & (B) report where the treating physician may be testifying as to causation)); *Lamere v. N.Y. State Office of the Aging*, 223 F.R.D. 85, 89 (N.D.N.Y. 2004) (“It is indeed certain that a treating physician who has not complied with the reporting requirement of Rule 26(a)(2)(B) should not be allowed to render opinions outside the course of treatment and beyond the reasonable reading of the medical records.”).

The Northern District of Georgia grappled early with whether new subsection (C) disclosures took the place of subsection (B) disclosures that had previously been required for treaters planning to testify on causation. There, the plaintiff argued that his treating physicians could not be deemed subsection (B) witnesses as they were not “retained or specially employed” to testify in the case; thus, only a subsection (C) disclosure was required. *Kondragunta v. Ace Doran Hauling & Rigging Co.*, No. 11-1094, 2013 WL 1189493, at *9 (N.D. Ga. Mar. 21, 2013). The court rejected this argument, relying on a review of (admittedly scarce) post-2010 case law and determined that the few decisions on the matter had “adhere[d] to traditional tests for determining when a treating physician is considered to be a full-blown expert and when he is considered to be more akin to a percipient witness with professional expertise, like the experts envisioned in the new Subsection C.” *Id.* at *10.

Critically, the *Kondragunta* court held that the label of “treating physician” is irrelevant; instead, the determination turns on “the substance of the physician’s testimony.” *Id.* Notwithstanding the advisory committee notes advising that treating physicians do not have to provide a Rule 26(a)(2)(B) report, the court concluded that prior case law had not been abrogated because “the trigger for Subsection B status—the phrase ‘retained or specially employed’—is found in both the amended and unamended rule, and caselaw that had interpreted that phrase, even before the amendment, is more persuasive to the Court than is the Advisory Committee Notes’ listing of an example.” *Id.* The court agreed with the *Fielden* and pre-2010 decisions holding that a physician offered to provide causation testimony might do so without submitting an expert report in accordance with Rule 26(a)(2) so long as the causation opinion was “formed and based on observations made during the course of treatment.” *Id.* at *12. If, however, “the physician’s

opinion was based on facts gathered outside the course of treatment, or if the physician's testimony will involve the use of hypotheticals, then a full subsection B report will be required." *Id.*

Other courts to consider the matter have followed suit. In a recent medical device case, the Eastern District of Michigan confronted a similar issue, in the form of a treating surgeon who planned to testify that the biological mesh he had used in the plaintiff was defective. This opinion went beyond mere causation, to an opinion that the materials used in the device were defective and ultimately caused the plaintiff injury. *Avendt v. Covidien Inc.*, No. 11-15538, 2016 WL 1566890 (E.D. Mich. Apr. 19, 2016). The court discussed the 2010 amendments in determining whether the treater was required to file a full expert report, concluding, like the *Kondragunta* court, that "in adding the expert disclosure provision in 26(a)(2)(C), the drafters did not intend to absolve *all* treating physicians, simply by virtue of their *status* as treating physicians, of the obligation of filing an expert report under Rule 26(a)(2)(B)." *Id.* at *7 (emphasis original). The court observed:

As was the case before the 2010 Amendments, if a treating physician is going to offer expert testimony that goes beyond the diagnosis and treatment of the patient and purports to opine on causation that was not determined as part of the treating relationship, that treating physician must still file a full blown expert report under 26(a)(2)(B).

Id.; see also *Call v. City of Riverside*, No. 3:13-133, 2014 WL 2048194, at *2 (S.D. Ohio May 19, 2014); *Coleman v. Am. Family Mut. Ins. Co.*, 274 F.R.D. 641, 645 (N.D. Ind. 2011); *In re Denture Cream Prods. Liab. Litig.*, No. 09-2051, 2012 WL 5199597, at *4 (S.D. Fla. Oct. 22, 2012) (analyzing the 2010 amendment and holding that "when a treating physician testifies regarding opinions formed and based upon observations made during the course of treatment, the treating physician need not produce a Rule 26(a)(2)(B) report. By contrast, treating physicians offering opinions beyond those arising from treatment are experts from whom full Rule 26(a)(2)(B) reports are required.") (citations omitted); *Walti v. Toys R Us*, No. 10-2116, 2011 WL 3876907, at *6 (N.D. Ill. Aug. 31, 2011) (observing that, even after the 2010 amendments, "a treating physician who provides an expert opinion regarding causation is required to provide an expert report pursuant to Rule 26(a)(2)(B) if that opinion was not previously determined during the course of treatment"); but see *In re C.R. Bard, Inc.*, 948 F. Supp. 2d 589, 616 (S.D. W. Va. 2013), *on reconsideration in part* (June 14, 2013) (holding that, although plaintiffs' treating physicians might offer opinions outside the course of treatment, including testimony about the design of the defendants' products, it was harmless error not to have provided 26(a)(2)(B) expert reports and the physicians would be permitted to testify on these topics at trial).

Courts are most likely to require nothing more than a Rule 26(a)(2)(C) report when a treating physician's opinion rests only on medical records. However, where the doctor seeks to render an opinion based on facts, experiences, or observations not apparent from, or not adequately disclosed in, the medical records, courts worry that the subsection (C) disclosure may not fully disclose the expert's opinion and the scientific basis on which the opinion rests, prejudicing an opposing party who may be unable to test sufficiently the expert's opinion during depositions and suffer unfairly from this handicap at trial. See *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, No. 06-CV-1520, 2014 WL 5757713, at *5 (S.D.N.Y. Nov. 5, 2014) (requiring plaintiffs' treating physicians to file expert reports under 26(a)(2)(B) because their causation opinions "that the World Trade Center dust caused the Plaintiffs' injuries will necessarily rely upon information developed through the Mt. Sinai WTC Program and other information and expertise that falls far outside the scope of an individual plaintiff's treatment"); see also *Laslovich v. State Farm Fire & Cas. Co.*, 307 F.R.D. 533, 536 (D. Mont. 2015) (noting that expert reports under 26(a)(2)(B) are required, and 26(a)(2)(C) disclosures are insufficient, for treating physicians who offer opinions that go beyond the scope of treatment); *Blakely v. Safeco Ins. Co.*, No. 13-cv-796, 2014 WL 1118071, at *2-3 (M.D. Fla. Mar. 20, 2014) (observing that the label of "treating physician" is irrelevant in determining whether a Rule 26(a)(2)(B) report is required and

holding that a “physician who supplies an opinion procured directly from treatment is not subject to the expert witness disclosure requirements in Rule 26(a)(2)(B) . . . [b]ut if a health care professional is asked to give any additional opinions, beyond those procured directly from treatment, then for those additional opinions to be admissible, Plaintiff must first provide the full written disclosures required by Rule 26(a)(2)(B)”.

Conclusion

The 2010 amendments to Rule 26 were ostensibly made to clarify the scope of treating physician disclosures. With respect to treaters’ ordinary opinions and observations, formed during treatment of plaintiffs, the new Rule 26(a)(2)(C) has been helpful and accepted by the courts. However, when treaters’ opinions go beyond what may be reasonable gathered from a plaintiff’s medical records, the treaters, and their patients, should be prepared to provide a full expert report under Rule 26(a)(2)(B).

Keywords: litigation, mass torts, treating physician, causation, summary report, Federal Rule of Civil Procedure 26(a)(2)(C), 2010 amendment

[Andrea Mahady Price](#) is a member at Barrasso, Usdin, Kupperman, Freeman and Sarver LLC in New Orleans, Louisiana.

PRACTICE POINTS

September 9, 2016

How to Take a Two-Step Approach to Preparing Your Expert Witness for Deposition

Hectic schedules filled with client demands, looming discovery deadlines, expert report disclosures, procedural rules, and many other factors impact the timing of preparing an expert witness for his or her deposition. The next time you face juggling these often conflicting demands and factors, consider utilizing a two-step approach to the deposition preparation and defense of your expert witness. In addition to the traditional session immediately prior to deposition, plan an earlier separate session approximately two weeks prior to the scheduled deposition, to address important tactical and foundational issues. In the right situation, this two-step approach provides an opportunity to enhance the defense of your expert and appropriately advance your overall case themes.

Most seasoned attorneys are familiar with the preparation that generally immediately precedes an expert witness's deposition. During this session, counsel typically reminds an expert witness to listen carefully to each question, pause to contemplate the response, and reply truthfully. Counsel may also seek to ease any potential anxieties by setting expectations and avoiding surprises about basic logistics, provide insights regarding opposing counsel's demeanor, confirm ground rules for communications between breaks, review foundational documents, and perhaps identify opposing counsel's areas of focus and significant themes. This session also presents an opportunity to revisit the tactical and foundational issues that were initially raised in the first session.

So let's rewind to the aforementioned first session. Shifting the tactical discussion to an earlier date provides flexibility to perform a more deliberate assessment of how best to present the expert's testimony. For example, if an analytical methodology is similar to a court-accepted fact pattern from a prior matter that is subject to a protective order, the expert witness would have ample time to review the protective order, confer with counsel, and determine the level of detail that may be disclosed. This level of preparation would not be possible if the first discussion of the topic occurs the day before the deposition.

The early session also offers an opportunity to revisit the scope of the opinion, create clear boundaries regarding the scope of the engagement, and assess any newly developed facts. Generally, the scope of the opinion connects directly to the published report. However, additional materials may be produced after the publication of an expert report, including testimony from other expert witnesses, testimony from fact witnesses, or delayed document productions. Counsel must first decide whether to share the newly developed information with the expert based on the overall context, relevancy and significance to the original opinion or analysis, and other strategic considerations. Assuming counsel shares the newly developed information during the early preparation session, the extra time will be important to fully evaluate the impact on opinions and perhaps consider an addendum to the original report if needed and allowed.

An early session also allows for the opportunity to review the deposition notice or case management order, particularly regarding instructions about materials to produce at or before the deposition. In instances where materials not directly related to the immediate dispute are required to be produced (e.g., prior relevant presentations or scholarly articles), this negates the need for last minute finding, gathering, and production of materials the night before the deposition.

In situations involving economic damages, the expert and counsel may anticipate and discuss hypothetical scenarios that could be advanced by opposing counsel. With the benefit of additional time, the expert has an opportunity to investigate relevancy of the hypothetical scenario given the fact pattern of the case, assess consistency with

© 2016 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

generally accepted methodologies, evaluate materiality to the opinion, and confer with counsel regarding the merits of quantifying the impact of the anticipated hypothetical. All these steps generally require more time than would be available if discussed on the eve of the deposition.

There are countless other ways that an early defense preparation session provides critical extra time needed to fully prepare and defend an expert witness. While a two-step deposition preparation approach may not be feasible in all situations, implementing this approach reduces the chaos that often immediately precedes an important expert deposition and positions your case for success.

Keywords: mass torts, deposition preparation, expert witness, economic damages, causation

—*Kristin L. Beckman, Barrasso Usdin Kupperman Freeman & Sarver, LLC, New Orleans, LA*

August 31, 2016

Considering Where to Litigate an International Mass Tort Case

In the latest turn in the long-running dispute between Chevron and Ecuadorian residents alleging environmental damages, the Second Circuit affirmed the district court's judgment finding bribery, fraud, and coercion in the procurement of the judgment and enjoining the plaintiff's lawyer and two representative plaintiffs from seeking to enforce the judgment in the U.S. courts and imposing a constructive trust on any recovery made by those individuals on the judgment anywhere in the world. See *Chevron Corp. v. Donziger*, Nos. 14-0826, 14-0832, 2016 U.S. App. LEXIS 14532 (2d Cir. Aug. 8, 2016).

Stepping back from the particulars of the Chevron-Ecuador dispute, including the somewhat incredible facts constituting the fraud and the legal considerations of whether notions of international comity or U.S. recognition law can somehow permit recognition of a fraudulent foreign judgment—they cannot—let us consider some of the matters that should be considered at the outset of an international mass toxic tort action.

In the first scenario, a domestic entity is sued in the United States by foreign plaintiffs for injuries occurring abroad, as a result of activities of the entity or its affiliates abroad or via a product exported to the foreign country. Another example of this scenario is an action brought against Goodyear alleging occupational exposure to toxins at a French facility operated by one of Goodyear's subsidiaries (plaintiffs argued for jurisdiction over the parent based on, inter alia, the parent's adoption and implementation of company-wide safety standards). It might seem preferable to litigate in the United States as one's home forum; but, on the other hand, the foreign forum might be more favorable due to the lack of a class action mechanism and the prospect of generally lesser damages awards assessed by the court rather than a jury. Thus, the domestic party might seek dismissal on forum non conveniens grounds, as Goodyear successfully did in its recent case. *Solari v. Goodyear Tire & Rubber Co.*, No. 15-4242, 2016 U.S. App. LEXIS 12164 (6th Cir. June 29, 2016), *aff'g* No. 5:14 CV 1000, 2015 U.S. Dist. LEXIS 140400 (N.D. Ohio Oct. 15, 2015). (Notably, the Chevron-Ecuador dispute was originally filed in the United States but was dismissed on forum non conveniens grounds.)

Before deciding to pursue a path to litigating in the foreign forum as a result of a forum non conveniens motion, it should be recognized that doing so presents a number of challenges for U.S. lawyers:

- Discovery is likely to be severely limited, especially in a civil law jurisdiction.
- Expert practice will be very different:
 - There will be no *Daubert*-like challenges to the adversary's expert opinions.
 - Local, academic experts will be preferred over U.S. experts with lengthy testimonial experience.
 - The foreign court will place reliance on peer-reviewed literature.
 - The foreign court might rely on its own court-appointed experts.
- Causation standards might not be definitive and not fit the usual general/specific causation paradigm.
- While class actions might not be permitted, a case might be comprised of "representative plaintiffs" and constitute a "test case," effectively the same result of a U.S. bellwether case.
- Evidentiary rules will be lax.
- There will be a tension between adhering to local practice (including not heavily relying on U.S. law and principles) and making the requisite record for a U.S. challenge to recognition of a potential judgment on due process grounds.

Thus, the calculus and strategic weighing of pros and cons is not so simple.

In a second scenario, a U.S. entity is sued in the foreign jurisdiction, in which case one is likely to hear from the client that (1) there cannot be jurisdiction and (2) we do not want to get railroaded in the foreign court. Again, the weighing of pros and cons is not so straightforward as determining whether there is a strong jurisdictional argument such that an ensuing judgment would not be enforceable under U.S. recognition laws (generally, that the exercise of jurisdiction by the foreign court is incompatible with U.S. standards). Even with a strong jurisdictional challenge to U.S. recognition, the procedural path to doing so will likely require taking a default judgment in the foreign court, due to the provision in article 5 of the uniform recognition law that a jurisdiction challenge is not available if the defendant appears in the foreign court for any reason other than challenging jurisdiction (in many foreign jurisdictions, a standalone motion to dismiss for lack of jurisdiction is not procedurally available). So, to preserve the U.S. challenge, a default would need to be taken, and the plaintiff might not even seek U.S. recognition, but pursue recognition elsewhere. Moreover, if the plaintiff's case is a prelude to other similar cases, the default judgment would then be used to support those other plaintiffs. A default judgment might also produce bad publicity for the client.

So, part of the initial consideration of the appearance or default issue is an assessment of the factors mentioned above and formulation of a plan to overcome such challenges in the foreign forum, leading to a successful defense. Even in the event that the defense is unsuccessful, there are appeals in the foreign jurisdiction and a potential challenge to U.S. recognition and enforcement of such judgment, all of which might be a far more preferable path than taking a default.

As the foregoing should reflect for younger lawyers, strategic decisions have many layers and generally cannot be resolved by one issue, such as whether the forum non conveniens or personal jurisdiction arguments implicated by the scenarios noted above are strong. Rather, even from the outset, we need to play out the scenarios and determine overall our best recommendation for the client.

Keywords: litigation, mass torts, international, recognition, enforcement, foreign judgment, forum non conveniens

—*Paul V. Majkowski, Rivkin Radler LLP, Uniondale, NY*

EDITORIAL BOARD

Newsletter Editor

» [James M. Beck](#)

Web Editor

» [David Schwan](#)

Social-Media Editor

» [Courtney E. Ward-Reichard](#)

**Leadership Development & Young
Lawyer Outreach Liaison**

» [Catherine Riegle Finley](#)

Committee Cochairs

» [Richard M. Gaal](#)

» [Laurie Novion](#)

Staff Editor

» [J.R. Haugen](#)

The views expressed herein are those of the author(s) and do not necessarily reflect the positions or policies of the American Bar Association, the Section of Litigation, this committee, or the employer(s) of the author(s).

ABA Section of Litigation Mass Torts Litigation Committee
<http://apps.americanbar.org/litigation/committees/masstorts>