SIMPSON THACHER MEMORANDUM

New York Appellate Court Issues Significant Ruling Rejecting the Aggregation of Personal Injury Claims Based on *Forum Non Conveniens* in *In re OxyContin II*

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INTRODUCTION

The New York Appellate Division, Second Department, recently issued its ruling in *In re OxyContin II*, reversing the trial court's denial of Defendants-Appellants' motion to dismiss suits filed on behalf of 246 non-New York residents who claimed they had been injured by their use of the prescription painkiller, OxyContin. In so ruling, the Court rejected the trial court's reasoning that so-called "mass torts" in non-class actions should be adjudicated in a single forum to maximize judicial efficiencies, without regard to whether any particular non-resident's case, standing alone, would be properly subject to dismissal under the long-standing doctrine of *forum non conveniens*. The decision is important to manufacturers of nationally marketed products as it thwarted plaintiffs' counsel's efforts to utilize the State's procedure for pre-trial coordination of cases properly filed in New York to bring and aggregate hundreds of actions by out-of-state plaintiffs in a New York forum.

BACKGROUND

In 2007, product liability lawsuits were filed against manufacturers of OxyContin, including Purdue Pharma L.P. (collectively, "Purdue"), on behalf of 29 New York residents and 246 non-residents in New York Supreme Court, Richmond County.

This was the third time the New York Supreme Court, Richmond County, was faced with adjudicating aggregated OxyContin litigations. In 2005, in *Hurtado v. Purdue Pharma Co.*, Justice Joseph J. Maltese denied class certification in an action filed on behalf of five Staten Island residents on the ground that individualized issues—such as each plaintiff's injury, addiction and physician's knowledge of OxyContin—predominated over the common issues of fact. No. 12648/03, 2005 WL 192351, at *5-8 (N.Y. Sup. Ct. Jan. 24, 2005). Upon denying class certification, Justice Maltese referred the then-pending OxyContin actions to the New York Litigation Coordinating Panel ("LCP"). *Id.* at *15. The LCP entered an order providing that the *Hurtado* action—which involved only New York-resident plaintiffs—and any OxyContin cases subsequently filed in New York were to be coordinated for discovery and pre-trial matters before Justice Maltese. The same plaintiffs' counsel, seeking to benefit from the State's procedure for coordinated pre-trial proceedings, then initiated *In re OxyContin I* by filing 1,117 individual OxyContin cases in New York, 924 of which were filed on behalf of non-New York residents. 15 Misc. 3d 388, 391 (N.Y. Sup. Ct. 2007). Purdue moved to dismiss for *forum non conveniens* the 924 out-of-state residents' cases, but Justice Maltese denied the motion. *Id.* at 395.

Subsequently, the *OxyContin I* cases settled. On the heels of that settlement, different plaintiffs' counsel filed cases collectively captioned as *In re OxyContin II* in 2007. Purdue again moved to dismiss the non-resident cases on the basis of *forum non conveniens*, arguing that those plaintiffs had not been prescribed OxyContin in New York, had not ingested the drug in New York, and complained of conduct that had not occurred in New York. Because the non-resident cases had no meaningful connection to the State, Purdue argued, they would be better adjudicated in each plaintiff's state of residence where the parties would have access to critical localized proof, such as the testimony of treating physicians, employers, family and friends.

Justice Maltese denied Purdue's *forum non conveniens* motion to dismiss the 246 non-resident cases—which had been filed on behalf of individuals from 45 jurisdictions—on the basis that there was no other *single* alternate forum in which all of the resident and non-resident cases could be adjudicated together. *In re OxyContin II*, 881 N.Y.S.2d 812, 818 (N.Y. Sup. Ct. 2009). In his decision, Justice Maltese emphasized what he described as the "state and national trend" of aggregating "mass torts" before a single court for resolution in order to "maximize judicial economy." *Id.* at 816, 818. Justice Maltese concluded that there would be a collective convenience to coordinating all of the non-resident cases with the resident cases filed throughout the State for "discovery, summary judgment and possibly trials." *Id.* at 816.

Purdue appealed Justice Maltese's decision to the Appellate Division, New York's intermediate appellate court, arguing, as it had before the Supreme Court, that New York courts routinely dismiss, on *forum non conveniens* grounds, non-resident product liability and personal injury cases by analyzing the factors set forth in *Islamic Republic of Iran v. Pahlavi*, 467 N.E.2d 245 (N.Y. 1984). These factors include, among others, (i) the burden on the New York courts; (ii) the potential hardship to the defendant forced to defend an action in New York; and (iii) the availability of an alternative forum in which the plaintiff might bring suit outside New York. Purdue argued that application of the *Pahlavi* factors to each non-resident's case would compel dismissal, and that Justice Maltese erred by departing from well-established New York precedent merely because there was no other single alternate forum where the cases of both resident and non-resident plaintiffs could be adjudicated together.

Amicus curiae briefs were submitted in support of the appeal by the Product Liability Advisory Council, Inc. ("PLAC"), the Chamber of Commerce of the United States of America (the "Chamber"), and Professor Aaron D. Twerski, Esq., the Irwin and Jill Cohen Professor of Law at Brooklyn Law School. Simpson Thacher & Bartlett LLP represented PLAC on its *amicus* brief.[1] PLAC's brief expounded on the fact that, by failing to apply all of the *Pahlavi* factors to each non-resident case individually and instead considering only whether there was an alternate forum in which all of the actions could be filed, Justice Maltese had effectively created a "mass tort" exception to the traditional *forum non conveniens* analysis. Such an approach would impose great hardship on manufacturer defendants in product liability cases because of the difficulty of obtaining proof critical to the defense of each action, including the testimony of local witnesses such as, in pharmaceutical cases, the prescribing physician and each plaintiff's

[1] David W. Ichel, Mary Elizabeth McGarry and Chantale Fiebig of Simpson Thacher authored the brief and appeared for PLAC.

family, friends and employers. PLAC's brief also pointed out that the judicial efficiencies Justice Maltese emphasized in justifying his decision to retain jurisdiction over all of the cases, such as coordination of discovery, can be achieved through other means that do not deprive a party of the ability to try its cases effectively.

PLAC further argued that by declining to dismiss the out-of-state plaintiffs' cases, Justice Maltese distorted the role of the LCP, which was not intended to displace Rule 327(a) of New York's Civil Practice Law and Rules or the long-standing doctrine of *forum non conveniens.* Instead, the LCP was created to allow related cases filed in different counties of the State to be brought together before a single Justice for pre-trial proceedings only, and then returned to the court of filing, much like the federal procedure for multi-district litigation. *See* 28 U.S.C. § 1407. The LCP Rules also are designed to encourage the New York judge handling the cases pre-trial to coordinate with other state and federal courts handling cases arising out of the same products or other common facts. PLAC argued that the precedent set by Justice Maltese's apparent "mass tort" exception to the usual *forum non conveniens* analysis would result in New York becoming a "magnet jurisdiction" for suits arising from nationally sold products.

The Chamber's *amicus* brief also cautioned that by adopting a "mass tort" or "product liability" exception to the traditional *forum non conveniens* analysis, New York would become the nation's "Tort Court." Creating such an exception would encourage forum shopping by plaintiffs from across the country, which would in turn result in congestion of the New York judicial system.

Professor Twerski argued in his *amicus* brief that a New York court adjudicating non-residents' claims would be constrained to apply the law of dozens of other jurisdictions to a multitude of key substantive issues including, among other things, the question of proximate cause, permissible theories of liability and available defenses to particular claims. The application of foreign law to plaintiffs' claims weighed heavily in favor of dismissing the 246 non-resident cases on the basis of *forum non conveniens*.

In response to the arguments raised by Purdue and the *amici curiae*, Respondents argued that Justice Maltese's decision was consistent with the trend in New York courts (and in the courts of neighboring states) of coordinating the actions of both in- and out-of-state plaintiffs to efficiently resolve "mass tort" cases. Respondents also maintained that Justice Maltese properly applied the *Pahlavi* factors, and that the decision should be affirmed due to the efficiencies resulting from coordinated pre-trial proceedings before Justice Maltese.

SUMMARY OF THE DECISION

In a unanimous decision, the Appellate Division reversed the trial court's denial of Purdue's motion to dismiss the non-resident cases. The Court held that consideration of the traditional *forum non conveniens* factors "weigh[ed] heavily against retaining the actions of the nonresident plaintiffs." First, the Court recognized that because none of the non-resident plaintiffs ingested OxyContin in New York or received medical treatment in New York, "witnesses with critical information on both proximate cause and damages do not reside in New York." The Court noted that as a result, defendants forced to defend OxyContin cases in New York, where courts lack the authority to subpoena non-residents to testify at trial, would face "substantial

difficulties." Second, the Court emphasized that under well-settled conflict of laws principles, retaining the non-resident cases could result in New York courts being "called upon to apply different principles of law to identical claims." The Court also noted that the burden that retention of a case would impose upon New York courts is a factor to be considered in the *forum non conveniens* analysis. In light of these considerations, and absent any "strong counterbalancing" factors, the Court concluded that "the Supreme Court improvidently exercised its discretion in denying [Purdue's] motion to dismiss."

Consistent with New York precedent, the Court conditioned its reversal on the Defendants-Appellants stipulating, as Purdue had agreed to do, that they would (i) accept service of process for the non-resident plaintiffs' cases commenced out-of-state; (ii) waive defenses that would not have been available to them in New York; (iii) allow depositions of home-office employees taken by plaintiffs to be cross-noticed and deemed taken in all cases of that counsel; and (iv) not object to the appearance of their home-office employees at depositions or trial in a new forum on the ground of venue or location of the lawsuit.

IMPLICATIONS OF THE DECISION

The Appellate Division's decision precludes plaintiffs' counsel from aggregating in New York the cases of non-resident plaintiffs arising from nationally sold products. As a result, it will be more difficult for plaintiffs to aggregate non-class action lawsuits in this forum to coerce settlements from defendants, and New York will not become a "magnet jurisdiction" for personal injury cases. By considering the difficulties defendants would face in defending against any individual non-resident's claims absent access to critical witnesses, the Court rejected the notion of a "mass tort" exception to the traditional *forum non conveniens* doctrine, and underscored the impropriety of denying a defendant's motion to dismiss on the basis that there is no single other alternative forum in which cases on behalf of residents and non-residents could be adjudicated together. Moreover, in conditioning the dismissal upon defendants allowing plaintiffs' counsel to cross-notice depositions of defendants' witnesses in all of plaintiffs' counsel's cases pending in other jurisdictions, the Court confirmed PLAC's *amicus* arguments that judicial efficiencies can be achieved through coordinated discovery proceedings where litigations arising from the same nationally sold product are pending in multiple state or federal courts, without improperly aggregating cases in any single forum.

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To read the decision in *OxyContin II*, please click here. For more information, please contact:

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