

COMPLEX LITIGATION & *E - Discovery*

A Case Study on the Importance of Forum Selection in Mass Tort Litigation

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All attorneys eventually come to recognize the vital importance of choice of forum in complex litigation cases. In mass tort litigation, forum considerations are no less significant, and plaintiffs' counsel look to conflict of laws issues to determine whether a particular forum is hospitable on core liability and damages issues. However, an often overlooked consideration is a prospective forum's discovery standards and practices. Those discovery rules and practices can dictate the type and quality of evidence that will be discovered and used in that case. As such, the choice of forum determination is especially critical in mass tort actions, where a plaintiff's counsel sometimes has the choice to file in a state court mass tort (or other) proceeding or in a federal court multi-district litigation ("MDL").

New Jersey Superior Court Judge

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Jessica R. Mayer recently issued an opinion in the *Zometa/Aredia* mass tort proceedings which demonstrates the significance of a plaintiff's choice of forum. On September 4, 2009, counsel for the defendant, Novartis Pharmaceuticals Corporation, filed a motion to engage in substantive ex parte interviews with the plaintiffs' treating physicians. Novartis argued that such contacts were expressly permitted in the *Aredia/Zometa* MDL, pending in the United States District Court for the Middle District of Tennessee. Novartis pointed out that, under N.J.S.A. 2A:84A-22.4, the New Jersey physician-patient privilege is waived by a plaintiff upon initiating a personal injury suit, which places his medical condition at issue. Moreover, ex parte contacts with a plaintiff's treating physicians are expressly permitted as a means of efficiently engaging in discovery and trial preparation. See *Stempler v. Speidell*, 100 N.J. 368 (1985). Novartis contended that, by engaging in ex parte interviews with the plaintiffs' treating physicians, the company would be able to distinguish the medical providers whose testimony was essential to the plaintiffs'

claims from those who provided merely ancillary care, thereby allowing it to narrow the number of physicians to depose and concentrate resources on physicians whose depositions would provide better "fact gathering" for trial.

Novartis further asserted that the conditions imposed by *Stempler* and its progeny provided ample protection to the plaintiffs. Under *Stempler*, defense counsel must: (1) provide the treating physician with a description of the anticipated scope of the interview; (2) communicate the fact that the physician's participation in an ex parte interview is voluntary; and (3) provide the plaintiff's counsel with reasonable notice of the time and place of the proposed interviews.

Regardless of the *Stempler* strictures, Novartis contended that it was entitled to engage in nonprivileged contacts with the plaintiffs' physicians. Novartis gave numerous examples of what it deemed to be nonprivileged matters outside the scope of *Stempler* and its protections: (1) contacting a plaintiff's physician merely to schedule a deposition; and (2) inquiring as to matters other than the care and treatment of the plaintiff, such as the

physician's experience with company sales representatives and the physician's views on general causation.

From the plaintiffs' counsel's perspective, such ex parte interviews would necessitate the investment of substantial resources counsel could otherwise utilize more effectively in prosecuting the plaintiffs' claims. Ex parte interviews of treating physicians, whether based on privileged or nonprivileged topics and with or without *Stempler* protections, could adversely affect the deposition and trial testimony of the physicians, as well as their willingness to cooperate.

On October 29, 2009, Judge Mayer issued an unpublished opinion denying Novartis' motion. See *Gaus v. Novartis Pharmaceuticals Corp.*, Docket No. L-7014-07MT. The court in *Gaus* recognized that although ex parte interviews are broadly permitted under *Stempler*, the Supreme Court was careful not to make them mandatory in all cases. In "extreme cases," *Stempler* vests the trial court with discretion to prohibit the use of ex parte contacts, and require depositions in accordance with formal discovery rules.

The court in *Gaus* went on to reason that, although there is a general presumption in New Jersey that defendants should be permitted to initiate ex parte contacts with the plaintiffs' treating physicians, the unique set of practical concerns presented in mass tort cases should not be overlooked. The *Zometa/Aredia* matters are a complex mass tort involving over 150 plaintiffs

and growing. Each plaintiff has several treating physicians. These characteristics alone suffice to fall under the category of "unusual" or "extreme" cases recognized by *Stempler*.

Moreover, the court in *Gaus* aptly noted that the litany of potential issues which can emanate from the ex parte interview process is virtually boundless. These issues include consent disputes, HIPAA authorization disputes and even the rights of the physicians to have their own counsel present. Further, because there were at least three physician interviews per case, it would have been virtually impossible to monitor all of the informal interviews to ensure that there were no inadvertent disclosures of the plaintiffs' confidential medical information. Finally, based on the discovery conducted in the parallel MDL proceedings, the court concluded that Novartis would most likely conduct the same number of formal depositions regardless of whether it was permitted to conduct the requested informal discovery.

The court in *Gaus* concluded that it lacked sufficient judicial resources and time to deal with the continuous motions the parties would inevitably file on these issues. With each motion would come a corresponding delay in the discovery process until the court could schedule hearings concerning the proper parameters of the ex parte interviews. The court suggested that the limited resources of all involved were best spent in preparing cases for trial, and not debating the rela-

tive value of informal discovery or dealing with extensive motion practice. Contrary to Novartis' arguments, the interviews simply would not lead to more efficient discovery. Thus, the court in *Gaus* found that the alleged efficiency of allowing *Stempler* interviews did not outweigh the impracticality of permitting interviews in these mass tort cases.

However, the court remained mindful of the fact that both parties should have the same right of access to all nonparty witnesses. Indeed, under *Stempler* it is clear that no party has a proprietary right to any witness' evidence. Accordingly, the court ruled that neither party was permitted to engage in ex parte contacts with the plaintiffs' treating physicians or influence the deposition or trial testimony of the plaintiffs' treating physicians. Thus, all parties were ordered to proceed by formal deposition of the plaintiffs' treating physicians.

It would be difficult to understate the significance of the court's ruling on practical litigation issues such as timing and expense, as well as the effect on the evidence that will naturally be at the heart of each of the mass tort cases. The court's ruling in *Gaus* is only an illustration of the importance of forum selection in mass tort actions. Sometimes the plaintiff's attorney has little choice on forum selection, but more often there are indeed decisions to be made, and informed choices on forum can make a critical difference in the outcome of high stakes mass tort litigation. ■