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PRACTICE TIP

How to Mediate a Product Liability Case

By Kevin Curry and Jennifer Bullard

"As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough." — Abraham Lincoln.

Mediation is a common feature of product liability practice. If done well, mediation earns you favor with your clients. They recognize that mediation is an opportunity to control the case outcome and save money. But before entering into mediation, preparation is crucial. Once at mediation, listen carefully to all parties present, including the mediator. If you prepare and listen, you increase the odds of a favorable result.

Build a Relationship With the Other Attorneys

Mediation, like politics, is the art of the possible. Building a good relationship with opposing counsel will pay dividends, and expand the scope of the possible. Discovery is the primary avenue to learn about the case. But frank pre-mediation discussions among counsel are also valuable. Use these discussions to ensure that all parties have the information necessary to evaluate the case. At the same time, use the discussions to

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I'll See You in the Agency!

'Primary Jurisdiction' Gains Ground As a Defense for Regulated Industries

By Cary Silverman

A barrage of lawsuits against food and other companies asserting that advertising or labeling of their products is misleading, even as government regulators have not challenged the representations, has led attorneys representing the companies increasingly to raise the "primary jurisdiction" doctrine as a defense. In essence, the doctrine provides that courts should not take jurisdiction of cases where the core issue raised by the plaintiff's claim is subject to the expertise of a federal agency.

This year, manufacturers used the primary jurisdiction doctrine to achieve several significant victories. This article briefly explores the underpinnings of the primary jurisdiction doctrine, highlights its use in product cases in 2012 and 2013, and considers the role primary jurisdiction may play in future consumer class action litigation and beyond.

The Primary Jurisdiction Doctrine

The primary jurisdiction doctrine should be of interest to any business, subject to the jurisdiction of a federal agency, that faces litigation challenging an aspect of a product, or its labeling or advertising. The flexibility of the doctrine may provide product makers with an additional, attractive public-policy-driven alternative to the more traditional federal preemption and compliance-with-standards defenses. Courts have applied the doctrine to dismiss cases where:

- An agency has adopted a formal regulation with which the company complied;
- An agency adopted an informal policy and may intervene through an enforcement or other action if it finds the practice at issue is unlawful in a specific instance;

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- An agency is considering adopting a policy on the practice at issue, even if the agency has not done so after several years of deliberation;
- An agency has effectively allowed the practice by not regulating it, even as it has issued regulations applicable to other specific aspects of the product; or
- There is an administrative petition pending before an agency involving the practice at issue.

Courts have recently shown an increasing acceptance of the primary jurisdiction doctrine in food and cosmetic cases. The principles of the doctrine, however, apply equally to cases involving other Food & Drug Administration (FDA)-regulated products, such as pharmaceuticals, or consideration of product issues by other agencies, such as the Consumer Product Safety Commission (CPSC) or National Highway Traffic Safety Administration (NHTSA).

General Principles

The primary jurisdiction doctrine is based on sound jurisprudence. It allows a court to decide not to hear a claim when it implicates technical or policy questions that are best addressed in the first instance by a government agency with regulatory authority over the product or service at issue rather than by the judicial branch. *See Clark v. Time Warner Cable*, 523 F.3d 1110, 1114 (9th Cir. 2008). While the primary jurisdiction doctrine has been around for over a century, it has newfound importance in suits alleging deceptive labeling or advertising.

The doctrine "applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues, which, under a regulatory scheme, have been placed within the special competence of an administrative body. ... " *CSX Transp. Co. v. Novolog Bucks County*, 502 F.3d 247, 253 (3d Cir. 2007) (quoting *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 64 (1956)). The doctrine does not limit a court's authority, but "serve[s] as a means of coordinating administrative and judicial machinery and to promote uniformity and take advantage of the agencies' special expertise." *Id*. (citation omitted).

A court weighs four factors in deciding whether to apply the primary jurisdiction doctrine: "(1) the need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity that (4) requires expertise or uniformity in administration." *Syntek v. Semiconductor Co., Ltd. v. Microchip Tech., Inc.*, 307 F.3d 775, 781 (9th Cir. 2002). When a core issue in a case meets this test, a court has discretion either to stay the case and retain jurisdiction, or dismiss the suit without prejudice. Since there is no formal mechanism for the court to refer the question at issue to the agency, the parties are responsible for initiating administrative proceedings themselves. *See id*. at 782 n.3.

The primary jurisdiction doctrine resembles other familiar principles. For example, similar to the doctrine of *forum non conveniens* as applied in most states, the primary jurisdiction doctrine permits a court to dismiss a case that is more appropriately heard in another venue. It also has some likeness to the political question doctrine, through which courts may decline to exercise jurisdiction over a public policy matter that is best decided by Congress through the political process. Under all three doctrines, prudential considerations prompt courts to decline to hear disputes where another body has greater institutional competence for resolving the issue in an effective and fair manner.

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Over the years, courts have applied the primary jurisdiction doctrine to cases involving practices falling under the jurisdiction of various agencies, including cases raising environmental issues falling under the purview of the Environmental Protection Agency (EPA), conduct by telecommunication service providers subject to the Federal Communications Commission (FCC), and, as this article discusses, food and cosmetic representations falling under the jurisdiction of the FDA, U.S. Department of Agriculture (USDA), and Federal Trade Commission (FTC).

When issues raised in litigation are subject to the jurisdiction of state administrative agencies, similar principles apply through operation of the "*Burford* abstention doctrine," a federal law's commitment of the issue to state regulators, or state common law. *See, e.g., Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) (providing that federal courts should avoid interfering with proceedings or orders of state administrative agencies on public policy issues that transcend the case before the court or where federal review of the issue would disrupt state efforts to establish a coherent policy with respect to a matter of substantial public concern); *Davies v. National Cooperative Refinery Ass'n*, 963 F. Supp. 990, 997-99 (D. Kan.1997) (dismissing citizen suit brought under Resource Conservation and Recovery Act as within specialized expertise of state environmental agency); *State ex. rel. Norvell v. Arizona Pub. Serv. Co.*, 510 P.2d 98, 103-04 (N.M. 1973) (applying the primary jurisdiction doctrine to state agencies as a matter of common law).

The Rise of Primary Jurisdiction in Product-Related Cases

Successful Use: Labeling of Juice Drinks, Yogurt, and Cosmetic Products

This past year's most high-profile win through use of the primary jurisdiction doctrine occurred in a commercial dispute, but the ruling is already having a significant impact in consumer class actions. In May 2012, the Ninth Circuit ruled in a case pinning Pom Wonderful, the manufacturer of pomegranate juice beverages, against Coca-Cola. Pom claimed that Coke's labeling of a competing product, Minute Maid "Pomegranate Blueberry," was deceptive because the product largely consisted of apple and grape juices. Pom sought to require Coke to place the phrase "Flavored Blend of Five Juices," which already appeared on the label, in a font of equal size and prominence to the product name.

A three-judge panel of the Ninth Circuit affirmed the district court's dismissal of the Latham Act claim, finding that when a plaintiff's claim requires a court to decide an issue committed to the FDA's expertise, dismissal in deference to the agency is the proper result. The court noted that FDA regulations govern statements that must appear on such labeling, and specify how prominently and conspicuously those statements must appear. "As best as we can tell," the court found, "FDA regulations authorize the name Coca-Cola has chosen" and the label abides by FDA requirements.

The court, however, made clear that it was not holding that the label was non-deceptive, distinguishing the primary jurisdiction doctrine from a regulatory compliance defense. Rather, it deferred to the FDA to take action if the agency believed the labeling would mislead consumers. "[U]nder our precedent, for a court to act when the FDA has not — despite regulating extensively in this area — would risk undercutting the FDA's expert judgments and authority," Circuit Court Judge Diarmuid F. O'Scannlain wrote. *See Pom Wonderful LLC v. Coca-Cola Co.*, 679 F.3d 1170, 1177-78 (9th Cir. 2012). Pom has filed a petition for a writ of certiorari and, on March 25, the U.S. Supreme Court asked the Solicitor General to weigh in on whether it should grant review.

The primary jurisdiction doctrine was also a key factor when a federal district court in Minnesota dismissed a consumer class action challenging General Mill's labeling of Yoplait Greek yogurt in December 2012. In that case, the plaintiff alleged violations of Minnesota consumer protection law, claiming that the Yoplait Greek products are "neither Yogurt nor Greek, as those terms are used in the industry and defined by regulation." The plaintiff took particular issue with General Mill's use of Milk Protein Concentrate (MPC), a blend of dairy products, which is listed among the product's ingredients. MPC results in the thickness and protein content of typical Greek yogurt, but does not require the straining process traditionally used for producing Greek yogurt. In 1981, the FDA promulgated standards for yogurt, low-fat yogurt, and nonfat yogurt, but did not implement a provision regarding the use of "other optional ingredients." In 2009, the FDA proposed a rule updating its yogurt standard, which would recognize MPC as a permissible ingredient, but the rule remained on hold as the FDA did not schedule a public hearing "due to competing priorities and limited resources." Meanwhile, plaintiffs' lawyers filed several consumer class actions against the Greek yogurt makers.

U.S. District Court Judge Susan Richard relied on the primary jurisdiction doctrine to dismiss the suit without prejudice, concluding, "the FDA is in the best position to resolve any ambiguity about the standard of identity for yogurt — a matter requiring scientific and nutritional expertise." Judge Richard found it "imprudent for the Court, at this juncture, to substitute its judgment for that of the Agency's while revision of the standard of identity is pending." She recognized that FDA action would help ensure national uniformity in labeling, as contrasted with the flood of class action lawsuits on the issue, which may result in inconsistent rulings. Judge Richard dismissed the claim even as she acknowledged that the FDA's pronouncements on the issue

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"do not constitute a model of clarity." *Taradejna v. General Mills Inc.*, No. 12-993, 2012, 174264 WL 6113146, at *5 (D. Minn. Dec. 10, 2012). Thus, even if agency policy or practice does not definitively support the regulated party's position, and resolution of the issue involved in the litigation is not a high agency priority, Taradejna supports dismissal where the issue is within the agency's expertise.

Years earlier, General Mills and others were also successful in using the primary jurisdiction doctrine to persuade a court to dismiss a group's challenge to an advertising campaign promoting the weight loss benefits of consuming dairy products. Just before commencing litigation, the group had filed administrative petitions with the FTC and FDA, leading the district court to find those agencies better suited to consider the scientific basis of the representations and the probable impact on consumers. *Physicians Committee for Responsible Medicine v. General Mills, Inc.*, No. 05-cv-958, 2006 WL 3487651, at *6 (E.D. Va. Nov. 30, 2006), aff'd on other grounds, 283 Fed. Appx. 139 (4th Cir. 2008).

The primary jurisdiction doctrine, of course, applies to a wide range of products and services, not just food. For example, in November, Judge Phyllis J. Hamilton dismissed a consumer class action related to use of "natural" on lotions, deodorants, and other products. The court found that the plaintiffs could not argue that such claims were misleading due to artificial or synthetic ingredients in the cosmetics because, relying on *Pom Wonderful*, "Congress had entrusted the task of guarding against deception to the FDA," which had issued "remarkably specific" requirements for cosmetic labeling but that were silent on use of the term "natural." Private litigation, the court found, would "undercut the FDA's expert judgments and authority." Judge Hamilton concluded that "[i]n absence of any FDA rules or regulations (or even informal policy statements) regarding use of the word 'natural' on cosmetic labels, the court declines to make any independent determination of whether defendant's use of 'natural' was false of misleading." *Astiana v. Hain Celestrial Grp., Inc.*, No. 11-cv-6342-PJH, 2012 WL 5873585, at *3 (N.D. Cal. Nov. 19, 2012).

A lawsuit brought by a competitor regarding whether Dr. Bronner's Magic Soaps qualified as "organic," as labeled suffered a similar fate. In that instance, the U.S. Department of Agriculture had repeatedly shifted its position on whether its organic standards applied to personal care products. The agency then indicated an interest in developing a comprehensive approach to such products with the FDA and FTC. While the USDA had struggled with this issue for over a decade, Judge Susan Illston found "[t]he fact that the USDA has not acted quickly enough, in the plaintiff's view, to develop and promulgate regulations regarding the labeling of personal care products does not mean that the Court may adjudicate plaintiff's Latham Act claim without impermissibly intruding on the USDA's jurisdiction." *See All One God Faith, Inc. v. Hain Celestrial Grp., Inc.*, No. 09-cv-3517, 2012 WL 3257660, at *10 (N.D. Cal. Aug. 8, 2012).

Not All Courts Have Applied the Primary Jurisdiction Doctrine

While defendants persuaded several courts to dismiss deceptive practices claims on primary jurisdiction grounds in a variety of circumstances, not all judges have applied it in food-related cases. For instance, ConAgra Foods raised the primary jurisdiction defense in a lawsuit challenging the labeling of Pam cooking spray, Hunt's tomato products, and Swiss Miss cocoa. The plaintiffs took issue with ConAgra's characterizing products as "100 natural" when they contained a propellant or preservatives, its touting of foods as "organic" when they contained certain allegedly disqualifying ingredients, and the company's antioxidant representations, among other claims, under California consumer protection laws. In rejecting ConAgra's argument that the FDA has primary jurisdiction over such matters, Judge Charles R. Breyer found instructive that the FDA has not issued a formal rule on use of the term "natural" on food labeling. The FDA's inaction, the court found, weighed against a need for uniformity in administration of labeling. Nor did the court regard the case as requiring the special expertise of the FDA. "[T]his case is far less about science than it is about whether a label is misleading," the court concluded. *Jones v. ConAgra Foods, Inc.*, No. 12-cv-1633, 2012 WL 6569393 (N.D. Cal. Dec. 17, 2012).

This Year's Primary Jurisdiction Rulings

Food makers are continuing to raise primary jurisdiction as a defense, a trend that we expect to continue in 2013 and expand to products regulated by other agencies.

For instance, on the heels of its successful use of the primary jurisdiction doctrine in the Minnesota Greek Yogurt class action, and bolstered by the *Pom Wonderful* and *Astiana* rulings, General Mills raised the doctrine as a defense in a class action over whether Nature Valley granola bars are "100% Natural" when they contain high-fructose corn syrup, high-maltose corn syrup, or the texturizer maltodextrin. General Mills' motion to dismiss acknowledges that the FDA has not adopted a formal regulation defining the term "natural" for food labeling, but notes that the agency has repeatedly issued guidance interpreting the term and routinely enforced this informal policy by issuing letters to manufacturers calling for corrective action to the label when it deems the label deceptive. If the FDA, in its expert judgment, believes more should be done to protect consumers, or that General Mill's advertising is deceptive, the agency can act. *Janney v. General Mills*, No. 12-cv-3919-PJH (N.D. Cal. motion filed Dec. 3, 2012).

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CASE NOTES

Tainted Meat

In *Long v. Fairbank Reconstruction Corp.*, 2012 WL 5871043 (1st Cir. Nov. 21, 2012), 32 people in the northeastern United States were sickened by an outbreak of *E. coli* that was traced to the defendant's meat-processing facility in Ashville, NY. Two of the people infected, both of whom had purchased packages of ground beef from a supermarket in Maine, sued the defendant in the United States District Court for the District of Maine. The defendant then filed a third-party complaint against the slaughtering and processing company that had allegedly supplied the tainted beef.

After the defendant settled with the plaintiffs, the third-party indemnification claims proceeded to trial, focusing on the "traceback" analyses that led the defendant's experts to conclude the tainted meat came from the third-party defendant's shipments rather than another supplier's. The jury returned a verdict for the defendant; the district court denied the supplier's post-trial motions for relief and the supplier appealed.

The First U.S. Circuit Court of Appeals affirmed, rejecting the supplier's arguments that: 1) there was insufficient evidence its meat was contaminated and had been included in the packages purchased by plaintiffs; and 2) the trial court should not have admitted the videotaped deposition of the supplier's former expert witness testifying that the supplier was a "probable" source of the tainted beef. Regarding the deposition testimony, the trial court had previously denied the supplier's motion *in limine* to preclude the deposition's use at trial so long as defendant could establish it qualified as former testimony of an unavailable witness under Fed. R. Civ. P. 32(a)(4) and Fed. R. Evid. 804(b)(1). The court of appeals held the deposition testimony had been properly admitted at trial, not only because the supplier never objected to its introduction at any time after denial of its motion *in limine*, but because there was sufficient foundation for the expert's opinion. The court also found ample other evidence supporting the jury's conclusion that the *E. coli* came from the supplier's meat, including: 1) United States Department of Agriculture records concluding that the supplier's meat was in the packages the defendant shipped to the supermarket in question; 2) testimony of multiple experts who examined the supplier's internal records and reached the same conclusion; 3) circumstantial evidence that the same *E. coli* strain that sickened the plaintiffs had appeared in the supplier's meat in California; and 4) there were other positive *E. coli* tests at the supplier's facility on the same date as the shipment to the supermarket in question.

Malfunctioning Yacht Engines

In *Sauvageau v. Detroit Diesel Corp.*, 82 Mass. App. Ct. 1121 (Mass. App. Ct. Nov. 14, 2012), the plaintiff had purchased an ocean yacht in November 2002 from its original owner, who had taken delivery of the yacht in July 2001. The yacht was powered by two diesel engines manufactured by the defendant; the engines came with a two-year express warranty. In early 2003, the defendant circulated to the plaintiff and others a modification bulletin stating that it had located a potential defect with one of the engines' components, which it would replace free of charge. As instructed by the modification bulletin, the plaintiff contacted the defendant's authorized distributor to request an appointment to perform the repairs.

However, the repairs were never performed, and the component part in one of plaintiff's engines malfunctioned in August 2004, resulting in significant damage to that engine. The plaintiff sued the defendant and the distributor in Massachusetts Superior Court, asserting claims of breach of contract (based on the modification bulletin), breach of express warranty and violation of Mass. Gen. L. ch. 93A (the Massachusetts unfair and deceptive practices statute), and seeking to recover the costs of repairing and rebuilding the engines.

After the court granted the defendant summary judgment on the breach of warranty claim, finding it barred by the two-year term of the express warranty, the remaining claims proceeded to trial. A jury found only the distributor, not the defendant, liable for breach of contract, and the court ruled that the ch. 93A claim against the defendant also must fail, since the plaintiff could not succeed on the underlying breach of warranty and contract claims. Following the trial court's denial of the plaintiff's motion for judgment notwithstanding the verdict on the breach of contract claim, the plaintiff appealed.

The plaintiff first argued that his warranty claim was not time-barred, notwithstanding that the engine failure occurred more than two years after the tender of delivery to the original owner. The plaintiff argued that the warranty was not conditioned on "failure of the engine," but rather on "any malfunction occurring during the warranty period," and that the defendant had admitted plaintiff's engine was malfunctioning by circulating the modification bulletin in early 2003. Because nothing in the summary judgment record suggested the plaintiff's particular yacht was malfunctioning at that time, however, the Massachusetts Appeals Court affirmed summary judgment on the warranty claim.

The court also affirmed the judgment for the defendant on the breach of contract and ch. 93A claims. With respect to the contract claim, the court held that the jury could have reasonably found that only the distributor, not the defendant, entered into and breached a contract with the plaintiff to repair the engine. With respect to the ch. 93A claim, the court held that a plaintiff cannot prevail on a ch. 93A claim when he cannot prevail on the individual underlying claims — here, the contract and warranty claims. Thus the trial court's dismissal of the ch. 93A claim was appropriate. — **David R. Geiger**, Foley Hoag LLP

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Campbell's Soup Co. is also among the companies facing lawsuits claiming that their products are not "100 Percent Natural" as labeled. A class action claims that Campbell's misrepresented seven of its soups as natural because they may contain genetically modified corn or soy ingredients. Campbell's moved to dismiss the case on the ground that the USDA, which has jurisdiction over the two chicken soup products that constituted the plaintiff's only purchases, inspected the labels and found them compliant with applicable regulations. USDA policy, Campbell's says, makes no distinction between ingredients developed through biotechnology and those resulting from research using conventional techniques. Campbell's also notes that USDA's informal policy allows products to be advertised as "natural" so long as they do not contain any artificial flavor, color, or chemical preservative, or any other artificial ingredient, and the product and its ingredients are not more than minimally processed. While the motion to dismiss largely focuses on preemption, Campbell's raises the primary jurisdiction doctrine as an alternative basis to dismiss the claim. *Barnes v. Campbell Soup Co.*, No. 12-cv-5185, at 8n.7 (N.D. Cal. motion filed Feb 13, 2013).

As of the writing of this article, the Northern District of California had not ruled on General Mills' or Campbell's motions to dismiss. In February 2013, however, that court dismissed, on primary jurisdiction grounds, a claim that Kraft Foods had engaged in a deceptive practice by stating that the serving size of Dentyne breath mints is "one mint." This claim was predicated on an FDA regulation that, according to plaintiff, would have required a serving size of four mints. The FDA, however, proposed a smaller serving size for breath mints in 1997, solicited comments on the proposal in 2005, and placed the issue on its regulatory agenda for 2012. Since that the FDA was in the process of amending the serving size regulation, Judge Ronald M. Whyte "decline[d] to usurp the FDA's expertise in this area." With respect to state consumer protection claims challenging statements on several other product labels, Judge Whyte found the primary jurisdiction doctrine inapplicable because the alleged violations "mirror or are identical to the FDA provisions which require no original interpretation by this court." Where the court found clear compliance with federal labeling requirements, the court dismissed claims on preemption grounds. The court allowed various other claims, including those challenging "100% natural" representations on the labeling of granola and cheese products, to go forward. *See Ivie v. Kraft Foods Global, Inc.*, No. 12-2554 (N.D. Cal. Feb. 25, 2013).

The wide variation in court rulings applying the primary jurisdiction doctrine provides the U.S. Supreme Court with an opportunity in *Pom Wonderful* to provide helpful guidance on use of the doctrine in cases involving labeling regulated by federal agencies.

Practice Considerations

Primary jurisdiction should be considered an important defense for companies whose products or services are subject to federal regulation. In both consumer protection and product liability cases in which a government agency has regulated a product's design, labeling, or marketing, the flexibility of the primary jurisdiction doctrine may provide an additional, attractive public-policy driven alternative to the more traditional federal preemption and compliance with standards defenses.

Unlike federal preemption, a constitutional principle rooted in the Supremacy Clause, the primary jurisdiction doctrine does not require a conflict between a tort claim and a particular regulation or evidence that Congress sought to displace an entire regulatory field. *See* Victor E. Schwartz & Cary Silverman, Preemption of State Common Law by Federal Agency Action: Striking the Appropriate Balance that Protects Public Safety, 84 *Tulane L. Rev.* 1203 (2010). The primary jurisdiction doctrine allows the court to consider an agency's informal guidance, enforcement history, or even an agency's decision to further deliberate and not to act on a particular issue.

Nor does the primary jurisdiction doctrine require a finding that the manufacturer complied with a government standard that specifically regulates the product, practice, or representation at issue. Most state consumer protection laws provide a statutory regulatory compliance defense. *See* Victor E. Schwartz, Cary Silverman & Christopher E. Appel, "That's Unfair!" Says Who — The Government or Litigant?: Consumer Protection Claims Involving Regulated Conduct, 47 *Washburn L.J.* 93 (2007). The primary jurisdiction doctrine may provide an effective alternative where a state consumer protection law lacks such a provision, where state courts have narrowly interpreted the scope of the regulatory compliance defense, or where an agency has effectively authorized a practice by opting not to regulate it. The doctrine does not necessarily require compliance; it only requires finding that an agency, not a court, is in the best position to evaluate the lawfulness of the practice at issue.

Conclusion

In sum, primary jurisdiction has come to the forefront of food and cosmetic litigation because of the onslaught of consumer class actions challenging the advertising of products as "natural" or "organic." The history of, and public policy underlying, the doctrine shows that it has broader application in litigation involving a wide range of products. As courts become more familiar with a revitalized primary jurisdiction doctrine in the onslaught of food lawsuits, judges may become more receptive to such arguments in litigation involving other regulated products and industry conduct.

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Practice Tip

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manage the other parties' expectations before mediation. You do not want an opposing party to think they have a "slam dunk" case, or that you will "roll over."

Lawyers, as a general rule, are hesitant to "educate" the opposition. But mediation by ambush is counterproductive. Of course, plaintiff's counsel must explain the basis for the claimed defect and liability. Defendants must also be forthcoming. A plaintiff is more likely to settle at mediation if the defense has explained why the claimed defect is not, in fact, a defect, or the alternate grounds for accident causation. At some point during mediation, opposing counsel will have to explain the strengths of your case to his or her client. Counsel can only do this if you have provided sufficient information, if your relationship is reasonably cordial, and if they trust you.

Prior to mediation, determine what person on the opposing side has decision-making power, either as a matter of law or as a matter of fact. For instance, if you know that a particular parent in a minor case has more sway, you can tailor your message accordingly. Frequently, if you ask, opposing counsel will tell you who calls the shots. Sometimes, if settlement is a high priority, opposing counsel will tell you what message will be most persuasive to that decision-maker.

Choose Your Mediator

The ideal mediator is one you regularly hire to good result. But that is not always possible. In almost all cases, the preferred mediator is experienced, engaged, creative, and has a backbone. Spend the extra money for such a person. In a product liability case, it is wise to use a mediator who is familiar with product liability law and the specific product type in question. Given the technical complexities of product litigation, an educated mediator will make your life easier. Basic biographical information is easily found on the Internet. But if you do not know a proposed mediator, call colleagues who have hired that mediator in the past, as past performance is the best predictor of future performance. Obviously, a mediator should be fair, and not prefer one party over the other. But do not shy away from using a mediator trusted by opposing counsel. Assuming you can persuade the mediator of the merits of your case, that trust will work to your advantage.

Evaluate Your Case

Above all, aim for a realistic case valuation. The relevant law and facts will guide your case-specific valuation. Published verdict and settlement information from similar cases in the geographic region is a good resource and provides a gauge in measuring the accuracy of your case valuation. Prior to any mediation, you will discuss case value with your client. But also consider how the other parties will value the case. If you can predict their bottom line, you are in a better negotiating position.

Similarly, decide if you will share some limited information about how you value the case with opposing counsel. You will never share your bottom line. But giving the other parties a sense of how you value the case before mediation is often productive. Assuming your valuation is reasonable, such information allows the other parties time to set their expectations accordingly. This is an important consideration. If a plaintiff seeking $1 million first learns at mediation that the defendant values the case at no more than $250,000, the plaintiff will likely be upset and not respond well. Conversely, a defendant's early disclosure that its case valuation is nowhere near $1 million will give the plaintiff's counsel time to process this information and control client expectations.

Remember to bring material supporting your position on damages and valuation to mediation. For example, a list of verdict and settlement results from similar cases will help you sway the mediator and perhaps opposing parties. In the same vein, give some thought to negotiation strategy before mediation. While any pre-conceived strategy will change over the course of a mediation, having a strategy in place beforehand increases your odds of a favorable result. It is better to have the flexible outline of a path than no path at all. Obviously, your goal is to settle close to your target number. A pre-mediation negotiation strategy increases the likelihood of achieving that goal because it forces you to be proactive rather than simply reacting to the other parties.

Prepare Your Mediation Brief

Your mediation statement is a roadmap for the mediator. You should clearly explain the facts, case chronology, and law. Give the mediator the information he or she needs to convince the opposing party to settle on terms favorable to your client. Pay particular attention to the fact summary, as a good explanation of who/what/why/where/when is often persuasive to mediators. Much like the opening statement in a trial, this first impression is lasting. Persuasively explain your case and counter the opposition's best arguments, but keep strident language to a minimum. Because product liability cases are technical, pictures and diagrams help educate the mediator — a few good pictures may be worth many thousands of dollars. Setting forth any prior negotiations (demands/offers) will allow the mediator to get a running start at mediation.

Some attorneys prefer to exchange mediation briefs. We prefer mediation briefs that are confidential to the mediator. If you decide it is wise to share information in the briefs, or the briefs themselves, you can do so at mediation.

Prepare Yourself

As with trial, preparation is key to successful mediation. You must know the facts, the law, and the evidence. You must be able to refute or counter your opponent's best arguments.

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Your key themes, key arguments and key exhibits should be readily available as you walk into mediation. Particularly in product liability cases, photographs, diagrams, portions of expert reports, and portions of deposition testimony can help you explain complex concepts and technologies to the mediator and other parties. Re-read the depositions of the plaintiff and the defendants' representatives. These depositions, particularly the plaintiff's deposition, often contain highly relevant information that you did not notice when taking the deposition or reading the transcript for the first time. Seemingly unimportant facts about how the accident happened or how injuries affect a life can take on new importance on the eve of mediation.

If the mediation location is not familiar, arrive early so you can change or adjust any unacceptable situation, such as inappropriate room temperature, room size or a lack of privacy. If possible, spend a minute greeting the other lawyers.

Prepare Your Client

Client input is vital to mediation preparation, determination of settlement value and determination of settlement authority. You must be candid with your client about case strengths and weaknesses. Setting realistic client expectations is a fundamental aspect of mediation preparation. If your client will attend mediation, he or she must have an understanding of the process and his/her role in the process. Your client will likely want to be more than a silent observer, and you will have to prepare your client accordingly.

The client, if sufficiently familiar with case facts, can help educate the mediator about technical matters. Indeed, your client may know the facts and technology better than anyone else at mediation. Do not hesitate to use this resource. But make sure your client knows your case themes and presents them well. It is your job to make sure your client does not say something counter-productive.

There is always the chance the client will hear some hard news or get "leaned on" by the mediator. Thus, have your client prepared for the give and take of mediation. Importantly, make sure you have explained to your client any bad facts or law before mediation. Your client should not get surprising bad news at mediation.

The old adage is that all parties walk away from a good mediation a bit unhappy. Make sure your client understands that complete victory is rare at mediation, where compromise is the order of the day. But, of course, your job is to make sure that such compromise is as small as possible. If compromise is not on your client's agenda, then you should be preparing for trial, not mediation.

Attend Mediation with an Open Mind

Set the tone in mediation early. A positive tone and strong message do more to bring the parties closer to settlement than accusations and bombast. The trend in mediation is to limit party interaction. Indeed, we disfavor opening statements, as they are often counterproductive. If, however, you do interact with the other parties, the initial interaction sets the tone for the day. Generally, a reasonable, open tone is better than an adversarial tone. Remind the parties that all attorneys present have a job to do — to represent their clients. This will lessen any sense of personal attack. Provide information about the merits of your case in a clear confident manner. Counter your opponent's best arguments in a respectful manner. Give both the mediator and the other parties a clear picture of your case strengths. Finally, emphasize that you and your client are there to take part in thorough, productive settlement discussions.

Your job is to listen when other parties or the mediator speak. While product liability mediation focuses primarily on money, there are other interests at play: emotions, relationships, pride, saving face, being heard by the opposing party. Be attuned to these issues and be creative in your approach. If you listen to the mediator and other parties, you will learn something — either about the financial bottom line or other interests at stake. What you learn may help settle the case, or it may help at trial. For instance, we have encountered plaintiffs who want to speak their mind to the manufacturer's representative at mediation. If this can be done in a manner respectful to all parties, it will often clear a path to settlement.

On a purely nuts and bolts level, keep track of new information and keep track of the parties' demands and offers — write them down, noting the time, party making the demand/offer, and any explanatory notes. Bring a calculator because doing calculations on a piece of paper under time pressure is challenging.

Conclusion

Mediation is a human endeavor. Be credible and honest when addressing the other parties and mediator. Mediation is also a confidential proceeding, so you can be candid to the degree you are comfortable doing so. Remember that the mediator can help the parties address tough issues. He or she is not just a messenger, but an active participant. Ask yourself, "How can the mediator help my client reach his/her goals?" Finally, be patient. Mediation is a process and most progress is made toward the end of the session. Consider bringing a draft settlement agreement with the amount of the settlement payment left blank. This proposed settlement agreement will help the parties discuss non-monetary settlement terms, such as confidentiality, in detail at the mediation. Finally, if you do settle, make sure the document memorializing the agreement is signed by all parties and the mediator before you leave.

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