

# Mass Torts, Insurance and Consumer Litigation

Skadden

The Mass Torts, Insurance and Consumer Litigation Group at Skadden has been involved in many of the significant complex tort and consumer fraud litigations of the last 30 years, many of which are considered “bet-the-company” matters. The group pioneered the “national counsel” model of handling mass tort litigation and has strong relationships with local defense lawyers in virtually every state. We handle some of the most noteworthy cases nationwide for clients such as Altria, Anheuser-Busch, Bausch & Lomb, Electrolux, Intuitive Surgical, Johnson & Johnson, Lincoln Electric, Merck, Nissan, Pfizer, Red Bull and Toyota.

Our practice is comprised of experienced litigators who have defended cases on every level — from formulating and implementing national strategy in multijurisdictional litigation to conducting *Daubert* hearings and trials, as well as pursuing significant appeals. We have been lead defense counsel in a number of MDL proceedings, developed experts and conducted expert discovery, mapped strategies to obtain important early victories on substantive motions in key jurisdictions, coordinated discovery in thousands of actions, and prepared for and conducted precedent-setting trials. Skadden also has served as appellate counsel in landmark cases in many state and federal appellate courts and files *amicus* briefs in appeals that raise significant substantive law issues.

Additionally, we have been involved in numerous developments in class action law. For example, several attorneys in our group were instrumental in the passage of the Class Action Fairness Act, which expanded federal jurisdiction over class actions and prevents plaintiffs from “forum shopping” by filing their claims in state courts known to be plaintiff-friendly. We also regularly represent the Product Liability Advisory Council and the U.S. Chamber of Commerce as *amici* in appeals involving important class action principles.

Our attorneys have been among the lead proponents of expanding the use and application of the “no injury” doctrine, which holds that a plaintiff fails to state a legally cognizable injury when he or she is merely seeking recovery for the alleged heightened risk of physical

or economic injury. Also, we have developed and implemented the “class-wide proof” concept in scores of class actions, persuading federal and state court judges to deny certification because the plaintiffs could not properly try their claims on a class-wide basis. We have experience combating efforts to water down the “injury” and “causation” elements of many causes of action through the use of “presumed reliance” and “market fraud” arguments.

Skadden was named 2022 Washington, D.C. Litigation Department of the Year for Product Liability by *The National Law Journal*, 2021 Litigation Department of the Year by the *New York Law Journal* and a finalist in the general litigation category of the *New York Law Journal*’s 2023 and 2022 Litigation Department of the Year competitions. We also were named a finalist in *The American Lawyer*’s 2021 Litigation Department of the Year competition and a finalist in the Products Liability category of the publication’s 2023 competition. We were named among *Law360*’s Product Liability Groups of the Year for 2022. We ranked in the top tier for Product Liability and Mass Torts: The Elite by *Chambers USA 2024*. Skadden also has been named to BTI Consulting Group’s Fearsome Opponents list and recognized repeatedly among BTI’s Fearsome Foursome. Additionally, we ranked in the top tier for Mass Tort Litigation/Class Actions — Defendants by *Best Lawyers Best Law Firms*.

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## Our Experience

### Automotive

- Nissan Motor Co., Ltd. in securing a Ninth Circuit affirmance of the dismissal of a federal class action complaint (and the dismissal of a subsequent complaint by the trial court) in connection with Nissan's vehicles equipped with the "Intelligent Key," in which plaintiffs alleged that because of noncompliance with certain provisions in the Federal Motor Vehicle Safety Standard, drivers could depart their vehicle when the automatic transmission was not in the "park" position, allowing the vehicle to roll away unattended.
- Toyota Motor Corporation and Toyota Motor Sales, U.S.A. in multidistrict unintended acceleration litigation, venued in the Central District of California.

### Consumer

- Anheuser-Busch Company, LLC:
  - in securing the dismissal of a multidistrict litigation in which the plaintiffs alleged that Anheuser-Busch overstates the alcohol content on the labels of some of its malt beverages, although always within the tolerance allowed under federal labeling regulations;
  - in securing the settlement of a Florida consumer class action filed by two Miami residents accusing the company of deceiving consumers into thinking that Kirin beer is still imported from Japan;
  - in securing the dismissal of a putative class action in which the plaintiffs alleged that the advertising, packaging and labeling of Bud Light Lime Lime-A-Rita and related products deceived consumers in violation of California law; and
  - in multiple class action lawsuits in Ohio, Colorado, Texas, California, New Jersey and Pennsylvania alleging that it overstates the amount of alcohol in its beer by adding extra water to the finished product in order to cut costs. The U.S. Judicial Panel on Multidistrict Litigation centralized the six putative class actions in the Northern District of Ohio.
- Electrolux Home Products, Inc. in:
  - several class actions seeking compensation in connection with thousands of allegedly defective washing machines. Most recently we secured the reversal of a class certification ruling; and
  - its motion to dismiss in a case in California involving similar mold allegations under seven states' laws. The U.S. District Court for the Central District of California dismissed the plaintiffs' claims in part and denied class certification.

- Estée Lauder in securing the dismissal of a federal consumer class action alleging consumer fraud violations and challenging advertising claims for the company's Advanced Night Repair products.
- Philip Morris USA Inc. in securing a Second Circuit affirmance of the dismissal of a federal putative class action by smokers seeking to hold the company liable for medical monitoring.
- Red Bull North America, Inc. and its corporate parent in:
  - defense of multiple putative nationwide class actions pending across the country. The actions challenge the nature and content of Red Bull's advertising statements concerning its products' benefits and the scientific support for its claims that Red Bull improves mental and physical performance. Skadden is simultaneously advising Red Bull in responding to congressional investigations into the energy drink segment and with respect to threatened actions by a consortium of attorneys general; and
  - reaching an agreement to favorably settle a proposed class action in the U.S. District Court for the Southern District of New York. This is one of the largest consumer class settlement groups in U.S. history, with over 2.4 million valid class members.
- SiriusXM in the denial of class certification in a case involving SiriusXM's practice of automatically renewing customers' satellite radio subscriptions — a practice the plaintiff alleged violated New York consumer protection laws. The U.S. District Court for the Southern District of New York adopted a report and recommendation by the chief magistrate judge and denied the plaintiff's motion for class certification.
- TAMKO Building Products in securing a favorable ruling in a class action brought against the company alleging that it misrepresented the quality and characteristics of roofing shingles used on putative class members' homes and breached warranties with respect to those products.

### Environmental

- BHP Billiton in securing the dismissal of a Pennsylvania state asbestos personal injury litigation.
- Lincoln Electric Co. (and other welding industry defendants) as lead counsel in federal multidistrict litigation and state court mass tort proceedings involving more than 12,000 products liability claims brought by individuals who allegedly suffered injuries caused by manganese inhaled during use of welding consumables. Once considered the "next asbestos," with claims valued in the billions, defendants have been victorious in 26 of 31 individual cases that have gone to trial, and three of the plaintiff victories were later overturned on appeal. Over the eight-year history of the litigation, more than 85 percent of the claims have been volun-

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tarily dismissed, and most of the few remaining were resolved in 2012 through a nominal settlement.

- SIGG Switzerland Inc. in securing the dismissal with prejudice of an MDL proceeding after SIGG filed for Chapter 11. Plaintiffs in this consolidated master class action alleged that SIGG falsely marketed its reusable aluminum bottles as free of Bisphenol-A and that the liners on the bottles leaked BPA.

## Insurance

- Consecro Life Insurance Co. in securing a favorable decertification ruling in a federal breach of contract class action in which the court agreed with Skadden's arguments to decertify the class and, citing the Supreme Court's *Wal-Mart v. Dukes* decision, ruled that those who were no longer policyholders could not be part of the class, removing approximately 40 percent of the class members and limiting the relief.
- Fidelity National Financial and several of its subsidiaries in an Illinois consolidated class action involving claims seeking recovery for title insurance premiums paid during a six-year period as alleged "kickbacks" to attorney agents proscribed by the federal Real Estate Settlement Procedures Act.
- The Port Authority of New York and New Jersey, together with Larry Silverstein (who was represented by another law firm), in obtaining a verdict against nine insurers that allowed the Port Authority and Silverstein to receive an additional \$1.2 billion in insurance proceeds arising out of the destruction of the World Trade Center on Sept. 11, 2001. After a four-week trial and 11 days of deliberations, the jury determined that the loss of the World Trade Center was the result of two separate occurrences, the collision of two planes into the towers. The verdict allowed a recovery of two sets of insurance limits under Silverstein's insurance program. Skadden also represented the Port Authority in its settlement of property damage and loss of revenue insurance claims. After nine years of litigation, the U.S. District Court for the District of New York dismissed, in their entirety, two pending consolidated coverage actions. In total, the Port Authority collected well in excess of its per-occurrence limits from its carriers.

## Health Care, Pharmaceuticals and Medical Devices

- Bausch & Lomb Incorporated in the denial of class certification in a multidistrict litigation in the U.S. District Court for the District of South Carolina, Charleston Division, brought by plaintiffs alleging economic losses as a result of purported defects in Bausch & Lomb's ReNu With MoistureLoc contact lens solution. The court later dismissed all claims from remaining class actions.
- Emeritus Corporation in defense of a putative nationwide class action by current and former residents claiming in California

federal court unfair competition and consumer fraud based on allegations of under staffing at assisted living facilities.

- Ethicon Inc., a unit of Johnson & Johnson, in an ongoing product liability multidistrict litigation over its vaginal mesh implants, namely in a motion for sanctions against Ethicon's document retention standards outlined in a decade-long preservation hold.
- Intuitive Surgical, Inc. in securing a defense verdict in its favor in a five-week Washington state court trial in which the plaintiff alleged the company was negligent in its training of a doctor who performed a robot-assisted surgery on a patient who later died. This case was the first to go to trial of at least 26 lawsuits against Intuitive Surgical alleging injuries tied to its "Da Vinci" robotic system.
- Johnson & Johnson and its subsidiary DePuy Orthopaedics in successfully settling a federal mass tort multidistrict proceeding for \$2.5 billion, resolving approximately 8,000 U.S. personal injury claims against J&J's Synthes DePuy Orthopedics unit in connection with one of its hip implant products. Skadden attorneys had previously provided guidance on new strategies that resulted in a bellwether trial victory that paved the way for the resolution.
- Johnson & Johnson in securing a rare directed verdict in a bellwether trial in the Ethicon Vaginal Mesh MDL proceedings involving 10,000 personal injury claims.
- Merck Sharp & Dohme Corp., (fka Merck & Co.), in:
  - a federal lawsuit claiming the Kentucky attorney general's use of contingency fee attorneys in an underlying civil penalties action violates the company's due process rights;
  - an appeal of a statute-of-limitations dismissal of multiple personal injury cases concerning Fosamax, an osteoporosis medicine. Finding the plaintiffs' appeal presented a question of Virginia state law, the U.S. Court of Appeals for the Second Circuit certified the question to the Supreme Court of Virginia, which ruled in Merck's favor;
  - securing a favorable ruling in its federal Fosamax MDL proceeding, rejecting a motion by 91 plaintiffs to remand their case to Missouri state court and agreeing with Skadden's argument that the plaintiffs' claims were fraudulently misjoined. Skadden also assisted with briefing on summary judgment in the bellwether case, which ultimately alleged that the company's prescription drug Fosamax caused the plaintiff's bone to fracture;
  - securing a favorable Virginia Supreme Court ruling after appealing a statute-of-limitations dismissal of multiple personal injury cases concerning Fosamax, an osteoporosis medicine;

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- an appeal overturning a lower court's class certification in connection with litigation related to Merck's Vioxx medication, finding that the plaintiff failed the predominance requirement because his claims implicated individualized questions regarding loss, reliance and causation;
  - securing a rare All Writs Act injunction when a Louisiana federal court intervened in a state court proceeding to prevent plaintiffs from pursuing certain damages theories already addressed by earlier settlements. The order was directed at a \$220 million Vioxx-related state consumer class action;
  - opposing a petition to the U.S. Supreme Court by plaintiffs challenging the Vioxx resolution program, which settled more than 50,000 personal injury claims;
  - securing an appellate victory that stated the plaintiffs lacked standing to challenge a Vioxx settlement agreement because they had not participated in it; and
  - securing the dismissal of a two-part lawsuit brought by a Washington, D.C. plaintiff, initially seeking more than \$2 million in False Claims Act damages by alleging that Merck misrepresented the safety of Vioxx and caused the city to pay for Vioxx prescriptions it otherwise may not have covered, and subsequently seeking to represent a class of other Washington, D.C. residents who purchased Vioxx.
- Pfizer Inc. in:
- securing summary judgment in a failure-to-warn products liability litigation alleging Pfizer failed to warn consumers about stomach bleed risks associated with the use of Pfizer's Advil Liqui-Gel product;
  - securing the dismissal of a federal putative class action alleging that Pfizer falsely labeled and marketed Centrum multivitamins as providing positive health benefits and preventing chronic diseases;
  - a federal class action alleging RICO violations related to programs offered by Pfizer that assisted consumers in making co-payments for the prescription medicines Celebrex, Chantix, Effexor XR, Geodon, Lipitor and Pristiq;
  - a nationwide consumer class action involving allegations that Pfizer misrepresented the contents of its Advil containers through "slack fill" space intended to mislead consumers as to the actual number of pills in each bottle;
  - heading its efforts in achieving a confirmation plan in connection with Quigley Company, Inc.'s Chapter 11 restructuring after it was found that Quigley was selling insulation products with asbestos;
  - securing the dismissal of five New York state actions alleging that Zolofit causes birth defects;
  - securing the dismissal with prejudice of federal claims brought by Health Care Services Corporation alleging economic injury as a result of Pfizer's alleged off-label marketing of the antipsychotic medicine Geodon and antibiotic Zyvox;
  - in the defense of federal RICO claims in Texas and California brought by Health Care Service Corporation alleging Pfizer improperly promoted off-label use of the drug Bextra; and
  - the dismissal (without leave to amend) of a civil consumer class action that alleged Pfizer had conspired to defraud consumers through its marketing, promotion and sales of 12 of its medicines.
- Purdue Pharma, L.P. in securing the dismissal of a high-profile law enforcement matter against the makers of OxyContin and other opioid pain medicines.
- Vintage Pharmaceuticals, LLC, a subsidiary of Endo Pharmaceuticals, Generics International Inc., and certain of its subsidiaries, including those commonly known as Qualitest Pharmaceuticals, in connection with hundreds of claims brought by plaintiffs alleging serious personal injuries arising from Vintage's generic prescription medications containing propoxyphene.

## Sports

- National Hockey League as lead MDL counsel and coordinating counsel in a proceeding asserting personal injury claims on behalf of all former NHL hockey players.
- National Football League in securing the dismissal of a federal personal injury class action filed by 10 retired NFL players, including Hall of Fame defensive end Richard Dent, who alleged that the NFL and its teams improperly provided prescription painkillers and anti-inflammatories to players through team physicians and trainers in order to push players back to the field, to the detriment of their long-term health.