Morgan Lewis

commercial litigation newsletter

litigation

Feature Story

THE DODD-FRANK ACT – PREEMPTION

by Tom Sullivan and Sarah Kang

The Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act) became law on July 21, 2010. The Dodd-Frank Act, which arose out of the recent financial crisis, is one of the most significant and sweeping pieces of financial services legislation enacted since the Great Depression. The provisions of the Dodd-Frank Act include, but are not limited to, the creation of a Financial Stability Oversight Council to identify and respond to any emerging risks in the financial system (attempting to end "too big to fail" bailouts) and the reformation of the Federal Reserve system.

One of the most important of the 16 Titles of the Dodd-Frank Act is the Consumer Financial Protection Act of 2010 (CFPA), codified in Title X of the Dodd-Frank Act. The CFPA contains many provisions that alter existing laws, and it establishes the Bureau of Consumer Financial Protection (the Bureau) as an independent "watchdog" organization with broad power and authority to write, interpret, examine, and enforce rules that provide consumers protection from financial institutions. One area in which the CFPA changes the law significantly is the federal preemption of state laws.

Prior to the enactment of the Dodd-Frank Act, state financial laws were generally preempted by federal laws. The Dodd-Frank Act substantially redirects this decades-long trend in favor of federal preemption of state law by focusing more on "conflict" preemption than notions of "field" preemption, with entities covered by the CFPA being affirmatively subject to state laws unless the laws are "inconsistent" with the Dodd-Frank Act's provisions. The Dodd-Frank Act also codifies a separate preemption standard for national banks and federal savings associations with respect to "state consumer financial laws."

The Dodd-Frank Act's preemption provisions could lead to litigation in several different areas. A critical threshold issue for any preemption determination is whether a particular state law constitutes a state consumer financial law. The Dodd-Frank Act will not affect preemption of state laws that do not fall within the Dodd-Frank Act's definition of "state consumer financial law." For example, it is possible that "Little FTC" acts, consumer fraud and deceptive trade practice statutes, advertising and marketing laws, and general antidiscrimination statutes not specifically directed to financial transactions are not subject to the same preemption standard under the Dodd-Frank Act as "state consumer financial laws." The plaintiffs' bar and states' attorneys general have been active in filing consumer fraud litigation against companies in several different industries. Litigation relating to this and other aspects of the preemption provisions could have a significant impact on entities covered by the Dodd-Frank Act.

Read the Full Story

Summer 2011

in this issue

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Litigation Highlights

Defending the Pharmaceuticals Industry Against Class Action Claims

Morgan Lewis is one of the most active class action defense law firms in the United States, currently ranked #1 for federal class action representations by *Law360*.

This #1 ranking signals certain diversity in our client industries. Take, for example, the pharmaceutical sector. We represent more than half of the world's top pharmaceutical companies across the entire spectrum of these companies' civil litigation and complex regulatory needs, from IP and licensing disputes to antitrust, FDA, and securities enforcement.

We have been recognized by the *American Lawyer* and other legal publications for our precedent-setting work in the pharmaceutical industry, such as the summary dismissals of a series of first-ever nationwide "off label" consumer fraud class actions, a key antitrust victory on the eve of one of the country's largest mergers, an arbitration victory concerning the breach of a licensing agreement ranked by the *American Lawyer* as one of the top 30 international arbitration victories for 2009, and succeeding in having a case brought by a state attorney general tossed out of court with prejudice.

Furthermore, our commercial class action litigation team is a core part of the firm's interdisciplinary pharmaceutical practice, equipping us to represent any pharmaceutical company — from a startup trying to market a novel therapeutic agent to a multinational with many blockbuster drugs and devices — through the entirety of the product life cycle.

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Morgan Lewis's breadth of pharmaceutical industry experience permits each putative class matter to be subjected to a rigorous and thorough analysis to identify any potential scientific or litigation issue that could arise. Our litigators vet a full range of industry- and case-appropriate legal theories prior to engaging in motion practice in order to summarily defeat nascent class actions before they reach the costly discovery stage.

This often includes skillful navigation of regulatory matters and practiced interpretation and presentation of sophisticated scientific evidence by our team of attorneys, some of whom have advanced life sciences degrees, formerly served as in-house counsel to pharmaceutical companies, or have pharmaceutical regulatory experience with the U.S. attorney's office or the FDA.

In prevailing on the summary dismissal of multimillion-dollar nationwide class claims of consumer fraud via alleged "off label" prescription drug marketing to physicians, Morgan Lewis litigators constructed compelling legal theories that successfully rebutted payors' right to sue on behalf of prescription drug consumers. These theories not only allowed our clients to prevail, but also contributed significantly to new case law that is influencing ongoing litigation across the country.

Moreover, "off label" litigation is just one example of Morgan Lewis's experience with and focus in areas most susceptible to class claims against the pharmaceutical industry. Others involve pricing, failures to disclose, data privacy, and product liability. Our experience in product liability and mass, serial, and multidistrict torts includes pharmaceuticals, medical devices, breast implants, chemicals, flavoring ingredients and additives, food and beverages, and tobacco.

Morgan Lewis's effectiveness in defending pharmaceutical class claims is further enhanced by the firm's strong presence in jurisdictions where many of these claims are filed by private parties or state attorneys general, including California, Houston, New York, and Pennsylvania.

Morgan Lewis Wins Defense Verdict in Rare Consumer Class Action Trial; Plaintiffs Sought $25 Million

Greg Parks

Joe Duffy

In February, Morgan Lewis obtained a significant victory for a leading retail client. Our client was awarded a total defense verdict in the first consumer class action trial under California's gift card law. Under that law, which has spawned more than a dozen lawsuits to date, retailers are required to redeem a gift card for cash upon customer request when the balance of the card falls

below $10. Plaintiffs in the case alleged that our client failed to comply with the law and had deceptive statements on the back of its gift cards. They relied on testimony from individual customers as well as a survey to seek more than $25 million in damages. Morgan Lewis litigators successfully persuaded the court in a three-week bench trial that our client in fact complied with the law and had not engaged in any deceptive practices. The court found that the individual testimony was insufficient to establish a companywide practice, but could reflect a simple mistake by store-level personnel. Additionally, the court held that the survey failed to adequately replicate real market conditions.

This was a significant win for our client with important implications for our class action practice and our retail practice because (1) class action trials are extremely rare; (2) it established a very favorable precedent as it is one of dozens of cases filed under this gift card law; (3) plaintiffs' class action lawyers typically try to turn simple mistakes by store-level retail personnel into class actions and, in this trial, Morgan Lewis defeated that effort; and (4) survey evidence is a new phenomenon in class actions and Morgan Lewis convinced the court not to rely on it here.

The Morgan Lewis team that obtained this great result for our client was led by Litigation partners Greg Parks (Philadelphia) and Joe Duffy (Los Angeles).

Morgan Lewis Client Asahi Kasei Pharma Awarded $577M, Including $30M in Punitive Damages


Rollin Chippey, II


Benjamin Smith


Christopher Banks


Brock Gowdy

Following a $550 million jury verdict in favor of client Asahi Kasei Pharma Corporation on April 29, we won $30 million in punitive damages on May 3. The punitive damages were awarded after a protracted three-month trial regarding a licensing dispute against Swiss biopharmaceutical firm Actelion Ltd. and associated corporate and individual defendants, including Actelion CEO Jean-Paul Clozel. Evidence at trial showed that the Actelion defendants "painstakingly killed" the development of Asahi's rival drug Fasudil in order to keep the pharmaceutical market "free" for Actelion's competitive drug Tracleer. Asahi's trial team was led by Morgan Lewis partners Rollin Chippey, II, Benjamin Smith, and Christopher Banks.

Until early 2007, when Actelion acquired South San Francisco–based CoTherix, Inc., Asahi's drug Fasudil was under development by CoTherix for the treatment of pulmonary arterial hypertension (PAH) and stable angina (SA). PAH is a rare but invariably fatal disease primarily affecting younger women. Evidence presented at trial showed that Fasudil holds significant promise to ameliorate or even reverse the disease, and that CoTherix planned to sell Fasudil at an annual cost of approximately $5,000, less than one-tenth of the current price of Actelion's Tracleer.

During closing arguments, Asahi argued that each of the Actelion defendants engaged in "deliberate, intentional" interference with Asahi's deal with CoTherix in an effort to preserve Actelion's admittedly "dominant" market share in the PAH market. San Francisco litigation partner Christopher Banks argued that the defendants "knew the consequences of interfering with [Asahi's] agreement, and went ahead and did it anyway. Fasudil was on its way to success, and if the defendants hadn't done what they did, it would be coming on the market right now." As a result of Actelion's conduct, Banks argued, Fasudil is no longer being developed in the United States or the European Union—which is "exactly what the defendants intended."

The jury unanimously found that all seven defendants named in the case, including Actelion CEO Jean-Paul Clozel, intentionally interfered with Asahi's agreement with CoTherix to develop Fasudil, and did so with "malice, oppression, or fraud." As a result of the finding, all of the Actelion defendants were liable for punitive damages.

The Morgan Lewis trial team was guided and advised by San Francisco managing partner Franklin Brockway "Brock" Gowdy.

Chicago Expansion

Chicago Attorneys Add Depth to Commercial Litigation and Class Action Teams

Morgan Lewis's Chicago office has expanded its commercial litigation capabilities with the addition of five partners from Howrey LLP: David W. Clough, Ph.D., Kenneth M. Kliebard, Scott T. Schutte, Romeo S. Quinto, Jr., and Jason C. White.

These additions add great depth to our litigation capabilities in the Midwest. Ken Kliebard, Scott Schutte, and Romeo Quinto are involved in significant complex commercial litigation with an emphasis on class action matters. Ken has experience at the trial and appellate court levels defending class actions involving consumer and advertising fraud in state and federal courts throughout the United States. Scott has handled a broad array of complex commercial litigation, including claims involving breach of contract, insurance coverage, unfair competition, products liability, lender liability, and breach of fiduciary duty. A complex business litigator, Romeo Quinto has experience in consumer class action defense, trade secret, and private antitrust litigation.

Both David Clough and Jason White are seasoned litigation and intellectual property attorneys. David's practice focuses on the acquisition and enforcement of intellectual property rights worldwide and on the design and implementation of global intellectual property strategies. David has represented clients before various courts and administrative agencies, and in private mediation and arbitration. Jason focuses on patent litigation matters and has previously represented many Fortune 500 companies — as both plaintiffs and defendants — in complex litigation cases.

Our new partners join litigation partner Theodore Becker, who has practiced in our Chicago office since 2004. Ted has a national practice with more than 25 years of experience in litigation, including class actions and dispute resolution, and practices before the U.S. Supreme Court; federal trial, appeals, and bankruptcy courts; and state trial and appeals courts, as well as before administrative and regulatory agencies and in arbitration, mediation, and alternative dispute resolution proceedings.

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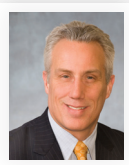

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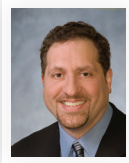

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