



2013 Practice Group of the Year

Product Liability

Kirkland & Ellis LLP's product liability practice group, with a series of huge wins over the past year including a U.S. Supreme Court decision siding with a generic drug manufacturer on a preemption issue and the successful defenses of wide-ranging litigation over two major drugs for different companies, has earned a place at top of the class as one of *Law360's* Product Liability Practice Groups of the Year.

Kirkland employs about 500 "generalist" attorneys, of whom about 50 or 60 work on product liability matters. While they are spread out around the country, most of the work gets done in the Chicago, New York and Washington, D.C., offices. In recent years, the practice has seen growth in the pharmaceutical arena as evidenced by the firm's top product liability wins this year.

In one of the most-watched decisions in the product liability arena this year, senior litigation partner Jay Lefkowitz convinced the Supreme Court to overturn a \$21 million verdict in favor of a woman who sued Mutual Pharmaceutical Co. Inc. after allegedly suffering injuries from Sulindac, a generic anti-inflammatory drug. The high court reversed the First Circuit's holding that the user of a generic drug can bring a state-law

design defect claim against its manufacturer, pointing out that generics makers cannot change a drug's design under federal law.

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"We argued that the Supremacy Clause requires that the federal law has to trump state law whenever they are in conflict," Lefkowitz said. "If the First Circuit's ruling was allowed to stand, you'd actually be inverting that pyramid, and state law would be supreme."

He said that if the appeals decision stood, even though a drug company was following federal law with regard to packaging, warning and design requirements, state laws could still provide that if the drug was found to be unsafe there, the maker could be liable for damages.

"We argued that this would turn preemption on its head," Lefkowitz said.

The Supreme Court's ruling in *Mutual's* favor marked the court's first major decision on generic-drug manufacturer liability since its *Mensing* decision in 2011 — which Lefkowitz also argued — in which it held that federal law preempted state-law failure-to-warn claims against the companies.

Lefkowitz credited the firm's product liability attorneys for working hard to prepare cases properly in whatever industry they are working in, something Kirkland partner Leslie Smith also mentioned when she discussed her work on representing Baxter Healthcare Corp. and Scientific Protein Laboratories LLC against thousands of claims alleging injury and death from contaminated blood thinner Heparin.

After leading the effort to consolidate the litigation in a federal multidistrict litigation in the Northern District of Ohio and Illinois state court, Kirkland engaged in aggressive motion practice based on key admissions obtained through discovery of the plaintiffs' general causation experts, *Daubert* challenges and a focus on individual claims, particularly with respect to product identification. Smith's team was able to dispose of the majority of the cases filed in the MDL and achieved dismissal or settlement for a significant number of the remaining hundreds of individual cases.

"We made a very concerted effort to establish credibility with both of the judges presiding over the consolidated proceedings, in terms of fluency in the science and the facts, but never overstating so that both the courts and plaintiffs' counsel understood that we were not only knowledgeable but trustworthy," Smith said.

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She said it is a hallmark of the Kirkland approach to be thoroughly prepared and fluent in the facts and the science — to understand exactly where it is possible to make progress in terms of motion practice and then carry that forward, if necessary, to trial.

Another science-intensive matter the firm found itself is the defense of Abbott Laboratories in dozens of products liability actions involving its blockbuster rheumatoid arthritis drug, Humira. Led by Michael Foradas, the Kirkland team serves as national counsel in high-profile cases alleging that Humira caused serious — and sometimes fatal — injuries, including cancer, neurological conditions and systemic infections.

Foradas said his team faced a challenge in that they had to present both a vigorous defense that Humira was not responsible for the alleged problems, as well as an argument that to the extent there was any risk, the company adequately warned consumers.

"The only way you can defend a flagship product like this is to make

sure that the plaintiffs' bar understands that if they can't resolve the cases on a pretrial basis, as they hope to do, that they're prepared to take cases to trial and take verdicts if necessary," Foradas said.

He said companies need a strong advocate to send a message that it believes in the product, is prepared to defend the product and will make sure that the plaintiffs are put to their proofs.

"We have so many of these cases, and many firms would be stretched very thin. But I think the breadth of our practice allows us to handle them and bring in people as needed when you're in a situation when you're going to trial," he said.

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