



## STUDY REVEALS PHARMACEUTICAL PRODUCT-LIABILITY PLAINTIFFS DRAWN TO SUE IN CALIFORNIA

by Mark A. Behrens

The Civil Justice Association of California (CJAC) recently studied product-liability cases filed against pharmaceutical manufacturers in two bellwether courts—the Los Angeles and San Francisco Superior Courts—between January 2010 and May 2016.<sup>1</sup> The results of CJAC’s comprehensive study show that nonresident plaintiffs—“litigation tourists”—are filing pharmaceutical cases in California by the thousands, dwarfing the number of filings by people who reside in the state.

### CJAC Study Highlights

Ninety percent of the 25,503 plaintiffs in the CJAC study were from out of state. Since roughly 12% of Americans live in California, that means the percentage of in-state plaintiffs in the lawsuits studied is lower than the state’s percentage of the national population. Over two-thirds of the 2,919 cases in the study involved *only* nonresident plaintiffs. In almost 86% of the cases, more than half of the plaintiffs were from out of state.

CJAC’s study also revealed that a small number of law firms represented the plaintiffs in these cases, with 25 firms representing 91% of the plaintiffs. Seven of those firms had California residents make up less than 7% of their plaintiffs. None of the top firms had California residents make up more than one-third of their plaintiffs. It appears that the law firms bringing most of the pharmaceutical product-liability cases in California are actively searching for plaintiffs in other states and funneling those filings to California.

### Why California?

California’s plaintiff-friendly reputation no doubt attracts many out-of-state plaintiffs. The entire state has been labeled a “Judicial Hellhole” by the American Tort Reform Foundation each year since 2010. California took the number-two spot in 2016.<sup>2</sup> The state consistently produces many of the nation’s largest verdicts in tort cases generally<sup>3</sup> and in pharmaceutical cases in particular.<sup>4</sup>

<sup>1</sup> Ryan Tacher, *Out-of-State Plaintiffs: Are Out-Of-State Plaintiffs Clogging California Courts?* (Civil Justice Ass’n of Cal. 2016), available at [http://cjac.org/what/research/CJAC\\_Out\\_of\\_State\\_Plaintiffs\\_Exec\\_Summary.pdf](http://cjac.org/what/research/CJAC_Out_of_State_Plaintiffs_Exec_Summary.pdf).

<sup>2</sup> See Am. Tort Reform Found., *JUDICIAL HELLHOLES 2016-2017* (2016), available at <http://www.judicialhellholes.org/wp-content/uploads/2016/12/JudicialHellholes-2016.pdf>.

<sup>3</sup> See, e.g., Wendy Leung, *Jury Reaches \$125 Million Verdict in Oxnard Drunken Driving Case*, *Ventura County Star*, Jan. 23, 2016; Erin Coe, *Top Calif. Verdicts of 2014—And the Firms That Won Them*, *LAW360*, July 14, 2014 (discussing \$1.15 billion award against several companies to address risks posed by lead paint in homes).

<sup>4</sup> See, e.g., Daniel Siegal, *J&J Unit Hit With \$5.6M Verdict Over Calif. Risperdal Death*, *LAW360*, Oct. 19, 2015; Jessica Dye, *Johnson & Johnson Ordered to Pay \$5.7 Million in California Mesh Trial*, *Reuters*, Mar. 5, 2015; Tom Moylan, *California State Jury Awards \$6.5 Million in 1st Actos Bladder Cancer Case to Go to Trial*, *LEXISNEXIS*, Apr. 29, 2013.

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In addition, California courts have adopted permissive tort-liability theories that likely attract plaintiffs to the state. For example, California is the birthplace of so-called innovator liability theory, which provides that the manufacturer of a brand-name drug may be subject to liability when a patient is injured by a generic version made by a third party.<sup>5</sup> Further, California is among a shrinking minority of states that has not adopted the federal *Daubert* standard for the admissibility of expert evidence.<sup>6</sup> California also retains joint liability for noneconomic damages<sup>7</sup> and has no statutory cap on punitive damages, unlike many other states.

### Nonresident Plaintiffs Engage in “Forum Shopping” in California

California courts appear to welcome out-of-state litigation. For instance, just this past August the California Supreme Court decided *Bristol-Myers Squibb Co. v. Superior Court*, a case that involved claims by 86 California residents and 592 nonresidents who alleged injuries from a prescription blood-thinner. The defendant, a Delaware corporation with headquarters in New York and substantial operations in New Jersey, argued that the court lacked personal jurisdiction because the product at issue was not manufactured, developed, labeled, packaged, or approved in California, and revenue generated from the product’s sales in California amounted to only 1.1% of the company’s nationwide sales revenue of all of its products. Nevertheless, the California Supreme Court ruled that the manufacturer’s marketing and distributing of the product in California—a state which boasts the world’s sixth-largest economy—established *specific* personal jurisdiction.<sup>8</sup> The decision effectively cemented California’s position as a plaintiff-friendly destination for pharmaceutical and other mass-tort litigation.<sup>9</sup>

### Conclusion

The Civil Justice Association of California study exposes the pervasiveness of nonresident pharmaceutical filings in the Golden State. It provides an essential starting point for further discussions regarding the impact of nonresident filings in pharmaceutical and other mass-tort cases in California—including over how the flow of out-of-state cases to California may also contribute to the state judiciary’s budget crisis and impede access to justice for California’s own residents.<sup>10</sup>

<sup>5</sup> *Conte v. Wyeth*, 85 Cal. Rptr. 3d 299 (1st Dist. 2008). The California Supreme Court will consider the issue in 2017. See *T.H. v. Novartis Pharms. Corp.*, 199 Cal. Rptr. 3d 768 (Cal. Ct. App. 4th Dist. 2016), *review granted and opinion superseded*, 371 P.3d 241 (Cal. 2016). [Ed. Note: WLF filed an *amicus* brief in support of the Respondent in this case. See [http://www.wlf.org/litigating/case\\_detail.asp?id=882](http://www.wlf.org/litigating/case_detail.asp?id=882).]

<sup>6</sup> The California Supreme Court signaled that trial court judges are empowered to act as “gatekeepers” in *Sargon Enter., Inc., v. Univ. of S. Cal.*, 288 P.3d 1237, 1250-51 (Cal. 2012). It remains uncertain whether its judges will undertake the extensive preliminary review of reliability associated with the federal standard. [Ed. Note: WLF filed an *amicus* brief in support of the Defendants and Appellants in this case. See [http://www.wlf.org/litigating/case\\_detail.asp?id=655](http://www.wlf.org/litigating/case_detail.asp?id=655).]

<sup>7</sup> See CAL. CIV. CODE ANN. §§ 1431, 1431.2.

<sup>8</sup> *Bristol-Myers Squibb Co. v. Super. Ct.*, 377 P.3d 874, 878-79, 887 (Cal. 2016), *cert. pet. filed*, No. 16-466 (2016). [Ed. Note: WLF filed *amicus curiae* briefs in support of the Petitioner in the California Supreme Court and in the US Supreme Court. See [http://www.wlf.org/litigating/case\\_detail.asp?id=816](http://www.wlf.org/litigating/case_detail.asp?id=816).]

<sup>9</sup> See Emily Field, *Plavix Ruling Cements Calif. as Center for Mass Torts*, LAW360, Aug. 30, 2016.

<sup>10</sup> See California Judicial Branch, *In Focus: Judicial Branch Budget Crisis*, available at <http://www.courts.ca.gov/partners/1494.htm>.