Product Liability Group Of The Year: Skadden

By Megan Stride

Law360, New York (January 19, 2011) -- Skadden Arps Slate Meagher & Flom LLP helped score the reversal of a $20.5 million verdict against Lincoln Electric Co. and other defendants in a bellwether personal injury case, just one of many victories that made it one of Law360's Product Liability Groups of 2010.

The firm also scored big wins leading Pfizer Inc. through a thicket of claims and class certification bids over the off-label marketing of epilepsy drug Neurontin, helping Merck & Co. defeat Louisiana's suit seeking damages for Medicaid payments for the discontinued painkiller Vioxx, and defeating a challenge to the dismissal of multidistrict litigation against Amgen Inc. over the off-label marketing of anemia drugs.

Skadden has a roster of about 60 products liability attorneys who are concentrated in the firm's New York and Washington, D.C., offices, along with a smaller presence in Skadden's San Francisco and Palo Alto, Calif., offices, according to Sheila Birnbaum, co-chair of the firm's mass torts and insurance litigation group.

Birnbaum said the practice garnered a "big boost" to its already established reputation and client base when it hired partner John Beisner to serve as practice group co-head with her in 2009.

"I think the depth that we have is really unsurpassed in most other law firms," Birnbaum said. "We can bring large numbers of people to very big multidistrict cases, which gives us a very big leg up."

Beisner said he was drawn to Skadden by the group's tenacious yet thoughtful approach to litigation, a strategy that played a large part in helping the firm compile so many product liability victories in 2010.

"The hallmark of the group is its aggressiveness and creativity," Beisner said. "I think the group encounters problems of all sorts in litigation and there's a spirit of 'we'll figure out a way to tackle it.'"

That approach proved a winning one for Skadden in September, when the firm helped cinch the reversal of a $20.5 million trial verdict against Lincoln Electric and several other welding supply manufacturers in a bellwether personal injury case.

Skadden partner Stephen Harburg argued for Lincoln Electric and the other appellants before the U.S. Court of Appeals for the Sixth Circuit, which, on Sept. 8, overturned the verdict that a district court handed to a couple as part of a multidistrict litigation alleging that the defendants failed to warn that exposure to fumes from welding products could cause neurological injury.

On appeal, attorneys from Skadden and several other firms argued that the lower court violated Rule 702 of the Federal Rules of Evidence when it allowed the testimony of a neurologist who diagnosed a plaintiff with manganese-induced Parkinson's disease linked to welding fumes.

The appeals court ruled that the doctor's testimony regarding whether the plaintiff had developed manganese-induced Parkinson's relied too heavily on speculation and lacked sufficient scientific facts to support it.

Concurring with the argument of Skadden and the other defense firms, the court ruled that the neurologist's level of speculation was inconsistent with the knowledge requirement of Rule 702 and remanded the case for a retrial.

At the time, a representative for the defendants said the ruling could have a major impact on remaining cases in the enormous multidistrict litigation by sending the message that lawsuits cannot be based on "speculative or hypothetical science."

Beisner said the Sixth Circuit win demonstrates the ability of Skadden attorneys to represent a client through several layers of litigation, noting that the firm has successfully backed Lincoln Electric in a slew of related cases in trial courts as well.

"The appeals we take are argued by people within the group, so one day they may be working on the trial and the next day we may be working on the appellate brief," Beisner said.

Skadden secured another significant product liability win in June, when it helped Merck defeat a suit brought by the Louisiana attorney general in an attempt to recover damages for Medicaid payments for Vioxx under a state law that allows for a full refund for defective products.

The post-trial ruling, in which the court threw out Louisiana's claims under the state's redhibition law, was preceded by a March 31 decision that granted Merck summary judgment on several of the claims at issue.

According to Beisner, the summary judgment ruling was particularly significant in the context of product liability litigation brought by state attorneys general as an end run around class action certification, a trend that has exploded in popularity over the past five years or so.

By tossing several claims before trial, the court "called that out," Beisner said, sending the message that disguised class claims are not appropriate.

Skadden went on to help defeat the remainder of the claims at trial. On June 29, the court ruled that Merck's marketing was consistent with the results of clinical trials, and that Louisiana had not met its burden of showing that it would have excluded Vioxx if it had had different information about the drug.

"This case was less about personal injury and more about economic loss," Beisner said. "Plaintiffs are being pretty creative as well, and I think we're coming up with even more creative ways to combat these claims, which I think are different than what you would have seen 10 or 15 years ago."

Skadden bagged some of its biggest product liabilities victories in 2010 while representing Pfizer in suits stemming from the pharmaceutical giant's alleged off-label marketing of the epilepsy drug Neurontin.

The firm's triumphs have rippled through the widespread Neurontin litigation, causing scores of plaintiffs to drop out of cases following Skadden wins that convinced them their claims were "no longer viable," according to Skadden partner Mark Cheffo.

In 2010, Skadden helped Pfizer topple several class certification bids from plaintiffs seeking economic damages for Neurontin prescriptions they claimed to have paid for as a result of the drug company's allegedly shady shilling.

Cheffo led the group to such a win on Jan. 10, 2010, when a Pennsylvania appeals court affirmed a state court's 2009 decision to decertify a class in a fight over the drug and ruled that the plaintiffs had failed to meet commonality and typicality requirements.

In January 2010, the Superior Court of Pennsylvania ruled that the plaintiffs' expert testimony, from a doctor who asserted that the class members relied on Pfizer's alleged misrepresentations in their purchase and use of the drug, was not solid enough to overturn the decertification ruling, as the doctor did not base her numbers on information gathered from discussions with the prescribing doctors.

The firm logged a handful of other significant wins in Neurontin litigation in 2010, including an August summary judgment ruling for Pfizer in a personal injury case in which a plaintiff claimed her injuries were linked to the alleged off-label marketing and a January summary judgment win in a suit brought by insurance companies seeking more than $200 million in damages over the alleged marketing.

Cheffo, who led the Skadden team on all of the Pfizer Neurontin matters, credits the firm's aggressive approach in discovery with coming out on top time and again in these cases.

Several times, Skadden attorneys managed to uncover key information about plaintiffs and their claims to show that they "did not have the injury they alleged initially," Cheffo said.

The group's focus on strong, consistent collaboration between its lawyers at all levels — and in some cases, between different practice groups within the firm — also played a key role in Skadden's victories for Pfizer, according to Cheffo.

"It's not just at the partner level, which is very collaborative and very collegial," Cheffo said. "It's also between our counsel and our associates. It's worked seamlessly."

Skadden secured a victory for another pharmaceutical client in October, when the firm helped Amgen defeat a challenge to a district court's decision to dismiss with prejudice and in its entirety the multidistrict litigation accusing Amgen of fraudulently promoting off-label uses of its anemia drugs Epogen and Aranesp.

The U.S. Court of Appeals for the Ninth Circuit affirmed the total dismissal — which Skadden helped Amgen win in 2009 at the district court level — on Oct. 21, agreeing with the lower court's finding that Amgen had not committed fraud simply by marketing the drugs for off-label uses.

The third-party payor plaintiffs in the suits had alleged that Amgen's actions amounted to fraud under the Racketeer Influenced and Corrupt Organizations Act, but Skadden attorneys helped kill that argument.

The appeals court ruled that the plaintiffs failed to link Amgen's behavior to their injury, and further found that the chain of events that the payors claimed Amgen kicked off — and which allegedly cost

them tens of millions of dollars — was too attenuated to satisfy the proximate causation requirement for RICO claims that the U.S. Supreme Court established in a January 2010 decision.

The Ninth Circuit also ruled that the plaintiffs' complaint failed to reference specific test results allegedly hidden by Amgen.

Skadden's ability to turn in victory after victory in the products liability sphere is largely due to the diligence and expertise of its attorneys, which has engendered a camaraderie that only encourages the the group's top-notch work, Birnbaum said.

"We really all like each other," Birnbaum said. "We work well together, and we respect each other a great deal."

--Additional reporting by Allison Grande, Evan Weinberger, Ryan Davis and Ian Thoms

Methodology: In mid-November Law360 solicited submissions from more than 300 law firms for its practice group of the year series. The more than 400 submissions received were reviewed by a committee of four editors. Winners were selected based on the number of significant wins the group had in litigation or the size, number and complexity of deals the group worked on in 2010.