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Q&A With Skadden's Jessica Miller

Law360, New York (February 20, 2013, 3:53 PM ET) -- Jessica Davidson Miller is a partner in the Washington, D.C., office of Skadden Arps Slate Meagher & Flom LLP.

She has experience in the defense of purported class actions and other complex civil litigation with a focus on product liability matters and multidistrict litigation proceedings. She has served as a counselor to the U.S. Chamber of Commerce, the Civil Justice Reform Group and other organizations dedicated to civil justice reform.

Q: What is the most challenging case you have worked on and what made it challenging?

A: The hardest case I ever worked on should have been the easiest: A bogus consumer fraud class action in which the plaintiffs purchased manufactured homes, signed disclosures making clear that they would not keep the wheels and axles used to deliver their homes, watched the installers take away the wheels and axles, never asked that the wheels and axles be returned and then years later, were recruited by plaintiffs' lawyers to file a nationwide class action lawsuit claiming that those wheels and axles had been stolen.

The lawsuit was even more ridiculous than the run-of-the-mill class action because the consumers had no practical use for wheels and axles. Although their homes were manufactured before delivery, they were built to be permanent homes and were installed upon delivery. It wasn't as though you could uproot your home one weekend, put it back on the wheels and axles and move.

So why was the case so hard? Because it was filed in a county court in Arkansas, where no class action had ever been rejected. None of our arguments or evidence mattered, and even though the suit was meritless, no sane defendant would have risked a class trial in that sort of venue. As a result, the defendant was forced to settle a completely meritless case and pay the plaintiffs' lawyers millions of dollars.

When the lawsuit was finally over, I felt as though I had failed my client. We had strong, unbeatable arguments, but the chances of the U.S. Supreme Court taking a case from state court about wheels and axles was virtually nil, and we were in a jurisdiction where our client was dead on arrival. This case really affected my views about the importance of legal reform and why passage of the Class Action Fairness Act was such an important legislative accomplishment for civil justice in this country.

Q: What aspects of your practice area are in need of reform and why?

A: If I could magically impose one legal reform initiative on our civil justice system, it would be to require plaintiffs and/or their counsel to pay a defendant's discovery expenses if the plaintiff loses at summary judgment or trial. Almost every week, I see a product liability or consumer fraud suit proceed to discovery even though it is facially meritless.

Perhaps the plaintiff did not read the product warning, or the plaintiff seeks to certify a class involving individualized sales pitches, or the plaintiff seeks to recover over a supposed warranty that never existed. And far too often, a few weeks or a month later, the defendant makes a pragmatic choice to settle.

Our judicial system puts defendants at a double disadvantage that forces settlement of meritless cases because: It is very difficult to prevail on a motion to dismiss or early summary judgment motion, even if a case is obviously meritless; and once a case survives a motion to dismiss, the plaintiff can bombard the defendant with burdensome discovery that make it far cheaper to settle than to litigate.

As a lawyer, nothing frustrates me more than watching a client settle a meritless case simply because of discovery cost. But the reality is that a defendant cannot rationally spend $100,000 in discovery if a case is only worth $50,000, or $1 million in discovery if the plaintiff's lawyer is willing to settle for a payoff of $300,000. If plaintiffs' counsel knew that losing at trial meant they would have to pay the other side's discovery costs, I am fairly certain that: They would be a lot more temperate in their discovery demands; and the price of settling weak cases would suddenly be a lot more reasonable.

I understand that there is a strong resistance in our country to the sort of "loser pays" rules that govern litigation in Europe, but shifting discovery costs (and putting lawyers on the hook if their clients can't pay) is a more modest solution to the problems of litigation abuse that would help equalize the playing field in product liability and aggregate litigation.

Q: What is an important issue or case relevant to your practice area and why?

A: In Re Zyprexa Products Liability Litigation, 671 F. Supp. 2d 397 (E.D.N.Y. 2009). This case has had a significant impact on a new genre of lawsuits against product manufacturers — suits by third-party payors such as health insurers and state Medicaid agencies. The plaintiffs in these suits typically allege that they are entitled to a refund for covering the costs of various prescription medications because there has been some allegation that the medication has undisclosed side effects or that it was promoted for off-label uses.

I find these suits extremely troubling for two reasons. First, they don't redress any real injury; they simply seek a windfall. Realistically, if an insurer didn't cover one medication, it would have covered another. In addition, as one court noted, insurers are sophisticated entities that know they might pay for unnecessary drugs, and they factor that into the premiums they charge.

The second troubling aspect of these lawsuits is that the plaintiffs have no realistic way of proving causation. That is what bothered Judge Jack Weinstein in In Re Zyprexa. There, the state of Mississippi brought suit against Eli Lilly, alleging that the company engaged in illegal off-label promotion of Zyprexa and failed to warn about the drug's side effects. Id. at 401. The state sought refunds for covering the drug and an award of civil penalties.

But the state had no way to prove which of the prescriptions it paid for were caused by the alleged off-label promotion of Zyprexa and which prescriptions would have happened anyway. Weinstein found this troubling and invoked an "individualized-proof rule," a legalistic way of saying that just as an individual suing Eli Lilly would have to prove that his or her injuries were caused by the defendant's conduct, so did the state of Mississippi.

I think Weinstein's ruling has had a real impact on how courts across the country view efforts by plaintiffs to bring aggregate litigation when they don't have a means of proving causation, particularly because he has a reputation as a liberal judge.

Q: Outside your own firm, name an attorney in your field who has impressed you and explain why.

A: Beth Wilkinson at Paul Weiss. She is smart, savvy and plain-spoken, and she is amazingly skilled at making judges and juries understand that corporations are not just monoliths — in most instances, they are organizations filled with hardworking, honest people trying to do the right thing.

I have seen her in the courtroom, in client meetings, in strategy sessions and even at Little League games, and she brings the same confidence and grace to all of these settings.

Q: What is a mistake you made early in your career and what did you learn from it?

A: The biggest mistake I made as a junior associate was not taking vacations. Having grown up in a household where money was scarce, I paid off my student loans and saved money for a down payment instead of traveling. Now, my loans have been paid off, but I have three highly energetic, demanding children, and my most exciting vacation is the boardwalk amusement park in Rehoboth, Del. As a result, I constantly urge young associates to take exotic vacations before they have kids!

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