Public Client Department Overview

Shayna E. Sacks, Esq.

Thank You

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Experienced Public Client Advocates

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Social Media Litigation: Motions to Dismiss

In November of 2023, Hon. Yvonne Gonzalez Rogers granted in part and denied in part certain motions to dismiss, limiting the claims at issue in the MDL. Importantly, the Court found that the case should not be dismissed entirely under Section 230 of the Communications Decency Act (CDA), 47 U.S.C.A. § 230, including the important claims of strict liability, failure to warn and negligence. The Court also refused to grant defendants' motion to certify an interlocutory appeal.

- Claims 2 and 4 allege that defendants distributed defective and unreasonably dangerous products without adequately warning users of risks including risk of abuse, addiction, and compulsive use. The Court defines the risks are those created by the defects addressed in claims 1 and 2. Defendants do not brief application of Section 230 to any of the failure to warn claims. This alone is a basis to deny the motion as to these claims. In any event, the Court finds **these claims plausibly allege that defendants are liable for conduct other than publishing of third-party content and that they could address their duty without changing what they publish**. The duty arises not from their publication of conduct, but from their knowledge, based on public studies or internal research, of the ways that their products harm children. Plaintiffs allege through these claims that defendants could meet this duty without making any changes to how they publish content, by providing warnings for any and all of the alleged defects.

In re Soc. Media Adolescent Addiction/Pers. Inj. Prod. Liab. Litig., No. 4:22-MD-03047-YGR, 2023 WL 7524912, at *16 (N.D. Cal. Nov. 14, 2023), motion to certify appeal denied, No. 4:22-MD-03047-YGR, 2024 WL 1205486 (N.D. Cal. Feb. 2, 2024)

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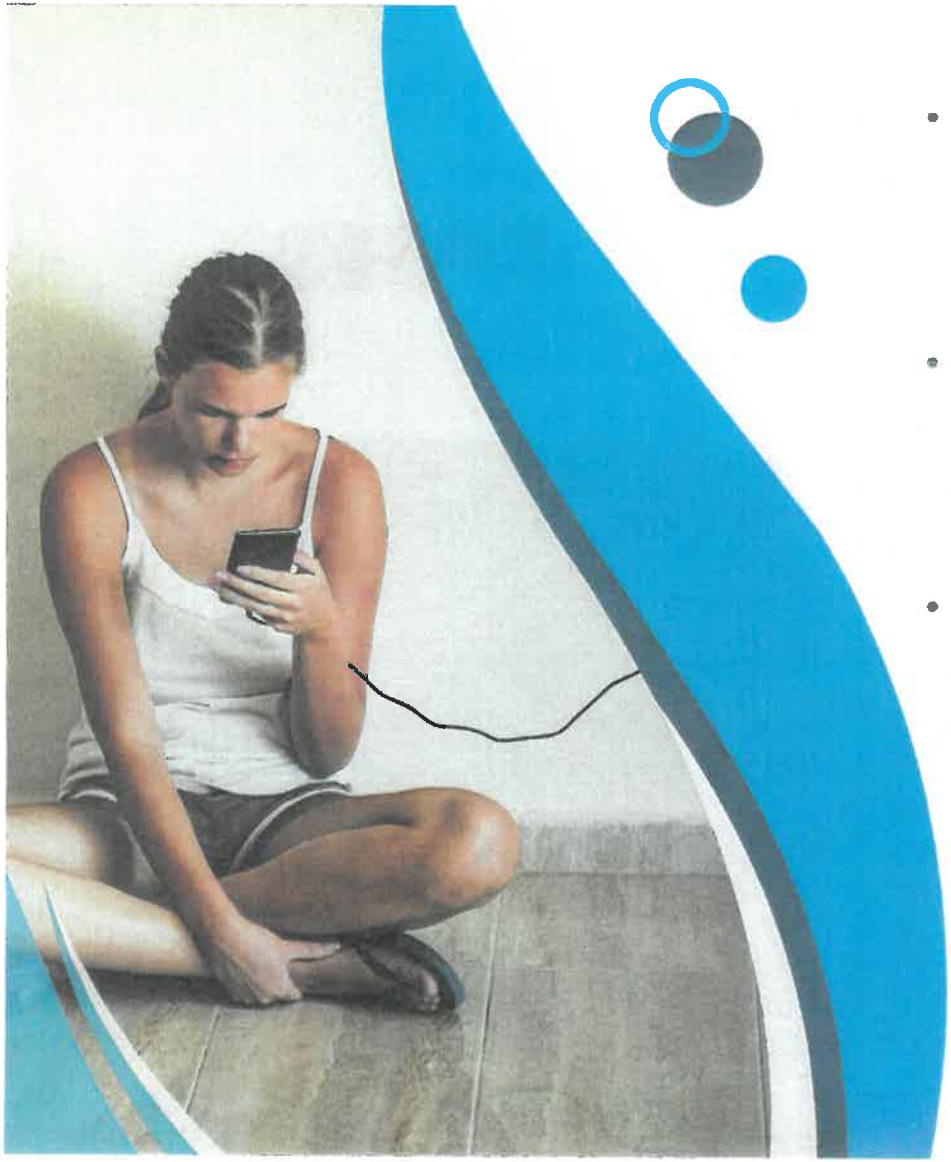
- These social media companies designed and marketed their exploitive social media platform to be extremely popular among minors.

- Nationwide studies have shown that social media use is highest amongst teenagers between 13-17 years old, reaching **98%.**

- **32%** of children between 7-9 years old use social media.

- **38%** of children between 8-12 years old use social media.

- **49%** of children between 10-12 years old use social media.



- Facebook, Instagram, TikTok, and YouTube use engagement-optimized algorithms to control users' main feeds.
- As a result of their propensity to generate engagement, the algorithms spread extreme and directed content.
- That design defect foreseeably leads to dangerous challenges spreading easily on these platforms, among other consequences.

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SOCIAL MEDIA PLATFORMS

Four major Social Media Corporations – Meta, Google, Snap and TikTok – have deliberately embedded within their products an array of design features aimed at maximizing youth engagement and driving advertising revenue.

The design features borrow heavily from the behavioral and neurobiological techniques used by slot machines and exploited by the cigarette industry.

Shorts

Meta

Snapchat

TikTok

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In re Social Media Adolescent Addiction/Personal Injury Products Liability Litigation (MDL No. 3047)

- Since 2022, the social media corporations that operate the five major social media platforms – namely Meta Platforms, Inc., Instagram LLC, Snap, Inc., TikTok, Inc., ByteDance, Inc., YouTube LLC, Google LLC, and Alphabet Inc. - have been subject to coordinated litigation in the U.S. District Court for the Northern District of California.

- Multiple plaintiffs have alleged that the defendants' social media platforms are defective because they are designed to maximize screen time, which can encourage addictive behavior in adolescents. As alleged, this conduct results in various emotional and physical harms, including death.

- The plaintiffs include individuals, classes, counties, schools, school districts and other governmental entities. Over 200+ schools and school districts around the country have already filed direct actions against the Social Media Defendants.

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Social Media Litigation

Napoli Shkolnik represents multiple school boards against major social media corporations that own, operate, control, produce, design, maintain, manage, develop, test, label, market, advertise, promote, supply, and distribute the widely popular social media platforms Facebook, Instagram, Snapchat, TikTok, and YouTube.

We assert that these platforms are defective, designed to maximize screen time and encourage addictive behavior in adolescents, leading to various emotional and physical harms.

The impact of social media causes an emotional and physical toll while also incurring significant costs for school districts.

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AFFF Litigation- Government Contractor Defense

This argument posits that the manufacturers should not be held liable for products made in accordance with explicit government specifications. The AFFF manufacturers argued that the United States government instructed them to use PFAS in the manufacturing of their proprietary AFFF.

Conversely, Plaintiffs argued that the manufacturers could have satisfied the first element of the government contractor immunity defense established in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988).

On September 16, 2022, Judge Richard Gergel issued a ruling denying Defendants' motions to apply the government contractor defense to the MDL, which would have dismissed a great number of the cases filed. In re Aqueous Film-Forming Foams Prod. Liab. Litig., No. MDL 2:18-MN-2873-RMG, 2022 WL 4291357, at *9 (D.S.C. Sept. 16, 2022)

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AFFF Environmental Litigation

On December 7, 2018, the United States Judicial Panel on Multi-District Litigation ("JPML") initiated the AFFF MDL. The allegations surround AFFF contaminated groundwater in proximity to specific airports and industrial sites. The allegations revolve around the presence of perfluorooctane sulfonate ("PFOS") and PFOA, both toxic substances found within AFFF formulations.

The consolidated actions included "...personal injury cases brought by individuals who allegedly drank contaminated groundwater, class actions seeking to represent individual who live near sites where AFFF was used and assert claims for medical monitoring and property damage, and cases brought by water authorities and other governmental entities seeking costs for environmental remediation or upgrades to water treatment systems." *See* ECF 239, Transfer Order, MDL No. 2873, p. 4 (December 7, 2018).

These cases were consolidated under the jurisdiction of Judge Richard M. Gergel at the United States District Court for the District of South Carolina.

In re Aqueous Film-Forming Foams Prod. Liab. Litig., 357 F. Supp. 3d 1391, 1392 (U.S. Jud. Pan. Mult. Lit. 2018)

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AFFF Environmental Litigation

PFAS, or Perfluoroalkyl and Polyfluoroalkyl Substances, are a group of man-made chemicals that include PFOA, PFOS, GenX, and many others.

These products have caused widespread water contamination in our communities' water districts, landfills, airports, military bases, firehouses and firefighter academies.

Settlements negotiated by our firm have already been announced on behalf of public water systems against 3M Company, Tyco and DuPont resulting in billions of dollars to our communities.

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Insulin Litigation- Federal Officer

In a case that remains outside of the MDL, the United States District Court for the Central District of California ruled in favor of the State of California on a hot button issue being handled by courts across the country as raised by certain pharmacy benefit manager defendants.

These defendants argued that the case should be removed to federal court based on the federal officer removal statute (28 U.S. Code § 1442), despite the scope of the allegations, disclaimers and waivers in the operative pleading.

> *Therefore, the Court recognizes and accepts Plaintiff's decision to disclaim any claims that it may have against Express Scripts and Caremark for inflation of insulin pricing felt by beneficiaries of the TRICARE and FEHBA health plans. There is no evidence of judicial manipulation or forum shopping, nor do Defendants argue this beyond a short argument regarding artful pleading. As explained above, Plaintiff's disclaimer, and later repeated waivers, negate any causal nexus that might otherwise have existed between Plaintiff's claims and the Removing Defendants' conduct on behalf of government officers. Therefore, the Court need not reach the issue of whether the Defendants have adequately asserted a colorable federal defense.*

People of the State of California v. Eli Lilly & Co.
No. 2:23-CV-01929-SPG-SK, 2023 WL 4269750, at *7 (C.D. Cal. June 28, 2023)

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Price Fixing on Insulin Products

The insulin pricing scheme involved two unlawful practices.

- The PBMs sought substantial, undisclosed, and continually expanding "rebates" and payments for preferred formulary positions, causing higher costs for payors and plan members over the last two decades.

- The Manufacturers raised insulin prices in sync with larger rebates to secure valuable placement on the PBMs' standard formularies, despite decreased manufacturing expenses, and insulin's longstanding history and stable formulation.

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Price Fixing on Insulin Products

Since at least 2003, six large corporations have been able to successfully exploit the U.S. healthcare system through a conspiracy to intentionally hike insulin prices and line their pockets through kickback schemes and agreements.

These companies include:

- Three dominant insulin manufacturers – Eli Lilly, Novo Nordisk, and Sanofi.
- Three major PBMs – Express Scripts, CVS Caremark and OptumRx.

These deliberate actions placed an economic burden on self-funded health plans, impacting both their members and beneficiaries, while the manufacturers made billions, including Eli Lilly at $22.4B and Sanofi at $37B (2014-2018).

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Insulin Pricing Scheme

- Diabetes continues to be one of the leading causes of death in the United States. Insulin is a medication used by millions of Americans to regulate their blood sugar levels and manage this disease.

- Since 2003, it is likely that you have purchased insulin and other diabetic medication from the insulin manufacturers through pharmacy benefit managers ("PBMs"), paying exorbitantly high prices due to the insulin pricing scheme. It is well known that the price range for insulin today can range from $300 to $700, despite costing manufacturers as little as $2 to produce.

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Generics Litigation- Right to Remand

Recently, the Judicial Panel on Multidistrict Litigation ruled that the state plaintiffs did not waive their statutory right to seek remand, as transfers to an MDL entail the right to remand and that the original opposition to such transfer was sufficient to avoid waiver.

- Transfer to an MDL necessarily entails the right to remand under Section 1407; a party's opposition to the transfer is irrelevant. Moreover, plaintiffs did oppose transfer of the first-filed State Action to the MDL. See In re Generic Pharms. Pricing Antitrust Litig., MDL No. 2724, 2017 WL 4582710 (J.P.M.L. Aug. 3, 2017) (denying motion to vacate CTO).

- That plaintiff correctly perceived that repeating their arguments against transfer with respect to their later-filed actions would not serve judicial economy or the parties' interests does not amount to waiver of remand under Section 1407.

In re Generic Pharms. Pricing Antitrust Litig., No. MDL 2724, 2024 WL 560576, at *3 (U.S. Jud. Pan. Mult. Lit. Jan. 31, 2024)

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Generics Litigation Status

- In MDL 2724, the District Court for the Eastern District of Pennsylvania selected three Bellwether Plaintiffs, including the state Attorneys General, Direct Purchaser and End-Payer Class Action Plaintiffs.
- Bellwether fact discovery was substantially completed in October of 2023, with additional discovery conducted and scheduled throughout 2024.
- On December 20, 2023, Hon. Judge Cynthia M. Rufe appointed Diane M. Welsh (Retired) as Settlement Master in the litigation.
- The rest of the cases in the MDL are engaged in fact discovery and a schedule was recently set forth.

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Price Fixing and Anticompetitive Conduct in the Generics Market

The manufacturers' anticompetitive conduct falls principally into two categories:

- *First,* they would avoid eroding the prices by refusing to bid, providing cover bids or otherwise not competing with one another upon entry into a given generic market or upon the entry of a new competitor into that market.

- *Second,* competitors in a particular market communicated — either in person, by telephone, or by text message — and agreed to collectively raise and/or maintain prices for a generic drug.

- Manufacturers would regularly suppress and eliminate competition by agreeing to allocate customers and rig bids for, and stabilize, maintain, and fix prices of, certain generic drugs.

- Certain conduct between competitors is per se illegal – **with no exceptions** – including agreements to raise prices, allocation of customers between competitors, and allocation of market shares.

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Collusion within the Generic Drug Market

Despite Congress's attempt to regulate the industry, generic drug companies eventually resorted to anticompetitive and collusive conduct to line their pockets.

Critical factors that led to this conduct include:

- High barriers to enter the market
- Employee mobility between companies
- The very structure of the generic drug industry
- Individual drug markets became highly concentrated
- The high expense for the creation of new drug companies
- Close contacts and communications between competitors
- Opportunities to collude in regularly scheduled trade meetings

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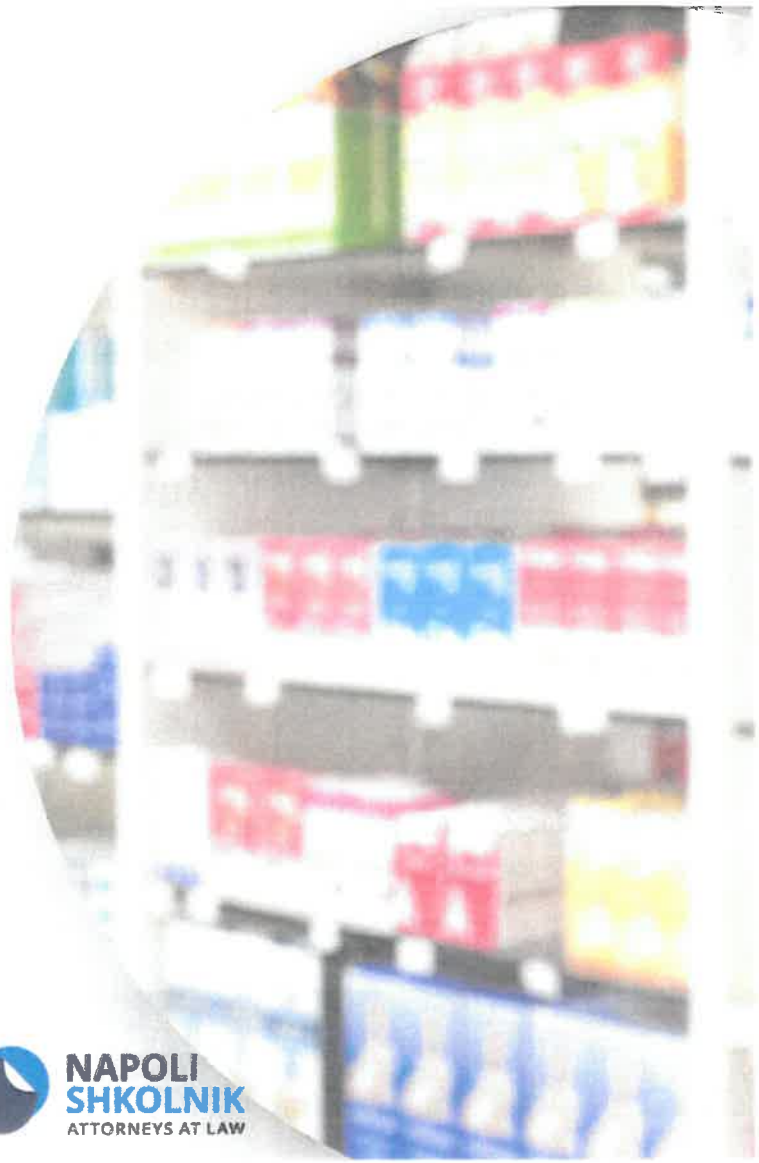
Generic Drug Industry

Generic drugs were originally created to make healthcare affordable for Americans, as manufacturers would use the identical active pharmaceutical ingredient molecule as brand drugs at lower costs.

After Congress enacted the Hatch Waxman Act in 1984, Americans enjoyed decades of low-priced generic drugs under a modern system of regulation, which facilitated and encouraged competition between drug manufacturers.



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Pricing Scheme Litigations against Big Pharma

Comparison Between the 2 MDLs (Overview)

	MDL 2724, In re Generic Pharmaceuticals	MDL 3080, In re Insulin Pricing Litigation
Nature of the Price Fixing Conspiracy	Individual Conspiracies on Hundreds of Individual Generic Drugs, and Overarching Conspiracy on All Generic Drugs	Conspiracy on 19 Insulin Products
Defendants	40+ Pharmaceutical Company Defendants	3 Pharmaceutical Companies* and 3 Pharmacy Benefit Managers*
Causes of Action	Violations of Federal and State Antitrust Laws and Unjust Enrichment	RICO, Unfair and Deceptive Trade Practices, Breach of Contract, Unjust Enrichment, Injunction
Relevant Period of Illicit Conduct	2010-Present	2003-Present

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*These companies are not Defendants in MDL 2724.

Pricing Scheme Litigations against Big Pharma

Napoli Shkolnik is leading the charge to ensure that self-insured governmental entities and private companies recover the burdensome cost of generic drugs and insulin products.

Throughout the United States, state Attorneys General, governmental entities, direct purchasers, end payors, class action plaintiffs and other private companies have been litigating in two ongoing multidistrict litigations to seek relief due to massive price hikes implemented by pharmaceutical companies and others on a multitude of drugs.

These cases include:

- MDL 2724, In re Generic Pharmaceuticals Antitrust Pricing Litigation
- MDL 3080, In re Insulin Pricing Litigation

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Opioids Litigation

The manufacturers of prescription opioids grossly misrepresented the risks of long-term use of those drugs for persons with chronic pain. The distributors failed to properly monitor suspicious orders of those prescription drugs--all of which contributed to the current opioid epidemic. The pharmacies filled those prescriptions ignoring red flags. New potential defendants are being identified and included in lawsuits every day.

To date, national settlements have been reached with Janssen, Cardinal, McKesson, AmerisourceBergen, Teva, Allergan, CVS, Walgreens, and Walmart. Funding from these settlements have begun to flow into our communities.

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Current Litigations

- MDL 2804, In Re Opioids Litigation
- New York State Coordinated Opioids Litigation
- MDL 3080, In Re Insulin Pricing Litigation
- MDL 2724, In Re Generic Pharmaceuticals Antitrust Pricing Litigation
- MDL 2873, In Re Aqueous Film-Forming Foam (AFFF) Product Liability Litigation
- MDL 3047, In Re Social Media Adolescent Addiction/Personal Injury Products Liability Litigation

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Public Client Group

State and local governments and their associated entities have been carrying the ongoing costs caused by the negligence and wrongdoing of corporations for far too long.

Napoli Shkolnik and its nationally recognized Public Client Group is dedicated to investigating and assisting governmental entities recover funding through litigation to ensure that they can continue to protect and provide for their citizens' health and safety.

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1:10 pm- 2:00 pm

Shayna E. Sacks, Esq.

COUNTY ATTORNEY'S ASSOCIATION
OF THE STATE OF NEW YORK
2024 Annual Meeting