U.S. Supreme Court Docket, October 2017 Term — Products Liability Cases

Issued Opinions	Docket No.	Subject	Status, Transcript, Filings	Holding
N/A				
Pending Petitions	**Docket No.**	**Subject**	**Status, Deadlines**	**Questions Presented**
Merck Sharp & Dohme Corp. v. Albrecht	17-290 (8/22/17)	Preemption	Response due 9/25/17 Waiver of right of respondents Affronti, Joanne, et al. to respond filed (8/31/17) Blanket Consent filed by Petitioner, Merck Sharp & Dohme Corp. on 09/12/2017 (9/11/17) Blanket Consent filed by Respondents, Albrecht, Doris, et al. on 09/21/2017 (9/20/17) Order extending time to file response to petition to and including October 25, 2017, for all respondents (9/21/17) Because Justice Alito now realizes that he should have recused himself from consideration of this application, the order of June 27, 2017, is vacated. Pursuant to Rule 22.2, the application (16A1264) to extend the time to file a petition for a writ of certiorari from July 23, 2017 to August 22, 2017, has been submitted to Justice	In *Wyeth v. Levine*, 555 U.S. 555 (2009), this Court held that the FDA's approval of a drug label does not, standing alone, insulate the manufacturer from failure-to-warn liability under state tort law. At the same time, the Court recognized that if "the FDA would not have approved" the label demanded by state law, then the manufacturer could invoke an "impossibility" preemption defense. In this case, it was "undisputed" that (i) "the FDA was aware of the possible link" between petitioner's drug and the risk at issue; (ii) petitioner "submitted a comprehensive safety update to the FDA reporting … numerous studies" finding "such an association"; (iii) petitioner "proposed warning language" about this risk, but the FDA "rejected" it; (iv) the FDA stated that

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			Sotomayor (9/22/17) Application (16A1264) granted by Justice Sotomayor extending the time to file until August 22, 2017 (Justice Alito is recused)(9/22/17) Brief amicus curiae of Pharmaceutical Research and Manufacturers of America filed (9/25/17) Brief amici curiae of Product Liability Adisory Council, Inc., et al. filed (9/25/17) Waiver of Affronti, Joanne, et al. of right to respond submitted (10/5/17) Supreme Court Docket	the "conflicting nature of the literature d[id] not provide a clear path forward" and that it needed "more time" to consider "the issue of a precaution"; and (v) only later, after a report from a task force, did the FDA become "confident" that an association "potentially" existed. The Third Circuit nonetheless held that a jury could find that petitioner had not shown by "clear and convincing evidence" that the FDA would have rejected a warning label of the type that respondents claim state law required. The question presented is: Is a state-law failure-to-warn claim preempted when the FDA rejected the drug manufacturer's proposal to warn about the risk after being provided with the relevant scientific data; or must such a case go to a jury for conjecture as to *why* the FDA rejected the proposed warning? Third Circuit decision (3/22/17)
Philip Morris USA Inc. v. Naugle	17-400 (9/15/17)	Due process; preemption	Response due 10/16/17 Waiver of right of respondent James Naugle to respond filed (9/16/17) DISTRIBUTED for Conference of 10/13/2017 (9/27/17)	This case presents questions also raised in the petition for a writ of certiorari filed today in *R. J. Reynolds Tobacco Co. v. Graham*, No. 17-415: 1. When there is no way to tell whether a prior jury found particular facts against a party, does due process permit those facts to be conclusively presumed against that party in subsequent litigation?

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			Response Requested. (Due November 6, 2017) (10/6/17) Order extending time to file response to petition to and including December 21, 2017 (10/24/17) Supreme Court Docket	2. Are strict-liability and negligence claims based on the findings by the class-action jury in *Engle v. Liggett Group, Inc.* preempted by the many federal statutes that manifested Congress's intent that cigarettes continue to be lawfully sold in the United States? District Court of Appeal of Florida, Fourth District decision (4/27/17)
Philip Morris USA Inc. v. Lourie	17-401 (9/15/17)	Due process; preemption	Response due 10/16/17 Order extending time to file response to petition to and including November 6, 2017 (10/6/17) Supreme Court Docket	This case presents questions also raised in the petition for a writ of certiorari filed today in *R. J. Reynolds Tobacco Co. v. Graham*, No. 17-415: 1. When there is no way to tell whether a prior jury found particular facts against a party, does due process permit those facts to be conclusively presumed against that party in subsequent litigation? 2. Are strict-liability and negligence claims based on the findings by the class-action jury in *Engle v. Liggett Group, Inc.* preempted by the many federal statutes that manifested Congress's intent that cigarettes continue to be lawfully sold in the United States? District Court of Appeal of Florida, Second District decision (8/10/16)
R.J. Reynolds Tobacco Co. v. Graham	17-415 (9/15/17)	Due process; preemption	Response due 10/19/17 Order extending time to file response to petition to and including November 20, 2017 (9/22/17)	In the course of a later-decertified class action against the major U.S. tobacco companies, a Florida jury found that, at some point over four decades, each

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			Blanket Consent filed by Petitioner, R.J. Reynolds Tobacco Company, et al. on 09/27/2017 (9/26/17) Blanket Consent filed by Respondent, Theresa Graham on 09/27/2017 (9/26/17) Brief amicus curiae of Washington Legal Foundation filed (10/19/17) Brief amicus curiae of Product Liability Advisory Council, Inc. filed (10/19/17) Brief amici curiae of Chamber of Commerce of the United States, et al. filed (10/19/17) Supreme Court Docket	defendant was negligent and sold defective cigarettes. But while the class put on evidence of myriad purported negligent acts and defects, the jury never identified what act it found negligent or what defect it found, making it impossible to tell what conduct and which cigarettes, over what time frame, it had condemned. Nonetheless, the Florida Supreme Court held that the thousands of members of the decertified class who subsequently filed individual actions could rely on the "res judicata" effect of these generalized findings to prove the tortious-conduct elements of their claims, regardless of which cigarettes they had smoked, or when. Defendants are thus barred from contesting the core basis of their own liability. In the decision below, a sharply divided *en bane* Eleventh Circuit held that this regime neither violates the Due Process Clause nor is preempted by federal law. The questions presented are: 1. When there is no way to tell whether a prior jury found particular facts against a party, does due process permit those facts to be conclusively presumed against that party in subsequent litigation? 2. If the *Engle* jury's findings are deemed to establish that all cigarettes are inherently defective, are claims based on those findings preempted by the many federal statutes that manifested Congress' intent that cigarettes continue to be lawfully sold in the

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				United States? Eleventh Circuit decision *sub nom Graham v. R.J. Reynolds Tobacco Co.* (5/18/17)
R.J. Reynolds Tobacco Co. v. Block	17-443 (9/25/17)	Due process; preemption	Response due 10/25/17 Waiver of right of respondent Sharon Block to respond filed (9/26/17) DISTRIBUTED for Conference of 10/27/2017 (10/11/17) Response Requested (Due November 15, 2017) (10/16/17) Supreme Court Docket	This case presents questions also raised in the petition for a writ of certiorari filed September 15, 2017, in *R.J. Reynolds Tobacco Co. v. Graham,* No. 17-415. 1. When there is no way to tell whether a prior jury found particular facts against a party, does due process permit those facts to be conclusively presumed against that party in subsequent litigation? 2. Are strict-liability and negligence claims based on the findings by the class-action jury in *Engle v. Liggett Group, Inc.* preempted by the many federal statutes that manifested Congress's intent that cigarettes continue to be lawfully sold in the United States? District Court of Appeal of Florida, Fourth District decision (4/27/17) (see Appendix A of Petition)
Phillips v. General Motors LLC	17-466 (9/25/17)	Fed. R. Civ. P. 60(b)(3); equitable relief from final judgment	Response due 10/30/17 Supreme Court Docket	Fed. R. Civ. P. 60(b)(3) provides equitable relief from a final judgment based on a showing of "fraud ..., misrepresentation, or misconduct by an opposing party" that denied the movant a full and fair opportunity to present their case. The circuits are sharply split on the substantive requirements that entitle a party to 60(b)(3)

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				relief, including (1) the burden of proof, (2) the evidence necessary to meet the burden, (3) who constitutes "an opposing party," and (4) what is "misconduct." The questions presented are: 1. Whether a movant must show that she has been denied a full and fair opportunity to present her case by "clear and convincing evidence," as the Third, Fifth, Seventh, Eighth, and Eleventh Circuits have held; or must the movant instead show "substantial interference" in the presentation of her case, as the Ninth, Tenth, and D.C. Circuits have held; or does the burden on this issue shift under certain circumstances to the party opposing a Rule 60(b)(3) motion, as the First and Sixth Circuits have held; 2. Whether "an opposing party" can be a third-party who's [sic] actions facilitate the fraud, misrepresentation or misconduct; and 3. Whether "misconduct" under Fed. R. Civ. P. 60(b)(3) includes purely accidental and unintentional omissions in the course of discovery, as the First, Fifth, Eleventh and Federal Circuits have held, or requires a showing of improper or wrongful behavior, as the Sixth Circuit has held. Second Circuit decision (5/3/17)
Taft v. Nabisco Inc.	17-551 (10/6/17)	Design, manufacturing, and warning defects; pleadings	Response due 11/13/17 Supreme Court Docket	1. Are pleadings in a compliant [sic] supposed to be taken as true? 2. If one branch of a cause of action is not challenged or addressed in an opinion[,]

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				should it be allowed to preserve the whole cause of action according to FRCP 8(d)(2). 3. Do the principles in the Federal Rules of Evidence, FRE 102 and 104, have any application, meaning or relevance to consideration of material in the appeal of a case that has not gone to trial yet? In particular[,] should a court of appeal allow augmentation of the record even if the filing is late but still 8 months before a decision? 4. To what extent do courts have an obligation to give reasons for their opinions? Ninth Circuit decision (1/26/17)
Denied or Dismissed Petitions	**Docket No.**	**Subject**	**Status, Deadlines**	**Questions Presented**
GlaxoSmithKline LLC v. M.M. ex rel. Meyers	16-1171 (3/23/17)	Jurisdiction	Petition denied 10/2/17 Supreme Court Docket	The Due Process Clause allows a state court to exercise specific personal jurisdiction over a non-resident defendant only when the plaintiff's claims "arise out of or relate to" the defendant's forum activities. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (citation omitted). The question presented is: For a claim to "arise out of or relate to" a defendant's forum-state contacts, must there be a meaningful causal link between the defendant's forum-state contacts and the plaintiff's claim?

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				Illinois Appellate Court decision *sub nom M.M. ex rel. Meyers v. GlaxoSmithKline LLC* (8/26/16)
Teva Pharmaceuticals USA, Inc. v. Superior Court of California	16-1364 (5/12/17)	Personal jurisdiction	Petition denied 10/2/17 Supreme Court Docket	(1) Does the Due Process Clause prohibit inferring consent to personal jurisdiction for an out-of-state plaintiff's complaint from a defendant's decision to respond to a different complaint that names no plaintiffs? (2) Does the Due Process Clause prohibit a court from depriving a defendant of any opportunity to challenge personal jurisdiction, by structuring the sequence of a coordinated proceeding to compel consent? California Court of Appeal decision (10/19/16)
Monje v. Spin Master, Inc.	16-1380 (5/15/17)	Damages	Petition denied 10/2/17 Supreme Court Docket	Toxic Chinese toy beads sold in America poisoned a 16-month-old baby in Arizona. The product's distributors should have known that the beads were toxic. Indeed, if they had learned the bead's true ingredients, tested the beads properly, and monitored early poisoning reports, they would have known about the toxicity in time to prevent the poisoning. Since the poisoned child's father inadvertently failed to list claims for emotional-distress, loss-of-consortium, and medical-cost damages in a bankruptcy case,

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				the district court presumed he had engaged in manipulation, and judicially estopped the claims. In contravention of the judicial-estoppel principles of *New Hampshire v. Maine*, 532 U.S. 742 (2001), the Ninth Circuit also applied that presumption. The Second, Third, Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits would agree with the Ninth Circuit, although the Fourth and Eighth Circuits would not. The first question is therefore whether that conflict among the circuits, and the failure to follow *New Hampshire*, require grant of certiorari under Supreme Court Rules 10(a) and 10(c). The district court and Ninth Circuit failed to apply substantive Arizona punitive-damages law. The second question is whether this Court should grant certiorari because the Ninth Circuit so far departed from the accepted and usual course of judicial proceedings in its treatment of the punitive-damages issue in this case, and has so sanctioned such a departure by the district court, as to call for the exercise of this Court's supervisory power under Supreme Court Rule 10(a). The district court and the Ninth Circuit contravened substantive Arizona law by rejecting key expert-witness causation evidence. The third question is whether this Court should grant certiorari because the Ninth Circuit so far departed from the accepted and usual course of judicial

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				proceedings in its treatment of substantive Arizona expert-witness causation principles, and has so sanctioned such a departure by the district court, as to call for the exercise of this Court's supervisory power under Supreme Court Rule 10(a). Ninth Circuit decision (2/14/17)
Ethicon, Inc. v. Huskey	16-1399 (5/23/17)	Evidence	Petition denied 10/2/17 Supreme Court Docket	Section 510(k) of the Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. § 360(k), requires the federal Food and Drug Administration (FDA) to review medical devices for safety and efficacy before clearing them for marketing and sale. Under the 510(k) review process applicable to the "Class II" device at issue in this case, FDA clears the device as safe to market if the agency finds it to be "substantially equivalent" to a device already determined to be safe. The Fourth Circuit in this case, however, construed *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), as holding categorically that FDA's 510(k) review process does not encompass meaningful safety review. Applying that reading of *Lohr*, the Fourth Circuit held that FDA's 510(k) clearance of petitioners' device was irrelevant to its safety, and thus affirmed a district court ruling prohibiting petitioners from introducing evidence of FDA's 510(k) clearance to defend against respondents' claims that the device was unsafe. The question presented is:

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				Whether the Fourth Circuit properly applied *Lohr* to hold that safety is irrelevant to FDA's 510(k) clearance of a medical device and that the device's manufacturer therefore may be barred from introducing evidence of 510(k) clearance in defense of a claim that the device is not reasonably safe. Fourth Circuit decision (1/26/17)
Fernandez v. Daimler, A.G.	16-1482 (4/7/17)	Jurisdiction	Petition denied 10/2/17 Supreme Court Docket	(1) Whether the actions of the Respondent, DaimlerChrysler, AG (now "Daimler, AG"), render that corporate entity "at home" in the courts of the State of New York under *Daimler, AG v. Bauman*'s "exceptional case" measure such that the exercise of personal jurisdiction by a state court comports with the Due Process Clause of the 14th Amendment to the United States Constitution. (2) Whether this Supreme Court, when recognizing the facts and exceptional circumstances of Petitioner's instant claims, would determine that under *Daimler, AG v. Bauman* that the exercise of personal jurisdiction over Daimler, AG in New York Courts would comport with the Due Process Clause of the 14th Amendment to the United States Constitution. (3) Whether Daimler AG's regular holding of meetings of its Board of Management (its primary governing board) in New York City over a period of years from 1999 through 2006 when combined with the issuance of

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				$32 Billion in bonds with an accompanying guarantee and consent to the jurisdiction of New York Courts is sufficient enough to establish jurisdiction under the "exceptional case" measure established in *Daimler, AG v. Bauman*. New York Court of Appeals decision (1/10/17) (see Appendix A of Petition)
Calloway v. R.J. Reynolds Tobacco Co.	16-1507 (6/14/17)	Damages	Petition denied 10/2/17 Supreme Court Docket	Whether the *en banc* Florida Court of Appeals' ruling prohibiting Plaintiff's attorneys from arguing that the conduct of the Defendant tobacco companies was sufficiently reprehensible to warrant an award of punitive damages violates this Court's precedents specifically requiring that plaintiffs demonstrate reprehensibility to support an award of punitive damages. Florida District Court of Appeal decision (9/23/16)
PLIVA, Inc. v. Superior Court of California	16-1513 (6/16/17)	Jurisdiction	Petition denied 10/2/17 Supreme Court Docket	California, like other states, bundles lawsuits together for purposes of efficiency and administrative ease. The procedure benefits the state courts that invite those lawsuits to reap the revenue from filing and other fees, but need a procedure to avoid being overwhelmed by management of hundreds or thousands of individual lawsuits. Plaintiffs benefit by filing lawsuits en masse without risking individual scrutiny of meritless or marginal cases facilitating their goal of building the case count to promote global settlements. Plaintiffs' increasing use of state coordination procedures to aggregate lawsuits of plaintiffs from throughout the United States raises due process concerns under the

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				Fourteenth Amendment. The constitutional rights of corporate defendants to challenge personal jurisdiction in individual cases cannot be extinguished by state laws that coordinate hundreds, sometimes thousands, of cases before one judge. Yet, that is exactly what the courts did here. The state court lacks both specific and general jurisdiction over Petitioner in well over a thousand individual lawsuits but employed state coordination proceedings and unprecedented theories of waiver and consent to assert personal jurisdiction over Petitioner without conducting a due process analysis. The question presented is: When a state court lacks personal jurisdiction in lawsuits against a defendant, and the state court combines those lawsuits into a coordination proceeding with other lawsuits where personal jurisdiction exists, does a defendant's participation in the state-court coordination proceeding constitute waiver of the defendant's fundamental right not to be subject to the coercive power of a state court that lacks personal jurisdiction over it or consent to that court's exercise of personal jurisdiction over it in every individual lawsuit coordinated under the state-court procedures? California Court of Appeal, First Appellate District, Division One order (11/9/16) (see Appendix B of Petition)
Gillette v. Boehringer Ingelheim Pharmaceuticals,	17-305 (8/21/17)	Multi-district litigation; causation	Petition denied 10/10/17 Supreme Court Docket	(1) Whether the claimant in a last tag-along case in an antiquated MDL should be briefed by the court as to the events of the case, specifically requirements for general

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Inc.				causation versus specific causation or transfer the case since the question to be answered involves specific causation or just close the MDL? (2) Whether the decision in this case conflicts with an opinion of the Sixth Circuit as well as affirmations contained in the opinions of this Court? Eighth Circuit decision (4/17/17)

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