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## The \$75,000 Question: *Can Plaintiff Limit Money Sought to Stay In State Court? Yes, Says Federal Judge*

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*Of the Legal Staff*

If the individual members of a proposed class action voluntarily limit the damages they seek in court to less than \$75,000 — the threshold amount required for federal diversity jurisdiction — the case shouldn't be removed from state court, a federal judge has ruled.

John K. Weston, the lead plaintiff's lawyer in *Clark v. Pfizer Inc.*, promised the federal court last month that his client would not accept any recovery above \$75,000.

The proposed class action, brought by Gregory Clark of Northeast Philadelphia, claims that a pharmaceutical manufacturer marketed the epilepsy drug Neurontin as treatment for medical ailments for which the drug wasn't legally approved.

"Plaintiff has stipulated, on behalf of himself and the uncertified class, that he will 'voluntarily limit' his recovery to under \$75,000," U.S. District Judge Berle M. Schiller wrote in a recent opinion. "Upon remand, plaintiff will be held to this voluntary limitation."

Weston heralded the decision's significance for other plaintiffs seeking damages of less than \$75,000 and whose lawsuits have been removed to federal court.

"A plaintiff can limit his own damages and, therefore, keep a case out of federal court," said Weston, an attorney at Sacks & Weston.

Richard G. Placey, a lawyer for the defendants, said it was unclear whether

Schiller's decision would be interpreted as limiting plaintiffs to the damages they demand in their pleadings or requiring a plaintiff's specific promise — like Clark's — not to seek or accept damages of \$75,000 or more.

Deciding a related motion, Schiller rejected the defendants' request that he not rule on the removal matter until the federal Judicial Panel on Multidistrict Litigation conducts a hearing scheduled for later this month on

motions to transfer and consolidate more than 30 Neurontin cases from around the country to one multidistrict court.

Schiller instead examined the jurisdiction issue before him and then denied the defendants' motion as moot.

Federal law allows a defendant in state court to remove an action to federal district court when federal court has original jurisdiction over the civil action; that is, the parties reside in different states and the amount in dispute exceeds \$75,000.

Schiller's opinion emphasized Clark's "binding limitation" on his and the class members' individual recoveries and quoted a 3rd U.S. Circuit Court of Appeals ruling requiring the federal removal statute to be "strictly construed against removal."

Schiller concluded that the district court had no federal subject matter jurisdiction over *Clark*.

The lawsuit had been removed from the Philadelphia Court of Common Pleas in July at the request of the defendants, pharmaceutical manufacturer Warner-Lambert Co. and

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SCHILLER

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its parent company, Pfizer.

Weston said he argued that his client's complaint explicitly limited the damages below the federal jurisdictional threshold.

The defendants, who had the burden of proving the district court's jurisdiction over the case, argued that jurisdiction was present because the plaintiffs may recover more than \$75,000 — despite what they stipulated in their complaint, Placey said.

Schiller quoted Clark's complaint in his decision:

“Neither the plaintiff, nor any member of the class, seeks damages exceeding \$75,000,

nor do their damages individually exceed \$75,000, inclusive of interest and attorneys' fees and all relief of any nature sought hereunder. Neither plaintiff, nor any of the class members, seeks any form of “common” recovery, but rather individual recoveries not to exceed \$75,000 for any class member, inclusive of interest and attorneys' fees and all relief of any nature sought hereunder.”

Placey, of Montgomery McCracken Walker & Rhoads, said, “Our read of it was that the plaintiffs had pleaded in the complaint damages which would exceed \$75,000.”

Montgomery McCracken is representing Pfizer and Warner-Lambert in the Neurontin litigation in Pennsylvania and New Jersey, Placey said.

Lead defense counsel, John E. Caruso, was on vacation and could not be reached for comment this week.

Schiller said the principle that a plaintiff may avoid federal jurisdiction by limiting his damage claim is described in dictum by the U.S. Supreme Court in a 1938 case called *St. Paul Mercury Indemnity Co. v. Red Cab Co.*

In *Red Cab*, the plaintiff was asking the court for permission to amend the complaint to seek damages that would have been below the federal jurisdictional threshold amount. The high court concluded that the face of the complaint determined the jurisdictional amount at the time of removal, Schiller explained.

However, the Supreme Court also said that

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if a plaintiff “does not desire to try his case in the federal court he may resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more, the defendant cannot remove.”

Federal district courts have not agreed on whether a plaintiff “is bound by his self-limitation,” Schiller observed. “Under Pennsylvania state court procedural rules, a plaintiff is not limited to the amount of damages pleaded in the ad damnum clause of his complaint.”

Clark's limitation on his damages amount is “not a mere formality of pleading” but a voluntary limitation that he will be held to upon remand, Schiller ruled.

His Sept. 7 order remanded the proposed class action to the Philadelphia trial court. As a

result, it cannot be a part of any federal multi-district litigation.

Schiller's ruling is not reviewable by a higher court, lawyers said.

Clark's complaint alleges that Warner-Lambert violated several state laws, including the Unfair Trade Practices and Consumer Protection Law, when it engaged in the marketing scheme to promote Neurontin.

The complaint says Clark was prescribed Neurontin for knee pain following surgery in 2003 as a “direct result” of the defendants' marketing tactics. Knee pain is not one of the medical conditions for which Neurontin is approved by the U.S. Food and Drug Administration, explained one of his

lawyers, Julie C. Parker.

“It's a very widely prescribed drug,” said Parker, an attorney at Sacks & Weston.

Parker estimated the proposed class could number in the tens of thousands and would include Pennsylvanians who were prescribed Neurontin.

Neurontin, or gabapentin, is an anti-convulsant that was approved by the U.S. Food and Drug Administration in 1993 for helping to treat seizures in people with epilepsy. It is also approved for treating pain associated with certain herpes-related skin rashes.

In April, Warner-Lambert agreed to plead guilty to two counts of violating the Federal Food, Drug and Cosmetic Act by misbranding

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Neurontin and not providing adequate directions for its use, according to the FDA's Web site.

The pharmaceutical company agreed to pay \$240 million in criminal fines. It also said it would pay \$83.9 million in civil damages to the federal government to cover losses in the Medicaid program and \$34 million in civil damages to the states — all to remedy the effects of what prosecutors called an “off-label marketing plan,” according to the FDA's Web site.

In a statement regarding the settlement, Pfizer noted that the federal investigation of Warner-Lambert and the allegations against it originated in 1996 — “well before” Pfizer's acquisition of Warner-Lambert in 2000.

*(Copies of the eight-page opinion in Clark v. Pfizer Inc., PICS No. 04-1425, are available from The Legal Intelligencer. Please refer to the order form on Page 9.)*