Product Liability Newsletter

Fall 2008

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The Product Liability Initiative is comprised of eight major American law firms. Our central purpose is to serve as an international legal resource for clients defending against product liability and mass tort litigation.

Members of the Product Liability Initiative are veteran trial lawyers with a wide variety of backgrounds. We serve as trial counsel in high profile, multi-jurisdictional matters and regularly counsel clients on product liability issues both in the United States and around the world. Each of our members is familiar with product liability defenses and their skills include pre-trial preparation, electronic discovery, and expert witness development. We share a thorough understanding of product liability law and its application across diverse industries.

Members of this initiative are familiar with design, engineering, distribution, marketing, labeling, advertising, and consumer usage. We have extensive experience defending and managing mass tort litigation as well as class actions. We have expertise in medical issues that involve epidemiology, statistics and toxicology. We also use our knowledge of relevant federal agencies such as the Consumer Product Safety Commission to review our client's product warnings and warranties.

Our lawyers frequently advise manufacturers, distributors, and retailers. This is done at the local, state, national and international level with our attorneys serving as national, regional or convergence counsel.

Representative industries of our members' clients include: alcohol, asbestos, automotive, aviation, chemical, electronics, engines, firearms, medical devices, pharmaceuticals, power equipment, recreational products, security systems, sporting goods, and tobacco.

Our members regularly publish articles and hold leadership positions in several defense organizations including the Product Liability Advisory Council and the Defense Research Institute. ■

THE DUTY OF MANUFACTURERS TO INDEMNIFY SELLERS IN PRODUCT LIABILITY CASES

by: Lisa Powell
Partner, Jackson Walker L.L.P.

Strict tort liability as restated in Section 402A of the SECOND RESTATEMENT OF TORTS has been adopted in some form by the vast majority of courts in the United States in product liability cases. Noticeable exceptions to the general rule are Delaware and North Carolina which do not recognize strict liability in tort in products liability actions at all. The provision imposes strict liability not just on the manufacturer of the defective product, but also on every seller in the chain of distribution so long as the seller is engaged in the sale of such a product. No independent fault must be established against the seller in order to impose liability under this provision.

A seller's right to indemnity from a manufacturer in a products liability action is an important issue for both parties…

Sellers of products are routinely joined as defendants in product liability actions even when there are no substantial allegations of independent fault by the seller and no question about the ability of the manufacturer to pay any judgment. They are also joined notwithstanding the fact that the plaintiffs are prohibited from obtaining a double recovery of their damages under the one satisfaction rule, and the joinder of the seller may not increase the amount of the recovery. One reason plaintiffs choose to sue non-manufacturing sellers is that their inclusion may defeat federal diversity jurisdiction. Another strategic reason for joining the seller is the possibility of pitting the seller against the manufacturer. However, one of the greatest factors motivating plaintiffs in this decision is purely economic. The seller or its insurer may make a contribution toward settlement based solely on the cost of defense.

State legislatures are increasingly limiting either in total or in part a plaintiff's right to proceed against a non-manufacturing defendant in a products liability action. Some states such as Georgia and Michigan have enacted statutory provisions which bar in total any products liability claims against a non-manufacturing seller of a product. Some states such as Arizona and Texas have passed legislation prohibiting the imposition of liability against an "innocent seller," but fact issues on this issue can be created rather easily preventing dismissal of the seller early in the case.

In the majority of states where a non-manufacturing seller can be sued in a products liability action, there is at a minimum a common law right of indemnity by an innocent seller against the manufacturer of a defective product. Typically, a common law right of indemnity is limited to recovery in cases in which the product is found defective. If the case is settled, dismissed, or the plaintiff loses, there is frequently no right to common law indemnity by the seller. Similarly, the attorneys' fees incurred by the seller in bringing the indemnity action are frequently not recoverable. The right to common law indemnity is somewhat illusory since the vast majority of cases are settled or dismissed before trial.

At the opposite end of the spectrum are states such as Texas and Oklahoma which have both enacted legislation which requires a manufacturer to indemnify a seller except as to any loss caused by the seller. At first blush, these statutes may seem almost identical to the common law indemnity scheme, however, they are actually very different. These statutes place on the manufacturer the burden of proof on the issue of the seller's fault. The statutes also expressly provide that the duty to indemnify applies in cases in which the retailer settles and/or the plaintiff loses. Further, the seller may recover not only the amount of any settlement/judgment and attorneys' fees incurred in the underlying lawsuit, but may also recover its reasonable attorneys' fees incurred in prosecuting the indemnity action.

A seller's right to indemnity from a manufacturer in a products liability action is an important issue for both parties which should be examined at the time of notification of a claim. Manufacturers and sellers of products sued in product liability cases will have very different views about the wisdom of the different state indemnity schemes, but will nonetheless be required to navigate their way through them. ■

TOXIC TORTS IN MULTI-DISTRICT LITIGATION

by: Rocky Walker
Partner, Jackson Walker L.L.P.

The huge proliferation of personal injury suits alleging exposure to hazardous substances (toxic torts) is a well-known feature of American jurisprudence.

Multi-district litigation is one of several tools the federal judiciary has available to manage a number of complex cases such as toxic torts. Other tools, including class actions and rules related to the consolidation of related federal cases in a single court and the bankruptcy code, are beyond the scope of this article.

In the mid-1950's it became apparent that a procedure needed to be established to manage complex cases pending in multiple districts, especially in the anti-trust area. The Chief Justice of the United States Supreme Court, in response to this concern, appointed a committee under Judge E. Barrett Prettyman to study these issues and make recommendations, and the committee issued its report which was adopted by the Judicial Conference in the early 1950's. This was the first comprehensive study of the impact of complex cases on the federal judiciary. In general, the Prettyman report concluded that the federal courts must closely supervise and coordinate pretrial matters in complex cases pending in multiple courts to avoid expense, delay and inconsistent results. 15 Charles Alan Wright et al., Federal Practice and Procedure § 3861-ff (3d ed. 2007).

In the mid-1960's, anti-trust litigation continued to be the focus of judicial concerns regarding multi-district litigation. 17 Moore's Federal Practice § 112.02(1). In the electrical equipment manufacturers anti-trust cases, 1800 civil suits were filed in thirty-three different district courts. Wright at § 3861. In those cases the courts and litigants cooperatively developed procedures to manage the complex set of issues resulting from alleged anti-trust violations filed in numerous courts. These were:

1. scheduling coordinated pretrial discovery proceedings;

2. national depositions with lead counsel chosen by plaintiffs and defendants; and

3. a central document depository available to all parties.

Out of this, the Judicial Conference established a special panel of judges and, eventually, the first Manual on Complex and Multi-District Litigation was published in 1968. At about the same time, on the recommendation of the Judicial Conference, 28 U.S.C § 1407 was enacted in 1968 setting up the Judicial Panel on Multidistrict Litigation and establishing procedures to transfer cases with common issues of law or fact to one transferee court for all pretrial matters for the convenience of the parties and witnesses and to conserve court resources.

Concurrent with this judicial and congressional activity, personal injury suits for exposure to hazardous substances (toxic torts) increased at a dramatic rate. Leading the way, of course, was an explosion of asbestos litigation, but other hazardous exposures, such as silica, PPA, and breast implants, to name a few, saw multiple plaintiffs filing suits in multiple districts against multiple defendants they claim exposed them to hazardous substances. Currently there are multi-district litigation matters pending in an array of districts regarding various subjects such as air crash disaster, anti-trust, securities, toxic tort and patent litigation.

The object of multi-district litigation (MDL) is:

1. elimination of duplication of discovery;

2. avoidance of conflicting rulings and schedules;

3. reduction of costs; and

4. a saving of time and effort of the parties, witnesses, counsel and courts. 28 U.S.C. § 1407(a).

In the mid-1950's it became apparent that a procedure needed to be established to manage complex cases pending in multiple districts, especially in the anti-trust area.

With a very limited exception, cases transferred to an MDL are transferred there only for pretrial proceedings. The statute allows the transfer of civil actions pending in more than one district court involving one or more common questions of law or fact for coordinated and consolidated pretrial proceedings. The panel is not limited by any other venue provision in its choice of transferee court. The mo-

tion to transfer can be initiated by any party or by the panel itself, but a panel initiated transfer is usually restricted to "tag-along" cases following the initial transfer of cases.

The transfer becomes effective when the panel's order is filed with the transferee court. Thereafter the jurisdiction of the transferor court ceases and the transferee court exercises exclusive jurisdiction until the matter is remanded to the transferor court.

Once transferred, the district judge of the transferee court exercises the powers of a district judge in any district for the purposes of pretrial proceedings. The transferee district judge can vacate or modify any order earlier issued by the court transferring the matter but, unless altered, the transfer court's orders remain enforceable. Thereafter the transferee district judge can order consolidated pretrial conferences and discovery, including depositions of experts and common fact witnesses, as well as the collection and filing of evidence in a central depository, made accessible to all parties. Once these matters are concluded and on remand, the transferee district court issues a pretrial order describing what took place in the transferee court as well as a description of the matters remaining to be handled prior to trial.

Although trial of matters assigned to an MDL take place in the transferor court, the transferee court has the power to dispose of cases by granting motions for summary judgment or motions to dismiss, as well as entering judgment based on settlement agreements.

MDLs have shown themselves effective in the management of toxic tort cases. For example, Judge Janis Jack in In Re Silica Products Liability Litigation, number MDL 1553, 398 F. Supp. 2d 563, (S.D. Tx 2005) held consolidated hearings and found wide-spread abuse of scientific evidence by plaintiffs' lawyers, physicians and screening companies and effectively brought the litigation to a halt, citing several physicians, screening companies and attorneys for abusive, if not criminal conduct. [This is but one example of how tight control of the pretrial procedure by a judge in whose court all such cases are pending can render a more just result.] ■

EVENTS: WHERE WE WILL BE IN 2009

DRI 2009 Product Liability Conference

DRI, the national organization of defense trial lawyers and corporate counsel, is holding a product liability conference in San Diego, California on 14-17 April 2009.

Globalaw Product Liability Initiative Coordinator and Partner of Hanson Bridgett LLP Merton Howard will be presenting on 17 April.

The discussion will include a review of the 2008 federal legislation, the Consumer Product Safety Improvement Act of 2008 and its impact on various state laws and proposed legislation regarding children's products.

For more information contact Merton Howard
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www.dri.org

Nanotech Conference & Expo 2009

This is the world's largest and most anticipated annual nanotechnology conference and expo. Nanotech 2009 brings together over 5,000 technology and business leaders and experts from academia, government, startups and Fortune 1,000 companies.

The 12th annual Nanotech 2009 conference will take place at the George R. Brown Convention Center in Houston, Texas from 3 May 2009 to 7 May 2009.

Globalaw member firm Jackson Walker L.L.P. is a platinum sponsor of the event and will be exhibiting at Nanotech 2009.

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ADMISSIBILITY OF PRODUCT RECALL EVIDENCE IN THE UNITED STATES

by: John Koepke
Partner, Jackson Walker L.L.P.

Product recalls by foreign manufacturers is headline news in the United States. Can an injured party in a products liability suit use the fact of a product recall campaign against the manufacturer or seller of the product? Maybe—it depends upon where the suit is filed. Generally, the product manufacturer is better off in federal versus state court. Under Federal Rules of Evidence, product recalls which, if carried out earlier, would have reduced the likelihood of a given harm or injury, are generally treated as "subsequent remedial measures" and cannot be used to show the manufacturer's negligence, other culpable conduct, or defective design. See Fed. R. Evid. 407. Ten states (☐) have adopted the federal rule. The reason behind this is the public policy encouraging manufacturers and sellers to make products safer.

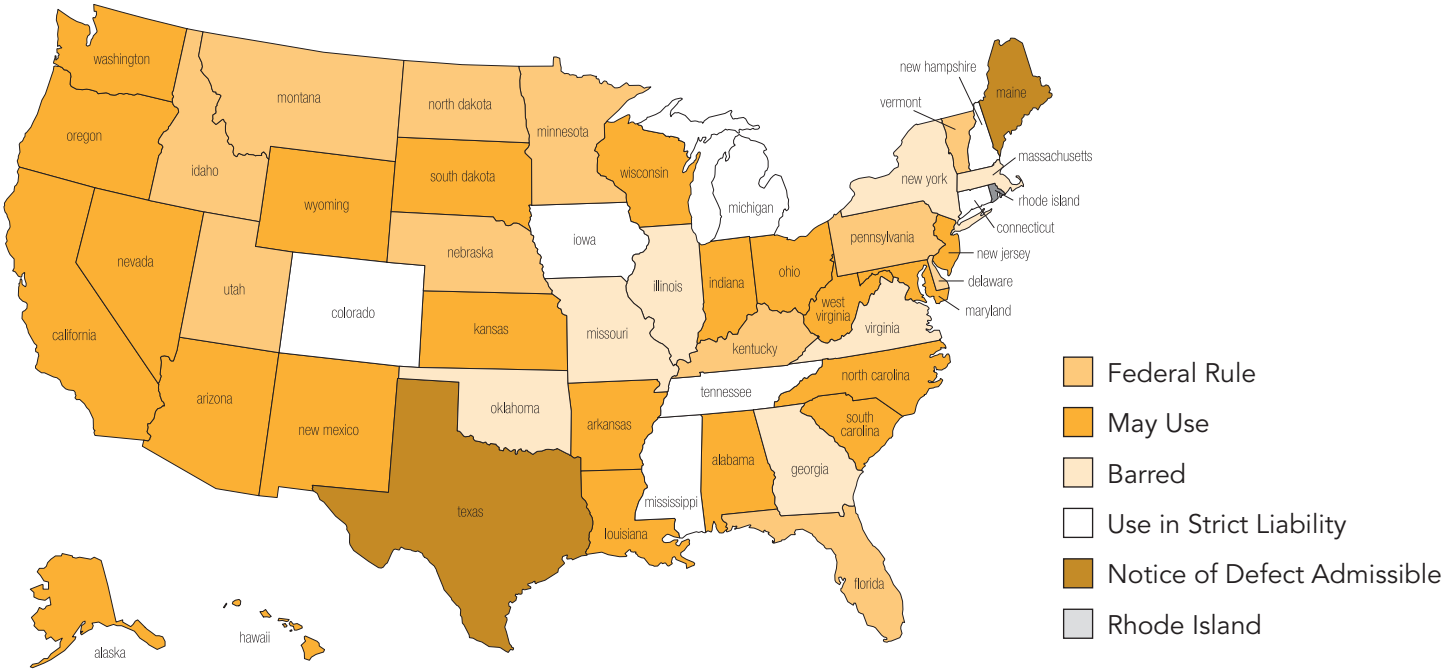
Despite this general rule against use of product recalls, however, facts showing subsequent remedial measures, like product recall efforts, may still be used against the manufacturer for other purposes, "such as proving ownership, control, or feasibility of precautionary measures, if controverted", or impeachment of a witness. Id.

It is noteworthy that evidence of a government mandated recall is not automatically barred from use in federal court, or in many state courts. A proactive products manufacturer may be well served to consider initiating a voluntary recall, if a later mandatory recall seems inevitable. Of course, a state by state analysis—guided by your Globalaw counsel and the map below—should be conducted to determine how advantageous such a course of action would be.

Twenty-two states (☐) follow the rule that the existence of product recalls may be used to show defective product manufacture or design. In these states, the question of whether product recalls of a defective product may be used against the manufacturer to determine the existence of a defect is decided on a case by case basis. Seven states (☐) have codified the rule that product recalls may be used against the manufacturer in strict liability cases.

Two states (☐) allow the use of product recalls, when written notices of defect are sent by a manufacturer to its customers. Seven states (☐) have no formal rules, and rely on the general rule that product recalls generally cannot be used to show negligence. Finally, the state of Rhode Island expressly allows the use of product recalls if relevant and there is a showing that a defect existed.

While the chart below provides a general overview, your local Globalaw counsel should always be consulted regarding each state's treatment of the use of product recall evidence. ■



RIEGEL V. MEDTRONIC

by: Mert Howard
Partner, Hanson Bridgett

In its recent decision in Riegel v. Medtronic, Inc. (2007) 552 U.S. ___, the U.S. Supreme Court significantly expanded liability protection for manufacturers of medical devices. Specifically, the Court held that federal law preempts product liability claims under state law for injuries caused by defects in medical devices that have received "premarket approval" from the Federal Food and Drug Administration ("FDA").

The case arises from a product liability claim against Medtronic, Incorporated ("Medtronic") relating to its Evergreen Balloon Catheter. The plaintiff, Charles Riegel, underwent coronary angioplasty after suffering a myocardial infarction. As part of the angioplasty, Mr. Riegel's doctor employed an Evergreen Balloon Catheter to dilate a diseased coronary artery. During the surgery, the catheter burst, allegedly causing Mr. Riegel to suffer significant injuries.[1] Mr. Riegel and his wife sued Medtronic, alleging causes of action under the tort common law of New York. Medtronic argued that the Riegel's claims were pre-empted by 21 U.S.C. section 360k,[2] relating to the "premarket approval" of new medical devices.

Writing for the eight-to-one majority, Justice Scalia discussed the "rigorous process" of premarket approval at some length, noting the agency's responsibility for weighing the expected benefits of the device against likely risks of injury. The Court also discussed the history of the statute, stating that "Congress stepped in" in 1976 to enact a statutory system, including Section 360k, "which swept back some state obligations and imposed a regime of detailed federal oversight." With this policy/historical background, and relying heavily on Medtronic, Inc. v. Lohr (1996) 518 U.S. 470 (hereinafter "Lohr"), the Court articulated a two-part test to determine whether the Riegel's claims were pre-empted by federal law. First, the Court found that federal law established "requirements" applicable to Medtronic's catheter. Second, the Court held that the Riegel's common law claims were state-law "requirements" applicable to the Medtronic catheter and were, therefore, pre-empted by federal law.

Federal law will only preempt state requirements when the FDA has established regulations specific to a device. The Court found that, during the premarket approval process, the FDA imposes extremely specific and rigid requirements on the design and manufacture of each device, and "the FDA requires a device that has received premarket approval to be made with almost no deviations from the specifications in its approval application, for the reason that the FDA has determined that the approved form provides a reasonable assurance of safety and effectiveness." Accordingly, premarket approval imposes "requirements" on medical devices that may preempt additional or different state-law requirements.

Following the plurality in Lohr and the decision Cipollone v. Ligett Group, Inc. (1992) 505 U.S. 504, the Court also concluded that common-law claims for negligence and strict liability constitute "requirements" under state law that may be pre-empted by federal law. The Court rejected the Riegel's contrary argument that common law causes of action for product liability were not pre-empted because New York product liability law applies to products generally, not just medical devices. Closely analyzing the wording of the statute, the Court concluded that the statute requires that state law impose a requirement on the device, not that the requirement apply only to the device.

The Court also found no support for the Riegel's argument that pre-emption does not extend to "[s]tate or local requirements of general applicability where the purpose of the requirement relates either to other products in addition to devices (e.g., requirements such as general electrical codes, and the Uniform Commercial Code (warranty of fitness), or to unfair trade practices in which the requirements are not limited to devices." The Court held that this regulation did not exempt tort law of general applicability from pre-emption, but only exempted the specific kinds of laws listed.

Finally, the Court refused to address the Riegels' argument, presented for the first time on appeal, that the requirements imposed by New York product liability law were not necessarily "different from or in addition to" federal requirements. Nonetheless, it appears that the Court could find that a state law identical in effect to federal requirements would not be pre-empted.

This decision is a substantial boon to manufacturers and suppliers of medical devices. This is not the end of state litigation over allegedly defective medical devices, however, as the decision leaves room for future plaintiffs to pursue state tort liabilities on a theory that a medical device failed in some respect to conform to requirements imposed by federal law. The Court's analysis would tend to suggest that such an argument might be availing. Unquestionably, however, this will be a more difficult burden than traditional state requirements for demonstrating a product defect. ■

FOOTNOTES

1. It also appears that Mr. Riegel's doctor misused the catheter, despite warnings on its packaging. Any defense of misuse, however, was not at issue in the Court's decision.

2. Unless otherwise specified, all references to statutory "Sections" will refer to Title 21 of the United States Code.

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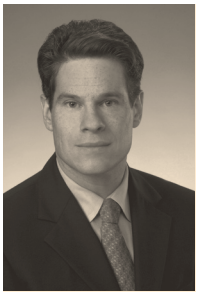

Mert Howard

Mert Howard's practice involves complex civil litigation, products liability, toxic tort cases, and business risk management. His experience involves all aspects of litigation, trial, appeal, and alternative dispute resolution. He has handled cases involving catastrophic injuries, children's products, chemicals and pesticides, medical devices, sports equipment, consumer goods, aviation law, asbestos and other toxic substances, California's Proposition 65, contractual interpretation, unfair competition, and premises liability.

John Koepke

John Koepke's experience primarily has focused upon representation of a variety of employers in employment, trade secret, intellectual property, and labor law litigation. He has a litigation oriented practice for a wide variety of clients including Fortune 100 corporations, privately held companies, and health care facilities. He has successfully handled virtually every type of case in the field of employment and commercial litigation including arbitrations, class actions, state and federal court jury trials, and administrative proceedings.

Lisa Powell

Lisa Powell has had an unusually diverse litigation and dispute resolution practice during her 20-plus year career. She has represented clients in complex business and international disputes, facilitated bankruptcy proceedings, handled multiparty insurance claims, and defended product liability, personal injury, and mass tort cases. This wide experience has given her a deep repertoire of litigation and arbitration procedures and tactics.

Rocky Walker

Rocky Walker specializes in civil litigation, primarily in both the prosecution and defense of complex commercial matters, and multiparty toxic tort issues, insurance coverage issues, intellectual property including trademark and copyright issues, and in construction law, representing both contractors and owners in the governmental and commercial areas. Additionally, he has handled the defense of class action suits and multiparty litigation in the products liability and securities areas.

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