JONES DAY

PRACTICE PERSPECTIVES: PRODUCT LIABILITY & TORT LITIGATION

The World of Product Liability

letter from the practice chair

Media articles in recent years discussing Jones Day's litigation capabilities (and successes) have said that we represent the "powerfully damned and the damned powerful" and that we do the "hardest cases in the toughest places." We like it that way.

We also know that, although we are in a learned profession and are officers of the Court operating scrupulously within Rules of Professional Conduct, we are in a service business that is ever-changing and highly competitive. That is the reason we take special pride in being consistently recognized by The BTI Consulting Group as a leader in client service.

As our former Managing Partner, Patrick F. McCartan, liked to say, "Excellence is a process, not an event." None of us can afford to become complacent. We must remain committed to being at the cutting edge of developments in our areas of practice while always being responsive to our clients.

The articles in this issue, on a variety of topics that we hope readers will find useful, represent just small examples of how our lawyers are staying attuned to the hottest developments in the law. We report and describe recent changes but also work to identify larger trends and continuing themes. We then hope to offer creative, proactive strategies to deal favorably with those trends and themes.

We would appreciate receiving feedback from our clients, colleagues, and friends. It will help us in our quest as individuals, and as a firm, to find ways to be better lawyers. ■

Paul M. Pohl

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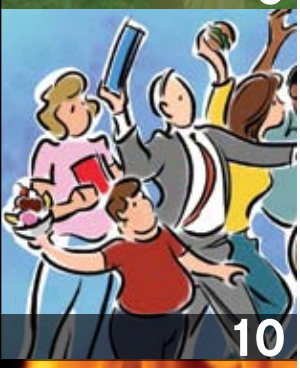

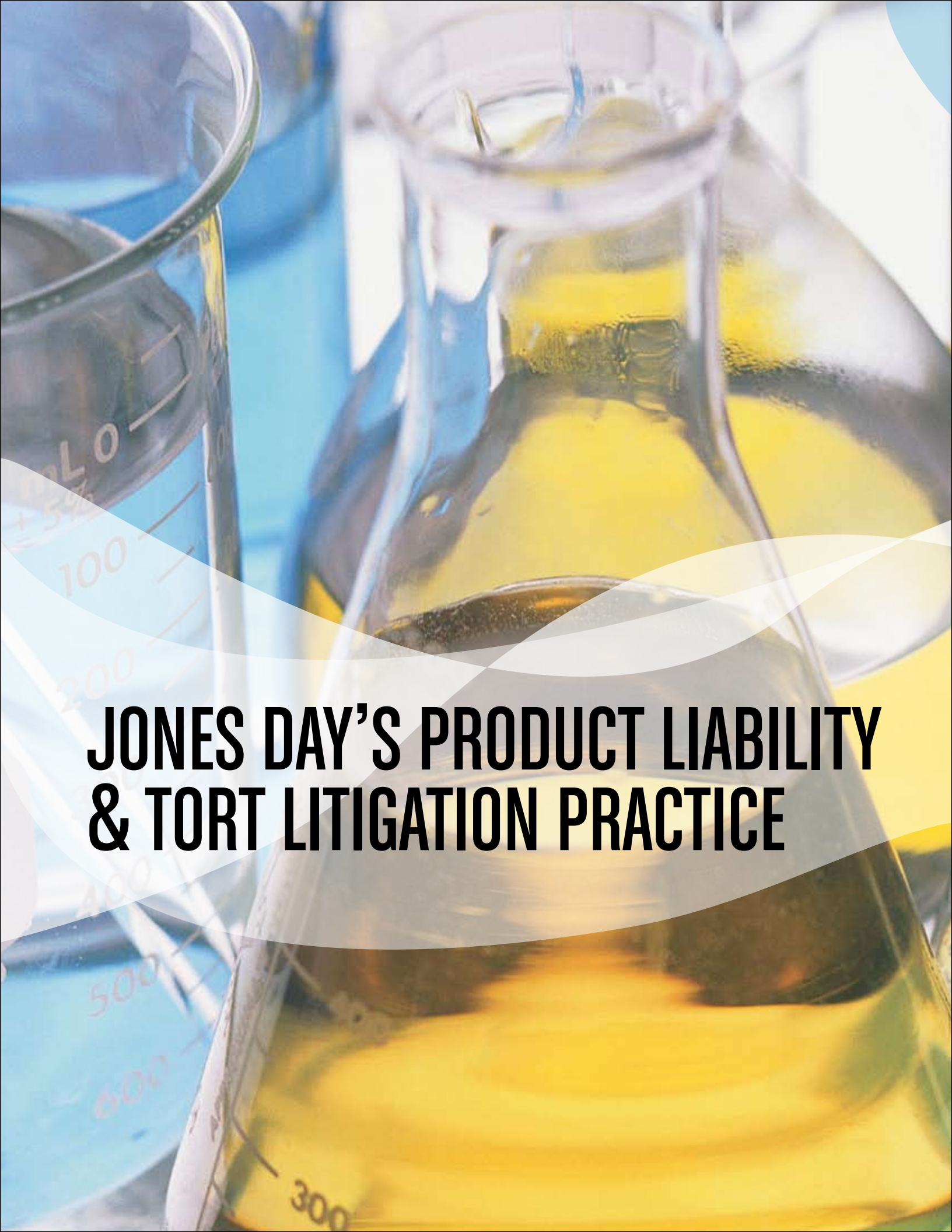

JONES DAY'S PRODUCT LIABILITY & TORT LITIGATION PRACTICE

For further information on Jones Day's Product Liability & Tort Litigation Practice, please contact the following practice leader:

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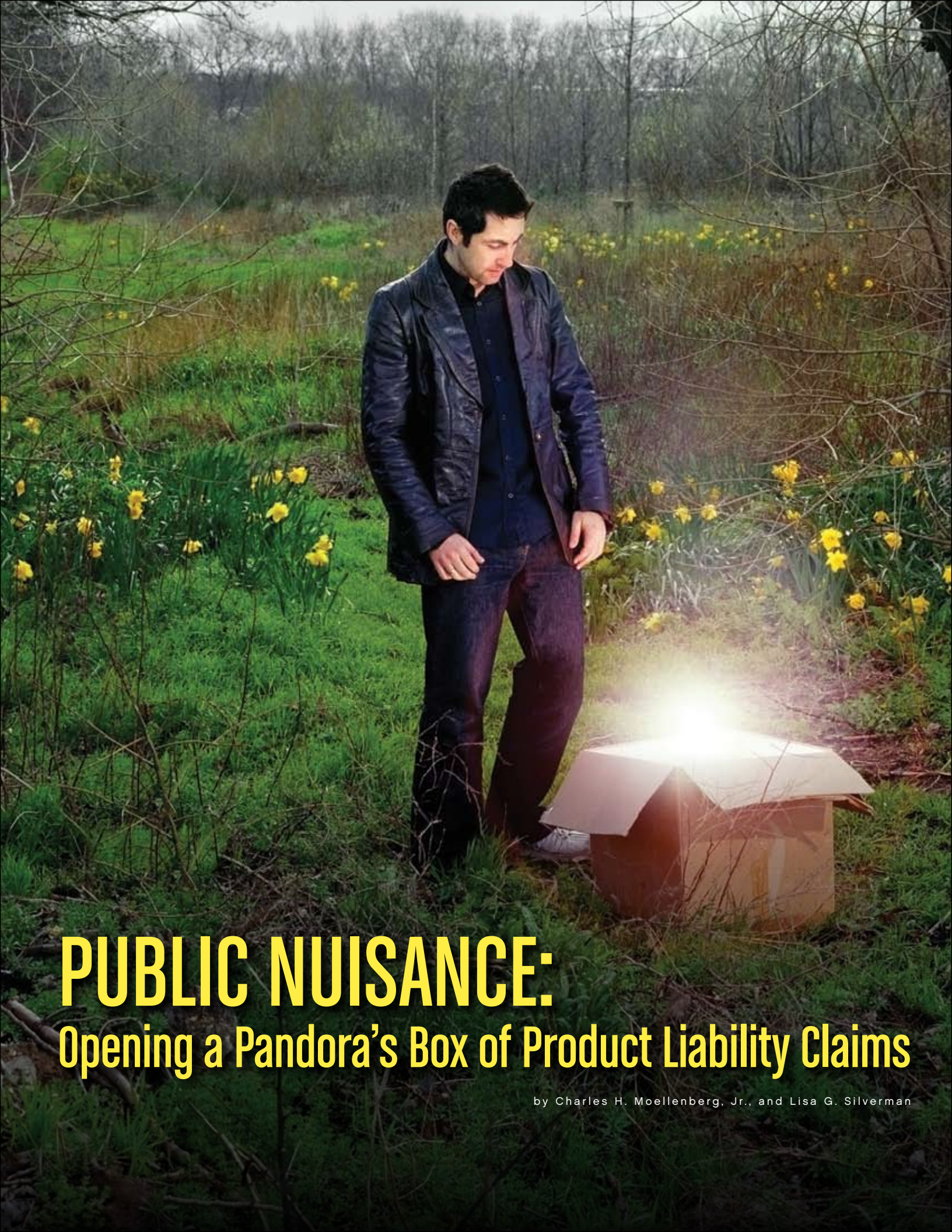
Named "Product Liability Department of the Year" by *The American Lawyer* in January 2004 and further as a Finalist in 2006, Jones Day's Product Liability & Tort Litigation Practice advises and defends a broad range of national and international manufacturers of a variety of products, including chemicals, consumer goods, pharmaceuticals and medical devices, tobacco, firearms, lead-based paint and pigment, aviation components, tires and rims, and industrial equipment. We serve as national trial and coordinating counsel in high-profile multijurisdictional matters, including class actions and multidistrict litigation, throughout the U.S. In addition, we regularly counsel clients on liability prevention in the U.S. and around the world, as well as regulatory and legislative issues.

The members of Jones Day's Product Liability Practice exemplify our ability to create a cohesive team of lawyers, irrespective of office location, with the proper mix of experience and skills, given the particular client's situation, needs, and expectations. We possess not only the requisite trial skills but also in-depth experience in a broad range of issues, such as class actions, e-discovery, emergency writ procedures, epidemiology, statistics, and toxicology.

In addition to having 14 full-service U.S. offices, Jones Day has a significant presence outside the U.S., now numbering approximately 550 lawyers. Included in that figure are approximately 80 litigators in Europe and 60 in Asia who possess local-law and cross-border litigation, arbitration, and mediation experience. We also offer local-law product liability and product recall capability for U.S. companies that fall under foreign jurisdiction as well as non-U.S. companies with operations or sales in the United States. ■



PUBLIC NUISANCE:
Opening a Pandora's Box of Product Liability Claims

by Charles H. Moellenberg, Jr., and Lisa G. Silverman

Product manufacturers historically could expect that one claiming injury from exposure to their products would pursue a product liability claim under a negligence or strict liability theory. A troubling trend has emerged where governmental units, often with the assistance of private counsel, are attempting to circumvent the legal constraints of traditional product liability theories by asserting public nuisance claims.[1] This approach attempts to avoid product identification[2] and focuses on the gravity of the collective harm rather than the defendants' conduct.

Public nuisance claims essentially assert that product manufacturers created or maintained a public health crisis when they manufactured and sold a legal product that allegedly contributed to conditions such as elevated blood lead levels in children, tobacco-related health issues, or injuries from firearm usage.[3] This latest iteration of public nuisance claims requires courts to assume a regulatory role in determining whether product manufacturers are responsible to the entire public community simply because they manufactured and sold a lawful product. That role is best left to the legislature in enacting product liability statutes that delineate a product manufacturer's potential liability to the public for harm caused by its product.

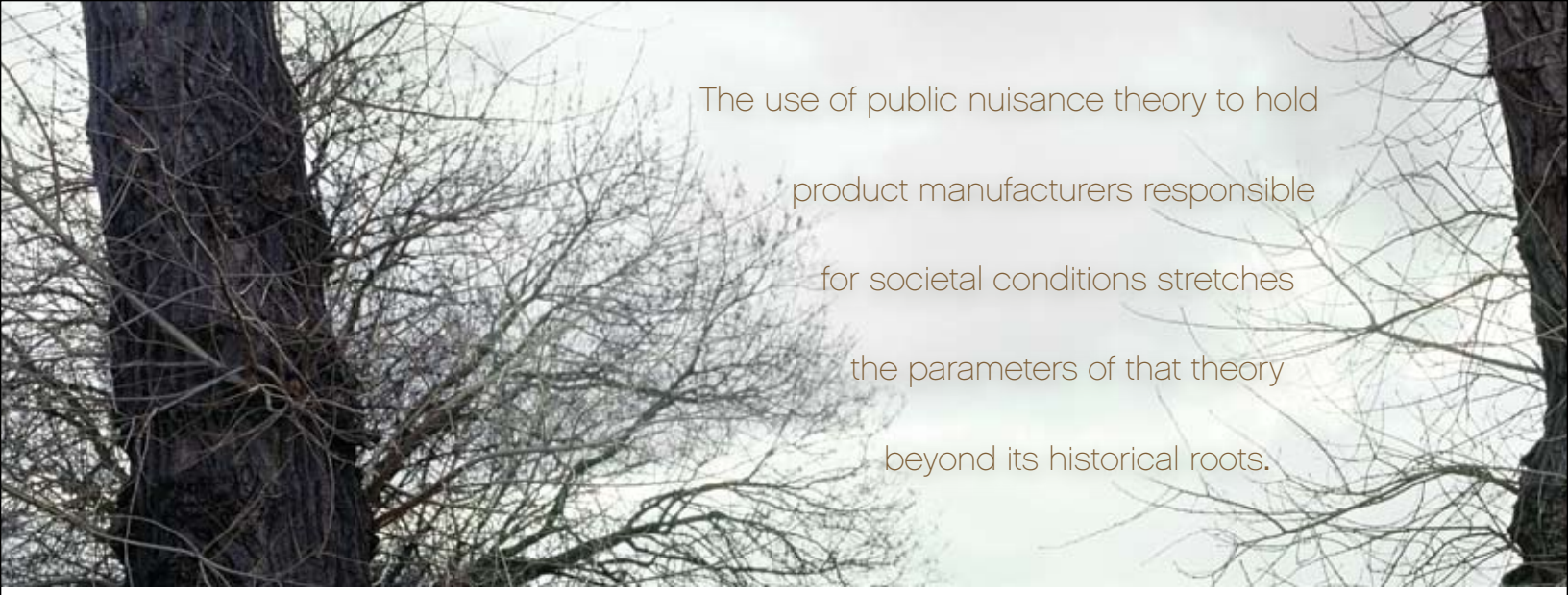
Morphing public nuisance theory to fit product claims threatens manufacturers being held to a standard of absolute liability for public nuisance—if you made it and sold it, and the alleged public harm was caused by the mere existence of that category of product, you are responsible for the societal harm. Broadening the traditional scope of public nuisance to accommodate these claims for societal ills opens a Pandora's box for future claims. Under this paradigm, all types of industry, not just product manufacturers, could be swept in to defend public nuisance suits that, until now, never were contemplated as a risk of potential liability for conducting business. Illustrating the expansive reach of this theory are the recent public nuisance claims against electric utilities seeking redress for their alleged contributions to global warming and its alleged impact in intensifying the effects of Hurricane Katrina.[4]

"Public nuisance" is defined as "an unreasonable interference with a right common to the general public," which includes an interference with public health, public safety, and public peace. Restatement (Second) of Torts § 821B cmt. e (1979) (setting forth factors to determine whether an activity unreasonably interferes with a right common to the general public). Public nuisance historically provided an avenue for the government to enjoin activity that was causing an interference with the exercise of a public right. For instance, the typical public nuisance claim attempted to redress such wrongs as a factory emitting a foul odor or the blocking of a public roadway. *See* Restatement (Second) of Torts § 821A cmt. b (1979).

The use of public nuisance theory to hold product manufacturers responsible for societal conditions stretches the parameters of that theory beyond its historical roots. Given that it has long been recognized that "nuisance" is incapable of being defined exactly or comprehensively,[5] today's courts grapple with the newly constructed intersection of the theories of public nuisance and product liability. Uncertainty abounds, from how to define the nuisance at issue to whether traditional product liability or tort defenses apply, including product identification, state of the art, causation-in-fact and proximate cause, remoteness doctrine, product alteration, failure to maintain the product, assumption of the risk, and statute of limitations.[6] Courts also struggle in fashioning a remedy, as governmental entities attempt to recoup economic losses sustained in remedying the health effects from the alleged product exposure even in the face of the limited equitable remedies available in a public nuisance claim.[7] These claims also raise due process and other constitutional issues, particularly when retroactive liability to reimburse government expenditures is sought. Since no guiding principles exist, the net effect of this intersection of theories is inconsistent rulings.

Traditionally, product manufacturers raised a number of defenses to individual product liability claims alleging injury from exposure to products. Most courts considering those individual claims declined to permit the claims to proceed in the absence of proof that the manufacturer was at fault and caused the injury. *See, e.g., Jefferson v. Lead Indus. Ass'n, Inc.*, 106 F.3d 1245, 1253 (5th Cir. 1997); *Santiago v. Sherwin-Williams Co.*, 3 F.3d 546, 547 (1st Cir. 1993). Many courts considering product liability cases couched in public nuisance theory similarly followed the rule that the mere possibility of causation is not enough to permit the imposition of liability.[8] A number of courts dismissed public nuisance claims for an inability to meet causation and product identification requirements. For example, the Appellate Court of Illinois affirmed the dismissal of the City of Chicago's public nuisance claim against manufacturers and sellers of lead-based paint for failure to state a claim. In so holding, that court aptly stated that "defendants cannot be liable under a theory of public nuisance of the manufacture, sale and promotion—decades ago—for products containing lead pigment because plaintiff has failed to allege facts adequate to show the proximate cause element of the cause of action." *City of Chicago v. American Cyanamid Co.*, 823 N.E.2d 126, 140 (Ill. App.), *appeal denied*, 833 N.E.2d 1 (2005). Likewise, both a Missouri trial and intermediate appellate court determined that the City of St. Louis's public nuisance claim against lead-paint and lead-pigment companies should not proceed because, among other reasons, the city could not prove causation due to its inability to identify any of the defendant's products at any location in the city.[9]

A few recent public nuisance cases, however, have not required proof that the alleged injury relate to a specific manufacturer's product due to the collective nature of the harm alleged. A Rhode Island jury found three former manufacturers of lead pigments liable for creating a public nuisance by making, promoting, and selling lead pigments absent proof of negligence, fault, or that any specific manufacturer's product caused any one case of an elevated blood lead level or property damage.[10] That nuisance was defined as the cumulative presence of lead pigments in paints and coatings on buildings throughout Rhode Island. *State v. Lead Indus. Ass'n*, No. 99-5226, 2004 WL 2813747, at *1–2 (R.I. Super. Ct. Nov. 9, 2004). In ruling that this was not a product liability case, the trial court declined to require specific causation and product identification, and it precluded traditional defenses. *State v. Lead Indus. Ass'n*, No. Civ. A. 99-5226, 2005 WL 1331196, at *2 (R.I. Super. Ct. June 3, 2005). The Wisconsin Court of Appeals similarly ruled that a public nuisance claim against two former lead-paint and -pigment manufacturers should proceed to trial even though the city admitted that it could not connect any manufacturer of lead paint or pigment to a specific building sought to be abated. *City of Milwaukee v. NL Industries, Inc.*, 2005 WI App. 7, 278 Wis. 2d 313, 691 N.W.2d 888 (Ct. App. 2004).



In the past, individual plaintiffs who attempted to overcome product identification inadequacies by advancing industry-wide or collective theories of liability met judicial resistance. These theories have included: (1) market share liability (plaintiff need not identify the manufacturer of the specific injury-causing product, but defendants' share of liability is based upon their market share), which the majority of courts have declined to adopt;[11] (2) enterprise liability (an industrywide standard is the cause of injury, and liability is distributed among defendants who participated in perpetuating and using that standard), which courts have universally rejected;[12] (3) alternative liability (all parties contributing to the risk of harm are collectively liable unless they can prove that their actions were not the cause of plaintiff's injury), which courts have rejected where more than a few defendants manufactured the product in question;[13] and (4) concert-of-action and conspiracy theories (manufacturers are jointly and severally liable when it can be proved that they engaged in civil conspiracy or acted in concert in an effort to conceal or avoid disclosing the risks caused by exposure to their products), which the majority of courts have rejected if premised on mere parallel activity.[14]

Until recently, every court considering market share liability as an exception to proving causation in both individual and public nuisance cases declined to extend that theory beyond the miscarriage drug DES.[15] Rarely will the product exposure alleged to have caused an injury be limited to a discrete period of time (such as DES exposure during a nine-month pregnancy) to permit determination of the relevant market share. Despite this, the Wisconsin Supreme Court recently became the first court in the country to extend risk-contribution theory (a form of market share liability) to former white lead-pigment manufacturers, allowing the plaintiff's claim to survive a summary judgment motion despite his inability to show which manufacturer's product, if any, caused his alleged injury.[16] This holding essentially eliminated the specific or actual causation requirement in an individual child lead-injury case in favor of collective liability based on mere historical participation in an industry. The *Thomas* court initially determined that the right to a remedy provision of the Wisconsin Constitution (Article I, Section 9) required the extension of the risk-contribution theory to former lead-pigment manufacturers. The court further determined that such an extension was warranted because the former lead-pigment manufacturers contributed to the risk of injury to the public and to individual plaintiffs and are supposedly better poised to absorb or distribute the cost of the injury.[17]

The effect of advancing public nuisance and market share theories to avoid causation issues varies, based on the facts, the existing law of public nuisance and product liability in each jurisdiction, and the rulings made by courts to address the unique claims pending, often in the absence of any controlling or even guiding precedent in that jurisdiction. Expanding public nuisance theory to address societal harms, however, is not limited to the private sector. These evolving principles may eventually permit claims against governmental units for their role in creating public nuisances through their operations, *e.g.*, use of lead-containing paints, installation of lead water pipes, or operation of lead-emitting processes, such as incinerators.[18]

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A Smorgasbord of Attac

In 1988, when a federal jury in New Jersey awarded Antonio Cipollone, a retired cable splicer, $400,000 in damages against cigarette manufacturer Liggett Group Inc. for his wife's death from lung cancer, skepticism regarding smokers' suits against the tobacco industry remained strong. After all, the verdict represented the first time a jury had awarded damages against the tobacco industry since smoker lawsuits first appeared in the 1950s.[1] Legal commentators predicted no increase in new cases following the verdict, believing it was simply unlikely that juries would ever sympathize with sick smokers, who had long been warned about the risks of smoking.[2] Though the cigarette industry continues to prevail in most of the cases against it, and the number of those cases has fallen dramatically, those who predicted no surge in litigation following the *Cipollone* verdict were certainly proved wrong. Of course, not every sudden uptick in litigation against a particular industry portends a new mass tort, and there are significant differences between the cigarette suits and claims against the food and beverage industry. Nevertheless, recent events, including a number of new proposed class actions filed against fast-food companies, and various steps by government groups, including new and proposed legislation, seem to suggest that the same alliance of public-health groups, consumer advocacy groups, academics, state attorneys general, and plaintiffs' lawyers may be joining forces against the food and beverage industry.

ks on the Food Industry

by Harold K. Gordon and Carol A. Hogan

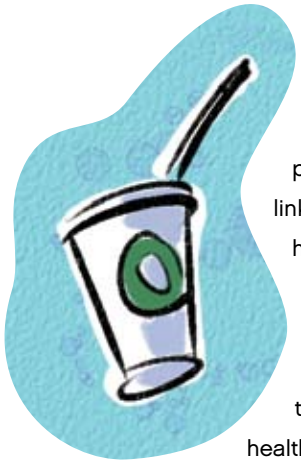
GOVERNMENT STUDIES AND REPORTS

The list of public-health community studies and reports on food-marketing practices, food labeling, and obesity-related disease continues to grow. History has taught that these types of studies and reports can provide powerful evidence for food-industry claims, particularly to prove damages.

In 2001, the Surgeon General issued a report finding that obesity had reached epidemic proportions in the United States and that there were about twice as many overweight children and almost three times as many overweight teenagers as there had been in 1980. Office of the Surgeon General, U.S. Dept. of Health & Human Services, *The Surgeon General's Call to Action to Prevent and Decrease Overweight and Obesity*, foreword at xiii (2001). In April 2005, the California Department of Health Services estimated that the total direct and indirect costs to California in 2000 from "physical inactivity, obesity, and overweight" amounted to $21.68 billion. California Dept. of Health Services, *The Economic Costs of Physical Inactivity, Obesity, and Overweight in California Adults During the Year 2000*, exec. sum. at v (2005).

In December 2005, the Institute of Medicine issued a report on the food industry's marketing to children, which drew significant media attention and will likely be cited by public-health officials, plaintiffs' attorneys, and others in support of litigation and legislation to curtail certain marketing practices. Institute of Medicine of the National Academies, *Food Marketing to Children and Youth: Threat or Opportunity?* (2005). Among other findings, the report revealed that the food, beverage,

and restaurant industry spent about $11 billion on advertising in 2004, including $5 billion on television advertising alone; that the preponderance of advertising targeted at children pertained to high-calorie and low-nutrient food products; and that there was "strong" statistical evidence that food and beverage advertising on television was associated with "adiposity" (body fat) in children aged two to 11 and adolescents aged 12 to 18. *Id.* at ES-3, 7.



In September 2006, the Federal Communications Commission ("FCC") publicly announced its plans to study links among television advertising, viewing habits, and the rise of childhood obesity. The FCC has put together a task force, which includes official members of the food, television, and advertising industries; consumer advocacy groups; and health experts.

"PUBLIC INTEREST" GROUP ACTION

Founded in 1971, the Center for Science in the Public Interest ("CSPI") is the undisputed leader among America's "food police," with annual funding of $17 million. Center for Science in the Public Interest, *available at* http://www.cspinet.org. The group advocates for nutrition and health, food safety, and alcohol policy. While the CSPI touts itself as a public-interest group, its consolidated financial statements make clear that it has a litigation agenda:

> [P]romote changes in the American food supply and in food policies through the litigation process, including identifying deceptively labeled or advertised products appropriate for class-action lawsuits, providing expertise and resources to private class-action litigants, initiating litigation under state laws that bar unfair or deceptive marketing practices, and filing lawsuits to improve food policies.

Center for Science in the Public Interest Financial Statements and Independent Auditor's Report, June 30, 2006 and 2005, at Note 2. CSPI has a "litigation director" and has aligned itself in many of its litigation efforts with well-known former proponents of litigation against the tobacco companies. One example is Richard Daynard of the Public Health Advocacy Institute ("PHAI") at Northeastern University. He is described on the Northeastern University School of Law's web site as being "at the forefront of the national movement to establish the legal responsibility of the tobacco industry for tobacco-induced death, disease and disability." Daynard now chairs the Obesity and Law Project at the PHAI, and since 2004, he and his group have been advocating lawsuits against the food industry, under state consumer-protection statutes based on food and beverage marketing to children.[3]

CSPI has been involved in numerous lawsuits and other actions against the food industry. In June 2006, CSPI brought a class-action lawsuit against KFC seeking to either ban its use of partially hydrogenated oils or require KFC to inform customers that its food contains trans fat. *Hoyte v. Yum! Brands, Inc. d/b/a KFC*, No. 4526-06, 2006 WL 1648127 (D.C. Super. Ct.). The case was subsequently removed to federal court, where a motion to dismiss is pending. *Hoyte v. Yum! Brands, Inc. d/b/a KFC*, No. 06-1127 (D.D.C.). In October 2006, CSPI stated that it was withdrawing from the lawsuit after KFC announced that it was switching to a trans-fat-free frying oil in certain of its foods, though other parties to the suit will continue to pursue the action. CSPI Press Release, *CSPI Withdraws From Lawsuit After KFC Cuts Trans Fat* (Oct. 30, 2006).

In addition, CSPI recently sued Nestlé and Coca-Cola over the release of Enviga, their new energy drink, seeking restitution and an injunction prohibiting the claim that Enviga burns more calories than it provides, resulting in "negative calories." CSPI Press Release, *Watchdog Group Sues Coke, Nestlé For Bogus "Enviga" Claims* (Feb. 1, 2007). The action was brought in federal court under the New Jersey Consumer Fraud Act. *Ctr. for Science in the Pub. Interest v. The Coca-Cola Co.*, No. 07-539 (D. N.J.).

CSPI has continued its litigation efforts in 2007, announcing on January 8, 2007, that it was assisting the representation of a Florida woman in her proposed class action against Kraft Foods, alleging that Kraft deceptively marketed its foil-pouch drink Capri Sun as "All Natural," notwithstanding that the beverage is composed of water, high-fructose corn syrup, and

small amounts of juice. The suit claimed that although high-fructose corn syrup is no more harmful than other sugars, it is an artificial ingredient and thus the Capri Sun drink is not "All Natural" as advertised. CSPI Press Release, *Kraft is Sued for Falsely Calling Capri Sun Drink "All Natural"* (Jan. 8, 2007). CSPI dropped the lawsuit once Kraft abandoned the "All Natural" claim. *Id.*

Beyond its litigation agenda, CSPI has on multiple occasions petitioned regulatory agencies overseeing the nation's food supply for new measures it believes will promote food safety and nutrition. In November 2006, for example, CSPI petitioned the Food and Drug Administration ("FDA") to design a national set of symbols identifying healthy foods that will be more consumer-friendly than the dozens of different logos and labels currently employed by food manufacturers for that purpose. CSPI Press Release, *FDA Urged to Create New "Healthy Food" Labeling System* (Nov. 30, 2006). On December 1, 2006, CSPI sent a letter to FDA commissioner Andrew von Eschenbach urging the agency to test and publish levels of acrylamide, an alleged human carcinogen in processed foods, and to limit acrylamide in foods such as cereal, potato chips, and cookies. CSPI Press Release, *CSPI Urges FDA to Test for Acrylamide in Foods* (Dec. 1, 2006). So far this year, CSPI is attempting to get the U.S. Department of Agriculture ("USDA") to establish maximum levels of sodium in different categories of meat and poultry products, citing statistics by sodium researchers that halving the salt content in processed and restaurant foods would save 150,000 lives a year in the United States. CSPI Press Release, *USDA Urged to Limit Sodium in Meat and Poultry Foods* (Jan. 3, 2007).

Another "advocate" to watch is John Banzhaf, a George Washington University professor who is a longtime proponent of tobacco litigation. Banzhaf has asserted in a CNN interview that fast food, like nicotine, triggers an addictive response in the brain. Transcript, CNN Live (June 22, 2003), *available at* http://banzhaf.net/docs/cnn.html. In addition, press reports have recently appeared discussing the efforts of food scientists to calibrate the taste and smell of food products to make them more enticing. *See* Patricia Callahan et al., *Where there's smoke, there might be food research, too*, Chicago Tribune, Jan. 29, 2006.

The Physicians Committee for Responsible Medicine ("PCRM") has also been mounting litigation against the food industry. In 2005, PCRM filed two lawsuits claiming that the dairy industry was misleading consumers with deceptive advertising that made scientifically unsubstantiated claims about the effect of dairy products on weight loss. *Physicians Comm. for Responsible Med. v. Int'l Dairy Foods Assoc.*, Law No. CL05001320 (Va. Cir. Ct.); *Physicians Comm. for Responsible Med. v. Kraft Foods, Inc.*, Chancery No. 05002179 (Va. Cir. Ct.).

The defendants removed the actions to federal court pursuant to the Class Action Fairness Act of 2005, where the cases were consolidated and dismissed for failure to state a claim. *Physicians Comm. for Responsible Med. v. Gen. Mills, Inc.*, No. 05-958, 2006 WL 3487651 (E.D.Va. Nov. 30, 2006).

EARLY LEGAL ACTION BY GOVERNMENT AGENCIES AND ADVOCACY GROUPS

In the late 1970s, a consortium of plaintiffs, which included the Committee on Children's Television, Inc., and the California Society of Dentistry for Children, sued a number of food- and advertising-industry companies, including General Foods Corporation and Ogilvy & Mather International Inc. The plaintiffs alleged that the defendants improperly marketed and advertised certain breakfast cereals to children that should have been more accurately described as "sugar products" or "candy breakfasts." *Comm. on Children's Television, Inc. v. Gen. Foods Corp.*, 673 P.2d 660, 664 (Cal. Sup. Ct. 1983). The case was brought under California's consumer protection statute, which prior to being amended by voters in 2004 did not require plaintiffs to show injury. California Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, *et seq*. (2005), amended by Proposition 64. Noting that "[a]llegations of actual deception, reasonable reliance, and damage are unnecessary," the California Supreme Court concluded that the claims were sufficient to overcome a motion to dismiss. *Comm. on Children's Television*, 673 P.2d at 668.

Then, in the late 1980s, the attorneys general of several states pursued McDonald's for allegedly deceptive advertisements. The group included then-New York attorney general Robert Abrams, who asserted in 1987 that McDonald's made deceptive claims about the sodium and saturated-fat content of

certain food products and about the artificial ingredients and preservatives in its shakes. *See Pelman v. McDonald's Corp.*, 237 F. Supp. 2d 512, 528–29 (S.D.N.Y. 2003) (discussing an April 24, 1987, letter by Abrams asserting allegedly deceptive claims by McDonald's). State attorneys general and other government agencies have remained active in policing conduct in the food and beverage industry. In 1991, for example, Abrams reached an agreement with Coffee-mate, KFC, and Dunkin' Donuts to restrict various allegedly misleading health claims.[4] The same year, the Federal Trade Commission ("FTC") sued Stouffer Foods Corporation, asserting that it had engaged in deceptive advertising by falsely telling consumers that its Lean Cuisine products had a low sodium content. *In re Stouffer Foods Corp.*, No. 9250, 1993 FTC LEXIS 196 (Aug. 6, 1993); *see generally* Felix H. Kent, *The FTC Flexes Its Muscle*, N.Y.L.J., at 3 (Dec. 17, 1993). As a result, an administrative law judge issued an order prohibiting Stouffer from misrepresenting the sodium content of any of its frozen-food products; this was followed by an FTC order extending the scope of the decision beyond sodium to all ingredients. Federal Trade Commission, *FTC Upholds Law Judge's Ruling That Stouffer Food Corp. Made False Low Sodium Claims In Ads For Lean Cuisine* (Oct. 4, 1994). In August 2005, California's attorney general sued a number of food companies, including Frito-Lay, PepsiCo, H.J. Heinz, and Wendy's International, asserting that they failed to warn consumers that certain of their processed potato products contained acrylamide, the alleged carcinogen. *California v. Frito-Lay, Inc.*, No. BC338956 (Cal. Super. Ct. Los Angeles Cty.). The case seeks an order mandating a warning to consumers and unspecified monetary damages.

Recent events seem to suggest that an alliance of public-health groups, consumer advocacy groups, academics, state attorneys general, and plaintiffs' lawyers may be joining forces against the food and beverage industry.

PRIVATE CLASS ACTIONS EMERGE

The first proposed consumer class actions against the food and beverage industry emerged in 2002 in New York. Ashley Pelman and Jazlen Bradley, two minors, and their parents sued McDonald's as members of a proposed class. Pelman and Bradley asserted that they had become overweight and developed certain obesity-related diseases, including diabetes, coronary heart disease, and high blood pressure, as a result of their consumption of McDonald's products. Judge Robert Sweet of the Southern District of New York dismissed the original complaint for lack of specificity, *Pelman*

v. McDonald's Corp., 237 F. Supp. 2d 512, 519 (S.D.N.Y. 2003), and subsequently granted McDonald's motion to dismiss the amended complaint because the plaintiffs failed to adequately allege that McDonald's caused the plaintiffs' injuries and that McDonald's representations to the public were deceptive. *Pelman*, 2003 U.S. Dist. LEXIS 15202 (S.D.N.Y. Sept. 3, 2003). Plaintiffs appealed, however, and the Second Circuit vacated and remanded Judge Sweet's dismissal of claims premised on the New York Consumer Protection Act, finding that the plaintiffs sufficiently met the notice-pleading requirements of the Federal Rules of Civil Procedure. *Pelman*, 396 F.3d 508 (2d Cir. 2005).

Receiving the case on remand, Judge Sweet directed the plaintiffs to provide details about the particular advertisements that they alleged were deceptive, their awareness of the advertisements, and the purported injuries that resulted. *Pelman*, 396 F. Supp. 2d 439, 446 (S.D.N.Y. 2005). The plaintiffs filed a second amended complaint, and McDonald's again moved to dismiss it. This time, however, the motion was denied. *Pelman*, 452 F. Supp. 2d 320 (S.D.N.Y. Sept. 16, 2006). Although not addressing the legal sufficiency of the claims, Judge Sweet concluded that the plaintiffs complied with his directive by supplying sufficient details for McDonald's to answer the complaint. The case now appears to have proceeded into discovery.

The legal effort to ban the use of partially hydrogenated vegetable oils also began with class-action litigation. In 2003, a San Francisco attorney filed two class actions—one seeking to ban Kraft Foods from selling Oreos containing hydrogenated oil and the other against McDonald's for allegedly misleading its customers into believing that it had switched to a lower-trans-fat cooking oil.[5] Plaintiff's counsel quickly dropped the cases but contends that he did so only after the defendants agreed to reduce trans fat in their products.

In 2004, the alcoholic-beverage industry was hit with two proposed class-action complaints. The proposed class members consisted of the parents and guardians of underage consumers of certain alcoholic beverages, who alleged deliberate and reckless targeting of such consumers in marketing campaigns. *Eisenberg v. DeGross*, No. 04-1081, 2006 U.S. Dist. LEXIS 4058, at *11–13 (N.D. Ohio). Alleging violations of the Ohio Consumer Sales Practice Act and certain common-law claims, they sought recoupment of the funds their children spent on illegal purchases of alcoholic beverages and an injunction to prevent defendants from continuing to market alcoholic beverages to underage drinkers. *Id*. at *12–13. In granting the defendants' motion to dismiss the two complaints, the court held that the plaintiffs failed to assert legally cognizable injuries and did not provide sufficient notice to each defendant of the particular advertising and marketing practices they alleged were harmful. *Id*. at *13–17.

Several new proposed class actions against food- and beverage-industry defendants have been filed in multiple jurisdictions in the past year. Their timing and similar allegations suggest coordination by a national consortium of plaintiffs' counsel. In *Hardee v. Del Mission Liquor*, No. GIC 844745 (Cal. Super. Ct. San Diego Cty.), the plaintiff sued on her own behalf and as a representative of a proposed class of consumers of certain breakfast cereals touted as "low sugar" that allegedly, unbeknownst to plaintiff, contained "other carbohydrates," making the defendants' representations that the cereals had nutritional value over their full-sugar breakfast products false. In February 2006, a proposed consumer-fraud and false-advertising class action was filed against Merisant Company, the maker of the artificial sweetener Equal Sugar Lite. The complaint asserts that Merisant deceived consumers by declaring that Equal Sugar Lite contained half the calories and carbohydrates of sugar when in fact the product was composed of about 90 percent sugar and thus contained the same amount of carbohydrates as sugar. *Markowitch v. Merisant Corp.*, No. 06-846 (N.D. Ill.) (dismissed with prejudice pursuant to stipulation entered June 14, 2006).

McDonald's again found itself the target of class-action lawsuits following announcements the company made regarding its french fries. On February 8, 2006, McDonald's announced that the trans-fat content in a large order of its fries was one-third higher than previously reported, the total fat content was 20 percent higher, and the total number of calories was 570 instead of 520.[6] And on February 13, 2006, the company revealed that wheat and dairy products were used to flavor its fries.[7] Within weeks of each announcement, McDonald's was named in proposed class actions in New York, Florida, Illinois, and California. Invoking consumer-fraud statutes in each jurisdiction, the complaints seek class certification on behalf of consumers who claimed they would have "moderated" their intake of fries if they had known their true caloric

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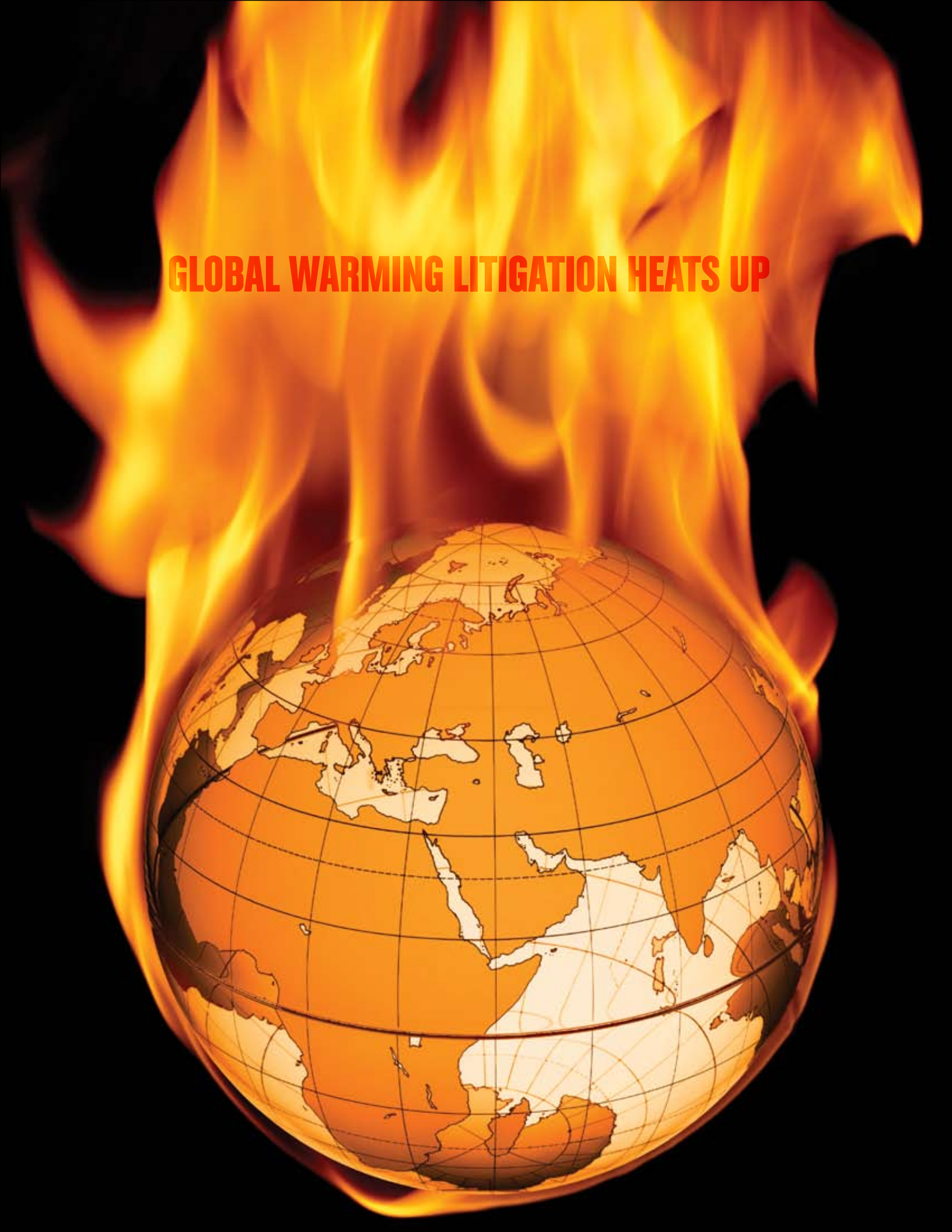
GLOBAL WARMING LITIGATION HEATS UP



Whatever one's personal views of the existence, extent, or causes of global warming, there is no disputing the fact that global warming has vaulted to the forefront of environmental issues. This is reflected in the success of Al Gore's 2006 film, *An Inconvenient Truth*, and its two Academy Awards; the almost daily press reports regarding global warming appearing in newspapers across the country; the number of bills being introduced in Congress to address climate change; and even the recent decision from the United States Supreme Court holding that greenhouse gases in automobile emissions are subject to EPA's regulatory authority under the Clean Air Act. *See Massachusetts v. EPA*, _____ U.S. _____, 127 S. Ct. 1438 (2007). While these examples address direct regulation of greenhouse gases by legislatures or administrative bodies, climate change has also found its way into tort cases brought against a variety of industries that are alleged to contribute to global warming. Jones Day is representing Xcel Energy Inc. ("Xcel Energy"), one of the nation's largest electric utilities, in two such tort cases.

CONNECTICUT V. AEP

In July 2004, eight states—Connecticut, New York, California, Iowa, New Jersey, Rhode Island, Vermont, and Wisconsin—and the City of New York filed an action in federal court in New York against the five largest electric utilities in the United States, including Xcel Energy. *See Connecticut v. American Electric Power Co.*, No. 1:04-cv-05669-LAP (S.D.N.Y.). On the same day, three private land trusts—Open Space Institute, Inc.; Open Space Conservancy, Inc.; and Audubon Society of New Hampshire—filed a parallel suit making virtually identical allegations. *See Open Space Institute, Inc. v. American Electric Power Co.*, No. 1:04-cv-05670-LAP (S.D.N.Y.). In their complaints, plaintiffs asserted claims under federal common law or, alternatively, state nuisance law, to abate the "public nuisance" of "global warming." They asked the court to cap defendants' emissions of carbon dioxide from their plants and then reduce those emissions by some unspecified percentage each year for at least a decade.

Plaintiffs' assertion of "federal common law of public nuisance" and their attempt to assert tort claims based on the worldwide phenomenon of global warming raised a number of legal issues, including whether any federal common-law cause of action to abate global climate change was inconsistent with basic separation-of-powers principles, whether any cause of action that might have encompassed such claims had been displaced, whether plaintiffs lacked standing, and whether the alternative state law–based public nuisance claims were preempted. When the case was argued in the district court, Judge Loretta A. Preska also raised, and defendants endorsed, the concept that the basic separation-of-powers principles relied upon by defendants could also lead to the conclusion that plaintiffs' claims raised nonjusticiable political questions.

FEDERAL COMMON LAW OF PUBLIC NUISANCE

While the Supreme Court had previously recognized a federal common-law claim to abate an interstate public nuisance, *see, e.g., Missouri v. Illinois*, 180 U.S. 208 (1901) ("*Missouri*"), and *Illinois v. Milwaukee*, 406 U.S. 91 (1971) ("*Milwaukee I*"), the circumstances giving rise to claims in those cases are markedly different from those that exist with respect to any of the theories related to global warming. In *Missouri*, the Court permitted a claim to enjoin the discharge of "contagious and typhoidal diseases" into interstate waterways. In *Milwaukee I*, the Court recognized Illinois's right to challenge the discharge of raw sewage into Lake Michigan by cities in Wisconsin. The Supreme Court recognized the need for such judicial relief

as the *quid pro quo* for the states' surrender of their right to assert their claims through war on their neighbors.

In contrast, the scientific theories that attribute global warming to greenhouse gases recognize that those emissions are not inherently hazardous and not directly traceable to any single source. Instead, carbon dioxide, which comes from a wide variety of human activities over many decades, mixes in "relatively homogenous concentrations around the world." *See Control of Emissions from New Highway Vehicles and Engines*, 68 Fed. Reg. 52922, 52927 (Sept. 8, 2003). In moving to dismiss the *Connecticut* case, defendants argued that the unique nature of global warming distinguished it from the previously recognized federal common-law cause of action to abate "simple type" interstate nuisances. Indeed, defendants argued that any effort to address global warming involved matters of high policy that could be resolved only by the political branches of the federal government. The Supreme Court's *Massachusetts v. EPA* decision bolsters defendants' argument, recognizing that the state's "sovereign prerogatives [to regulate greenhouse gas emissions] are now lodged in the Federal Government, and Congress has ordered EPA to protect Massachusetts (among others)" in this area. 127 S. Ct. at 1454.

Moreover, just as the federal common-law cause of action initially recognized in *Milwaukee I* was subsequently displaced by the enactment of the Clean Water Act, *see Illinois v. Milwaukee*, 451 U.S. 304 (1982) ("*Milwaukee II*"), defendants argued that any federal common-law claim applicable to global warming has been displaced by multiple congressional actions legislating on global warming and carbon dioxide emissions. *See, e.g.*, National Climate Program Act of 1978, 15 U.S.C. §§ 2901 *et seq.*; Energy Security Act, Pub. L. No. 96-294, tit. VII, § 711, 94 Stat. 611, 774–75 (1980); Global Change Research Act, 15 U.S.C. §§ 2932, 2933, 2936(3); Energy Policy Act of 1992, Pub. L. No. 102-486, § 1604, 106 Stat. 2776, 3002. Indeed, in 2005, Congress debated, but ultimately rejected, mandatory caps on greenhouse gas emissions. *See* 151 Cong. Rec. S6892, 6894 (daily ed. June 21, 2005). While plaintiffs contended that no displacement could occur unless Congress enacted a comprehensive remedy, Congress's decision not to adopt the remedy plaintiffs wanted should not give federal courts license to circumvent Congress and judicially create such federal law. The holding in *Massachusetts* that greenhouse gases come within the Clean Air Act's definition of "air pollutant" should conclusively resolve the displacement issue in defendants' favor and require the dismissal of the federal common-law claims asserted in *Connecticut*.[1]

ARTICLE III STANDING

Article III's core standing requirements—injury-in-fact, causation, and redressability—were another basis to challenge the sufficiency of plaintiffs' claims. While plaintiffs claimed a number of current environmental effects from global warming, they did not allege actual, current injuries from those effects. Instead, plaintiffs' complaints spoke of the future harms expected to occur over the next 100 years. Defendants also contended that the alleged future harms described by plaintiffs are not "fairly traceable" to defendants because, under any theory, defendants' emissions are harmful only as part of the worldwide, homogenous mix of greenhouse gases, as discussed more fully below with respect to *Comer* and the causation argument. Finally, defendants argued that plaintiffs' alleged injuries from global warming cannot be redressed by the relief they sought against these utilities in light of the extraordinarily small contribution attributed to these defendants and the failure to control concurrent emissions around the world from other sources.

In *Massachusetts*, the majority held that the Commonwealth has standing and, to a limited extent, discussed each standing element in the context of global warming. 127 S. Ct. at

1453–58. Nonetheless, the majority relied heavily on the fact that Congress had created the right to challenge agency action in 42 U.S.C. § 7607(b)(1), based upon which it noted that a party " 'can assert that right without meeting all the normal standards for redressability and immediacy.' " 127 S. Ct. at 1453 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)). The Court noted that this statutory right was "of critical importance to the standing inquiry." *Id.*

No such statutory right of review is present in *Connecticut*, and as a result, *Massachusetts* should not directly affect the standing arguments. Not surprisingly, however, the state plaintiffs in *Connecticut* have already tried to use the Court's language regarding the "special solicitude" owed states protecting their quasi-sovereign interests to bolster their arguments before the Second Circuit. The Supreme Court's statements regarding standing, however, must be read in the context of the statutory right to challenge EPA's actions, which the Court noted did not require a plaintiff to meet "the normal standards for redressability and immediacy." 127 S. Ct. at 1453. Indeed, given the great emphasis in Justice Stevens' rebuttal to Justice Roberts' dissent that Massachusetts—the one state found to have standing—was asserting its rights under federal law, *i.e.*, the Clean Air Act, the Court's decision should not be read to alter traditional standing analysis when a state asserts claims under state law. *See* 127 S. Ct. at 1455 n.17.

THE DISTRICT COURT DECISION AND THE POLITICAL QUESTION DOCTRINE

In dismissing both the *Connecticut* and *Open State* cases, Judge Preska concluded that plaintiffs' claims raised complex issues of such economic and political significance that initial policy decisions by Congress and the Executive Branch will be required to address them. Because addressing those complex issues "requires identification and balancing of economic, environmental, foreign policy, and national security interests" and demands a "single-voiced statement of the Government's views," the district court determined that plaintiffs' claims raised nonjusticiable political questions. *Connecticut*, 406 F. Supp. 2d 265, 274 (S.D.N.Y. 2005) (internal quotation marks and citation omitted). The appeals in *Connecticut* and *Open Space* were argued on June 7, 2006, and remain pending. *See Connecticut v. American Elec. Power Co.*, No. 05-5104-cv (2d Cir.); *Open Space Institute, Inc. v. American Elec. Power Co.*, No. 05-5119-cv (2d Cir.).

COMER V. MURPHY OIL, U.S.A.

Global warming litigation moved beyond the automobile and utility industries in the wake of the devastation across Mississippi caused by Hurricane Katrina in 2005. As the citizens of Mississippi struggled to recover, some of them turned to the courts. The lawsuit began as a class action against seven insurance companies for claims arising out of property damage. *Cox v. Nationwide Mut. Ins. Co.*, No. 1:05-cv-00436 (S.D. Miss. filed Sept. 20, 2005). Just 10 days later, plaintiffs amended their complaint to name five major oil companies based on allegations that they contributed to global warming, which in turn caused or intensified Hurricane Katrina and thus its effects. After the district court dismissed the insurance-company defendants,[2] plaintiffs again amended their complaint to name additional oil companies, chemical companies, utility companies (including Xcel Energy), and coal companies as defendants.

In their Third Amended Complaint (recaptioned *Comer v. Murphy Oil, U.S.A.*), plaintiffs asserted state-law claims for negligence, trespass, public nuisance, fraud, unjust enrichment, and civil conspiracy. On behalf of Xcel Energy, the Firm filed a motion to dismiss that, like *Connecticut* and *Open Spaces*, challenged plaintiffs' standing and argued that plaintiffs' claims raise nonjusticiable political questions. Xcel

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THE AMERICANIZATION OF AVIATION CLAIMS:

LITIGATING EXTRATERRITORIAL AIR CRASHES IN THE U.S. COURTS AND THE IMPACT ON AVIATION AND AIRLINES

by John D. Goetz and Dana Baiocco

"As a moth is drawn to the light, so is a litigant drawn to the United States."

— *Smith Kline & French Lab. Ltd. v. Bloch*, 1 W.L.R. 730 (1983).

In recent years, the plaintiffs' bar increasingly has used U.S. courts to adjudicate aviation claims, no matter where in the world the cause of action may have arisen. Indeed, plaintiffs have become more aggressive in seeking recovery in U.S. courts, especially for extraterritorial air crashes, and without regard to whether the accident has any meaningful contacts with the U.S. forum.[1]

In our opinion, plaintiffs seek refuge in American courts because they believe an air-crash case will have substantially greater value if litigated in the U.S. rather than in the forum of the accident or in a decedent's residence abroad. The availability of punitive damages, trial by jury, the size of verdicts, publicity, lack of consistent damage caps for noneconomic damages, and the difficulty of obtaining summary judgment in some U.S. state courts all add to the benefits of filing in an American forum.

This article highlights the potential exposure for airlines and aviation defendants sued in American courts, and it provides examples of the "Americanization" of aviation cases arising out of non-U.S. incidents. We discuss the recent development of "blocking statutes," which make *forum non conveniens* transfers of U.S. litigation to another forum more difficult. We also offer strategies to return aviation cases to more appropriate forums for resolution.

WHAT U.S. LITIGATION MEANS FOR AVIATION DEFENDANTS

U.S. courts offer procedural and substantive advantages to plaintiffs that are not available in other jurisdictions around the world. The procedural advantages weigh heavily in favor of a U.S. litigant:

- Loose standards for *in personam* jurisdiction give plaintiffs several possible venues in the U.S.
- Liberal pleading rules allow plaintiffs to sue multiple defendants and enter courts with vague claims.
- "Mass actions" and multidistrict litigation, where the claims of groups of plaintiffs are lumped together in one action for joint disposition, are available.
- Broad pretrial discovery increases a defendant's litigation costs and improves plaintiffs' bargaining position in settlement negotiations.
- Publicity from an unfettered press and strategies employed by media-savvy plaintiffs' counsel enhance the emotional components of a case.
- Availability of jury trials adds the emotions and sympathies of laypersons in evaluating the evidence.

Litigating an aviation claim in U.S. courts offers various substantive advantages as well to a plaintiff:

- Expanded statutes of limitations for filing claims, including federal limitations periods under the Death on the High Seas Act ("DOHSA").[2]
- Differences in privilege law applicable to internal communications.
- Relaxed evidentiary standards for the admission of key evidence, which may allow non-U.S. documents such as investigative reports to be admitted in evidence.
- Availability of punitive damages and the prospect of most state courts allowing such claims to be submitted to the jury.
- Lack of consistent damage caps for noneconomic damages, allowing juries to make untethered awards for claims of lost care, comfort, and companionship.

In addition, the "American System," whereby the losing party does not pay the expenses of the winner, reduces a plaintiff's risk in filing suits and encourages risk-averse plaintiffs to sue in the U.S. At least one study has indicated that non-U.S. residents are more successful, in terms of recovery, in bringing claims in U.S. courts than are U.S. plaintiffs. Kevin M. Clermont & Theodore Eisenberg, *Xenophilia in American Courts*, 109 Harv. L. Rev. 1120, 1122 (1996). Contingent-fee agreements, which are not available in most countries, further add to the zeal of the U.S. plaintiffs' bar to retain claimants abroad to file suit in the U.S.

All of these factors can make the allure of U.S. courts irresistible. And the increased risk to a defendant in litigating an aviation case in the U.S. is measurable.

EXAMPLES OF "AMERICANIZED" AVIATION CLAIMS

There are many examples of aviation cases being litigated in U.S. courts despite few meaningful contacts. A classic example involves the crash of a 737-300 commercial airliner near Palembang, Indonesia: The claims of numerous non-U.S. residents were litigated in Los Angeles County and in federal court for years despite few meaningful contacts with the U.S. Specifically, in *Junitha Bee, et al. v. Kavlico Corp., et al.*, Case No. BC 202587 (Superior Court, Los Angeles County), 32 non-U.S. plaintiffs filed claims arising out of the crash of SilkAir Flight 185. The state judge promptly denied the international airline's motion to dismiss for lack of personal jurisdiction. The court then proceeded to litigate the merits of the case, including the cause of the crash, over a six-year period.

The first claims tried to verdict were those of family members related to three passengers—two who had resided in Singapore and one who had resided in New Zealand. Incredibly, the trial court adjudicated the claims under *California* law, despite the fact that plaintiffs (and the passengers) lacked any connection whatsoever to California. (Defendants filed choice-of-law motions before trial.) The jury applied California's open-ended standards for assessing noneconomic damages and returned a verdict in these three cases (only) in the amount of $43.6 million. Special Verdict, *Bee v. Kavlico*, No. BC 202587 (July 6, 2004). The trial judge denied post-trial motions and eventually entered judgment on the verdict. The court next scheduled five additional

passenger-case suits for a damages trial. The verdict was on appeal when the litigation was resolved.

More recently, in *Esheva, et al. v. Siberia Airlines, et al.*, Civil Action No. 06-cv-11347, 161 plaintiffs filed suit in October 2006 in federal district court in the Southern District of New York pertaining to the crash of Siberia Airlines Flight 778 in Irkutsk, Russia. All plaintiffs reside in Russia, the airline is located outside the U.S., and the flight originated and took place entirely in Russia. The evidence pertaining to the crash was recovered, and is located, in Russia. Yet plaintiffs have sought refuge in the U.S. courts to adjudicate their claims. Personal jurisdiction was based on a boilerplate contractual dispute resolution procedure requiring that controversies between codefendants (*i.e.*, the international airlines and the leasing company) be adjudicated in New York.[3] Plaintiffs are *not* parties to the contract and have no connection whatsoever with the contract or the forum chosen by their counsel. Nevertheless, the case remains pending in the U.S.

General aviation cases having minimal or no meaningful contacts with the U.S. also are routinely filed in U.S. courts. For example, in *DiBacco, et al. v. Parker Hannifin, et al.*, plaintiffs—residents of Argentina—filed suit in Broward County, Florida, asserting claims based on the crash of a Cessna T210J in Rosario, Argentina. Case No. 06-007037-CIV-05 (Broward County, Florida). The pilot and occupants of the plane were citizens of Argentina; the plane was registered, maintained, and operated in Argentina; the crash occurred in Argentina; most of the wreckage is stored there; and Argentinean authorities investigated the incident. Yet numerous defendants were sued in Florida, only some of whom are located in the state. Motions to transfer were filed, but the case remains pending in Florida.

There are ways to avoid cases like these that are filed in American courts. Traditionally, a motion to dismiss or transfer based on the doctrine of *forum non conveniens* is filed at the *early stage* of a case to move the matter back to a forum more appropriately connected with the accident. In addition, early settlements of U.S. claims that may adversely affect a defendant's *forum non conveniens* motion often are effectuated to improve the chances that the motion will be granted. However, the trend now is for non-U.S. countries to enact statutes designed to "block" cases from being returned from the U.S. to a more appropriate forum, so that litigants can benefit from American-style litigation.

BLOCKING STATUTES

Several Latin American countries have passed or are considering "blocking statutes," which divest their civil courts of jurisdiction when their residents' claims are filed in the U.S. These statutes attempt to preempt or "block" adjudication of claims in the resident's own courts, and they are asserted by a plaintiff to defeat a defendant's motion to transfer a U.S.-filed case under the doctrine of *forum non conveniens*. Because the U.S. court is blocked from transferring the case to another forum for resolution, the plaintiff argues that no "feasible, alternative forum" exists under the factors courts must consider when deciding a motion to transfer. Accordingly, the plaintiff contends that the suit must remain in the U.S.[4]

Various countries have either passed or are considering blocking statutes: Costa Rica, Dominica, Ecuador, Guatemala, Honduras, Nicaragua, and Venezuela. These statutes are based on the Latin American Parliament "Model" Statute,[5] which provides:

> **Model Law on International Jurisdiction and Applicable Law to Tort Liability**
>
> * * *
>
> **Art. 1 National and international jurisdiction.** The petition that is validly filed, according to both legal systems, in the defendant's domiciliary court, extinguishes national jurisdiction. The latter is only reborn if the plaintiff desists of his foreign petition and files a new petition in the country, in a completely free and spontaneous way.
>
> **Art. 2 International tort liability. Damages.** In cases of international tort liability, the national court may, at the plaintiff's request, apply to damages and to the pecuniary sanctions related to such damages, the relevant standards and amounts of the pertinent foreign law.

U.S. courts have struggled to interpret and apply these blocking statutes in determining whether a U.S.-filed aviation case is more appropriately adjudicated elsewhere. Courts also may

face challenges in determining whether a statute remains in effect, because obtaining up-to-date materials on the current status of non-U.S. legislative acts may be difficult.[6]

Other complications may prevent transfer of an aviation case that is inappropriately filed in the U.S. For example, non-U.S. plaintiffs have argued that treaties between the U.S. and their forum countries, along with international conventions, give them the right to litigate in U.S. courts *on equal footing* with American citizens.[7] U.S. plaintiffs further argue that multiple alternative forums *support* litigation in their chosen forum, *i.e.*, a U.S. court, because the court cannot hold that a specific, alternative forum is the *most* convenient alternative under a *forum non conveniens* analysis.[8] Finally, plaintiffs are quick to argue that a U.S. judge should adjudicate a case and deny transfer, despite minimal contacts, because it is interesting, challenging, or unique to a particular locale.

STRATEGIES TO ENHANCE TRANSFER OF LITIGATION INAPPROPRIATELY FILED IN U.S. COURTS

The trend of "Americanizing" aviation claims has real significance for the aviation industry. Litigating an aviation mishap in a U.S. court can significantly affect costs, legal fees, insurance rates and, eventually (depending on the outcome), overall competitiveness. Airlines and aviation defendants that believe litigation has been inappropriately filed in U.S. courts can pursue strategies to maximize the chances that such suits will be transferred to another venue for adjudication.

First, a well-written motion to transfer or dismiss based on the doctrine of *forum non conveniens* at the *early stage* of a case is a must. If the conditions are ripe, U.S. courts are much more apt to transfer (or dismiss) a case at an early stage than they would be if the case was permitted to move forward into merits discovery. The motion should persuasively argue that a weighing of private and public interest factors supports transfer of the action to a forum outside the U.S.[9] The motion should be supported by public documents to support factual statements about why the case should be transferred. In addition, statements about another country's laws or procedure should be supported by an affidavit from an expert witness and copies of relevant statutes or rules.

If record evidence is needed to support a motion to transfer, the aviation defendant should file a motion requesting bifurcated, limited discovery on the relevant factors underlying a *forum non conveniens* analysis. The motion should demonstrate to the court that a valid issue exists as to whether the case should proceed in the U.S. It also should outline *specific*, targeted discovery that needs to be completed on the relevant factors. The motion should further propose a limited time frame of 30 or 60 days for completion of the discovery.

Second, a defendant should consider entering into early-settlement negotiations to resolve all U.S.-based claims in a case involving a "mass action," or multidistrict litigation. Resolving limited U.S. claims from an otherwise non-U.S. mishap will enhance the chances that a court will dismiss or transfer the action based on *forum non conveniens*, because few or no meaningful contacts with the U.S. will remain.

Third, an airline or aviation defendant should consider a stipulation that would permit the refiling of claims in the U.S., if a blocking statute is applied by a non-U.S. resident's court. This stipulation would allow a defendant to demonstrate to the U.S. court that the plaintiff will not be left without a remedy, in the event the transferee court will not allow the case to be refiled because of a blocking statute.

Finally, where a *forum non conveniens* transfer may not be advisable, a defendant should file a choice-of-law motion early in the proceeding. Even if the case will be litigated in a U.S. court, the defendant should closely examine whether another country's laws are more advantageous with regard to liability and/or damages. Often they are. If this indeed is the case, the issue must be raised promptly with the trial court.

CONCLUSION

Jones Day has effectively used many of these strategies in the aviation cases it has defended and in other multijurisdictional and multidistrict litigation. In combating the trend of using U.S. courts to litigate aviation claims, one maxim especially applies: "Chance favors the prepared." ■

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PUNITIVE DAMAGES IN LIGHT OF THE R
SUPREME COURT DECISI

ECENT UNITED STATES ON IN *PHILIP MORRIS USA V. WILLIAMS*

by Jason E. Keehfus, Emily C. Baker, and Frank T. Bayuk

The United States Supreme Court recently put additional constitutional strictures on punitive damages awards by ruling that a jury may not award such damages in order to punish a defendant for harming nonparties—that is, for harming individuals not before the court. In a 5-4 decision in *Philip Morris USA v. Williams*, the Court held that a punitive damages award based in part on the jury's desire to punish a defendant for harming nonparties amounts to a "taking of 'property'… without due process." *Williams*, 127 S. Ct. 1057, 1060 (2007). The Court's holding, however, fell short of prohibiting the jury from considering *any* evidence of harm to others in assessing a punitive award. Instead, the Court found that "[e]vidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible." *Id.* at 1064. This hazy distinction, as well as related practical considerations it raises, are explored further below.

SIGNIFICANT RECENT SUPREME COURT DECISIONS REGARDING PUNITIVE DAMAGES

Just over 15 years ago, in *Pacific Mutual Life Insurance Co. v. Haslip*, the United States Supreme Court observed that "[p]unitive damages have long been part of traditional state tort law." *Haslip*, 499 U.S. 1, 15 (1991) (*quoting Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984)); *but see id.* at 25 (Scalia, J., concurring) (conceding that while they have a long history in American jurisprudence, "they have always been controversial"). There, the Court also noted that under the "traditional common-law approach," punitive damages are assessed by a jury instructed to consider the severity of the wrong committed and the need to deter similar conduct. *Id.* at 15. After the jury imposes punitive damages, according to the *Haslip* Court, the amount of the award is reviewable by the trial court in the first instance, and later by appellate courts, to ensure it is reasonable.

Moreover, the Court found that it was unaware of any state or federal court that had ruled that the "traditional common-law approach" to assessing punitive damages was, by itself, violative of due process. *Id.* at 16–17. However, while affirming the punitive damages award in that case—and finding that punitive damages can be levied to both punish and deter—the Court recognized that "unlimited jury discretion … in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities." *Id.* at 18.

Only five years after its decision in *Haslip*, the Supreme Court once again examined the constitutionality of a punitive damages award, this time in *BMW v. Gore*. In *Gore*, the plaintiff alleged in the trial court that he had been the victim of fraud when he discovered that his new black BMW sports sedan—absent any noticeable flaws—appeared to have been repainted at some point prior to his purchase. *Gore*, 517 U.S. 559, 563 (1996). At trial, BMW admitted that it had, in fact, repainted portions of the car in accord with its nationwide policy that if a car was damaged during manufacture or transport, and the cost of repairing the damages did not exceed 3 percent of the suggested retail price, the car was sold as new without advising the dealer that any repairs had been made. *See id.* at 563–564.

To prove actual damages, the plaintiff relied on the testimony of a former BMW dealer that the value of a repainted car was "approximately 10 percent less than the value of a new car" that had not been similarly repaired—or in this case, about $4,000. *See id.* at 564. In requesting punitive damages, the plaintiff introduced evidence that since the time BMW implemented its nationwide policy concerning cars damaged during manufacture or transport, it sold 983 cars as new without disclosing that those cars had been repainted before sale. *See id*. Arguing that nearly 1,000 cars had been sold in this way, and by using the actual damages estimate of $4,000 per car, the plaintiff sought nearly $4 million in punitive damages. *See id.* As the plaintiff requested, the jury ultimately awarded $4,000 in compensatory damages and $4 million in punitive damages.

On appeal, the Alabama Supreme Court ordered that the punitive damages award be remitted to $2 million because the jury "improperly computed the amount of punitive damages by multiplying [the plaintiff's] compensatory damages by the number of similar sales in other jurisdictions." *See id.* at 567 (*citing BMW v. Gore*, 646 So. 2d 619, 627 (Ala. 1994)). In reversing the judgment and remanding the case for "transcend[ing] the constitutional limit," the Supreme Court held that there were three "indici[a] of the reasonableness" of a punitive damages award, which have since become commonly known as "guideposts": (i) the degree of reprehensibility of the conduct at issue; (ii) the extent of parity between the harm (or potential harm) and the punitive damages award; and (iii) comparisons between the punitive damages award and civil or criminal penalties that could be imposed for comparable misconduct. *Id.* at 575–586.

In 2003, in *State Farm Mut. Automobile Ins. Co. v. Campbell*, the Supreme Court applied the *Gore* guideposts in analyzing whether an award of $145 million in punitive damages was excessive and in violation of the Due Process Clause where compensatory damages totaled only $1 million. *State Farm*, 538 U.S. 408 (2003). In the lower court, plaintiffs sued defendant State Farm in a bad-faith action for failing to settle claims associated with an automobile accident. During trial, the court allowed the plaintiffs to introduce evidence of State Farm's out-of-state conduct—or, more specifically, "extensive expert testimony regarding fraudulent practices by State Farm in its nation-wide operations." *Id.* at 415. After the jury awarded the plaintiffs $2.6 million in compensatory damages and $145 million in punitive damages, the trial court reduced the awards to $1 million and $25 million, respectively. *See id.* On appeal, the Utah Supreme Court endeavored to apply the *Gore* guideposts but found that the ratio of punitive and compensatory damages was not excessive. *See id.* at 416.

In its application of *Gore*, in particular its analysis under the first guidepost (the reprehensibility of State Farm's conduct), the Supreme Court stated that "[a] defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages." *Id.* at 422. In other words, the Supreme Court found, "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis." *Id.* at 423; *see also id.* at 425 (noting that, though the Court would not "impose a bright-line ratio which a punitive damages award cannot exceed," punitive damages awards significantly exceeding a single-digit ratio were unlikely to comport with due process); *Haslip*, 499 U.S. at 23 (noting that a punitive damages award of more than

four times the amount of compensatory damages is "close to the line … of constitutional impropriety").

The Court further held that:

> An application of the *Gore* guideposts to the facts of this case, especially in light of the substantial compensatory damages awarded … likely would justify a punitive damages award at or near the amount of compensatory damages. The punitive award of $145 million, therefore, was neither reasonable nor proportionate to the wrong committed, and it was an irrational and *arbitrary deprivation of the property* of [State Farm].

Id. at 429 (emphasis added).

THE "NUANCE" CREATED BY *WILLIAMS*

Most recently, in *Williams*, the Court vacated an Oregon Supreme Court decision that a $79.5 million punitive damages award comported with due process. In its opinion, the Court noted that it would not determine whether the award at issue was "grossly excessive," but instead would "only consider the Constitution's procedural limitations" with respect to the award. *Williams*, 127 S. Ct. at 1063.

In doing so, the Court held that due process bars states from assessing punitive damages awards "to punish a defendant for injury that it inflicts upon nonparties … *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation." *Id.* The Court refused, however, to impose a blanket prohibition on the admission of evidence of harm to nonparties, but rather agreed that it may be taken into account for purposes of determining reprehensibility, given that "conduct that risks harm to many is likely more reprehensible than conduct that risks harm to only a few." *Id.* at 1065.

Put differently, juries may, according to the Court, consider harm to third parties to assess reprehensibility of the defendant's conduct (which could in theory increase a punitive damages award), but may not do so to directly punish the defendant for harm to those third parties. Justice Stevens perhaps highlighted this confusing distinction best when he stated simply that "[t]his nuance eludes me." *Id.* at 1067 (Stevens, J., dissenting).

PRACTICAL CONSIDERATIONS IN LIGHT OF *WILLIAMS*

As always, parties facing potential punitive damages awards must develop an aggressive punitive damages defensive strategy early in the case, including using discovery to narrow the punitive damages issue at trial and considering what experts or other witnesses may be needed for a punitive damages phase. Moreover, in light of *Williams*, jury instructions must be carefully prepared to ensure that the jury does not punish directly for harm to third parties. A calculated motions strategy may also be pursued to exclude or limit evidence and argument related to alleged harm to nonparties. At the very least, if such evidence is admitted, strongly worded limiting instructions should be sought at such time. Regardless, counsel must be vigilant at trial to prevent the introduction of "procedures that create an unreasonable and unnecessary risk of … confusion" for the jury regarding how it may take into account harm to nonparties. *Id.* at 1065.

Finally, in spite of the Court's apparently elusive distinction regarding how juries may consider evidence of harm to third parties, its decision in *Williams* undoubtedly represents an additional constraint, grounded in due process, on punitive damages awards—one that parties facing punitive damages awards should closely examine. ■

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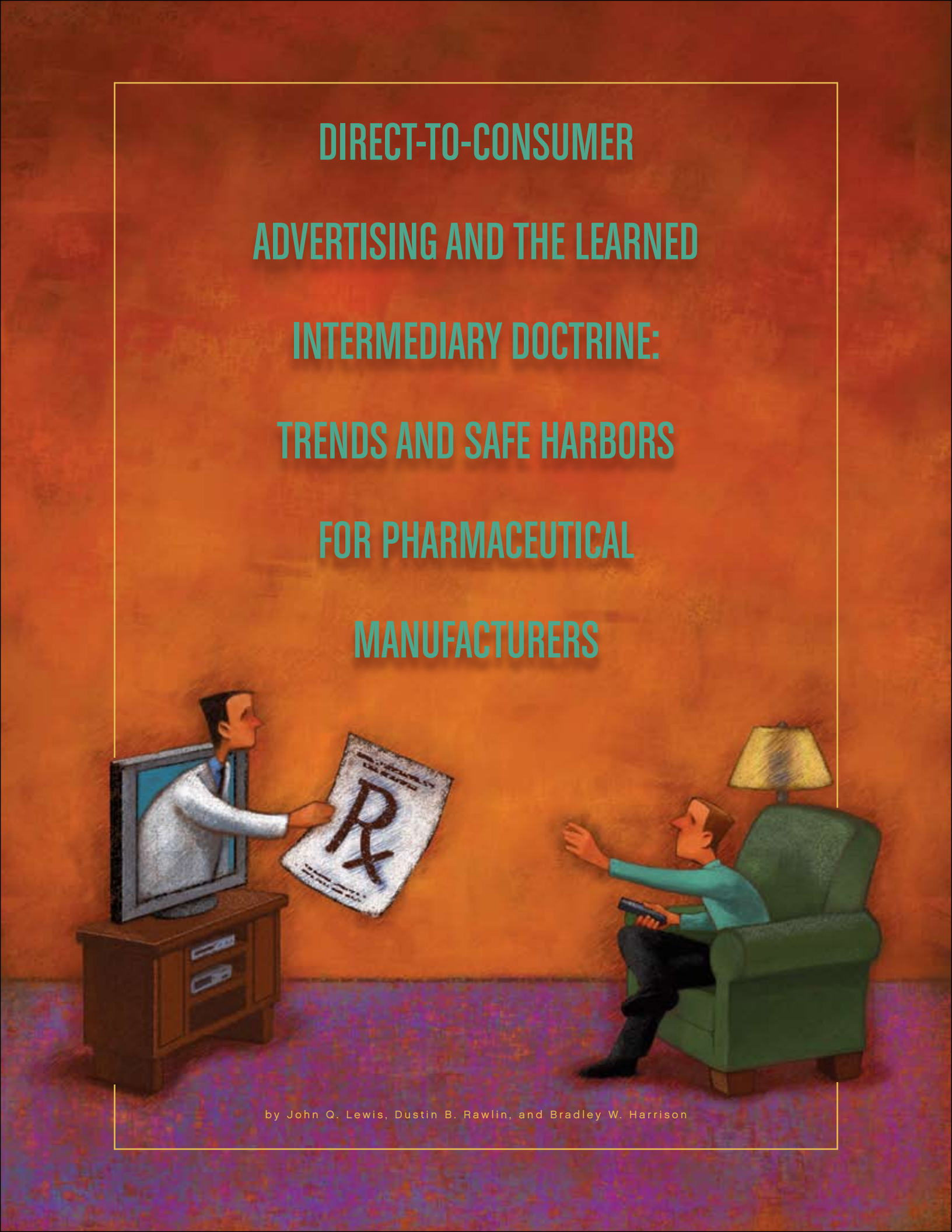
DIRECT-TO-CONSUMER ADVERTISING AND THE LEARNED INTERMEDIARY DOCTRINE: TRENDS AND SAFE HARBORS FOR PHARMACEUTICAL MANUFACTURERS



by John Q. Lewis, Dustin B. Rawlin, and Bradley W. Harrison

Prescription pharmaceutical manufacturers continue to increase spending on direct-to-consumer ("DTC") advertising. This trend prompted outspoken consumer advocates, legal commentators, and personal injury attorneys to pursue aggressive strategies in an effort to undermine the well-established learned intermediary doctrine and potentially increase manufacturer liability in failure-to-warn product liability cases. Most courts have declined to follow a 1999 New Jersey Supreme Court decision holding that DTC advertising creates an exception to the learned intermediary doctrine. But a recent West Virginia Supreme Court decision once again calls the viability of the doctrine into question.

In addition, DTC-advertising opponents lately have pressed state and federal legislators and regulators to tighten oversight of DTC advertising. While this development ultimately may increase the administrative burden for drug makers, it also may serve to further shield these manufacturers from liability in personal injury litigation. This article examines historical trends in pharmaceutical DTC advertising and outlines best practices for manufacturers to maximize the strength of defenses in failure-to-warn product liability litigation.

THE LEARNED INTERMEDIARY DOCTRINE INTERSECTS WITH DTC ADVERTISING

The learned intermediary doctrine arms pharmaceutical manufacturers with a powerful defense in product liability lawsuits. Unlike most product liability cases, where the law imposes a duty on manufacturers to warn consumers directly about the risks of their products, the learned intermediary doctrine excuses a prescription drug manufacturer from warning each patient directly. Rather, a drug manufacturer prevails on a failure-to-warn claim so long as it provided an adequate warning to the physician, usually accomplished through the product's labeling or product insert. Physicians possess sophisticated educational backgrounds and expertise in their field and thus are better able to comprehend scientific warnings. First developed more than 50 years ago, the learned intermediary doctrine is followed in more than 40 states, the District of Columbia, and Puerto Rico. (Vermont courts have apparently never had the opportunity to consider the doctrine.)

The learned intermediary doctrine is premised on real-world dynamics in the health-care field. A physician has a relationship with the patient and can perform the appropriate balancing test, weighing the benefits of prescribing the drug against the risks of doing so. A physician is well positioned to take into account all relevant information regarding the patient, such as medical history and symptoms. On the other hand, a manufacturer possesses far less, if any, information necessary to provide the patient-specific analysis required before a drug is prescribed.

Within the past 20 years, pharmaceutical manufacturers have changed how they advertise their products. Before 1980, manufacturers tended to market their products solely to health-care professionals through sales personnel and written materials. Starting in the mid-1980s, however, DTC television advertisements dramatically increased. Boots Pharmaceuticals is often identified as the first manufacturer to advertise a prescription drug to consumers; in 1983, it used a television spot to promote its prescription-strength ibuprofen product, Rufen. In 1984, Upjohn implemented an advertising campaign for its prescription hair-regrowth product, Rogaine. Several other manufacturers followed suit.

The U.S. Food and Drug Administration ("FDA") initially encouraged the increased dissemination of information regarding prescription drugs. But some outspoken critics suggested that DTC advertisements served to mislead individual consumers and interfere with the physician/patient relationship. Others asserted that DTC advertisements would result in patients' pressuring their physicians to prescribe certain drugs, thus disrupting the carefully balanced risk/benefit analysis performed by physicians. After some deliberation, the FDA requested a voluntary moratorium on DTC advertising to further study its impact on consumers and the doctor-patient relationship.

In 1985, the FDA issued a rule requiring DTC advertisements to meet the regulatory requirements governing advertisements to medical providers. Under the rule, pharmaceutical companies were required to provide a so-called "brief summary" to consumers. The "brief summary" typically included the entire, lengthy reprinting of FDA-approved labeling for the drug, including detailed warnings, potential complications, and contraindications. This requirement chilled advertising to consumers on radio or television because manufacturers were unable to feasibly provide the "brief summary" in such a limited time and space. To avoid the rule, pharmaceutical companies subsequently invested in advertisements that either: (1) mentioned a drug's name but not what condition it treated, or (2) discussed the symptoms of a condition and urged patients to seek medical advice.

The FDA's DTC-advertising rule did not last long. Schering-Plough's 1996 television ad for Claritin allergy medication featured the distinctive voice of Cole Porter singing, "Blue skies shining on me, nothing but blue skies do I see." In the advertisement, Schering-Plough did not mention the name of the drug or the condition it treated, presumably to avoid the FDA rule. The vague advertisement left many consumers confused, a result that prompted the FDA to reevaluate its DTC-advertising rule.

On August 8, 1997, the FDA published *Draft Guidance for Industry: Consumer-Directed Broadcast Advertisements*. The FDA relaxed its prior rule on how pharmaceutical manufacturers could advertise to consumers, especially with respect to broadcast-media advertisements. Instead of requiring manufacturers to provide all information required by the "brief summary," manufacturers need only make an "adequate provision" for interested members of the public to obtain the FDA-approved labeling and warnings. A manufacturer meets FDA requirements by providing in the advertisement a toll-free number for consumers to request information, a web-site address where the warnings are posted, a cross-reference to a print advertisement that contains the "brief summary," and a referral to a physician for consultation before making a decision about medical treatment. The new rule resulted in increased spending on DTC advertisements. From 1997 to 2005, total DTC spending increased from $1.1 billion to $4.2 billion, averaging an increase of about 20 percent per year.

This rise in DTC-advertising expenditures caused courts and commentators to raise new questions about the viability of the learned intermediary doctrine. For example, the American Law Institute Reporters initially took no position on the doctrine in early drafts of the *Restatement (Third) of Torts: Products Liability* § 6(d), leaving open the question of whether manufacturers should have a duty to warn patients directly. Later, the section was modified to include a proposed exception to the learned intermediary doctrine that required manufacturers to always warn patients directly when "the manufacturer advertised or otherwise promoted the drug or medical device directly to users and consumers." By the time the *Restatement (Third)* was published in 1998, the drafters deleted that proposal in favor of a comment that left the issue to be decided by "developing case law." *See* § 6(d), comment b.

The New Jersey Supreme Court's subsequent decision in *Perez v. Wyeth Laboratories Inc.*, 734 A.2d 1245 (N.J. 1999), altered the litigation risk calculus for pharmaceutical manufacturers engaging in DTC advertising. There, the plaintiffs

had prescription-only Norplant contraceptive capsules implanted in their upper arms. The plaintiffs claimed that the manufacturer had engaged in a "massive advertising campaign" directed at women on television and in magazines. According to the plaintiffs, while the ads lauded the benefits of Norplant capsules, they lacked warnings about possible side effects. The trial court dismissed the claims because, under the learned intermediary doctrine, the manufacturer had properly warned physicians about the risks of the product. That the manufacturer also had advertised its product directly to consumers was immaterial because "a physician nevertheless retains the duty to weigh the benefits and risks associated with a drug before deciding whether the drug is appropriate for the patient." *Id.* The appellate court affirmed summary judgment for the manufacturer.

The New Jersey Supreme Court reversed. In so doing, the court considered the dramatic increase in spending on DTC advertising by pharmaceutical companies and found that "[p]ressure on consumers is an integral part of drug manufacturers' marketing strategy." *Id.* at 1251. Citing the *Restatement (Third)*'s invitation to "develop case law" related to DTC advertising, the court found that DTC advertising had eroded the predicates upon which the learned intermediary doctrine was founded. Specifically, the court reasoned that modern patients increasingly drive treatment decisions versus previous eras, when doctors had a "paternalistic" approach. Moreover, the court pointed to managed care as reducing the time a physician could spend with a patient informing her of the risks associated with a particular drug. In addition, because manufacturers spent $1.3 billion on advertising, the court took comfort in the fact that manufacturers had the resources to communicate effectively with each patient. Based on these developments, the court found that DTC advertising "belies each of the premises on which the learned intermediary doctrine rests" (*id.* at 1256) and thus created an exception to the learned intermediary doctrine.

After *Perez*, some commentators proclaimed the end of the learned intermediary doctrine as we once knew it. But eight years after *Perez* was decided, "no state [had] joined New Jersey" in adopting the DTC-advertising exception to the learned intermediary doctrine. *E.g., Colacicco v. Apotex, Inc.*, 432 F. Supp. 2d 514, 547 n.30 (E.D. Pa. 2006) (citing cases). *See also In re Norplant Contraceptive Prods. Liab. Litig.*, 215 F. Supp. 2d 795, 811–813 (E.D. Tex. 2002) ("New Jersey law is in direct conflict with the law of every other jurisdiction in the United States"). Most considered *Perez* to be the exception, not the rule.

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and fat content,[8] those claiming they were injured because they had purchased McDonald's fries believing they were free of gluten and milk or wheat allergens,[9] and vegans (vegetarians who do not eat animal byproducts, such as milk) who asserted that they would not have consumed McDonald's fries if they had known they contained dairy products.[10] A number of these cases were centralized by the Multidistrict Litigation Panel and are now pending in the Federal District Court for the Northern District of Illinois. *In re McDonald's French Fries Litig.*, No. MDL-1784, 444 F. Supp. 2d 1342 (Jud.Pan.Mult.Lit. 2006); *In re McDonald's French Fries Litig.*, No. 06-4467 (N.D. Ill.).

The recent *E. coli* bacteria outbreaks have also demonstrated the heightened readiness to litigate against the food and beverage industry. Even before health officials warned about possible contamination from spinach, one Seattle law firm had already filed its first lawsuit, and within weeks of the outbreak, it filed several others.[11] Indeed, just three days after the FDA advised the public not to eat fresh spinach, a proposed class action was filed in Cook County, Illinois, to recover the purchase price paid for fresh spinach that had to be discarded because of concerns over the *E. coli* outbreak.[12] On the regulatory front, in November 2006, CSPI formally petitioned the FDA to issue regulations regarding inspections and mandatory standards governing manure, water, and sanitation on farms to help reduce future incidents of *E. coli* contamination. CSPI Press Release, *CSPI Petitions FDA to Regulate Manure, Water and Sanitation on Farms* (Nov. 15, 2006).

The same routine recently unfolded in reaction to an *E. coli* outbreak associated with Taco Bell. The same Seattle law firm filed two federal lawsuits just days after Taco Bell pulled green onions from its restaurants. *Minis v. Yum! Brands, Inc.*, No. 06-5392 (E.D. Pa.); *Keller v. Yum! Brands, Inc.*, 06-1480 (N.D.N.Y.). Illustrating the difficulty in accurately tracing the source of food contamination at a national fast-food chain with a menu containing many different food ingredients, in December 2006, investigators from the Centers for Disease Control and Prevention said the likely source of the outbreak was not the green onions that Taco Bell used, but lettuce. FDA officials said they planned to continue trying to trace the contaminated lettuce to its source.[13] The finding led to the voluntary dismissal of claims against the supplier of Taco Bell's green onions. *Minis v. Yum! Brands, Inc.*, No. 06-5392, Stipulation of Dismissal (E.D. Pa. Dec. 14, 2006); *Keller v. Yum! Brands, Inc.*, 06-1480, Stipulation of Dismissal (N.D.N.Y. Dec. 14, 2006).

Whether courts will determine that any of these purported class actions satisfy such basic class-action requirements as commonality, predominance, and manageability will depend in part upon the contours of the different consumer-fraud statutes they invoke and whether those statutes require proof of such individualized elements as reliance and actual deception. A recent 2006 New York Appellate Division opinion illustrates the hurdles confronting a proposed consumer-fraud action against a food manufacturer in New York. *In Klein v. Robert's American Gourmet Food, Inc.*, 28 A.D.3d 63, 808 N.Y.S.2d 766 (2d Dep't 2006), the plaintiffs sued the maker of the snack food Pirate's Booty after it was revealed that it and related products had a fat and caloric content substantially higher than advertised. The Appellate Division reversed the trial court's certification order, finding that because some of the plaintiffs' New York consumer-fraud and common-law claims required a showing that class members relied on the defendants' allegedly misleading fat and calorie statements and were deceived, the class was overbroad, as some consumers may have purchased the snacks regardless of their fat and caloric content. *Id.* at 72–73, 808 N.Y.S.2d at 773.[14]

In contrast, it is no surprise that parents and advocacy groups have announced their intention to file proposed class-action lawsuits in Massachusetts under the state's liberal consumer-protection law, Massachusetts General Law Chapter 93A, targeting Viacom's and Kellogg's marketing of junk food to children[15] and the sale and marketing of soft drinks in schools by soft-drink companies and their bottlers.[16] Plaintiffs who claim to have been injured by an unfair or deceptive act or practice may seek class certification directly under Chapter 93A " 'if the use or employment of the unfair or deceptive practice has caused similar injury to numerous other persons.' " *Aspinall v. Philip Morris Cos., Inc.*, 813 N.E.2d 476, 481 (Mass. 2004). Courts considering class-certification motions under Chapter 93A need not adhere to each of the certification elements required under Federal

Rule 23. *Id.* at 485. In addition, the statute requires neither proof that a plaintiff relied on a representation nor evidence that a defendant intended to deceive the plaintiff. *Id.* at 486. An advertisement may be deceptive under Chapter 93A if it merely has the capacity or tendency to mislead reasonable consumers. *Id.* at 487–89.

Even under Massachusetts' liberal consumer-protection statute, however, the basic requirements of causation and injury are required for there to be a justiciable controversy.[17] Apart from questions of reliance or damages, whether any of the recently filed proposed class actions will gain traction may turn on these threshold elements to maintain a claim. For instance, the plaintiffs in the proposed Massachusetts action against Viacom and Kellogg appear to claim that each child they represent was injured simply when he or she witnessed one of the allegedly improper Kellogg advertisements because children are subsequently hard-wired to want food that "contributes to poor health." CSPI Pre-suit letter to the CEOs of Viacom and Kellogg (Jan. 18, 2006). There is no allegation that any of the children actually consumed the food products of "poor nutritional quality" at issue and suffered any adverse health consequences, such as diabetes or obesity, because of the products. *Id.* If they never actually consumed the products or suffered any diet-related harm from them, or their parents purchased them for reasons wholly unrelated to the allegedly improper advertisements, where is the injury?

Assuming any of the pending food suits get past the threshold pleading stage and into document and deposition discovery, as it appears the *Pelman* case recently has, it is conceivable that consumers may learn that certain fast foods and beverages do indeed reflect years of research and design efforts by food-company scientists and marketing executives and that still more products will be shown to contain unexpected ingredients or a higher fat and calorie content. Individual plaintiffs who can demonstrate physical or economic injury from purchasing such products in reliance on misleading manufacturer statements may have a consumer-fraud claim. In the class-action context, however, just as certification has been denied or reversed in virtually every class action proposed against the cigarette manufacturers,[18] the individualized inquiry inherent in a consumer food or beverage transaction should preclude litigating such claims on a classwide basis, given such consumer-specific questions as why a product was purchased, whether a company statement or advertisement was objectively deceptive, and whether a consumer's alleged physical injuries were caused by the product or multiple alternative risk factors.

These lawsuits appear to be attempts to use the courts for social engineering and behavior modification. Such issues should be the domain of legislatures and regulators. At an even more basic level, they are the responsibility of parents and consumers old enough to understand that advertising is designed to sell a product and that certain foods and beverages should be consumed in moderation as part of a balanced diet.

LEGISLATIVE ACTION

Recently, there has been an increase in various legislative efforts to regulate the food industry. One such measure recently approved by the New York City Board of Health requires all city restaurants to phase out artificial trans fats from the foods that they serve. New York City Health Dept., *Press Release—Board of Health Votes to Phase Out Artificial Trans Fat From New York City's Restaurants* (Dec. 5, 2006). Chicago is considering a similar prohibition affecting restaurants with more than $20 million in annual sales.[19] The Boston Public Health Commission is also contemplating a trans-fat ban.[20] In addition, the New York City Board of Health passed a measure requiring some restaurants to make calorie information publicly available by posting it on menus and menu boards, where consumers can see it when they order. New York City Health Dept., *Press Release—Board of Health Votes to Require Calorie Labeling in Some New York City Restaurants* (Dec. 5, 2006).

Trans fats are a byproduct generated when liquid vegetable oil is turned into solid oil through hydrogenation, a chemical process.[21] Restaurants and food manufacturers have used trans-fat oils in their food products, claiming it made their food crispier or moister, which customers preferred, and gave baked goods a longer shelf life. Some studies have linked trans fats to increased levels of low-density lipoprotein (or "bad cholesterol") in the blood, leading to an increased risk

of heart disease, and decreased levels of high-density lipoprotein (or "good cholesterol"),[22] although some commentators remarking on the recent trans-fat ban by the New York City Board of Health say the science on the risk of trans fats is inconclusive.[23]

Whether the various attacks on the food industry will ever gain traction is unknown. What we do know is that with millions of dollars at stake, the "obesity war" will surely continue to be fought for some time on a multitude of fronts. ■

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[1] John Riley & David Henry, *Tobacco Firms Fire Back, Countering Jury Award of $400G*, Newsday, June 15, 1988, at 7.

[2] Geoffrey Cowley, et al., *A Split Decision on Smoking—But a Jury Breaks the Industry's Winning Streak*, Newsweek, June 27, 1988, at 48.

[3] Kate Zernike, *Lawyers Shift Focus From Big Tobacco to Big Food*, N.Y. Times, Apr. 9, 2004.

[4] Marian Burros, *Eating Well; Food Companies Agree To Modify Claims on Fat*, N.Y. Times, Oct. 30, 1991.

[5] Marian Burros, *A Suit Seeks to Bar Oreos as a Health Risk*, N.Y. Times, May 14, 2003; *see also* http://www.bantransfats.com.

[6] John Schmeltzer, *New fat stats for fries? Not lovin' it—Self-testing reveals McDonald's nutritional data was wrong*, Chicago Tribune, Feb. 9, 2006, at C-1; *McDonald's Updates Info. on Fries*, The Wall Street Journal, Feb. 9, 2006, at D6.

[7] David P. Hamilton, *McDonald's French Fries Contain Possible Allergens Wheat, Milk*, The Wall Street Journal, Feb. 13, 2006, at B4.

[8] *Raingevirtz v. McDonald's Corp.*, No. 06-605 (E.D.N.Y.); *Reyes v. McDonald's Corp.*, No. 06 CH 2745 (Ill. Cir. Ct. Cook Cty.). These actions were successfully transferred and removed, respectively, to the U.S. District Court for the Northern District of Illinois. On November 8, 2006, all claims other than the consumer-fraud count under Illinois law were dismissed. *Raingevirtz v. McDonald's Corp.*, No. 06-2813 (N.D. Ill.); *Reyes v. McDonald's Corp.*, No. 06-1604 (N.D. Ill.).

[9] *Levy v. McDonald's Corp.*, No. 06-60236 (S.D. Fl.); *Moffatt v. McDonald's Corp.*, No. 06 CH 03305 (Ill. Ch. Ct. Cook Cty.). The same day the *Moffatt* complaint was filed in state court in Illinois, the parents of a five-year-old girl with food allergies sued McDonald's in Florida state court, asserting she had fallen ill from undisclosed gluten in the company's french fries. *Chimiak v. McDonald's Corp.*, No. 2006-1597 (Fl. Palm Beach Cty.).

[10] *Sugich v. McDonald's Corp.*, No. BC347519 (Ca. Super. Ct. Los Angeles Cty.). The *Sugich* proposed class also includes consumers who would not have purchased McDonald's fries if they had known they were not wheat- or gluten-free.

[11] Heather Won Tesoriero & Peter Lattman, *How a Tiny Law Firm Made Hay Out of Tainted Spinach*, The Wall Street Journal, Sept. 27, 2006, at B1.

[12] Eric Herman, *Class-action lawsuit filed in Cook County*, Chicago Sun-Times, Sept. 19, 2006.

[13] Associated Press, *Lettuce most likely source of Taco Bell E. coli, feds say,* Dec. 13, 2006, *available at* http://www.cnn.com/health.

[14] Proof of actual deception and injury is required under the consumer-fraud statutes of other states as well, including Illinois and California, where some of the recent McDonald's actions were filed. *See Price v. Philip Morris, Inc.*, No. 96236, 2005 Ill. LEXIS 2071, at *140 (Ill. Sup. Ct. Dec. 15, 2005) ("[T]o meet the causation element of a Consumer Fraud Act claim …, the members of the class must have actually been deceived in some manner by the defendant's alleged misrepresentations of fact.") (citation omitted); *United Investors Life Insur. Co. v. Waddell & Reed, Inc.*, 23 Cal. Rptr. 3d 387, 388–89 (Cal. Ct. App. Jan. 20, 2005) (discussing the 2004 adoption of Proposition 64, which amended California's unfair competition statute, California Business and Professions Code § 17200 *et seq*., to prohibit a private action under the statute unless the plaintiff has suffered injury in fact and has lost money or property).

[15] *See* CSPI Pre-suit letter to the CEOs of Viacom and Kellogg (Jan. 18, 2006), *available at* http://www.cspinet.org/new/200601181.html; CSPI Press Release, *Parents and Advocates Will Sue Viacom & Kellogg* (Jan. 18, 2006).

[16] *See* Banzhaf e-mail notice to school boards, school board associations, and their counsel, *Imminent Class Action Law Suits Over Soft Drink Sales in School* (Feb. 17, 2006), *available at* http://banzhaf.net/docs/sodawarn.

[17] *Hershenow v. Enterprise Rent-A-Car Co.*, 840 N.E.2d 526, 533–35 (Mass. 2006) (confirming that although consumers are not required to prove reliance on deceptive conduct to invoke Chapter 93A, they must be able to demonstrate causation, that is, that the alleged deceptive act injured them or caused them to suffer a loss). At least two bills are currently pending before the Massachusetts Legislature to curtail the ability of plaintiffs to seek class certification of consumer-fraud claims under Chapter 93A. Noah Schaffer, *Lawyers split on 93A reform bill*s, Massachusetts Lawyers Weekly, Mar. 20, 2006, at 11.

[18] *E.g., Barnes v. Am. Tobacco Co.*, 161 F.3d 127 (3d Cir. 1998), *cert. denied*, 526 U.S. 1114 (1999); *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *Small v. Lorillard Tobacco Co.*, 252 A.D.2d 1, 679 N.Y.S.2d 593 (1st Dep't 1998), *aff'd*, 94 N.Y.2d 43 (1999).

[19] Monica Davey, *Chicago Weighs New Prohibition: Bad-for-You Fats*, N.Y. Times, July 18, 2006.

[20] *Trans Fats: Will They Get Shelved?* The Wall Street Journal, Dec. 9–10, 2006, at A6.

[21] *Id.*

[22] *Id.*

[23] *See, e.g., The Bloomberg Diet*, The Wall Street Journal, Dec. 9–10, 2006, at A8.

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Energy's motion, however, led with a causation argument, *i.e.*, the application of the remoteness doctrine, and also argued preemption, personal jurisdiction, and the failure to state a claim as to each of the specific causes of action pled by plaintiffs.[3]

REMOTENESS

Courts have long recognized that, while any tortious act can cause "ripples of harm" extending to a multitude of eventual persons, only those harms that are direct, proximate, and not remote are actionable. *See Holmes v. Securities Investor Prot. Corp.*, 503 U.S. 258, 266 n.10 (1992). If the alleged injuries are too remote, proximate causation is missing as a matter of law without the need for factual development. The remoteness doctrine has been applied by federal courts of appeals to dismiss union health fund cases against tobacco companies and by courts to dismiss cases brought by cities and counties against firearms manufacturers for alleged costs incurred by those governments as a result of the criminal misuse of firearms in their communities. *See, e.g., Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912, 930, 933–34 (3d Cir. 1999) ("sheer number of links in the chain of causation" demonstrated absence of proximate cause); *Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536, 541 (3d Cir. 2001).

In *Comer*, remoteness applies because there are simply too many "links in the chain" of causation from defendants' emissions to plaintiffs' alleged injuries resulting from Hurricane Katrina. Those links include at least (1) the emission of carbon dioxide from a single defendant's source; (2) the combination of those emissions with other greenhouse gases from around the world over many decades; (3) an increase in the amount of solar energy trapped in the atmosphere; (4) over an extended period of time, a resulting climate change and warming of the water in the Atlantic Ocean, Caribbean Sea, and Gulf of Mexico; (5) various weather developments that generated the conditions that gave rise to Hurricane Katrina; (6) the intensification of an otherwise weaker Katrina caused by the warmer temperatures of the earth's waters; (7) Katrina striking Mississippi; and (8) resulting damage to plaintiffs' properties from the intensified strength of Katrina.

The causation chain inherent in plaintiffs' claims is not only lengthy in its number of links, but also reflects the alleged combined effects of greenhouse gas emissions over an extraordinary period of time. At the same time, the chain involves contributions of greenhouse gases from around the world, alleged atmospheric changes on a planetary basis, and multiple interrelated and extraordinary weather phenomena that are, at least in part, naturally occurring. Simply stated, under the facts alleged in plaintiffs' complaint, the court would face an insurmountable hurdle in trying to determine what portion of plaintiffs' damages was caused by a particular defendant's actions as opposed to the actions of other persons or other factors. The remoteness doctrine requires the dismissal of such claims.

In the course of its standing analysis in *Massachusetts*, the Supreme Court addressed causation in a fairly short discussion, presumably so abbreviated because, as the Court noted, "EPA does not dispute the existence of a causal connection between man-made greenhouse gas emissions and global warming." 127 S. Ct. at 1457. As a result, the Court found that "EPA's refusal to regulate such emissions 'contributes' to Massachusetts' injuries." *Id.* Again, because the Court's statements are made in the context of the challenge to EPA's rulemaking decision, they are not applicable to *Connecticut* or *Comer*. EPA may be compelled to act and can act without regard to other potential causes and without having to make a finding sufficient for legal causation that would tie a particular defendant or emission source to a particular harm. In contrast, a civil lawsuit requires a specific determination of legal causation as to each defendant as a predicate to either abatement or damages. Thus, in the context of *Comer*, the remoteness argument should continue to be a powerful—indeed, perhaps even more important—argument.

PREEMPTION

As a general matter, preemption occurs when (i) federal law occupies a field, (ii) Congress expressly states the preemptive effect of a statute, and (iii) state law or regulation conflicts with the method or purpose of the federal statute. Xcel Energy argued that plaintiffs' state-law claims are preempted first because the issue of global climate change

is so uniquely national that there is simply no room for a patchwork of state laws that would be inconsistent, ineffective, and counterproductive. In addition, because the imposition of state tort liability on defendants for emitting "too much" greenhouse gas would necessarily compel emission reductions to forestall future liability, plaintiffs' claims would circumvent and frustrate the federal government's policy eschewing mandatory limits in favor of incentives for voluntary reductions and the development of new technology. (Indeed, Xcel Energy has already undertaken numerous voluntary actions to reduce its greenhouse gas emissions.) *See Geier v. American Honda Motor Co.*, 529 U.S. 861, 874–75 (2000). Finally, state laws imposing mandatory emission limits on greenhouse gases should be preempted because they would give the President "less to offer" other countries and "less diplomatic leverage" in his foreign-policy efforts to bring developing countries into the process of limiting worldwide greenhouse gas emissions. *See Crosby v. National Foreign Trade Council*, 530 U.S. 363, 377 (2000).

The *Massachusetts* decision does not address preemption directly. While the Court states that "[c]ollaboration and research do not conflict with any thoughtful regulatory effort; they complement it," 127 S. Ct. at 1461, its statement was directed at EPA's argument that congressional actions since the Clean Air Act are inconsistent with the notion that Congress intended to regulate greenhouse gases when it passed the Clean Air Act. That is different from saying that *state* regulation of greenhouse gases would not be in conflict with the federal approach. Moreover, as indicated above, given the Court's statements that the authority to address greenhouse gas emissions—if not regulate them via mandatory limits—is lodged with the federal government, the preemption argument remains powerful. Permitting a patchwork of state-law tort actions would be inconsistent with the unique national interest in regulating those emissions in a uniform manner, *see United States v. Locke*, 529 U.S. 89, 108 (2000), and with the President's stated foreign-policy objective of securing concessions from developing countries in exchange for any restrictions within the United States on greenhouse gas emissions.

CONCLUSION

Even as *Connecticut* and *Comer* work their way through the courts, the fluid nature of EPA's reaction to the Supreme Court decision in *Massachusetts* and new legislation being proposed in Congress increase the uncertainties over future global warming litigation. Companies that find themselves targeted in such cases, however, have a variety of legal responses with which to defend such claims effectively. ■

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[1] In *California v. General Motors Corp.*, No. C06-05755-MJJ (N.D. Cal.), the State of California asserted a similar federal common-law public nuisance claim against a number of automobile manufacturers related to automobile emissions. Defendants there have made similar arguments regarding the absence of a federal common-law claim and displacement. Because the Supreme Court's *Massachusetts* decision deals specifically with regulation of automobile emissions under the Clean Air Act, it should be beyond question that any federal common-law claim has been displaced. Defendants' motion to dismiss has been briefed and argued and is pending in the *California* case.

[2] The district court required plaintiffs to refile separate actions against their own insurers and mortgage lenders (also added in the amended complaint), which many did. In one case, *Broussard v. State Farm Fire & Cas. Co.*, No. 1:06-cv-0006-LTS (S.D. Miss.), judgment was entered for policy limits of $211,222 and punitive damages of $1 million. State Farm has announced that it will not write any new commercial or homeowners insurance policies in the state.

[3] Plaintiffs have filed a motion for leave to file a Fourth Amended Complaint that would add a claim under federal common law to support subject-matter jurisdiction. If leave is granted over defendants' objections, plaintiffs' federal common-law claim would be subject to the same attacks as those in *Connecticut*.

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Appellate courts and legislatures must determine the proper policy guiding such claims in order to bring certainty to the standards and process and to stem trial courts from assuming a regulatory role. Within a year of the 2005 passage of the Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901–03, a number of public nuisance claims against firearms manufacturers were dismissed. *See, e.g., Ileto v. Glock, Inc.*, 420 F. Supp. 2d (C.D. Cal. 2006) (granting motion to dismiss public nuisance and other claims based on Protection of Lawful Commerce in Arms Act). That Act provides immunity to firearms manufacturers and dealers from any lawsuit, pending or otherwise, fitting the Act's definition of "qualified civil liability action," which (subject to delineated exceptions) includes an action against a manufacturer for any type of damages or equitable relief resulting from the criminal misuse of a firearm. 15 U.S.C. §§ 7902–03. Even with the passage of this Act, however, some courts have permitted claims to proceed by finding that the public nuisance claim fits an exception to the Act or that the Act itself violates constitutional guarantees of due process and separation of powers. *See, e.g., City of Gary, Indiana v. Smith & Wesson Corp.*, 801 N.E.2d 1222 (2003) and subsequent decisions therein.

Similarly, late in 2006, after five Ohio cities sued former lead-pigment manufacturers, the Ohio legislature passed amended Senate Bill 117, reaffirming that lead-paint plaintiffs suing in public nuisance must meet the elements of proof required under product liability law. That law was enacted during the final days of former governor Bob Taft's administration, only to be purportedly vetoed by the current governor, Ted Strickland, upon assuming office. The circumstances surrounding the enactment and subsequent veto of that law are the subject of litigation in the Supreme Court of Ohio. Public nuisance claims may arise, as in Ohio, even when a product liability act predates the filing of the public nuisance claim. In New Jersey, the intermediate appellate court determined that the New Jersey Products Liability Act ("PLA") did not apply to the public nuisance action brought by various public entities of New Jersey against former manufacturers of lead products. That court determined that the manufacturers' conduct fell within the environmental tort action exception to the PLA. *In re Lead Paint Litigation*, 2005 WL 1994172, at *10–11 (N.J. Super. Ct. App. Div.), *cert. granted*, 185 N.J. 391 (2005).

As the Ohio, New Jersey, and gun legislation illustrate, even when the legislature speaks, product manufacturers still have difficulty avoiding public nuisance suits, which are viewed as a means to fund publicly desirable projects. What is required is product liability legislation specifying and comprehensively encompassing the obligations of product manufacturers for all claims based on their manufacture, distribution, promotion, and sale of a product, including public nuisance actions. Until then, because all products have some risk of harm, especially if the product is misused or not maintained, the expansion of public nuisance to products may have a profound effect on the business landscape of any manufacturer of a mass-produced product. ■

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[1] *See County of Santa Clara v. Atlantic Richfield Co.*, No. 1-00-CV-788657 (Cal. Super. Ct. April 4, 2007) (public attorneys cannot constitutionally delegate their prosecutorial function to contingency-fee attorneys who had filed public nuisance claims against lead-paint manufacturers on behalf of various California cities and counties).

[2] *See, e.g., Bateman v. Johns-Manville Sales Corp.*, 781 F.2d 1132, 1133 (5th Cir. 1986) (asbestos case dismissed for plaintiffs' failure to identify the specific products that caused their disease or any of the product manufacturers); *Skipworth v. Lead Indus. Ass'n*, 690 A.2d 169, 175 (Pa. 1997) (summary judgment for defendants because plaintiff was unable to identify the manufacturer of the lead pigment); *Brown v. Philip Morris Inc.*, 228 F. Supp. 2d 506, 515 (D.N.J. 2002) (summary judgment for defendant tobacco company where plaintiff provided insufficient evidence of exposure to the company's product).

[3] *See, e.g., State v. Lead Indus. Ass'n*, No. 99-5226, 2004 WL 2813747*1 (R.I. Super. Ct. Nov. 9, 2004) (lead-pigment manufacturers); *McClendon v. Georgia Dep't of Cmty. Health*, 261 F.3d 1252, 1254–55 (11th Cir. 2001) (discussing tobacco settlement); *Camden County Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp.*, 273 F.3d 536, 541 (3d Cir. 2001) (firearms manufacturers).

[4] *See Connecticut v. American Electric Power Co., Inc.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005), *appeal pending*, No. 05-5104-cv (2d Cir. argued June 7, 2006) and *Open Space Institute, Inc. v. American Electric Power Co., Inc.*, No. 05-5119-cv (2d Cir. argued June 7, 2006); *Comer v. Murphy Oil, U.S.A.*, No. 1:05-CV-00436-LTS-RHW (S.D. Miss.) (motions to dismiss pending).

[5] W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* 616 (5th ed. 1984) ("There is perhaps no more impenetrable jungle in the entire law

than that which surrounds the word 'nuisance.' "). *See also City of Chicago v. American Cyanamid Co.*, 823 N.E.2d 126, 130 n.2 (Ill. App. Ct. 2005) (summarizing the historical confusion surrounding the law of nuisance).

[6] *See Tioga Public School Dist. v United States Gypsum Co.*, 984 F.2d 915, 920 (8th Cir. 1993) (holding that public nuisance theory does not apply to the sale of products and recognizing that such an application would "devour in one gulp the entire law of tort").

[7] *See, e.g., County of Santa Clara v. Atlantic Richfield Co.*, 137 Cal. App. 4th 292 (2006) (permitting public nuisance claim to proceed to seek abatement of the alleged hazard but precluding claim for damages); *In re Lead Paint Litigation*, 2005 WL 1994172 (N.J. Super. Ct. App. Div.), *cert. granted*, 185 N.J. 391 (2005) (permitting city to pursue recovery of public funds allegedly spent to abate lead paint from building interiors and the costs of providing medical treatment to lead-poisoned population).

[8] *See, e.g.*, W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* 269 (5th ed. 1984); *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1116 (Ill. 2005) ("we are reluctant to state that there is a public right to be free from the threat that some individuals may use an otherwise legal product (be it a gun, liquor, a car, a cell phone, or some other instrumentality) in a manner that may create a risk of harm to another"); *District of Columbia v. Beretta U.S.A., Corp.*, 872 A.2d 633, 650 (D.C. 2005) ("Deplorable though these facts may be, the ready availability of firearms in the nation at large, and the sheer number and variety of opportunities by which persons intent on acquiring them unlawfully can do so, counsel strong restraint on the part of a court asked to hold defendants—individual or corporate—answerable for a common-law nuisance.... In keeping with our own decisions and others we have found persuasive, we decline to relax the common-law limitations of duty, foreseeability, and direct causation so as to recognize the broad claim of public nuisance the District has alleged.").

[9] *City of St. Louis v. Benjamin Moore & Co.*, No. E. D. 87702 (Mo. Ct. App. E. D. Dec. 26, 2006) (affirming dismissal of claim for failure to meet product identification requirements and transferring case to the Supreme Court of Missouri for consideration of the standards of proof for causation in a public nuisance case).

[10] *State v. Lead Indus. Ass'n*, No. 99-5226, 2004 WL 2813747 (R.I. Super. Ct. Nov. 9, 2004) (declining to require the state to prove that the manufacturers were the proximate cause of the specific complained-of injuries); Creswell, Julie, "The Nuisance That May Cost Billions," *N.Y. Times*, April 2, 2006. An appeal to the Supreme Court of Rhode Island is pending from the trial court's February 2007 denial of post-trial motions.

[11] *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924 (1980) (market share liability recognized in cases involving the miscarriage drug DES). *See also* cases cited *infra* at n.15.

[12] Since its origination in the case of *Hall v. E.I. DuPont de Nemours & Co.*, 345 F. Supp. 353 (E.D.N.Y. 1972), enterprise or industrywide liability has been universally rejected. *See, e.g., Schwartzbauer v. Lead Indus. Ass'n*, 794 F. Supp. 142, 145–46 (E.D. Pa. 1992); *Ryan v. Eli Lilly & Co.*, 514 F. Supp. 1004, 1017 (D.S.C. 1981) (theory is "repugnant to the most basic tenets of tort law"); *Zaft v. Eli Lilly & Co.*, 676 S.W.2d 241, 245–46 (Mo. 1984).

[13] *See Summers v. Tice*, 199 P.2d 1 (Cal. 1948); Restatement (Second) of Torts § 433(B)(3) (1965) (embodying alternative liability theory) and comment h. thereto.

[14] *See Rastelli v. Goodyear Tire & Rubber Co.*, 591 N.E.2d 222, 224 (N.Y. 1992) (parallel activity without more is insufficient to establish the agreement necessary to maintain a concert-of-action claim); *Sindell*, 607 P.2d at 933 (rejecting concert-of-action claim where parallel conduct was reliance on each other's testing and promotion of DES). *But see In Re Asbestos Cases*, 543 F. Supp. 1152, 1158 (N.D. Cal. 1982) (allowing plaintiffs to proceed on concert-of-action theory).

[15] *See, e.g., Jefferson v. Lead Indus. Ass'n*, 106 F.3d 1245, 1247–48 (5th Cir. 1997); *Santiago v. Sherwin-Williams Co.*, 3 F.3d 546, 552 (1st Cir. 1993); *City of Philadelphia v. Lead Indus. Ass'n*, 994 F.2d 112, 126 (3d Cir. 1993); *Skipworth v. Lead Indus. Ass'n, Inc.*, 690 A.2d 169, 172 (Pa. 1997); *City of Chicago v. American Cyanamid Co.*, 823 N.E.2d 126, 135–36 (Ill. App. Ct. 2005); *Goldman v. Johns-Manville Sales Corp.*, 514 N.E.2d 691, 702 (Ohio 1987). *See also* cases adopting market share liability in the DES context. *Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 539 N.E.2d 1069, 541 N.Y.S.2d 941 (N.Y.), *cert. denied*, 493 U.S. 944 (1989); *Martin v. Abbott Labs.*, 102 Wash. 2d 581, 689 P.2d 368 (Wash. 1984).

[16] *Thomas v. Mallett*, 2005 WI 129, 285 Wis. 2d 236, 701 N.W.2d 523 (Wis. 2005). *See also Collins v. Eli Lilly Co.*, 116 Wis. 2d 166, 342 N.W.2d 37 (Wis.) (adopted risk-contribution theory, which relaxed plaintiff's burden in proving causation in her negligence and strict liability claims against 12 drug companies that produced or marketed DES), *cert. denied*, 469 U.S. 826 (1984).

[17] *Thomas*, 2005 WI 129, ¶¶ 135–36, 285 Wis. 2d 236, ¶¶ 135–36, 701 N.W.2d 523, ¶¶ 135–36.

[18] *See generally Milwaukee Metro. Sewerage Dist. v. City of Milwaukee*, 2005 WI 8, 277 Wis. 2d 635, 691 N.W.2d 658 (Wis. 2005) (City of Milwaukee sued by sewerage district for negligence and nuisance seeking to recoup the costs of rebuilding areas that were allegedly destroyed when city water main collapsed).

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Perez now has company. The West Virginia Supreme Court's recent opinion in *State ex rel. Johnson and Johnson v. Karl*, *et al.*, No. 33211, 2007 W. Va. LEXIS 57 (W. Va. June 27, 2007), promises to rekindle debate about whether the learned intermediary doctrine can survive in a world with DTC advertising. That case involved a wrongful death lawsuit filed by the estate of a woman who had been prescribed Propulsid and died three days after she began taking the drug. The defendant manufacturer, through a petition for writ of prohibition before trial, sought to overturn the trial court's failure to adopt the learned intermediary doctrine. The West Virginia Supreme Court denied the writ. In so doing, the court held that "manufacturers of prescription drugs are subject to the same duty to warn consumers about the risks of their products as other manufacturers" and declined "to adopt the learned intermediary exception to this general rule." *Id.* at *55. The court borrowed heavily from the New Jersey Supreme Court's analysis in *Perez*, noting that "significant changes" have postdated the adoption of the learned intermediary doctrine in many states, including "the initiation and intense proliferation of direct-to-consumer advertising, along with its impact on the physician/patient relationship, and the development of the internet as a common method of dispensing and obtaining prescription drug information." *Id.* at *30–31.

Detractors of DTC advertising persist. Critics continue to argue that DTC advertisements typically do not support major public-health issues, in that the majority of these ads focus on expensive drugs for bothersome, incurable conditions such as toenail fungus or acid reflux. Others assert that DTC advertising needlessly increases health-care spending by encouraging patients to insist on expensive name-brand medications they have seen on television rather than equally effective generic brands. Still others point to the large numbers of FDA warning letters issued to pharmaceutical companies regarding DTC advertising and conclude that these advertisements mislead many consumers.

The focus on DTC advertising has spilled over to legislative and regulatory bodies. Congress is considering legislation that would give the FDA additional authority to impose tighter safety requirements on drugs once they go to market, including heavy restrictions on consumer advertising. For example, the Senate recently passed Senate Bill 1082, the Prescription Drug User Fee Amendments of 2007, by a 93-1 vote. Among other things, the bill grants the FDA increased power to oversee DTC advertisements and authorizes the imposition of civil fines of up to $300,000 for manufacturers that disseminate false or misleading advertising. While it is unclear at this point what the final legislation will entail with regard to DTC advertising, most agree that the eventual new law will strengthen FDA oversight of DTC advertising in many ways.

States, too, are focused on legislation to restrict DTC advertising. California, for instance, has proposed various bills that would, among other things, require manufacturers of drugs for life-threatening chronic conditions to pay the California Department of Health Services a rebate equal to the costs of marketing the drug. Another bill would have prohibited the Department from entering into a contract to purchase a drug or placing the drug on the Medi-Cal contract drug list if the product had been advertised in California via DTC advertising. While these measures failed, California did pass a resolution requesting that the FDA aggressively monitor and regulate DTC advertising of prescription drugs by pharmaceutical companies and urging the President and Congress to ban DTC advertising. *See* California Assembly Joint Resolution 49 (Rep. Nation) (2006). Numerous states also have attempted to require pharmaceutical companies to disclose their DTC-advertising spending. Such measures have been successful in Vermont, Maine, Minnesota, West Virginia, and the District of Columbia as well as California.

IMPACT OF DTC-ADVERTISING TRENDS ON PRODUCT LIABILITY LITIGATION

Increased federal and state regulatory oversight and additional reporting requirements no doubt will increase financial and administrative burdens for pharmaceutical companies that promote products through DTC advertising. But this trend may benefit manufacturers as well. Detailed FDA regulations on DTC advertising, including such things as preapproval of advertisements, strengthen a manufacturer's federal preemption defense in failure-to-warn product liability lawsuits, even in jurisdictions that may have declined to adopt the learned intermediary doctrine. *E.g., Perez*, 734 A.2d at 1259 ("For all

practical purposes, absent deliberate concealment or non-disclosure of after-acquired knowledge of harmful effects, compliance with FDA standards should be virtually dispositive of such claims."). In addition to federal preemption, compliance with governing federal regulations, in some jurisdictions, provides for manufacturer immunity or a rebuttable presumption of nondefectiveness in product liability lawsuits. *E.g.*, Tex. Civ. Prac. & Rem. Code § 82.007 (providing for rebuttable presumption that a manufacturer is not liable for failure to warn if labeling and warnings are compliant with FDA regulations); Mich. Comp. Laws § 600.2946(5) (providing that a prescription drug is presumptively not defective if compliant with FDA regulations, subject to limited exceptions).

Pharmaceutical manufacturers should consider, at a minimum, implementing two "best practices" to maximize the effectiveness of FDA compliance in future lawsuits premised on DTC advertisements. First, manufacturers should thoroughly document the FDA review and approval process for DTC advertisements. Among other things, this ensures that compliance evidence is readily available for affirmative use in failure-to-warn lawsuits that implicate the advertisement. Second, manufacturers should continue to emphasize both in warnings to physicians and in DTC advertisements that DTC advertisements do not in any way intend to replace the necessary physician/patient consultation or risk/benefit analysis required before any drug is prescribed for a patient. ■

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THE AMERICANIZATION OF AVIATION CLAIMS
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[1] Earlier this year, we attended the International Air Transport Association's Legal Symposium and reported on this trend to general counsels of several of the world's international airlines.

[2] *See* 46 U.S.C. § 761 *et seq.* DOHSA offers plaintiffs a three-year statute of limitations. *Id*. § 763a.

[3] The complaint in the action alleges: "Defendants are further subject to the jurisdiction of this court pursuant to the forum selection clause included in the lease agreement entered into between SIBERIA and AIRBUS LEASING, which governs the aircraft involved in the accident, and which provides that each party irrevocably 'submits to the non-exclusive jurisdiction of the … United States District Court for the Southern District of New York.' " Compl. ¶ 10, *Esheva, et al. v. Siberia Airlines, et al.*; No. 06-cv-11347 (DC) (S.D.N.Y.).

[4] *See, e.g., Martinez v. Dow Chemical Co.*, 219 F. Supp. 2d 719 (E.D. La. 2002) (refusing to grant FNC motion because Costa Rica, Honduras, and the Philippines were not available alternative forums); *In re Bridgestone/Firestone, Inc. Tires Product Liability Litigation*, 190 F. Supp. 2d 1125 (S.D. Ind.) (2002) (same result; applying Venezuela blocking statute).

[5] http://www.iaba.org/LLinks__forum__non__Parlatino.htm; *see also* Henry Saint Dahl, *Forum Non Conveniens, Latin America and Blocking Statutes*, U. Miami Inter-Am. L. Rev. 21, 47 (2004) (providing translation of PARLATINO model statute).

[6] *See Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 546 (S.D.N.Y. 2001), *aff'd as modified*, 303 F.3d 470 (2d Cir. 2002); *Polanco v. H.B. Fuller Co.*, 941 F. Supp. 1512, 1525 (D. Minn. 1996).

[7] *Da Rocha v. Bell Helicopter Textron, Inc.*, No. 05-2277-CIV-UNGARO-BENAGES/O'Sullivan et al., 451 F. Supp. 2d 1318 (S.D. Fla. 2006) (plaintiff claimed Brazil-U.S. treaty gave Brazilian citizens same access to U.S. courts as U.S. citizens).

[8] *See In re Air Crash at Taipei, Taiwan Multidistrict Litig.*, 153 Fed. Appx. 993, 2005 U.S. App. LEXIS 24800 (9th Cir. 2005). *But see Van Schijndel v. Boeing Co.*, 434 F. Supp. 2d 766 (C.D. Cal. 2006) (on remand from 9th Circuit, district court again dismissed case, narrowing alternative forum to Singapore).

[9] *Forum non conveniens* issues involve a weighing of various private and public interests. *See, e.g., Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947) (outlining factors); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).