JONES DAY

PRACTICE PERSPECTIVES: PRODUCT LIABILITY & TORT LITIGATION

Business-Focused Solutions

letter from the practice chair

As readers of these *Practice Perspectives* have seen previously, our objective in each issue is to give our clients articles on cutting-edge issues they may be encountering. The articles are scholarly in approach and analysis while also being short and practical. We know how busy our in-house lawyer friends are—you need practical solutions, not law review articles. We hope the articles in this issue meet those objectives and are of value to you. We also hope that you will see the range of topics on which our lawyers have in-depth experience.

Jones Day—and our Product Liability & Tort Litigation lawyers—knows we are in a competitive environment where law firms are spewing print and electronic content (and I use that word loosely) at you, trying to be noticed favorably. What can Jones Day provide your company or organization that is extremely valuable, notable in the profession, and probably not obvious to outsiders? Our understanding and commitment to business-focused solutions. One of the most important things that we at Jones Day emphasize is the need for our lawyers to understand a client's business. When you entrust a litigation matter to a lawyer, whether it is one case or a group of mega-cases, there is often an unfortunate tendency for the lawyer to see that assignment in isolation, *i.e.*, as merely a puzzle that stands alone, a legal problem to be solved. We at Jones Day know that solving a client's problem must be seen with an eye toward the overall health and strategy of an ongoing business, a business that has to worry about remaining in existence; satisfying customers, shareholders, and stakeholders; staying acceptably profitable; protecting its reputation; and resolving litigation disputes in a cost-effective manner. Our clients usually do not need pointy-headed lawyers who see a litigation matter as a science project. Rather, they want strategies and solutions that are consistent with or do not disrupt the company's business plan. We believe that not all law firms are as focused on this as we are at Jones Day.

What can Jones Day provide your company or organization that is extremely valuable, notable in the profession, and probably not obvious to outsiders? Our understanding and commitment to business-focused solutions.

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THE U.S. CONSUMER PRODUCT SAFETY COMMISSION:

WHAT YOU NEED TO KNOW TODAY–AND TOMORROW

by Geoffrey K. Beach, Peter J. Biersteker. and David T. Miller

At least weekly, it seems yet another company is facing the daunting task of implementing a large-scale recall of one or more of its products. Nancy Nord, acting chairman of the Consumer Product Safety Commission ("CPSC"), aptly termed the summer of 2007 the "summer of recalls." Nord's agency has overseen recalls of laptop batteries, cribs, millions of toys, baby seats, and a great many other products. There have been many other recent high-profile recalls—of peanut butter, pet food, frozen hamburgers, and, most recently, pot pies—under the jurisdiction of the Food and Drug Administration and the Department of Agriculture as well.

The financial ramifications of such recalls can be extraordinary, and any misstep in the process can put a company's assets, goodwill, and brand equity at risk. For example, shortly after the Topps Meat Company—the largest U.S. manufacturer of frozen hamburgers—recalled more than 21 million pounds of meat, it announced that it was going out of business as a result. As the chief operating officer, Anthony D'Urso, noted, "In one week we have gone from the largest U.S. manufacturer of frozen hamburgers to a company that cannot overcome the economic reality of a recall this large." Topps Meat Company, press release: "Topps Meat Company Ends Operations After 67 Years" (Oct. 5, 2007). Besides the complex issues and practical burdens of conducting a recall while rehabilitating their brand names and corporate reputations, companies are faced with a plaintiffs' bar ready to initiate litigation over every such recall and in the process disparage (or worse) everything companies facing large-scale recalls must try to accomplish.

The purpose of this article is twofold: to arm the reader with a basic understanding of the CPSC's jurisdiction and standards and to describe key features of currently pending legislative proposals to amend the Consumer Product Safety Act in the wake of recent criticisms of the existing regulatory structure. *See, e.g.,* E. Lipton, "Safety Agency Faces Scrutiny Amid Changes," *The New York Times* (Sept. 2, 2007). Indeed, an editorial in *The New York Times* on October 10, 2007, went so far as to dub the CPSC the "Caveat Emptor Commission." In all, given the significant risks and long-term ramifications of such recalls, it is prudent to evaluate these issues carefully in an effort to minimize the risk that a recall will occur in the first place and, if it does, to maximize the likelihood that your company is prepared for it.

OVERVIEW OF THE CPSC–WHAT YOU NEED TO KNOW TODAY

The CPSC is the lead U.S. agency charged with oversight of consumer safety relating to most consumer products—approximately 15,000—used in and around the home, in schools, and in recreation. A list of products over which the CPSC asserts jurisdiction may be accessed at http://www.cpsc.gov/businfo/reg1.html (last visited February 25, 2008). The CPSC does not have jurisdiction over many other products, including foods, drugs, cosmetics, medical devices, firearms and ammunition, boats, motor vehicles, aircraft, and tobacco. A list of products over which the CPSC does not have jurisdiction may be accessed at http://www.cpsc.gov/businfo/notcpsc.html (last visited February 25, 2008).

The CPSC is fundamentally charged with protecting the public from "unreasonable risks of injury and death" associated with the consumer products within its jurisdiction. Companies involved in the manufacture, importation, distribution, or retail sale of these products are subject to CPSC jurisdiction and oversight. CPSC duties extend beyond the oversight of consumer product recalls to maintaining an injury information clearinghouse and establishing safety standards for certain products or helping outside organizations to do so.

Firms subject to the CPSC's jurisdiction must notify the agency when they obtain information "which reasonably supports the conclusion" that a consumer product (1) fails to meet a consumer product safety standard or regulation; (2) contains a defect that could create a substantial product hazard to consumers; (3) creates an unreasonable risk of serious injury or death; or (4) fails to comply with a voluntary standard upon which the CPSC has relied under the Consumer Product Safety Act (*e.g.*, voluntary standards applicable to chain saws or unvented gas space heaters). That's the big picture, but the devil is in the proverbial details.

First, it is important to realize that a company is obligated to contact the CPSC "immediately" upon obtaining reportable information, which means within 24 hours. *See* 15 U.S.C. § 2064(b)(3); 16 C.F.R. Part 1115 ("Substantial Product Hazard Reports"). When the CPSC evaluates whether timely notification was made, it considers not only the actual knowledge of the company, but also what a reasonable person, acting under the circumstances, should have known about the hazard while exercising due care. Accordingly, the clock for disclosure starts running when the information is received by an employee or official who may reasonably be expected to be capable of appreciating its significance. *See* CPSC, *Recall Handbook* § I(A)(2) (May 1999). If a company is uncertain about whether information is reportable, it is permitted to investigate the matter for a "reasonable" amount of time (up to 10 days is deemed "reasonable"; longer periods of time will need to be justified to the CPSC). This rapid-disclosure requirement is likely to mean that a company is reporting information while its own investigation is ongoing. The CPSC encourages firms to report if in doubt as to whether a defect could present a substantial product hazard, particularly where the extent of public exposure and/or the likelihood or seriousness of injury are not well known. (It is noteworthy that shareholder litigation filed against Mattel pertaining to its recent recalls involving 21 million toys alleges, among other things, that the company breached its duty to shareholders by delaying reporting beyond this required time period. *See* L. Story, "Mattel Faces Shareholder Suit Over Toy Recalls,"

THE FINANCIAL RAMIFICATIONS OF HIGH-PROFILE RECALLS CAN BE EXTRAORDINARY, AND ANY MISSTEP IN THE PROCESS CAN PUT A COMPANY'S ASSETS, GOODWILL, AND BRAND EQUITY AT RISK.

The New York Times (Oct. 10, 2007).) The only express exemption from this disclosure requirement applies when the company otherwise obligated to report has "actual knowledge" that the CPSC has already been adequately notified of the failure to comply or of the defect or risk.

This discussion raises the important question of what constitutes "reportable information." Of course, the most direct answer is no doubt information that assists the CPSC in evaluating whether some form of remedial action is appropriate, and the CPSC relies on the concept of product "defect" to inform that judgment. A "defect," in the simple sense of the term, is a fault, flaw, or irregularity that causes weaknesses, failure, or inadequacy in form or function. A defect can be the result of a manufacturing error or can stem from the design of the product or the materials used in its manufacture, including the product's contents, construction, finish, packaging, warnings, or instructions. *See* 16 C.F.R. § 1115.4 (2007). The mere fact that a product presents a risk of injury does not render it defective (*e.g.*, a kitchen knife). When evaluating whether a product's risk of injury could make the product defective, the CPSC considers the following factors: the utility of the product, the nature of injury that the product may cause, the need for the product, the population exposed to the risk of injury, its experience with the product, and other information that sheds light on the product and patterns of consumer use. CPSC, *Recall Handbook* § II. These criteria roughly parallel those applied under the law of many states to evaluate legal claims of product defect, commonly referred to as the "risk utility test."

If the information indicates that a product has a defect, the company and the CPSC must consider whether the defect creates a substantial product hazard. The CPSC looks to four factors to evaluate this second inquiry: (1) pattern of defect (*i.e.*, cause of defect and how it manifests itself); (2) number of defective products distributed; (3) severity of risk (*i.e.*, whether the injury that might occur is serious and/or whether the injury is likely to occur); and (4) likelihood of injury (*i.e.*, number of injuries that have occurred or could occur; intended use/foreseeable misuse of product; and group at risk, such as children or the elderly). According to the CPSC's regulations, most defects "could present a substantial product hazard if the public is exposed to significant numbers of defective products or if the possible injury is serious or is likely to occur." *See* 16 C.F.R. § 1115.4.

OVERVIEW OF PROPOSALS TO CHANGE THE CPSC–WHAT YOU NEED TO KNOW TOMORROW

The recent spate of recalls has spurred action in both houses of Congress, with competing bills in the House and Senate looking to alter the landscape of regulation under the CPSC. These proposals, if enacted, would have a wide range of effects. From the seemingly mundane measure of increasing the CPSC's funding to the requirement for independent third-party certification of compliance with applicable safety standards for children's products, the proposals could significantly alter the framework within which companies subject to the CPSC must operate. S. 1847, 110th Cong. § 2(a) (2007); S. 2045, 110th Cong. § 3 (2007); and S. 1833, 110th Cong. § 3 (2007). A summary of some of the proposed changes is set forth below.

One proposal expands the list of prohibited acts to make it unlawful to "sell a product" in three circumstances: The product (1) fails to conform to an applicable consumer product safety standard; (2) is the subject of a voluntary recall or other corrective action by a manufacturer and is determined by the CPSC to be unsafe; or (3) is declared imminently hazardous, is deemed to pose a substantial hazard necessitating a recall, or is designated a hazardous substance under the Federal Hazardous Substances Act. S. 2037, 110th Cong. § 1 (2007). This amendment would close the exception for sellers that rely in good faith on the representation by the manufacturer or distributor that the product either is not subject to a safety standard or complies with any applicable standard. Accordingly, this proposal could require retailers to create infrastructure and bureaucracy to oversee the compliance of the products they sell.

Another proposal would require the inclusion of tracking information on consumer products or packaging to enable consumers to determine whether their products are among those recalled. S. 2037, 110th Cong. § 2 (2007); S. 2045, 110th Cong. § 11 (2007). The proposal would require the "source, date, and cohort (including the batch, run number, or other identifying characteristic)" to be on each consumer product or its packaging, with an expressed preference for the information being on the product itself "to the greatest extent feasible." While the CPSC already has the authority to require inclusion of this information in packaging or on products, it has not chosen to do so in many circumstances. Accordingly,

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Exposure Assessment in Personal Injury Litigation: Challenging the Data

by J.C. McElveen and Robin L. Juni

Although much has been written about evidence that may be used to demonstrate causation in toxic tort litigation, relatively little attention has been focused on the types of evidence that may be used to prove that a plaintiff had the level and duration of exposure to an alleged toxin necessary even to develop the injury he or she claims. Yet the sufficiency of exposure data is often as important as the causation evidence.

Indeed, either a court, in deciding pretrial motions, or a finder of fact, in post-trial deliberations, may conclude that enough evidence exists to find that a particular chemical or physical agent is capable of causing a certain adverse outcome, but the evidence is simply not sufficient to conclude that the plaintiff was exposed to a dose of that material high enough to have caused the claimed effect.

In federal cases, under Federal Rule of Evidence 702, *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993), and its progeny, exposure must be proven—through expert testimony—with the same degree of reliability and "fit" as causation. State courts have reached the same conclusion. Under these circumstances, it may be useful to consider how some parties have attempted to prove exposure and how courts have treated that evidence. As an initial matter, however, it is probably useful to discuss some of the ways in which exposure might be established.

EXPOSURE ASSESSMENT METHODOLOGIES

Personal Testimony. A plaintiff may simply say, "I ate it," "I drank it," or "I breathed it." This bare evidence may suffice for some types of exposures, such as when the potential toxicant at issue is a pharmaceutical product and the concentration or other dosage level is known. However, under most circumstances, the information that a person took something into his or her body, without more data, does not provide sufficient information for a finder of fact to reach any real conclusion as to what level of exposure the person experienced. Although precise measurement has not typically been required, *some* sort of quantifiable finding is important because most courts insist on an evidentiary showing that: (1) the material alleged to have caused an adverse effect has the relevant toxicological properties; and (2) the plaintiff has received a dose of that material consistent with such an effect.

Biological Measurements/Biomarkers. A plaintiff may have measurable quantities of the allegedly harmful material, or some metabolite of the material, present in his or her body. Lead in blood and arsenic in hair are good examples of

this type of exposure measurement. Although the presence of the material is not in doubt, methodological shortcomings remain. First, the source of exposure generally cannot be identified, because many materials are not unique to a single source. Second, depending on the tissue sampled, the measurement may reflect only recent or very old exposures. The exposure pathway can be even more attenuated if the toxin—such as mercury in fish—is present only in a "vector" that passes alleged exposure to a human plaintiff.

Similarly, some materials have generally accepted biological effects, even if direct levels in the body are not measured. For example, long-term asbestos exposure can produce lung-function abnormalities. Radiation may cause certain cancers or DNA mutations. Based on these "biomarker" relationships, if a particular individual had particular deficits in lung function or specific DNA changes, one might argue that it was the result of a certain exposure. However, it is seldom possible to "fingerprint" an exposure: few biomarker effects are uniquely caused by a particular exposure. Moreover, even if a particular biomarker effect can be isolated to a certain type of exposure, the source of that exposure can rarely be identified with certainty. Finally, for many biomarker effects, detection does not necessarily signal an adverse health event, now or in the future.

Industrial Hygiene Sampling. There are essentially two types of industrial hygiene sampling utilized in personal injury litigation: personal sampling and area sampling. In personal monitoring for potential chemical exposure, the sampling device is placed on an individual, and its readings measure inhalation exposure, in that individual's breathing zone, of the chemical material being sampled. In area monitoring, the sampling device is placed at a set location, and a measurement of airborne chemical levels—again, only for the material being sampled—is achieved for the area and time frame sampled.

Although such devices—along with similar devices measuring exposure to physical agents, such as radiation or noise—do not directly measure those chemicals or agents within the body, if personal monitoring devices are placed and interpreted correctly, the devices generally provide reliable information about the exposure of that individual. So, for example, if a monitoring device, calibrated to identify and quantify a particular chemical, is properly placed in a person's breathing zone, the resulting measurement may be considered good evidence of exposure to that chemical for that person.

However, there are numerous evidentiary shortcomings to the use of industrial hygiene monitoring as "proof" of exposure. First, exposures can be measured only when the devices are properly placed, calibrated, and operated. Second, even if the devices are correctly utilized, interpretation of the data gathered may not reflect actual exposure. For example, some industrial hygienists will interpret a "nondetect" value for a particular chemical as one-half the limit of detection, when there is no evidence that the material was present at all. Third, the instruments are not designed to identify a source of exposure, only the level measured in a breathing zone or the area monitored. Fourth, even if some chemical concentration is measured, the sampling presented may not be representative of the plaintiff's actual exposure, such as when area monitoring measurements are sought to be used as a proxy for personal monitoring data.

Computer Modeling. Computer modeling has been used to try to estimate exposures to various chemicals and physical agents. The modeling can be simple or complex, and it can attempt to simulate indoor or outdoor environments. All modeling, however, is based on inputs to the model that reflect assumptions, and complex models can have many assumptions that undercut their reliability—*i.e.*, "Garbage in, garbage out."

Modeling has historically been used in the risk assessment paradigm, but not as proof of exposure in an individual toxic tort or product liability case. In a risk assessment or regulatory context, of course, assumptions in the model can be driven by policy decisions, such as the "precautionary principle," that are not appropriate for use in a personal injury lawsuit. Models presented in court must scrupulously adhere to the facts of the case, and each interpretation or assumption made by the modeler—or by the internal working of the model itself—must be exhaustively documented and consistent with the facts.

JUDICIAL APPROACHES

Courts grappling with exposure assessment issues have evaluated evidence presented under each of the biomarker, industrial hygiene, and modeling methodologies, and they have

identified potential flaws in each approach. The cases discussed provide useful examples of the principles at issue but do not represent an exhaustive survey of the many complex issues inherent in litigation regarding exposure assessment.

Biomarkers/Subcellular Damage. Courts addressing biomarker issues have been careful to note that the existence of a biomarker in a plaintiff does not inevitably lead to a causation finding. For example, in *Cotroneo v. Shaw Environmental & Infrastructure, Inc.*, No. Civ. A. H-05-1250, 2007 WL 3145791 (S.D. Tex. Oct. 25, 2007), the court reviewed claims that cleanup contractors had been exposed to radioactive materials, including Americium-241 ("Am-241") and Cesium-137, and found it "undisputed that some level of this toxin [Am-241] is present in each plaintiff's urine." *Id.* at *1. The court further recognized that "[t]he Dose Report indicating the presence of Am-241 in plaintiffs' bodies is evidence of exposure; it is not evidence of causation." *Id.* at *5 n.19. The plaintiffs could not make the required causation showing, and summary judgment ultimately was granted to the defendants. *See also In re Hanford Nuclear Reservation Litig.*, 497 F.3d 1005, 1016 (9th Cir. 2007) (noting that plaintiff exposure to radioactive Iodine-131 had been shown but that epidemiological studies had not established any causative relationship between Iodine-131 and the plaintiffs' illnesses at the dose levels received).

Other courts have found that the presence of a biomarker in a plaintiff may not even rise to the level of a cognizable claim. For example, the Sixth Circuit in *Rainer v. Union Carbide Corp.*, 402 F.3d 608 (6th Cir. 2005), found that demonstrated DNA damage from plutonium and neptunium exposure (but no clinical symptoms of any associated disease) would not be accepted, under Kentucky state law, as a "bodily injury" on which a claim under the Price-Anderson Act could be predicated. *Id*. at 618. In so ruling, the court looked to medical monitoring jurisprudence to hold that the Kentucky Supreme Court would find "a claim of an enhanced risk of illness or disease [ ] insufficient to establish a 'present physical injury.' " *Id.* at 619.

Although recognizing that the plaintiffs in the earlier medical monitoring cases "did not (and perhaps could not) point to any concrete physical damage," *id.*, while the *Rainier* plaintiffs did have proven subcellular effects, the court nonetheless found that Kentucky law would not provide a basis for their claims. The court reasoned that the Kentucky Supreme Court had addressed asbestos-exposure claims in its prior jurisprudence and "was presumably aware that asbestos inhalation causes subclinical tissue damage to the lungs. Yet it did not recognize this damage as sufficient to constitute a 'present physical injury.' " *Id.* Accordingly, the Sixth Circuit found that the district court properly rejected these claims.

The court further noted that its decision reflected sound public policy, because a ruling to the contrary would "throw open the possibility of litigation by any person experiencing even the most benign subcellular damage," a potentially immense class of claimants. *Id.* at 621. Moreover, the court said, its ruling perhaps would inure to the plaintiffs' benefit in the future, because Kentucky has a "one claim" rule that would permit the plaintiffs only "nominal recovery" for their DNA damage claims and would preclude their subsequent recovery "should they later develop a truly debilitating disease." *Id.*

Industrial Hygiene Data. A Delaware court hearing the W.R. Grace bankruptcy proceedings undertook analysis of various sources of air-sampling data to determine whether claimants had shown exposure to asbestos fibers that would substantiate their claims in the bankruptcy. *In re W.R. Grace & Co.*, 355 B.R. 462 (Bankr. D. Del. 2006). The court first rejected historical testing from the 1970s, because the methodology utilized could not be documented and, more importantly, because the testing was not representative of homeowner exposure. *Id.* at 488–89. Second, the court similarly found that additional data collected during drywall installation and insulation removal were "not consistent with domestic exposure" to asbestos fibers and accordingly could not support claimants' exposure allegations because the sampling sought to be presented did not "fit" the facts of the case. *Id.* at 489–90.

Finally, the Delaware court compared the data-collection efforts undertaken by experts for the claimants and for W.R. Grace, holding that the claimants' expert had erred in conducting industrial hygiene studies that included only 30-minute testing for "excursion limits"—*i.e.*, the maximum short-term exposure—and did not utilize eight-hour time-weighted averages ("TWAs"), which would have been more representative and consistent with applicable exposure standards. The court ultimately rejected these claimant-collected data, like the other data sets, because the claimants' expert report did "not

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Most product liability litigators are well aware of many of the standard affirmative defenses to raise at the responsive pleading stage. Statute of limitations, statute of repose, comparative fault or contributory negligence, and superseding cause are all common defenses used liberally in product liability—and other—litigation. *See generally* Fed. R. Civ. P. 8(c) (stating that "[i]n responding to a pleading, a party must affirmatively state any avoidance or affirmative defense" and enumerating several such defenses). This article, however, outlines a handful of less familiar, and perhaps underutilized, product liability affirmative defenses, to serve as a reminder that these defenses exist and may be applicable, depending on the unique facts and applicable law in your case. The defenses described below may not be as widely used as their more common counterparts, but they can be every bit as viable and effective.

THE COMPONENT SUPPLIER DEFENSE

In general, this defense provides that the manufacturer of a nondefective component is not liable for injuries sustained from the use of a larger defectively designed product into which the component is integrated. *See, e.g.*, *Restatement (Third) of Torts (Product Liability)* § 5. The common rationale for application of this defense is twofold. First, courts note that a fundamental requirement of strict liability theory is that the product malfunctions. *See, e.g.*, *Crossfield v. Quality Control Equip. Co., Inc.*, 1 F.3d 701, 704 (8th Cir. 1993). In cases where the component supplier defense is applicable, however, the component part is not defective and operates as it is intended. The part becomes hazardous only when incorporated into the larger machine system. Thus, the danger arises from the design or manufacture of the larger machine, not the component part. Accordingly, the designer of the machine is in the best position to know of these dangers and prevent them from causing injury. *See Crossfield*, 1 F.3d at 704.

SOMETIMES A GOOD DEFENSE IS THE BEST OFFENSE:

A Summary of Certain Useful Product Liability Affirmative Defenses

by Jason Keehfus
and Emily Baker

The second common rationale used by courts is that the component supplier has no duty to warn end users because the supplier has no control over the design and function of the machine into which its product is integrated. *See, e.g.*, *Childress v. Gresen Mfg. Co.*, 888 F.2d 45, 49 (6th Cir. 1989); *Fleck v. KDI Sylvan Pools, Inc.*, 981 F.2d 107, 118 (3d Cir. 1992); *Jacobini v. V. & O. Press Co.*, 588 A.2d 476, 479 (Pa. 1991); *Zaza v. Marquess and Nell, Inc.*, 675 A.2d 620, 628 (N.J. 1996). Courts find that imposing liability upon the component supplier would unreasonably extend liability because it would require the supplier to have expert knowledge in the integrated product. *See Travelers Ins. Co. v. Chrysler Corp.*, 845 F. Supp. 1122, 1126 (M.D.N.C. 1994); *Crossfield*, 1 F.3d at 704. Indeed, imposing liability "would mean that suppliers would be required to hire machine design experts to scrutinize machine systems that the supplier had no role in developing. Suppliers would be forced to provide modifications and attach warnings on machines which they never designed nor manufactured." *Id.*

To the extent you can establish facts showing that the product you supplied was not defective or that you had no control over, or input into, the design of the larger machine system, you may have a viable defense to liability.

THE LEARNED INTERMEDIARY/SOPHISTICATED USER DOCTRINE

The learned intermediary doctrine, also often referred to by courts as the "sophisticated user doctrine," provides that a manufacturer may rely on a sophisticated and knowledgeable customer to warn the end user of the risks of the product. *See, e.g.*, *West v. Searle & Co.*, 806 S.W.2d 608, 613 (Ark. 1991); *Restatement (Third) of Torts (Product Liability)* § 6. While the rule typically arises in product liability actions brought against prescription drug manufacturers, the rule has been applied to other products as well. *See Singleton v. Manitowoc Co.*, 727 F. Supp. 217, 225 (D. Md. 1989) (eliminating manufacturer's duty to warn of risks of crane, under sophisticated user doctrine, where purchaser was a knowledgeable user of cranes); *Portelli v. I.R. Constr. Prod. Co.*, 554 N.W.2d 591, 601 (Mich. Ct. App. 1996) (finding manufacturer of door had no duty to warn ultimate user when purchaser was a sophisticated user); *Restatement (Second) of Torts* § 388, cmt. n (listing factors to consider in determining whether warning to intermediary discharges manufacturer's duty to warn). Whether a party is a "learned" intermediary is a fact-intensive question that will hinge on the party's degree of knowledge, experience, and sophistication with the particular product at issue. *See In re TMJ Implants Prod. Liab. Litig.*, 872 F. Supp. 1019, 1029–30 (D. Minn. 1995).

There are several reasons for applying the learned intermediary rule. First, it may be virtually impossible for a manufacturer that does not interact directly with the ultimate user to warn that person. *See West*, 806 S.W.2d at 613; *Hill v. Searle Labs.*, 884 F.2d 1064, 1070 (8th Cir. 1989). Indeed, requiring manufacturer's warnings to be given to the ultimate user might be futile because the manufacturer cannot guarantee that warnings emblazoned on its packages will remain intact until reaching the ultimate user. *See In re TMJ Implants Prod. Liab. Litig.*, 872 F. Supp. at 1029. Accordingly, the intermediary is usually in the best position to warn the user of the product. *See Singleton*, 727 F. Supp. at 227. Second, in the context of pharmaceuticals, application of the learned intermediary doctrine helps preserve the doctor-patient relationship. *West*, 806 S.W.2d at 613. The rule ensures that the doctor is the patient's source for a consistent warning regarding product risks. *See In re Rezulin Prods. Liab. Litig.*, 133 F. Supp. 2d 272, 288 (S.D.N.Y. 2001). Requiring the manufacturer to warn the patient, on the other hand, would threaten to undermine the patient's adherence to his physician's informed opinion regarding the patient's medical care. *Id.*

In the pharmaceuticals context, there is one key exception to the learned intermediary rule that may apply in your jurisdiction. According to the "mass immunization" exception, a drug manufacturer whose product is distributed to patients en masse, and not as a prescription drug, may have a duty to directly warn patients of the dangers of its product. *See Givens v. Lederle*, 556 F.2d 1341, 1345 (5th Cir. 1977) (finding manufacturer is required to warn patient when it has knowledge that vaccine is administered with little independent medical judgment about the patient); *Mazur v. Merck & Co.*, 742 F. Supp. 239, 255–56 (E.D. Pa. 1990) ("[T]he mass immunization exception to the learned intermediary rule recognizes that there may be circumstances when by reason of the very size of a program, a manufacturer will know or should know that its product will not be dispensed as a prescription drug; in short the manufacturer can foresee that there will be no individualized balancing of the medical benefits and risks."); *see also Restatement (Third) of Torts (Product Liability)* § 6, cmt. c.

Thus, to the extent a manufacturer can demonstrate that it has little or no control over the communication of a warning to the ultimate user, and that the person who interacts directly with the ultimate user is knowledgeable about the risks of the product, the manufacturer may have a strong defense to liability.

THE GOVERNMENT CONTRACTOR DEFENSE

The government contractor defense may preclude state tort liability for manufacturers when the following three-part test is met: (i) The United States approved "reasonably precise specifications"; (ii) the "equipment conformed to those specifications"; and (iii) the "supplier warned the government about the dangers" associated with the use of the equipment that were known to the supplier, but not to the government. *Boyle v. United Technologies Corp.*, 487 U.S. 500, 512 (1988). Whether this defense applies to claims other than product liability claims, such as intentional torts, is unclear. *See, e.g.*, *In re "Agent Orange" Product Liability Litigation*, 373 F. Supp. 2d 7, 18 (E.D.N.Y. 2005) ("the government contractor defense does not apply to violations of human rights, norms of international law and related theories"); *but see Ibrahim v. Titan Corp.*, 2007 U.S. Dist. LEXIS 81794, *8–9 (D.D.C. Nov. 6, 2007) (finding that the government contractor defense may preempt common-law tort claims against contractors performing combatant activities if the "[contractor's] employees were acting under the direct command and exclusive operational control of the military chain of command"). At least one court, however, has extended the defense to contracts for services, rather than simply to procurement contracts. *See Hudgens v. Bell Helicopters*, 328 F.3d 1329, 1334 (11th Cir. 2003) (holding that government contractor defense applied to claims that defendant negligently maintained or repaired military helicopter).

THE SEALED CONTAINER DEFENSE

This statutory defense shields sellers from product liability claims if the "product was acquired and then sold or leased by the seller in a sealed container or in an unaltered form" and the seller had no knowledge of, nor could it discover, the defect. Maryland Code Ann. § 5-405; *see also, e.g.*, N.C. Gen. Stat. § 99B-2; Tenn. Code Ann. § 29-28-106; Del. Code Ann. 18 § 7001. In some jurisdictions, the defense is not strictly limited to products entirely enclosed or "sealed" at the time of sale, but rather covers any product that is sold in a "box, container, package, wrapping, encasement, or housing of any nature that covers it" or "unpackaged products that [are] sold in an unaltered form." *See* Maryland Code Ann. § 5-405*; see also Quirk v. Home Depot U.S.A.*, 2005 WL 3448039, at *1 (D. Md. Dec. 15, 2005); N.C. Gen. Stat. § 99B-2(a) ("No product liability action, except an action for breach of express warranty, shall be commenced or maintained against any seller when the product was acquired and sold by the seller in a sealed container or … *under circumstances in which the seller was afforded no reasonable opportunity to inspect the product*") (emphasis added).

In order to invoke the defense, a seller must typically establish that (i) the product was acquired and subsequently sold in either a sealed container or unaltered form; (ii) it was unaware of the defect and could not have discovered such defect; (iii) it did not designate or otherwise create specifications for the defective product; and (iv) it did not alter, modify, or mishandle the product prior to sale. *See, e.g.*, Maryland Code Ann. § 5-311(b); Del. Code Ann. 18 § 7001. Indeed, where these elements are present, product liability claims against sellers—and, in most cases, wholesalers, distributors, or retailers—may be barred.

CONCLUSION

As always, defendants facing product liability claims must develop defense strategies early in the case. Any strategy should include a thorough determination as to what, if any, affirmative defenses, such as those summarized above, apply. In certain situations, raising these affirmative defenses may not only underscore important litigation themes but could also result in a favorable dispositive ruling prior to trial. *See Hudgens*, 328 F.3d at 1345 (finding that the defendant "demonstrated the absence of any genuine issue of material fact regarding its entitlement to the [government contractor defense]" and affirming summary judgment on its behalf). ■

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Evidence Matters: Other Injuries, Accidents, and Complaints in Product Liability Litigation

by Paul D. Koethe

In today's world of mass-produced consumer products, foods, and pharmaceuticals—where manufacturers place thousands of products into the stream of commerce—product mishaps and injuries rarely occur in isolation. Instead, manufacturers typically are faced with claims by multiple individuals who allege injury resulting from use of the company's product. It is in this context that evidence of other injuries, accidents, and complaints often arises.

To illustrate the prejudicial impact that such evidence may have, consider the following example. In an action against International Harvester ("IH"), plaintiff sought to recover for

burns sustained when he was sprayed with gasoline that had spurted, or "geysered," from the fuel tank of his tractor. Throughout the trial, plaintiff's counsel offered evidence of many other users of IH tractors who had experienced similar geysering incidents. Counsel was also permitted to "parade" before the jury three "hideously deformed" witnesses who had suffered severe burns in previous unrelated IH tractor accidents. These witnesses testified about their own experiences with IH fuel-cap failures that had resulted in severe burns. During closing argument, plaintiff's counsel vividly reminded the jury of the "ghastly" appearance of the three other burn victims and used their appearance as a basis for inflammatory and prejudicial appeals to the jury. Counsel argued that only a large punitive-damages award would force a change in company behavior. Not surprisingly, the jury rendered a verdict against IH and imposed substantial punitive damages.[1] While this scenario may seem extreme, it highlights the need for counsel in product liability litigation to carefully consider the circumstances under which evidence of other accidents, injuries, and complaints is admissible; the impact that such evidence may have if allowed; and how best to manage the litigation risk presented by such evidence.

PERMISSIBLE PURPOSES

Typically, plaintiff's counsel will seek to discover and introduce evidence of other complaints, accidents, or injuries to bolster the case. Such evidence usually dovetails with the themes plaintiff will present at trial: that (i) the product was indeed dangerous and defective; (ii) the manufacturer knew of the danger or defect; (iii) the manufacturer knew that others were injured by the product; and (iv) the manufacturer nonetheless kept the product on the market without adequate warnings or design modifications.

Because of the prejudicial impact that such evidence can have, courts typically scrutinize it carefully.[2] Courts have generally recognized four permissible purposes for admitting evidence of other injuries, accidents, and complaints. First, such evidence may be admitted to demonstrate the existence of a defect or dangerous condition in the product.[3] Second, evidence of other injuries or accidents is commonly offered to prove that the manufacturer was on notice of the danger or defect—that it knew or should have known of the danger presented by the product.[4] Third, evidence of other injuries or accidents may be offered to show the extent of the risk or danger created by the product.[5] Fourth, evidence of other injuries or accidents may be used to show that the product defect or dangerous condition caused the injury in question.[6]

STANDARDS FOR ADMISSIBILITY

A party seeking to introduce evidence of other injuries, accidents, or complaints must establish that the other incidents are "substantially similar" to the events at issue in the case for which the party seeks to use the evidence. Only other incidents that are substantially similar to the one in dispute will be admissible in evidence. *Surles v. Greyhound Lines, Inc.*, 474 F.3d 288, 297 (6th Cir. 2007); *Rye v. Black & Decker Mfg. Co.*, 889 F.2d 100, 102 (6th Cir. 1989). Other incidents must be sufficiently similar in time, place, and circumstances to be probative.[7] Minor or immaterial dissimilarities, however, will not usually prevent admissibility. *White v. Ford Motor Co.*, 312 F.3d 998, 1109 (2002), *amended by*, 335 F.3d 833 (9th Cir. 2003). Even if another incident is relevant and substantially similar to the one at issue, the evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion, or waste of time.[8] For example, evidence of other incidents confuses the jury and wastes time if it requires the parties to engage in unnecessary "mini-trials" exploring the possible causes of the other incidents to establish their similarity to the incident at issue.[9] Finally, admissibility determinations are within the discretion of the trial

court and are reviewed under an abuse-of-discretion standard. *Surles*, 474 F.3d at 296.

RECENT EXAMPLES

Counsel for plaintiffs are becoming increasingly creative in the manner in which they seek to inject evidence of other injuries, accidents, and complaints into the litigation process. Several recent cases illustrate this point. In a recent Florida vehicle rollover case against Ford Motor Company, the trial court permitted expert testimony and attorney argument to the effect that Ford had "caused hundreds of injuries and deaths in other rollover accidents" involving the Ford Explorer. Plaintiff's design expert was permitted to testify that he had been involved in many prior incidents where Ford Explorer handling and stability problems had brought about rollover accidents and that he had notified Ford about this problem on at least 150 prior occasions. Plaintiff's counsel argued in closing that, instead of making necessary design modifications once becoming aware of the problem, Ford continued selling the Explorer and made millions of dollars in "blood money" that it should not be allowed to keep. The jury rendered a $60 million verdict against Ford.[10]

In a recent case against Greyhound Bus Lines, plaintiff suffered severe injuries when another passenger attacked the bus driver, causing the bus to crash. During discovery, plaintiff sought all documents and "prior incident" reports generated as a result of any other violent episodes that had occurred on a Greyhound bus during the previous 25-year period. While the trial court placed some limitations on the scope of plaintiff's discovery request, the court permitted the introduction at trial of 42 prior incident reports and allowed plaintiff to present expert testimony concerning the prior incident reports and the need for entry-resistant barriers to protect bus drivers. The jury returned a verdict against Greyhound for $8 million. *Surles*, 474 F.3d 288 (upholding admissibility of expert testimony and prior incident reports for incidents within the preceding four years).

Similarly, in a recent case against Cessna Aircraft Company involving a fatal airplane crash, Cessna sought to prevent plaintiff from introducing numerous service difficulty reports ("SDRs") that described prior incidents of wastegate-elbow malfunctions in other Cessna aircraft. Plaintiff argued, and the court agreed, that such evidence was relevant to prove whether Cessna was on notice of a defect in the wastegate elbow. The court further found that such evidence was probative of whether Cessna was negligent in failing to redesign the wastegate elbow.[11]

The issue of other injuries, accidents, and complaints has also arisen in the context of pharmaceutical litigation. In one early case involving an intrauterine contraceptive device ("IUD"), plaintiff claimed that a defect in the IUD caused her to contract a serious pelvic inflammatory disease, resulting in a complete hysterectomy. At trial, plaintiff was permitted to introduce reports from doctors and company field representatives describing various adverse reactions associated with use of the IUD in other women. The court found that this evidence was relevant to whether the defendant had received sufficient notice of a defect and its possible consequences to require corrective action. Plaintiff obtained a jury award of compensatory and punitive damages. *Worsham v. A.H. Robins Co.*, 734 F.2d 676 (11th Cir. 1984).

In several more recent cases involving alleged adverse drug reactions, plaintiffs have sought to introduce FDA-required "adverse event" reports—together with the investigators' subjective "relatedness assessments" contained in those reports. The adverse event reports are generated whenever a patient taking the drug develops certain health problems, even though the problem may not be causally related to the drug. The clinical investigator is also required to make an assessment—often based on limited evidence—of whether the event was "related" to the drug use. Plaintiffs may seek to offer the relatedness assessments from other patients to bolster their claim that the drug "caused" the injury in dispute. Courts have typically rejected the use of relatedness assessments for this purpose, finding that these subjective assessments from other patients are unreliable indicators of individual causation in a given case. *In re Accutane Prods. Liab. Litig.*, No. 8:04-MD-2523, 2007 WL 2340496 (M.D. Fla. Aug. 15, 2007); *Soldo v. Sandoz Pharm. Corp.*, 244 F. Supp. 2d 434, 546 (W.D. Pa. 2003). In another recent unreported case involving an alleged adverse drug reaction, plaintiff sought to proffer evidence of the side effects experienced by the plaintiff-decedent's sister, who also took the drug at issue, arguing that this evidence was probative of a "genetic component" involved in the decedent's alleged adverse reaction to the drug. *Dobbs v. Wyeth Pharm.*, No. CIV-04-1762-D (W.D. Okla. 2008) (summary judgment granted for defendant prior to ruling on evidentiary issues).

MANAGING LITIGATION RISKS

As the cases above demonstrate, evidence of other injuries, accidents, and complaints can adversely affect the outcome of product liability litigation. There are various ways in which defense counsel can manage and reduce this risk. Just a few will be discussed here.

Discovery. Often, a defendant can properly limit the scope of discovery concerning other injuries, accidents, and complaints if such discovery lacks relevance or is unduly burdensome. When faced with broad, all-encompassing discovery requests of prior incidents, defendants should seek to limit those requests to incidents involving similar circumstances, identical or similar products, similar product use, similar product failures, similar injuries, and nonremote time periods and geographic locations.[12] Likewise, in deposing plaintiff's expert witnesses, it may be possible to obtain admissions regarding the lack of similarity between other incidents and the incident at issue. During an expert deposition, consideration should be given to exploring all material circumstances that help to differentiate the other incidents from the incident in dispute. Concessions from the opposing expert can provide powerful ammunition when seeking to exclude evidence of other incidents at trial.

Motions *in Limine*. Whenever a defendant expects opposing counsel to offer evidence of other injuries, accidents, or complaints, counsel should consider raising the issue with the court during the motion-*in-limine* stage prior to trial. Motions *in limine* provide an opportunity for the defendant to educate the court on the nature of the injury or accident at issue and to highlight potential weaknesses in plaintiff's proof. Motions *in limine* also allow the defendant to spell out in detail the manner in which the other incidents differ from the matter in dispute and to demonstrate the unfair prejudice that would result from the use of prior incident evidence.[13]

Preserving Objections/Limiting Instructions. Although it may seem obvious, defendants must exercise care to preserve any objections when the court permits opposing counsel to introduce evidence of other incidents at trial. In the *International Harvester* case discussed above, defense counsel failed to object to plaintiff's improper closing argument until after counsel had completed his argument and the jury had left the courtroom. In finding that defendant had waived any error, the court noted that the trial judge had "looked at defense counsel six or eight times during plaintiff's argument almost inviting objections," but defense counsel made a conscious decision as a matter of trial strategy not to object. The trial court could have "stopped the improper comments upon defendant's objection and admonished the jury of the impropriety; yet the trial court's stares to counsel inviting objection were met with silence."[14]

If defense counsel is unsuccessful in keeping out evidence of other incidents, consideration should be given to requesting a limiting instruction from the court concerning the evidence. For example, in a case involving liver damage allegedly resulting from the combined exposure to acetaminophen and alcohol, the court admitted into evidence drug experience reports ("DERs") describing other incidents of consumers taking the medication in combination with alcohol. However, the court gave a limiting instruction to the jury that it could consider the DERs only as evidence of notice to the defendant, and not for the truth of the matter contained within them. *Benedi v. McNeil-P.P.C., Inc.*, 66 F.3d 1378, 1385–86 (4th Cir. 1995); *Worsham v. A.H. Robins Co.*, 734 F.2d 676, 686 (11th Cir. 1984). While some harm may inevitably flow from the introduction of evidence concerning other incidents and injuries, a carefully crafted limiting instruction from the court will arm defense counsel with some ability to limit the potential damage caused by such evidence. ■

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Jones Day law clerk Jamie Cole assisted in the preparation of this article.

[1] *Stambaugh v. International Harvester Co.*, 435 N.E.2d 729 (Ill. App. Ct. 1982) (not-reversible error to permit in-court appearance and testimony of burn victims from unrelated occurrences; defendant waived error committed in closing argument by failing to timely object), *rev'd on other grounds*, 464 N.E.2d 1011 (Ill. 1984) (improper venue).

[2] *Crump v. Versa Products, Inc.*, 400 F.3d 1104 (8th Cir. 2005) (evidence of other injuries may raise extraneous controversial points, lead to confusion of issues, and present undue prejudice disproportionate to its usefulness).

[3] *Burke v. U-Haul Int'l, Inc.*, 2007 U.S. Dist. LEXIS 7539 (W.D. Ky. Jan. 31, 2007), citing *Bush v. Michelin Tire Corp.*, 963 F. Supp. 1436 (W.D. Ky. 1996).

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by Daniel L. Russo, Jr. and Robert Iscaro

As high-stakes, complex litigation has increasingly become a "battle of the experts," litigants seek whatever advantage they can gain through discovery of all materials considered by their adversaries' designated experts. The target of such discovery is not confined to materials generated by the expert himself but includes any materials provided, or information conveyed, to the expert by retaining counsel that could demonstrate that the expert's opinions have been influenced by the opinion work product of counsel. The success of the party attempting to obtain this material and information has centered on courts' interpretation of Fed. R. Civ. P. 26(b)(3), which codifies the qualified attorney work-product privilege, and Rule 26(a)(2)(B), which requires the disclosure of "the data or other information considered by the witness in forming the opinions." Although a few courts find that attorney work product is not discoverable, even if disclosed to testifying experts, the tide of judicial opinion is clearly in the opposite direction.

In *Elm Grove Coal Co. v. Director, Office of Workers' Compensation Programs*, 480 F.3d 278 (4th Cir. 2007), the United States Court of Appeals for the Fourth Circuit recently determined that attorney work-product materials lose any privilege once disclosed to a testifying expert. In *Elm Grove*, an action arising under the Black Lung Benefits Act, 30 U.S.C. §§ 901–945, defendant sought all draft reports and communications between claimant's counsel and his testifying expert witnesses. Claimant argued that the materials were attorney work product and thus immune from discovery. Although the action was governed by the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, the court analyzed the issue under Rule 26 of the Federal Rules of Civil Procedure, noting that the rules were "essentially identical." *Id*. at 30. Relying on the plain language of Rule 26(a)(2)(B), which requires the disclosure of "the data or other information considered by the witness in forming the opinions," as well as the Advisory Committee notes, the court held that "draft reports prepared by counsel and provided to testifying experts,

EXPERT DISCOVERY:

Does a Testifying Expert's Consideration of Attorney Work Product Vitiate the Attorney Work-Product Privilege?

and attorney-expert communications that explain the lawyer's concept of the underlying facts, or his view of the opinions expected from such experts, are not entitled to protection under the work product doctrine." *Id.* at 303. The court reasoned that such disclosure is necessary for adequate cross-examination:

> [I]t is important to the proper cross-examination of an expert witness that the adverse party be aware of the facts underlying the expert's opinions, including whether the expert made an independent evaluation of those facts, or whether he instead adopted the opinions of the lawyers that retained him.

Id. at 301. The court noted that although a lawyer's participation in the preparation of an expert's report does not render the report inadmissible, it can affect the weight to be accorded the expert's opinions and that "[t]he interplay between testifying experts and the lawyers who retained them should … be fair game for cross-examination." *Id*. at 301 n.23.

The Fourth Circuit's decision in *Elm Grove* is in accord with the handful of circuit courts that have considered the issue. *See, e.g., Regional Airport Author. v. LFG, LLC*, 460 F.3d 697, 717 (6th Cir. 2006) ("Rule 26 creates a bright-line rule mandating disclosure of all documents, including attorney opinion work product, given to testifying experts.") (effectively overruling *Haworth, Inc. v. Herman Miller, Inc.*, 162 F.R.D. 289, 292–96 (W.D. Mich. 1995), the seminal case finding that attorney opinion work-product disclosures to experts were privileged); *In re Pioneer Hi-Bred Int'l, Inc.*, 238 F.3d 1370, 1375 (Fed. Cir. 2001) (attorney-client privilege and work-product protection waived by disclosure of confidential communications to testifying experts: "[D]ocuments and information disclosed to a testifying expert in connection with his testimony are discoverable by the opposing party, whether or not the expert relies on the documents and information in preparing his report.").

The importance of disclosure of all materials "considered" by a testifying expert has caused one court to refuse to carve out an exception for attorney work product that was inadvertently disclosed to a testifying expert. *In re Vioxx Prods.*, MDL No. 1657, 2007 WL 1558700 (E.D. La. May 30, 2007). In that case, the plaintiffs produced the materials considered by their experts, including a document that constituted undisputed attorney work product, to the defendant. *Id.* at *1. The plaintiffs moved to compel the return of their attorney work product, arguing that the disclosure was not intentional. The court denied the motion, finding that any work-product privilege had been waived because the document was disclosed, albeit inadvertently, to opposing counsel and to the plaintiffs' testifying experts, and because the document was relevant to the experts' testimony.

A minority of district courts, however, have refused to find that the attorney work-product protection is lost when attorney work product is disclosed to a testifying expert. *See, e.g., Krisa v. Equitable Life Assur. Soc.*, 196 F.R.D. 254 (M.D. Pa. 2000); *Moore v. R.J. Reynolds Tobacco Co.*, 194 F.R.D. 659 (S.D. Iowa 2000); *Smith v. Transducer Technology, Inc.*, 197 F.R.D. 260, 262 (D.V.I. 2000) ("[W]here documents considered by Defendants' experts contain both facts and legal theories of the attorney, Plaintiff is entitled only to discovery of the facts."); *Nexxus Products Co. v. CVS New York, Inc.*, 188 F.R.D. 7, 10–11 (D. Mass. 1999); *but see Suskind v. Home Depot Corp.*, No. 99-10575-NG, 2001 U.S. Dist. LEXIS 1349 (D. Mass. Jan. 2, 2001). Noting the high degree of protection traditionally accorded to attorney work product, these decisions are grounded on the fact that Rule 26 does not explicitly state that materials protected by the attorney work-product privilege are discoverable if provided to a testifying expert and that, without clear authority to the contrary, the privilege should be upheld. *See Krisa*, 196 F.R.D. at 260; *Moore*, 194 F.R.D. at 663–64 ("opinion work product has nearly absolute immunity from discovery"). Thus, the court in *Krisa*, *supra*, criticized the so-called "bright-line rule" requiring disclosure as "abridg[ing] the attorney work product privilege without specific authority to do so." 196 F.R.D. at 260. At least one court adhering to the work-product privilege has also rejected the argument that disclosure is necessary for proper cross-examination, finding that the focus should be on the basis for the expert's opinion:

> The central inquiry on cross examination of an expert witness, however, is not the question of if and to what extent the expert was influenced by counsel; rather it is this: what is the basis for the expert's opinion. Cross examination on the adequacy and reliability of the stated basis for the expert's opinion can be conducted effectively absent a line of questioning on counsel's role in assisting the expert.

Nexxus, 188 F.R.D. at 10. The minority view finds that:

> through continued protection of core work product, communication between expert and attorney will remain unconstrained, and will thus better serve both the ultimate truth-seeking function of the trial process and the goal of assisting the trier of fact pursuant to F.R.E. 702, 703, and 704 within the framework of our adversarial system.

See, e.g., id., 188 F.R.D. at 10–11.

The quest for discovery from experts that could show that their opinions were tainted by the influence of retaining counsel has extended beyond testifying experts to experts who were originally designated as testifying experts but were then redesignated as consulting experts. Relying on *House v. Combined Ins. Co. of Am.*, 168 F.R.D. 236 (N.D. Iowa 1996), one leading treatise states that once a witness is designated as a testifying expert, all information provided to the expert is discoverable, even if the designation is later withdrawn:

> Once a party has designated an expert witness as someone who will testify at trial, the later withdrawal of that designation may neither prevent the deposition of that witness by the opposing party nor the expert's testimony at trial. Furthermore, if a party is deemed to have waived the privilege as to documents provided to its named expert, that party may not avoid production of those documents under Rule 26(b)(4)(A) by later changing the designation of that expert from "testifying" to "non-testifying" expert.

6 *Moore's Federal Practice* § 26.80[1](a) (3d ed.). Several courts, however, have held to the contrary, depending on the timing of the redesignation.

For example, in *Estate of Douglas L. Manship v. U.S.A.*, 240 F.R.D. 229 (M.D. La. 2006), the defendant initially designated two witnesses as testifying experts but redesignated them as consulting experts before they provided reports disclosing their opinions. The plaintiff sought to take their depositions, arguing, *inter alia*, that the witnesses had participated in depositions of certain of the plaintiff's employees and that the defendant should not be permitted to "retroactively cloak the information provided by and between the [defendant] and its experts with the work product and/or consultative privilege" through an "eleventh hour" redesignation. *Id*. at 233. The defendant argued, *inter alia*, that the experts' opinions were protected from disclosure because they were no longer testifying experts. *Id*. at 231. The court agreed. The court noted that Rule 26(b)(4)(A) permits the depositions of testifying experts only after their reports have been provided and that under Rule 26(b)(4)(B), discovery against experts who are not expected to testify is permitted only upon a showing of exceptional circumstances. *Id.* Because the experts had not provided expert reports and were not going to testify at trial, the court concluded that there was no need for their depositions:

> [T]he purpose underlying Rule 26(b)(4)(A), which permits discovery from a testifying expert witness to facilitate cross-examination of that expert and elimination of surprise at trial, is simply not implicated in a case such as this, where [the experts] will not testify at trial and have never produced expert reports.

Id. at 237. Thus, in order to depose these experts, the plaintiff would have to satisfy the "exceptional circumstances" requirement set forth in Rule 26(b)(4)(B) for nontestifying experts. *Id.* at 238–39. *See also Bradley v. Cooper Tire & Rubber Co.*, 2007 U.S. Dist. LEXIS 2458 (D.N.H. 2007) (Where the witness has been redesignated as a consulting expert from a testifying expert after his report has been produced, "[f]airness requires the deposition go forward and there is no prejudice.").

While the *Manship* court seemed to find important the fact that experts were redesignated before they had provided reports, a number of courts have held that the work-product protection is restored to redesignated experts as long as they had not yet been deposed. These decisions are based on the common-sense determination that such experts are not "testifying" experts unless and until they have given testimony. *See Ross v. Burlington Northern R.R.*, 136 F.R.D. 638, 639 (N.D. Ill. 1991) ("Since plaintiff changed his mind before any expert testimony was given in this case, the witness never actually acted as a testifying expert witness."); *FMC Corp. v. Vendo Co.*, 196 F. Supp. 2d 1023 (E.D. Cal. 2002). *See also Netjumper Software, LLC v. Google, Inc.*, 2005 U.S. Dist. LEXIS 27813, *3 (S.D.N.Y. 2005) ("The purpose of Rule 26(b)(4)(A),

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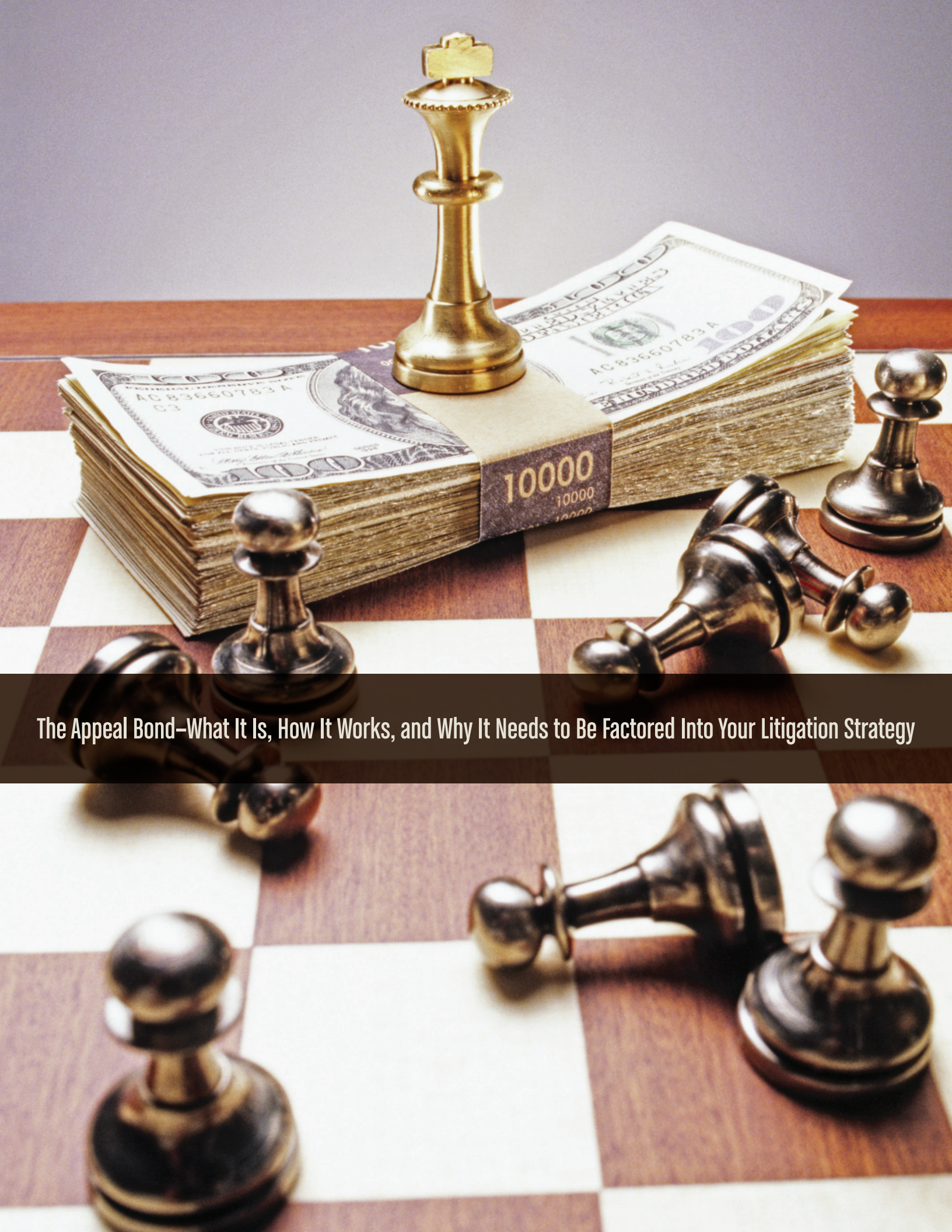

The Appeal Bond–What It Is, How It Works, and Why It Needs to Be Factored Into Your Litigation Strategy

When a business is hit with a bet-the-company product liability lawsuit—for instance, a putative nationwide or statewide class action—the defendant and its lawyers spend a lot of time at the outset thinking about case strategy and putting dollar-and-cent values on a range of issues. What will it cost to defend the lawsuit? Is the company likely to get a fair shake in the forum and, if not, is it possible to change the venue? Who makes up the potential jury pool, and what is the range of jury verdicts in the jurisdiction? What are the odds of winning or losing at trial and on appeal? Based on all of the known factors, is the case one that should be settled or tried?

by Richard G. Stuhan and Sean P. Costello

But one question that often is *not* asked early in the case is one whose answer can fundamentally change the strategy of the case: How much will it cost the defendant to appeal an adverse judgment? We're not talking about attorneys' fees or the associated costs of appeal, although these are important considerations. Instead, we're talking about the bond a losing defendant must pay to secure its right to appeal and stay the judgment. This bond is called a "*supersedeas* bond," commonly referred to simply as an "appeal bond." It is a requirement of the federal courts and every state court. Though the specific requirements vary widely, every jurisdiction requires the defendant to post some form of bond in order to appeal an adverse judgment and stay the plaintiff's execution of that judgment.

Failing to take the appeal bond into account in the early stages of case evaluation and strategy can put a defendant and its lawyers in a very uncomfortable position if, despite their best efforts and superlative lawyering, the company loses at trial and faces an adverse judgment. For instance, in a handful of jurisdictions today, the defendant is required to post the full amount of the judgment plus interest as an appeal bond. When the potential worst-case scenario is a

multibillion-dollar judgment, posting such a bond could be devastating for the company and its employees, particularly since the defendant must often post the bond within a few weeks of an adverse judgment.

The most famous example of the difficulties created by an appeal-bond requirement in a "blockbuster" case is *Pennzoil v. Texaco*, in which Pennzoil won a $10.5 *billion* verdict against Texaco.[1] The Texas appeal-bond rule required that Texaco post the entire amount of the judgment, plus interest, to stay execution of the judgment. After numerous unsuccessful efforts to avoid the appeal-bond requirement, Texaco filed for bankruptcy protection, which, by virtue of the automatic stay provisions of the Bankruptcy Code, effectively stayed execution of the judgment and led to a settlement. A more recent example is the *Price v. Philip Morris* class-action case in Illinois, where Philip Morris was hit with a $10 *billion* judgment.[2] Philip Morris would have been required to post $12 *billion* to stay execution of the judgment pending appeal, but the court reduced that amount by half following severe public scrutiny of the case. For a time, however, it appeared that Philip Morris would not even have an opportunity to contest the judgment—which would have been a sad result, given that the Illinois Supreme Court later reversed the judgment and ordered the case dismissed.[3]

For smaller companies, even much smaller bond amounts may be impossible to obtain. In many cases, the company itself will lack sufficient funds to self-finance the bond and thus will need to turn to third parties. This is unlikely to be an easy task. The process can be as time-consuming and complex as a multitier financing effort.

Even the most sophisticated analysis of the odds of reversing an adverse judgment on appeal is worthless if the bonding requirement precludes an appeal. Knowing what it may cost to appeal an adverse judgment early in the case, therefore, is just as critical as getting an informed sense of what the exposure is with respect to the judgment itself. It can affect the fundamental decision of whether to try or settle the case.

THE APPEAL BOND: WHAT IT IS AND WHAT IT DOES

A *supersedeas* or appeal bond is a "bond required of one who petitions to set aside a judgment or execution and from which the other party may be made whole if the action is unsuccessful." *Black's Law Dictionary* 1438 (6th ed. 1990). To be clear, an appeal bond is not, technically, a requirement for appeal. It is, instead, a device that allows the court to stay the execution of the judgment while the matter is on appeal. Generally speaking, a defendant can appeal without posting a bond, but in that case the plaintiff is free to execute on the judgment it has obtained while the appeal is pending. If the defendant succeeds on appeal, it would then have to (a) file a separate action to recover from the plaintiff the money the plaintiff collected from it following judgment, and (b) collect on any judgment it obtains.

For most defendants, that is not a realistic option. Aside from the potentially disruptive, if not devastating, effect of doling out millions of dollars (or more) to a plaintiff whose claims may be meritless, there is no guarantee the defendant company will be able to get its money back after the appeals process has run its course. To get the money back, the company would have to file a lawsuit, win, and then seek to collect—all of which costs time and money. A plaintiff may have taken steps to make himself "judgment-proof" during the pendency of the appeal. After being vindicated in the court of appeals, a defendant could nonetheless find that it cannot get its money back. That is not a happy situation. The appeal bond allows a defendant to avoid these problems.

From the plaintiff's perspective, the appeal bond ensures that, if the trial judgment is affirmed on appeal, money will be available to him at the conclusion of the appellate process, which could be years down the road. Just as the defendant has concerns about its ability to collect from the plaintiff months or years later, the plaintiff has concerns about his ability to collect from the defendant. From the plaintiff's perspective, during the time it takes for the appellate process to conclude—an average of 12.2 months in the federal system[4]—the corporation could go bankrupt or otherwise be in a position that renders collection difficult or impossible. The plaintiff wants assurance that the judgment will be worth something if it is upheld on appeal.

Thus, both the defendant and the plaintiff have an interest in ensuring that there will be a pot of gold at the end of the rainbow. The defendant wants the entire pot back, and the plaintiff wants to take it. But the pot has to be there for both parties.

THE REQUIREMENTS OF AN APPEAL BOND VARY WIDELY AMONG JURISDICTIONS, AND MOST STATES HAVE REFORMED THEIR STATUTES WITHIN THE LAST 10 YEARS

Federal Rule of Civil Procedure 62 supplies the general rule for *supersedeas* bonds in the federal courts. Under that rule, a plaintiff cannot execute on a judgment until 10 days after the judgment has been entered. To stay the execution of a judgment as a matter of right, the defendant must provide a *supersedeas* bond at or after filing a notice of appeal. Fed. R. Civ. P. 62(a), (d). The amount of the bond is the amount of judgment, plus interest and costs. *Id.*

It is important to note, however, that in the federal system, the district court has discretion to set a lower bond or to not require one at all, provided the defendant shows "good cause" (*e.g.,* liquidity, burden, etc.) for doing so. *See, e.g., N. Ind. Pub. Serv. Co. v. Carbon County Coal Co*., 799 F.2d 265, 281 (7th Cir. 1986). The federal rule is in contrast to some state jurisdictions, which give the lower court no discretion to reduce the amount of the bond. (In Virginia, for instance, the trial court does not have authority to alter the amount of the bond. *See Tauber v. Commonwealth ex rel. Kilgore*, 562 S.E.2d 118 (Va. 2002).)

In the past eight years, a staggering number of states have reformed their appeal-bond statutes, most by capping the amount that must be posted. The reform efforts were championed by the American Tort Reform Association ("ATRA") as part of an overall tort-reform effort. *See* Peter Geier, "States Looking at Appeal-Bond Caps," *National Law Journal* (March 26, 2007). ATRA's efforts were inspired by several high-profile, large-dollar judgments. Since 2000, 39 states have amended their appeal-bond laws by lowering the bond requirements or otherwise making the securing of an appeal bond less onerous for defendants. *See id.* Four states—Alaska, Maryland, New Mexico, and Wyoming—reformed their appeal-bond statutes just this year. *Id.*

A few examples will illustrate the variety among the states:

- In Wyoming, a defendant cannot be required to pay more than $25 million to stay execution of the judgment pending appeal, and businesses with 50 or fewer employees (deemed "small" businesses) cannot be required to pay more than $2 million.
- Hawaii, in 2006, passed a similar reform but limited the amount small businesses can be required to post to $1 million.
- Georgia reformed its appeal-bond statute in 2004 by capping the appeal bond at $25 million for all damages; previously, that cap applied only to punitive-damages awards.
- In Oklahoma, unless the defendant is a signatory to the Master Settlement Agreement ("MSA"), it must post a bond equal to double the judgment, though the trial court has discretion to lower the amount if the defendant can demonstrate that it is likely to suffer substantial economic harm.
- In 2002, Ohio imposed a $50 million cap on appeal bonds.
- Mississippi, in 2001, imposed a three-part limit on appeal bonds, under which a defendant is required to post an appeal bond covering punitive-damages awards of the *lesser* of (a) $100 million, (b) 125 percent of the judgment, or (c) 10 percent of the defendant's net worth.

(Each of these examples is identified on the ATRA web site at http://www.atra.org/issues/index.php?issue=7488; last visited on February 25, 2008.)

Other appeal-bond reforms were directed only at particular classes of defendants. A number of states, for instance, imposed appeal-bond caps for the benefit of signatories to the MSA between the states and several tobacco companies arising out of the states' Medicaid reimbursement lawsuits against the tobacco industry.

About the only place where reform efforts failed was Illinois—an interesting development insofar as it was the judgment in *Price v. Philip Morris* that inspired the reform movement. The plaintiffs' bar, which is notoriously powerful in that state, defeated efforts to reform the appeal-bond requirements. Thus, corporate defendants in Illinois continue to face the same risks that almost prevented Philip Morris from appealing the judgment against it—a judgment that the Illinois Supreme Court ultimately reversed.

There are other wrinkles in the appeal-bond statutes of the various states, and the curious reader can see them by visiting ATRA's web site, http://www.atra.org. But our point here is not to compare and contrast the jurisdictions. It is more basic: The defendant and its lawyers need to familiarize themselves with the appeal-bond requirements of the particular jurisdiction in which they have been sued. They cannot simply assume that the rules are the same everywhere.

THE ARGUMENTS FOR AND AGAINST APPEAL-BOND REFORM AND CAPS

It seems obvious that the opponents of appeal-bond reform did not persuade many legislators, insofar as 39 states have significantly changed the rules that govern appeal bonds—most by capping the amounts defendants must post. Nonetheless, it is worth exploring the arguments advanced by opponents of such caps.

Opponents of appeal-bond caps make three principal arguments. First, they claim that justice delayed is justice denied. They maintain that appeal-bond caps make it easier for defendants to "wait out" plaintiffs, who may die, lose interest, or feel financial pressure to compromise the judgment they obtained.[5] This, however, is not so much an argument about appeal bonds as it is about the right to appeal itself. It is the appeal that takes time and "delays justice," not the bond, and no one can seriously contend that the right to appeal should be restricted or eliminated simply because it prolongs the litigation. Doing it right is more important than doing it quickly, and the higher the stakes, the more true that principle becomes. Since a large number of "blockbuster" judgments are reversed on appeal—Exhibit A is the Supreme Court's recent punitive-damages jurisprudence—the "doing it right" part of the equation has increased in significance.

Second, and relatedly, opponents argue that caps allow corporations to take advantage of the "time value of money." If, for instance, the return the company would realize by redeploying the money it would otherwise pay the plaintiff exceeds what it would cost to obtain an appeal bond, corporations can play the waiting game. It really is an empirical question of whether, at any given time, the return on redeploying capital is more than the cost of the appeal bond. But this argument overlooks the fact that a large judgment against a corporation has deleterious effects on the corporation in several ways; the larger the judgment, the greater the impact. A corporation hit with a gigantic judgment will have a more difficult time gaining access to investments and loans. Moreover, potential acquirors are likely to shy away from companies with large, unsatisfied judgments. Thus, the corporation has no more incentive to drag out the appeals process than the plaintiff has.

Finally, opponents argue that appeal-bond caps are the result of corporate power and influence and represent legislative favoritism of certain industries, pointing to the fact that several appeal-bond reforms were directed at capping bonds for tobacco companies. This argument, however, ignores the fact that most reforms are industry-neutral. There are, in any event, sound reasons for capping tobacco companies' appeal bonds. Most of the lawsuits against the tobacco industry that succeeded at the trial level (a small percentage of the cases brought) were ultimately found, on appeal, to be groundless. Large tobacco trial judgments are routinely reversed or significantly reduced. Moreover, several states had come to depend on the money made available to them under the MSA, and they did not want to risk losing that cash.

Proponents of appeal-bond reform were successful not only because they had good responses to the objections outlined above, but also because their case for reform resonates with basic notions of justice and fair play. Reduced to its essentials, their argument is that everyone should have the right to appeal. The more expensive it is to appeal a decision, the less likely a losing party will be to appeal the case. Bad decisions will go unchecked and injustices will be allowed to stand unchallenged. Justice delayed *might* serve to deny justice, but closing the courthouse doors most assuredly *does* deny justice.

A review of recent "blockbuster" judgments bears this out. Huge damages awards—particularly punitive-damages awards—are frequently reversed or at least substantially reduced. *Price v. Philip Morris* is a prime example. And the United States Supreme Court's punitive-damages jurisprudence over the last decade provides further evidence. The fact of the matter is that huge verdicts rarely survive appeal intact.

Also worth noting is the lack of symmetry between defendants and plaintiffs in large-dollar product liability and quasi–product liability cases. A plaintiff who loses in the trial court generally does not need to post a bond because there is no judgment to protect. The plaintiff has nothing to lose by appealing, except attorneys' fees and other costs. And in a typical contingent-fee-based product liability case, the plaintiff probably will not have to pay those costs either. The plaintiff has all the leverage. Capping the amount of bond merely serves to level the playing field.

Finally, we should not overlook the fact that defendants cannot appeal just because they lost in the trial court.

There must be good grounds for filing an appeal, and there are serious professional consequences for lawyers who file meritless appeals. Thus, while delay may be a consequence of appeal, and while making it less financially onerous for a defendant to appeal might increase the number of appeals (an empirical question, at any rate), caps on appeal bonds should not increase the number of appeals filed for delay's sake. If appeals filed for delay's sake are a problem—and there is no evidence that they are—the solution is to amend the rules governing the grounds for appeal and the obligations of lawyers filing such appeals, not to make it financially impossible for defendants to stay execution of a judgment pending appeal.

Failing to take the appeal bond into account in the early stages of case evaluation and strategy can put a defendant and its lawyers in a very uncomfortable position if, despite their best efforts and superlative lawyering, the company loses at trial and faces an adverse judgment.

A MODEST PROPOSAL FOR FURTHER REFORM

From our vantage point as product liability lawyers, we question whether the reforms go far enough. In the typical, large-scale product liability case, an automatic or presumptive appeal-bond requirement seems to make little sense. Most of the defendants in the types of cases that result in blockbuster judgments are large, established corporations with substantial financial resources. They are not companies on the brink of financial ruin or in danger of disappearing and thus do not create any genuine risk that plaintiffs will be left with nothing. If they were, chances are the plaintiffs' lawyers would not have targeted them in the first place. Plaintiffs' lawyers look for deep pockets without lots of holes.

One approach would be to reverse the presumption by making a stay of execution the default rule, without any bond requirement (or only a nominal amount), and putting the burden on the plaintiff to demonstrate that a bond (or a larger bond) should be required. A showing similar to that demanded for a preliminary injunction could be required. Thus, the plaintiff would have to demonstrate, among other things, a risk of irreparable harm in the absence of an appeal bond, which would obviously entail showing that the defendant would be unable to pay the judgment. Given the rate of reversals in large-scale cases, putting the onus on the plaintiff to show the need for an appeal bond makes more sense than the current approach.

We anticipate that plaintiffs' lawyers would raise several objections to such a regime. The first is that it would so compromise judicial efficiency as to prove unworkable because it would necessitate virtual mini-trials, discovery, and the associated delay and expense. The fact of the matter is, however, that in the typical large-judgment case involving punitive damages, there already has been an inquiry into the financial health of the defendant—which would be the principal focus of the bond determination. Consequently, additional discovery would seem to be the exception rather than the rule. Both the scope of discovery and the complexity of any bond-determination hearing would, in most cases, be minimal.

Another objection is more fundamental. The plaintiff won at trial and obtained a judgment. Why should he bear the burden of protecting that judgment? This is a fair point but, ultimately, one that proves too much. After all, the very same

objection could be made against allowing a stay of the judgment's execution in the first place.

Under the prevailing presumptive appeal-bond requirement, the plaintiff has tremendous leverage over a defendant and can use the bond requirement to extort a settlement, no matter how tenuous the judgment or how meritorious the appeal. But rules are supposed to be fair and not favor one side or the other. Therefore, maintaining the plaintiff's unfair leverage cannot be a sound justification for the rule. Shifting the burden does no more than level the playing field, which should be a worthy goal.

FOREWARNED IS FOREARMED: THE APPEAL BOND AND LITIGATION STRATEGY

Further reform any time soon is unlikely. So, as a practical matter, product manufacturers should focus on making the potential need for an appeal bond part of their strategic thinking and planning. As a matter of strategy, point No. 1 is that the sophisticated product manufacturer and its lawyers must give serious thought to the appeal-bond requirements of the jurisdiction in which it faces significant litigation *at the beginning of the case.* Postjudgment is too late to become familiar with the appeal-bond requirements. If the jurisdiction is notoriously hostile to corporate defendants and the potential exposure approaches or exceeds the appeal-bond cap, the defendant must evaluate whether this is a case it is willing and able to litigate. Early in the case, defendants should explore and analyze options for securing an appeal bond for whatever amount is required. Depending upon how the case progresses, it may even be wise to prepare internal term sheets in anticipation of securing a bond, to the extent the corporation is unable to bond a judgment on its own. Throughout the litigation, the appeal bond should be factored into the analysis, just like other contingencies.

Potential sureties should be identified and investigated. Negotiating the terms and conditions of a surety agreement with the handful of companies able to provide such amounts will take weeks, if not longer, particularly since more than one surety is almost certainly going to be necessary in the event of a mega-judgment. Thus, it may make sense to identify and involve them early on in the process. As a practical matter, a surety will likely want to know a lot about the case, and waiting until judgment has been entered to involve the surety may be too late. Delicate issues of privilege and work product will need to be considered, since sureties will seek to learn about the lawyers' evaluation of the case. Thus, on top of the usual complexities associated with any high-stakes financial deal, the appeal-bond context requires an evaluation of the strengths and weaknesses of the defendant's case.

Simply knowing what the bond requirements are will help the corporation and its lawyers devise an appropriate litigation strategy and give the corporation a leg up in the event of an adverse result in the trial court. The case may or may not be worth pursuing through trial and appeal, but you cannot evaluate that risk intelligently without knowing whether, as a practical matter, you can defer paying millions or billions while the appeal is proceeding.

NO ONE CONSIDERED THE APPEAL BOND BEFORE, AND THE DEFENDANT HAS JUST BEEN HIT WITH A $10 BILLION JUDGMENT. NOW WHAT?

But suppose the corporation and its lawyers find themselves on the receiving end of a substantial adverse judgment, and they did not focus on the appeal-bond requirements beforehand—as we have recommended. Suppose further they are shocked to learn that, to appeal, they must post the full amount of the judgment, plus interest, and they must do so within 30 days. What can they do? Unfortunately, the options at this point are limited.

Even with the best lobbyists in the world, it is too late to reform the appeal-bond requirement. What, then, are the alternatives? The corporation can seek to locate sureties, banks, insurers, and other financial institutions after judgment. As might be expected, there are companies that specialize in appeal bonds, and some even have web sites, including the aptly named appealbond.com. Such services, however, are intended for more quotidian bond amounts. If the amount is in the tens of millions, hundreds of millions, or billions of dollars, the company will have to turn to more sophisticated providers. Reaching agreements with various financial institutions is going to be difficult, and probably impossible, within the time available.

About the only realistic option available to a corporation in this situation, other than trying to obtain additional time to post a bond, is to forge a creative solution with the court and opposing counsel. One possibility is to work out an agreement

with the plaintiff's counsel in which the defendant pays counsel some nonrefundable amount in exchange for counsel's agreement that the defendant may post a bond in an amount less than what the appeal-bond statute requires. This may work; it may not. The plaintiff's lawyer has most, if not all, of the leverage, and he could simply refuse. But as the saying goes, a bird in the hand is worth two in the bush. From the plaintiff's (and certainly his lawyer's) perspective, there is always a risk of reversal in whole or in part on appeal. A plaintiff may more easily accept the risk of trying to collect on a large judgment in the future—which may not even survive appeal—in exchange for a relatively small amount of nonrefundable cash. The biggest problem with this approach, however, is that it may not be up to the lawyers. The court may conclude that it lacks discretion to allow a lower amount. In the case of a class action, there may be additional problems, including whether the payment is to be regarded as a form of settlement and is thus subject to a time-consuming fairness-hearing process (if the state has such a requirement, as many do).

Bankruptcy is a possibility, but it is not an attractive option and perhaps not even a viable one. Texaco pursued this strategy to apparent success. Since that time, however, bankruptcy rules have been tightened, and case law has made clear that bankruptcy for the sake of avoiding judgment will not be countenanced.[6]

Likewise, a defendant is not likely to succeed in obtaining an injunction in federal court to stop the execution of the judgment or challenge the constitutionality of the appeal-bond statute. That effort was rejected in *Pennzoil v. Texaco*, and it has been rejected just about every time it has been tried since. The courts, relying on *Younger* abstention principles, reason that the defendant may pursue its constitutional objections in state court, thus obviating the need for federal-court intervention.

CONCLUSION

Barring a substantial reform, such as that proposed in this article, the appeal-bond requirement is likely to remain a staple of litigation for years to come. Though often overlooked, the fact and amount of a potential appeal bond can be significant issues in any product liability case, but they are particularly significant in large-scale, bet-the-company cases. Consequently, the appeal bond should be treated like other significant risks in the case and given due consideration early in the litigation and repeatedly throughout the conduct of the case. Failing to do so can lead to serious, and unpleasant, consequences down the litigation road. ■

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[1] *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768 (Tex. App. 1987), *cert. denied*, 485 U.S. 994 (1988); Doug Rendleman, "A Cap on the Defendant's Appeal Bond?: Punitive Damages Tort Reform," 39 *Akron L. Rev.* 1089, 1106–1107 (2006).

[2] *Price v. Philip Morris, Inc.*, No. 00-L-112, 2003 WL 22597608 (Ill. Cir. Ct. 2003), *rev'd*, 848 N.E.2d 1 (Ill. 2005), *reh'g denied*, 846 N.E.2d 597 (Ill. 2006). Journalist Steve Whitworth discusses the case in "Supreme Court Turns Out the 'Lights,' " *The Telegraph* (Nov. 28, 2006).

[3] The enormity of the problem presented by the appeal-bond requirement is illustrated by the fact that the interest on the bond—which Philip Morris did not recover—was enough to finance a number of expensive endeavors in Madison County. According to news accounts, Madison County earned $17.6 million in interest from a portion of the bond deposited in an escrow account. The county used that money to "pa[y] off virtually all county debt"; pay for the county's administration and criminal courts buildings; establish an early-retirement system for county employees; and install a $2 million, state-of-the-art 911 dispatch system. *See* Whitworth, *supra* note 2.

[4] *See* Admin. Office of the U.S. Courts, Statistical Tables, Median Time Intervals in Cases Terminated After Hearing or Submission, by Circuit for 2006, available at http://www.uscourts.gov/judbus2006/contents.html (last visited February 25, 2008).

[5] *See* Rendleman, *supra* note 1 at 1094.

[6] *See id.* at 1106–1107.

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making this provision mandatory could cause increases in manufacturing costs. Moreover, ambiguously requiring the information to be on the product itself "to the greatest extent feasible" raises the specter of having to alter the product design to satisfy the requirement.

For manufacturers of children's products (defined variously as products for those under age seven or under age five), a proposal would require independent third-party certification of the product's compliance with applicable safety standards. S. 1833, 110th Cong. § 3 (2007); H.R. 3903, 110th Cong. § 2 (2007). Depending on the yet-to-be-determined standards and protocols for these certifications (S. 2045, 110th Cong. § 10 (2007)), this requirement may complicate the manufacturing and shipping processes necessary to accommodate certification and necessitate expanded management of the third-party-certification process. This requirement could have the effect of reducing investment in in-house testing facilities. Since appropriate product stewardship includes product testing as an integral component of product design and manufacturing, the requirement could ultimately lead to products that are, contrary to the stated purpose, less safe.

On a perhaps more practical level, other proposed changes may affect manufacturers' interactions with the CPSC, with some commentators fearing that the proposed changes may shift the CPSC's focus from cooperating with manufacturers to positioning itself for litigation against them. Erin Marie Daly, "Retailers Target Flaws in CPSC Reform Bill," *Product Liability Law 360*, Oct. 19, 2007, at 2.

For example, the pending proposals would increase funding levels for the CPSC, increase the number of its full-time employees, and minimize the impact of political appointees on the CPSC's work. S. 2045, 110th Cong. §§ 3(a), 4(a), and 4(d) (2007). This may portend a CPSC that is more proactive in working with manufacturers.

Moreover, one proposal would give the CPSC, not the business entity, the power to determine whether the recall remedy will be to repair the product, replace it, or provide a refund, based on what the CPSC "determines to be in the public interest." S. 2045, 110th Cong. § 13(5). This shift in control could alter the initial negotiation positions of the CPSC, resulting in a more complex, costly, and lengthy process.

A number of proposals create or increase the punishments that could be imposed on a manufacturer that fails to furnish the required compliance certificate, presents a false certificate, or misrepresents information in an investigation. S. 2045, 110th Cong. §§ 16(c) and (d) (2007). Existing penalties would be increased, with civil fines for knowingly committing prohibited acts increased to $250,000, with a limit of $100 million, and criminal penalties of up to one year in prison for the knowing commission of prohibited acts and up to five years for the knowing and willful commission of prohibited acts. S. 2045, 110th Cong. §§ 17(a) and (b) (2007).

One particularly troubling proposal is the ill-defined measure that would allow as a criminal penalty the forfeiture of assets associated with a violation. S. 2045, 110th Cong. § 17(d) (2007). For example, this could conceivably include forfeiture of the plant where the products were made, as well as any revenues from the sale of the product. Another proposal would permit enforcement by a state attorney general on behalf of the state's citizens, with a provision to allow the recovery of fees and costs. S. 2045, 110th Cong. § 21 (2007). Such a provision is likely to provide an incentive for litigation. Finally, a proposal would provide for whistleblower protection and incentives, ensuring protection against discrimination for reporting violations and providing a monetary reward of up to 1 percent of any civil penalty collected for the reported violation. S. 2045, 110th Cong. § 22 (2007). ■

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support unreasonable risk of harm due to typical homeowner activities." *Id.* at 490.

In contrast, the court found that exposure assessment experts for W.R. Grace appropriately accounted for potential lifetime average exposure of the claimants, "used exposure assessment data and dose response to calculate risk," and appropriately calculated an excess mortality risk from the presence of asbestos in claimant homes of 0.01 to 0.0001 percent. *Id.* at 491–92 (footnotes omitted). The court found that this level did "not establish an unreasonable risk of harm" and accordingly could not support the relief that claimants sought. *Id.* at 493.

Computer Modeling. As already noted, the key issue in garnering judicial acceptance of a computer model is demonstrating that factually correct inputs have been made and no inappropriate assumptions have undercut the results obtained. This issue is implicit in the discussion of data "fit" so important to the W.R. Grace bankruptcy court and has been discussed in numerous judicial decisions. One recent case, *Gallaway v. Empire Fire & Marine Insurance*, No. 03-113, 2007 WL 1199502 (W.D. La. Apr. 20, 2007), *aff'd*, *Medlin v. Newman*, No. 07-30460, 2007 WL 4180542 (5th Cir. Nov. 27, 2007), illustrates the power that competent defense modeling can have over plaintiff claims of exposure.

In *Gallaway*, the plaintiffs alleged that they had been "engulfed" by a "cloud" of hydrochloric acid ("HCL") fumes after a truck carrying liquid HCL was involved in a road accident that caused acid to leak from the truck. Although no one disputed that some level of fumes was present at the accident, absent defensive modeling efforts, the plaintiffs' testimony of their exposure might have gone unchallenged. However, an air dispersion model used by emergency responders to predict chemical dispersion after an accidental release showed that the plaintiffs "could not have been exposed to harmful levels of HCL such that would have caused their alleged chronic symptoms." *Id.* at *2–3.

The court was persuaded that the defense expert who presented the model had reviewed available factual information about the event, including meteorological records and emergency response reports, and had made appropriate inputs to the model regarding—among other things—the amount of chemical spilled, the location of the chemical source, the duration of the spill, and the position of the plaintiffs relative to that source. *Id.* at *3. Because the plaintiffs did not present any evidence to counter the defendants' model, the court granted summary judgment to the defendants and dismissed all of the plaintiffs' claims. *Id.*

These cases demonstrate the importance of critically analyzing the factual basis for alleged exposure claims and carefully delineating the areas in which "supporting" data may be challenged as inconsistent with the facts. Any exposure methodology is likely to have flaws; proper exploration and presentation of these defects can provide an early litigation victory to the prepared defendant. ■

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[4] *Id., citing New York Life Ins. Co. v. Seighman*, 140 F.2d 930 (6th Cir. 1944); *Robinson v. Crown Equip. Corp.*, 2007 U.S. Dist. LEXIS 71772 (E.D. Ark. Sept. 26, 2007).

[5] *Burke*, 2007 U.S. Dist. LEXIS 7539, *citing Rimer v. Rockwell Int'l Corp.*, 641 F.2d 450 (6th Cir. 1981).

[6] *Id., citing Wojciechowski v. Long-Airdox Div. of Marmon Group, Inc.*, 488 F.2d 1111 (3rd Cir. 1973).

[7] *Sheesley v. Cessna Aircraft Co.*, 2006 U.S. Dist. LEXIS 77919 (D.S.D. Oct. 24, 2006).

[8] *Burke*, 2007 U.S. Dist. LEXIS 7539.

[9] *Id.*; *Sheesley*, 2006 U.S. Dist. LEXIS 77919.

[10] *Ford Motor Co. v. Hall-Edwards*, 2007 Fla. App. LEXIS 17738 (Nov. 7, 2007) (jury verdict set aside and remanded for new trial at which plaintiff must lay a sufficient foundation to establish substantial similarity between the evidence relating to other accidents and the accident at issue).

[11] *Sheesley*, 2006 U.S. Dist. LEXIS 77919 (further holding that plaintiff must lay an adequate foundation that the incidents contained in the SDRs were substantially similar to the accident at issue).

[12] *DiPesa v. Home Depot U.S.A.*, Inc., 245 F.R.D. 53 (D. Mass. 2007) (court limited discovery of prior falling-merchandise incidents to those incidents involving falling lumber during the preceding five-year period; court refused to limit discovery to Massachusetts stores and allowed discovery of such incidents in all of defendant's U.S. stores); *Dillard v. Cooper Tire & Rubber Co.*, 2007 Ala. LEXIS 229 (Oct. 26, 2007) (trial court exceeded its discretion in permitting discovery regarding tire failures unrelated to tread separation; however, court permitted discovery of tread-separation failures for all tire models manufactured by defendant during seven-year period before plaintiff's accident).

[13] *Burke v. U-Haul Int'l, Inc.*, 2007 U.S. Dist. LEXIS 7539 (W.D. Ky. 2007) (court excluded testimony of 11 individuals involved in previous accidents while towing dolly manufactured by defendant; jury would be tempted improperly to use the emotionally disturbing testimony to find a product defect); *Crump v. Versa Products, Inc.*, 400 F.3d 1104 (8th Cir. 2005) (court properly excluded evidence of 44 other incidents of ladder-hinge failure where the incidents occurred *after* the date of plaintiff's injury or involved incidents where the ladder was not configured in a straight position).

[14] *Stambaugh v. International Harvester Co.*, 435 N.E.2d 729, 744–45 (Ill. App. Ct. 1982).

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which permits discovery from a testifying expert witness, is to facilitate cross-examination of that expert at trial. That purpose is not implicated where, as here, the expert will not testify, has never been deposed, and has never produced a report.") (citation omitted).

The critical role the testifying expert plays in the outcome of bet-the-company litigation can be irretrievably undermined by any suggestion that the expert's opinions are the product of improper influence by retaining counsel. Yet the input of retaining counsel, who will have gained an in-depth understanding of the subject matter of the expert's testimony and with whom rests the ultimate responsibility for the presentation of the case at trial, is simply unavoidable. Because all communications and materials provided to a testifying expert are discoverable in the overwhelming majority of jurisdictions, all members of the case team (*e.g.*, junior associates and legal assistants) must receive proper instruction concerning information exchange, whether oral or written, with experts. Such precautions will go a long way toward preventing opposing counsel from portraying the expert's opinions as not the product of his own independent analysis. Finally, to the extent retaining counsel wishes to restore the attorney work-product protection by redesignating a testifying expert as a consulting expert, the redesignation should be made prior to the expert's deposition. ■

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Our lawyers know that they are expected to learn about the client and keep themselves informed about the industry within which it operates. We believe that in this fashion we can best serve you. We do not charge clients for keeping informed and for trying to be not just great lawyers but also well-rounded and sensible participants in the client's global efforts. Our lawyers are expected to know what the client's business strategies are, what business issues our clients are facing, and what the analysts are saying about the industry. In this setting, we can best avoid developing case plans and strategies that may win a lawsuit but that can be counterproductive in terms of the company's grand strategies. When a case comes in, someone needs to assess whether it is one that cries out for a business resolution or whether it must be litigated to a conclusion. A victory that craters relationships with customers and consumers is probably not much of a victory. At the other end of the spectrum, a case plan that winds up in a quick, inexpensive settlement but causes an avalanche of new cases was probably not a great result. The fact that Jones Day has consistently been ranked as the best in the nation at client service in The BTI Consulting Group's Survey of Client Service Performance shows that our clients appreciate this approach. And make no mistake—we understand that client satisfaction is an ongoing test, not anything that can be taken for granted.

The most recent initiative of Jones Day's Product Liability Practice—its Product Response Team—has been getting a lot of attention and attracting a lot of work. This is a multidisciplinary, global group set up to provide quick responses to clients who may have product recall or related issues thrust upon them. It is described on our web site and in printed materials that can be obtained from any Jones Day office. Jones Day is one of the few firms in the world that can provide one-stop shopping to clients facing a possible product recall. With English-speaking lawyers in China and in the EU, with lawyers experienced in CPSC matters and in dealing with European regulators, with experienced litigators who have tried product cases and handled the biggest multicase projects across the U.S., with lawyers who have negotiated with state attorneys general and handled congressional inquiries, and with lawyers who can address the insurance and securities disclosure issues likely to be presented, we are well positioned to help a company work its way quickly through the myriad decisions and issues that must be addressed in a potential recall and in the inevitable litigation fallout. Our Product Response Team even includes a Jones Day lawyer who is a Ph.D. toxicologist who can assist clients in navigating the issues of product testing and expert selection. When you call this team, you will not be paying for fresh research by someone who would like to become an expert in the field. Our team has been and currently is involved in the biggest fights of this kind in the world.

As always, we appreciate your candid feedback on the writings in these issues. I even appreciated the client who sent me a Christmas card saying he loved the articles and my commentary but that my web site picture looked like a Soviet-era passport photo! New photo coming soon. ■

Paul M. Pohl


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