LJN LAW JOURNAL NEWSLETTERS

LJN'S
Product Liability
Law & Strategy®

Volume 23, Number 12 • June 2005 ALM

Practice Tip

Prepare Yourself and Your Employee Witness for the 'Regulatory' Deposition

By Julie Blum

During the course of discovery in product liability matters, a key liability theme is often whether the defendant company complied with its regulatory obligations in connection with the product at issue. For example, in product liability litigation concerning chemical compounds, the focus might be on whether the company properly registered the compound with the EPA or with state environmental agencies. Likewise, in a pharmaceutical or medical device product liability case, plaintiffs will often focus on whether the product complied with FDA regulatory requirements. Plaintiffs' approach to such liability issues will often result in depositions that focus on whether, how, and when the defendant company informed the appropriate regulatory agencies of any risks potentially associated with use of the product at issue.

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Editor's Note

You spoke. We listened. Beginning with this issue, *LJN's Product Liability Law & Strategy* expands to 12 pages in order to provide more articles, features and analysis critical to your practice. Thank you to all our subscribers who participated in our readership survey.

Beware of Judicial Exceptions to Federal Rule of Evidence 407

By Alan D. Kaplan and Christopher P. Greeley

As you prepare for your upcoming product liability trial, things could not seem any better. You have qualified experts waiting to testify that your client's product is not defective. The client is credible, well established, clearly safety conscious and responsible. Throughout lengthy pretrial depositions, your client has never denied ownership or control of the product, and never claimed that purported safety measures suggested by the plaintiff were not feasible. He claims only that the measures would have been inconsequential based on the facts of the case. Therefore, it is your impression that the warning label your client added to the "Super Widget" subsequent to the accident will never be presented to the jury based on the protections of Federal Rule of Evidence 407, a conclusion the judge will surely come to as she flips through your motion *in limine*. In pertinent part, the Rule states that:

> When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction.

What then could possibly be the basis for your opponent's opposition papers that have now landed on your desk?

Rule 407 provides a handful of statutory exceptions to keep defendants from using the rule as both a sword and a shield. The Rule permits the admission of evidence of subsequent remedial measures when they are presented for uses "such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment." Wright & Graham, *Federal Practice and Procedure* §5289, at 145 (1980) ("it is doubtful that the plaintiff, at common law, could have called the defendant to the stand, asked him if he thought he had been negligent, and impeach[ ] him with evidence of subsequent repairs if he answered 'no.'"). While FRE 407 has, generally speaking, secured the front door against the admission of

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subsequent remedial measures, several judicially created exceptions have opened windows that plaintiffs are using to present this evidence to a jury. With the strong public policy of encouraging remediation in mind, certain factual situations, which do not fit neatly within that policy, have become the basis for these exceptions.

The first of these exceptions discussed herein is the admission of subsequent remedial measures where those measures are undertaken at the direction of a superior governmental authority. The rationale behind this use is that Rule 407 is meant to encourage voluntary actions, and that once a manufacturer is forced to make changes to its product, the public policy behind the rule is eviscerated. The real battle over this exception occurs when a court is forced to decide what exactly constitutes a superior government authority, and what a company is being forced to do and what it is undertaking voluntarily.

Proponents of the admission of subsequent remedial measures also point to the unfulfilled public policies behind Rule 407 when proffering evidence of repairs carried out by third parties. This, plaintiffs claim, does not chill the remedial measures that a party may undertake after an accident because it is not the manufacturer who is actually performing the repair or alteration. This immediately draws issues of agency and control into question as a court is forced to decide the relationship between anyone performing a repair and the party sought to be held liable.

Finally, and with much less success, plaintiffs have tried to admit reports that discuss the product alterations, and the process that led up to them. For the most part, these reports have been viewed as an end run around Rule 407; but where the plaintiff could demonstrate that the report was produced before the accident or that it was not created expressly for the purpose of subsequent remedial measures, these reports have been admitted.

Superior Authority

The opposition papers that cross your desk lead with the argument that the Super Widget's warning was added as a result of a recall monitored by the Consumer Product Safety Commission and can, therefore, be received in evidence in spite of Rule 407. Several circuits have recognized that there is an exception to Rule 407 that allows the admission of remedial actions mandated by a superior authority because the policy goals of Rule 407 are not implicated in those instances. *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1343 (5th Cir. 1978); *O'Dell v. Hercules*, 904 F.2d 1194 (8th Cir. 1990); *In re Aircrash in Bali, Indonesia*, 871 F.2d 812 (9th Cir. 1989); *Herndon v. Seven Bar Flying Service, Inc.*, 716 F.2d 1322, 1331 (10th Cir., 1983); *Kociemba v. G. D. Searle & Co.*, 683 F. Supp. 1579, 1581 (D. Minn., 1988). As the Tenth Circuit succinctly held, "[w]here a superior authority requires a tortfeasor to make post-accident repairs, the policy of encouraging voluntary repairs which underlies Rule 407 has no force — a tortfeasor cannot be discouraged from voluntarily making repairs if he must make repairs in any case." *Herndon v. Seven Bar Flying Service, Inc.,* 716 F.2d 1322, 1331 (10th Cir., 1983).

Those courts that have recognized this exception have limited their view to remedial measures taken at the direction of the government or at the direction of a regulatory arm of the government such as the Federal Aviation Authority or the National Highway Traffic Safety Administration.

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Product Liability

Law & Strategy®

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Product Liability Law & Strategy® (ISSN 0733-513X) is published by Law Journal Newsletters, a division of ALM.
Telephone: (800) 999-1916
Editorial e-mail: jgromer@alm.com
Circulation e-mail: subspa@alm.com

Product Liability Law & Strategy P0000-224
Periodicals Postage Pending at Philadelphia, PA
POSTMASTER: Send address changes to:
ALM
1617 JFK Blvd., Suite 1750, Philadelphia, PA 19103
Annual Subscription: $329

Published Monthly by:
Law Journal Newsletters
1617 JFK Boulevard, Suite 1750, Philadelphia, Pa 19103
www.ljnonline.com

Researching Your Case: When Hard Work Pays Off (For the Other Side)

By Kurt Hamrock and Lisa Abrams

An essential step in any product liability litigation is learning the history behind the product at issue. Frequently, the manufacturer's files are incomplete, especially when the product was created long ago. Documents relating to the product's creation, design, testing, production, safety record, etc., often may be obtained from other sources, both public and private. Good attorneys know how to search for such documents from other sources and do so as part of their case development. The attorneys might personally conduct the search or use associates, private investigators, or litigation support firms that specialize in historical document research.

Can an attorney keep such documents "under wraps" and undisclosed to opposing counsel? If so, on what grounds? Must an attorney identify the documents withheld on a traditional privilege log or by other means? May the documents later be used by the attorney who withheld them? Most attorneys have a strong opinion on this subject, but the case law is mixed. Attorneys should consider the issue carefully before searching for documents from outside sources.

Are Documents Obtained from Outside Sources Responsive to Discovery?

Suppose, for example, that an individual sustains injuries from a product and brings suit against the manufacturer; documents related to safety studies and the product's design will be of great interest, both to the plaintiff and to the defendant. Such documents, if still held by the manufacturer, clearly would be both relevant and discoverable. Suppose, however, that the manufacturer has safety records dating back only a few years. Let us further suppose that, after the inception of litigation, the defense attorney finds and obtains from third parties other safety records that were not in the possession of the manufacturer. Must such documents be disclosed?

The starting point of the analysis is, as usual, the Federal Rules of Civil Procedure. Rule 26(a)(1) requires the parties to make initial disclosures that include a copy or description of all documents that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses. Under Rule 26(b)(1), parties may obtain additional discovery regarding any nonprivileged matter that is relevant to the claim or defense of any party, including the existence and description of documents containing discoverable matter. Document requests are addressed by Rule 34, which permits a party to inspect and copy any documents containing relevant matter which are in the possession, custody, or control of the party upon whom the request is served. Parties are required to supplement their prior disclosures or responses, if they learn that the original disclosure or response is incomplete in some material respect.

These rules do not carve out any exceptions for documents obtained by an attorney from sources other than the client. Using the above example, safety reports certainly remain relevant, whether taken from the files of the manufacturer or obtained from other sources. Further, such reports are still within the "possession, custody, or control" of the manufacturer, even when held by the manufacturer's attorneys. *Henderson v. Zurn Indus., Inc.*, 131 F.R.D. 560, 566 (S.D. Ind. 1990); *Lone Star Steakhouse and Saloon, Inc. v. Liberty Mutual Insur. Group*, 2003 WL 21659662, at *2 (D. Kan. June 4, 2003). Thus, it would appear that such documents are responsive to discovery requests, regardless of their source.

Can Responsive Documents Be Shielded from Disclosure?

The rules provide, however, that otherwise responsive and relevant documents need not be disclosed if they are privileged or otherwise protected. *See* Rule 26(b)(1) and (b)(3). Do documents collected as part of a litigation effort enjoy such protection? The case law is mixed on this question.

Counsel would be hard pressed to argue that such documents fall within the attorney-client privilege. The privilege extends to communications between an attorney and client and to documents prepared by a client in order to secure legal advice from the attorney. *See Upjohn Co. v. United States*, 449 U.S. 383, 394 (1981). The documents in the example — safety records from years past — would seem to have no connection to such communications. Documents cannot become privileged simply by channeling them into the hands of the attorney for custodial purposes to avoid disclosure. *Natta v. Hogan*, 392 F.2d 686, 692 (10th Cir. 1968).

Protection more likely may be found in the attorney work product doctrine. The doctrine, which is partially codified in Rule 26(b)(3), protects against disclosure the mental impressions, conclusions, opinions, legal theories, research, and certain factual material gathered in preparation of litigation. *In Re Grand Jury Proceedings, Appeal of FMC Corp.*, 604 F.2d 798, 801 (3d Cir. 1979). Generally, an item is protected by the work product doctrine if: 1) it is a document or tangible thing; 2) prepared in anticipation of litigation or for trial; and 3) by or for an opposing party or its representative. The doctrine is extended to protect materials prepared by or gathered by non-attorneys, so long as they are acting at the behest of the attorney. *See, e.g., In re LTV Securities Litigation*, 89 F.R.D. 595, 613 (N.D. Tex. 1981).

Rule 26 and the related case law define two types of attorney work product: "ordinary" work product and "opinion" work product. Ordinary work product contains "raw factual information." *Moore v. R.J. Reynolds Tobacco Co.*, 194 F.R.D. 659, 662 (S.D. Iowa 2000). The protection afforded ordinary work

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product can be overcome by a party demonstrating a substantial need for the information and an inability otherwise to obtain the materials without due hardship. On the other hand, opinion work product "contains counsel's mental impressions, conclusions, opinions and legal theories." *Id*. Opinion work product is more closely guarded and afforded almost absolute protection from disclosure.

The documents previously discussed — old safety records — presumably were not created in anticipation of litigation. However, the work product doctrine still may apply. The very compilation and selection of documents, rather than the documents themselves, may constitute "attorney work product." *Sporck v. Peil*, 759 F.2d 312, 315 (3d Cir. 1985). Under this "compilation" theory, when selecting and compiling documents obtained from outside sources, an attorney exercises legal talent and training by initiating and directing the investigation. *See*, *e.g.*, *Scourtes v. Fred W. Albrecht Grocery Co.*, 15 F.R.D. 55, 58 (N.D. Ohio 1953). Such effort is entitled to protection.

Many attorneys assume that *all* document recovery efforts constitute work product. This conclusion is not supported by the case law. For example, a court has held that documents obtained by plaintiff's counsel from a litigation support group were discoverable. *Bohannon v. Honda Motor Co. Ltd.*, 127 F.R.D. 536 (D. Kan. 1989). Another court compelled a plaintiff to produce press releases issued by the defendant but obtained from another source. *Zucker v. Sable*, 72 F.R.D. 1 (S.D.N.Y. 1975). Other cases also run contrary to the "conventional wisdom" that an attorney need not share documents obtained from third parties as part of the case investigation.

In short, "the mere fact that an attorney *located* a particular document while preparing for litigation does not make the document 'work product.'" *Scott Paper Co. v. Ceilcote Co.*, 103 F.R.D. 591, 594 (D. Maine 1984). The protection depends on the existence of real, rather than speculative, concern that the thought processes of counsel in relation to pending or anticipated litigation will be exposed. *In re Shell Oil Refinery*, 125 F.R.D. 132, 133-34 (E.D. La. 1989). These cases suggest that, to constitute work product, the compilation or selection of documents must involve an exercise of the attorney's discretion sufficient to reveal the mental impressions or legal strategy of the attorney if the documents were disclosed. This determination will vary, depending on the facts of a particular case.

Can the Work Product Doctrine Be Overcome?

Even if the work product doctrine applies in a particular case to the selection and compilation of documents, the documents at issue *still* may have to be disclosed. As previously described, courts may order the disclosure of "ordinary" work product upon a showing of substantial need and undue burden. "Opinion" work product, however, enjoys almost absolute protection.

Does the compilation and selection of documents by an attorney or the attorney's agent constitute "ordinary" or "opinion" work product? Unfortunately, the case law also is divided on this question. Under some circumstances, the compilation is considered "opinion" work product. *See Sporck* (selection of documents used to prepare witness for deposition). However, the compilation may be "ordinary" work product. *See In re Shell Oil Refinery* (selection of certain documents for copying from larger number provided during discovery). Consequently, the work product doctrine may not protect against the disclosure of documents obtained from outside sources.

Attorneys may well cry "foul" at an attempt by opposing counsel to benefit from the other side's research efforts. Indeed, some courts have denied discovery requests seeking documents obtained from third parties on the grounds that it would penalize the diligent and place a premium on laziness. Others, however, have granted such discovery in the absence of evidence that one party was seeking to exploit the work of opposing counsel. *Compagnie Francaise D'Assurance Pour Le Commerce Exterieur v. Phillips Petroleum Co.*, 105 F.R.D. 16, 41-42 (S.D.N.Y. 1984).

A cautious attorney, then, must be prepared for a discovery request from opposing counsel that encompasses documents obtained from third-party sources. If the request is a general one, *eg*, "all safety reports related to the product at issue," it may be difficult to argue that providing documents in response will disclose attorney work product. On the other hand, if the request specifically seeks documents compiled or selected from other sources, an attorney has a better chance of opposing production. This is especially true if the responsive documents already have been produced to the other side as part of a larger production.

Withholding such documents, however, raises another question. Must the withheld documents be listed on a privilege log? Rule 26(b)(5) ordinarily requires that documents withheld on work product grounds be described in sufficient detail to demonstrate that the doctrine applies. Courts applying the work product doctrine to the compilation and selection of documents have not addressed whether the documents must be identified on a privilege log. However, the identification of the compiled documents theoretically would thereby disclose the mental processes of the attorney who selected them, which is the very basis for the application of the doctrine. Thus, it may be argued that the documents cannot be listed on a privilege log without revealing protected information. *See Sporck* at 316.

Can Withheld Documents Be Used Later in the Case?

Withholding documents obtained from outside sources may lead to trouble later in a case. Suppose, for example, that a plaintiff's attorney seeks from a manufacturer safety records relating to the product at issue. The manufacturer has in its possession safety reports for only the past 3 years, which the manufacturer's attorney produces to plaintiff. The manufacturer's attorney then uses a litigation research company to locate safety records from various public and private sources going back another 20 years. The older records paint the product in a very favorable light. Defense counsel,

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Did the company submit the requisite scientific data; did it properly report known adverse events associated with the product at issue, and did it seek appropriate approval from the regulatory agency regarding the nature of its warnings to users and consumers? To that end, plaintiffs will often notice depositions of fact witnesses whom they think can provide testimony on the company's regulatory compliance or they may seek depositions pursuant to Fed. R. Civ. P. 30(B)(6) of witnesses "with knowledge" of the company's regulatory compliance.

A very basic, yet critical, component of the successful defense of a product in product liability litigation is the thorough preparation of the defendant company's employee witnesses who may be called to testify about regulatory compliance. Although such witnesses may be well versed in the regulations that govern the product at issue, they often walk into depositions woefully unprepared to deal with deposition "tactics." So how can one thoroughly prepare a company witness who will be asked to testify regarding the company's compliance with governing regulatory schemes? First, learn the regulations yourself well in advance of your meeting with the witness. Become familiar with the regulatory scheme that governs the registration and marketing or sales of your client's product. Obtain and read all documents that reflect contacts between your client and the regulatory authority. Second, have the witness walk you very carefully through his/her understanding of the regulations and the company's compliance with them. This is important so that you can assess the witness's knowledge, as well as to further your own education about the company's regulatory compliance. Review the regulatory documents with the witness. Know which documents he has specific knowledge of and which ones he does not. Third, make sure that the witness is familiar with the deposition process itself and understands the mechanics of the deposition, *eg,* what to do when you object, not to speculate when giving answers, etc. Fourth, and perhaps most important, prepare your witness well for the "trap" questions. These are questions that assume regulatory requirements, which often are not imposed in the manner suggested by the question. Consider the following deposition question typical of one posed by plaintiffs in a pharmaceutical product liability case:

Q: Do you have an understanding that an ethical pharmaceutical corporation in the United States has responsibility for proposing drug interaction language to be included in the package insert when it becomes aware of a potential drug interaction with clinically significant implications?

The unprepared witness might be tempted to answer "yes" to this question and hope that he gets to follow up with "and that is what my company did." The "trap" here is that the question presumes that there is a requirement to do just what the question asks. Is that what the regulations require? Maybe or maybe not, depending upon how the regulations define and address the terms "drug interaction" or "clinically significant implication." A "yes" answer here could potentially be used as an admission by the company, and further deposition testimony along these lines will likely only confuse the witness leading to less than accurate testimony. The witness must understand through your careful preparation that it is the regulations that govern what a company must do, not the implied obligations suggested by the question. An example of how a witness would avoid taking the bait and responding to the trap question follows:

A: I would say that the drug company marketing prescription drugs has the duty to follow the regulations provided by the government, one of which is as follows: "that practical guidance for the physician be presented about clinically significant interactions that occur in vivo in patients taking the drug."

The key to this response is its focus, and reliance, upon the regulations, solid ground for the witness. Because the regulations are what govern the company's actions, they are the proper foundation upon which the witness should build his/her answer.

Witnesses confronted at depositions with questions that implicate regulatory schemes are well advised to use their knowledge of the applicable regulations in responding to these questions. To do otherwise is to become ensnared in counsel's verbal trap, and inadvertently to respond in a way that may well not be entirely accurate.

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however, does not produce the documents to plaintiff.

May the manufacturer later use the old safety records in a motion for summary judgment? Or during its deposition of plaintiffs' expert witnesses? Unfortunately, the answer is unclear. Generally, production of part of a work product file waives only the work product protection for that portion of the file. *See*, *e.g.*, *Pittman v. Frazier*, 129 F.3d 983 (8th Cir. 1997). However, courts have ruled that "privileges cannot be used as both a sword and a shield." *See*, *e.g.*, *Burlington Industries v. Exxon Corp.*, 65 F.R.D. 26 (D. Md. 1974). Courts thus may take a dim view of a party that discloses some, but not all, documents clearly relevant to an issue and then seeks to use the undisclosed documents against the other side. At best, a party's counsel will have to answer some probing questions from a suspicious court as to why the documents were not previously produced. At worst, a party may face additional discovery or be prohibited from using the undisclosed documents to support its case. A wise lawyer who decides to withhold documents obtained from outside sources will find some way to alert the other side that such documents exist prior to using them in court.

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Application of a Universal Law in Multidistrict Litigation

By Daniel J. Herling and James Hess

When product liability cases are consolidated through Multidistrict Litigation ("MDL") proceedings, the proceedings are rife with complexities, and the obvious temptation for an MDL judge is to streamline and simplify these proceedings as much as possible. MDL judges have many appropriate tools at their disposal, such as case management orders and adoption of uniform discovery requests, to facilitate the proceedings. While certain techniques used to simplify and consolidate are appropriate, application of a "universal law" — in which one substantive law is applied to cases from various jurisdictions — is not. Application of a universal law violates due process and places consolidation and expediency above the interests of justice. Such a dangerous proposition was briefly suggested during the Ephedra MDL proceedings, involving hundreds of cases consolidated for pretrial purposes in the Southern District of New York.

Judge Jed S. Rakoff of the Southern District of New York is overseeing the cases consolidated in *In re Ephedra Products Liability Litigation*, No. 04-1598 (S.D.N.Y) (the "Ephedra MDL Proceeding"). In his Case Management Order No. 6 ("CMO No. 6"), Judge Rakoff invited the parties to the proceeding to make oral presentations as to the possibility of applying the Restatement (Third) of Torts (the "Restatement") as the universal law applicable to all claims in the Ephedra MDL Proceeding.

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In accordance with §11.211 of the Manual of Complex Litigation (4th Ed.), which recommends that the court and parties attempt to identify and resolve disputed issues of law early in the case management process, counsel are invited to make oral presentations at the September status conference about whether the Restatement (Third) of Torts can provide a uniform substantive law for all claims of personal injuries in these cases.

One must only take a simple product liability example to illustrate the potential troubles in applying universal law. Assume a product liability case in which either Arizona or Indiana law could apply. Even a cursory look at applicable laws shows drastic differences. Without going into unnecessary detail: Arizona follows the hindsight test in product liability actions, but no Indiana court appears to have considered whether to adopt this test; Indiana does not recognize the tort of negligent misrepresentation outside of the employment context, while Arizona follows the Restatement (Second) of Torts §552, which generally recognizes the tort in the context of commercial transactions; Arizona allows parents to bring loss-of-consortium claims for injuries to their adult children, while Indiana allows only loss-of-services actions, and only for harm to minor children; Arizona follows the collateral source rule, while an Indiana statute, in contrast, requires trial courts to admit "evidence of ... proof of collateral source payments" with certain limited exceptions; and with respect to punitive damages, Arizona imposes no quantitative limit while Indiana limits punitive damages to the greater of three times compensatory damages or $50,000.

It Is Inappropriate for a Court to Apply a Universal Law in the MDL Setting

The U.S. Supreme Court's decision in *Phillips Petroleum Co. v. Shutts et al.*, ruled — due in no small part to the vast differences in substantive laws such as the ones discussed above — that application of a universal law would violate the due process rights of parties who are guaranteed to have the appropriate law applied to their various claims. *Phillips Petroleum,* 472 U.S. 797, 823 (1985). In *Phillips Petroleum*, a class had been sought to pursue claims concerning interest on overdue royalty payments stemming from gas leases. Class members resided in all 50 states, the District of Columbia, and several foreign countries. Phillips Petroleum claimed that the claims of all class members could not be decided by applying Kansas law to all the transactions. The Supreme Court agreed, holding that a state court cannot apply one substantive law to all claims, even if they were properly consolidated. Similarly, numerous federal courts have found that in an MDL, the choice-of-law rules to be applied as to each case in such a proceeding, presuming the cases are in federal court based upon diversity jurisdiction, are the rules of the states where the actions were originally filed. *See In re Air Crash Disaster near Chicago.,* 644 F.2d 594, 610 (7th Cir. 1981) (applying the laws of no less than eight states to cases in an MDL, holding, " ... it is not disputed that, since federal jurisdiction is based on a diversity of citizenship, the choice-of-law rules to be used are those choice-of-law rules of the state where the actions were originally filed."); *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*, 309 F. Supp. 1053 (E.D. Pa. 1969); *In re Air Crash Disaster at Boston,* 399 F. Supp. 1106 (D. Mass. 1975).

The Exception — and Why It Happened

At least one federal court *has* applied a universal substantive law to a major MDL that consolidated product liability cases for pretrial purposes. *In re "Agent Orange" Product Liability Litigation*, 580 F. Supp. 690, 693 (E.D.N.Y. 1984). In *Agent Orange*, the court addressed the preliminary issue of what substantive law should apply in an action by plaintiffs — Vietnam War veterans and their families — against defendant "Agent Orange" manufacturers for injuries suffered as a result of plaintiff veterans' exposure to Agent Orange during the Vietnam War.

In response to the court's decision to apply a universal federal law to all claims, plaintiffs argued that such application would be inappropriate.

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The plaintiffs argued that: 1) federal common law may only be applied where there is a substantial federal question at stake; 2) the Second Circuit's decision — that diversity of citizenship and not federal question, gave the federal court jurisdiction — constituted a determination binding on the court that no such federal interest existed; and 3) the court could not, therefore, apply federal or "national consensus" common law to any issue. Further, the plaintiffs suggested that no single national consensus substantive law existed.

In response, the court defended its position to apply a universal federal common law. First, the court explained that issues involving the federal government dominated the case: "This suit involves tens of thousands of servicemen and their wives and children alleging injury abroad in time of war as a result of a military decision. As opposed to the general policy behind products liability which encompasses all those injured by defective products, there is a far more specific federal policy of ensuring compensation for injured members and veterans of the armed forces." Second, the court minimized the importance of the states' interests: "At most, a state's contacts in an 'Agent Orange' suit would consist of the individual plaintiff veteran's residence in that state — a factor readily subject to change in our transient society — and the fact that one of the seven defendant companies is either incorporated, has its principal place of business or manufactured its Agent Orange in that state. At the risk of restating the obvious, those contacts are dwarfed by the national contacts in the case."

Thus, Judge Weinstein's opinion in *Agent Orange* went to enormous lengths to justify its decision as not being violative of due process. Nevertheless, many commentators have criticized Judge Weinstein's opinion as an obvious attempt to streamline complex litigation in order to coerce parties into settling the case, despite knowing that the application of a universal substantive law was inappropriate. *See* 52 Ark. L. Rev. 9, 27 (1999); *see also*, 97 Colum. L. Rev. 1971, 1989 (1997) (commenting that "in *Agent Orange* Judge Weinstein, pursuing the goal of settlement, applied what he knew was not generally understood as the law, and did everything he could to make sure that the train he was conducting was not derailed by the Court of Appeals."). Commentary on this issue further supports the conclusion that the MDL court cannot disregard the substantive law that would apply in each transferor court. While the MDL court can avoid or finesse conflict issues to a certain degree, the MDL court will eventually have to deal with issues that involve state law. When defenses are based on statutory or other types of "national" law, such as the federal statutes, government contracts, or the U.S. Constitution, choice-of-law issues are largely eliminated. This is not the case for many decisions, *eg,* a statute of limitations defense, which would likely present various potential laws, requiring an MDL court to either force all parties into a universal law or face the burden of learning the substantive law in each state.

Further Complications

Aside from the obvious difficulties raised by trying to apply one substantive law to cases arising from jurisdictions with vastly different substantive law, there are additional complications. When a case is remanded back to the transferor court, the transferor court gains exclusive jurisdiction of the case. Although it is possible for transferor courts to overturn, vacate, or modify transferee court rulings, most commentators have indicated that this is a rare occurrence.

The ruling in *In re The Upjohn Antibiotic "Cleocin" Products Liability Litigation* explicitly supports the transferor court's sole jurisdiction following remand while simultaneously offering implicit support for its ability to modify MDL rulings. After the MDL court had remanded the cases, the plaintiffs requested that the MDL court modify a previous order regarding discovery seeking, *inter alia*, a protective order to quash depositions of previously deposed witnesses. The MDL court denied the plaintiffs' motion and found that after remand the MDL court no longer had jurisdiction over the matter. Essentially, the court held that after remand, decisions are in the transferor court's hands. *See Upjohn*, 508 F. Supp. 1020, 1021 (E.D. Mi. 1981) ("When a case has been transferred by the multidistrict panel, venue has been changed and the transferor court no longer has any jurisdiction of the matter. It can issue no further order and any further action it takes has no effect."). This said, it is difficult to imagine a transferor court overturning substantive decisions made during the MDL. This begs a number of questions: Must the transferor court apply the substantive law chosen by the MDL Judge? Must summary judgment motions be reheard if the applicable substantive law would yield a potentially different result?

Conclusion

Turning back to the Ephedra MDL, Judge Rakoff thankfully chose the appropriate course of action when, at the Sept. 10, 2004, Status Conference in the Ephedra MDL, the court made clear that the application of a universal substantive law was tempting, but inappropriate. The court stated:

> Yes. I need to add, I have doubt about my power, even if all the parties were agreed, to say well, the law for all these cases is Restatement 3d, torts, state X, which clearly it isn't, we'll take an extreme, the state court has rejected, if there is any such statement as a theoretical proposition. I don't know if on consent, I don't know that we can say we can apply the law of Restatement 3d. To go further and suggest that the court has the power to say well, even though the case law is unequivocal in Jurisdiction X, that the Restatement 2d should apply, I know in my heart that they would now adopt the third Restatement. I think that is beyond my power.

Judge Rakoff realized that however tempting the application of a universal law may be — as it streamlines proceedings and saves the MDL judge from analyzing the substantive law of numerous states — it is legally unsound.

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Fortune Favors the Prepared Lawyer

The Benefits of a Trial Plan at the Class Certification Stage

By Will W. Sachse

By now, most class action lawyers are familiar with the argument that a court must take a "close look" during the class certification stage in order to ensure that certification is indeed practicable and appropriate. *Castano v. American Tobacco Co.*, 84 F.3d 734, 740 (5th Cir. 1996) (reversing certification decision for failure to assess "how a trial on the merits would be conducted"). This "close look," or "rigorous analysis," is not meant as an opportunity to prejudge the merits of the case, but is instead intended to give the court a realistic sneak preview of what trial of the issues will entail.

The latest iteration of Federal Rule 23 acknowledges the importance of the "close look." Under the 2003 Amendments to Rule 23, it is no longer permissible to take a "certify now, ask questions later" approach. *Compare* Dec. 1, 1998 Amendment to Rule 23(c)(A) (providing that certification order "may be conditional") *with* Dec. 1, 2003 Amendment to Rule 23(c)(A)(1) (deleting reference to conditional certification). Rather, plaintiffs must show at the class certification stage that class-wide proof of common issues exists. As the Advisory Committee noted, "an increasing number of courts require a party requesting class certification to present a 'trial plan' that describes the issues likely to be presented at trial and tests whether they are susceptible to class-wide proof." Advisory Committee Notes to 2003 Amendment to Fed. R. Civ. P. 23, subdiv. (c) ¶ 1. Forcing plaintiffs to articulate a realistic trial plan may be a valuable tool for educating the courts (and the parties) as to which cases are doomed to splinter into an endless stream of mini-trials.

There is now even more compelling case law holding that a viable trial plan is *required* before a class may be certified, although the case law suggests that the ultimate responsibility for formulating such a plan rests with the trial court certifying the class. Most recently, the Supreme Court of Texas reversed a class certification order where neither the trial court nor the plaintiffs formulated a trial plan. *See State Farm Mut. Automobile Ins. Co. v. Lopez*, ___ S.W.3d ___, 2004 WL 2754648, at *6 (Tex. Dec. 3, 2004). *Lopez* followed on the heels of a previous Texas Supreme Court case, *Southwestern Refining Co. v. Bernal*, 22 S.W.3d 425 (Tex. 2000), in which the court "reject[ed] this approach of certify now and worry later," instead finding it "improper to certify a class without knowing how the claims can and will likely be tried." *Id.* at 435. The *Bernal* plaintiffs suggested a trial plan that largely consisted of proof by expert testimony, models, formulas, and extrapolation. *Id.* at 437. Although this may have been an "expeditious" manner of proceeding with trial, "[t]he plaintiff must prove, and the defendant must be given the opportunity to contest, every element of a claim." *Id.* at 438. The court recognized that the substantive proofs needed to show causation and damages — which could not be altered by a procedural device — required individual determinations. *Id.* Accordingly, class treatment was impossible.

In the wake of *Bernal*, courts across the country grappled with that case's message. In some respects, the message of *Bernal* was clear; no longer should vague promises of "expert testimony" or "formulas" satisfy a court that methods of class-wide proof exist. But did *Bernal* go further? Did it in fact *require* plaintiffs to put forth a trial plan whenever seeking certification? The Texas Supreme Court answered these questions in its *Lopez* decision.

In *Lopez*, the trial court certified a class of all persons who held State Farm insurance policies that were issued in Texas. *Lopez*, 2004 WL 2754648, at *2. In the wake of *Bernal*, State Farm challenged the trial court's failure to consider whether a viable trial plan existed before certifying the class. *Id.* at *3. The court of appeals concluded that *Bernal* did not require a trial plan in every class certification order — particularly where the predominance and superiority prongs of the class certification test are not at issue. *Id.* at *3-*4. The Texas Supreme Court reversed. State Farm argued that there were "fundamentally conflicting economic interests" among the class members and that the trial court further failed to consider critical choice of law issues. *Id.* at *5. State Farm contended that the court's failure to develop a plan for dealing with these issues was an abuse of discretion; the court had failed to conduct the "rigorous analysis" required by the class action rules. *Id.* The Texas Supreme Court agreed, concluding, "a trial plan is required in every certification order to allow reviewing courts to assure that *all* requirements for certification … have been satisfied. The formulation of a trial plan assures that a trial court has fulfilled its obligation to rigorously analyze all certification prerequisites, and 'understand[s] the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues.'" *Id.* (emphasis in original).

Lopez clearly establishes a requirement that courts consider and articulate with specificity whether there is a viable plan for trial. Because virtually all states' class action rules, including the Texas rules, are modeled on the federal rule, *Lopez* should have persuasive force in many, if not all jurisdictions. Defense lawyers who argue that one must consider trial plan issues before certifying a class now have another weapon in the arsenal. The Advisory Committee Note stressing the importance of trial plans is more vital than ever in the aftermath of *Lopez*.

For the practicing class action lawyer, a trial plan requirement has significant benefits. Requiring a concrete trial plan at the time class certification is decided is, first and foremost, a matter of efficiency. Nobody wants to expend years of

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work and millions of dollars litigating a class action lawsuit that is destined to unravel at trial, or even worse, on appeal after a lengthy trial. The trial plan should give the court and the litigants a realistic assessment as to the feasibility of class-wide proof on the critical substantive issues. It should answer two questions: 1) Is this case *manageable* as a class action? 2) Is a class action *superior* to other methods for the *fair and efficient* adjudication of the controversy? *See, Philip Morris Incorporated v. Angeletti,* 752 A.2d 200, 240 (Ct. App. Md. 2000). Too often, classes are certified on the basis of vague assurances that "we can work it all out later."

Some courts have stopped short in analyzing how a class action could be tried to verdict, resting their certification decisions on a finding that an adverse ruling on certain common foundation issues would dispose of the entire case. Of course, such a finding does not go nearly far enough. The plaintiffs must explain how the case could be tried if those "common foundational issues" are resolved in plaintiffs' favor. *Id.* at 239-40 (citations deleted.) The defendants and the court must demand such an explanation because without it there can be no informed analysis of whether common or individual issues will predominate. Nor can the court address how individual issues critical to any finding could ultimately be adjudicated without offending defendants' right to due process.

To that end, insisting on a trial plan can be a powerful tool for defense lawyers hoping to show that a class action is unrealistic. It forces the court to consider the implications of the decision carefully. Does plaintiffs' proof of liability (or damages) hinge on factors unique to each plaintiff? Is there some individual defense that will require sifting through, class member by class member, to determine who may recover and who is barred? Is there a viable way to try an issue like the statute of limitations (or fraudulent concealment) in a class action trial? Are there intra-class conflicts that require the court to adjudicate the rights of subclasses separately? These questions, and many others, are often raised during the class certification stage but rarely resolved satisfactorily. Demanding answers to these questions in the form of a concrete trial plan leads to the kind of "rigorous analysis" required under the class action rules — and it ensures that courts rely on more than vague assurances when deciding whether to certify a class.

The benefits of a trial plan requirement, therefore, are great. Nevertheless, a careful lawyer will also be alert to, and prepared for, potential drawbacks. Class certification occurs early in the litigation, and discovery is often bifurcated. Thus, a court will typically assess the feasibility of a trial plan before substantial merits discovery has occurred. After merits discovery, it may well turn out that the trial plan proposed during class certification is no longer tenable. It is up to the class action lawyer, then, to ensure that the trial court does not become too wedded to a trial plan that may no longer be effective. The class action rules contemplate continuing supervision by the court over a class action, with the court able to revisit the certification decision at any time — even after seeing the case unfold at trial. The class action lawyer should likewise monitor the course of the class action proceedings and be prepared to argue for decertification (or a new trial plan) as soon as it becomes evident that the original proposed trial plan is no longer viable.

Similarly, the class action lawyer should be prepared if the court, reviewing a proposed trial plan at the class certification stage, makes a ruling that appears to prejudge the merits or makes a merits evidentiary ruling. For example, what if the court, in adopting a trial plan, announces that it need not consider the right to present a certain type of evidence because such evidence is "irrelevant"? What does that mean for the subsequent merits discovery and trial? The answer, of course, is that such a preliminary determination should be subject to being revisited "down the road." At the class certification stage, the court is not making "merits" determinations such as fixing liability or determining what evidence is not admissible. It is thus up to the practitioner to ensure that any such ruling does not become entrenched. The court should be reminded that, although it may look at the merits of the case in an effort to get a realistic picture of how the case will be tried, the class certification stage is not the proper time to make merits rulings.

Conclusion

Certainly, a trial plan requirement is good for plaintiffs and defendants alike, and the case law and commentary is moving clearly in the direction of favoring, if not requiring, a preliminary trial plan in the class certification stage of *every* class action. Realistic trial plans can prevent the waste associated with failed class actions, and can serve as a powerful tool for defendants to point out, in specific detail, the difficulties and individual issues inherent in a particular class action.

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Researching

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Conclusion

Attorneys too frequently assume that documents they discover through their own research need not be disclosed to the other side. The case law, however, does not support such a conclusion. There are many cases in which courts have ordered production of such documents. Thus, an attorney must consider carefully, before beginning a search for documents from outside sources, whether production of such documents will be required, or if such documents properly may be withheld from opposing counsel; and if the documents may be withheld, what other steps (*eg,* completion of a privilege log or other notification to opposing counsel) may be required. Considering these issues at the beginning of the discovery process will help avoid discovery problems later in the case.

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In *dicta*, the Fifth Circuit even suggested that any remedial measures that would have been required by an administrative agency, which the party undertook on its own, would not receive the protections of FRE Rule 407. *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1343 (5th Cir. 1978).

It is necessary to point out that the remedial measures are not admissible because they were undertaken for, or in conjunction with, a government agency. It is the concept of voluntary action that brings the protections of Rule 407 into question. Where agencies provide voluntary programs for a product's review, any remedial measures that are taken, even if the party would have been compelled to make the change had they not entered the voluntary program, are protected by Rule 407. As the Fourth Circuit explained, "[i]f subsequent warnings are admitted to prove antecedent negligence simply because [the] FDA required or might have required the change, then drug companies may be discouraged from taking early action on their own and from participating fully in voluntary compliance procedures." *Werner v. Upjohn Co.*, 628 F.2d 848, 859 (4th Cir. 1980). The court went on to hold that the protective policies that underlie Rule 407 are achieved by voluntary programs because both encourage early and socially responsible actions. *Id*.

Luckily for your client, the Super Widget's warning was developed in conjunction with the Consumer Product Safety Commission through its Fast Track Product Recall Program. The program allows manufacturers and retailers voluntarily to submit a product for review to determine whether or not the product should be altered or should have additional or different warnings attached to it. *Conditions Under Which the Staff Will Refrain From Making Preliminary Hazard Determinations*, 62 Fed. Reg. 39827 (July 24, 1997). The voluntary nature of the program allows your client to continue to enjoy the protections offered by FRE 407, and defeats the plaintiff's first attempt to present the subsequently added warning to the jury.

Subsequent Measures Undertaken By a Third Party

The plaintiff's next argument continues to build on the CPSC's involvement with the Super Widget, as the plaintiff argues that the warning attached to the product after the alleged accident was a remedial measure undertaken by a third party, and not by your client. Remedial actions taken by a third party are admissible against a manufacturer because the protective policies of Rule 407, which are designed to encourage the manufacturer to make its products safer, are not implicated. In order for the subsequent remedial measures to be admitted, the changes must be made directly by someone not associated with the defendant and by someone who is not a party to the litigation. *Koonce v. Quaker Safety Products and Manufacturing Co.*, 798 F.2d 700 (5th Cir. 1986); *World Boxing Council v. Cosell*, 715 F.Supp. 1259 (S.D.N.Y. 1989). It is not sufficient that a third party to the suit directs or suggests the changes. *Middleton v. Harris Press and Shear, Inc.*, 796 F.2d 747 (5th Cir. 1986).

These cases most often arise out of situations where someone in the product stream makes a change to the product, but is not a party to the case. For example, there would be no implication of Rule 407's protective policies in a case where a mechanic made material alterations to a truck's axles after their original design contributed to an accident if the truck's manufacturer is sued, but the mechanic is not. *Farmer v. Paccar, Inc.*, 562 F.2d 518 (8th Cir. 1977). Similarly, the safety precautions taken by a munitions plant after a flash fire would be admissible if the plant was not a party to the suit. *Koonce v. Quaker Safety Products and Manufacturing Co.,* 798 F.2d 700 (5th Cir. 1986).

As a result of this exception, plaintiffs face a potential trade-off when initiating their action. If feasible based on the facts of the case, a plaintiff can choose not to bring an action against the party who made the subsequent change, thereby forgoing one avenue of recovery in the case. In exchange, the plaintiff may have "bought" itself an opportunity to present the remedial evidence to a jury, thereby helping any verdict that is eventually achieved against those defendants actually in the case. Of course, the defendants could always attempt to bring the party who performed the remedial action into the case in order to bring the public policy underlying Rule 407 into question, namely that the remedying party would be deterred from taking any future remedial actions. *See Dixon v. International Harvester Co.,* 754 F.2d 573 (5th Cir. 1985); *World Boxing Council v. Cosell*, 715 F.Supp. 1259 (S.D.N.Y. 1989).

The facts of the Super Widget case continue to keep the case law on your side. Since the Consumer Product Safety Commission did not take any direct action with regard to the Super Widget, the warning will likely never get before a jury. It was your client who, through the voluntary process, put the warning label on the product. Since your client is the only defendant who is a party to the suit, the plaintiff will not be able to use this exception to put the Super Widget's warning on the record.

Reports Leading Up to Subsequent Remedial Actions

The plaintiff's final line of attack to defeat your motion *in limine* is its attempt to admit several reports created by your client about the safety of the Super Widget. The first question to ask to determine whether this argument has any credence is: When were the reports in question created? In your case, we'll assume that one of the reports was created 2 months before the accident, and the other was created just days after the accident in an effort to ascertain what, if anything, was wrong with the Super Widget.

The report that was created before the alleged accident could never be considered a subsequent remedial measure because it was not created after the incident. *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1343 (5th Cir. 1978). To the extent that it contains information duplicated in a post-accident report, that information would not be protected.

However, the report created after the alleged accident has to be protected by Rule 407; otherwise the exception to the rule would overtake the rule itself. If reports created for the purpose of instituting subsequent

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ONLINE

Explore Consumer Advocacy on the Web

Public Citizen ("PC") is a national, nonprofit consumer advocacy organization founded in 1971 to represent consumer interests in Congress, the executive branch and the courts. Its Web site is located at *www.citizen.org*.

PC states that it fights for openness and democratic accountability in government; for the right of consumers to seek redress in the courts; for clean, safe and sustainable energy sources; for social and economic justice in trade policies; for strong health, safety and environmental protections; and for safe, effective and affordable prescription drugs and health care.

There are six divisions and two state offices. The site offers links so users can learn more about each of the divisions and Texas and California offices. The divisions include the Auto Safety Group, Congress Watch, Critical Mass Energy and Environment Program, Global Trade Watch, Health Research Group, and Litigation Group.

The Auto Safety Group has been a part of Public Citizen since 1971. It works to improve highway safety by lobbying Congress to pass legislation, monitoring the Department of Transportation to be sure it carries out the will of Congress, conducting public awareness campaigns on critical issues, and participating in lawsuits to force government action when necessary. There are links to other topics relevant to auto safety, such as "Legislation in Congress," "Rulemaking by the Federal Auto Safety Agency," "Rollover Crashes," "Air Bags," "SUV Safety Hazards" and "Defects and Recalls."

Congress Watch has links to other topics of interest: "Campaign Finance Reform"; "Government Ethics and Election Reform"; "Health Care Reform and Rx Drugs"; Civil Justice and Legal Rights"; "Federal Regulations: Health, Safety and Environment"; "Corporate Welfare"; "Key Reports"; and "Congressional Voting Records." There is also information about the Chamber of Commerce, class actions and the ethical allegations faced by U.S. House Majority Leader Tom DeLay.

Public Citizen's Critical Mass Energy and Environment Program works to protect citizens and the environment from the dangers posed by nuclear power and seeks policies that will lead to safe, affordable and environmentally sustainable energy. It also advocates creation of an agricultural and food distribution system that guarantees safe, wholesome food produced in a humane and sustainable manner and works to protect the world's fragile water resources from commodification, privatization, and mass diversion.

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remedial measures were admissible, a plaintiff would never need to seek admission of the subsequent remedial measures themselves. In addition, the mere presence of the reports in evidence would place the defendant in a "catch-22 situation" because it tacitly broaches the subject of whether remedial measures were taken at all. Left unanswered, these questions could poison a jury, which would spend an entire trial waiting for an answer to the questions. If answered, the defendant opens the door to cross-examination on the measures themselves.

The danger is even greater when the reports are created by or somehow implicate the involvement of a regulatory agency. If your client has the post-incident report admitted, and that report contains references to the CPSC, the jury would immediately draw an inference that the CPSC's involvement means that the product was defective. This would create yet another situation in which your client would be forced to choose between silence, which implies guilt, or a complete abandonment of the evidentiary protections afforded to manufacturers and retailers under the Federal Rules of Evidence.

CONCLUSION

The cases that have dealt with this issue have all echoed the above concerns. For example, the Tenth Circuit admitted a report created after a helicopter accident, but redacted those parts of the report that either suggested any remedial measures were taken or discussed the redesign of any of the helicopter's parts. *Rocky Mountain Helicopters, Inc. v. Bell Helicopters*, 805 F.2d 907 (10th Cir. 1986). In that way, the court removed the danger in admitting the report by removing any information that could lead to questions about remedial measures.

If nothing else, diligent practitioners must remember to read past Rule 407 when determining the chances that their client's subsequent remedial measures may be admitted into evidence. Any denial by a defendant that a subsequent remedial action was ever taken or that it had no control over the product in the first place will allow a plaintiff to admit the subsequent remedial measures into evidence using the statutory exceptions. In addition, the failure to take advantage of voluntary remediation programs from your client's governing regulatory agency, if any, could cause the admission not only of the subsequent remedial measures, but also of the agency's involvement, creating negative connotations for a jury. Most importantly, you should be thorough and exhaustive in your investigation into the circumstances surrounding the remedial measures to ensure that the factual situation surrounding them conforms to Rule 407's underlying policy of encouraging first-party subsequent remediation.

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CASE NOTES

CERTIFICATION FOR INTERLOCUTORY APPEAL DENIED WHEN TERMINATION OF LITIGATION UNLIKELY TO RESULT

A request for certification to pursue an interlocutory appeal may be denied where the movants are unable to establish that interlocutory review would materially advance the ultimate termination of the litigation. *In re: Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation*, Master File No. 1:00-1898, MDL 1358 (SAS), M 21-88, U.S. District Court for the Southern District of New York, Jan. 6, 2005.

The plaintiffs requested certification to pursue an interlocutory appeal, and the district court denied the motion. It held that under the legislative factors set forth in Section 1292 of Title 28, district courts have wide discretion to deny certification; the Second Circuit has directed that certification should be narrowly reserved for cases where an intermediate appeal would avoid protracted litigation. Under the circumstances of this case, the district court held that the plaintiffs could not demonstrate that an interlocutory review would advance the termination of the litigation (such as advancing the time for trial or to shortening the time required for trial). In fact, the district court noted that an interlocutory appeal could cause the litigation to become more protracted and expensive because the plaintiffs more likely than not would continue to litigate their claims in state court.

NEGLIGENCE CLAIMS PROPERLY DISMISSED UNDER LOUISIANA PRODUCTS LIABILITY ACT

Claims rooted in negligence may be dismissed on summary judgment where those claims are based upon the Louisiana Products Liability Act, which bars claims in negligence. *Pompey v. Immunex Corporation, Amgen, Inc., and Wyeth-Ayerst Laboratories*, Civil Action No. 04-3357, Section "J," U.S. District Court for the Eastern District of Louisiana, Jan. 24, 2005.

The plaintiff was injured after using a medication manufactured by the defendants. The plaintiff's sole causes of action arose under the Louisiana Products Liability Act ("LPLA"). The defendants moved to dismiss, arguing that the plaintiff's claims were all rooted in negligence, and, therefore, were barred under the LPLA. The district court granted the motion in part and denied it in part. The plaintiff claimed in part that the defendants were negligent in marketing and testing the product. The court held that the portion of the plaintiff's claim rooted in negligence could be dismissed on summary judgment. The rest of plaintiff's claim, however, would not be dismissed on summary judgment because it sufficiently alleged that the product had an inadequate warning, which is a viable claim under the LPLA.

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Online

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Global Trade Watch ("GTW") promotes democracy by challenging corporate globalization, arguing that the current globalization model is neither a random inevitability nor "free trade." The group's work seeks to make the measurable outcomes of this model accessible to the public, press, and policymakers, while emphasizing that if the results are not acceptable, then the model can and must be changed or replaced. GTW works on an array of globalization issues, including health and safety, environmental protection, economic justice, and democratic, accountable governance.

The Health Research Group ("HRG") initiated a Web site that provides information about unsafe drugs and drug pricing. In addition, the section has links to recent documents on health-related topics, *eg,* "Petition to the FDA to remove the Attention Deficit drug pemoline (CYLERT) from the market because of liver toxicity (HRG Publication #1731)," "Statement of Sidney Wolfe, M.D. regarding the FDA's decision to leave Crestor on the market (HRG Publication #1730)" and "Petition to the FDA to remove the cancer drug gefitinib (IRESSA) from the market (HRG Publication #1728)."

PC's Litigation Group is a public interest law firm that specializes in federal health and safety regulation, consumer litigation, open government, union democracy, separation of powers and the First Amendment. It litigates cases at all levels of the federal and state judiciaries and practices before federal regulatory agencies. It also pursues its efforts through programs such as the Alan Morrison Supreme Court Assistance Project and the Freedom of Information Clearinghouse.

There are links to information on the "Alan Morrison Supreme Court Assistance Program," "The Freedom of Information Clearinghouse" and "Briefs, Testimony & Memoranda."

Of particular relevance to product liability practitioners is a link to PC's analysis on the Class Action Fairness Act.

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