



# Products Liability Perspectives



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## From the Chair



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On behalf of the ALFA Products Liability Committee, I would like to wish everyone a very prosperous and Happy New Year and hope you enjoy this latest edition of *Products Liability Perspectives*.

Now in its second issue, the Newsletter has added eight

regional editors worldwide and are looking for more to make this a completely global effort. The Publication Subcommittee's goal is to keep the membership and clients abreast of legal developments in products liability law, publish noteworthy articles that ALFA attorneys and clients might find informative or useful in their practice, and to highlight successful strategies and favorable results obtained by ALFA attorneys in the products liability field. If you are interested in

submitting a case summary, a brief description of a recent legal victory and any special strategy in the case that you found to be successful, or an article for publication, please inform your regional editor or the co-editors of the Newsletter. The Publications Subcommittee also invites ALFA clients to participate in the Newsletter by either recommending a topic for a future article or submitting an article that addresses issues of your area of expertise.

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## Defending the (Seemingly) Indefensible Product

By: Edward G. Bowron & John P. Kavanagh, Jr.  
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Disintegrating tires, silicone implants, asbestos insulation, suspect arthritis medicines, faulty gas tanks, herbal supplements - these are all examples of products which evoke negative reactions from most people, including those who fill jury boxes. Fueled by the media's need for sensational headlines, the public is bombarded with images and stories of the latest recall, investigation or study

negatively implicating one product or another. Print, radio and television ads from personal injury attorneys will be hard on the heels of the latest news, inviting potential clients to "act quickly" and to "protect your rights!"

In addition to the usual concerns a product manufacturer/distributor/retailer faces going into a trial, having its product as the feature story on "60 Min-

utes" brings a new set of pressures. This article offers thoughts, considerations and suggestions based on our experience in defending a product liability case in the not-too-distant past. Because of pending litigation, we will not identify our client and/or the product at issue. However, the points we offer are generally transferable to any product case complicated by extraneous factors such as

fewer, Mississippi counties were being appended? In two words, the answer is "tort reform," reforms which, while applicable to all damage suits, have already had and will have their greatest impacts on product liability actions. But not all of these reforms have come about from legislative action—in the 2003 governor's race, tort reform was a key issue and the new Governor has put his shoulder behind this wheel. And the Supreme Court has used both its rule-making power and opportunities presented by fortuitously timed appeals to help bring about a remarkable re-definition of this State's public policy as carried out within the judiciary system.

Since then, in fact within little more than a year, ATRA determined to do in 2004 something it had never done before—to "delist" a State entirely from its "judicial hellholes" list. ATRA President Sherman Joyce, said this about Mississippi's turnaround:

The (2004 "Judicial Hellholes") report tells an amazing story about the redemption of Mississippi justice. . . . Mississippi has managed to pull itself out of the negative spotlight through the resolve of the voters and elected officials in the executive, legislative and judicial branches. Mississippi is a stark contrast. . . .

(ATRA Press Release December 15, 2004) (emphasis added)

While the work of judicial reform can never be "finished" in Mississippi or anywhere else (other work remains to be done here), the amazing reforms in hand, realized by Mississippi in little more than a year, bode well for continuing improvements. Before the legislature did its part in bringing about these changes, the Chairman of the House Judiciary Committee had remarked that it would be a "cold day" in a place well known for its heat before, for example, non-economic damages were capped. But today that cap is solidly in place along with many more reforms now positively enacted. It is a great start. And it is gratifying that one of the State's harshest critics has recognized the prodigious efforts which brought about these changes by publicly editing its "Hellholes" list.

<sup>1</sup> For more information about ATRA and detailed information about its list of problematic jurisdictions, go to [www.atra.org](http://www.atra.org)

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## NEW JERSEY

### **Non-Physician Research Chemist May Provide Expert Medical Causation Testimony**

New Jersey continues to widen the gate for the admissibility of expert testimony. In *Clark v. Safety-Kleen Corp.*, 179 N.J. 318, 845 A.2d 587 (2004), the Supreme Court of New Jersey found that, under appropriate circumstances, a non-physician may provide testimony on medical causation in a products liability action. The trial court admitted a research chemist's medical causation testimony at trial. The intermediate appellate court reversed the trial court's decision, finding, *inter alia*, that the admission of this testimony was beyond the scope of his qualifications as a re-

search chemist. However, the Supreme Court reversed and reinstated the verdict.

*Clark* involved an auto mechanic who claimed that as a result of his using an auto parts cleaner, his cut finger was exposed to the defendants' product, sustained a serious chemical injury, developed an infection, and ultimately suffered a loss of full use. To assist in proving his claim, plaintiff relied on the chemist who testified that one of the chemical ingredients of that product, cresylic acid, could have caused injuries consistent with those of the plaintiff.

On *voir dire*, the chemist admitted that he was neither a toxicologist nor an industrial hygienist, and that he did not personally test the cleaner's chemicals on human skin. However, he reviewed a number of items that he claimed experts in his field rely on to form opinions regarding the effects of certain chemicals on human skin: the product's Material Safety Data Sheets ("MSDS"), defendant's documents, a number of chemical treatises, and the plaintiff's medical records.

As a general rule, the Court observed that prior cases have allowed non-physicians to testify on medical causation issues under appropriate circumstances. For example, an individual with the requisite knowledge, training, or experience may offer expert testimony about receiving emergency first aid without being a physician. Here, the chemist was offered, among other things, to discuss the effects of chemicals and cleaning products on human skin -- something clearly within that expert's education, experience, and research. Since he knew the chemical properties of the defendant's products, he would also know the chemical's toxicology and occupational health effects.

Plaintiff had a medical expert (his treating physician) who testified about the "chemical exposure," but the Court found that the plaintiff correctly used the chemist to link the plaintiff's testimony of use with the symptoms reported by the plaintiff, as such an opinion was within the chemist's ken.

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### **Government Contractor Defense Extends to Nonmilitary Contractors**

In *Silverstein v. Northrop Grumman Corp.*, 367 N.J. Super. 361, 842 A.2d 881 (App. Div. 2004), the Superior Court of New Jersey, Appellate Division, in a case of first impression, extended the government contractor defense to nonmilitary contractors. The plaintiff in *Silverstein* commenced a product liability action against the manufacturers of United States Postal Service ("USPS") mail delivery vehicles for injuries sustained due to an alleged rollover defect. The defendant manufacturers argued that the government contractor defense preempts the plaintiff's state law claims since the defendants were government contractors and satisfied each element of the three-prong test enunciated by the U.S. Supreme Court in *Boyle v. United Techs. Corp.*, 487 U.S. 50 (1988).

The defendants in *Boyle* and prior U.S. Supreme Court decisions were all military contractors. Nevertheless, the Court found that the policy concerns giving rise to the government contractor defense for military contractors exist for nonmilitary contractors as

well. Three significant policy reasons were cited. First, the defense preserves the government's ability and flexibility to exchange certain aspects of product safety with other technical, economic, or social considerations, whether a product is used for a military or civilian application. Second, without the protection afforded by the government contractor defense, both military and nonmilitary contractors would have increased financial burdens that would either drive away government contractor bidding, or otherwise have these added costs passed on to the government and the public. Third, the defense prevents states from "second-guessing" federal policy decision-making with respect to the design of products produced in accordance with government military or nonmilitary contracts.

*Silverstein* acknowledged that while federal courts are split over this issue, the majority favored extending the defense to non-military contractors. The Court also found support in that unlike prior U.S. Supreme Court decisions that fashioned a similar defense based on the unique relationship between the United States and its armed forces, *Boyle* rested its decision on the Federal Tort Claims Act's discretionary function exception. Further support from *Boyle* was found in Justice Brennan's dissent, wherein he believed that the defense was "breathtakingly sweeping," and specifically envisioned its application to Postal Service mail cars. The *Silverstein* court observed that the *Boyle* majority left Justice Brennan's interpretation unchallenged.

Having found that the government contractor defense was available to the defendant nonmilitary contractors, the court then evaluated and found that the three-prong *Boyle* test was satisfied. First, the contractors were required to demonstrate that the government approved reasonably precise product specifications and otherwise was able to exercise its discretionary functions in approving the vehicle. Here, the USPS did not design the vehicles. However, the defendants were obligated to incorporate the USPS' performance specifications into the vehicle's final design. The USPS continually reviewed and evaluated these specifications, extensively tested the vehicle, including specifically for stability, retained rights to approve the final design and reject vehicles failing to comply with specifications, and ultimately approved the specifications. Next, the defendants were able to demonstrate the second *Boyle* prong by showing that they conformed to the USPS' specifications. Indeed, the government's specifications reserved the right for USPS, not the contractors, to determine how much stability evaluation was necessary, and the USPS never rejected a vehicle because of unsatisfactory stability. Finally, the evidence clearly established the third prong by showing that the defendants did not withhold warning information that the USPS itself had already known about.

The Court gave short shrift in rejecting the plaintiff's estoppel claims. The contractors' obligations under the government contract to obtain product liability insurance was not, in and of itself, significant since the contractors did not objectively manifest an acceptance of design responsibility in their contract. Similarly, the contractors' marketing of the vehicles to private parties was irrelevant since, for purposes of meeting *Boyle*, they were designed pursuant to the government specifications and were not available to the public until that process was complete.

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## **RHODE ISLAND**

### **Scratching the Surface: Relevancy Issues in Public Nuisance Products Liability Litigation**

In *State of Rhode Island v. Lead Industries Association, Inc.*, 2004 WL 2813747 (R.I. Super.), the State of Rhode Island brought suit against manufacturers in the Paint Industry claiming that the cumulative effect of lead pigment in paint coatings in buildings throughout the State created a public nuisance. Noting the broad discovery permitted by R.I. RCP 26(b)(1), the Court granted the Defendants' discovery request to conduct testing at approximately 114 (identified as the "worst of the worst so far as lead problems are concerned") of the 270,000-360,000 implicated properties in Rhode Island.

After Defendants conducted the investigation, which they planned to use to show that the cause of harm giving rise to the State's claim was the failure of responsible parties to adequately maintain the lead painted properties, the State filed a Motion *in Limine* to keep the results of the investigation out of the trial. The Court noted that as a general proposition of products liability law, Plaintiff must establish that not only is there a connection between the manufacture and sale of the product and the harm alleged, but also that Defendants' actions are the proximate cause of the particular injury. However, the Court found that the primary thrust of the State's claim is its public nuisance cause of action, which requires the State to establish that the "cumulative effect" of lead paint and coatings found in buildings throughout the State created a public nuisance. The Court added that the use of evidence gathered from a sampling of buildings in an anecdotal manner would violate Rule 402 of the Rhode Island Rules of Evidence. The Court granted the State's Motion *in Limine*.

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## **TEXAS**

### **Texas Supreme Court Requires Finished Product Manufacturers to Prove Existence of Defective Component Part Before it is Entitled to Indemnification from Component Part Manufacturer**

In *Bostrom Seating Inc. v. Crane Carrier Co.*, 140 S.W.3d 681 (Tex. 2004), the Court held that a manufacturer is entitled to statutory indemnity from a component part supplier only when the component part is proven to be actually defective. This is in contrast to a manufacturer's duty to indemnify a seller of its product under Texas law, which is automatically triggered merely by a products liability pleading, rather than proof.

Chapter 82 of the Texas Civil Practice and Remedies Code (also referred to as the "Texas Products Liability Act") sets forth the statutory scheme whereby a product "manufacturer" is required to indemnify a product "seller". See Tex. Civ. Prac. & Rem. Code §82.002. Section 82.002(a) requires a manufacturer to indemnify and hold harmless a seller for losses arising out of a products liability action, except for those losses caused by the seller's negligence, intentional misconduct, or other act or omission. A manufacturer's duty to indemnify "applies without regard to the manner in which the action is concluded" and "is in addition to any duty to indemnify