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Products Liability Perspectives

Dennis B. Keene
Co-Editor-in-Chief
HUNTER, MACLEAN, EXLEY & DUNN, P.C.
Savannah, Georgia
(912) 236-0261

Krsto Mijanovic
Co-Editor-in-Chief
HAIGHT, BROWN & BONESTEEL LLP
Los Angeles, California
(310) 215-7100

Regional Editors

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From the Chair

Skip Martin
HAIGHT, BROWN & BONESTEEL LLP
Los Angeles, California
(310) 215-7100

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.

IN THIS ISSUE

Defending the (Seemingly) Indefensible Product

By: Edward G. Bowron & John P. Kavanagh, Jr.
Bowron, Latta & Wasden, P.C., Mobile, Alabama

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 Minutes" 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 redefinition 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.

[1] For more information about ATRA and detailed information about its list of problematic jurisdictions, go to www.atra.org

Jackson H. Ables, III
Daniel Coker Horton & Bell, P.A.
Jackson, Mississippi

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 research 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.

Bennet Susser
Sills Cummis Epstein & Gross P.C.
Newark, New Jersey

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 ("USPA") 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