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Welcome

Welcome to the second issue of *Product Lines* – our quarterly e-newsletter that focuses on toxic torts and products liability issues.

For this edition, we have rounded up several important and timely legal issues. As you will see, we strive to make these e-blasts both informative and valuable by having our attorneys comment on WHY these issues are important and how they could affect your business.

As always, if you have any particular topic you would like to hear more about, please let us know. Thank you for reading.

The [Toxic Tort Litigation](#) and [Product Liability Litigation](#) Practice Groups

Toxic Talc Suit and Buyer's Remorse

"Has a plaintiff - who has entirely consumed a product that has functioned for her as expected - suffered an economic injury solely because she now sincerely wishes that she had not purchased that product?"

Why it is important: In the *Johnson & Johnson* case, the U.S. Court of Appeals for the Third Circuit ("Third Circuit") affirmed the U.S. District Court for the District of New Jersey's dismissal of a class action in an opinion that the court described as both novel and precedential. The Third Circuit based its decision on the narrow issue of standing in plaintiff Estrada's pleadings. Estrada alleged in her complaint that a woman's perineal use of Johnson & Johnson's Baby Powder can lead to an increased risk of developing ovarian cancer. Estrada did not, however, plead the following: (1) that the baby powder caused her physical injury; (2) that she has ovarian cancer; (3) that she is at an increased risk of developing ovarian cancer; (4) that she has an emotional injury; (5) that she has a fear of developing ovarian cancer; (6) that the product is defective; (7) that the product did not perform as labeled; or (8) that she is entitled to money for the cost of purchasing the product or is entitled to the cost of medical monitoring. Estrada's complaint alleged only that she suffered an economic injury by purchasing improperly marketed and unsafe baby powder. However, she also alleged that she purchased and received, over six decades, the benefit of baby powder that successfully did what the parties bargained for and expected it to do: eliminate friction on the skin, absorb excess moisture, and maintain freshness. The Third Circuit held: a plaintiff does not have Article III standing when she pleads economic injury from the purchase of a product, but fails to allege the purchase

provided her with an economic benefit worth less than the economic benefit for which she bargained. --- [Heather Heiskell Jones](#)

Statutory Caps and Recent Judicial Intervention May Bring Sky High Verdicts Back to the Ground

"Both statutory caps and punitive damage limits may significantly decrease the compensation a plaintiff receives from a jury. However, statutory caps are continuously being challenged on the grounds that they are unconstitutional."

Why this is important: Many states have placed statutory limits or "caps" on the recovery plaintiffs can receive in personal injury cases, which can considerably decrease the compensation plaintiffs may receive from juries. Caps may limit plaintiffs' recovery in several ways depending on each state's laws: they may limit the recovery in general, they may limit only the non-economic damages portion of the recovery, or they may limit only the punitive damages portion of recovery. West Virginia does not have a statutory cap for general tort and personal injury cases. Although this is good news for corporate defendants in personal injury cases across the United States, it is important to note that caps in some states have been successfully challenged on constitutional grounds. As a result, if a damage cap applies to a judgment in a personal injury case, corporate defendants need to be aware that plaintiffs may challenge the cap. --- [Charity K. Lawrence](#)

Sherwin-Williams in Trouble Over Century-Old Ads for Lead Paint

"Sherwin Williams and two other companies have been ordered by a California court to pay hundreds of millions of dollars in damages to the State of California based upon the court's finding that Sherwin Williams promoted dangerous lead paint for decades. The court based its rulings on historical ads which dated back to 1904. Lead paint was banned for use in homes in the United States in 1978 and Sherwin Williams had quit making white-lead interior paint in 1943. The company is seeking intervention of the United States Supreme Court, arguing that lead paint was legal at the time of the advertisements and that it was not aware of the health risks of lead before it became accepted science and that it was advertising truthfully during the time periods at issue."

Why this is important: The case highlights the dangers that advertisements can create for many years after publication and as science changes. Companies' truthful advertisements may be used against them for decades, dampening free speech and due process, and forcing companies to consider how their advertisements might be interpreted years from now. --- [Neva G. Lusk](#)

Design Defect Cases - Industry Practice Evidence Admissible

"In a 7-0 decision affirming a judgment in favor of Toyota Motor Corp in a lawsuit over a crash avoidance feature, the state's highest court said industry practice evidence could help jurors compare cost and feasibility of alternative designs."

Why this is important: The court's opinion supported a crucial defense for manufacturers in design defect litigation. The plaintiffs had attempted to establish a rule

that any technology that would make a product safer must be used, regardless of whether the utility outweighed the cost. By ruling that evidence of industry practices could be admitted to demonstrate the balance of safety benefits and risks, the court reaffirmed a critical affirmative defense—one that will be increasingly relied on as technological advances outpace production norms. --- [James E. Simon](#)

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If you have any toxic tort or product liability questions, please feel free to contact our [Toxic Tort Practice Group](#) or our [Product Liability Litigation Practice Group](#) .



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