Issue 1, 2018

Welcome!

Welcome to our inaugural issue of *Product Lines*—our e-newsletter focusing on toxic torts and products liability news and issues. As we all know, there are many issues that arise in this complex area of the law every day. We try to cut through the noise and provide you information regarding cases and issues that not only impact a variety of industries, but could also impact your business.

This e-blast is not just a news source. In addition to bringing you the top news stories, our attorneys are providing their perspectives on why they think those stories are important. We want to be a different firm for you—to provide impactful news and to explain why it matters.

As with any of our publications, we appreciate your feedback. If there is a certain area or industry you would like to hear more about, just let us know. We want you to expect "different" from your law firm. And at Spilman, we strive to deliver just that.

Thank you for reading.

The Toxic Tort Litigation and Product Liability Litigation Practice Groups

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Bayer, Merck Sunblock SPF Suit Sent Back to State Court

"A consumer fraud class action lawsuit has been filed against Bayer Healthcare LLC and Merck & Co. Inc. alleging the advertising for their Coppertone Sport High Performance SPF 30 sunscreen is willfully false and misleading because the product does not provide greater protection against the sun as advertised, resulting in consumers paying for the product under false pretenses."

Why this is important: This case reinforces the notion that the plaintiff is the master of his or her own complaint—even if plaintiff's counsel engages in jurisdictional gamesmanship. In this case, a plaintiff brought a putative class action alleging a variety of New Jersey state law claims based upon alleged violations of federal standards, and defendants removed to federal court. Meanwhile, plaintiff's counsel filed a nearly identical action in federal district court in Illinois on behalf of a different named plaintiff. The putative class definition in the Illinois federal action, however, explicitly excludes any New Jersey citizens who purchased the sunscreen in New Jersey. Defendants argued the state law claims invoked federal-question jurisdiction because the claims relied on plaintiff proving a violation of FDA regulations governing a sunscreen's SPF and UV protection. The court disagreed and held the federalized testing requirements did not mandate its exercise of jurisdiction. Although the court noted the obvious costs and inefficiencies in litigating two parallel putative class actions, it refused to replace the plaintiff's well-established right to be the master of his or her own complaint. Prior to this decision, Bayer filed a motion to transfer the Illinois federal action to the New Jersey federal district

for consolidation with this action. The Illinois federal district court, however, stayed that motion pending resolution of the motion to remand by the New Jersey federal district court. Now that the New Jersey federal district court has refused to exercise jurisdiction over the case, it remains to be seen whether defendants will be able to otherwise consolidate the two actions or whether they will be burned by having to defend parallel putative class actions in New Jersey state court and federal district court in Illinois. --- Joseph A. Ford

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Supreme Court Declines to Expand West Virginia's Products Liability Law

"The state Supreme Court has declined to expand West Virginia's products liability law, saying a plaintiff has no cause of action against a brand-name drug manufacturer when the drug used was made by a generic manufacturer."

Why this is important: The Supreme Court of Appeals reaffirmed long-standing products liability law and joined the majority of courts across the country in rejecting an "innovator liability" theory in which branded drug manufacturers would be held liable for the allegedly inadequate warning labels adopted by their generic manufacturer competitors. The Court unequivocally affirmed that West Virginia products liability law is "premised upon the defendant being the *manufacturer or seller* of the product in question." (emphasis added). Here, the branded manufacturer was neither. Although issued in the pharmaceutical drug context, the Court's decision likely will have wider ripple effects on attempts to expand products liability law outside its long-standing boundaries. --- Neva G. Lusk and Joseph V. Schaeffer

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Faulty Expert Testimony Leads to Dismissal of Benzene Exposure Claims

"Illustrating the importance of expert testimony in toxic torts, the United States Court of Appeals for the Tenth Circuit recently dismissed a plaintiff's appeal after finding that the plaintiff's expert witness (1) provided a flawed methodology for determining benzene caused the plaintiff's leukemia and (2) failed to rule out idiopathic origins."

Why this is important: Reliable and accurate calculation of dose is fundamental to any exposure claim. Court recognition and appreciation of this element is essential to rigorous application of the court's gatekeeping function. Additionally, the expert witness's failure to rule out "idiopathic causes," when a disease's cause is unknown 70-75 percent of the time, resulted in a faulty differential diagnosis that was stricken by the trial court. A decision by a federal Court of Appeals that upholds these principles that are basic to so many claims of exposure is worthy of note. --- Clifford F. Kinney Jr.

The EPA Has Released an Updated Toxic Substances Control Act Chemical Substance Inventory

"The April 2018 update to the TSCA Inventory is now available. This version of the TSCA Inventory includes a new field designating which chemical substances were 'active' in U.S. commerce, based on reporting from the 2012 and 2016 Chemical Data Reporting cycles; Notices of Commencement received since June 21, 2006; and Notice of Activity Form A's received through February 7, 2018, per the TSCA Inventory Notifications (Active-Inactive) rule."

Why this is important: The TSCA chemical substance inventory April 2018 update includes a new field that requires the EPA to designate which chemical substances were "active" in U.S. commerce. A rule has been finalized that now requires industry reporting of chemicals manufactured (including imported) or processed in the U.S. over the past 10 years, ending on June 21, 2016. This is important because the reporting from these chemical manufacturers (and importers) will identify which chemical substances on the TSCA Inventory are active in U.S. commerce and will help inform the prioritization of chemicals for risk evaluation. The non-confidential inventory can be downloaded for use. --- Charity K. Lawrence

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Pennsylvania Court Finds That, Under New Jersey Law, an Employer Can be Liable for Take-Home Exposure to Girlfriends of Former Employees

"A developing area of law across the United States is the theory of 'take-home liability,' which establishes that an employer can have a duty of care not only to its employees, but also to the household members of its employees. Questions regarding take-home liability frequently arise in cases involving products like asbestos or beryllium, which can potentially be carried home on the clothes of employees. Most states that considered this theory rejected it on the grounds of foreseeability, but a minority group has accepted it. In some states, like West Virginia and Pennsylvania, the legislatures and high courts have not yet decided on the theory, despite the fact that those are the states hit particularly hard with that type of products liability litigation."

Why this is important: In this case, the United States District Court for the Eastern District of Pennsylvania found in favor of take-home liability and ruled that the defendant should have been aware of the risk of beryllium exposure to a household member. However, this ruling was based on an interpretation of New Jersey law, which is supportive of take-home liability. Fortunately for our Pennsylvania cases, the Court noted "Pennsylvania law embodies a defendant-protecting rule" and likely would reject take-home liability to shield corporations from the "unpredictable and possibly vast costs" that accompany such liability. As products liability litigation evolves, particularly in cases dealing with asbestos, the number of "true plaintiffs" will start to shrink and plaintiffs' attorneys will try to attach liability on increasingly tenuous grounds. Take-home liability would give them an almost unlimited amount of future plaintiffs to draw from, including those with no direct link to the defendants. It is encouraging to see courts in states such as Pennsylvania recognize that those states would be unlikely to attach such liability. --- James E. Simon

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Class Cert. Denied In $1B Toxins Suit Against Pratt & Whitney

"Pratt & Whitney scored a big win when a Florida federal judge denied a bid to certify a class of property owners claiming $1 billion in damages from contamination from the company's rocket and aerospace testing and manufacturing plant in western Palm Beach County."

Why this is important: This case makes it clear that class actions are an exception to the rule that litigation ordinarily is conducted on behalf of individually named parties. Plaintiffs were denied class certification because of their inability to put forth evidence that an identifiable class existed with members ascertainable by reference to objective criteria. Plaintiffs alleged air, water, and ground contamination from an industrial plant near a community that was not clearly defined. Plaintiffs' groundwater

expert expressed "theories" and "estimates" regarding fate and transport, not actual evidence. Similarly, plaintiffs' property appraiser's opinions failed to identify areas actually affected by contamination, and he took no steps to develop evidence to prove the claim of "stigma of environmental contamination," a key to plaintiffs' alleged damages. And, plaintiffs' neuropathologist's opinion had no evidence of dose and effect on any individual. The Court held there was no objective manner by which the defendant's alleged misconduct could be logically tethered to all property owners in the 60-square-mile expanse of the proposed class area covering 18,000 homes. --- Heather Heiskell Jones

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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 .