Issue 4, 2019

Welcome

Welcome to the fourth 2019 issue of *Product Lines* – our quarterly e-newsletter that focuses on toxic torts and product liability issues.

For this edition, we are reporting on 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 a 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

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Gun Control Advocates Nervous as Supreme Court Takes Up First 2nd Amendment Case in a Decade

"The Supreme Court is set to wade into the highly charged gun control debate for the first time in nearly a decade, hearing oral arguments in a dispute over a New York City gun restriction that could have major implications for gun rights nationwide."

Why this is important: When the Supreme Court granted certiorari to a case challenging New York City's restrictions on firearms transportation, gun rights advocates saw an opportunity for the Court to recognize a Second Amendment right to firearms possession outside the home. But sensing the grant of certiorari portended an adverse decision, New York State and New York City amended the law to eliminate the challenged restrictions and suggested the case had thus become moot. Oral arguments on December 2, 2019 indicated the efforts to moot the case were a sound strategic decision. Of the justices who asked questions on the merits, all but Justice Breyer expressed skepticism of the soundness of New York City's restrictions. Yet the Court's liberal wing appeared primed to dismiss the case on jurisdictional grounds, with Chief Justice Roberts asking questions indicating he might join them as the key fifth vote. Mootness in this case, however, would simply grant a temporary reprieve to gun control advocates while myriad other Second Amendment cases work their way up to the nation's highest court. --- Joseph V. Schaeffer

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Heartburn Medicine Recalled Because of Cancer Concerns

"Although it has not been fully determined if ranitidine-containing drugs do cause cancer,

there is a likely probability that there will be liability lawsuits filed by consumers who took these medications and then were diagnosed with cancer."

Why this is important: One of the most litigious and lucrative areas of product liability law is "bad drug" cases. With the opioid crisis in full swing, public opinion is turning against the pharmaceutical industry. Zantac, also known as the generic brand Ranitidine, is an over-the-counter and a prescription medication used by millions of Americans to treat heartburn and acid reflux. The Food and Drug Administration and Consumer Product Safety Commission are tasked with the responsibility of making sure the products are safe for the public. Unfortunately, a French drug manufacturer found that Ranitidine contained N-nitrosodimethylamine, which has been shown to be a probable carcinogen. Armed with this information, several chain pharmacies have pulled this medication from the shelves, and the drug has been recalled. In addition, the plaintiff's bar has begun soliciting clients to sue the manufacturers, distributors and designers of Ranitidine. Accordingly, there is a high likelihood of another wave of lawsuits regarding this product. --- Laura E. Hayes

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Exxon Found Not Guilty in New York Climate-Change Securities Fraud Trial, Ending 4-Year Saga

"The $1.6 billion lawsuit brought by the New York attorney general's office alleged that Exxon deceived investors about the true cost of climate change."

Why this is important: Exxon has proven victorious in what many foresee as the first of numerous legal battles seeking to hold major fossil fuel companies responsible for the perceived and projected effects of climate change. In this case, the State of New York sought to hold Exxon liable for allegedly misleading its investors about the potential costs of climate change, claiming Exxon had provided its investors with a positive outlook while internally making plans based on a more bleak projection. While New York's case was ultimately dismissed with prejudice, the court pointedly stated that nothing about its decision meant Exxon was innocent of the allegations it had contributed to climate change and hinted a case with a different cause of action might have had different results. Companies involved in the energy industry should be wary of viewing this case as anything more than an opening salvo in the upcoming war over responsibility for climate change. --- James E. Simon

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Wheels Begin to Turn on Self-Driving Car Legislation

"Movement on the issue follows pressure from industry groups and agencies that have been pushing for government guidelines to address the testing and use of autonomous vehicles."

Why this is important: Although the SELF-DRIVE Act and AV START Act stalled in the Senate last year, recent moves signal bipartisan support in both the House and Senate to craft new proposed legislation establishing federal safety regulations for autonomous vehicles. While all stakeholders recognize an urgent need for federal legislation addressing autonomous vehicles, the scope and content of the anticipated proposed legislation are far from clear, and the battle lines are likely to be similar to last year. Expect automobile manufacturers and industry groups to lobby for guidance to allow them to develop, test and market this emerging technology with greater certainty, while consumer organizations and advocates may counter that any proposed safety standards are inadequate to protect the public from "driverless cars." Both the Senate Commerce Committee and the House Energy and Commerce Committee are preparing proposals and seeking input. The House Energy and Commerce Committee's draft language released thus far is very similar to last year's SELF-DRIVE Act, but the Committee has not yet

released sections addressing cybersecurity protections, such as those that might protect against vehicles being hacked. The timeline for the introduction of these new bills is unknown given Congress' present preoccupation with other legislative priorities. In the absence of comprehensive federal legislation, some states have developed their own safety regulations for the testing of autonomous vehicles and likely will continue to do so. This alone should motivate Congress to address the complicated problems posed by the intersection of the innovative technologies of autonomous vehicles and the need for public safety protections. --- Gerald M. Titus III

Cybersecurity Vulnerabilities in a Widely-Used Third-Party Software Component May Introduce Risks During Use of Certain Medical Devices

"The U.S. Food and Drug Administration is informing patients, health care providers and facility staff, and manufacturers about cybersecurity vulnerabilities that may introduce risks for certain medical devices and hospital networks."

Why this is important: It might be surprising to learn, but many medical devices are subject to cybersecurity risks because of their links to the internet. In today's world, certain medical devices, including cellular phone applications (apps), record, transmit and receive data necessary to their functionality. The FDA regulates and monitors such devices and has been warning of available software to exploit cybersecurity vulnerabilities. The regulations require medical providers to monitor for such vulnerabilities and to advise patients of any vulnerabilities that may affect functionality. Manufacturers of such devices are encouraged to conduct risk assessments, work with vendors of operating systems to rectify vulnerabilities and to communicate risks to customers including health care providers. Health care providers in turn must advise patients using medical devices affected and to seek help if the patient believes functionality of the device has been compromised. Patients are advised to contact their health care providers to determine if any medical devices they are using may be affected by vulnerabilities and to seek medical help if the operation or function of the medical device changed unexpectedly. The need to be vigilant of cybersecurity risks that can affect medical devices is a continuous need. All of those involved in manufacturing, recommending and using those devices must be vigilant to ensure proper function and to ensure against adverse health effects from a malfunctioning device. --- Bryan S. Neft

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3D Printing Boom Stirs Legal Questions

"Nonetheless, he says overall, the challenges fall into two areas: counterfeiting and performance."

Why this is important: 3D printing is moving from the fringe into the mainstream as technology improves, prices drop and the use of 3D printers rises. Lawyers will be called upon to represent parties in the inevitable intellectual property disputes that will result across a broad spectrum of IP laws. Legal fights based on the quality, safety, durability and suitability of 3D printed goods are also likely to increase in the future. --- Clifford F. Kinney, Jr.

How Amazon's Quest for More, Cheaper Products has Resulted in a Flea Market of Fakes

"Former executives say e-commerce giant, which last year spent $400 million fighting fraud and abuse, has prioritized its broad selection over anti-counterfeiting."

Why this is important: Chances are you purchased something from Amazon this holiday season. The online retailer has grown to host around 2.5 million third-party sellers offering more than 500 million available items. The ease of entry for sellers into the Amazon marketplace has resulted in a surge of counterfeit and fake goods, ranging from knock-off luxury handbags to potentially unsafe baby food. As a result, Amazon faces criticism from lawmakers regarding its inability to control goods sold on the platform. Brands, as well as duped consumers, have filed claims or demanded refunds from the e-commerce giant as a result of the counterfeit goods sold on the website. This mounting criticism may lead to a change in laws relating to counterfeit goods sold online, which currently operate to shield online retailers from liability. --- Joseph A. Ford

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Senate Panel Advances Trump's Nominee for FDA Commissioner

"If confirmed, Hahn will join the FDA at a time when the spotlight is on the agency."

Why this is important: After the Senate Committee on Health, Education, Labor and Pensions approved Hahn's nomination, the full Senate on December 12 confirmed Hahn as FDA commissioner. The Senate vote was 72 to 18. He becomes the fourth chief of the agency this year. Hahn, a radiation oncologist, faced criticism from senators for refusing to promise to ban the sale of flavored e-cigarettes. Hahn repeatedly stated he would use the best science to make regulatory decisions. Hahn has spent the majority of his professional career running radiation oncology departments at academic medical centers and has little experience working in the federal government. In addition to tobacco products, Hahn will oversee the FDA's regulatory authority over prescription drugs, food safety, vitamin supplements, cosmetics, medical devices, and even pet products and treatments. --- Christina S. Terek

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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 .