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Issue 2, 2019

Welcome

Welcome to the second 2019 issue of *Product Lines* – our quarterly e-newsletter that focuses on toxic torts and products 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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West Virginia Supreme Court Ruling Could Impact Future Potential Class-Action Lawsuits

"In a June 5 opinion, the justices ruled that a Monongalia Circuit Court judge exceeded his powers by certifying a class 'while failing to conduct a sufficiently thorough analysis of the case to determine whether the commonality required for class certification … is present.'"

Why this is important: The *Gaujot* case is important because it demonstrates that the WVSCA requires a circuit court to conduct a thorough analysis, including factual findings and conclusions, in a case to determine whether class certification is warranted. In *Gaujot*, the WVSCA held that individualized analyses were required for each class member regarding the amount of money each was charged for medical records versus the amount actually expended by a hospital to copy and compile such records. Such individualized analyses were required to determine liability and damages and are contrary to the commonality requirement of Rule 23. The *Gaujot* Court remanded the case to the circuit court with instructions to determine whether the requirements of Rule 23 were met. Specifically, the Court ordered the lower court to determine whether there was a common dispute, either of fact or law, the determination of which would resolve an issue that is central to each of the class members' claims. The fact the WVSCA is scrutinizing class certification is, in and of itself, noteworthy. --- Heather Heiskell Jones

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Amazon Not Liable for Selling Product that Allegedly

Caused $300K in Fire Damage

"The United States Court of Appeals for the Fourth Circuit has ruled that Amazon.com Inc. is not responsible under Maryland law for products liability claims due to a defective product purchased on its website from a third-party seller."

Why this is important: Contrary to popular belief, Amazon does not itself *sell* all of the products available on its website. Third-party companies sell many of the products available for sale on Amazon.com, and Amazon merely provides logistics services for a fee. These services can include storing products at an Amazon warehouse, boxing and shipping products once they have been purchased, and receiving the customer's payment and remitting the balance to the third-party seller, less Amazon's fee. The Fourth Circuit provided Amazon yet another leg up on its brick-and-mortar competition by holding that the e-commerce giant was not liable for damages caused by a defective product sold on its website, where Amazon only provided logistical services in connection with the product. This will have the effect of requiring plaintiffs in products liability actions to seek damages from sellers and manufacturers further up the chain of distribution, even where the customer "got it from Amazon." --- Joseph A. Ford

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Pennsylvania Supreme Court Urged to Require Trial Judges to Question Witnesses' Credentials

"The Superior Court of Pennsylvania ruled in June 2018 that the Allegheny County Court of Common Pleas overextended its authority and involvement when, as part of a Frye standard test, it evaluated the rationale behind the opinions of plaintiff expert witnesses - epidemiologist Dr. April Zambelli-Weiner and physician Dr. Nachman Brautbar, and threw out their contributions."

Why this is important: The admissibility of expert opinions remains one of the most important factors in high-profile products liability cases such as the ongoing Johnson & Johnson talc litigation or the various pesticide-related lawsuits that continuously occupy the news cycle. Juries are faced with the question of whether a household product such as talcum powder or weed pesticides could have caused certain rare forms of cancer, and rely on expert opinions to aid them in making that decision. In *Walsh v. BASF Corp. et. al.* , the Superior Court of Pennsylvania threw out a county court's decision to exclude expert witness testimony that expanded beyond the Frye standard of requiring opinions adhering to methodology "generally accepted by the scientific community." The Superior Court's decision has since been brought up to the Supreme Court of Pennsylvania, which will decide whether the Superior Court correctly interpreted the Frye standard, or whether it incorrectly expanded the Frye standard. Various interest groups have filed an amicus brief urging the Pennsylvania Supreme Court to reverse the Superior Court, and for good reason: if expert witnesses are allowed to "opine that entire categories of chemicals generally could cause cancer" (as stated in the amicus brief), products liability for chemical manufacturers, distributors, and suppliers could drastically expand, as plaintiffs would have far more latitude to offer general expert opinions about causation rather than opinions grounded in scientific methodology. --- James E. Simon

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Did a Jury Ignore Science When It Hit Monsanto with a $2 Billion Verdict?

"The foreground is that the lawsuit, which was brought by Alva and Alberta Pilliod, a Livermore couple who both suffer from non-Hodgkin's lymphoma, hung on complicated scientific evidence over which experts themselves disagree."

Why this is important: In a jury verdict that rivals anything that hit the tobacco industry, asbestos containing products industry and the auto industry, a jury in California slammed Monsanto with an epic $2.055 billion verdict. Even considering the jurisdiction in which this sledgehammer of a verdict was rendered (i.e., Los Angeles), this verdict will surely send shock waves through the C-suite at Bayer, who purchased Monsanto for $62.5 billion as the clouds of litigation were gathering in 2017. This is a cautionary tale on two fronts: 1) when acquiring a business do your due diligence on the legal liabilities the company is threatened with, even if litigation has not been filed and 2) when going to a jury trial many factors are at play and predicting the outcome has as much to do with the human impact of the case as much as the alleged science behind the allegations. One aspect of the human impact is the appearance, likability, and sympathy a plaintiff exerts on a jury, particularly an individual or family that has suffered severe injury or death. By all accounts Alva and Alberta Pilliod, the plaintiffs in this case, are a likable couple in their 70s. This clearly had an impact on the jury's verdict and probably outweighed any questionable expert testimony that was presented by the plaintiff's counsel. Also, with these bellwether cases against corporate giants that have allegedly poisoned individuals with their products it is important to remember the very best plaintiff's will go to trial first in an effort to set the bar for future cases. So, it is sometimes a matter of simply trying to lower the bar in these cases rather than win them outright. That way the next 1,000+ cases that follow have the potential to be settled at a reasonable amount. --- Matthew W. Georgitis

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Jury Finds J&J and Colgate-Palmolive Liable for $12 Million in Woman's Mesothelioma Suit

"The 12-member jury voted 11-1 on almost every count, that Johnson & Johnson and Colgate-Palmolive were negligent, the powder products failed to perform safely, the risk was known by the companies and they failed to warn, and that the companies intended to deceive and Schmitz would have behaved differently not using the powder had she known the truth."

Why this is important: Cases involving consumer powder products have expanded the already vast scale of asbestos litigation nationally, and these verdicts are likely to keep the tide rolling. This litigation will prompt counsel handling cases involving more traditional asbestos-containing products, such as pipe insulation and asbestos gloves or blankets, to further examine in discovery and trial the source of the alleged asbestos-related injuries. For example, plaintiffs claiming various "take home" exposures, where the particular plaintiff did not work in a facility that manufactured or housed asbestos-containing products, may not have been exposed to asbestos from laundering clothes, but may have been exposed to powder products that allegedly led to the injuries. Further, expanded expert analysis of any alleged synergistic effect of exposures to both powder and other alleged asbestos-containing products may be required in cases involving plaintiffs who were exposed to both powder and more traditional asbestos-containing products. --- Stephanie U. Eaton

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U.S. Supreme Court to Hear BP Unit's Dispute Over Montana Superfund Site

"The U.S. Supreme Court agreed to a hear a bid by a unit of British oil major BP Plc to avoid a lawsuit by private landowners in Montana seeking to force the company to pay for a more extensive cleanup of a Superfund hazardous waste site than what federal environmental officials had ordered."

Why this is important: On June 10, 2019, the Supreme Court of the United States agreed to hear the appeal of Atlantic Richfield Co., a unit of BP Plc, from a 2017 ruling by the Montana Supreme Court that allowed private property owners to pursue a lawsuit seeking to have Atlantic Richfield clean up contaminated soil and ground water. Atlantic Richfield already had spent $470 million on soil and ground water remediation, as ordered by the United States Environmental Protection Agency (the "EPA"). The dispute relates to a century-old copper smelter that opened in 1884 and closed in 1980. The site was designated a Superfund site by the EPA in 1983 and Atlantic Richfield was ordered to reduce arsenic contamination on nearby residential property and in ground water. The EPA required Atlantic Richfield to bring arsenic contamination to "safe" levels of 250 parts per million. But, the residents who sued Atlantic Richfield in 2008 seek to have arsenic levels reduced to pre-smelter, normal in the area, levels of 25 parts per million, which is a significantly lower level than the government's level for safety. Atlantic Richfield argues that federal law prohibits state court lawsuits from interfering with an ongoing clean-up. Atlantic Richfield's position is supported by the United States Chamber of Commerce, the National Association of Manufacturers, and other industry groups. If the Montana residents prevail, a company that has performed clean-up of contamination as ordered by the EPA could be subject to private lawsuits, resulting in different and more onerous standards for clean-up than the EPA required. Thousands of lawsuits could be filed seeking to have companies re-do their already very expensive clean-ups (here $470 million) to different standards, which are lower than the standard that the government considers safe. --- Neva G. Lusk

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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 .