



PRODUCT SAFETY & LIABILITY



VOL. 38, NO. 5 PAGES 89-110

REPORTER

FEBRUARY 1, 2010

HIGHLIGHTS**7th Cir.: Certification Denial Does Not Kill Federal CAFA Jurisdiction**

Federal courts retain jurisdiction of cases filed under the Class Action Fairness Act of 2005 even after denying class certification, the U.S. Court of Appeals for the Seventh Circuit decides. The court reasons that sending a case back to state court after refusing to certify a class might mean that the suit would continue as a class action there, given different state certification rules. "That result would be contrary to the Act's purpose" of allowing class actions with incomplete diversity to be litigated in federal court, Judge Richard A. Posner says. **Page 92**

Federal Regulations Do Not Preempt Suit Over Glass in SUV Windows

A glazing standard for motor vehicles does not preempt an injured woman's claims that a different type of window glass in her SUV would have prevented some of her rollover injuries, a federal court in Oklahoma decides. The court also limits the testimony from two plaintiff's witnesses, and excludes the testimony of a third. **Page 93**

Seventh Circuit Bars Plaintiff's Expert, Affirms Judgment for Implant Maker

A federal appeals court affirms judgment for a knee implant maker in a suit stemming from a device failure, saying a lower court properly excluded the plaintiff's expert causation witness. The decision marks the second time in this case that the Seventh Circuit has disallowed the plaintiff's expert for failing to bridge the analytical gap between the sterilization method used on the device and the plaintiff's implant failure. **Page 94**

Electronic Media Pose Novel Notification Issues for Class Litigators

Attorneys litigating class actions must carefully consider the legal implications and technical challenges of using new electronic platforms instead of paper-based notification systems, practitioners experienced in notification trends say. Although courts have been receptive to e-mail, website, and search engine advertising as a means of communicating to potential class members, attorneys must nevertheless accommodate pre-internet dictates: Notice must be individualized and must be the best practicable notice under the circumstances. **Page 100**

House Schedules Hearing on Accelerator Problem; Toyota Takes Steps

The burgeoning Toyota recall of millions of vehicles for sudden acceleration prompts congressional intervention. The House Energy and Commerce committee schedules a Feb. 25 hearing to address the problem, and sends letters to Toyota President Yoshimi Inaba and National Highway Traffic Safety Administration Administrator David Strickland, asking for information about the events that led to the recalls and Toyota's and NHTSA's response to the safety hazard. Sudden accelerations in Toyota vehicles have led to 19 deaths in the past 10 years, nearly twice the number of that for cars made by all other car makers combined. **Page 104**

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BNA

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THE BUREAU OF NATIONAL AFFAIRS, INC. 1801 S. BELL STREET, ARLINGTON, VA 22202-4501 (703) 341-3000

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Product Safety & Liability Reporter (ISSN: 0092-7732) is published weekly, except for the weeks following Memorial Day, Thanksgiving, and Christmas, at the annual subscription rate of \$2,321 for a single print copy, by The Bureau of National Affairs, Inc., 1801 S. Bell St., Arlington, VA 22202-4501. **Periodicals Postage Paid** at Arlington, VA and at additional mailing offices. **POSTMASTER:** Send address changes to: Product Safety & Liability Reporter, BNA Customer Service, 9435 Key West Ave, Rockville, MD 20850.

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Product Liability

Aircraft

7th Cir.: Denial of Class Certification Does Not Kill Federal CAFA Jurisdiction

A federal appeals court held Jan. 22 that federal courts retain jurisdiction of cases filed under the Class Action Fairness Act of 2005 even after denying class certification (*Cunningham Charter Corp. v. Learjet Inc.*, 7th Cir., No. 09-8042, 1/22/10).

The U.S. Court of Appeals for the Seventh Circuit said that sending a case back to state court after refusing to certify a class might mean, given different state certification rules, that the suit would continue as a class action there. "That result would be contrary to the Act's purpose" of allowing class actions with incomplete diversity to be litigated in federal court, Judge Richard A. Posner wrote for the unanimous three-judge panel.

"Our conclusion vindicates the general principle that jurisdiction once properly invoked is not lost by developments after a suit is filed," Posner wrote, adding that "litigation is not ping-pong."

The appeals court reversed an order by the U.S. District Court for the Southern District of Illinois that remanded a warranty and product liability suit against Learjet Inc. to an Illinois state court.

John Cummerford, an attorney for the charter company that sued Learjet, said his client has not yet made any decisions about whether to seek rehearing en banc or to try to appeal to the U.S. Supreme Court.

The Seventh Circuit joined the U.S. Court of Appeals for the Eleventh Circuit in saying that federal jurisdiction under CAFA does not depend on class certification. The Eleventh Circuit, in *Vega v. T-Mobile USA Inc.*, 564 F.3d 1256 (11th Cir. 2009), overturned a district court's certification of a class of T-Mobile employees (10 CLASS 314, 4/10/09), and expressed its view on jurisdiction in a footnote.

The U.S. Court of Appeals for the First Circuit, in a brief discussion of the issue, assumed jurisdiction would fail after denial of certification (*In re TJX Companies Retail Security Breach Litigation*, 564 F.3d 489 (1st Cir. 2009)).

Anthony Rollo, an attorney with McGlinchey Stafford in New Orleans who writes about CAFA, told BNA, "The Seventh Circuit is clearly the first to squarely address it. The Seventh Circuit has been one of the leading circuits in the nation for purposes of clarifying what CAFA means. In many instances they are hitting topics earlier than other circuits. . . . On this occasion, I have no doubt that they got it correctly because the result [otherwise] is total disorder in the courts."

Rollo said the decision would be influential but that plaintiffs elsewhere still would be "crazy not to make the motion" to remand.

"Unless you're in the Seventh Circuit, and apparently the Eleventh Circuit, you're going to have to fight this out."

Rollo added, "This question is of great importance because it affects virtually every CAFA case sooner or later." He explained that unlike remand questions, which have received a great deal of attention in the courts, "this issue exists in every CAFA case," even those originally filed in federal court, because plaintiffs always ask for class certification.

Professor Stephen B. Burbank of the University of Pennsylvania Law School told BNA, "It was recognized by commentators . . . as a question that surely was going to arise. A number of people and a number of judges more or less assumed . . . that the whole purpose of this statute was to get cases into federal court. If the predicate disappeared, . . . there was no business for the case to be in federal court." But he said the statutory language of CAFA and the legislative history "make that a difficult argument to carry."

'Nose to Tail' Warranty. Cunningham Charter Corp. purchased a Learjet aircraft from a company called Transcraft Corp. in January 1999, according to the complaint. Transcraft, with Learjet's consent, assigned its interest in the purchase agreement to Cunningham. This included a warranty, which Learjet allegedly characterized as "the best warranty in the business 'nose to tail.'"

Cunningham alleged it began incurring costs for repairs and replacements of items such as windshields and batteries that should have been covered under the warranty but which, it said, Learjet refused to cover. The windshields and batteries were defective, Cunningham alleged.

Cunningham sued Learjet in Illinois Circuit Court, Union County, on behalf of itself and other Learjet purchasers, asserting express warranty and design- and manufacturing-defect claims. Learjet removed the case to federal court under CAFA's minimal diversity provisions.

Judge David R. Hendron of the federal district court denied Cunningham's certification motion and ruled that the denial eliminated subject-matter jurisdiction under CAFA. He ordered the case remanded to state court, and Learjet appealed.

Time of Filing Is Key. A section of CAFA, Posner said, provides that the statute "applies 'to any class action . . . before or after the entry of a class certification order.' . . . Probably all this means is that the defendant can wait until a class is certified before deciding whether to remove the case to federal court." As actually worded, he continued, the provision "implies at most an expectation that a class will or at least may be certified eventually." Without such an expectation, perhaps "it wasn't really a class action" and CAFA jurisdiction would not apply, Posner said.

Posner said that the CAFA section defining a “class certification order” related to whether a suit can be “maintained” as a class action. “But remember that jurisdiction attaches when a suit is filed as a class action, and that invariably precedes certification,” he wrote.

“There are, it is true, exceptions to the principle that once jurisdiction, always jurisdiction,” Posner wrote, such as where a case becomes moot or where a plaintiff “amends away jurisdiction in a subsequent pleading.” But Cunningham’s case did not present those issues, he said.

In addition to stating the principle of avoiding expense and delay—a case “should not be shunted between court systems”—Posner said, “An even more important consideration is that the policy behind the Class Action Fairness Act would be thwarted if . . . a suit that was within the scope of the Act by virtue of having been filed as a class action ended up being litigated as a class action in state court.”

Cummerford, Cunningham’s attorney, said his client has enough at stake to continue as an individual litigant. Referring to the repairs Learjet allegedly refused to pay for, he said, “On an expensive airplane like that it totals up to a substantial sum.”

Cummerford said that although his team was aware of the Eleventh Circuit position, “I didn’t really view it as a holding; it was more of a footnote.” He said that three or four district courts within the Seventh Circuit “had come out in favor of our position, and only one had come out in favor of the way the Seventh Circuit held on Friday, so there’s certainly a lot of room for judicial disagreement on this. I could easily see other circuits coming out the other way.”

Burbank raised an additional issue: some individual cases remaining in federal court after the denial of class certification in a minimal-diversity case—for example, a Pennsylvania plaintiff facing a Pennsylvania defendant—might run into constitutional problems.

Judges John L. Coffey and Joel M. Flaum also seved on the panel.

Cummerford and James F. Bennett of Dowd Bennett in Clayton, Mo., represented Cunningham.

Ron A. Sprague of Gendry & Sprague PC in San Antonio, Texas, represented Learjet.

BY MARTINA S. BARASH

The Seventh Circuit’s opinion is available at <http://op.bna.com/pslr.nsf/r?Open=mbah-823q3r>.

Motor Vehicles

Accident Victim May Sue Over Glass In SUV Windows: No Preemption by Safety Regs

A glazing standard for motor vehicles does not preempt an injured woman’s claims that a different type of window glass in her SUV would have prevented some of her rollover injuries, a federal court in Oklahoma decided Jan. 14 (*Raley v. Hyundai Motor Co.*, W.D. Okla., No. CIV-08-0376, 1/14/10).

Judge Joe Heaton of the U.S. District Court for the Western District of Oklahoma followed the reasoning of the U.S. Court of Appeals for the Fifth Circuit in *O’Hara v. General Motors Corp.*, 508 F.3d 753 (5th Cir. 2007), a case that also concerned an ejection during a rollover

(35 PSLR 1138, 12/10/07). Heaton, whose court is within the Tenth Circuit, also considered Tenth Circuit precedent on preemption in the manufactured housing context.

Other courts also have addressed the preemptive effect of the federal glazing standard. In January 2008 also agreed with the Fifth Circuit that the federal glazing standard is a minimum standard (36 PSLR 163, 2/18/08). But West Virginia’s top court came to the opposite conclusion in June 2009 (37 PSLR 708, 6/29/09).

In a separate opinion in this SUV case, Heaton limited the testimony of two experts for the plaintiff and excluded a third, agreeing with Hyundai Motor Co. and its American affiliate that much of the proposed testimony is inadmissible.

SUV Rollover. Misty Raley lost control of her 1999 Hyundai Sonata on an interstate highway in Oklahoma City and struck some sand barrels, according to the court. The SUV traveled down an embankment and rolled over. Raley was ejected and received serious injuries.

Raley sued Hyundai on behalf of herself and her children, asserting claims based on problems with roof strength and the type of glazing material used in the side windows and sun roof. She said Hyundai should have used laminated glass or a glass-plastic material rather than tempered glass. Among the experts she put forward were Allan J. Kam, a former enforcement attorney for the National Highway Traffic Safety Administration; Thomas J. Feaheny, a former Ford Motor Co. executive; and Ben Parr, a former General Motors executive.

Hyundai asked the court to exclude the experts’ testimony, and sought partial summary judgment on preemption grounds.

Glass Safety: ‘No One Type.’ On the preemption question, Heaton said the glazing standard at issue, Federal Motor Vehicle Safety Standard 205, approved both tempered glass and laminated glass. FMVSS incorporates the ANSI standard for safety glazing materials, which states, “[N]o one type of safety glazing material can be shown to possess the maximum degree of safety under all conditions, against all conceivable hazards,” according to Heaton.

Heaton looked to the U.S. Supreme Court’s decision in *Geier v. American Honda Motor Co.*, 529 U.S. 861, (28 PSLR 464, 5/29/00) which held that a different standard, FMVSS208, deliberately gave manufacturers a range of passive restraint options and thus impliedly preempted a state tort claim that Honda should have installed air bags in particular.

“The question presented here is similar—whether a federal safety standard preempts a common law suit alleging that a manufacturer’s use of a permitted technology was unsafe,” Heaton wrote. “However, the court agrees with the Fifth Circuit that there are distinctions between FMVSS 208 and FMVSS 205 which lead to a different conclusion as to the preemptive effect of the standard.”

In comments to FMVSS 205, unlike FMVSS 208, Heaton said, NHTSA provided no policy language on rollover protection and did not signal that “preserving the option” of tempered glass was important to the agency. He agreed with the Fifth Circuit’s conclusion that FMVSS 205 “is a minimum safety standard,” based

on a NHTSA document connected with the agency's decision not to require "advanced glazing" in the 1990s.

The Tenth Circuit made an easier call in *Choate v. Champion Home Builders Co.*, 222 F.3d 788 (10th Cir. 2000), Heaton said. It held that product liability claim for failure to provide battery-powered smoke detectors in a manufactured home was not preempted by a federal law's requirement that manufactured homes contain a hard-wired smoke detector. The claim was consistent with the federal law's goals of reducing injuries, deaths, and property damage, the Tenth Circuit pointed out.

In contrast, Heaton said, "[t]he result the plaintiff seeks in this case, if applied generally, would eliminate an option—tempered glass—under the federal standard. However, while the question is close, the court is persuaded by the Fifth Circuit's analysis."

Industry on Trial? In response to Hyundai's expert challenge, Heaton sought to make sure proposed testimony for Raley was relevant, within the witness's scope of expertise, and not in the nature of legal conclusions. Kam, the former NHTSA attorney, could testify regarding agency administrative practice, such as the implications of denying a petition for rulemaking, but could not testify about whether certain standards are "minimum" standards, whether they indicate a vehicle is "safe," or whether political influence and lobbying weakened regulations, he said.

Feaheny, who oversaw vehicle engineering at Ford, would be able to testify to his opinion that Hyundai's use of tempered glass made the Sonata's design defective, and about the technological feasibility of laminated glass, Heaton said. But he would not be able to testify as an accident reconstructionist would, to discuss the state of Hyundai's knowledge in 1970, or to opine that Hyundai acted with "reckless disregard and conscious indifference," Heaton added.

Heaton barred Parr's testimony in its entirety. "The issues in this case involve the adequacy of the design of the 1999 Sonata and the defendants' actions as to that," he said. "There is a substantial risk of confusing those issues if this case is permitted to turn into an argument over the conduct and actions of the automotive industry, most of which do not arguably involve Hyundai, over the past 40 years. Most of the opinions Mr. Parr seeks to offer must be excluded on this basis."

Mark A. Cox, Michael M. Blue, and John M. Merritt of Merritt & Associates PC in Oklahoma City, Okla., represent Raley.

J. Derrick Teague, James A. Jennings III, and Linda G. Kaufmann of Jennings Cook & Teague in Oklahoma City represent Hyundai.

The opinion on expert evidence is available at <http://op.bna.com/pslr.nsf/r?Open=jstg-825nr8>. The opinion on preemption is available at <http://op.bna.com/pslr.nsf/r?Open=jstg-825nt4>

Medical Devices

Seventh Circuit Excludes Plaintiff's Expert, Affirms Judgment For Implant Manufacturer

A federal appeals court Jan. 25 affirmed judgment for a knee implant maker in a suit stemming from a device failure, saying a lower court properly excluded the plaintiff's expert causation witness (*Fuesting v. Zimmer Inc.*, 7th Cir., No. 09-1362, 1/25/10).

In an unpublished unsigned order, the U.S. Court of Appeals for the Seventh Circuit affirmed a trial court's decision. It said the expert failed to bridge the analytical gap between the accepted fact that a sterilization method known as gamma irradiation in air (GIA) causes some oxidation and his ultimate conclusion that plaintiff Arthur Fuesting's particular knee implant failed because the manufacturer used the GIA method. The decision marks the second time in this case that the Seventh Circuit has ruled for manufacturer Zimmer Inc. on the admissibility of the plaintiff's expert testimony.

Knee Replaced in 1992. In 1992, Fuesting had his right knee replaced with an implant made by Zimmer. Nearly 10 years later, the implant failed and was explanted. Fuesting sued Zimmer in 2002, alleging theories of design defect, negligence, and strict liability. He claimed that his implant failed because Zimmer had not properly sterilized the product, which caused it to oxidize while implanted.

The U.S. District Court for the Central District of Illinois initially denied Zimmer's motion to exclude Fuesting's expert witness. The case went to trial and resulted in a \$650,000 verdict for Fuesting.

Zimmer appealed, and the Seventh Circuit reversed, saying the expert evidence should have been excluded. It remanded the case to the district court for a new trial.

On remand, the district court granted Zimmer's motion for summary judgment on the basis that expert testimony was required to prove Fuesting's claims and that he did not have any admissible expert evidence (37 PSLR 159, 2/9/09). Fuesting appealed.

'Analytical Gap' Still Not Bridged. Fuesting's theory of liability rested on improper sterilization of the implant. He argued that GIA causes at least some oxidation, and that there were reliable alternative methods of sterilization available when the implant was made that would not have caused oxidation.

The Seventh Circuit said it had determined that testimony by Fuesting's first expert witness, Dr. James Pugh, was inadmissible because he failed to "bridge the analytical gap" between his opinion that GIA sterilization leads to oxidation and the failure of Fuesting's knee implant in particular.

In this case, the court found that the testimony of Fuesting's second expert witness, Dr. Robert Rose, suffered from the same disabilities as Dr. Pugh's testimony. First, Rose's testimony did not show that his theory that knee implants oxidize inside the body (or in vivo) was generally accepted in the scientific community, the court said. Rose also failed to point to any peer-reviewed studies that discussed the oxidation rates of knee implants in vivo, it found. Additionally, Rose did not cite any studies or articles discussing how to tell whether oxidation occurred before or after implantation, nor did he rule out any other possible causes of the

oxidation or reasons for the implant's failure, the court said.

Most important in the court's opinion, Rose did not "bridge the analytical gap" between the accepted fact that GIA causes some oxidation and his ultimate conclusion that Fuesting's knee implant in particular failed because Zimmer used the GIA method.

"One indicator of unreliability is the unjustifiable extrapolation from an accepted premise to an unfounded conclusion," the court wrote. That is exactly what Rose did, it found. Some "greater methodology" was required to bridge the analytical gap between general principles and particular conclusions, it said. Here, Rose did not employ such a methodology to connect his general observations with Fuesting's knee implant, the court found.

Finally, the court said, Rose did not show that better alternative sterilization techniques existed when the implant was made in 1991. The expert said only that the industry standard was to sterilize implants with an inert gas instead of air. However, the record contained evidence that GIA was the "virtually universal industry practice" at the time, that no other manufacturer used another sterilization method, and that GIA was considered the "gold standard," the court said.

The court also faulted Rose for not addressing the possibility that the implant could have oxidized during the six years it sat on a shelf between the time it was explanted and the day Rose examined it.

Judges Joel M. Flaum, Terence T. Evans, and Ann Claire Williams heard the case.

Brent D. Holmes and David Stevens, of Heller Holmes & Associates in Mattoon, Ill., represented Fuesting.

Stephen L. Corn, of Craig & Craig in Mattoon; and Steven L. Jackson, of Baker & Daniels in Fort Wayne, Ind., represented Zimmer.

Full text of the order is at <http://op.bna.com/hl.nsf/r?Open=mapi-824mdc>.

Duract

Alabama Top Court Orders Class Decertified; Says Individual Issues Predominate

Alabama's highest court Jan. 15 decertified a putative nationwide class on behalf of insurance companies alleging that payments made by third-party payers (TPPs) for the purchase of the pain relief drug Duract unjustly enriched Wyeth Inc. to the extent the capsules went unused after Wyeth withdrew the product (*Wyeth Inc. v. Blue Cross and Blue Shield of Alabama*, Ala., No. 1050926, 1/15/10).

In a per curiam opinion, the state high court held that named plaintiff Blue Cross Blue Shield of Alabama failed to meet its burden of proving that common questions of fact and law predominate, as required by Ala. R. Civ. P. 23, which parallels the federal rule.

Unjust enrichment claims are generally not appropriate for class certification because they are fact-specific to each case, the high court said, quoting from its own 2003 decision in *Funliner of Alabama LLC v. Pickard*, 873 So.2d 198 (2003).

The high court rejected the trial court's attempt to distinguish between unjust enrichment claims based on

the theory that "equity and good conscience" require the defendant to disgorge money that belongs to the plaintiff and those based on the theory that a "mistake [of fact] or fraud" requires the defendant to return money that belongs to the plaintiff.

The trial court concluded that because BCBSAL's unjust-enrichment claims were based on "equity and good conscience," class certification was appropriate. However, the high court said that the "trial court's analysis asks too much of what it considers to be a separate type of unjust-enrichment claim, particularly insofar as providing a basis for the certification of a nationwide class action."

Noting that this is a nationwide case, and not just a statewide lawsuit, the court found that BCBSAL failed to make an adequate showing that the laws of all (or even most of) the 49 other states would allow unjust enrichment claims to proceed on such a basis. Further, the court said, "the fact that legitimate questions exist as to the plaintiff's legal theory and that there is a need to parse the laws of 50 states to see if that theory is cognizable in all or most of those states is itself inconsistent with a finding that common questions of law predominate."

Drug Voluntarily Withdrawn. According to the opinion, Wyeth began distributing Duract—a nonsteroidal, anti-inflammatory drug for the short-term management of acute pain—in mid-July 1997. Even though the label warned that the drug should not be used for more than 10 days, the company began receiving reports of liver problems, some life-threatening, in patients who took the drug for extended periods.

In February 1998, Wyeth received Food and Drug Administration approval for a revised package insert that described the reports of liver problems resulting from the overuse of the drug and re-emphasized that it was only intended for short-term use. Despite the new insert, Wyeth continued to receive reports of adverse liver effects in long-term users of Duract. Concluding that changing the insert would not guarantee that physicians would stop prescribing Duract for long-term use, the company voluntarily withdrew Duract from the market on June 22, 1998.

Wyeth instituted a customer-refund program for retail customers who still had unused Duract, reimbursing them at the rate of \$1.15 for every capsule returned to Wyeth, with a \$5 minimum refund regardless of the number of pills returned. The reimbursement amount was actually higher than the retail cost of the capsules in order to act as an incentive for customers to return remaining capsules. Wyeth refunded approximately \$705,000 to approximately 18,000 retail customers during the refund program.

BCBSAL sued Wyeth on Sept. 23, 2003, alleging breach of implied contract and unjust enrichment. BCBSAL later filed an amended complaint seeking certification of a class of all TPPs that paid for Duract capsules that went unused following the withdrawal of the drug from the market.

Still later, BCBSAL filed a second amended complaint seeking recovery against Wyeth solely on a theory of unjust enrichment.

The trial court certified a nationwide class of TPPs "who paid for the prescription drug Duract that was not used as of the date of its withdrawal from the market."

Any TPPs that purchased Duract directly from Wyeth were explicitly excluded from class membership.

Standing. The state supreme court first rejected Wyeth's argument that BCBSAL lacks standing to serve as class representative because it did not sustain an injury of a nature required for standing and did not allege any loss resulting from the withdrawal of Duract from the market.

According to the opinion, "The issue Wyeth seeks to frame for this Court as one of 'standing' is, in reality, an issue as to the cognizability of the legal theory asserted by BCBSAL, not of BCBSAL's standing to assert that theory or the subject-matter jurisdiction of this Court to consider it."

Dissenting Opinion. Justice Thomas A. Woodall dissented, writing that the case should be dismissed because BCBSAL lacked standing to bring it. Although BCBSAL alleges that it paid for Duract that was unused because of the drug's withdrawal, it does not explain how that withdrawal affected any of its legal rights, but simply says that it wants its money back, Woodall wrote. "In my opinion, more is required to allege an injury to a 'legally protected right,'" the dissenter said.

However, the high court majority found it unnecessary to decide—as Wyeth argued—that under Alabama law, "in the absence of some mistake, misreliance, fraud or wrongful conduct, there may be enrichment, but not unjust enrichment."

The opinion is available at <http://op.bna.com/hl.nsf/r?Open=bbrk-7zumab>.

Asbestos

California Jury Returns Defense Verdict In Man's Suit Over Micronite Cigarette Filter

SAN FRANCISCO—A California jury Jan. 19 returned a defense verdict for Lorillard Tobacco Co., rejecting a man's claims that asbestos-containing filters on Kent brand cigarettes caused his mesothe-

lioma (*Cox v. Asbestos Corp.*, Cal. Super.Ct., Los Angeles, No BC409474, verdict 1/19/10).

Jurors in the California Superior Court in Los Angeles deliberated for less than a day to clear Lorillard, Rheem Manufacturing Co., Hollingsworth & Vose Co., and Dowman Products Inc. of liability. Hollingsworth & Vose manufactures filter papers used on the cigarettes. Rheem makes furnaces and indoor air products, and Dowman manufactured drywall joint compounds that contained asbestos.

Jurors found that Robert J. Cox smoked Kent cigarettes between May 1952 and May 1956, the time period when the filters Lorillard used contained asbestos. But jurors said Cox did not inhale asbestos fibers released from the filters. Nor did jurors find negligence or that the companies failed to warn about their product.

The jury found that Cox did not inhale asbestos fibers from products by Rheem or Dowman.

From 1952 through 1956, Kent cigarettes contained crocidolite asbestos in the Micronite filters, which were advertised as "pure," "safe," "harmless," and "dust-free." Kent was the first paper filter cigarette on the market, noted David Thorne, with Shook, Hardy & Bacon in Kansas City, Mo., who is Lorillard's national counsel.

Cox alleged that asbestos exposure from the Kent cigarettes led to his disease, while the defense argued Cox had occupational exposure as a sheet metal worker in the heating, ventilation, and air conditioning industry.

Defendants also pointed to possible exposure from clothing worn by Cox's father, a pipe fitter who worked in the shipyards during World War II, Thorne said.

Sixth Straight Win for Lorillard. The verdict is the sixth win for Lorillard in a Kent filter case since 2006 and the 15th win in Kent Filter cases dating back to the early 1990s. The last defense verdict came from a Texas jury in September 2008 (36 PSLR 957, 10/6/08).

Thorne told BNA the trend defense counsel are seeing "is that jurors are able to grasp and understand that what people thought about asbestos at the time my client used it was much different than today."

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Asbestos during the 1950s was commonplace and used in filters for gas masks, respirators, hospital operating rooms, and elsewhere, Thorne said Jan. 25. The jury in Los Angeles and "at least in the last six or so cases, they've all understood that and times were different then and we can't judge people then on what we know today."

Plaintiffs' attorneys could not be reached for comment. The plaintiffs had sought \$15 million plus punitive damages.

Some 20 to 30 cases against Lorillard alleging asbestos exposure from filter cigarette use are pending, Thorne said.

Plaintiffs are represented by Gary M. Paul, Michael Armitage, and Tae Yoon Kim with Waters & Kraus in El Segundo, Calif.; and Gibbs Henderson with Waters & Kraus in Dallas.

Lorillard was represented by David Thorne and James Berger of Shook, Hardy & Bacon in Kansas City, Mo.; and Ricardo Cedillo of Davis, Cedillo & Mendoza in San Antonio.

Hollingsworth & Vose was represented by Andrew McElaney of Nutter McClennan & Fish in Boston, and Randall Haimovici of Shook Hardy & Bacon in San Francisco. Rheem was represented by David Marshall of Hawkins & Parnell in Atlanta.

Dowman was represented by Karen Agelson and Helen Luetto of Walsworth, Franklin, Bevins & McCall in Orange, Calif.

By JOYCE E. CUTLER

Contraceptives

Plaintiffs' Counsel Allowed Ex Parte Contact With Physicians, Subject to Limitations

The judge overseeing federal multidistrict litigation concerning the Ortho Evra birth control patch Jan. 20 allowed plaintiffs' attorneys to conduct ex parte interviews with the plaintiffs' treating physicians, but limited the permissible subject matter to medical records, treatment, and related matters (*In re Ortho Evra Products Liability Litigation*, N.D. Ohio, MDL No. 1742, 1/20/10).

According to the U.S. District Court for the Northern District of Ohio, the defendants sought to prohibit plaintiffs' counsel from ex parte contact with the treating doctors, or to limit ex parte contacts to a discussion of "the plaintiff's medical condition and prohibiting discussion of liability issues, warnings and Company documents."

The defendants "seek to prevent an unfair advantage by Plaintiffs lobbying their theories of liability and causation upon the treating physicians," the court said. The defendants asked the court to adopt the approach taken by a New Jersey court in the Zometa/Aredia Litigation, or the U.S. District Court for the Eastern District of Missouri, presiding over the NuvaRing Products Liability Litigation.

Plaintiffs Object. The plaintiffs objected to regulation of their contact with their own physicians. They argued that the federal MDL cases come from various states, each of which deals with physician-patient privilege in different ways. Altering that privilege would prove diffi-

cult, they said. They also disputed the applicability of the New Jersey ruling to the present dispute, and contended other federal MDL courts have allowed plaintiffs to have ex parte contact with their treating doctors.

In *Gaus v. Novartis Corp.*, No. MID-L-007014-07-MT, the New Jersey case, the court denied a defense request to conduct ex parte interviews with treating physicians, even though New Jersey law allows for such contact in furtherance of efficient discovery. According to the court here, the judge in *Gaus* noted that there were more than 150 plaintiffs, and expressed concern that a flood of discovery disputes would strain the court's resources. To ensure the same right of access and promote efficient discovery, the *Gaus* court ordered all parties to proceed by formally deposing plaintiffs' physicians.

In the *NuvaRing Product Liability Litigation*, the court declined to allow defendants to have ex parte contact with the plaintiffs' physicians, because they had alternative means of obtaining the information.

This case presents different circumstances from either *Gaus* or *NuvaRing*, the court said. For one thing, the numbers are smaller: this litigation is focused on the bellwether cases, only two of which will be set for trial in mid-2010. "This court does not envision significant discovery disputes or hearings which will overwhelm the judicial process." And, unlike the *Nuva Ring* parties, the parties here were not successful in reaching an agreement on the ex parte issue.

The court allowed plaintiffs' counsel to have ex parte contacts "to discuss the physicians' records, course of treatment and related matters, but not as to liability issues or theories, product warnings, Defendant research documents or related materials." Violations, the court said, "will result in sanctions."

Plaintiffs in Ortho Evra litigation have alleged that Johnson & Johnson and its Ortho-McNeil division knew or should have known that the transdermal patch was inherently more dangerous than contraceptive pills with respect to the risks of blood clots, pulmonary emboli, strokes, heart attacks, and deep vein thrombosis. Yet, the defendants aggressively marketed the patch without disclosing these side effects. Women using the patch absorb more estrogen than those who use contraceptive pills, because some of the hormone in oral medication is lost through digestion.

In 2008, the Food and Drug Administration approved additional changes to the Ortho Evra label to include results from a study that found users of the patch were at higher risk of developing serious blood clots than women using birth control pills (36 PSLR 117, 2/4/08).

Judge David A. Katz wrote the opinion.

The opinion is available at <http://op.bna.com/pslr/nsf/r?Open=jstg-825rez>

Medical Devices

Court Orders Ethicon to Produce Data Relevant to Design Claim Against Competitor

The federal court overseeing multidistrict litigation regarding the ObTape Transobdurator sling Jan. 14 ordered a competitor to produce information about its product (*In re Mentor ObTape Transobdurator*

Sling Products Liability Litigation, M.D. Ga., No. 08-MD-2004, *motion to quash subpoena denied* 1/14/10).

The U.S. District Court for the Middle District of Georgia denied a motion filed by Ethicon Inc. to quash a subpoena seeking information about Ethicon's "Gyn-ecare TVT Prolene Mesh" (TVT) product.

Plaintiffs sought the data to support their design defect claim against Mentor Corp., maker of ObTape, which requires proof of a safer feasible alternative design. Plaintiffs maintained that the TVT product was the "gold standard" of mesh products, like ObTape, used to treat female stress urinary incontinence.

In a footnote, the court mentioned that Ethicon is a wholly owned subsidiary of Johnson & Johnson, which recently acquired defendant Mentor Corp.

Discovery Allowed. Plaintiffs sought the information from Ethicon while taking discovery in the proceedings. Specifically, they asked Ethicon to produce: (1) testimony and documents that supported statements made in a pamphlet promoting the TVT device; (2) testimony and documents relating to Mentor's Section 510(k) application for marketing clearance to the Food and Drug Administration, in which Mentor asserted that the ObTape device was substantially equivalent to the TVT device; and (3) testimony and documents relating to all testing conducted on the TVT device.

Ethicon filed a motion to quash the subpoena, claiming that it sought information that was not relevant to the present litigation, that it sought the disclosure of trade secrets and other confidential information, and that it would impose an undue burden on the company.

The court denied the motion as to all but one category of information sought. It said that plaintiffs could not compel Ethicon to produce unretained expert testimony, but that Ethicon should produce the remainder of the information.

The court explained that, under Fed. R. Civ. P. 26, plaintiffs may take discovery of any nonprivileged matter that is relevant to that party's claims or defenses. Relevant matter need not be admissible in evidence, it noted, but need only be "reasonably calculated to lead to the discovery of relevant evidence."

The information plaintiffs sought from Ethicon was relevant to this action, the court found, because it could show that there was a safer alternative design for polypropylene mesh products used to treat stress urinary incontinence, which is an element of a design defect claim. Additionally, the information was relevant to counter Mentor's state-of-the-art defense, the court said.

Ethicon argued that the information was not discoverable because it contained trade secrets or confidential information. The court found, however, that Ethicon did not meet its burden of proving the privilege, or that producing the information would impose an undue burden on the company.

Publicly Available Information. Plaintiffs' request included information that supported statements made by Ethicon in a publicly available brochure about the TVT product. The court found that both the pamphlet and the medical studies cited to support Ethicon's claim were relevant to the plaintiffs' case. The fact that the most knowledgeable witnesses regarding the statements made in the pamphlet were in Europe did not, by itself, establish sufficient hardship to avoid compliance with the subpoena, the court added.

In addition, the court ordered Ethicon to produce testimony and documents regarding Mentor's FDA 510(k) application, particularly information supporting Mentor's claim that the ObTape was substantially equivalent to the TVT device.

The court acknowledged that Ethicon did not play any role in the Section 510(k) process for ObTape. Ethicon did not consult with either Mentor or FDA, and did not conduct any studies of the ObTape. Thus, the court said, to the extent that plaintiffs' request would require Ethicon to retain experts and form an opinion as to whether the products were substantially equivalent, the motion to quash was granted.

However, to the extent plaintiffs sought factual information about TVT so that their own experts could conduct a substantial equivalence review, Ethicon was required to produce the requested information, the court said. It went on to find that Ethicon did not demonstrate that producing this information would cause it undue hardship.

The court also ordered Ethicon to produce testimony and documents related to all testing done on the TVT product. It declined to consider Ethicon's claims that its internal documents should not be subject to production because they contained trade secrets and confidential information, since Ethicon did not produce a privilege log or other documentation from which the court could determine whether the privilege should apply.

Additionally, the court said that, even if the documents were privileged, plaintiffs should still be given access to them because plaintiffs have a substantial need for the information and it is not available from any other source. The court said that the documents could be protected from disclosure to nonparty competitors through a protective order.

Federal litigation over the ObTape was consolidated in the Middle District of Georgia in late 2008.

The dispute over the subpoena to Ethicon was transferred to the MDL court from the U.S. District Court for the District of New Jersey in November 2009.

Judge Clay D. Land wrote the opinion.

Full text of the order is at <http://op.bna.com/hl.nsf/r?Open=mapi-7zxlul>.

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Tylenol

N.Y. Court Excludes Plaintiff's Evidence, Grants Summary Judgment to Manufacturer

A woman failed to offer admissible scientific evidence linking Tylenol to her cirrhosis of the liver, a New York trial court said Jan. 19, excluding her experts and granting summary judgment to manufacturer McNeil PPC Inc. (*Ratner v. McNeil PPC Inc.*, N.Y. Sup. Ct., Kings Cnty., No. 48820/02, 1/19/10).

"The plaintiff has wholly failed to introduce any studies, peer articles, professional literature, judicial opinions or recognized text books that state plaintiff's simple yet novel premise, namely that normal ingestion of acetaminophen causes cirrhosis to develop in the liver," the New York Supreme Court, Kings County, said.

Plaintiff Used Standard Dose. Margalit Ratner sued McNeil-PPC, alleging that normal doses of Tylenol, whose active ingredient is acetaminophen, caused her to develop cirrhosis, which required a liver transplant in 2004.

The court noted that to prove causation in a drug case, a plaintiff must submit relevant scientific data or studies showing such a causal link. New York follows the *Frye* rule, excluding evidence where the methodology or techniques are not accepted within the scientific community, the opinion said.

The court said McNeil satisfied its burden of demonstrating that there is no scientific evidence linking acetaminophen with cirrhosis. The defendant offered an affidavit from Dr. Howard Worman, an expert in hepatology. According to the opinion, Worman said that there are no scientific peer studies that link acetaminophen with cirrhosis, that there is no evidence linking the two, and that the plaintiff's evidence is flawed and without acceptance in the scientific community.

Plaintiff's Evidence Inadequate. Ratner submitted various affidavits in opposition to McNeil's motion. Dr. Douglas Dietrich, a hepatologist, stated that there is no dispute that acetaminophen can cause liver cell death.

Dietrich cited numerous case studies purporting to show that the ingestion of acetaminophen can cause cirrhosis, and relied on differential diagnosis to determine that ingestion of acetaminophen caused the plaintiff's cirrhosis.

But the court said, "There are no studies or medical literature which conclude that the ingestion of normal doses of acetaminophen causes cirrhosis." On the other hand, "there are numerous studies and a reasonable medical consensus that doses greater than the recommended daily dosage can cause cirrhosis."

According to the court, Dietrich attempted to draw a medical parallel between proper doses and greater doses of acetaminophen to conclude that it causes cirrhosis. "However, that theory is not accepted within the scientific community," the opinion said.

FDA Notice Not Definitive. Dietrich agreed with the assessment that ingestion within recommended dosages is safe, the court said, but he attempted to prove that this dosage was too high by citing a Food and Drug Administration Notice saying there is little agreement concerning the 'specific threshold dose for toxicity' and re-

ducing the daily recommended adult dosage from 4,000 mg to 3,250 mg per day.

However, the court said, the FDA did not conclude the dose should be lowered because it was too high. Rather, the FDA was concerned that people could easily overdose on acetaminophen, for example, because it is an ingredient in many products. The agency said even slight overdoses can be unsafe.

According to the court, the FDA also said the public is not fully informed about the dangers of increased use of acetaminophen. Further, the FDA said some individuals—for example, those with liver disease or who consume alcohol—may be especially sensitive to liver injury from the drug.

But, "The agency's acknowledgement that certain individuals are sensitive to liver disease does not mean there is a general acceptance within the scientific community that acetaminophen causes cirrhosis," the court said.

Turning to the case reports Dietrich cited, the court said almost all of them concern situations in which the individual ingested doses far greater than the recommended daily dose, or suffered a disease other than cirrhosis.

Only two reports involved normal doses of acetaminophen in a patient who developed cirrhosis. However, far from stating causation with certainty, those reports "guardedly entertain the possibility that the liver injuries sustained are related to ingestion of normal doses of acetaminophen," the court said. "That is simply an insufficient basis upon which to demonstrate acceptance within the scientific community."

The court also disallowed an affidavit from Gerald Rosen, a chemist and pharmacologist, because it did not address whether acetaminophen causes cirrhosis.

Labeling Affidavit Disallowed. Likewise, an affidavit from Dr. Suzanne Parisian does not mention cirrhosis. Parisian, a former medical officer at the FDA and an advocate of proper drug labeling, said the warnings on Tylenol did not say that liver toxicity could occur from ingestion of the therapeutic dose, despite medical literature indicating that some people sustained liver injury from this dose.

Had such information been on the label, Ratner would have been able to recognize that her symptoms were caused by prolonged use of Tylenol, Parisian said. But the court said "that analysis does not pinpoint the specific disease, namely cirrhosis, that plaintiff claims was caused by normal ingestion of acetaminophen."

The court also disallowed an affidavit from Dr. Neil David Theise.

Judge Leon Ruchelsman wrote the opinion.

Attorneys for the plaintiff were Paul Pennock and Lawrence Goldhirsch of Weitz & Luxenberg in New York.

Attorneys for McNeil-PPC were Patrick G. Broderick and Michael E. Planell of Dechert LLP in New York.

Analgesics

Sixth Circuit Affirms Judgment for Target In Pro Se Plaintiff's Suit Against Pharmacy

A federal appeals court Jan. 21 affirmed a summary judgment ruling in favor of a retail pharmacy in a suit by a man who alleged he was injured by a generic drug purchased there (*Flint v. Target Corp.*, 6th Cir., No. 09-5153, 1/21/10).

In an unpublished opinion, the U.S. Court of Appeals for the Sixth Circuit said the district court's reasoning and conclusions were correct in its ruling against plaintiff Edward H. Flint.

Flint went to a Target pharmacy to fill a prescription for phenazopyridine, a urinary tract analgesic, following prostate surgery. The prescription was dispensed with a patient information sheet that listed possible side effects. He used the first prescription of medication, and one refill, without any adverse incident, the court said. However, Flint filled the prescription a second time, and suffered an allergic reaction—itchy hives and bumps inside his mouth, a numb tongue, and a loss of taste.

The company that provided the pills dispensed in the second refill was not the same company that had manufactured the pills dispensed in the first two fills, the appeals court noted.

Flint sued Target pro se under negligence and product liability theories. A federal trial court in Kentucky summarily dismissed the suit in January 2009, prompting Flint's appeal. (37 PSLR 106, 1/26/09).

On the negligence claim, the appeals court said under Kentucky law, pharmacists owe their customers a duty of care to dispense the correct medication in accordance with the prescribing physician's instructions. The district court correctly found Target complied with that standard, the appeals court said.

Flint claimed the drugs he received were not approved by the Food and Drug Administration, but the court said these statements were unsupported allegations. The court rejected Flint's argument that Target breached its duty to him in the second refill by substituting a cheaper generic for another generic, saying Target's actions are authorized by Kentucky statute.

Rebuffing his claims that Target had a duty to investigate and test any prescription medications before dispensing them to customers, the court said there is no law to support this assertion.

Middleman Statute Shields Target. On the product liability claim, the Sixth Circuit said the lower court properly determined that a Kentucky "middleman statute" shields Target.

Under Kentucky law, if a product manufacturer is identified and subject to the court's jurisdiction, then the "middlemen"—the distributors and retailers—are not potentially liable unless the product was altered from its original condition or the distributor/retailer breached a warranty or knew or should have known the product was defective. The Sixth Circuit agreed with the district court's conclusion that the two conditions were satisfied and neither exception applied.

Judge Julia Smith Gibbons wrote the opinion.

Flint appeared pro se.

Target was represented by Richard P. Schiller Jr. and Kimberley S. Naber of Schiller, Osbourn, Barnes & Maloney in Louisville, Ky.

The opinion is available at <http://op.bna.com/pslr.nsf/r?Open=jstg-825njr>

Civil Procedure

Electronic Technology Platforms Pose Novel Notification Issues for Class Litigators

Attorneys litigating class actions need to carefully consider the legal implications and technical challenges of using new electronic platforms instead of paper-based notification systems, practitioners experienced in notification trends told BNA.

While courts have been receptive to e-mail, website, and search engine advertising as a means of communicating to potential class members, attorneys must nevertheless accommodate pre-internet dictates: Notice must be individualized and must be the best practicable notice under the circumstances.

In some cases, electronic notice may be a reasonable contact strategy based on the parties' prior dealings. When e-mail and websites have previously been the standard mechanism for communication between parties and potential class members, electronic notices should satisfy due process requirements, they advised. In one pending lawsuit involving Facebook, the court approved a settlement in which notices were only sent through the social network.

Unique Challenges. But electronic notices present unique challenges that practitioners should watch. Notice to mobile devices—an uncommon but logical progression of developments seen in the online space—could violate the Telephone Consumer Protection Act, 47 U.S.C. § 227. The practitioners also shared tips for avoiding interception by ISP spam filters, negotiating banner notice and keyword advertising details, and backup options for when electronic notices are unsuccessful.

Persons whose interests are affected by class action litigation must receive, under Fed. R. Civ. P. 23(b)(3), notice of the action that is the "best . . . practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23 (c)(2)(B).

Under Fed. R. Civ. P. 23 (e), courts must direct notice about settlements to all class members who would be bound by the proposal. Rule 23(d) gives courts authority to require additional notice to class members, such as news about litigation developments.

In *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), a pre-internet case and the leading decision interpreting Rule 23(c)(2)(B)'s notice requirement, the U.S. Supreme Court held that individualized, mailed notice to all class members who could be reasonably identified was required, regardless of cost.

Many courts, looking to *Eisen*, have concluded that electronic notices are reasonably calculated to reach potential class members and satisfy due process requirements. Some have not, however, for reasons ranging from the accessibility of postal addresses to concerns about message alterations and forwarding.

E-Notice Gaining Popularity in Web Service Litigation.

Electronic notice has become at least a component of most recent class actions, especially in litigation involving technology companies and online services, Jay Edelson, managing partner of Edelson McGuire—formerly known as KamberEdelson—in Chicago, told BNA. E-mailed notices can have many benefits over mailed correspondence—including saved postage costs, enhanced delivery tracking capabilities, and convenience, Edelson said.

Settlement websites have been held to provide constitutionally compliant notice about class action lawsuits. Courts have also concluded that notices through e-mail and banner advertising are reasonable strategies for reaching potential class members.

Many judicial analyses about the propriety of electronic notice have come from opinions granting preliminary approval to proposed settlements. These decisions suggest that, at least from those courts' perspectives, how a company communicated with potential class members in the past is likely to dictate whether notices may be transmitted electronically.

Corporate Attorney Predicts Shift From Eisen Mailings.

“Companies want to keep costs down, and they recognize that they may ultimately bear the cost of notice after an adverse judgment or settlement,” Ted K. Bilich, a partner in Jones Day’s Washington, D.C., office, told BNA.

As a result, they are willing to experiment with alternatives to mailed notice in circumstances when Rule 23(c)(2)(B) notice is not required, he said. Electronic notice could be particularly useful when courts want to provide supplemental clarification or notice under Rule 23(d)(2), Bilich added.

“The tougher question is using electronic notice as Eisen-type best notice practicable where traditional-mail addresses are available, so that the Eisen dictates of traditional mail would ordinarily apply,” Bilich explained. Because the Eisen opinion was issued long before e-mail was commonly used, courts will likely move away from its strict mailing requirements, Bilich said.

“At some point courts will recognize that in certain circumstances best notice practicable is an electronic form of notice—e-mail, text messaging, or something else,” he said. “I could see that, for instance, where virtually all of the interaction between the proposed class and the defendant was electronic.”

But courts are unlikely to abandon individualized notice altogether, he said. “I think the preference would always be for something individually targeted over something dependent on a class member taking initiative to visit a website like a banner advertisement.”

Spam Filters, Bouncebacks, and Attachments Tips. Both e-mail and targeted online advertising were very effective at delivering class notices in as many as 20 class lawsuits litigated by KamberEdelson LLC over the last 18 months, Edelson said.

KamberEdelson has represented classes against many technology companies, including a social network application developer, *Claridge v. RockYou Inc.*, No. 09-6032 (N.D. Cal. complaint filed Dec. 28, 2009); Netflix Inc., *Doe v. Netflix Inc.*, No. 09-5903 (N.D. Cal. complaint filed Dec. 17, 2009); a marketing company that sent advertisements to cellular phones, *Czech v. Wall Street on Demand*, No. 09-180 (D. Minn. Dec. 8, 2009) (*holding CFAA claim failed for lack of damages*

from unsolicited text messages); and in the pending Facebook lawsuit, to name several actions.

“We do a lot of technology class actions, and everyone is moving to e-mail,” Edelson said.

Tips For Achieving Good Results. There are several issues litigants must watch out for to achieve the best results, Edelson said, including:

- the relationship between the sender and class members;
- recipients’ concerns about attachment viruses;
- avoiding ISP spam filters; and
- bouncebacks.

Electronic notice is most effective when class members already have an electronic-based relationship with the party sending the notice, Edelson said. “If a notice were to go to Facebook users in the mail, users may find it awkward because Facebook does not communicate with its users that way.”

Jeanne Finegan, legal notice expert with Garden City Group Inc., a legal notice company, agreed. It is the class member’s anticipation of online communications that makes electronic notice most effective, she said.

“E-mail’s greatest efficiency comes from trust and behavioral inclination. If a company has an ongoing dialog with its customers through e-mail, then the communications tend to be trusted and an e-mail notice program can be very useful. However, if a company does not typically communicate with its customers through e-mail, the customer may not expect the contact and is more likely not to trust it, thinking it is spam,” Finegan said.

Notices should be sent in the body of messages rather than as attachments, Edelson advised, because e-mail recipients may be reluctant to open attachments due to concerns about computer viruses.

Particularly when classes are quite large, litigants should consider sending e-mail notices in smaller batches, he recommended. ISP spam filters often block large numbers of messages sent simultaneously from the same source, so it is better to transmit notices over a period of time, he advised.

Finally, when notices result in bouncebacks, there should be a backup notice system in place, such as re-sending the notice or mailing a paper copy to ensure that as many class members as possible receive it.

Keyword Ads: Negotiate the Specifics. Litigants who elect to utilize e-mail notices should not, however, rely exclusively on that mechanism. “Do smart notice through multiple mediums to achieve the best results,” Edelson said.

A popular strategy is to create settlement websites, and link to them through keyword and banner advertising, he explained.

However, the terms of those systems should be carefully negotiated through the settlement process, he said. Litigants could, understandably, be adverse to advertisements linked to combinations of their names and phrases like “class action” or “fraud,” but use of generic terms may not reach sufficient numbers of class members.

Text-Message Notices Could Be Covered by TCPA. Edelson said that parties should avoid notice systems involving text messages to mobile devices. “People should not be sending SMS notices. It sounds creative, but it could violate the TCPA,” he explained.

The TCPA, at 47 U.S.C. § 227, prohibits calls to cell phones using “automatic telephone dialing systems.” The TCPA defines an “automatic telephone dialing system” as “equipment which has the capacity (a) to store or produce telephone numbers to be called, using a random or sequential number generator; and (b) to dial such numbers.”

The Ninth Circuit, in *Satterfield v. Simon & Schuster Inc.*, 569 F.3d 946 (9th Cir. 2009), ruled that unsolicited text messages are “calls” within the meaning of the TCPA.

Satterfield applied the TCPA to text messages sent by third-party marketers to customers who agreed to receive text messages in exchange for ringtones. The court said that because the customers only agreed to receive messages from the company and affiliated entities, the marketing messages fell outside the scope of customers’ consent.

The Federal Communications Commission said in its *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991* that the TCPA’s prohibition on automated dialing systems “encompasses both voice calls and text calls to wireless numbers including, for example, short message service (SMS) calls.”

Finegan said that class member-initiated SMS communications can still play a role in class litigation. As an example, she explained that notices advertised through publications and in stores could contain a code that potential class members can message to request additional information about a class lawsuit.

But in that situation, litigants must always remember to use “standard messaging rates apply” language to avoid complaints from class members about unexpected costs, she advised.

Several Opinions Reject E-Mail Deficiency Arguments. *Browning v. Yahoo! Inc.*, said in an unpublished opinion that “Email notice was particularly suitable in this case, where settlement class members’ claims arise from their visits to Defendants’ Internet websites.” No. 04-71463 (N.D. Cal. Nov. 16, 2007).

The *Browning* settlement notice was sent to class members through an e-mail that contained an abbreviated settlement announcement and a link to the settlement website. Some class members complained that they were reluctant to visit the site because of phishing concerns. The court found the abbreviated notice to be constitutionally adequate, finding that class counsel did not include the full notice in the e-mail message because of concerns that the large notice would trigger spam filters.

Browning said that electronic notice imperfections were not unique to online contacts. All notice systems involve tradeoffs, the court said.

“For approval, the notice need not have been perfect[,]” the court remarked. “Rather, it needed to be the ‘best notice practicable under the circumstances’ and directed ‘in a reasonable manner to all members who would be bound.’ The email notice program adopted in this case met those requirements.”

A class member in a California lawsuit involving the Netflix online video rentals service complained that e-mailed notice did not comport with due process because it only contained a summary of the lawsuit details. *Chavez v. Netflix Inc.*, No. A114334 (Cal. Ct. App. April 21, 2008). According to the individual, the notice

should have discussed the release of claims contemplated by the settlement, the fact that the final judgment would bind all class members, the procedure for opting out, and other information about settlement hearings and counsel.

The court disagreed. An e-mailed notice containing a summary of the settlement, enhanced by the linked website containing all the required details, provided all information required in a highly accessible form, the court found. “The manner of giving notice is subject to the trial court’s virtually complete discretion[,]” according to the court. “Using a summary notice that directed the class member wanting more information to a Web site containing a more detailed notice, and provided hyperlinks to that Web site, was a perfectly acceptable manner of giving notice in this case.”

In *Barker v. Skype*, No 09-1364 (W.D. Wash. *settlement preliminarily approved* Nov. 17), the court recently granted preliminary approval to a settlement involving allegedly unlawful expiration dates for credits for Skype’s voice over internet protocol communications service. The court permitted notice to class members to be conducted exclusively via e-mail.

“Due to the unique nature of the User Accounts, which are internet based accounts that are typically not tied to a postal address, mailed notice would not be effective and would unnecessarily deplete potentially available funds, to the detriment of the Settlement Class[,]” the court said.

Facebook Notice? One pending settlement permitted the transmission of notice documents exclusively through the Facebook social network.

The lawsuit involves claims that Facebook’s experiment with cross-website advertising violated the federal Electronic Communications Privacy Act, 18 U.S.C. § 2510, the Computer Fraud and Abuse Act, 18 U.S.C. § 1030, the Video Privacy Protection Act, 18 U.S.C. § 2710, and California state law. *Lane v. Facebook Inc.*, No. 08-3845 (N.D. Cal. *settlement preliminarily approved* Oct. 23, 2009).

The court preliminarily approved the settlement Oct. 23, and allowed notice through an internal Facebook message to affected users and one newspaper publication.

“[T]ransmission of the Notice as proposed by the Parties meets the requirements of Federal Rule of Civil Procedure 23 and due process, is the best notice practicable under the circumstances, and shall constitute due and sufficient notice to all Persons entitled thereto[,]” the court said.

At least one class member in the case has objected to the in-network notice. According to that objection, a notification that the user had received the message, which Facebook transmitted to the user via e-mail, landed in the user’s Gmail spam folder.

The user argued that Facebook should have notified users of the settlement through a notice on the Facebook website rather than an in-network message. “[I]n all past situations where Facebook has notified me of changes in policy, they have done so on the ‘Home’ page of their website which is easily more prominent than their emails[,]” the user said. “I realize that a Settlement Action is different, but this is to illustrate that Facebook has options other than mass-email for communicating with its users.”

But Other Holdings Still Required Postal Mail. But not all courts have approved the transmission of settlement notifications exclusively online, even if the sender has communicated with class members exclusively through the internet in the past.

In *West v. Carfax Inc.*, the Ohio Court of Appeals held that because an online company had access to customers' postal addresses, it was constitutionally required to send notifications through the U.S. mail. No. 08-45 (Ohio Ct. App. Dec. 24, 2009).

West, applying *Eisen*, reasoned that postal mail would be more likely to reach the intended recipients than e-mails sent to post-2003 customers and two news advertisements. The court—remarking that customers from as early as 2000 might be reached via e-mail—said that because the company could obtain postal addresses, it should send notices that way. Postal mail would reach as many class members as reasonably possible, the court said.

In *Reab v. Electronic Arts Inc.*, 214 F.R.D. 623 (D. Colo. 2002), the court rejected the propriety of e-mailed notice, not because of concerns about it reaching intended recipients, but what would happen to the notice after that.

The court said that e-mail notice was not appropriate because it “has the potential to be copied and forwarded to other people via the internet with commentary that could distort the notice approved by the Court.”

In *Karvaly v. eBay Inc.*, 245 F.R.D. 71 (E.D.N.Y. 2007), the court applied both *Eisen* and *Reab* to hold that individualized notice transmitted via e-mail was constitutionally deficient. “Individual notice to identifiable class members is not a discretionary consideration to be waived in a particular case[.]” the *Karvaly* court said, quoting *Eisen*. “It is, rather, an unambiguous requirement of Rule 23.”

The court rejected the plaintiff's argument that the individualized notice could be transmitted via e-mail

even though the parties dealt with each other exclusively online. “[Plaintiff] argued that electronic notice is appropriate in this case because PayPal's users are ‘on line people’ who ‘transact with [PayPal] completely on line,’ but offered no reason to assume that every prospective Class Member is sufficiently sophisticated in the ways of online commerce that they would be likely to receive and read an electronic notification delivered to their PayPal mailbox[.]” the court concluded.

A generalized website notice in *Karvaly* did not remedy the court's concerns about the e-mailed notices, because it was not individualized to each potential class member.

By AMY E. BIVINS

Correction

In a *Product Safety & Liability Reporter* story entitled “Pa. Appeals Court Affirms Decertification; Offers Different Reasoning Than Trial Court” (38 PSLR 4, 1/25/10), quotes should be attributed to plaintiffs' attorney John K. Weston and should read: In accepting the federal judge's reasoning to reject the proof from plaintiffs' expert Dr. Meredith Rosenthal, the Pennsylvania court “relied on a judge who was operating under a different standard,” Weston said.

“The appeals court did not take into account that Judge [Mark I.] Bernstein has faced arguments regarding Rosenthal's report and he has rejected those arguments,” Weston said.

Bernstein saw Rosenthal testify, and under Pennsylvania standards he said a jury should consider her report, Weston said.

Further down in the story, two paragraphs under the subheading, “Trial Court's Reasoning,” it should read, This aspect of the court's decision is “favorable,” and very important for the relatively sparse body of state class action law, plaintiffs' attorney Weston said.

Product Safety

Motor Vehicles

Vehicle Recalls

House Committee Calls for Hearing On Accelerator Problem; Toyota Takes Steps

The burgeoning Toyota recall of millions of vehicles for sudden acceleration has prompted congressional intervention, as a House committee Jan. 28 called for a hearing on the Toyota situation.

The House Energy and Commerce Committee scheduled the hearing for Feb. 25, to address National Highway Traffic Safety Administration data showing that sudden accelerations in Toyota vehicles have led to 19 deaths in the past 10 years, nearly twice the number associated with similar events in cars manufactured by all other car makers combined. The committee aims to acquire more information about these events and Toyota's and NHTSA's response to the safety hazard, according to committee members.

"Our hearing will help us better understand how quickly and effectively Toyota and the National Highway Traffic Safety Administration responded to consumer complaints about the safety of the recalled Toyota vehicles," committee chairman Henry A. Waxman (D-Calif.) said in a statement.

The call for a hearing also coincides with announcements that the beleaguered Toyota Motor Corp. has been working with its supplier to revise accelerator pedal designs to fix the problem. It comes a day after the company announced it was expanding a separate recall announced in October 2009 related to potential floor mat entrapments. Affected by this recall are 2008–2010 Highlander, 2009–2010 Corolla, 2009–2010 Venza, and 2009–2010 Matrix (NHTSA Recall #10V-023); and 2009-2010 Pontiac Vibe, a partner vehicle (NHTSA Recall #10V-018).

The hearing plan also comes two days after Toyota halted sales and production of eight models while the company develops a remedy for defective accelerator pedals, and amid reports Jan. 28 that Toyota plans to recall up to 1.8 million vehicles in Europe and vehicles in China to fix accelerator pedals (see related story in this issue).

Aiming for Answers. Waxman and subcommittee chairman Bart Stupak (D-Mich.) said the hearing will examine the "persistent consumer complaints" related to sudden unintended acceleration in Toyota Motor Corp. vehicles.

The committee seeks to address measures the automaker is taking to resolve what the lawmakers said are "unanswered questions" left over after committee staff met Jan. 27 with Toyota representatives.

The lawmakers said sticking accelerator incidents have been an ongoing problem with Toyota vehicles for

about a decade, and these have led to a disproportionately high number of deaths.

"Failure to take every step possible to prevent future deaths or injury is simply unacceptable. Our hearing will press for answers about the source of this accelerator defect and investigate whether adequate measures have been taken to ensure the safety of Toyota vehicle owners and all Americans on the road," Stupak said.

In Jan. 28 letters to Toyota President Yoshimi Inaba and National Highway Traffic Safety Administration administrator David Strickland, the lawmakers asked for information about when Toyota learned about the "serious safety defects" and the actions the company took to resolve the hazards.

Information Sought From NHTSA. Toward that end, they asked NHTSA for the following by Feb. 12:

- a timeline of consumer complaints and reports of deaths, injuries, and property damage related to sudden unintended acceleration (SUA);
- early-warning reporting information for SUA in Toyota vehicles compared with that for all vehicles sold in the United States;
- analyses of defects petitions;
- communications to and from Toyota related to the problem;
- Toyota's cooperation with any investigation related to SUA;
- agency efforts to update its standards and any plans to initiate rulemaking on brake-override systems in vehicles with electronic throttles.

The committee asked Toyota for much of the same information and any internal communications and presentations to senior company officials or government agencies relating to SUA incidents since Jan. 1, 2000.

Working with Supplier on Fix. Meanwhile, Toyota Motor Engineering & Manufacturing North America (TEMA) said it is working with its supplier, CTS, in Elkhart, Ind., to revise accelerator pedal designs. The revisions are in full production, TEMA said in a statement. The companies are working together to test effective modifications to existing accelerator pedals in the field, to be rolled out as soon as possible, TEMA added.

"We commend CTS for working diligently and collaboratively to find a solution to the potential problem and in developing a new design," said Chris Nielsen, TEMA's vice president of purchasing.

Expanding Floor Mat Recall. In related events, Toyota said it sent a letter to the National Highway Traffic Safety Administration Jan. 27 after deciding to expand a floor mat obstruction recall to include almost 1.1 million additional vehicles. The recall is separate from the sticking accelerator pedal recall.

The manufacturer's plan is to modify or replace the accelerator pedals on these vehicles to address the risk of floor mat entrapment, even when an older-design all-weather floor mat or other inappropriate mat is improperly attached, or is placed on top of another floor mat.

The company also is considering floor surface modifications, which will be included in the remedy plan for any model for which it is deemed appropriate. "Initially, dealers will be instructed on how to reshape the accelerator pedal for the repair. As replacement parts with the same shape as the modified pedal become available, they will be made available to the dealers for the repair," Toyota said.

The letter amended Toyota's defect information report to NHTSA dated Oct. 5, 2009, regarding the potential risk for floor mat entrapment of accelerator pedals in certain Toyota and Lexus models (NHTSA Recall #09V-388) (37 PSLR 1058, 10/5/09), the company said. The action is separate from the recall of certain Toyota vehicles for sticking accelerator pedals.

Toyota said that customers who have had the pedal reshape remedy completed will have the opportunity to receive a new pedal if they desire, after replacement pedals become available. Additionally, Toyota said it will replace any Toyota all-weather floor mat in these vehicles with a newly designed mat, free of charge. For customers who have the previous design all-weather floor mat but do not need or want the newly designed all-weather floor mat, Toyota will recover the previous design all-weather floor mat and reimburse the price.

BY LORRAINE GILBERT

The letters to Toyota and NHTSA are available at http://energycommerce.house.gov/Press_111/20100128/requestletters.pdf.

Additional information about the Toyota response to sudden accelerations can be found at <http://abouthttp://pressroom.toyota.com/pr/tms/default.aspx>

Vehicle Recalls

Toyota Halts Sales, Production of Autos; Critics Blame NHTSA, Company Inaction

Five days after announcing the recall of 2.3 million vehicles for a sticking accelerator problem, Toyota Motor Sales Jan. 26 took the unusual measure of temporarily halting the sale and production of eight models—some brand new and still at dealerships—involved in the recall.

A safety research consulting firm noted on its blog that Toyota had to cease selling the vehicles because a motor vehicle safety law implemented in 2002 forbids the sale or lease of new defective or noncompliant vehicles.

The National Highway Traffic Safety Administration, which enforces the recall law, issued a statement Jan. 27 by agency administrator David Strickland: "NHTSA informed Toyota of their obligations and they complied with the law. Their decision to halt sales was legally and morally the right thing to do."

Toyota Remiss in Selling Defective Vehicles? Toyota explained in a Jan. 21 press release that it was recalling approximately 2.3 million vehicles—several of the models still on the lot—because the accelerator pedals could fail to release when the driver released the pedal (38 PSLR 77, 1/25/10). The company said it planned to correct sticking accelerator pedals on these models.

"In the event that a driver experiences an accelerator pedal that sticks in a partial open throttle position or re-

turns slowly to idle position, the vehicle can be controlled with firm and steady application of the brakes. The brakes should not be pumped repeatedly because it could deplete vacuum assist, requiring stronger brake pedal pressure. The vehicle should be driven to the nearest safe location, the engine shut off and a Toyota dealer contacted for assistance," according to a Toyota release issued Jan. 21.

The company said it is instructing dealers to temporarily suspend sales of these models: 2009–2010 RAV4, 2009–2010 Corolla, 2009–2010 Matrix, 2005–2010 Avalon, certain 2007–2010 Camry, 2010 Highlander, 2007–2010 Tundra, and 2008–2010 Sequoia vehicles.

Toyota Group vice president and Toyota Division General Manager Bob Carter said in a statement the company decided the action is necessary until it can determine a remedy for the sticking accelerator pedal issue.

"We're making every effort to address this situation for our customers as quickly as possible," he said.

But critics believe Toyota did not act fast enough to address the problem. Not only that, the company was remiss in continuing to sell vehicles with a defect, according to Sean Kane of Safety Research & Strategies (SRS). Section 573.11 of the Transportation Recall Enhancement Accountability, and Documentation Act, which was implemented in April 2002, prohibits the sale or lease of new defective or noncompliant motor vehicles (30 PSLR 407, 5/6/02).

What this means, Kane said in a Jan. 27 web posting, is that the automaker "was planning to sell the defective vehicles, as is, with the proviso that new owners who noticed the problem could bring the vehicle to the dealer for the remedy."

The agency said in the April 2002 final rule that three prerequisites must occur for the prohibition on the sale or lease of new motor vehicles or equipment to apply: The notification of a defect or noncompliance must have been required by a United States Code order; a dealer must have been notified of the defect or noncompliance; and the dealer must be in possession of the vehicle or equipment.

In November, Kane's Massachusetts research group chastised NHTSA for refusing to open an investigation of Toyota sudden unintended accelerations (SUA). He contended the agency was not looking deeply enough into a complex issue (37 PSLR 1161, 11/9/09).

Equally troubling, SRS said, was the agency's inability to look beyond pedal interference. Part of the problem had to do with how the sudden acceleration complaints were coded and categorized, the firm said.

No Defect Existed, Toyota Said. Toyota in November noted that for the sixth time in six years NHTSA exhaustively reviewed allegations of unintended acceleration of Toyota and Lexus vehicles and reached the same conclusion each time: that no defect existed.

At the time, driver's-side floor mats were viewed as the culprit, and Toyota and NHTSA agreed that removal of the floor mats was the most immediate way to address the risk of SUA.

Meanwhile, the company said it has investigated isolated reports of sticking accelerator pedal mechanisms in some vehicles without the presence of floor mats and found that accelerator pedal mechanisms could, in rare instances, mechanically stick in a partially depressed position or return slowly to the idle position.

Sales Suspended to Assess Problem. Because of the sales suspension, Toyota said it planned to stop producing the vehicles the week of Feb. 1 to evaluate the situation.

No Lexus or Scion vehicles are affected by these actions. Toyota noted that also not affected are the Prius, Tacoma, Sienna, Venza, Solara, Yaris, 4Runner, FJ Cruiser, Land Cruiser, and select Camry models, including all Camry hybrids. All these vehicles will remain for sale.

The North American Toyota production facilities affected by the production stoppage include Toyota Motor Manufacturing in Canada, Indiana, Kentucky, and Texas; and Subaru of Indiana Automotive Inc.

Toyota said the sticking accelerator pedal recall is separate from the ongoing recall of Toyota and Lexus vehicles to reduce the risk of pedal entrapment by incorrect or out-of-place accessory floor mats (NHTSA Recall #09V-388) (37 PSLR 1074, 10/12/09). Approximately 1.7 million Toyota vehicles are subject to the two separate recalls, the company said.

BY LORRAINE GILBERT

Additional information is available at <http://www.safetyresearch.net/>.

Additional information about the Toyota response to sudden accelerations can be found at [http://pressroom.toyota.com/pr/tms/default.aspx](http://abouthttp://pressroom.toyota.com/pr/tms/default.aspx).

Administration

NHTSA Administrator Strickland Raises Questions on Agency Authority, Cites Goals

As vehicle design drives changes in expectations, both in the United States and globally, the first question on new National Highway Traffic Safety Administration Administrator David Strickland's mind is whether the agency is being well-served by the four vehicle statutes that prescribe its regulatory authority.

Speaking Jan. 27 at the SAE Government/Industry Meeting, in Washington, D.C., Strickland ticked off a list of other questions the agency's legal staff will be assessing in the coming months. He invited suggestions on how to improve NHTSA's statutory authority, to make it clearer and more logical: "The door is open at NHTSA."

Also on Strickland's mind: "Do NHTSA's statutory authorities accommodate the modern automobile? The modern competitive marketplace? More importantly, do they allow us to regulate in a way that allows the industry to build and sell products that consumers want to drive? Do they allow us to promote safety, innovation, and fuel efficiency? And do they allow NHTSA to move at pace with the industry?"

Strickland, who was sworn in Jan. 4 as administrator, said his priorities (all about equally important, he noted) include:

- vehicle safety technologies;
- behavioral safety measures, like increased seat belt use and reduced impaired driving;
- data collection;
- distracted driving—an emerging issue that has cost the loss of 6,000 lives;
- pedestrian safety; and

■ NHTSA reauthorization: Strickland said he is a "blank slate on statutory authority changes."

All this can be accomplished "with the resources we have," Strickland said, acknowledging, however, that more funding is always welcome.

Cooperative Measures Planned. Strickland told attendees he has been meeting with individual auto companies and plans to meet with the tire industry and safety advocacy groups.

With the current focus on distracted driving, Strickland said he intends to spur NHTSA development of an "evaluative framework for in-car technologies. . . . NHTSA needs a framework that clearly defines the danger zone for the driver—allowing NHTSA to keep pace with the industry, rather than playing catch-up."

As the United States evolves into a global community, the emphasis should be on fuel efficiency, Strickland said. "We will deliver on President Obama's call for a strong and coordinated national policy for fuel economy and greenhouse gas emission standards for motor vehicles, and we will do so in a way that does not compromise safety." He said the agency plans to publish a final rule on CAFE (corporate average fuel economy) in April.

Looking toward vehicle safety innovation, Strickland said active safety technologies will play an increasing role in the agency's injury prevention and reduction strategies. Advanced sensing technologies, enhanced communications, and satellite mapping will give automakers the tools to design vehicles that can detect unsafe conditions and react faster than drivers can on their own, he said.

An ongoing three-year industry partnership continues to develop and evaluate safety systems that incorporate vehicle-to-vehicle communications. These technologies, including rear-end, road-departure, and lane-change crash avoidance systems, could save thousands of lives each year while reducing congestion and providing other services, the administrator said.

Strickland also cited research under way on license plate readers to help law enforcement, and technologies to detect and prevent alcohol-impaired driving.

As technologies become more advanced and can track and record information, some raise questions about privacy concerns and consumer acceptance, Strickland said.

But the ultimate goal is to make NHTSA the "bridge for the future" as the new administrator ramps up the volume and dialog among the interested parties.

BY LORRAINE GILBERT

Consumer Products

All-Terrain Vehicles

Deaths, Injuries From ATVs Declined in 2008 CPSC Says, Prompting Groups to React

Deaths and injuries associated with all-terrain vehicle use declined in 2008, according to a Consumer Product Safety Commission report released Jan. 22.

The report, which includes updated information as of Dec. 31, 2008, shows that the total number of ATV-related injuries in 2008 decreased 10 percent from the number of such injuries in 2007. However, the numbers are likely to change because the agency is still collecting data from that period, CPSC said.

“As a result, the numbers of reported deaths for 2006 through 2008 are expected to increase before the next annual report is prepared,” CPSC wrote.

The ATV industry was quick to credit the lower 2008 numbers to safety initiatives, while safety advocates reiterated the seriousness of ATV-related dangers.

ATV fatalities account for a significant number of casualties to children under 16 years of age. The agency said that data since 1982 show that 2,588 of the ATV-related fatalities (27 percent of the total 9,633) were users younger than 16 years old, and 1,102 (11 percent of the total) were under the age of 12 years.

In 2008, at least 74 children were killed and more than 37,000 received serious enough injuries that they required emergency room treatment.

Even so, the total of ATV-related injuries in 2008 decreased 10 percent compared with the 2007 numbers, with injuries to children under 16 years of age declining 6 percent, according to current figures.

Industry Promotes Safe Use. The risk of injury per 10,000 four-wheel ATVs in use also declined by 15 percent from 2007 to 2008—lower now than any time since CPSC began calculating this type of risk in 1985, according to the Specialty Vehicle Institute of America (SVIA).

SVIA promotes safe and responsible use of ATVs through a number of initiatives, and attributes the positive changes to the commitment of SVIA member companies to rider education, parental supervision, and state legislation.

“Since 1984, the major manufacturers and distributors of ATVs in the United States have worked closely with the CPSC to implement ongoing safety initiatives,” Paul Vitrano, SVIA executive vice president, said in a statement.

Also partly responsible for the decline in ATV-related casualties is implementation of the Consumer Product Safety Improvement Act. The CPSIA directed the commission to adopt the industry’s voluntary standards (ANSI/SVIA) as mandatory (37 PSLR 1137, 11/2/09). The mandatory standards require all ATV manufacturers and distributors in the United States and those importing ATVs made abroad to adhere to the standards and training programs. To comply, manufacturers must certify that their products conform to the mandatory standards, and they must file safety action plans with the CPSC.

Consumer Groups Seek Tighter Controls. The safety advocacy group Consumer Federation of America said it is important to question the reason for the declines in injuries and deaths among ATV users, as the vehicles continue to cause hundreds of deaths and more than 100,000 injuries each year, “which makes them one of the most dangerous products that CPSC oversees,” according to Rachel Weintraub, CFA director of product safety.

“We need to understand why these numbers have declined: Is it because incidents with recreational off-highway vehicles were taken out of the report; is it because fewer children are riding ATVs that are too large

for them; is it because of higher gas prices; or is it because educational efforts are becoming effective?” Weintraub said.

Consumer groups in 2006 petitioned the agency, calling for a ban on the sale of adult-size ATVs for use by children, but then-Chairman Hal Stratton denied the petition (34 PSLR 711, 7/17/06). But under the leadership of Chairman Inez Tenenbaum, the agency has renewed the rulemaking process, and agency staff has been directed to follow the mandate of the CPSIA and pass new federal safety regulations.

SVIA said it “remains concerned that the effective ban on the sale of youth model ATVs resulting from the lead content provisions contained in the [CPSIA] will likely result in children under 12 years of age riding the more accessible larger and faster adult-size vehicles, creating—in the CPSC’s own words—a ‘more serious and immediate risk of injury or death’ than any risk from lead exposure.”

Vitrano said his members “strongly encourage” the CPSC to end the ban on the sale of youth ATVs, considering that the commission found that approximately 90 percent of injuries to children under 16 years old occur on adult-sized ATVs.

CFA and the American Academy of Pediatrics said they continue to call on the CPSC to reject the manufacture of youth model ATVs, capable of traveling at speeds up to 38 miles per hour, for 14- to 16-year-olds.

BY LORRAINE GILBERT

The report, 2008 Annual Report of ATV-Related Deaths and Injuries, is available at <http://www.cpsc.gov/LIBRARY/FOIA/FOIA10/os/atv2008/pdf>.

Product Recalls

Companies Recall Starbucks Glass Bottles, Horse Toy Figures, Zippo Butane Lighters

The Consumer Product Safety Commission Jan. 28 announced voluntary recalls of approximately 11,000 Starbucks glass water bottles, 15,000 Nature Wonders horse toy figures, and 17,500 Zippo butane candle lighters.

Starbucks Coffee Co., of Seattle, Wash., is recalling the glass water bottles because the bottle and/or its stopper can shatter when the consumer removes or inserts the stopper, posing a laceration hazard.

The recall involves 20-ounce clear glass water bottles with SKU number 11003503, manufactured in Taiwan.

Starbucks is providing refunds and also is offering a complimentary beverage to consumers who return the glass water bottles.

Lead Paint Violation. Importer Blip Toys, of Minneapolis, Minn., is recalling horse toy figures because they violate the lead paint standard. The surface paint coating on the horse contains excessive levels of lead.

The recall affects Nature Wonders HD pinto horse toy figures, model 92093, manufactured in China.

Blip Toys is providing a free replacement toy.

Lighters Pose Burn Hazard. Zippo Slatkin & Co. is recalling refillable butane candle lighters manufactured in China because they can produce an excessive flame

when being adjusted to the maximum flame setting. The condition poses a burn hazard.

The items, Zippo Slatkin & Co. candle lighters, with date codes G09 or H09, were imported by Zippo Manufacturing Co., of Bradford, Pa.

Zippo is providing a free replacement Zippo candle lighter.

Journal

MEETINGS

Ongoing, 2010—"Fire Retardant Dilemma Symposia," University of California, Berkeley, Calif. (The Green Science Policy Institute, (510) 644-3164, info@greensciencepolicy.org, <http://greensciencepolicy.org/upcoming-conferences>).

TBA, 2010—"CFA Awards Dinner," Washington, D.C. (Consumer Federation of America, http://www.consumerfed.org/aboutconferences_events.asp).

TBA, 2010—"Consumer Assembly," Washington, D.C. (Consumer Federation of America, http://www.consumerfed.org/aboutconferences_events.asp).

TBA, 2010—"National Food Policy Conference," Washington, D.C. (Consumer Federation of America, http://www.consumerfed.org/aboutconferences_events.asp).

February 3-9, 2010—"American Bar Association Mid-year Meeting," Orlando, Fl. (ABA, <http://new.abanet.org/calendar/midyear>).

Feb. 9-11, 2010—"Consumers Union Activist Summit, Third Annual," Pew Conference Center, Washington, D.C. (Consumers Union, Morgan Jindrich, (512) 477-4431, <http://events.consumersunion.org>).

Feb. 12-15, 2010—"Trial Advocacy College: Damages With David Ball, Ph.D.," (American Association for Justice, <http://www.justice.org>).

Feb. 26, 2010—"Litigating Truck Collision Cases Seminar," Westin Canal Place, New Orleans, La. (American Association for Justice, <http://www.justice.org>).

March 25-26, 2010—"4th Annual TSCI Program on Getting Ahead of the eDiscovery Curve," The Westin, Philadelphia, Pa. (The Sedona Conference Institute, <http://www.thesedonaconference.org/conferences/tsci/20100325>).

April 7-9, 2010—"Product Liability Conference," Defense Research Institute, Las Vegas, Nev. (DRI, www.dri.org).

April 9-10, 2010—"Medical School for Lawyers," Caesar's Palace, Las Vega, Nev. (American Association for Justice, <http://www.justice.org>).

April 13-15, 2010—"SAE 2010 World Congress, the Essential Automotive Technology Event," Cobo Center, Detroit, Mich. (SAE International, CustomerService@sae.org, www.sae.org/congress).

April 13-17, 2010—"ABA Section of International Law 2010 Spring Meeting," Grand Hyatt New York, N.Y. (American Bar Association, http://www.abanet.org/aba_timssnet/meetings).

April 21-23, 2010—"ABA Section of Litigation Annual Conference," The Hilton, New York, N.Y. (American Bar Association, http://www.abanet.org/litigation/programs/programs_future.html).

April 23-24, 2010—"Litigating Medical Negligence and Injured Infant Cases Seminar," Epic Hotel, Miami, Fl. (American Association for Justice, <http://www.justice.org>).

April 30-May 2, 2010—"Jazz Fest Seminar: Litigating Auto Collision Cases," New Orleans, La. (American Association for Justice, <http://www.justice.org>).

May 6-7, 2010—"Litigating Class Action Suits," Seattle, Wash. (Law Seminars International, <http://www.lawseminars.com/seminars-topic.php>).

June 22-25, 2010—"19th Annual National Expert Witness Conference," Chicago, Ill. (SEAK, http://www.seak.com/seminars/expert_witness_seminars.html).

July 16-17, 2010—"The 6th Annual Judicial Symposium," Sissotel Chicago, Chicago, Ill. (National Foundation for Judicial Excellence, <http://www.nfje.net>).

August 5-8, 2010—"ABA Annual Meeting," The Westin Market Street, San Francisco, Calif. (American Bar Association, http://www.abanet.org/litigation/programs/programs_future.html).



BNA

Electronic Resources

VOL. 38, NO. 5

FEBRUARY 1, 2010

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Index-Summary updates for Product Safety & Liability Reporter are available on a monthly basis.
<http://www.bna.com/current/psl>

INTERNET SOURCES

Listed below are the addresses of World Wide Web sites consulted by editors of BNA's Product Safety and Liability Reporter and WWW sites for official government information.

Consumer Product Safety Commission

<http://www.cpsc.gov>

American National Standards Institute

<http://www.ansi.org>

American Society for Testing and Materials

<http://www.astm.org>

Underwriters Laboratories

<http://www.ul.com>

Congressional Record

http://www.access.gpo.gov/su_docs/aces/aces150.html

Federal Register

http://www.access.gpo.gov/su_docs/aces/aces140.html

Code of Federal Regulations

<http://www.access.gpo.gov/nara/cfr/index.html>

GPO Access Databases

http://www.access.gpo.gov/su_docs/aces/aaces002.html

National Highway Traffic Safety Administration

<http://www.nhtsa.dot.gov>

Society of Automotive Engineers

<http://www.sae.org/servlets/index>

<http://www.lib.umich.edu/govdocs/federal.html>

White House

<http://www.whitehouse.gov/>

Thomas

<http://thomas.loc.gov>

U.S. House of Representatives

<http://www.house.gov>

U.S. Senate

<http://www.senate.gov>

U.S. Code

<http://uscode.house.gov>

BNA PRODUCTS

BNA publishes other information products for professionals in a variety of electronic formats, including the titles listed below.

Product Safety & Liability Reporter

<http://www.bna.com/products/corplaw/pslr.htm>

Toxics Law Reporter

<http://www.bna.com/products/lit/txlr.htm>

Class Action Litigation Report

<http://www.bna.com/products/lit/clas.htm>

Expert Evidence Report

<http://www.bna.com/products/lit/exer.htm>

United States Law Week

<http://www.bna.com/products/lit/uslw.htm>

ABA/BNA Lawyers' Manual on Professional Conduct

<http://www.bna.com/products/lit/mopc.htm>

BNA CONTACTS

Queries on editorial matters should be directed to Managing Editor; Product Safety & Liability Reporter; 1801 South Bell Street, Arlington, VA 22202; (703) 341-3901 (phone); (703) 341-1612 (fax); gweinstein@bna.com (e-mail).

BNA's World Wide Web Home Page

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Environment & Safety Division Homepage

<http://www.bna.com/prodhome/ens/index.html>

BNA Customer Relations, e-mail

customercare@bna.com

BNA PLUS, e-mail

BNAPLUS@bna.com

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