



Products Liability Perspectives



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Notes From the Editors

Change is in the air. From the changing seasons and temperatures to the changing of the President here in the States, change appears all around us. But here at *Products Liability Perspectives*, we've decided to bring you more of the same...that is, the same well-written, pertinent articles authored by our ALFA International colleagues, and the familiar "In the Trenches" notes highlighting significant legal accomplish-

ments by ALFA International firms. Indeed, there is no change in the fact that ALFA International attorneys continue to represent the best our profession has to offer.

Be sure to take this edition of *Perspectives* with you and read it while you're traveling to the Products Liability Seminar in Laguna Niguel (unless, of course, you're driving). We look forward to seeing you there!

-Steve Hamilton & Bryan Martin

The Writing is on the Wall: *The Sophisticated User Defense and the End of a Component Manufacturer's Duty to Warn*

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The California Supreme Court recently has adopted the Sophisticated User Defense in *Johnson v. American Standard, Inc.*, 43 Cal. 4th 56 ; 179 P.3d 905 (2008). This marks another jurisdiction to join the ranks of those who have placed

this seemingly common sense doctrine at the heart of any Products Liability defense. In *Johnson*, the court held that "[S]ophisticated users are charged with knowing the particular product's dangers [and] the failure to warn about those

dangers is not the legal cause of any harm that product may cause."

While there is no question that the duty to warn remains in general, the question for component parts manufacturers becomes: when, if ever, will a sale

not involve a sophisticated user? If the component part is either designed by a manufacturer or is pre-fabricated and selected by a manufacturer, in either case it is a fair assumption to believe that all who will use these products will possess "sophistication" regarding the "the particular product's dangers."

Is there an ability to disclaim liability by simply stating on a component part that a user should not incorporate this part into a product unless they understand the particular component product's dangers? Given the embrace of the sophisticated user defense in providing a shield to liability for component part manufacturers, it makes sense that in the context of component part manufacturing the duty warn is inapplicable.

The Courts that have evaluated and adopted the sophisticated user defense tend to speak of this defense in the context of the defendant as the manufacturer and the plaintiff as the end-user. However, this defense, in the component part manufacturer context, provides a much more powerful line of defense. For example, in *Childress v. Gresen Mfg. Co.*, 888 F.2d 45, 48 (6th Cir. 1989), the Sixth Circuit found, applying Michigan law, that a component parts manufacturer had no duty to warn either the manufacturer or an end user about the possible harms in the final product. This was found even though the defendant component part manufacturer had advanced knowledge of the end product's design. *Id.* at 48. This case involved a component manufacturer of a hydraulic valve used in a mechanical log splitter. The Court found that even though the valve manufacturer had advanced knowledge of the end product's design, they had no duty to warn. If there is no duty to warn in this situation, it is hard to imagine a situation where such a duty would ever arise.

In *Johnson v. American Standard, Inc.*, the California Supreme Court discussed and adopted the rationale which has been espoused by courts in Michigan, Nebraska, Texas and Kentucky. In the world of component part manufacturer defense, the *Johnson* case, in a watershed jurisdiction such as California, may have put another nail in the coffin of the duty to warn by a component part manufacturer.

A pending appeal in Washington State may serve as a cautionary tale for an alternative to the direction the *Johnson* court in California took. In *Simonetta v. Viad Corp.*, 137 Wh. App. 15; 151 P.3d 1019 (2007), Joseph Simonetta brought a product liability lawsuit against Viad Corp. Mr. Simonetta claimed to have been exposed to asbestos causing subsequent lung cancer. The exposure Mr. Simonetta claimed came from insulation manufactured by another corporation but which was necessarily used to encapsulate a Viad, Corp., evaporator installed aboard a Navy ship. *Id.* at 18-19.

The Washington Court of Appeals held Viad, Corp., as the manufacturer of the evaporator had a duty to warn Mr. Simonetta of the possible harm associated with exposure to asbestos. To follow this logic, Viad, Corp. had a duty to warn not only Mr. Simonetta, but presumably the United States Navy about the dangers of asbestos. Given the amount of litigation regarding the United States Navy and asbestos, it almost goes without saying that the Navy should be considered a sophisticated user.

Despite recognizing that the asbestos was applied after the evaporators were purchased, delivered and installed, the Washington Court of Appeals held that those who produce products that necessitate the use of asbestos, owe a duty to warn about the possible harms of asbestos exposure. *Id.* at 28-31.

In a twist of fate, the Washington Court of Appeals cited to California case law as a "strong counterargument" to Viad's claim that it was shielded from liability as a component part manufacturer. *Id.* at 28.

While asbestos cases in general occupy a unique place in the products liability world, the *Simonetta* case does send chills down the spine of any component part manufacturer who produces products which may be eventually combined with other dangerous items. The *Simonetta* decision and an accompanying case, *Braaten v. Saberhagen Holdings*, 137 Wh. App. 32; 151 P.3d 1010 (2007), are currently on appeal to the Washington Supreme Court.

The fact remains that the duty to warn in the component manufacturer context is still

a matter up for debate with differing opinions in the courts around the country. The *Johnson* decision represents a practical rule which allows a component part manufacturer to interact with sophisticated users free from worry about warnings to the ultimate end user. Component part manufacturers should be allowed to produce their products without having to warn about potentially unforeseen troubles downstream. The *Simonetta* case, on the other hand, does not allow this type of freedom. Rather, the rationale in *Simonetta* fails to distinguish properly between a component part manufacturer and a product manufacturer. It fails to distinguish between an ordinary user and sophisticated users. Ultimately, *Simonetta* fails to realize the practical realities to its wide sweeping rule.

The case law is at a pivotal moment regarding the sophisticated user defense. The *Johnson* decision seems to indicate that this defense is soon going to become the rule and not the exception.

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The Viability of the Critical Self-Analysis Privilege

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Spawned from an interest in protecting the confidentiality of physician peer review sessions in the early 1970's, the critical self-analysis privilege has become a difficult concept for courts to grasp as it continues to expand beyond its initial scope and into other areas of the law such as the products liability arena. Indeed, one would only need to perform a cursory review of published legal opinions on the subject to realize that courts across the nation have been hard pressed to establish a unified consensus on whether to even recognize it as a valid privilege, let alone how to apply it. Nevertheless, the critical self-analysis privilege has been applied in product liability cases with varying success. However, it could be on the verge of more widespread acceptance considering progress made in both the medical and environmental areas of the law.

I. WHAT EXACTLY IS THE CRITICAL SELF-ANALYSIS PRIVILEGE AND WHERE DID IT COME FROM?

The critical self-analysis privilege is recognized as a qualified privilege which protects from discovery certain critical self appraisals. See *Reichold Chemicals, Inc. v. Textron, Inc.*, 157 F.R.D. 522 (N.D. Fla. 1994). It allows individuals or businesses to candidly assess their compliance with regulatory and legal requirements without creating evidence that may be used against them by their opponents in future litigation. *Id.* The rationale for the doctrine is that such critical self-evaluation fosters the compelling public interest in observance of the law. *Id.*

The district court in *Bredice v. Doctors Hospital, Inc.*, 50 F.R.D. 249 (D.C. 1970) essentially set the template for the critical self analysis privilege when it protected hospital minutes taken during a confidential medical staff meeting concerning the treatment provided to the decedent. The minutes and reports of the boards or committees of the Hospital were records of medical

staff reviews by committees or doctors acting pursuant to the requirements of the Joint Commissions on Accreditation of Hospitals. *Bredice*, 50 F.R.D. at 250. The *Bredice* court determined that the hospital staff meetings were held to improve hospital and medical standards which were "essential to the continued improvement in the care and treatment of patients." *Id.* Recognizing the importance of maintaining the confidentiality of such discussions, the court explained that constructive professional criticism could not occur in "an atmosphere of apprehension that one doctor's suggestion will be used as a denunciation of a colleague's conduct in a malpractice suit." *Id.* Citing an overwhelming public interest in having medical staff meetings held on a confidential basis, the Court reasoned that the meetings were entitled to a "qualified privilege" so that the flow of ideas and advice among physicians could continue unimpeded. *Id.* at 251.

A year later, the Northern District of Georgia extended the critical self-analysis privilege to the employment discrimination field in *Banks v. Lockheed-Georgia Co.*, 53 F.R.D. 283 (N.D. Ga. 1971). In *Banks*, the defendant employer had appointed a special team of investigators to generate a report concerning the employer's problems in the area of equal employment opportunities. *Id.* at 284. In denying the plaintiff's motion to compel, the court determined that permitting access to the written opinions and conclusions of the members of the employer's research team would discourage companies from making investigations that were calculated to have a positive effect on equalizing employment opportunities. *Id.* at 285.

The *Bredice* and *Banks* decisions set off a wave of copycat assertions including in areas of antitrust, patent infringement, securities fraud, environmental litigation, civil rights, and products liability. Along the way, a four-step analysis was created in effort to establish some semblance of uniformity to the privilege. See *Note, The Privilege of*

Self-Critical Analysis, 96 Harv.L.Rev. 1083, 1086 (1983). First, the information must result from a critical self-analysis undertaken by the party seeking protection. *Id.* Second, the public must have a strong interest in preserving the free flow of the type of information sought. *Id.* Third, the information must be of the type whose flow would be curtailed if discovery were allowed. Finally, the information created must have been intended to be confidential. *Id.*

II. ASSERTING THE CRITICAL SELF-ANALYSIS PRIVILEGE IN PRODUCT LIABILITY MATTERS

The application of the critical self-analysis privilege in the context of product liability cases has been wildly inconsistent. *Roberts v. Carrier Corp.*, 107 F.R.D. 678 (N.D. Ind. 1985) was one of the first product liability cases to successfully assert the privilege. In *Roberts*, the plaintiff brought an action for damages arising out of a house fire allegedly caused by a Carrier-manufactured furnace. The plaintiff propounded a request for production seeking to discover information relating to the manufacture of the furnace and its component parts, along with information concerning complaints and performance problems involving a particular gas control valve. The defendant objected to the request for the control valve information on the grounds that it had an absolute privilege against such disclosure under the Consumer Product Safety Act for any information given to the Consumer Product Safety Commission, as well as a common law privilege against disclosure of critical self-analysis. Notably, the court rejected defendant's argument that it was entitled to assert an outright privilege under the Consumer Product Safety Act, but ultimately recognized a limited self-evaluative privilege. In so doing, the court carved out a modified four-part analysis. Specifically, the court applied the following standards:

1. To be privileged, the materials

must have been prepared for mandatory government reports;

2. Any privilege extends only to subjective, evaluative materials.

3. It does not extend to objective data in the same reports.

4. Discovery has been denied only where the policy favoring exclusion has clearly outweighed plaintiff's need.

Although the *Roberts* court recognized the "public policy behind the privilege to assure fairness to persons required by law to engage in self-evaluation," it significantly cut back the scope of the critical self analysis privilege in the products liability field by determining that it only applied to evaluations required by law. Therefore, an evaluation made voluntarily would not be subject to the critical self-analysis privilege. Moreover, the court also limited the privilege to only the subjective findings and still required the defendant to turn over its objective data.

While *Roberts* clearly sets forth the requirement that only mandatory government reports are protected, other courts have recognized the critical self-analysis privilege in response to requests for voluntary internal investigative reports. For example, in *Granger v. Nat'l Railroad Passenger Corp.*, 116 F.R.D. 507 (E.D. Pa. 1987) the plaintiff sought internal investigative committee reports that had been generated by the defendant Amtrak following a work related injury. Amtrak's policy was to conduct an internal investigation each time an injury occurred at the workplace. Amtrak agreed to provide a copy of the report concerning plaintiff's accident, but filed a motion for protective order pertaining to the "Accident Analysis", "Cause", "Contributing Factors", and "Committee Recommendations" aspects of the report. Amtrak conceded that the report was not subject to attorney-client privilege or prepared in anticipation of litigation and instead argued that the foregoing portions of the report contained the mental impressions, opinions and recommendations of its employees and should therefore be protected solely on the basis of the critical self-analysis doctrine. However, unlike the defendant in *Roberts*, the report was prepared by Amtrak voluntarily for the purpose of improving the safety of the railroad and not in response to a law or governmental request.

Nevertheless, the court in *Granger* ultimately determined that the critical self-analysis doctrine was applicable to the "Accident Analysis" and "Committee Recommendations" portions of the report. In sup-

port, the court noted the strong public policy ideology behind the privilege stating:

"There is no question that the public has an interest in the institution of practices assuring safer operations of railroads. The production of these portions of the report would tend to hamper honest, candid self-evaluation geared toward the prevention of future accidents." *Id.* at 510.

Likewise in *Bradley v. Melroe Co.*, 141 F.R.D. 1 (D.C.C. 1992), the plaintiff learned of seven other accidents resulting in personal injuries which involved the use of a ski loader manufactured by the defendant and sought to obtain the in-house investigative files that had been prepared for each of the seven accidents. In support of his motion to compel, the plaintiff argued that the files were prepared in the normal course of defendant's business. Defendant argued in response that the reports were not conducted by or at the direction of an attorney in anticipation of litigation, but rather "to uncover facts while still available before they may be lost." With both the attorney-client and work product doctrine unavailable, the court looked to the critical self-analysis privilege as a barrier to production, stating that "manufacturers study reports of accidents involving their products for the purpose of ascertaining if preventative measures can be taken to avoid future accidents." As such, the court determined that the "benefit to others from this critical analysis of the product or event far outweighs any benefits from disclosure" and ultimately held that the defendant was to produce only the factual data in the investigative files and could redact all mental impressions, opinions, evaluations, recommendations and theories contained therein.

III. PROBLEMS WITH THE PRIVILEGE

Perhaps the greatest deterrent to asserting the critical self-analysis privilege with any sort of confidence is simply the lack of consistency from the courts in trying to apply it. In fact, the difference in opinion concerning whether to apply it to governmental versus voluntary reports is just one example. The bigger problem involves the differing viewpoints from state to state. So far, legislators have been slow to expand the scope of the critical self-analysis privilege beyond the medical peer review arena. While Rule 501 of the Federal Rules of Evidence enables federal courts to apply privileges on a case by case basis, in diversity cases the state law of privilege applies when state law furnishes the rule of deci-

sion. See *Myers v. Uniroyal Chemical Co., Inc.*, 1992 U.S. Dist. LEXIS 6472 (E.D. Pa. 1992). This has created some uneasiness in applying the privilege absent a specific state court ruling to the effect. See e.g. *Winstanley v. Royal Consumer Information Products, Inc.*, 2006 U.S. Dist. LEXIS 44702 (Dist. Ariz. 2006) ("this Court will not recognize an Arizona common law privilege without some indication that Arizona courts would adopt the privilege"); *Lawson v. Fisher-Price, Inc.*, 1999 U.S. Dist. LEXIS 21262 (D. Vt. 1999) ("In Vermont, the self-critical analysis privilege has not been successfully invoked outside the medical arena"). Other courts have flat out rejected the critical self analysis privilege due to it not being specifically codified by state statute. See e.g. *Wells Dairy, Inc. v. Am. Industries Refrigeration, Inc.*, 690 N.W. 3d 38 (Iowa 2004); *Scroggins v. Uniden Corp.*, 506 N.E. 2d 83 (Ind. Ct. App. 1989); *Lamite v. Emerson Electric Co.*, 142 A.D.2d 293 (1988).

Nevertheless, even if the privilege is found to apply in the forum, the party seeking protection under the privilege is not quite out of the woods just yet. For example, courts have universally determined that the factual portions of the self-analysis fall outside the scope of the privilege. However, distinguishing facts from evaluations is not as clear cut as it sounds. See e.g. *Wood v. Breier*, 54 F.R.D. 7 (E.D. Wis. 1972). Often times a document will contain both objective and subjective material, requiring an in camera inspection to sort through the material. See e.g. *O'Connor v. Chrysler Corp.*, 86 F.R.D. 211 (D. Mass. 1980). The privilege can also be waived under certain circumstances. See *Volpe v. U.S. Airways, Inc.*, 184 F.R.D. 672 (M.D. Fla. 1998) (privilege waived because defendant raised its investigation and actions subsequent to the plaintiff's claim as an affirmative defense); *Moloney v. United States*, 204 F.R.D. 16 (D. Mass. 2001) (failure of counsel to assert privilege at deposition resulted in waiver). Moreover, the plaintiff still has an opportunity to overcome the privilege by making a showing of "extraordinary circumstances or special need." *Mao-Shiung v. Bodner*, 127 F.R.D. 91 (D. N.J. 1989); *Reichold Chemicals, Inc. v. Textron, Inc.*, 157 F.R.D. 522 (N.D. Fla. 1994).

Finally, the 9th Circuit has distinguished between pre-accident safety review reports and post-accident safety review reports finding that the critical self-analysis privilege does not apply to investigations taken prior to the subject event. See *Dowling v. American Hawaii Cruises*, 971 F.2d 423 (9th Cir. 1992) ("the candid analysis of the causes of accidents is more likely to be stifled by a

disclosure requirement than would the routine review of safety concerns. This is because pre-accident safety reviews are designed to preempt litigation.”).

IV. THE FUTURE OF THE CRITICAL SELF-ANALYSIS PRIVILEGE

The critical self-analysis privilege serves the public interest in allowing individuals and corporations to candidly assess their products without fear of creating potentially devastating evidence in subsequent litigation. Recognizing the strong public policy behind encouraging proactive self-evaluations, the privilege has been extended to numerous areas besides medical care. See *Reichold*, 157 F.R.D. at 525 (environmental law); see also *Banks v. Lockheed-Georgia Co.*, 53 F.R.D. 283 (N.D. Ga. 1971)(applying privilege to a defense contractor's confidential assessment of its equal employment opportunity practices); *In re Crazy Eddie Securities Litigation*, 792 F.

Supp. 197 (E.D. N.Y. 1992)(securities law); *Keyes v. Lenoir Rhyme College*, 552 F.2d 579 (4th Cir. 1992)(academic peer reviews). While the expansion of the critical self-analysis has been slow to gain widespread acceptance in the products liability arena, there are signs of progress. For example, Georgia has specifically endorsed the critical self-analysis privilege in the context of product liability matters and, similarly to the court in *Granger*, has applied it directly to confidential self-evaluation documents created by a manufacturer for submission to the Consumer Product Safety Commission. *Shipes v. BIC Corp.*, 154 F.R.D. 301 (M.D. Ga. 1994). Likewise, Arizona enacted a codified version of the common law critical self-analysis privilege to specifically address product safety analysis. A.R.S. § 12-687; see also *Hannah v. General Motors Corp.*, 1996 U.S. Dist. LEXIS 21531 (Dist. Ariz. 1996). Ultimately, the long term survival of the privilege will likely require either further legislative action, or a review by the United States Supreme Court.

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The Consumer Product Safety Improvement Act of 2008 Sets New Safety Standards for Children's Products

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On August 14, 2008, President Bush signed into law the Consumer Product Safety Improvement Act of 2008 ("CPSIA"). In addition to reforming and modernizing the Consumer Product Safety Commission, the Act establishes new consumer product safety standards and other safety requirements for children's products. This legislation was introduced in 2007 in the wake of increasing numbers of unsafe products being imported into the U.S., and the inability of consumers to anticipate risks associated with these products and to safeguard themselves adequately.

In 2007, excessive levels of lead paint were found in children's toys imported from China. A class action lawsuit filed on behalf of owners of "Thomas the Tank Engine" toy sets settled for \$30 million. Mattel Inc. recalled over nine million toys because they were found to contain excessive levels of

lead paint or presented a choking hazard.

The Consumer Product Safety Commission was created in 1972 to protect Americans from unreasonable risks associated with consumer products. However, almost since its inception, the agency has struggled - lacking the budget, statutory authority and personnel to ensure the safety of products entering the homes of consumers. While lead has been banned in consumer products for decades, the overwhelming number of recalls in children's toys last summer caused the legislature to take notice of an agency in need of an overhaul and additional funding. What resulted is the CPSIA.

NEW STANDARDS FOR CHILDREN'S PRODUCTS

The Act sets new limits on total lead that may be contained in all "children's products" (defined as a consumer product de-

signed or intended primarily for children 12 years of age or younger), and not just surface lead. Within six months of the enactment of the Act, or by February 10, 2009, the total lead content by weight for any part of a product may not exceed 600 parts per million (ppm). By next August, total lead may not exceed 300 ppm and if feasible, 100 ppm in three years. The CPSIA classifies any product that contains more lead than these limits as a banned "hazardous substance" under the Federal Hazardous Substances Act (15 U.S.C. 1261 et seq.). Under the Federal Hazardous Substances Act, a hazardous substance must be labeled as toxic. If a label will not adequately protect consumers from the hazard, the product can be banned.

The Commission must also adopt a rule within one year to apply to inaccessible component parts, such as batteries, if it is

not feasible for those parts to comply with the standards. Additionally, the Act sets more stringent regulations on the lead paint ban. The Commission must review the regulations on lead at least every 5 years and revise downward the limit as is technologically feasible.

The Act also addresses phthalates in toys and “child care articles” (defined as products for children 3 and under to help facilitate sleep, feeding or help with sucking/teething). Phthalates (pronounced THAL-ates) are most commonly used to make vinyl soft and flexible. Over the past 50 years phthalates have been used in products such as PVC, garden hoses, fragrances and nail polish. However, various kinds and forms are in use today and opinions vary on whether phthalates present any health hazards.

Some experts claim that phthalates have been shown to cause reproductive and neurological damage. Eating, breathing and skin contact are all ways in which phthalates may enter our bodies. Children may take in higher than average amounts because many chew toys are made of highly phthalate-softened vinyl (i.e., teething). Phthalates are also found in baby lotions, powders and shampoos. The Act mandates the appointment of a Chronic Hazard Advisory Panel which must, within 18 months after its appointment, complete an examination of the health effects of the full range of phthalates that are in children’s products.

Bisphenol A or BPA is another chemical found in plastics and which can behave similar to estrogen and other hormones in our bodies. Unlike phthalates, which are found in soft plastic products, BPA is found in hard plastics, like baby bottles and other plastic containers. Intense debate over BPA’s toxicity has caused consumers to be wary of using plastic food containers, baby bottles, water bottles, returnable containers for juice, milk and water and microwave overware. Numerous companies have reacted to the public’s concerns by tagging their products “BPA-Free” or “Phthalate-Free”. Recycling codes 3 and 7, found on the bottom of many plastic products, are more likely to contain BPA or phthalates.

The Act places restrictions on certain phthalates and allocates funding to the Commission to study the safety of other chemicals found in consumer products.¹ Under the Act, Di (2-ethylhexyl) phthalate (DEHP), dibutyl phthalate (DBP) and benzyl butyl phthalate (BBP), may not be present in excess of 0.1% within six months. Limits on diisononyl phthalate (DINP), diisodecyl phthalate (DIDP) and din-octyl phthalate

(DnOP) are identical, but are interim limits pending review by the Chronic Hazard Advisory Panel. The Act reserves the states’ ability to regulate phthalate alternatives not covered by the statute.

Phthalates may be identified in some products by their chemical names, or abbreviations. DBP is often found in personal care products, including nail polishes, deodorants, perfumes, aftershave lotions, shampoos and hand lotions. DEHP, DINP, DIDP and BBP are used in PVC plastics, including some medical devices.

The Commission has relied heavily on manufacturers to test their own products and obey the law that requires companies to self-report products hazards and deficiencies. Because companies have been lax in doing so, the Act imposes many new requirements on manufacturers or importers of children’s products. For one, before importing, warehousing or distributing certain children’s products, manufacturers must provide samples of those products to an accredited third party for testing to ensure the product complies with all rules, bans, standards or regulations under the Act. Some of the products affected include cribs, pacifiers, toys or products with small parts, children’s metal jewelry, baby bouncers, walkers and jumpers.

Within one year, manufacturers will be required to place permanent tracking labels on products that enable the manufacturer to ascertain the location and date of production and cohort information (batch, run number or other identifying characteristic). These labels will assist in tracking products in the event of a recall. The Act also forces manufacturers, importers, distributors and private labelers (including Internet advertising) to include mandatory warning information (e.g., choking hazard) in any advertising that provides a direct means of sale. A retailer is required to request and display this information as well, if applicable.

Manufacturers of durable infant and toddler products, including cribs, high chairs, strollers, infant carriers, bath seats, gates and swings, will also be required to provide postage-paid registration forms to notify consumers of recalls and deliver safety notices to consumers.

Under the Act, ASTM F963-07, the Standard Consumer Safety Specification for Toy Safety, becomes mandatory (was voluntary).

A REFORMED COMMISSION

The Act increases funding and authority to the Commission. Its budget is scheduled

to double for 2014 to \$136 million. For one year, two Commissioners from different political parties will constitute a quorum for the transaction of business. Full-time personnel employed by the Commission shall increase from about 400 to at least 500 by October 2013.

The Commission shall develop a plan for cooperation with U.S. Customs and Border Protection and develop a comprehensive risk assessment methodology for screening noncompliant imported consumer products to establish a substantial product hazard list and require destruction of noncompliant imports. The Act bans the export of recalled or nonconforming products unless the destination country accepts the product or the product was made for export in accordance with any applicable law.

The Commission must develop a new public database accessible through their Internet website for product safety information, including reports of harm. Any reports received from consumers, other federal agencies, health care professionals or other third parties must be transmitted to manufacturers and private labelers within five (5) days. The manufacturer or private labeler then has an opportunity to respond, including a request that portions of the report be designated confidential and/or redacted. If the request is refused, the information will be included in the database. A manufacturer or private labeler may then bring a cause of action for removal of the information from the Commission’s database.

ENFORCEMENT AND PENALTIES

The Act demands a joint enforcement regime with states and permits state Attorney Generals (AGs) to seek injunctive relief in federal court on behalf of their residents, and enforce specific provisions of the CPSIA. AGs must provide written notice to the Commission and wait thirty (30) days to file suit unless the CPSC consents to an earlier action or AGs can demonstrate a “substantial product hazard.” Then, a state can act immediately.

The Act also provides a “whistleblower” provision for non-governmental employees, allowing them to file suit for compensatory, consequential and punitive damages if discharged for reporting a product safety violation. The whistleblower protections went into effect the day the Act was signed into law.

Higher criminal and civil penalties are imposed for failing to report and distributing products in violation of the Act. For example, civil penalties are \$100,000 per violation

(up from \$5,000) and the cap on civil penalties is now \$15 million (up from \$1,825,000). The Act authorizes asset forfeiture and five years imprisonment as penalties in criminal cases and eliminates the requirement that officers and directors be notified of a violation before being subject to potential criminal liability. Officers and directors may be held liable for individual criminal responsibility even in the absence of actual knowledge of a violation, although criminal action must be based on knowing and willful conduct.

While many states, unwilling to wait for Congress to act, implemented their own product safety laws, the Act should provide the much sought-after uniform national standards. However, the Act will not preempt any warning requirements relating to consumer products established pursuant to state law that were in effect on August 31, 2003.

EFFECTS OF THE CPSIA

Manufacturers, distributors, importers and retailers need to be aware of the new provisions and requirements of this law. The increased availability of product safety information and product tracking should make it easier on consumers to pursue product liability actions against noncompli-

ant companies. The authority given to AGs is also likely to increase potential litigation exposure for manufacturers.

Whether products already in existence are affected by the law is not clear. A public meeting presentation by the Commission indicates that the third party testing requirements only apply to products manufactured 90 days after the Commission has established and published notice of the requirements of accreditation of third party conformity bodies (See <http://www.cpsc.gov/about/cpsia/orttable.pdf>). Further, consumer product safety standards (ASTM 963) are only applicable to consumer products manufactured after the effective date of the standard.

Finally, while the law prohibits any person from manufacturing for sale, importing or distributing in commerce any children's toy that contains the prohibited phthalates, the law only applies to those products manufactured 180 days after enactment of the law. Thus, it would seem that noncompliant products manufactured before February 10, 2009 are not covered by the law and will not require destruction.

The Act grants to the Commission the power to issue regulations, as necessary, to implement the Act and sets various deadlines for plans and rules they are to submit.

Thus, it will be necessary and important for manufacturers, distributors, importers and retailers, as well as consumers to continue to follow this law and the Commission's progress.

¹ See also "The Consumer Product Safety Commission and Nanotechnology" report by E. Marla Felcher for a complete analysis of the Commission's ability to deal with the use of nanotechnology in consumer goods and the potential health dangers associated with nanoproducts (PEN 14, August 2008).

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Case and Statute Analysis

WASHINGTON

WASHINGTON STATE COURT RULES SHIPS BEING BUILT OR UNDER REPAIR ARE CONSIDERED FEDERAL ENCLAVES

There are several shipyard asbestos exposure cases pending in Washington state court. The plaintiffs in these cases disclaimed all causes of action arising from asbestos exposure that occurred in the dockyards or "federal enclaves" to avoid removal of the action to federal court. Instead, the plaintiffs attempt to preserve in state court, all actions arising from asbestos exposure that occurred on the vessels themselves. The plaintiffs' position has been that a naval vessel being constructed or under repair within the shipyard confines is not a federal enclave.

In one of these cases, the defendants moved for summary judgment dismissal of all claims based on asbestos exposure, arguing the plaintiff had disclaimed such claims in his Complaint. The plaintiff responded that exposure in the shops at the shipyard were disclaimed, but not the work that occurred on the vessels themselves (where most of the work and asbestos exposure for these men typically occurs). The defendants undertook to establish that the shipyard boundaries extended beyond the drydocks and

piers on which the vessels were constructed or repaired. Although the plaintiffs attempted to argue that a Navy vessel, including one that is in the shipyard being built or repaired, is not a federal enclave or part of the federal enclave (there is case law that recognizes a ship on the open seas is not an enclave), the Court decided that not only is a shipyard a federal enclave but also the drydocks and piers and also the vessels under construction or repair in those drydocks and tied to those piers. After determining the extent of the enclave, the Court then concluded all of the plaintiff's exposure during the time he was a shipyard worker occurred within a federal enclave. Because Plaintiffs disclaimed those claims, summary judgment was appropriate for all defendants against which the action was based on shipyard work. *Abbey v. Cla-Vál Co.*, Washington Superior Court, King County, No. 07-2-36540-1 SEA and No. 07-2-36537-1 SEA (July 17, 2008).

After the Court's ruling, the plaintiff moved to reconsider. The Court denied this motion. The plaintiff then appealed and that appeal is pending.

“In the Trenches” Notable Accomplishments of ALFA Attorneys

GEORGIA

KEENE WINS SUMMARY JUDGMENT ON DESIGN AND MANUFACTURING DEFECT AND BREACH OF WARRANTY CLAIMS

Dennis Keene of Hunter Maclean in Savannah, Georgia successfully moved for summary judgment on behalf of clients Caterpillar and Caterpillar Financial Services in a product liability/ breach of warranty action involving state-of-the-art logging equipment. The computerized logging equipment, known as a harvester and forwarder, is used in cut-to-length timber operations. The harvester measures the diameter of the tree before it is cut down, and saws the tree into predesignated lengths based on information entered into the on-board computer. The environmentally-friendly forwarder follows the harvester and picks up the cut logs and routes them to log trucks waiting on nearby roads. The Plaintiff was the first timber company in Georgia to attempt a cut-to-length logging operation. The Plaintiff purchased this logging equipment for approximately \$1,000,000 and used it for eight months before

turning it over to Caterpillar and refusing to make additional payments on it. Plaintiff filed suit alleging that the equipment was defectively designed and manufactured, and that Caterpillar breached its warranties due to an alleged excessive amount of repairs needed to be performed on the equipment. After extensive discovery, Caterpillar and Caterpillar Financial moved the Court for summary judgment on all claims. The court held that there was no genuine issue of material fact as to the existence of a defect, and that Caterpillar made all necessary required repairs under the warranty. The critical issues were the Plaintiffs' pre-purchase knowledge of the potential downtime of the equipment, and the results of a financial audit performed on Plaintiff's accounting records that showed the overall profitability of the equipment for this Plaintiff. Due to lean times in the timber industry, Plaintiff merely had diverted the profits from the cut-to-length operation to its conventional logging operation, which had been operating in the red.

In a related case, Dennis Keene filed suit in federal court on behalf of Caterpillar Financial Services against the same plaintiff to recover the balance owed on the cut-to-length logging equipment. A judgment in favor of Caterpillar Financial was entered in the amount of \$508,000

MISSOURI

ST. LOUIS' BROWN & JAMES OBTAINS SUMMARY JUDGMENT FOR PRODUCT LIABILITY DEFENDANT CLIENT

Joseph R. Swift and Joshua B. Stegeman of Brown & James in St. Louis obtained a summary judgment for their client, FlexSol, in a third-party products liability suit against the manufacturer of bags designed for covering cotton after the ginning process. Six other

third-party defendants settled out of the case. Nearly 50,000 bales of cotton were damaged by excessive moisture added at the gin for total damages in excess of \$6 million. FlexSol was the only party awarded summary judgment on all six counts. The appellate case is currently pending in the 8th Circuit Court of Appeals.

Staple Cotton v. D.G. & G. v. FlexSol Packaging, Cape Girardeau, Missouri, United States District Court, Eastern District of Missouri.

PENNSYLVANIA

MURTAGH AND STUBITS OBTAIN DEFENSE VERDICT IN DESIGN DEFECT CASE

Dean Murtagh and William Stubits of German, Gallagher and Murtagh in Philadelphia recently obtained a defense verdict on

behalf of Black & Decker in a products liability case in the District Court Eastern District of Pennsylvania. Plaintiffs alleged defects in the design of the activation switch of an industrial hand held grinder, resulting in severe lacerations to plaintiff's forearm, permanent nerve destruction, and loss of use of the arm. Plaintiffs made a final demand of \$850,000, but the jury returned a verdict in Black & Decker's favor.

SOUTH CAROLINA

HIGHFIELD OBTAINS SUMMARY JUDGMENT ON TENANT'S INVASION OF PRIVACY CLAIM AGAINST LANDLORD

Duke R. Highfield of Young Clement Rivers obtained summary judgment on behalf of a landlord in a privacy invasion suit brought by a tenant. In the action, the Plaintiff sought to recover damages for injuries purportedly sustained as a result of Defendant's installation of audiovisual surveillance equipment outside the leasing office of the apartment complex in which Plaintiff resided and which Defendant operated. The Plaintiff claimed that the Defendant failed to post adequate notice of the surveillance equipment's installation, and that the Defendant's allegedly covert installation of this equipment-and covert use thereof-constituted a breach of her

lease agreement, an invasion of her privacy, and a violation of 18 U.S.C. § 2511 et. seq. (the Federal Wiretapping Statute). The Defendant acknowledged installing the equipment in response to concerns about criminal activity in the complex, but contended that proper notice of the surveillance was provided to the residents in the form of signage and written notices provided to the residents. In an order rendered on September 17th, 2008, the Court granted Defendant summary judgment on Plaintiff's breach of contract and invasion of privacy causes of action, as well as on certain aspects of Plaintiff's Federal Wiretapping Statute cause of action, including a ruling that damages were not appropriate.

The favorable ruling recently was featured in South Carolina Lawyers' Weekly (www.sclawyersweekly.com).

SOUTH CAROLINA

YOUNG CLEMENT RIVERS WINS DEFENSE VERDICT IN TWO DAY TRIAL

Ben Traywick of Young Clement Rivers, recently won a defense verdict following the two day trial of a motor vehicle accident case.

The defense successfully raised two key points: first, that the Defendant's colliding into the Plaintiff was excused by the affirmative defense of unavoidable accident; second, that the Plaintiffs' \$20,000 in medical specials were not supported by the evidence. While the jury's deliberations, and the basis of its decision, were private, the key evidence appeared to be photographs of the Plaintiff's vehicle, which revealed damage so minimal as to be wholly disproportionate to the claimed injury.

TENNESSEE

LEITNER AND KELLEY OBTAIN DEFENSE VERDICT FOR ALFA INTERNATIONAL CLIENT, NORDYNE INC., IN PRODUCTS LIABILITY CASE

On October 1, 2008, Paul Leitner and Amanda Kelley of Leitner, Williams, Dooley and Napolitan, PLLC obtained a jury verdict in a products liability action for Nordyne, Inc. At issue was a Heating, Ventilating and Air Conditioning (HVAC) unit manufactured by Nordyne. The suit was filed for \$350,000 in the United States District Court for the Eastern District of Tennessee at Chattanooga.

The HVAC unit was installed in a new house, which eventually was devastated by soot. The Plaintiffs also had many items of personal property destroyed. At trial, the defense successfully argued that the HVAC unit did not burn any petroleum product or fossil fuel. Soot by definition is a product of incomplete combustion of a petroleum product.

The Plaintiffs, after moving in their new house, installed an unvented fireplace which burns natural gas. These unvented fireplaces emit carbon monoxide and soot, especially if they are not properly adjusted. The Plaintiffs also burned candles which are capable of making soot. The defense contended that the soot came from the unvented fireplace and/or the candles, and the jury agreed, after hearing the experts presented by the defense.

Upcoming ALFA International Events

November 12-14, 2008

Product Liability Practice Group Seminar
The Ritz-Carlton Laguna Niguel
Dana Point, California

Contact Info

Chair: Charles A. (Chuck) Stewart III
Bradley Arant Rose & White LLP, Montgomery, Alabama
(334) 956-7700, cstewart@bradleyarant.com
ALFA Contact: Katie Garcia

November 12-13, 2008

International Law Practice Group Seminar
Mumbai, India

Contact Info

Chair: Rajarshi Chakrabarti
Co-Chair: Harvey Cohen
Co-Chair: Ignacio Lopez-Balcells
ALFA Contact: Joely Nicholson

March 5-8, 2009

2009 ALFA International - International Client Seminar
Westin Kierland Resort & Spa
Scottsdale, Arizona

Contact Info

Chair: Ronald G. Polly, Jr.
Hawkins & Parnell, LLP, Atlanta, Georgia
(404) 614-7400, rpolly@hplegal.com
Vice Chair: Michael J. Murphy
Carter, Conboy, Case, Blackmore, Maloney & Laird,
Albany, New York

(518) 465-3484, mmurphy@carterconboy.com
ALFA Contact: Joely Nicholson

May 6-8, 2009

Transportation Practice Group Seminar
Hotel del Coronado
Coronado (San Diego), California

Contact Info

Chair: Paul T. Yarbrough
Butt Thornton & Baehr PC, Albuquerque, New Mexico
(505) 884-0777, ptyarbrough@btblaw.com
Vice Chair: Danny M. Needham
Mullin Hoard & Brown, LLP, Amarillo, Texas
(806) 372-5050, dmneedham@mhba.com
ALFA Contact: Katie Garcia

June 17-19, 2009

Insurance Law Roundtable
New York Marriott Downtown - New York, New York

Contact Info

Chair: Kevin O'Brien
Hall & Evans, L.L.C., Denver, Colorado
(303) 628-3300, obrienk@hallevans.com
Vice Chair: Jill F. Endicott
Woodward, Hobson & Fulton, L.L.P. Louisville, Kentucky
(502) 581-8000, jendicott@whf-law.com
Property & Casualty Program Chair: Stephen Carter

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