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Notes From the Editors

Welcome to 2012! In celebration of the New Year we are publishing a special edition of our Products Liability Perspectives Newsletter. It is time to put the challenges of 2011 behind us and look to the promise of a growing economy and improved business environment. To ring in the New Year, we asked our members to submit articles on topics they have been tackling in recent months. In response, we received features providing guidance for precluding evidence of product recalls in medical device litigation, tips for safeguarding against pre-suit spoliation issues and confronting claims of intentional v. negligent spoliation, and developments in the area of fraudulent joinder and personal jurisdiction under the stream of commerce theory. Also included is an update on the government's increased enforcement of the Foreign Corrupt Practices Act (FCPA) and an outline of internal controls for maintaining corporate compliance with the FCPA. With more and more manufacturers doing business with companies located in areas having a reputation for being "hot spots" for bribes or corruption (China, India, Brazil, Nigeria, and Russia to name a few), compliance with the FCPA becomes essential to avoid the stiff penalties -- both criminal and civil -- that the government has been seeking for violations of it. Is it on your watch list for 2012?

While it is impossible to foretell what new changes in the product liability landscape will occur or what kind of road blocks manufacturers may face in the New Year, the members of ALFA's Product Liability Practice Group strive to stay ahead of the curve to keep you informed of new developments so you can be proactive, not reactive. Let us know the product issues that present the most challenge to your business or practice so we can address them over the course of 2012. Our nationwide network of product liability attorneys can solve the most difficult challenges, so we invite you to contact the editors with topics you would like to see covered or questions you want answered. As always, we also are happy to publish your product articles you wish to share with your manufacturing colleagues and counsel. Here's to a successful and prosperous New Year!

*Colleen Murnane, Stan Shuler &
Jackson Ables*

Preventing Admission of Product Recall Evidence Against Your Medical Device Client

By Marisa A. Trasatti, Esq. and Lydia S. Hu, Esq.

I. Introduction

Toyota, Peanut Butter, Vioxx--you can probably guess what this car manufacturer, food, and pharmaceutical have in common – each has been the subject of a full scale product recall. In 2010, Toyota made headline news with its recall of several million vehicles due to faulty accelerators. Just a year earlier, peanut butter was in the hot seat when the Food and Drug Administration (“FDA”) recalled thousands of peanut butter products due to salmonella concerns. Several years prior, in 2004, Vioxx was pulled from the shelves when the miracle arthritis drug was linked to elevated risks for heart attack and stroke.

Product recalls often affect the goods we rely upon in our daily lives; from our methods of transportation, to the foods we consume, and even the medications prescribed to relieve common aches and pains. For that reason, media channels and internet buzz tout the product recalls as the latest headline news story, leaving almost no member of the general public unaware. While the “real-time” broadcast of recent product recalls serves a purpose, i.e., warning consumers of product hazards, an unintended consequence is that it also taints jury pools.

Impanelling a jury that has been tainted by media and internet coverage complicates trial strategy. For example, medical device recalls are typically addressed to physicians, and the general public remains somewhat reliant on those learned intermediaries to convey any necessary warnings, etc. This does not mean that medical device recalls are not finding their way to the headlines and indeed, since at least 2007, there has been an uptick in the frequency at which such recalls are occurring. By

way of illustration, in 2006, the FDA recalled eighteen (18) medical devices. *See 2006 Medical Device Recalls*, U.S. Department of Health and Human Services, <http://www.fda.gov/MedicalDevices/Safety/RecallsCorrectionsRemovals/ListofRecalls/ucm217449.htm> (last visited July 22, 2011). In 2007, the FDA recalled twenty-four (24) medical devices. *See 2007 Medical Device Recalls*, U.S. Department of Health and Human Services, <http://www.fda.gov/MedicalDevices/Safety/RecallsCorrectionsRemovals/ListofRecalls/ucm217447.htm> (last visited July 22, 2011). In 2008, the FDA recalled eighteen (18) medical devices. *See 2008 Medical Device Recalls*, U.S. Department of Health and Human Services, <http://www.fda.gov/MedicalDevices/Safety/RecallsCorrectionsRemovals/ListofRecalls/ucm217446.htm> (last visited July 22, 2011). In 2009, the FDA recalled thirty-one (31) medical devices. *See 2009 Medical Device Recalls*, U.S. Department of Health and Human Services, <http://www.fda.gov/MedicalDevices/Safety/RecallsCorrectionsRemovals/ListofRecalls/ucm217445.htm> (last visited July 22, 2011). Finally, in 2010, the FDA recalled fifty-five (55) medical devices. *See 2010 Medical Device Recalls*, U.S. Department of Health and Human Services, <http://www.fda.gov/MedicalDevices/Safety/RecallsCorrectionsRemovals/ListofRecalls/ucm238423.htm> (last visited July 22, 2011).

This sets the stage for an uphill battle in preventing admission of this evidence at trial, for crafting limiting instructions when representing medical device clients, and for preventing mistrials associated with 20th century jurors who are savvier than the passive jurors of yesteryears. (In recent years, a new term has entered the legal lexi-

con: The "Google mistrial" was coined to describe the mistrials declared because of jurors' use of the Internet to conduct research about the case whether that be product related, recall-related, etc. For example, in a 2009 Federal drug trial in Florida, nine of the twelve jurors admitted to researching the case on the Internet. See Deirdra Funcheon, *Jurors and Prosecutors Sink a Federal Case Against Internet Pharmacies*, Broward Palm Beach New Times (Apr. 23, 2009), <http://www.browardpalmbeach.com/04-23/news/jurors-and-prosecutors-sink-a-federal-case-against-internet-pharmacies/2/>). This article addresses arguments litigators can make to prevent the jury from being further tainted by recall evidence. A seasoned litigator will presume that the jury has likely experienced or heard about a product recall in general, and is likely prejudiced. A shrewd plaintiffs' lawyer will use this juror suspicion tactically to curry sympathy for his or her "every man" client. Trial counsel has to understand how to adapt their approaches in light of juror sophistication, expectations, and perceptions, especially in product liability cases. This article aims to demystify the handling of recall evidence in product liability cases, explain the pitfalls of common objections to excluding the evidence, and map Plaintiff's typical strategy for gaining admission of the harmful evidence.



II. Objections

A. *The Recall Evidence Is Inadmissible Hearsay.*

The hearsay objection can be successfully implemented to exclude evidence of a recall against a product distributor, as opposed to a manufacturer. Distributor defendants should argue that the recall letters are out-of-court, written statements by the product manufacturers, and are thus, inadmissible hearsay. See *Higgins v. Gen. Motors Corp.*, 465 S.W.2d 898 (Ark. 1971) (holding that a recall letter issued by the manufacturer was inadmissible

against the product dealer, but admissible as against the manufacturer).

When the recall letter issued by the manufacturer is introduced by plaintiffs against a manufacturer defendant, however, several exceptions may thwart the application of the hearsay rule. First, the recall notices issued by your manufacturer client is a statement by a party-opponent. See Fed. R. Evid. 801(d)(2); *Higgins*, 465 S.W.2d 898. Second, Plaintiff may argue, under Federal Rule of Evidence 804(b)(3), that the recall letters are "statements against interest" and an admission by the manufacturer that the product was defective. See Fed. R. Evid. 803(8) ("The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: . . . (3) *Statement against interest.* A statement which is at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused, is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."). Under this rule, the unavailability of your designee to testify is irrelevant. See *Herndon v. Seven Bar Flying Serv., Inc.*, 716 F.2d 1322 (10th Cir. 1983); see also *Farner v. Paccar, Inc.*, 562 F.2d 518 (8th Cir. 1977); *Rozzler v. Ford Motor Co.*, 573 F.2d 1332 (5th Cir. 1978); *Millette v. Radosta*, 404 N.E.2d 823 (Ill. App. Ct. 1980). Third, opposing counsel may argue that records relating to the recall fall under the business records exception, provided by Rule 803(8), allowing the court to admit evidence of the product recall. See Fed. R. Evid. 803(8) ("Records, reports, statements, or data compilations, in any form, of public offices, agencies, setting forth (A) the activities of

the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters observed there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.”). *See generally In re Multi-Piece Rims Prods. Liab. Litig.*, 545 F. Supp. 149 (W.D. Mo. 1982) (admitting a letter written by an employee based on product testing and suggesting that the manufacturer issue a product recall, pursuant to Federal Rule of Evidence 803(8), because the letter constituted factual findings resulting from an investigation pursuant to authority granted by law).

Aside from the various exceptions to the hearsay rule, plaintiffs’ attorneys may also argue that an *involuntary* product recall, one conducted pursuant to statute or regulatory mandate, is not a statement. Some courts reason that a product recall conducted pursuant to statutory requirement, in contrast to a *voluntary* recall, is not a voluntary admission, thus falling outside the definition of a “statement” for purposes of the hearsay rule. *See* Fed. R. Evid. 801(a). (“A ‘statement’ is (1) an oral or written assertion or (2) non-verbal conduct of a person, if it is intended by the person as an assertion.”); *see also Vockie v. Gen. Motors Corp.*, Chevrolet Div., 66 F.R.D. 57 (D. Pa. 1975), *aff’d*, 523 F.2d 1052 (3d Cir. 1975) (holding that the manufacturer should not be penalized for issuing a product recall to comply with the Federal National Traffic and Motor Vehicle Safety Act). As discussed below, admitting an involuntary recall will also preclude other avenues for exclusion, namely, the Subsequent Remedial Measures (“SRM”) exclusion. Thus, careful consideration should be given at the recall stage so that the manufacturer understands the

long-term litigation impact of conducting a voluntary recall versus an involuntary recall.

B. *The Recall Evidence Is Irrelevant.*

Defendants can seek to exclude product recall evidence as not relevant under Federal Rules of Evidence 401 and 402. *See* Fed. R. Evid. 401. (“‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”); Fed. R. Evid. 402. (“All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.”). The relevancy objections may stem from several aspects of the product recall evidence, as outlined below:

a) Not the Same Product.

Defendant should object when the product recall evidence relates to a product that is not *identical* to the product at issue in the litigation. *See Jordan v. Gen. Motors Corp.*, 624 F. Supp. 72 (E.D. La. 1985) (excluding evidence of a product recall for the 1986 model, when the vehicle at issue was the 1987 model). *Similar* products are not the *same* products. Even small variations in products implicate design differences.

b) No Evidence that the Product at Issue was Defective

A few bad apples should not spoil the whole bunch. Often times, a product recall will capture all units manufactured although only a small percentage is actually defective. Do not let this fact be left unheard by the judge, especially if the specific product at issue in your case has been spoliated. Differences in lots, manufacturing plants

and protocols, and batches matter.

Moreover, product recall evidence “cannot be used to make the transition from the general to the particular” to prove that the particular product at issue in the litigation contained the defect to which the product recall related. *See Vockie*, 66 F.R.D. at 61. In *Vockie*, Plaintiffs alleged that a 1965 Pontiac contained a defective brake hose and sought to introduce evidence of Pontiac’s recall for the same defect. Not all vehicles recalled actually had the defect, however. The court excluded the recall evidence because there was no evidence that a particular vehicle at issue in the case had the defective part. Thus, Plaintiff’s attempt to prove the defect by moving from the general product recall to the specific product at issue, without any evidence that the specific product was defective, was rejected by the court. *See id.*; *see also Calhoun v. Honda Motor Co.*, 738 F.2d 126 (6th Cir. 1984); *Harley-Davidson Motor Co. v. Daniel*, 260 S.E.2d 20 (Ga. 1979); *Holmquist v. Volkswagon of Amer., Inc.*, 261 N.W.2d 516 (Iowa 1977); *Glynn Plymouth, Inc. v. Davis*, 170 S.E.2d 848 (Ga. Ct. App. 1969) (excluding evidence of the product recall because the recall applied to all vehicles while indicating only a small number of vehicles would be affected; and, it could not be assumed that the vehicle at issue “was one of the small percentage” to have the defective part without some evidence of it).

This factual background also lends itself to an objection, based on Federal Rule of Evidence 403, that the probative value of the evidence far outweighs its prejudicial value. *See Fed. R. Evid. 403*. (“Although relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”); *see also Bizzle v. McKesson*, 961 F.2d 719 (8th Cir. 1992) (holding that the recall evidence’s mini-

mal probative value was outweighed by dangers of unfair prejudice to defendant because of the possibility that the particular product was not subject to the recall).

c) Not the Same Defect

Evidence of other product recalls relating to the same product, but *different* defects and/or different mechanisms of failure should prompt relevancy objections. *See Olson v. Ford Motor Co.*, 410 F. Supp. 2d 869 (D. ND. 2006) (the trial court granted defendant’s motion *in limine* to preclude the introduction of four Ford Motor product recalls, none of which related to alleged failure of the speed control cable involved in the underlying action).

d) Not the Proximate Cause of the Accident.

After establishing that the defect for which the recall was implemented *was* present in the specific product, the plaintiff must establish the defect was the proximate cause of the injury. If plaintiff is unable to establish the proximate cause connection, then evidence of the recall should be excluded on relevancy grounds.

C. *The Subsequent Remedial Measures Rule Excludes the Recall Evidence.*

The SRM rule excludes evidence of a party’s corrective action following the discovery of a failure and/or injury. The rule is found at Federal Rule of Evidence 407, and it provides:

When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product’s design,

defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

Evidence of a SRM is excluded for public policy reasons. The first is that "the conduct is not in fact an admission." See Fed. R. Evid. 407 advisory committee's note. Second, manufacturers should be encouraged in, or at least not discouraged from, taking steps that further public safety. *Id.* By excluding the evidence, manufacturers are incentivized to promptly correct a defect or hazard without fear of fall-out that the corrective actions taken will somehow be used against the manufacturer in a subsequent personal injury action. (This is akin to the rationale for protecting medical review committee actions taken with respect to medical professionals. See *St. Joseph Md. Ctr., Inc. v. Cardiac Surgery Assocs., P.A.*, 896 A.2d 304, 314–315 (2006)).



A remedial measure is an action that, had it been taken earlier, would have made the injury less likely to occur. See Fed. R. Evid. 407; *Rocky Mountain Helicopters, Inc. v. Bell Helicopters Textron*, 805 F.2d 907, 918 (10th Cir. 1986). Product recalls fall within this definition of remedial measures because had the recalls been activated sooner, then injury allegedly caused by the product would have been less likely to occur. Compare *Chase v. Gen. Motors Corp.*, 856 F.2d 17 (4th Cir. 1988), and *Vockie v. Gen. Motors Corp., Chevrolet Div.*, 66 F.R.D. 57 (D. Pa. 1975), *aff'd*, 523 F.2d 1052 (3d Cir. 1975), and *Fields v. Volkswagen of Am., Inc.*, 555 P.2d 48 (Okla. 1976), and *Landry v. Adam*, 282 So.2d 590 (La. Ct. App. 1973), and *Gauche v. Ford Motor Co.*, 226 So.2d 198 (La. Ct. App. 1969), with *Barry v.*

Manglass, 389 N.Y.S.2d 870 (1976). Although a general removal of a product from the marketplace is sufficient to provide grounds for subsequent remedial measure protection, even a partial removal may afford the manufacturer defendant protection. See *In re Propulsid Prods. Liab. Litig.*, No. 00-2577, 2003 U.S. Dis. LEXIS 3824 (E.D. La. March 11, 2003) (holding that defendant's implementation of a restricted-availability program for a prescription drug, instead of a full-scale removal, qualified for subsequent remedial measure protection and exclusion from trial because the defendant's actions would have made the injury less likely to occur).

Not all records relating to product recalls are excluded by Rule 407, however. *Federal Register* published settlements, recall letters, and press releases are not admissible to prove negligence, culpable conduct, a defect in a product, a defect in the product's design, or a need for warnings. See *Vockie*, 66 F.R.D. 57. By contrast, post-accident studies, tests, and reports may fall outside of the exclusionary power of Rule 407, even if these documents later lead to a recall campaign. The studies, tests, and reports, taken alone, would not have made the injury less likely to occur, and thus, the public policy argument no longer applies. See *Benetiz-Allende v. Alcan Alumínio do Brasil*, 857 F.2d 26, 33 (1st Cir. 1988); *Rocky Mountain Helicopters, Inc.*, 805 F.2d at 918.

The application of Rule 407 is somewhat narrow. Already mentioned is the requirement that the remedial measure must actually be one that makes the injury less likely to have occurred. Defense attorneys should be prepared to confront the following plaintiff arguments that, if successful, will circumvent the SRM exclusion of recall evidence:

SRM Does Not Apply When the Recall Is Involuntary: SRM actions must be voluntary actions taken by the party in order to be excludable. As previously mentioned, mandatory or involuntary recall campaigns are not “remedial measures” for the purpose of Rule 407. Plaintiff will bear the burden of proving that the recall was involuntary to overcome the subsequent remedial measure exclusion.

In *HDM Flugservice GmbH v. Parker Hannifin Corp.*, Plaintiff sued for damage to his helicopter when landing gear allegedly failed to operate properly. See 332 F.3d 1025 (6th Cir. 2002). Plaintiff sought to introduce evidence that Defendant modified its safety manual shortly after the incident to require more thorough equipment inspections. Plaintiff argued that the modification was a mandatory response pursuant to a federal regulatory agency’s directive, which fell outside the exclusionary power of Rule 407. The Court agreed that Rule 407 only applies to voluntary recalls, but disagreed that the Defendant’s actions were required by the agency such that they were involuntary. The Court found that the Defendant’s initial communication and continued cooperation with the federal agency demonstrated voluntary participation and action.

Proving that a recall campaign is involuntarily conducted requires more than a mere showing that a federal agency is involved. Still, however, it remains unclear what level of government involvement is required to warrant a determination that the recall campaign is involuntary. In the context of medical devices, involuntary and mandatory recalls are rare. The FDA posted the following on its website:

In most cases, a company (manufacturer, distributor, or other responsible party) recalls a medical device on its own (voluntarily). When a company learns that it has a product that violates FDA law, it does two things:

- Recalls the device (through correction or removal)
- Notifies the FDA

Legally, FDA can require a company to recall a device. This could happen if a company refuses to recall a device that is associated with significant health problems or death. However, in practice, FDA has rarely needed to require a medical device recall.¹

Therefore, this exception to the SRM exclusionary rule is rarely seen in medical device cases to introduce evidence of product recalls.

Recall Evidence Is Admissible To Show Control: Rule 407 carves out an exception that allows evidence of a subsequent remedial measure to show control or ownership of the defective product. See Fed. R. Evid. 407; *Clausen v. Sea-3, Inc.*, 21 F.3d 1181 (1st Cir. 1994). The idea is that if a defendant denies control or ownership of the product, after having recalled the product, the plaintiff can introduce evidence of the recall campaign to prove control and ownership. Depending upon the product identification related facts of each case, defendants are likely better served to admit ownership and control to avoid introduction of the recall evidence.

Recall Evidence Admissible to Show Feasibility of a Precautionary Measure/Alternative Design: Plaintiff may introduce evidence of a product recall when the feasibility of an alternative design is controverted. See Fed. R. Evid. 407. Feasibility means the possibility of an alternative design, the costs and conveniences associated with it, and the ultimate utility and success of its performance. See *Anderson v. Malloy*, 700 F.2d 1208, 1213 (8th Cir. 1983) (reversing the trial court’s exclusion of subsequent remedial measures when defendant controverted the effectiveness of door chains and peep holes to make a hotel room safer).

In *Anderson v. Malloy*, the Court of Appeals for the Eighth Circuit reversed the trial court based, in part, on its exclusion of evidence of subsequent remedial measures when defendant contravened the feasibility of other safety measures. Plaintiff was assaulted while staying in defendant's hotel room when an unidentified assailant broke-in and entered. Defendant denied that the hotel room could have been made any safer and testified that even a door chain and peep holes would have provided only a false sense of security, thereby implying that those devices were not feasible alternative designs. *Id.* at 1214. The appellate court held that such testimony "opened the door" to plaintiff's evidence that defendant installed door chains and peep holes shortly after the assault.

This exception is likely to come into play in design defect cases. If the defendant claims that the plaintiff's suggested alternative design was not feasible, including the costs and utility, then plaintiff may introduce evidence of a product recall.

However, if the defendant elects to concede feasibility of an alternative design, then Rule 407 will apply to preclude evidence of the product recall because feasibility is not controverted.

In cases where the defendant is silent on the issue of feasibility, federal circuits are divided as to the effect of Rule 407. A minority of jurisdictions holds that silence on the issue of feasibility still allows the plaintiff to introduce evidence of the product recall; in other words, silence on feasibility means feasibility is controverted. *See Meller v. Heil Co.*, 745 F.2d 1297 (10th Cir. 1984); *Ross v. Black & Decker, Inc.*, 977 F.2d 1178 (7th Cir. 1992). The majority presumes feasibility is admitted unless a defendant affirmatively controverts it and therefore, the SRM evidence is not admissible. *See Grenada Steel Indus. v. Alabama Oxygen Co.*, 695 F.2d 883, 888 (5th Cir. 1983); *Werner v. Upjohn Co.*, 628 F.2d 848, 855 (4th Cir. 1980)

("[f]easibility is not an issue unless controverted by the defendant.").

Product Recall Evidence Admissible for Impeachment: Evidence of a product recall is admissible for the purpose of impeachment. *See Fed. R. Evid. 407.* "Impeachment" is limited to situations where the recall evidence will directly and significantly contradict a witness' earlier testimony. *See Petree v. Victor Fluid Power, Inc.*, 831 F.2d 1191 (3d Cir. 1987) (allowing evidence of product recall when defense expert witness testified that any possibility of danger had been engineered out of the product, that there was no need to modify the product's design, and a warning would serve no purpose); *Flaminio v. Honda Motor Co.*, 733 F.2d 463, 468 (7th Cir. 1984) (explaining that evidence of a subsequent design change does not impeach a defendant's testimony that it used due care, but that evidence of a design change would impeach a defendant's testimony that it never would have made the design changes). Testimony that embellishes or uses superlatives, such as "the best" or "the highest quality," to describe the product at issue may be impeached through product recall evidence. *See Wood v. Mobark Indus.*, 70 F.3d 1201, 1208 (11th Cir. 1995) (allowing evidence of a design change to impeach testimony offered by the president of a corporate defendant that the wood chipper chute was the safest length possible); *Muzyka v. Remington Arms Co. Inc.*, 774 F.2d 1309, 1313 (5th Cir. 1985) (allowing evidence of a design change to impeach testimony that the rifle was the best and safest of its kind on the market).

Non-Party Controlled Recall Admissible: Evidence of SRM actions taken by a non-party is not excluded by Rule 407. With the exception of the U.S. Court of Appeals for the Sixth Circuit, all federal circuits have held that Rule 407 does not require the exclusion of subsequent remedial measures taken by a non-party. *Bowling v. Scott Cnty., Tenn.*, No. 3:04-CV-554, 2006 U.S. Dist.

LEXIS 56079 (D. Tenn. Aug. 10, 2006); *Younge v. Constr. v. PSD Dev.*, No. 3:08CV1447, 2011 WL 1933755, *1 (D. Ohio 2011). “The admission of remedial measures by a non-party necessarily will not expose that non-party to liability, and therefore will not discourage the non-party from taking the remedial measures in the first place.” *Id.* (internal citations and quotations omitted).

Accordingly, a product recall conducted by a non-party actor is not excluded by Rule 407 and may be admissible evidence relating to a defendant’s liability. *Diehl v. Blaw-knox*, 360 F.3d 426 (3d Cir. 2004) (holding that evidence of the defendant’s employer’s post-accident modifications to the product were not excluded by Rule 407). When involved in a case where the plaintiff has not sued the manufacturer of the device and there was a product recall, be advised that Rule 407 will not preclude the admission of the recall evidence as a subsequent remedial measure. If the Complaint is amended or if a third-party action is filed against the manufacturer, then the newly added manufacturer defendant can move to exclude the evidence on behalf of all defendants.

III. Conclusion

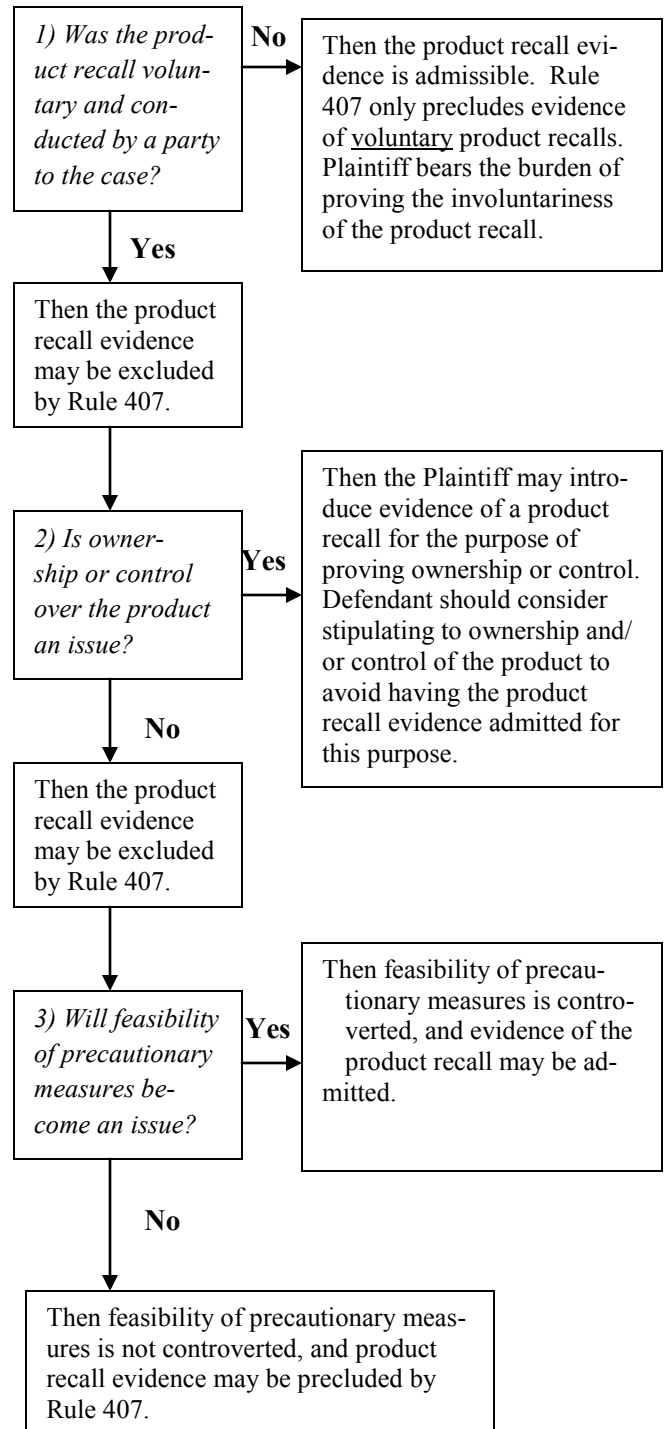
The likelihood of success of excluding evidence of a product recall is influenced, in part, by the facts of individual cases. Remember the following checklist of possible objections:

- 1) Hearsay Objections:
 - a) Statement by manufacturer defendant;
 - b) Statement by non-party distributor against manufacturer defendant.
- 2) Relevancy Objections:
 - a) not the same product;
 - b) not the same defect;
 - c) no evidence that the product was defective; and
 - d) no evidence that the defect was

the proximate cause of the injury.

3) Subsequent Remedial Measures:

a) The dichotomous key below is helpful to our analysis:



There is no silver bullet, unfortunately, when it comes to excluding product recall evidence. In fact, some medical device defendants may be best-served by embracing the evidence of the recall as a demonstration to the jury of their corporate accountability and responsibility. Under this strategy, defense attorneys can then emphasize self-corrective behavior.

The more common strategy, however, is to keep the product recall evidence away from the jury because overcoming juror prejudice associated with headline product recalls is a feat. In these cases, the goal is to use the evidentiary tools discussed in this article to keep the evidence out and convince the jury that they are smarter than the plaintiff. Inevitably, jurors will ask themselves, "Could this happen to me?" You want the answer to be, "No." If jurors believe that the plaintiff made a mistake or acted with disregard to a warning, then they would decide the accident was plaintiff's, or plaintiff's physician's fault.

With medical device recalls on the rise in recent years, defense attorneys are well-advised to anticipate plaintiffs' attempts to introduce product recall evidence at trial. Preparation, i.e., knowing the rules of evidence, is the only antidote. Hopefully, this article will serve as a helpful resource in this regard.

¹See *Medical Device Recalls*, U.S. Department of Health and Human Services, <http://www.fda.gov/MedicalDevices/Safety/RecallsCorrectionsRemovals/default.htm> (last visited July 1, 2011).



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Supreme Court Dams "Stream of Commerce" Theory of Personal Jurisdiction

By Jason R. Bonnet, Esq.

At the end of the Supreme Court's last term, the court issued two companion rulings severely curtailing the "stream of commerce" theory of personal jurisdiction nearly 25 years after its introduction into the legal realm in *Asahi Metal Industry Co. v. Superior Court of Cal.*, 480 U.S. 102 (1987). In *J. McIntyre Machinery, Ltd. v. Nicasastro*, 131 S. Ct. 2780 (2011) and *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011), the Supreme Court addressed the state of the "stream of commerce" theory in both the specific and general jurisdiction branches of the personal jurisdiction tree. Both decisions reflect a clear statement by the Supreme Court that merely placing a product into the marketplace will not subject a manufacturer to the jurisdiction of foreign states without the manufacturer purposefully directing some further conduct towards the forum state.

International Shoe v. Washington- Roots of Personal Jurisdiction

The doctrine of personal jurisdiction is rooted in the *Due Process Clause's* protection of deprivation of life, liberty and property without the exercise of a lawful power. Based on these rights, the Supreme Court has held that a state court may not exercise jurisdiction over an out-of-state defendant unless the defendant maintained "certain minimum contacts with [the State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

In *International Shoe*, the Supreme Court outlined two forms of personal jurisdiction, specific or case-linked jurisdiction, and general or all-purpose jurisdiction. Specific jurisdiction is

granted when a particular dispute “arises out of or is connected with” the defendant’s activities within the particular forum. *Id.* at 319. For example, in a tort case, if a defendant’s conduct in a state causes injury, the state court can exercise its jurisdiction over the defendant in a case related to that tortious conduct. In a subsequent decision readdressing jurisdiction, the Supreme Court in *Hanson v. Denckla* pronounced the often cited rule that exercise of judicial power is not lawful unless the defendant’s conduct is such that the defendant “purposefully avails itself of the privileges of conducting activities within the forum state, thus invoking the benefits and protections of its laws.” *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

In contrast to specific jurisdiction, a court may exercise general jurisdiction if defendant’s presence in the state is so “continuous and substantial” that the defendant is essentially “at home” in the forum state. *International Shoe*, 326 U.S. at 317. If so, a state court could exercise jurisdiction over the defendant for any dispute that may arise, whether related to the defendant’s conduct originating within the state or based on activities elsewhere.

***Asahi Metal Industry Co. v. Superior Court of California* - “Stream of Commerce” Theory Introduced**

In *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987), the Supreme Court first introduced the “stream of commerce” theory of personal jurisdiction into product liability cases. Asahi manufactured tire valves in Japan which were then sold to a Taiwanese company who incorporated the valves into tires to be sold around the world. After the Taiwanese company was sued in California following a motorcycle accident, it filed a cross-complaint seeking indemnification from Asahi.



Asahi objected to the court’s jurisdiction since Asahi had no connection with California and the jurisdictional issue reached the California Supreme Court. The California court found that although Asahi did not solicit business in California, Asahi’s intentional act of placing its components into the “stream of commerce” coupled with Asahi’s knowledge that its products may eventually find its way into California was sufficient to form the basis for jurisdiction under the *Due Process Clause*. *Id.* at 108.

The United States Supreme Court granted writs on the matter and issued a split 4-4 decision. Justice O’Connor, writing for four justices, stated that “the placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed towards a foreign state.” *Id.* at 112. O’Connor opined that some “additional conduct” directed toward the particular foreign state is required for jurisdiction to be proper, such as advertising in the state or establishing channels for providing regular advice to customers within the forum state. *Id.* at 114. On the other hand, Justice Brennan, with whom three other justices sided, found that the manufacturer’s mere foreseeability that a final product would be sold in a particular state alone would be sufficient to satisfy the *Due Process Clause* without the necessity of showing additional conduct by the manufacturer. Brennan stated, “[t]he stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sales.” *Id.* at 117 (Brennan J., concurring). “As long as the participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise.” *Id.*

For nearly twenty-five years after the decision

in *Asahi*, state courts split on whether Justice Brennan's "foreseeability test" or Justice O'Connor's more restrictive "stream of commerce-plus" test applied to product liability cases. The matter was finally readdressed by the Supreme Court earlier this year in two companion cases.

***J. McIntyre Machinery v. Nicastro* - "Stream of Commerce" and Specific Jurisdiction**

In *J. McIntyre Machinery v. Nicastro*, 131 S.Ct. 2780 (2011), the Supreme Court readdressed the "stream of commerce" theory as it relates to specific jurisdiction. Robert Nicastro seriously injured his hand at work while using a metal-shearing machine manufactured by J. McIntyre Machinery, Ltd. The accident occurred in New Jersey, but the machine was manufactured in England where J. McIntyre was incorporated and operated. J. McIntyre sold its products in the United States through an exclusive distributor (McIntyre Machinery America, Ltd.), from whom the shearing machine was purchased by Nicastro's employer. Nicastro filed a product liability action and J. McIntyre objected to the jurisdiction of the New Jersey court.

The trial court granted J. McIntyre's Motion to Dismiss for lack of personal jurisdiction, but appellate court reversed finding jurisdiction proper under the "stream of commerce" theory. Affirming the ruling, the New Jersey Supreme Court held that New Jersey court could exercise jurisdiction over the foreign manufacturer. The court believed jurisdiction was proper since (1) the injury occurred in New Jersey, (2) the manufacturer knew or reasonably should have known "its products are distributed through a nationwide distribution system that might lead to those products being sold in any of the fifty states", and (3) the manufacturer failed to "take reasonable steps to prevent the distribution of its products in this State." *Nicastro v. McIntyre Machinery America, Ltd.*, 201 N.J. 48, 77 (2008). In reaching its decision, the New Jersey Supreme Court noted the globalization of the

consumer marketplace made the "stream of commerce" theory particularly applicable in product liability cases. On this basis, the court held that if a manufacturer targets the United States marketplace as a whole, then it would be subject to the jurisdiction of each and every state in the country unless the manufacturer took steps to prevent the distribution of its products within a particular state. *Id.*

In yet another fractured decision, the United States Supreme Court reversed the New Jersey Supreme Court. Writing for the four-Justice plurality, Justice Kennedy first stated that the New Jersey court erred in finding that a foreign manufacturer that targets the United States marketplace as a whole could be subject to the jurisdiction of each of the fifty states. Rather, "personal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis" to determine if jurisdiction is proper in each state. *J. McIntyre Machinery*, 131 S.Ct. at 2789.

Next, Justice Kennedy noted that the "stream of commerce" metaphor is a flawed analogy for a jurisdictional analysis. The plurality rejected Justice Brennan's opinion in *Asahi* that mere foreseeability that a product may end up in a particular state is enough for a court to justify jurisdiction in that state. *Id.* at 2783. Instead, the court sided with O'Connor's position that the manufacturer must purposefully direct some action towards the particular forum state for jurisdiction to be proper. The court stated that "the defendant's transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum; as a general rule it is not enough that the defendant might have predicted that its goods will reach the forum state." *Id.* at 2789. "[I]t is the defendant's actions, not his expectations, that empower a State's courts to exercise jurisdiction over the defendant." *Id.*

Justice Breyer (joined by Justice Alito) wrote a concurring opinion stating that it would be im-

proper to announce a broad rule of jurisdiction without taking into consideration modern day e-commerce realities of world-wide websites and global marketing intermediaries such as Amazon.com. However, Breyer agreed that Supreme Court precedent mandated that there must be either a “regular flow” of sales into the state or some additional action by the defendant targeting a particular state for jurisdiction to be proper. *Id.* at 2792 (Breyer, J., concurring).

Justice Ginsburg, joined by Justices Sotomayor and Kagan, dissented in the opinion finding that a foreseeability-based analysis would be preferable in today’s marketplace.

***Goodyear Dunlop Tires Operations, S.A. v. Brown* - “Stream of Commerce” and General Jurisdiction**

On the same day the Supreme Court published its ruling in *J. McIntyre* dealing with specific jurisdiction, the Court issued a similar ruling unanimously rejecting the “stream of commerce” theory in a general jurisdiction case. In *Goodyear Dunlop Tires Operations v. Brown*, 131 S. Ct. 2846 (2011), two teens were killed in a bus accident in France allegedly caused by a defective tire. The boys parents filed suit in North Carolina against Goodyear, an Ohio company, and three of its foreign subsidiary manufacturers located in Turkey, Luxembourg and France. The three subsidiaries objected to the North Carolina court’s jurisdiction since they had no place of business in North Carolina and did not market or advertise their products for sale in North Carolina. In fact, the subsidiaries manufactured tires according to European tire specifications rather than United States’ requirements, and only a handful of their tires ended up in North Carolina.

Since the accident happened in France, plaintiffs were limited to seeking to invoke the court’s

general jurisdiction over the subsidiaries. Plaintiffs argued that by placing their products into the “stream of commerce,” the subsidiaries could be subject to the court’s general jurisdiction. The North Carolina courts recognized that general jurisdiction requires a “higher threshold” of inquiry than specific jurisdiction in that the defendants’ conduct must be “continuous and systematic” with North Carolina for jurisdiction to be proper. *Id.* at 2851 (citing *Brown v. Meter*, 199 N. C. App. 50, 58 (2009)). Nonetheless, the North Carolina court found “that threshold crossed...when petitioners placed their tires ‘in the stream of interstate commerce without any limitation on the extent to which those tires could be sold in North Carolina.’” *Id.*



The Supreme Court unanimously reversed the decision. The Court acknowledged that while there is a lack of Supreme Court cases addressing general jurisdiction, the “stream of commerce” theory has never been invoked in such a case. The Court confirmed that a defendant would only be subject to general jurisdiction when “their affiliations with the State are so ‘continuous and systematic’ as to render them essentially at home in the forum state.” *Id.* The Court noted that if it were to apply the “stream of commerce” theory to general jurisdiction cases “any substantial manufacturer or seller of goods would be amenable to suit, on any claim for relief, wherever its products are sold.” *Id.* at 2856. The fact that the subsidiaries products ended up in North Carolina “[fell] far short of the ‘continuous and systematic general business contacts’ necessary to empower North Carolina to entertain suit against them on claims unrelated to anything that connects them to the state.” *Id.*

Conclusion

These two recent decisions reflect a clear position by the Supreme Court that small manufacturers should not be subject to suit in far away

states simply because their products find their way into the state without some additional conduct by the manufacturers specifically directed towards the state. One of the Court's often-cited examples of conduct that may qualify under this standard is advertising within that particular state. The Court has already acknowledged that global marketing realities may make this analysis more difficult. With more small businesses selling their products online, lower courts are left to evaluate the level of conduct that must be directed towards a state for jurisdiction to be proper. At the very least, manufacturers now have better ammunition to fight jurisdiction in foreign states.



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The Sixth Circuit's Recent Decision on Fraudulent Joinder Weakens a Manufacturer's Fight Against Bad Faith Joinder of Non-Diverse Defendants

By Angela M. Daling, Esq.

A manufacturer's removal of a product liability case to federal court on diversity jurisdiction grounds can mean the difference between an even playing field and an uphill battle, particularly with respect to the use of experts. In light of the Sixth Circuit's recent decision in *Walker v. Philip Morris USA, Inc.*, No. 09-5318, 2011 U.S.App. LEXIS 22046 (6th Cir. Oct. 31, 2011), the battle a manufacturer defendant must engage in to defeat fraudulent joinder claims preventing removal has become much tougher.

Under the fraudulent joinder rule, "[a] party who removes a case involving non-diverse parties to federal court on diversity grounds will defeat a

a motion to remand if it can show that the non-diverse parties were fraudulently joined." *Saginaw Hous. Comm'n v. Bannum, Inc.*, 576 F.3d 620, 624 (6th Cir. 2009). Despite the importance of the fraudulent joinder rule, recent federal court decisions, including the Sixth Circuit, have established an excessively heavy burden on defendants attempting to establish fraudulent joinder. *See e.g., Walker*, 2011 U.S. App LEXIS 22046.

The Fraudulent Joinder Standard

All courts agree that a plaintiff fraudulently joins a defendant where the plaintiff has no cognizable cause of action against that defendant. Many federal districts apply various formulations of the same test, the central question being "whether there is **arguably a reasonable basis** for predicting that the state law might impose liability on the facts involved." *Alexander v. Elec. Data Sys. Corp.*, 13 F.3d 940, 949 (6th Cir. 1994) (emphasis added); *see, e.g., In re Briscoe*, 448 F.3d 201, 216 (3d Cir. 2003). Some courts require the removing party to prove that the plaintiff has "no reasonable possibility of prevailing" against the non-diverse defendant. *See, e.g., Pampillonia v. RJR Nabisco, Inc.*, 138 F.3d 459, 461 (2d Cir. 1998). All courts resolve all issues of fact and law in favor of the plaintiff. *See Walker*, 2011 U.S. App. LEXIS 22046, at *21.

Most circuits now recognize that the fraudulent joinder standard "is even more favorable to the plaintiff than the standard for ruling on a motion to dismiss." *See Walker*, 2011 U.S.App. LEXIS 22046, at *23. Under the fraudulent joinder standard, "the district court's task is limited to determining whether there is **arguably a reasonable basis** for predicting that the state law might impose liability based upon the facts involved." *See Junk v. Terminix Int'l Co., Ltd. P'ship.*, 628 F.3d 439, 445 (8th Cir. 2010). In contrast, "[t]o survive a Rule 12(b)(6) motion to dismiss, a com-

complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is *plausible on its face*.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009). Because the two standards are different, plaintiffs can defeat removal (and federal jurisdiction) by simply asserting a claim against a non-diverse defendant that might otherwise be dismissed under Fed. R. Civ. P. 12(b)(6). *See In re Briscoe*, 448 F.3d at 218.

The Sixth Circuit’s New Analysis in *Walker* Increases the Burden on Defendants

All district courts may resolve fraudulent joinder claims by “piercing the pleadings” and “considering summary judgment-type evidence such as affidavits and deposition testimony.” *Cavallini v. State Farm Mutual Auto Ins. Co.*, 44 F.3d 256, 263 (5th Cir. 1995). The purpose of “piercing the pleadings” is to allow district courts to look at more than just artfully pled allegations and identify facts that would indicate fraudulent joinder, including if the plaintiff “misstated or omitted discrete facts.” *See Smallwood v. Ill. Cent. R.R. Co.*, 358 F.3d 568, 573 (5th Cir. 2004) (en banc).



However, in the Sixth Circuit, *Walker* has forbidden districts courts from conducting any inquiry into the sufficiency of a plaintiff’s allegations. *See Walker*, 2011 U.S. App. LEXIS 22046, at *27-29. The plaintiffs in *Walker* brought claims against various manufacturers, alleging that the defendants’ respective products caused the Plaintiffs’ building to catch on fire. *Id.* at *6-7. In a seemingly blatant attempt to destroy diversity jurisdiction, Plaintiffs also brought a negligence claim against the owners of the building, alleging that they assumed a duty of care to maintain and repair a smoke detector that failed to function on the night of the fire. *Id.* The defendants removed the case on diversity grounds and

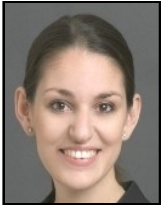
plaintiffs moved for remand. *Id.* When considering the motion, the district court “pierced the pleadings” and considered affidavits and a report submitted by the defendants showing that the plaintiffs omitted facts showing that the owners of the building did not assume a duty to maintain the smoke alarm. *Id.* at *9-11. One plaintiff submitted a “self-serving and conclusory” affidavit claiming that he relied on the owners to service the smoke detector and believed that they did so. *Id.*

After concluding that the plaintiffs “tendered no evidence to either refute the non-diverse Defendants’ answer and affidavits, or to support their own allegations,” the district court denied the motion to remand. *Id.* The Sixth Circuit reversed, holding that the district court erred by testing the evidentiary support for plaintiffs’ claim and explaining that district courts should not conduct any “summary-judgment” analysis. *Id.*

This decision appears to be in stark contrast to the approach taken by other courts that characterizes the procedure for resolving a claim for fraudulent joinder as “similar to that used for ruling on a motion for summary judgment under Fed. R. Civ. P. 56(b).” *See, e.g., Crowe v. Coleman*, 113 F.3d 1536, 1538 (11th Cir. 1997). For example, one court, when finding that the plaintiffs had fraudulently joined a non-diverse defendant, explained that “[a]lthough Plaintiffs’ burden is not a heavy one, they must point to some evidence that supports their claim against [non-diverse defendants] now that the mere allegations in the Complaint have been controverted by [defendant’s] sworn affidavit.” *Davis v. Wyeth*, No. 4:03-CV-128, 2004 U.S. Dist. LEXIS 26499, at *9-10 (M.D. Ga. June 10, 2004). This approach ensures that plaintiffs cannot destroy diversity by hiding behind unsupported, concocted allegations.

As a result of the decision in *Walker*, the fight

manufacturing and other defendants will face when challenging a plaintiff's fraudulent joinder in the Sixth Circuit will not likely be a very fair one.



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Confronting Spoliation: Litigation Holds and Lost Products

By Lauren Fajoni Bartlett, Esq.

Background

Spoliation of evidence – or the impairment of a civil claim – is the destruction, material alteration or failure to preserve evidence for another's inspection, testing or use during pending or reasonably foreseeable litigation. *See Culler v. Shinseki*, 2011 U.S. Dist. LEXIS 96043 (M.D. Pa. Aug. 26, 2011), citing *Ogin v. Ahmed*, 563 F.Supp.2d. 539, 542 (M.D.Pa. 2008) (citing *Mosaid Techs., Inc. v. Samsung Elecs. Co., Ltd.*, 348 F.Supp.2d 332, 335 (D.N.J. 2004)). Spoliation claims may be brought against both parties and non-parties, although the remedies are different as to each. A successful spoliation claim against a party defendant could result in an adverse presumption that the evidence would have been harmful to its case, and a successful claim against a party plaintiff could result in a dismissal of the entire lawsuit. Conversely, the remedy for spoliation of evidence would be a suit for damages for impairment of an underlying civil claim.

Safeguarding against pre-suit spoliation issues

The obligation to preserve evidence during pend-

ing litigation is fairly well recognized, but pinpointing a party's duties and obligations when there is no pending lawsuit can prove a bit more problematic. If the duty to preserve evidence arises even before litigation may be filed, the question then becomes when is litigation "reasonably foreseeable" so as to trigger litigation hold procedures or put a manufacturer on notice that it should take steps to retrieve and/or preserve its product.

Whether we are talking about securing documents and electronically stored information through litigation hold procedures or taking steps to reclaim and preserve the product itself, the issue of spoliation is an important one because of the severe sanctions that are available. While sanctions can range in severity depending on the importance of the evidence, it is important to remember that – as a threshold matter – a party can only be sanctioned if it actually has a duty to preserve the evidence. *See Culler v. Shinseki*, 2011 U.S. Dist. LEXIS 96043 (M.D. Pa. Aug. 26, 2011), citing *Micron Technology, Inc. v. Rambus, Inc.*, 645 F.3d 1311 (Fed. Cir. 2011) (citing *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y.)). In the absence of pending litigation, knowing when to act is not always clear. "When litigation is 'reasonably foreseeable' is 'a flexible fact-specific standard that allows a district court to exercise the discretion necessary to confront the myriad factual situations inherent in the spoliation inquiry.'" *Micron Technology, Inc.*, 645 f.3d 1311, (citing *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001)). Moreover, the duty to preserve is not triggered by the mere existence of a potential claim or the distant possibility of litigation, but it need not be imminent or probable either. *Id.*; *see also Trask-Morton v. Motel 6 Operating L.P.*, 534 F.3d 672, 681-82 (7th Cir. 2008). Ultimately, whether litigation is reasonably foreseeable is a fact specific inquiry that must be decided on a case-by-case basis.

When is litigation “reasonably foreseeable”?

It is well settled in products cases that a defect cannot be presumed from the mere fact that an accident or injury occurred. See *Wheeler v. Ho Sports, Inc.*, 232 F.3d 754, 758 (10th Cir. Okla. 2000); *Krummel v. Bombardier Corp.*, 206 F.3d 548, 551 (5th Cir. La. 2000); *Martin v. Unit Rig & Equipment Co.*, 715 F.2d 1434, 1441 (10th Cir. N.M. 1983). Since a spoliation claim requires proof that the party knows litigation is reasonably foreseeable and not a mere possibility, the fact that a manufacturer may be aware of a product related injury in and of itself is not sufficient to trigger its duty to preserve evidence. When a lawsuit has not been filed and the only notice to the manufacturer is a reported incident, it is unlikely that a spoliation claim would be sustainable.

For example, in *Evans v. Medtronic, Inc.*, 2005 WL 3547240 (W.D.Va. 12/27/05), the plaintiff sued Medtronic, the manufacturer of the Intrel 3 Spinal Cord Stimulation System that allegedly malfunctioned during surgery, for manufacturing a defective product. During the procedure, in which two Medtronic sales representatives were present, the operating physician began tugging on an exposed portion of the lead in order to remove and redirect it to a new location. When the lead would not move, a second physician was called into the operating room to assist. The second physician pulled back the boot of the lead and noticed that the insulation had been fractured, the coils stretched and the wires broken. He removed the damaged lead and handed it to the scrub nurse for disposal. The lead was then discarded and never recovered. During the procedure, neither Medtronic sales rep took steps to reclaim the damaged lead or requested that the surgical staff preserve it or return it to the manufacturer for examination and testing.

As a result of the foregoing complication, the

plaintiff had to undergo a second surgery - an emergency laminectomy - but additional complications that arose during the second surgery caused the plaintiff to become paralyzed. Following surgery, the plaintiff began complaining of severe pain and immobility in her extremities, and her physician determined that she had suffered a spinal cord injury, which was later confirmed by MRI. One of the Medtronic sales representatives subsequently testified that he learned of these additional complications within 20 to 30 minutes of the second procedure, but he did not go back and try to reclaim the lead.

During the ensuing product liability litigation, the plaintiff argued that she was entitled to an adverse presumption that the lead was defective based on Medtronic’s alleged spoliation because the sales representatives were present when the second physician discovered the fractured lead and at least one of them learned within 20 or 30 minutes of the procedure that she had been injured, yet neither of them retrieved the damaged lead or asked the hospital to retrieve it and return it to Medtronic. The *Evans* court stated that in pre-litigation situations, the duty to preserve material evidence exists when a party reasonably should know that the evidence may be relevant to anticipated litigation. Accordingly, the plaintiff has to prove (1) the Medtronic sales representatives should have anticipated litigation surrounding the damaged lead, giving rise to a duty to preserve the evidence; and (2) their willful conduct resulted in the destruction of the evidence.

In connection with the first element, the plaintiff argued that the sales reps were on notice that litigation was reasonably foreseeable when the surgeon discovered the fractured lead during surgery, but at the very latest within 30 minutes of the procedure when they learned of her spinal cord injury. Alternatively, they breached a statutory duty to retrieve the lead because the FDA requires manu-



facturers to investigate the cause of a malfunction and file an incident report within 30 days of learning that an adverse event had occurred. Medtronic responded that its sales reps could not have anticipated litigation at that time because they attributed the broken lead to the physician's attempted removal and not to a defect in the product itself. Medtronic further argued that its sales reps could not have willfully caused the destruction of the evidence because, in point of fact, they had never even come into actual possession of the lead. The testimony from the operating room personnel unequivocally established that the physician handed the damaged lead to the scrub nurse who then disposed of it in due course.

The court agreed with Medtronic that its sales reps could not have reasonably anticipated a product liability claim would be filed at the time of surgery because, as both the physicians and the sales reps testified, the possibility of a product defect was not on anyone's mind during the surgery or immediately thereafter. Further, the reps were not even aware that the plaintiff had been injured until after the lead had already been removed and disposed of by the scrub nurse. Although it was undisputed that the Medtronic employees knew the lead had been damaged prior to leaving the operating room, there was no evidence in the record to suggest that anyone related it to a product defect. Thus, there was no duty to reclaim the lead during surgery or ask the scrub nurse to preserve it and return it to Medtronic in due course.

The plaintiff next argued that Medtronic had a statutory duty to preserve the damaged lead because the FDA requires all manufacturers of medical devices to investigate and report on any adverse event involving one of its products that results in death of serious bodily injury within thirty days of discovery. The court, however, observed that nothing in the FDA regulatory requirements imposed an obligation on the manu-

facturer to retrieve and maintain the device as part of its investigation. The court ultimately concluded that, "[i]n hindsight, it would have been prudent for them to retrieve the lead or notify the plaintiff of its disposal, but their failure to do this at most would fall more along the lines of negligence than willful conduct." *Id.* Since the plaintiff could not prove an intentional destruction of evidence, she was not entitled to an adverse evidentiary presumption.

Intentional versus negligent spoliation and spoliation per se.

Spoliation claims are not recognized in every jurisdiction, but in those that do recognize it, the prevailing view is that the moving party must prove the intentional destruction of evidence with the specific intent of depriving another of the evidence. *See United States v. Spalding*, 2011 U.S. App. LEXIS 19633 (6th Cir. Ky. 09/26/11) (defendant not entitled to adverse presumption where it could not prove plaintiff had specific intent to destroy evidence); *Kemp v. CTL Distrib.*, 2011 U.S. App. LEXIS 16345 (5th Cir. La. 08/05/11) (Fifth Circuit explicitly rejected the argument that spoliation of evidence may be based on the negligent destruction of evidence, requiring instead that a party prove a specific intent to deprive the adverse party of access to the evidence); *Henning v. Union Pac. R.R. Co.*, 530 F.3d 1206, 1220 (10 Cir. 06/19/08) ("courts require evidence of intentional destruction or bad faith before a litigant is entitled to a spoliation instruction. Mere negligence in losing or destroying records is not enough because it does not support an inference of consciousness of a weak case.") However, a growing minority of jurisdictions have begun to recognize a claim for negligent spoliation under certain limited circumstances. *See, e.g., Borsellino v. Goldman Sachs Group, Inc.*, 477 F.3d 502, 510 (7th Cir. 02/20/07) (analyzing a spoliation claim under an ordinary negligence standard); *E.I. du Pont de Nemours &*

Co. v. Kolon Indus., 2011 U.S. Dist. LEXIS 79406 (E.D. Va. 07/21/11), citing *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148 (4th Cir. 12/06/95) (recognizing a claim for negligent spoliation where party failed to exercise the standard of care that a reasonably prudent person would have exercised under similar circumstances even though there was no evidence to suggest the evidence had been intentionally destroyed for the purpose of denying a litigant access to evidence); *cf. Evans, supra* (noting that plaintiff could not prove spoliation even though the sales reps may have been negligent in not preserving the damaged lead).

Even in jurisdictions where the law on spoliation is settled on the issue of specific intent, a claimant may nevertheless have an independent tort arising from the negligent destruction of evidence if the offending party breaches a statutory, contractual or other legal duty to preserve evidence on behalf of the aggrieved party. Thus, a number of jurisdictions now recognize the existence of two different types of spoliation claims: one for intentional spoliations, and another for negligent spoliation or impairment of a civil claim based on the breach of a legal duty. *See Silhan v. Allstate Ins. Co.*, 236 F. Supp. 2d 1303, 1307 (N.D. Fla. 2002). As a general matter, negligent spoliation claims may be brought against parties as well as non-parties while intentional spoliation claims are generally reserved for parties who have acted in bad faith.

The specific elements for an intentional spoliation claim vary slightly among the different jurisdictions; however, the common thread among all jurisdictions is the specific intent to disrupt the underlying litigation. *See id.* (citations omitted). The remedy for intentional spoliation of evidence more often than not is an adverse presumption that the evidence would have been harmful to the party who destroyed it. Conversely, a negligent spoliation claim employs a

duty/breach analysis using the following elements: (1) existence of an underlying civil claim; (2) a legal or contractual duty to preserve evidence which is relevant to the underlying claim; (3) destruction of evidence; (4) a significant impairment of the ability to prove the underlying claim; (5) a causal relationship between the destroyed evidence and the inability to prove the underlying claim; and (7) damages arising from the inability to prove the underlying claim. The remedy for negligent spoliation is a damages suit for impairment of the underlying civil claim.

The duty to preserve evidence can arise by contract or statute, and in certain cases even by a properly served discovery request or subpoena in the context of pending litigation. *See Silhan v. Allstate Ins. Co.*, 236 F. Supp. 2d 1303, 1309 (N.D. Fla. 2002). For example *Longwell v. West Jefferson Medical Center, et al.*, 970 So.2d 1100 (La.App. 5 Cir. 10/16/07) and *Bondu v. Gurvich*, 473 So.2d. 1307 (Fla.App. 1984), both recognized a negligent spoliation cause of action when the hospitals failed to maintain patient records in violation of state statutes that require them to hold such records for a period of not less than three years. In each of these cases, the plaintiffs had filed malpractice actions against the hospitals and their physicians, although during the course of discovery they learned that the hospitals had failed to preserve their medical records in violation of state law. The statutes at issue create an affirmative duty on the part of the hospitals to preserve specific information regarding specific individuals (i.e. the patients who treat there) for a set period of time. While neither hospital had intentionally destroyed the records, both courts held the hospitals liable for negligent spoliation because the patients were not able to pursue their malpractice claims due to lack of evidence. Employing the standard duty/risk analysis, these courts reasoned that the hospitals owed a statutory duty to these plaintiffs to preserve their medical records, they breached



their duty, and they were liable for the resulting harm.

The key determining factor in these negligent spoliation cases appears to be the requirement that the statutory or contractual duty run in favor of the specific individual claiming the harm; however, courts may well reach a different result if the statutory language does not create a duty directly on behalf of the aggrieved party. For example, in medical device cases, the FDA requires medical device manufacturers to file an adverse event report with the Department within 30 days of learning that one of its devices “may have” caused or contributed to a death or serious injury. 21 C.F.R. 803.5. Unlike the statutes at issue in *Longwell* and *Bondu*, this is a regulatory reporting requirement designed to aid the FDA in the performance of its governmental function, and it does not create a private right of action in the event of noncompliance even if the aggrieved party is the subject of the reported event. See *Medtronics v. Lohr*, 518 U.S. 470, 116 S. Ct. 2240, 135 L.Ed.2d 700 (1996) (“Congress did not intend to create a private cause of action when it enacted the FDCA, and no federal court has ever found an implied right of action under the FDCA”). While no court has ever specifically addressed this issue, it is unlikely that any court would allow a cause of action for negligent spoliation arising from regulatory noncompliance even in jurisdictions that recognize a statutory or contractual breach as a basis for the tort.

Conclusion

The issue of spoliation of evidence continues to be a source of legal scrutiny especially in cases involving litigation holds and lost products. It is difficult to know when to implement a litigation hold or take steps to reclaim the product in cases where there has been an adverse event but where there is no imminent threat of litigation, although the law does compensate for this uncertainty by

placing an onerous burden on the moving party to prove a specific intent to destroy evidence. A more pressing matter is the increasing number of jurisdictions that now recognize a cause of action for negligent spoliation, which carries a much lower burden of proof. It is important, therefore, to emphasize the need for conservative litigation hold policies and liberal communication between the various corporate departments when litigation is suspected so as to ensure strict and timely statutory and/or regulatory compliance. After all, the best defense is always an early and strong offense.



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United States Foreign Corrupt Practices Act: Creating a Compliance Framework

By Patrick F. Haggerty, Esq. and
Lindsey Carr Siegler, Esq.

Many of the clients for whom you perform product liability services are purchasing, selling or manufacturing their products, or components of their products, in overseas markets. As a result, your clients are likely subject to an American law (the Foreign Corrupt Practices Act) which proscribes certain activities as “corrupt.” Increasingly, you may find it helpful if you are able to advise your clients of the existence of this law and point them in the direction of seeking counsel to create a compliance program.

Governments around the world are increasing their anti-corruption and anti-bribery enforcement efforts. Enforcement of the United States Foreign Corrupt Practices Act (FCPA), enacted in 1977 (revised 1988), has reached unprecedented levels. As of September 2011, there were an estimated 33 resolved FCPA enforcement actions for the year. In the first half of this year, 10 significant actions resulted in approximately \$490 million in penalties, disgorgement and prejudgment interest. 2010 was a record year for enforcement: the Department of Justice imposed \$1.2 billion in fines related to FCPA violations, and the Securities and Exchange Commission recovered over \$500 million in penalties, disgorgement and interest. In addition, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 created a new set of incentives for whistleblowers who provide the SEC with information on securities fraud and FCPA violations.

Anti-corruption activity overseas has been similarly aggressive, as evidenced by the OECD Anti-Bribery Convention, which issued standards for anti-corruption legislation and enforcement in signatory countries, and the passage of the UK Bribery Act, which came into force on July 1, 2011. The list of anti-corruption legislation is long and includes the countries fueling economic global growth – from Australia’s anti-bribery law (Division 70 of the Criminal Code Act 1995), to the recent amendment to China’s law prohibiting bribery of a foreign public official (Article 164 of the PRC Criminal Law), to the four provisions of Brazilian Penal Code which prohibit corruption (Art. 332, 333, 337-B, and 337-C), companies operating internationally must be aware of the evolving legal landscape.

Continuing along this trend, corporate investigations in the United States appear to be on the rise. This quarter alone, five new companies are reported to be potentially under FCPA investigation: Brazil-based Embraer; U.S.-based Hallibur-

ton; China-based Keyuan Petrochemicals; Japan-based Olympus; and U.S.-based Koch Industries, Inc. Reflecting this sentiment, SEC **Chairman Mary Schapiro recently stated:** “Continued strong enforcement of the FCPA sends the message that American companies operating abroad will not pay bribes as a ‘cost of doing business.’ **The deterrence message of the Commission’s FCPA enforcement program incentivizes companies to self-assess and update their compliance and internal controls** – all of which benefits companies’ operations overall and provides greater transparency to investors.” Accordingly, for any company doing business abroad, the importance of a genuine and effective Compliance and Ethics Policy cannot be overstated.

The Compliance Framework

In 2010, the SEC implemented a “Cooperation Initiative,” a series of measures and incentives designed to encourage greater cooperation from individuals and companies in the agency’s investigations and enforcement actions. Specifically, the SEC approved the following measures. First, the Division of Enforcement authorized its staff to use various tools to encourage individuals and companies to report violations and provide assistance to the agency, including Cooperation Agreements, Deferred Prosecution Agreements and Non-prosecution Agreements. Second, the SEC streamlined the process for submitting witness immunity requests to the Justice Department for witnesses who have the capacity to assist in its investigations and related enforcement actions. Third, the SEC described the way in which it will evaluate whether, how much, and in what manner to credit cooperation by individuals. In this policy statement, the SEC identified four general considerations: (1) the assistance provided by the cooperating individual; (2) the importance of the underlying matter in which the individual cooperated; (3) the societal interest in ensuring the individual is held accountable for his

or her misconduct; and (4) the appropriateness of cooperation credit based upon the risk profile of the cooperating individual.

Similarly, over the past two years, the Department of Justice has offered some guidance regarding how to create and maintain an effective culture of voluntary compliance. Specifically, two recently resolved enforcement actions have provided helpful information on what constitutes a best practice FCPA program.

First, in November 2010, the DOJ charged U.S.-based Panalpina, Inc. and its parent company with FCPA violations. The charges arose from thousands of alleged bribes totaling \$27 million paid to obtain customs clearance in Russia from 2002-2007. Panalpina ultimately settled with the DOJ and entered into a deferred prosecution agreement (DPA) which, among other things, required Panalpina to adopt controls to detect and deter violations of the FCPA and other anti-corruption laws. The Corporate Compliance Program in the DPA outlined thirteen areas in which a company must develop internal controls, policies and procedures:

1. Compliance Code. A company should develop and promulgate a clearly articulated and corporate policy against violations of the FCPA.

2. Senior Management Support. The company will ensure that its senior management provides strong, explicit, and visible support and commitment to its compliance code.

3. Anti-Corruption Policies and Procedures. A company should develop and promulgate compliance standards designed to reduce the prospect of violations of the anti-corruption laws. Such standards shall include policies governing: (a) gifts; (b) hospitality, entertainment, and expenses; (c) customer travel; (d) political contributions; (e)

charitable donations and sponsorships; (f) facilitation payments; and (g) solicitation and extortion.

4. Use of Risk Assessment. A company should develop these compliance standards on the basis of a risk assessment addressing the individual circumstances of the company.

5. Annual Review. A company should review, update and modify its anti-corruption compliance standards and procedures no less than annually.

6. Senior Management Oversight and Reporting. A company should assign responsibility to one or more senior corporate executives. Such official(s) shall have direct reporting obligations to the company's Legal Counsel and independent monitoring bodies.

7. Internal Controls. A company should ensure that it has a system of accounting procedures designed to ensure fair and accurate books, records, and accounts so they cannot be used for the purpose of foreign bribery or concealing

bribery.

8. Training. A company should implement mechanisms including periodic training and annual certifications regarding compliance with the training requirements.

9. Ongoing Advice and Guidance. The company should establish an effective system for: (a) providing guidance on complying with anti-corruption policies; (b) internal reporting regarding suspected criminal conduct or violations of the compliance policies; and (c) undertaking necessary action in response to such reports.

10. Discipline. A company should have appropriate disciplinary procedures to address violations of the anti-corruption laws and the company's anti-corruption compliance code.



11. Use of Agents. The company should institute appropriate due diligence and compliance requirements pertaining to the retention and oversight of all agents and business partners.

12. Contractual Compliance Terms and Conditions. A company should include standard provisions in agreements with all agents and business partners that are calculated to prevent violations of the anticorruption laws.

13. Ongoing Assessment. A company should conduct periodic review and testing of its anticorruption compliance code, taking into account relevant developments in the field and evolving international and industry standards.

Then, in April 2011, Johnson & Johnson entered into a DPA with the Department of Justice, which settled an FCPA enforcement action involving conduct in Greece, Poland and Romania with various health care providers. In the DPA, the DOJ states: “J&J had a pre-existing compliance and ethics program that was effective and the majority of problematic operations globally resulted from insufficient implementation of the J&J compliance and ethics program in acquired companies.” In addition to the standard compliance measures found in typical DPAs and non-prosecution agreements, the DPA also sets forth “Enhanced Compliance Obligations.” This result is concerning given the DOJ’s recognition that J&J already generally had “effective” compliance procedures. The enhanced obligations include the following:

1. Compliance Department – A senior executive will serve as the Chief Compliance Officer and shall report to the Audit Committee of the Board. There will be heads of compliance within each business sector and a Global Compliance Leadership Team which reports to the CCO.

2. Gifts, Hospitality and Travel – Gifts shall be of “modest” value. Hospitality and travel are limited to officials and shall consist of reasonably

priced meals, accommodations and incidental expenses. They should be a part of education programs, training, business meetings or conferences.

3. Complaints and Reports – The company shall have a procedure for making reports and shall create a “Sensitive Issue Triage Committee” to address FCPA issues.

4. Risk Assessments and Audits – The company will conduct risk assessment in markets where it has customers who are foreign governments and for a minimum of five operating companies who are in high risk markets and after the initial audit every three years for any such operating entity.

5. Acquisitions – If possible, the company shall conduct a pre-acquisition FCPA audit of any target. After an acquisition, the company shall conduct a full FCPA audit and training of all relevant personnel.

6. Relationships with Third Parties – The company shall conduct a thorough due diligence of all third party representatives.

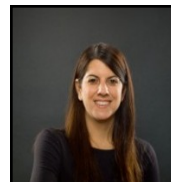
7. Training – The company shall provide training to all directors, officers and employees who could “present corruption risk” to the company and to “relevant third parties acting on the companies behalf.”

8. Annual Certifications – The company shall require certifications from each of J&J’s corporate-level divisions in each foreign country regarding compliance with anticorruption policies.



Patrick F. Haggerty is a partner at Frantz Ward LLP where he regularly serves as lead trial counsel in a wide variety of commercial and tort cases, both in federal and state courts. Pat frequently advises clients on practices to avoid litigation, including contract formation, product liability and

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“In the Trenches”

Notable Accomplishments of ALFA Attorneys

Favorable Verdicts for ALFA Client in Illinois

Louisville Ladder Inc., an ALFA international client, asked John W. Bell and Charles P. Rantis of Johnson & Bell, Ltd. (Chicago, Illinois ALFA firm) to defend it in a product liability lawsuit filed in federal court in the Northern District of Illinois, Eastern Division.

On August 1, 2006, plaintiff, John Baugh, 64, a retired businessman, was using a 5-foot Cuprum type III aluminum stepladder to remove and install gutter screws at his home in the western suburbs of Chicago. John Baugh’s wife alleged that while John Baugh was on the stepladder, the stepladder suddenly collapsed without warning, causing John Baugh to fall onto his concrete driveway and strike the back of his head. John Baugh sustained severe brain damage; incomplete quadriplegia; and has been confined to a long term nursing facility since the date of the accident.

Baugh sued Cuprum (now part of Louisville Ladder) asserting design defect and failure to warn theories. The plaintiff’s experts testified at trial that the accident was the result of a structural failure of the stepladder under normal usage. The plaintiff’s experts opined that the lower rail and/or gusset below the bottom step of the stepladder failed because of inadequate buckling resistance and inadequate strength of the 5-foot type III duty rated aluminum stepladder. The plaintiff’s experts contended that a 1995 subsequent design change to the gusset which made the gusset longer, thicker, and shaped differently, in addition to a different attachment point to the rail, were design changes which would have prevented the Baugh accident. Moreover, the plaintiff’s experts were extremely critical of defendant’s assertion that compliance with the applicable ANSI A14.2 in-

dustry consensus standard rendered the stepladder reasonably safe.

The defendant ladder manufacturer withdrew its affirmative defenses of assumption of the risk of injury and contributory negligence and asserted that the sole proximate cause of the accident was the plaintiff’s own conduct. The manufacturer’s metallurgical expert and mechanical engineering expert asserted that the plaintiff’s experts could not replicate their theory of liability by testing or experimentation regarding how the ladder allegedly failed under normal usage. The defendant’s experts opined that the cause of the failure was a loss of balance, overreaching, and failure to follow the safety decals affixed to the ladder. The defendant contended that the damage to the ladder was caused by an impact blow to the side rail by the plaintiff falling and striking the ladder.

The plaintiff’s attorney asked the jury for between \$10 million to \$18 million dollars in damages. The defense had offered \$3 million, but withdrew the offer prior to trial. After two (2) days of deliberations, the jury found in favor of Cuprum and against the plaintiff.

Louisville Ladder Inc., an ALFA international client, asked Johnson & Bell, Ltd. (Chicago, Illinois ALFA firm) to defend it in a product liability lawsuit filed in the Circuit Court of Cook County, Illinois. Johnson & Bell attorneys, Charles P. Rantis and Meghan M. Sciortino represented Louisville Ladder Inc. at trial.

On August 18, 2005, plaintiff Jeffrey Sipple, age 38, a journeyman electrician, was working on an 8-foot, fiberglass type IA duty rated stepladder, manufactured by Louisville Ladder Inc. The plaintiff alleged that the fiberglass stepladder sud-

denly collapsed as a result of a design defect. As a result of the accident, the plaintiff sustained a SLAP tear in his right shoulder which required surgery. The plaintiff also sustained a wrist fracture with residual impairment and soft tissue injuries to his right ankle.

Plaintiff's counsel argued that the accident was the result of a structural collapse of the fiberglass stepladder under normal use. The plaintiff's engineering expert opined at trial that the ladder lacked sufficient torsional stability and had excessive lateral movement because it lacked a sufficient number of gussets and had spreader braces located below the fourth step of the ladder, resulting in a smaller ladder footprint. In addition to a design defect based on lack of sufficient structural integrity and torsional stability, plaintiff's counsel argued that the subject model ladder had never been properly tested pursuant to the ANSI testing protocol in effect at the time the subject ladder was manufactured. Plaintiff's counsel also called witnesses who testified that the subject ladder had no prior damage and was in excellent condition before the accident.

Louisville Ladder denied that the subject ladder had structurally failed under normal use. Defense counsel argued that the cause of the accident was a result of the plaintiff's conduct as well as the plaintiff's employer's failure to take the ladder out of service due to prior damage. Defense counsel for Louisville Ladder contended that the damage to the front rail was due to a side impact blow from the falling user. Johnson & Bell further asserted that the subject model ladder was tested and complied with the ANSI industry consensus standard even though measurements on the ANSI test reports were inaccurate.

After 70 minutes of deliberation, the Cook County jury returned a defense verdict in favor of Louisville Ladder Inc. and against the plaintiff.

John W. Bell and **Charles P. Rantis** received Trial Lawyer's Excellence awards from the Chicago Daily Bulletin/Cook County Verdict Reporter for the outstanding defense verdict in a product liability case for 2011 for their work in the *Baugh* case.

Unanimous Defense Verdict Obtained in Product Liability Claim

Renaud Cook Drury Mesaros, PA attorneys William W. Drury, Randy J. Aoyama and Jeffrey S. Hunter obtained a unanimous defense verdict in a product liability claim arising from a propane-fueled flash fire in the Plaintiffs' home.

Plaintiffs, a family of four, suffered severe burn injuries which caused significant scarring and disfigurement. Plaintiff Raymond Greenwood suffered third-degree burns over 51% of his body and spent three months in a coma and in excess of six months in a burn unit. Mr. Greenwood underwent numerous skin grafts and subsequent scar release surgeries. It is expected that he will require multiple future surgeries. Mr. Greenwood's past medical expenses amounted to \$2.3 million and Plaintiffs claimed \$3.2 – \$4.45 million for future medical expenses. Plaintiff Tasha Greenwood suffered third-degree burns to her face, neck, arms and hands. She spent 26 days in the hospital with 10 days on a mechanical ventilator. She underwent multiple skin grafts and it is anticipated that she will have additional surgeries to her face and arm. Mrs. Greenwood's past medical expenses amounted to \$509,000 and Plaintiffs claimed \$1.0 – \$1.3 million in future medical expenses. Plaintiff Maria Greenwood, age 3 years, suffered second-degree burns to her forehead and both cheeks. She incurred \$34,000 in medical expenses and was estimated that she will require future surgeries and future medical expenses of \$44,000 - \$60,000. Plaintiff Arizona Greenwood, 11 months old, suffered second-degree burns to

her face and right arm. She suffered past medical expenses of \$33,000. It was claimed that both Marita and Arizona suffered permanent disfigurement and scarring to their face.

Plaintiffs claimed that a catalytic heater was defective and unreasonably dangerous, causing unburned propane to enter Plaintiffs' home. They alleged that, when Plaintiff Raymond Greenwood attempted to start the heater, the fugitive propane ignited and caused a flash fire. Defendants denied that the heater was defective, and explained that the fire was caused by an improperly installed pressure regulator just three days before the fire.

Prior to trial, Plaintiffs served offers of judgment of \$28 million to all defendants and \$18 million separately to Mepamsa. In the weeks leading up to trial, Plaintiffs' attorney responded to settlement offers by stating that he was not interested in discussing a compromise unless it was "in the several million dollar range." In opening statement, Plaintiffs requested \$15 million from the jury. The trial lasted ten days. The jury returned a unanimous defense verdict after one hour of deliberations.

Directed Verdict Obtained in New York District Court

ALFA International Firm Nilan Johnson Lewis obtained directed verdict for long time client WaterPik Technologies in New York District Court, Nassau County earlier this year. ALFA lawyers Sheila Kerwin and Christy Mennen obtained a directed verdict after three weeks of trial on plaintiff's case. The case involved an alleged personal injury on a Foot Spa manufactured by WaterPik. Plaintiff, who was a paraplegic before the accident, claimed a design defect related to the thermostat of the foot spa allowed him to sustain third degree burns on his left foot (for which he

did not experience pain due to his paraplegia). Plaintiff's expert claimed he was able to recreate extremely elevated temperatures when he used an exemplar foot spa on his own feet in testing that was done without all counsel present. Judge Brandveen granted defendant's motion in limine and refused to let plaintiff's expert testify about the undocumented testing which occurred days before trial a year after his expert opinion was disclosed on the subject.

After the close of plaintiff's case, Ms. Kerwin and Ms. Mennen made a motion for a directed verdict on numerous grounds. A significant issue was the fact that plaintiff had not distinguished which aspects of his damages were related to the alleged burn and which related to the prior paraplegia. Specifically, plaintiff alleged depression related to the burn, but the plaintiff testified that he was also depressed from unrelated paraplegia. There was no expert medical witness who distinguished the damages. The Second Department of New York District Court, in *Marazzo v. Gilbert*, 151 AD2d 728 (2nd Dept 1989) has determined that expert testimony is required to distinguish the damages related to multiple injuries so the jury can determine causation. In directing a verdict for WaterPik, Judge Brandveen stated that it was incumbent upon plaintiff to provide the jury with medical expert testimony so it could perform the complex task of distinguishing between the damages associated with plaintiff's alleged burn versus the damages association with his paraplegia. Without such testimony, the case had to be dismissed due to plaintiff's failure to prove causation.

For further information, contact Sheila Kerwin of Nilan Johnson Lewis at 612-305-7515 or skerwin@nilanjohnson.com.

Judgment Obtained in Wrongful Death Products Liability Case

Michael Knight and Craig Hamilton of McDowell Knight Roedder & Sledge, LLC. re-

cently obtained a judgment as a matter of law on behalf of Celltrion DBI, Inc., a Korean seatbelt manufacturer, in a wrongful death-products liability case following a two week jury trial in Mobile County, Alabama. The case involved the ejection and death of a 16-year-old girl during a rollover accident. The decedent's family contended that the seatbelt system in the vehicle was defective because of a false-latching condition that was alleged to exist in certain seatbelt buckles in the model vehicle in question. The vehicle was ultimately recalled. The lawsuit was filed under Alabama's wrongful death statute where the only damages available are punitive in nature. The case went to the jury against DBI under Alabama's Extended

Manufacturer's Liability Doctrine. The co-defendant Korean car manufacturer and its American distributor also went to the jury under the AEMLD and for negligent and wanton failure to timely recall the vehicle. In Alabama, the jury is not allowed to apportion damages in a wrongful death case and there is joint and several liability among co-defendants. In June 2011, following a two week trial, the jury ultimately returned a verdict against all defendants for \$40,000,000. However, after argument on post-trial motions, the Court granted DBI's Renewed Motion for Judgment as a Matter of Law throwing out the verdict against DBI and dismissing it from the case.

Upcoming ALFA International Events

March 8-11, 2012

International Client Seminar

Hosted by ALFA's Labor & Employment Practice Group

Westin Kierland Resort & Spa

6902 East Greenway Parkway

Scottsdale, Arizona

PG Chair: Carol B. Ervin

Program Chair: Elizabeth P. Johnson

ALFA Contact:

Jessica Zaroski at jzaroski@alfainternational.com

May 2-4, 2012

Transportation Practice Group Seminar

The Ritz Carlton

4750 Amelia Island Parkway

Amelia Island, Florida

Additional information will be available in early 2012

June 6-8, 2012

Retail Real Estate Seminar

The Ritz Carlton, Palm Beach

100 South Ocean Boulevard

Manalapan, Florida

Additional information will be available in early 2012

June 13-15, 2012

EPLI Seminar

The Ritz Carlton Battery Park

Two West Street

New York, New York

Additional information will be available in early 2012

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