Contributing Authors
Geron Bird & Matthew Wright HINKLE ELKOURI LAW FIRM Wichita, Kansas
Jonathan Brogan & David Goldman NORMAN, HANSON AND DETROY, LLC Portland, Maine
Alan F. Herman HAWKINS & PARNELL LLP Atlanta, Georgia
J.K. Leonard BALL & WEED, P.C. San Antonio, Texas
Jerry L. Saporito & Edward T. Hayes LEAKE & ANDERSSON, L.L.P. New Orleans, Louisiana
Robert G. Smith, Jr. LORANCE & THOMPSON, L.P. Houston, Texas
Michael Walsh STRASBURGER & PRICE, LLP Dallas, Texas

This is our second summer working on the Products Liability Perspectives. One impressive characteristic we've noticed from the ALFA International members is high quality -- both in the articles published and in the accomplishments announced in the "In the Trenches" section. This issue is no different in its display of that characteristic. It includes excellent articles on the Duty to Warn Indirect Purchasers, Protecting the Attorney/Client Privilege from the Crime/Fraud Exception, and a detailed article on litigation concerning MTBE, the gasoline additive that has been found to pollute groundwater when gasoline with MTBE is spilled or leaked. It also includes case notes from a few key cases decided over the past several months and the "In the Trenches" accomplishments.

In addition to reading this great issue, start thinking about attending the 2010 ICS, which is being presented by the Product Liability Committee. It will be held March 11-14, 2010 at the JW Marriott in Desert Springs, California. You'll get to experience summer in the spring!

-Steve Hamilton & Bryan Martin

Notes From the Editors
It is black letter tort law that manufacturers can be held liable to direct purchasers for harms caused by defective products. Restatement (Third) of Torts: Products Liability § 2(c).

Recently, Maine’s Law Court had the opportunity to address a duty to warn issue that has been the subject of much litigation in recent years: What duty to warn of dangers learned post-sale, if any, does a manufacturer owe to...
consumers who bought their products from a party other than the manufacturer itself or an authorized distributor (i.e. an “indirect purchaser”)?


At trial, the jury returned a verdict for Crown on one issue, but found for Mr. Brown’s widow on another issue; both parties cross-appealed to the First Circuit. Brown v. Crown Equip. Corp., 501 F.3d 75, 77 (1st Cir. 2007). Rather than rule on the appeals, the First Circuit certified two questions about Maine law to the Maine Law Court. Id. at 80. One of these questions will be discussed herein.

At trial, the evidence showed that Crown originally manufactured the forklift in question in 1989 and sold it to a third party in 1990. Prime later purchased the forklift from a used equipment dealer. Brown, 2008 ME 186, ¶ 5, 960 A.2d at 1191.

In 1995, Crown learned that many warehouses were using a new shelf design that exposed operators of their forklifts to the risk that shelves could enter the fork lift at an unshielded level and strike the operator of the forklift. Id.

Between December 1989, when Crown manufactured the forklift, and August of 1999, Crown received notices of 134 such “horizontal intrusion” accidents, including more than fifty that resulted in serious injuries or death. Id. Despite these notices, Crown made no attempt until 1999 to warn its customers of the horizontal intrusion risk and did not inform anyone that serious injuries and deaths were occurring in connection with this risk. Id.

In 1995, Crown developed a kit to reduce the risk of horizontal intrusions and in August of 1999 mailed its customers to notify them of its existence. Id. ¶ 6, 960 A.2d at 1191. The mailing, however, gave no indication on the envelope that it contained safety information and did not urge the use of protective measures or inform readers that operators had been injured and killed in a series of horizontal intrusion accidents. Id. Parties that did not purchase their forklifts directly from Crown, such as Prime, did not receive the notice at all. Id. ¶ 7, 960 A.2d at 1191.

A few months after the notices were mailed, a Crown employee visited Prime to assess an OSHA-mandated modification that Prime had requested for the forklift in question. Id.

The Crown employee did not mention the notices that had been mailed, the risk of horizontal intrusion, or the kit that existed to reduce that risk. Id.

Mr. Brown’s death in 2003 was the direct result of a horizontal intrusion that occurred while he was turning his forklift near a shelf. Id. Mr. Brown became the eleventh operator of one of Crown’s forklifts to die from a horizontal intrusion. Id.

At the conclusion of the trial, the jury found for Mr. Brown’s widow on her failure to warn claim. Id. ¶ 8, 960 A.2d at 1191. Crown appealed the judgment to the First Circuit Court of Appeals, which, in turn, certified the following question to the Maine Law Court: “Does Maine law incorporate the rule of Restatement (Third) of Torts: Products Liability § 10 that a manufacturer has a duty to warn known but indirect purchasers where its product was not defective at the time of sale but a product hazard developed thereafter?” Id. ¶¶ 9-10, 960 A.2d at 1192.

Specifically, the Restatement (Third) of Torts § 10 provides as follows:

(a) One engaged in the business of selling or otherwise distributing products is subject to liability for harm to persons or property caused by the seller’s failure to provide a warning after the time of sale or distribution of a product if a reasonable person in the seller’s position would provide such a warning.

(b) A reasonable person in the seller’s position would provide a warning after the time of sale if:

(1) the seller knows or reasonably should know that the product poses a substantial risk of harm to persons or property; and

(2) those to whom a warning might be provided can be identified and can reasonably be assumed to be unaware of the risk of harm; and

(3) a warning can be effectively communicated to and acted on by those to whom a warning might be provided; and

(4) the risk of harm is sufficiently great to justify the burden of providing a warning.

In response to the First Circuit’s certified question, the Law Court neither adopted nor rejected what it characterized as the Restatement’s “expansive” products liability approach, holding that Brown could be decided more narrowly under traditional negligence principles. Id. ¶ 14, 960 A.2d at 1193. Specifically, the Court cited prior Law Court precedent in which it held that manufacturers have a duty to keep abreast

Continued on Page 3
of developments in their field, *id.* ¶ 16, 960 A.2d at 1193 (citing *Maietta v. International Harvester Co.*, 496 A.2d 286, 297 (Me. 1985)), and that professionals upon whom others rely for expertise in their field have a duty to warn of “learned dangers,” *id.* (citing *Farnum v. Oral Surgery Assocs.*, 2007 ME 140, ¶¶ 7-8, 933 A.2d 1267, 1270-71).

The Law Court applied these precedents in ruling that Crown’s appreciation of the serious nature the danger posed to operators of their forklifts, going so far as to develop a kit to mitigate that danger, together with its direct personal contact with Prime, including an evaluation of the very forklift that Mr. Brown was operating at the time of his accident, created a situation where the Court had “no difficulty concluding that Crown owed a duty to Brown as a known user of that forklift.” *id.* ¶ 17, 960 A.2d at 1193. The Court further held that “Crown breached that duty by failing to warn Brown or his employer when it had an opportunity to do so,” a failure that was the proximate cause of Mr. Brown’s death. *id.*

Although the Law Court relied on an extension of its own existing jurisprudence rather than explicitly adopting the Restatement (Third) of Torts § 10, it may turn out to be a distinction without a difference. Although the Law Court was able to decide Brown without adopting the Restatement approach, the holding in Brown nevertheless is entirely consistent with Restatement (Third) of Torts § 10.

Maine’s Law Court has a long history of adopting Restatement provisions wholesale into its opinions. This approach serves Maine well as it provides depth and breadth to an otherwise relatively shallow pool of issues upon which the Law Court has an opportunity to issue controlling opinions by providing Maine attorneys with the opportunity to cite to other states that have interpreted Restatement provisions. Given this tendency, and at least until the Law Court directly rejects the Restatement approach, Maine practitioners would be wise to look to the Restatement (Third) of Torts § 10, and decisions from other jurisdictions interpreting that Section, for guidance on a manufacturer’s duty to warn indirect purchasers of known dangers.

Jonathan Brogan is a native of Maine and has been with Norman, Hanson & DeTroy since 1985. He is the chair of the firm’s litigation practice group and concentrates his practice in complex cases involving personal injury, product liability, medical malpractice and business litigation. Jon is a frequent speaker on issues of trial practice and trial presentation and has written extensively on those subjects. Mr. Brogan can be reached at 207.774.7000 or jbrogan@nhdlaw.com.

David Goldman has been with Norman, Hanson & DeTroy since 2008. His practice spans a wide variety of legal issues in personal injury, medical malpractice, business litigation, employment law, and insurance coverage matters. Mr. Goldman can be reached at 207.774.7000 or dgoldman@nhdlaw.com.
All fifty states recognize the crime-fraud exception through either statutory codifications, rules of evidence or the common law. See, e.g., Ala. R. Evid. 502(d)(1); Del. R. Evid. 502(d)(1); N.H. R. Evid. 502(d)(1); Cal. Evid. Code § 956 (West 2009); Newman v. State, 863 A.2d 321, 335 (Md. 2004); State v. Kirkpatrick, 263 N.W. 52, 55 (Iowa 1935); Gebhardt v. United Rys. Co. of St. Louis, 220 S.W. 677, 679 (Mo. 1920). The scope of the exception varies between states, with some applying the exception more broadly than others. Compare Milroy v. Hanson, 902 F. Supp. 1029, 1033 (D. Neb. 1995) (declining to extend the exception to tortuous behavior), with Kan. Stat. Ann. § 60-426(b)(1) (2009) (stating that the exception applies to torts). Practitioners should carefully research the law applying the crime-fraud exception in their respective jurisdiction to understand the scope of the exception and the law applying it.

Federal courts also recognize the crime-fraud exception. Specifically, federal courts allow in camera review of the privileged evidence before ruling on the application of the exception for some circumstances. Zolin, 491 U.S. at 565. In order for in camera review of privileged information to occur, the party invoking the exception must establish a factual basis “adequate to support a good faith belief by a reasonable person’ that in camera review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies.” Id. at 572 (internal citation omitted). In Zolin, the court explained this standard by stating that “a lesser evidentiary showing is needed to trigger in camera review than is required ultimately to overcome the privilege.” Id. This adopted standard was intended to balance between two risks involved in the procedure of ruling on the crime-fraud exception, in that “[t]oo much judicial inquiry into the claim of privilege would force disclosure of the thing the privilege was meant to protect, while a complete abandonment of judicial control would lead to intolerable abuses.” Id. at 570-71 (quoting U.S. v. Reynolds, 345 U.S. 1, 8 (1953)).

To gain access to privileged information, parties may attempt to exploit the crime-fraud exception to disgorge privileged information gathered in a good-faith effort to abide by the law when it is later determined, or even alleged, that the opposing party is violating the law. See, e.g., Exxon Corp. v. Dep’t of Conservation & Natural Res., 859 So. 2d 1096 (Ala. 2002). In Exxon, the defendant sought legal advice from in-house counsel to ensure that royalty provisions of a lease complied with other lease agreements. Id. at 1100. Defendant’s in-house counsel offered three interpretations of the provisions, and the defendant adopted an interpretation that eventually led to a suit by the state where the defendant was found guilty for fraudulent underpayment of royalties. Id. at 1100-01. The trial court ruled that the report of in-house counsel providing the interpretations of the provision did not fall under the crime-fraud exception, and the state appealed the issue, claiming that it did fall under the exception because the information “was instrumental in informing, guiding, and thereby furthering Exxon’s fraud.” Id. at 1107.

The Alabama Supreme Court rejected the state’s argument and, in doing so, relied on federal law that stated “[t]o trigger the crime-fraud exception, the government must establish that ‘the client was engaged in or planning a criminal or fraudulent scheme when it sought the advice of counsel to further the scheme.’” Id. (quoting In re Grand Jury Proceedings, 87 F.3d 377, 381 (9th Cir. 1996)) (emphasis in original). The court further explained: “[I]t isn’t enough for the government merely to allege that it has a sneaking suspicion the client was engaging in or intending to engage in a crime or fraud when it consulted the attorney. A threshold that low could discourage many would-be clients from consulting an attorney about entirely legitimate legal dilemmas.” Id. (quoting In re Grand Jury Proceedings, 87 F.3d at 381) (emphasis in original). Ultimately, because the report was obtained in the ordinary course of business, the crime-fraud exception did not apply. Id.

Parties seeking to avoid the invocation of the crime-fraud exception should heavily enforce the burden to provide evidence to support the showing of some wrongdoing or the intent to commit it at the time of the communication. Additionally, arguments defining the scope and depth of the crime-fraud exception in certain circumstances should keep in mind the values and principles behind the attorney-client privilege, which are “to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.” Upjohn, 449 U.S. at 389.

The importance of the attorney-client privilege should be emphasized in conjunction with the consideration that exceptions to it should be narrowly construed and “made only when the reason for disclosure outweighs the potential chilling of essential communications.” Blumenthal v. Kimber Mfg., 826 A.2d 1088, 1100 (Conn. 2003). Finally, practitioners should familiarize themselves with the particular burdens of proof adopted and applied in case law for each relevant jurisdiction to successfully defend the attorney-client privilege from the crime-fraud exception in state and federal courts.

Geron Bird is a Partner in Hinkle Elkouri’s product liability and complex tort litigation practice group. Mr. Bird focuses primarily on product liability defense, but has experience handling ERISA litigation, employment litigation, general commercial litigation, and appellate matters. Mr. Bird can be reached at 316.660.6513 or gbird@hinklaw.com.

Matthew Wright is an Associate in Hinkle Elkouri’s product liability and complex tort litigation practice group. His practice focuses primarily on product liability defense and general commercial litigation. Mr. Wright can be reached at 316.631.3147 or mwright@hinklaw.com.

For more information, please contact ALFA International at (312) 642-ALFA or visit our website at www.alfainternational.com.
Beginning in the late 1970s, a push began to remove lead from gasoline, and refiners and suppliers sought practical and economical alternatives. By 1979, MTBE was being used by some suppliers, but so too were ethanol, methanol and other blends. As lead was phased out of gasoline in the 1980s, the intricacies of the gasoline distribution system made it difficult, if not impossible, to transport both gasoline capable of blending with other oxygenates and gasoline already blended with MTBE in the same distribution system. MTBE proved the most economically viable, because it was a byproduct of the refining process and readily available in vast quantities in the United States. Thus, throughout the 1980s and 1990s, the retailer wanting to use an oxygenate other than MTBE found it increasingly difficult to compete in terms of supply and price. While no retailer wants gasoline in an underground storage tank (“UST”) to release into the ground, older UST technology resulted in a significant percentage of releases. UST owners and operators were accustomed to cleaning up releases from UST systems, and the BTEX constituents in the gasoline behaved predictably and could be cleaned up. What they did not begin to learn until the late 1990s was that, once in the ground, the MTBE component would separate from the BTEX and travel with the ground water (i.e. further and faster than the other gasoline constituents). The unfortunate fact of life is that much of our water supply is beneath the ground and is drawn from near where we live, and therefore where gas stations are located.

In 1990, Congress enacted section 211(k) of the Clean Air Act (“CAA”), 42 U.S.C. § 7545(k), to reduce ozone-forming volatile organic compounds (“VOCs”) and emissions of toxic air pollutants. See In re Methyl Tertiary Butyl Ether Prods. Liab. Litig. (MTBE I), 175 F. Supp. 2d 593, 600 (S.D.N.Y. 2001). Pursuant to the CAA, the Environmental Protection Agency (“EPA”) mandated that gasoline blended for use in certain metropolitan areas at certain times of the year contain at least 2.0% oxygen by weight. See id. In order to meet this requirement, oil companies added EPA-certified oxygenates, such as MTBE, to their gasoline. See id. (citing 42 U.S.C. § 7545(k)(4)). In 1991, pursuant to the 1990 amendment to the CAA, the EPA approved the use of seven compounds to achieve the requirements set forth in the OFP (needs to be defined): (1) MTBE, (2) ethanol, (3) methanol, (4) tertiary amyl methyl ether, (5) ethyl tertiary butyl ether, (6) tertiary butyl alcohol, and (7) diisopropyl ether. See In re Methyl Tertiary Butyl Ether Prods. Liab. Litig., 342 F. Supp. 2d 147, 151 (S.D.N.Y. 2004) (citing Proposed Guidelines for Oxygenated Gasoline Credit Programs Under Section 211(m) of the Clean Air Act as Amended, 56 Fed. Reg. 31,151, 31,154 (July 9, 1991)). According to the refiners, “like Congress, the EPA understood that MTBE would be ‘the most common oxygenating compound’ used by refiners to comply with the CAA’s new air emissions standards.” Id. (quoting Approval and Promulgation of Implementation Plan, 56 Fed. Reg. 5,458, 5,465 (Feb. 11, 1991)). As of 2002, it was reported that MTBE was added to about 87% of the gasoline that was marketed, sold and used in the United States.

On October 10, 2000, pursuant to 28 U.S.C. § 1407, the Judicial Panel on Multi-District Litigation transferred the first MTBE cases to Judge Shira Scheindlin in the Southern District of New York, in In re: Methyl Tertiary Butyl Ether (“MTBE”) Products Liability Litigation MDL-1358, finding common questions concerning whether (1) the defendants misrepresented the nature of MTBE and conspired to market MTBE without disclosing its risk to downstream users, the government, or the public and (2) the plaintiffs sustained drinking water contamination as a result of MTBE. Notably, at this same time, in Millett v. Atlantic Richfield, the Superior Court of Maine denied a class certification on these issues, stating that “[t]here is no doubt that the contamination of Maine’s ground water supplies by MTBE presents a major social problem that needs to be addressed” and “this court finds that the better approach to this litigation is individual trials.” No. Civ. A CV-98-555, 2000 WL 359979, at *22 (Me. Super. Mar. 2, 2000), appeal dismissed, 760 A.2d 250 (Me. 2000). Within a couple of years, the MDL court reached a similar conclusion denying class treatment.

In 2003, individual case filings throughout the country began in earnest. The MDL Court has described the properties of MTBE, the alleged risk it presents and the problem of identifying the manufacturers as follows:

MTBE is a chemical compound produced from methanol and isobutylene, a byproduct of the gasoline refining. It is highly soluble in water and does not readily biodegrade. Because of its high solubility, MTBE races through the underground water supply, eventually contaminating wells and underground aquifers. MTBE can persist in underground aquifers for many decades, far longer than other components of gasoline. Even in very small quantities, MTBE imparts a foul taste and odor to water and renders it unusable and unfit for human consumption. MTBE is carcinogenic in animals and may be carcinogenic in humans, as well... Once it is released into the environment, MTBE lacks a “chemical signature” that would enable identification...
of the refinery or company that manufactured that particular batch of gasoline.


The MDL Court summarized the plaintiffs' allegations against the refiners as follows:

Defendants chose MTBE so as to profit from a gasoline refining waste byproduct.... Defendants were aware that mixing MTBE with gasoline would result in massive groundwater contamination. They knew that there was a national crisis involving gasoline leaking from multiple sources, such as underground storage tanks, and that gasoline enters the soil from gas stations due to consumer and jobber overfills.... Despite knowledge of MTBE's ill effects, defendants conspired to mislead plaintiffs, the EPA, downstream handlers, and the public about the hazards of adding MTBE to gasoline.... to conceal the risk of MTBE contamination.

Id. at 365-67.

Since the inception of this litigation, the number of reported UST leaks continues to dwindle. According to EPA, more than 377,000 sites have been cleaned up, leaving a backlog of almost 103,000 old leaks remaining to be cleaned up. See 2008 EPA Annual Report on The Underground Storage Tank Program (March 2009), available at http://www.epa.gov/ OUST/pubs/OUT308AnnualReport_Final3-19-09.pdf. Moreover, the current administration has set aside funds to further address this issue in the American Recovery and Reinvestment Act of 2009, where Congress appropriated $200 million from the Leaking Underground Storage Tank (LUST) Trust Fund to EPA for cleaning up leaks from USTs. See EPA Information Related to the Recovery Act, http://www.epa.gov/OUST/ eparecovery/index.htm (last visited June 29, 2009).

A relatively small number of cases predate the MDL, and very few have been tried. Perhaps the most notable is South Lake Tahoe v. Atlantic Richfield. See No. 99-9128 (Cal. Super. Ct. April 15, 2002). In April 2002, the jury issued a special verdict in the first phase of the trial deciding a pivotal question: is gasoline containing MTBE a defective product by reason of design and warnings? To both questions the jury answered “Yes.” It is important to note that the Tahoe Court's trial plan put the issue of liability ahead of causation and damages, and the result proved potent in forcing the parties to the negotiating table and, perhaps, generating the litigation that followed.

The wave of cases filed in 2003 were removed from state court by Defendants on various grounds, but the most significant was federal agent jurisdiction pursuant to Section 1442(a)(1) of Title 28. Ultimately, the Second Circuit rejected the MDL Court's federal officer basis for jurisdiction and also remanded the police power claims asserted by the state plaintiffs. Two additional grounds for federal court jurisdiction have been tested: Toxic Substances Control Act, (“TSCA”) 15 U.S.C. § 2601, et seq., and Energy Policy Act of 2005 (the “Energy Act”), Pub.L. 109-58, tit.XV, § 1503, 119 Stat. 1076 (codified at 42 U.S.C § 7545 note). The MDL Court declined to exercise supplemental jurisdiction over state law claims based on TSCA, recognizing that “the state law claims are the real substance of these suits [and] fairness is served by requiring plaintiffs to proceed in state court.” Plaintiffs’ attempts at federal jurisdiction have also been defeated under the Energy Policy Act of 2005 because the Energy Policy Act provides removal jurisdiction, not original jurisdiction. Pub.L. 109-58, tit.XV, § 1503, 119 Stat. 1076 (codified at 42 U.S.C § 7545).


Continuing a judicial trend of extending the reach of nuisance law in the products liability arena, the MDL Court held the following:

[Plaintiff] argues that defendants did more than merely manufacture or distribute gasoline containing MTBE without warning of the danger posed. [Plaintiff] contends that defendants "represented, asserted, claimed and warranted" that gasoline containing MTBE "could be used in the same manner as gasoline [without MTBE]" and that it "did not require any different or special handling instructions." … If the allegations made by [Plaintiff] are true, such allegations would be sufficient to sustain a nuisance claim against the defendants.


Defendants moved to dismiss the plaintiffs’ claims on numerous grounds, including federal preemption, political question, primary jurisdiction, lack of standing and lack of cognizable interest, lack of causation, and limitations. In multiple lengthy, detailed, and meticulously reasoned opinions, the Court deftly denied each. In refusing to dismiss on preemption grounds, the Court held that “even if state tort law demands that defendants not use MTBE, federal law did not require the use of MTBE,” “EPA did not intend to preempt the field of fuel content regulation for all purposes,” and EPA does not “have authority to preempt the field of fuel content for all purposes.” In re Methyl Tertiary Butyl Ether Prods. Liab. Litig., 457 F. Supp. 2d 324-43 (SDNY 2006).

In rejecting the defendants’ political question challenge, the Court cited US Supreme Court factors for determining whether an action is non-justiciable under the political question doctrine:
[The fact that the issues arise in a “politically charged context” does not convert this tort suit into a non-justiciable political question, given that there is no evidence that Congress has decided that it would resolve the issues. While regulation of the national fuel supply is surely not an issue for the judicial branch, these suits seek abatement and damages in addition to a ban on further contamination.… Though the political question doctrine has given rise to many difficult cases, this is not one of them.


Primary jurisdiction is a judicially-created “prudential doctrine under which courts may, under appropriate circumstances, determine that the initial decision making responsibility should be performed by the relevant agency rather than the courts.” See 438 F. Supp. 2d at 295. Applying the Second Circuit’s primary jurisdiction analysis, the MDL Court found that none of the following four factors favored deference to the state agency: (1) whether the question at issue is within the conventional experience of judges or whether it involves technical or policy considerations within the agency’s particular field of expertise; (2) whether the question at issue is particularly within the agency’s discretion; (3) whether there exists a substantial danger of inconsistent rulings; and (4) whether a prior application to the agency has been made. (438 F. Supp. 2d at 297-303.

In rejecting Defendants’ motion to dismiss claims regarding MTBE amounts below the established maximum contaminant level (“MCL”) on the grounds of lack of cognizable interest/lack of standing/lack of justiciability, the MDL Court held the following:

The essence of the dispute here is the extent to which an MCL defines what constitutes a legally cognizable harm.…While the MCL may serve as a convenient guidepost in determining that a particular level of contamination has likely caused an injury, the MCL does not define whether an injury has occurred. Although linking injury to the MCL would provide a bright-line rule, it would do little else to promote standing principles. Rather, this conclusion comports with the essential principles underlying the standing doctrine: the parties have adverse interests and the complained of conduct is concrete and specifically impacts plaintiffs’ zone of protected interests. While it may eventually be determined that some levels of contamination below the applicable MCLs do not injure plaintiffs’ protected interests, plaintiffs have presented sufficient evidence for purposes of standing to show that they may have been injured—not as a theoretical matter, but rather as a question that is appropriate for judicial resolution.


An interesting corollary to the Court’s “cognizable interest” holding arose in the context of accrual, where the Court recognized that knowledge of the presence of MTBE alone was insufficient for the plaintiffs to have discovered their injuries. Instead, a plaintiff’s claims accrue when it first knows of both (1) the presence of MTBE at a level sufficient to constitute an injury and (2) the harmful impact of MTBE on drinking water. The Court stated that the mere presence of MTBE in the water does not trigger the statute of limitations, but “there does come a point where the concentration levels are so significant as to warrant discovery of a cognizable injury as a matter of law.” The Court then recognized the MCL as that “level” stating, “Once the MTBE concentrations pass the levels established by the state, the statute of limitations begins to run as a matter of law. As water providers, plaintiffs knew about their duty to comply with this regulatory standard.” In re Methyl Tertiary Butyl Ether Prods. Liab. Litig., 591 F. Supp. 2d 259, 267-68 (S.D.N.Y. 2008). While the bright line for standing and limitations of MTBE above the MCL may seem helpful, most cases involve very low detection levels and the questions of standing and limitations are case-specific.

Of the numerous issues the MDL Court has addressed, none is perhaps more contentious and fraught with broad reaching implications than alternative liability. The Court provided an exhaustive discussion of the history of alternative liability and concluded the following:

MTBE-containing gasoline is a fungible product because all brands are interchangeable, and…[a]s such, it is inherently difficult to identify the refiner that caused plaintiffs’ injuries, and indeed, may be even more difficult than in DES cases because DES pills could be distinguished by appearance (e.g., color, shape, or size of the pills). MTBE-containing gasoline is an indiscrete liquid commodity that mixes with other products during transport, and might not vary in appearance from batch to batch. According to plaintiffs, when it is released into the environment, it lacks even a chemical signature that would enable identification.


The Court has recognized three alternative liability schemes: (1) concurrent wrongdoing (with joint and several liability), (2) market share (apportioned liability without punitive damages) and (3) commingled product theory (apportioned liability, with punitive damages). The commingled product theory is the construct of the MDL Court and is the most controversial. Recognizing that gasoline containing MTBE is fungible, not unlike a bank account where the dollar you put in is not the same dollar you take out, the Court embarked on a long road finding that this new theory would be recognized in the various states:

The review of the various theories of collective liability set forth above reveals that from time to time courts have fashioned new approaches in order to permit plaintiffs to pursue a recovery when the facts and circumstances of their actions raised unforeseen barriers to relief…. These MTBE cases suggest the need for one more theory, which can
be viewed as a modification of market share liability, incorporating elements of concurrent wrongdoing. To that end, I shall now describe what I call the “commingled product theory” of market share liability. When a plaintiff can prove that certain gaseous or liquid products (e.g., gasoline, liquid propane, alcohol) of many suppliers were present in a completely commingled or blended state at the time and place that the risk of harm occurred, and the commingled product caused a single indivisible injury, then each of the products should be deemed to have caused the harm. This modification of market share liability is based on two features distinguishable from those instances in which market share liability has been applied. First, because the gaseous or liquid blended product is a new commodity created by commingling the products of various suppliers, the product of each supplier is known to be present. It is also known that the commingled product caused the harm. What is not known is what percentage of each supplier’s goods is present in the blended product that caused the harm.


The Court further elaborated on the commingled product theory, as follows:

In addition, “[a] defendant must be able to exculpate itself by proving that its product was not present at the relevant time or in the relevant place, and therefore could not have been part of the commingled or blended product.” The commingled product theory lies somewhere between market share and concurrent wrongdoing.


According to the Court, the commingled product theory allows “in for a penny, in for a pound.” See In re Methyl Tertiary Butyl Ether Prods. Liab. Litig., No. 04-CV-3417 (S.D.N.Y. filed June 6, 2009). The Court remains undecided on the geographic scope of the market (i.e. national, city or state, gas stations, or “some other market”) See id. but has decided that the burden is on the defendant to show a “reasonable basis” for its allocable “share of the market” for several liability. See In re Methyl Tertiary Butyl Ether Prods. Liab. Litig., No. 04-CV-3417 (S.D.N.Y. filed July 14, 2009).

A large number of MDL cases recently were settled by most defendants, and while the terms of the settlements remain confidential, some state laws bar those settling defendants from asserting contribution and common law indemnification claims against third parties provided that a “fairness hearing” is conducted and the settlement is approved by the court. In a published opinion, much detail has been disclosed regarding how these cases were valued by both sides. The Court recognized that in estimating damages, plaintiffs relied on industry data to estimate high, low, and mean costs of treating wells contaminated with MTBE, “[using] a standard linear regression analysis... and considering MTBE detection levels.” The Court stated the following in discussing apportionment among the settling defendants:

The settling parties justify their use of national refining capacity as a rough estimate of liability in several ways. First, the plaintiffs stress that nearly all the claims in each case are premised on defendants’ decision to use MTBE in their gasoline rather than on spilling gasoline or failing to prevent leaks at their gas stations. Second, they note that discovery in other cases in the MDL has shown that gasoline from various refiners is generally commingled for transportation, storage, and distribution, with the result that any gasoline released into the environment is generally the product of numerous defendants. In addition, they state that the national refining share is a better measure than [individual states]... because certain defendants that do not own refineries in a state may still participate in the gasoline market through exchange agreements or otherwise... [and] “the means of allocating liability in these cases remains highly contested.


Most of the cases in the MDL are brought by states, cities, water districts, and water purveyors and involve claims related to multiple drinking water wells and sites. In some cases, hundreds of potential wells or sites are at issue. While most defendants were able to reach a settlement, one major refinery defendant did not, and one of the Court’s original trial focus cases, the City of New York v. Amerada Hess, began trial in July 2009. In an attempt to construct a trial plan that balances the defendants’ rights while permitting the Court to try less than the whole case at once, the parties were required to choose a subset of wells or sites (bellwether sites) for dispositional motion practice and, possibly, trial. In deciding to use bellwethers, the Court reasoned:

The notion that the trial of some members of a large group of claimants may provide a basis for enhancing prospects of settlement or for resolving common issues or claims is a sound one. . . . The reason for acceptance [of bellwether trials] by the bench and bar are apparent. If a representative group of claimants are tried to verdict, the results of such trials can be beneficial for litigants who desire to settle such claims by providing information on the value of the cases as reflected by the jury verdicts. Common issues or even general liability may also be resolved in a bellwether context in appropriate cases... And every experienced litigator understands that there are often a handful of crucial issues on which the litigation primarily turns.

Continued on Page 9
A bellwether trial allows each party to present its best arguments on these issues for resolution by a trier of fact. Moreover, resolution of these issues often facilitates settlement of the remaining claims. 


The trial plan for the City of New York case, a case concerning a dilapidated water system fraught with problems and largely not in use for reasons having nothing to do with MTBE permits “phases” with partial verdicts or jury interrogatories on issues as the case proceeds. Phase I addressed the issue of whether the City has met its burden to show that there is a “reasonable probability” that a treatment facility will be constructed at a selected well in the next 15 years and whether the water will be used as either a water source or backup supply. On August 12, 2009 the jury returned its verdict on the Phase I questions finding the City will construct the facility and use the well as a backup source. Phase II began on August 12, 2009 with the testimony of Marcel Moreau, co-author of a 1986 article widely touted as focusing attention on MTBE in gasoline. Phase II will address whether MTBE will be in the well in 15-20 years when the well is put in operation; Phase III will address liability, causation and damages; and Phase IV will address punitive damages.

MTBE has not been blended into gasoline in the United States for a number of years, and only time will tell if old releases present new problems or if the litigation, like the product itself, will simply attenuate to the point of not being detectable.

Mike Walsh is a trial lawyer who devotes his practice to the defense of manufacturers in mass tort, toxic exposure, pharmaceutical, and medical device litigation. His practice includes complex litigation involving scientific, medical products, and medical device disputes. Mr. Walsh can be reached at 214.651.4459 or michael.walsh@strasburger.com.

CASE NOTES

MANUFACTURER OF ASBESTOS-CONTAINING PARTS HAS NO DUTY TO WARN OF DANGERS INHERENT IN MATERIALS MANUFACTURED BY OTHERS AND USED WITH ORIGINAL MANUFACTURER’S PRODUCTS


The case arose out of injuries allegedly suffered by plaintiff’s late husband from exposure to asbestos-containing products during his Navy service aboard the USS Hornet in the mid-1960’s. During World War II, when the Hornet was originally commissioned, defendants supplied the Navy with various pieces of equipment that were used in the ship’s propulsion system, and some of this equipment included asbestos-containing parts. The asbestos-containing parts to which plaintiff’s husband was exposed, however, were not manufactured or supplied by defendants but instead by third parties.

In February 2005, plaintiff filed suit against defendants asserting causes of action for negligence and strict liability, among others, alleging that they had breached their duty to warn plaintiff of the risks inherent in the asbestos-containing materials supplied by other manufacturers. The trial court granted summary judgment to defendants on the ground that under California law a manufacturer’s duty to warn extends only to the manufacturer’s own products. The Court of Appeal affirmed.

Significantly, although it was undisputed that plaintiff’s husband was exposed to asbestos-containing materials aboard the ship, it was also undisputed that by the time plaintiff’s husband served aboard the Hornet, all of the original asbestos-containing parts of defendants’ equipment would have been removed. In reaching its holding, the Taylor court held that defendants could not be strictly liable to plaintiff for three reasons: (1) defendants were not in the chain of distribution of the injury-causing products; (2) the agent that caused injury did not come from defendants equipment itself, but instead was caused by a product made or supplied by other manufacturers and used in conjunction with defendants product/equipment; and (3) the component parts doctrine shielded defendants from liability because it was undisputed that plaintiff’s husband’s injuries were caused by his exposure to products manufactured by other companies, and installed long after defendants products were supplied to the Navy. Further, there was no evidence that defendants participated in the integration of their components into the design of the Hornet’s propulsion system.

As for plaintiff’s negligence claim, the court held that defendants owed no duty of care to plaintiff because, among other things, the connection between defendants’ conduct and plaintiff’s husband’s injury was far too remote and attenuated, and not reasonably foreseeable to the defendants.

With respect to the distribution issue, the Taylor court made clear that defendants could not be strictly liable for the dangers inherent in the asbestos-containing materials that were used with their products because they were not part of the “chain of distribution” of the products that plaintiff’s husband encountered during his service on the Hornet in the 1960’s. Indeed, all of the original asbestos-containing materials that may have been supplied when respondents delivered their equipment to the Navy in 1943 had been removed by the time plaintiff’s husband served aboard the ship. Thus, even if defendants were part of the chain of distribution of the original materials, they were not part of the chain of distribution for the asbestos-containing materials to which plaintiff’s husband was exposed. In reaching this conclusion, the court specifically rejected plaintiff’s argument that defendants were liable for plaintiff’s husband’s exposure to the asbestos-containing components that replaced the original components.

Moreover, with respect to the component parts doctrine in California, the Taylor court found that because there
was no claim that defendants' equipment released the asbestos that caused plaintiff's husband's injuries, the issue of causation had to be resolved in defendants' favor as a matter of law. Indeed, it was undisputed that plaintiff's husband's injuries were caused by his exposure to asbestos fibers released from gaskets, packing, and insulation manufactured by other companies, and installed long after defendants' products were supplied to the Navy. Further, there was no evidence that defendants participated in the integration of their components into the design of the Hornet's propulsion system, but rather defendants provided components in accordance with Navy specifications.

In its rejection of plaintiff's negligence claim, the Taylor court focused on several factors surrounding the question of "duty." On appeal, plaintiff placed much emphasis on the issues of "foreseeability," arguing that defendants knew asbestos-containing products would be used with their equipment and this was enough to impose liability. The Taylor court disagreed, holding that "while important, foreseeability alone is not sufficient to create an independent tort duty." Instead, the court held that whether a defendant may be held to owe a duty of care depends not only upon the foreseeability of the risk, "but also upon a weighing of the policy considerations that militate for and against imposition of liability." Thus, even if an injury is foreseeable, "policy considerations may dictate a cause of action should not be sanctioned no matter how foreseeable the risk."

Against this back drop, the dispositive issue to the Taylor court was whether a manufacturer could reasonably be expected to foresee the risk of latent disease arising from products supplied by others that may be used with the manufacturer's product years or decades after the product leaves the manufacturer's control. So viewed by the court, it held that the foreseeability of such harm becomes much less clear, but even assuming that the risk is a foreseeable one, other policy considerations weighed against recognition of a duty and imposition of negligence liability in that case.

Specifically, the Taylor court found that the connection between defendants' conduct and plaintiff's husband's injury was too remote. This was so because defendants sold their equipment to the Navy in the early 1940's and defendants were not the manufacturers or suppliers of the injury-causing products that plaintiff's husband encountered some 20 years later. Defendants' allegedly culpable conduct thus arose from other manufacturers' products two decades after defendants delivered their products to the Navy. To the extent any defendants were blameworthy in Taylor, it was the manufacturers and suppliers of the asbestos-containing materials plaintiff's husband actually encountered, "who were in the best position to investigate and warn of the dangers posed by their products."

Moreover, the Taylor court found that imposing liability on defendants would not serve the important policy of preventing future harm. As acknowledged by the court, it was doubtful that defendants had any ability to control the types of products that were used with their equipment so long after it was sold. Defendants delivered various parts to the Navy during World War II and had no control over the materials the Navy used with their products 20 years later when plaintiff's husband was exposed to asbestos.

As such, the Taylor court concluded that defendants owed plaintiff no duty to warn of the dangers inherent in the asbestos-containing products supplied by other manufacturers as the imposition of such a duty would be inconsistent with California case law and would not serve the policies underlying strict liability or negligence.

R. Bryan Martin
Haight Brown & Bonesteel LLP
Los Angeles, California

Texas Supreme Court Maintains Viability of Texas Statutes of Repose

On June 26, 2009, the Texas Supreme Court issued an opinion in Galbraith Engineering Consultants, Inc. v. Pochucha, --- S.W.3d ----, 2009 Tex. LEXIS 460 (Tex. June 26, 2009), holding that Texas' responsible third party statute does not revive claims extinguished by a statute of repose.

In Galbraith, the statute in question was Tex. Civ. Prac. & Rem. Code §16.008, which is a statute of repose related to architects, engineers, and construction. The trial court in Galbraith granted summary judgment for the entities that were added as responsible third parties, holding that the ten-year statute of repose barred all claims and that Tex. Civ. Prac. & Rem. Code §33.004 did not revive the claims barred by the statute of repose. The Court of Appeals reversed the summary judgment and remanded the case for further proceedings but the Texas Supreme Court determined that the revival statute found at §33.004 revived claims "barred by limitations" but not claims "extinguished by a statute of repose." The Court emphasized that the various statutes of repose would be defeated by construing "limitations" to include statutes of repose.

Part of Texas' Tort Reform in 2003 is that a defendant can designate a person as a responsible third party; that person will be listed on the jury charge for comparative negligence purposes but is not a formal third-party defendant and does not have an attorney. Defendant must file a motion to designate the person as a responsible third party at least sixty days before trial. Tex. Civ. Prac. & Rem. Code §33.004. Plaintiff may then join the responsible third party as a defendant within sixty days after designation as a responsible third party, "even though such joinder would otherwise be barred by limitations."

Texas has a fifteen-year statute of repose for products liability actions. Tex. Civ. Prac. & Rem. Code §16.012. Therefore, a defendant can name a responsible third party after Plaintiff's claims are barred by the statute of repose, without fear of the party being an actual defendant with an attorney that could make cross claims against the original defendant

Robert G. Smith, Jr.
Lorance & Thompson, P.C.
Houston, Texas
ATLANTA ALFA FIRM, HAWKINS & PARNELL, OBTAINS DEFENSE VERDICT IN WRONGFUL DEATH PRODUCTS LIABILITY ACTION

Cundiff v. Lifeline Systems, Inc.

Alan F. Herman, of the Atlanta ALFA law firm of Hawkins & Parnell, won a defense verdict for Lifeline Systems, Inc. (now Philips Lifeline) in the United States District Court for the Western District of Virginia, Roanoke Division, in a case tried and decided in October of 2008.

The lawsuit involved a claim for wrongful death of a deceased 40-year-old plaintiff who was afflicted by Down syndrome. The decedent died as a result of starvation after his elderly father suffered a heart attack and died. It was claimed that a personal response communicator manufactured by defendant failed to properly function to alert the defendant, who in turn would have been responsible for alerting the authorities that no communication had taken place.

Defendant proved that the lack of communication occurred because of the failure of telephone service at the father’s residence, which service was essential for the proper functioning of defendant’s product. Mr. Herman showed that the telephone service had been interrupted by providing telephone records that indicated a complaint by a neighbor, which had led to a repair and resumption of telephone service, which in turn allowed defendant to be notified of inactivity; unfortunately, this notification came too late to save the decedent or his father. The jury agreed there was no defect in the personal response communicator and returned a defense verdict, despite the presence of a tremendous amount of sympathy for the decedent and his father.

WICHITA ALFA MEMBER, HINKLE ELKOURI LAW FIRM, SECURES DEFENSE VERDICT FOR CLIENT COLEMAN IN WRONGFUL DEATH ACTION

In a case tried by ALFA Member Ken Lang, with the assistance of Amy Decker and Scott Schillings, attorneys with Wichita-based Hinkle Elkouri Law Firm L.L.C., a jury in Santa Fe, N.M. found that a propane heater manufactured by the Coleman Company was not at fault in the 2005 deaths of a father and son. The father was a security guard at a ranch near Santa Fe during the production of a Turner Films, Inc. TV miniseries. He and his 13-year-old son were found dead in a small storage shed where they had been sleeping. A large Coleman propane construction heater was found inside the shed.

Attorneys for the decedents’ family asserted that the propane heater was defectively designed, allowing it to produce deadly amounts of carbon monoxide. They further claimed that it contained inadequate warnings. The plaintiffs sought nearly $10 million in compensatory damages. During trial, their economist opined Coleman should additionally pay $146 million in punitive damages, a number plaintiffs’ counsel reduced to more than $40 million at the close of the case.

The defense contended that the large propane heater – intended for outdoor or well-ventilated construction use only – was neither defective in its design or warnings nor the source of carbon monoxide for the deaths. After an 8-day trial, the jury took only an hour to render a defense verdict on each of the plaintiffs’ claims.

Hinkle Elkouri attorneys partnered with Eric Sommer of Sommer, Udall, Hardwick & Hyatt, PA, for local trial counsel.

SAN ANTONIO ALFA MEMBER, BALL & WEED, OBTAINS DEFENSE JURY VERDICT FOR CLIENT ELECTROLUX HOME PRODUCTS

J.K. Leonard, a shareholder of San Antonio, Texas law firm and ALFA Member Ball & Weed, P.C., successfully defended Electrolux Home Products Inc., the manufacturer of a Frigidaire home refrigerator, in a recent products liability trial. Leonard was assisted by assisted by appellate partner Christopher J. Deeves.

Plaintiffs alleged that a manufacturing defect in the refrigerator’s wiring caused a fire during the early morning hours of February 4, 2007, resulting in the death of one individual and seriously injuring another. The refrigerator was pre-owned and had been purchased approximately three months before the fire. The circumstances of the refrigerator’s use and the identity of its former owner(s) was unknown. Plaintiffs claimed that the compressor wiring contained a manufacturing defect, either in the form of sub-standard PVC insulation or resulting from damage to the conductor itself, which Plaintiffs alleged led to series arcing, overheating and degradation of the insulation.

Plaintiffs claimed that this defect caused an arcing event to occur between the compressor wiring and a cover plate on the back of the refrigerator, igniting other control wiring and nearby combustibles and eventually spreading to the structure itself. One individual in the home suffered fatal injuries, leaving behind two daughters (age 17 and 4 at the time), as well as an adult daughter and mother. A friend of the deceased who was staying at the home suffered minor burn injuries, but significant inhalation injuries.

Plaintiffs’ claims against Electrolux were based primarily on the absence of arcing activity found in the home except for the arc on the refrigerator and the major damage to the house...
structure directly behind the refrigerator. Electrolux contended there was no manufacturing defect in the refrigerator because the refrigerator was too old at the time of the fire to reasonably infer that a manufacturing defect was the cause. Electrolux also argued that the arc was the result of the refrigerator being attacked by a fire, not the cause of the fire. Electrolux offered evidence of an alternate origin in close proximity to the refrigerator (not within or on the refrigerator itself), but the cause of the fire was undetermined.

During closing arguments, plaintiffs asked the jury to award approximately $41 million against Electrolux. On March 12, 2009, after a week-long trial, the jury returned a unanimous verdict absolving Electrolux of any responsibility after approximately seventy minutes of deliberation.

NEW ORLEANS ALFA FIRM, LEAKE & ANDERSSON, SUCCEEDS ON APPEAL IN MISSISSIPPI FOR CLIENT DUNLOP TIRE

_Borne v. Dunlop Tire Corp._

Jerry Saporito, a partner in ALFA Member and New Orleans-based law firm Leake & Anderson, L.L.P., prevailed on an appeal to the Mississippi Court of Appeals in which Saporito defended Dunlop Tire, a tire manufacturer, against a products liability action. _Borne v. Dunlop Tire Corp._, --- So.3d ----, 2009 WL 1856676 (Miss. App. June 30, 2009). Plaintiffs originally brought a products liability action against Dunlop, alleging that the cause of a vehicle rollover was an unspecified defect in the right rear tire of the vehicle.

Dunlop filed a motion for summary judgment on the grounds that the tire represented as the defective tire could not have been the tire mounted on the vehicle at the time of the accident. Defendant produced an expert affidavit showing that the tire presented had wear vastly exceeding the three-month life of the tire and that it was therefore physically impossible that the tire could have been mounted on the vehicle at the time of the accident. The trial court granted summary judgment and in doing so ruled that an affidavit presented by Plaintiffs to establish the chain of tire custody was insufficient under Rule 56(e). An appeal followed to the Mississippi Court of Appeals.

First, the Court of Appeals addressed the sufficiency of Plaintiffs’ affidavit under Rule 56(e). The affiant was the Plaintiffs’ original attorney who had since been appointed to a federal judgeship. The affidavit was not based on personal knowledge but was carefully worded to reflect the now-judge’s “best recollection” of prior events. Plaintiffs argued that the trial court erred by striking the affidavit because no formal motion to strike had been filed. The appellate court found that the trial judge did not strike the affidavit, but rather ruled that the affidavit did not satisfy Rule 56(e). The appellate court confirmed that the affidavit contained double layers of hearsay and was not based on the affiant’s personal knowledge. The court pointed out that while most affidavits contain hearsay, the Mississippi Supreme Court has ruled that such affidavits may be considered on summary judgment motions where they are based on personal knowledge and set forth facts that would be admissible in evidence. Thus, each hearsay part of the statement must qualify under a hearsay exception for it to be admissible. The affidavit presented no testimony from the individuals who may have actually handled the tire and no testimony regarding anyone who may have actually stored the tire. Thus, the Court of Appeals concluded that the affidavit was not based on personal knowledge and that the trial court properly ruled that it was insufficient under Rule 56(e).

Second, the Court of Appeals analyzed whether there was a genuine issue of material fact regarding whether the subject tire in Plaintiffs’ possession was, in fact, the tire on the vehicle at the time of the accident. Dunlop’s expert affidavit adequately showed that the subject tire could not have been on the vehicle at the time of the accident. The burden of proof then shifted to Plaintiffs to rebut Dunlop’s contention. The court found that Plaintiffs’ only rebuttal effort, the affidavit of the original attorney, was insufficient to carry their burden of proof.

REMINDER

The 2010 ALFA International Client Seminar
Co-hosted by the Product Liability Practice Group

March 11-14, 2010
JW Marriott Desert Springs
Palm Desert, California
Upcoming ALFA International Events

September 17, 2009
Workers’ Compensation Practice Group Seminar
Loews Vanderbilt Hotel
Nashville, Tennessee

Contact Info
Chair: Stephen Hessert
Norman, Hanson & Detroy, LLC, Portland, Maine
(207) 774-7000, shessert@nhdlaw.com
ALFA Contact: Joely Nicholson

October 22, 2009
Women’s Initiative Practice Group Seminar
Westin Chicago River North
Chicago, Illinois

Contact Info
Co-Chair: Sarah H. Lamar
Hunter, Maclean, Exley & Dunn, P.C., Savannah, Georgia
(912) 236-0261, slamar@huntermaclean.com
Co-Chair: Eugenia (Gina) Carter
Whyte Hischboeck Dudek S.C., Madison, Wisconsin
(608) 234-6058, gcarter@whdlaw.com
ALFA Contact: Jessica Zaroski

October 22-24, 2009
Annual Business Meeting
Westin Chicago River North
Chicago, Illinois

Contact Info
ALFA Contact: Amy Halliwell

October 25-26, 2009
International Law Practice Group Seminar
Eden Roc Renaissance Resort
Miami Beach, Florida

Contact Info
Chair: Harvey Jay Cohen
Dinsmore & Shohl LLP, Cincinnati, Ohio
(513) 977-8200, harvey.cohen@dinslaw.com
Chair: Ignacio López-Balcells
Bufete B. Buigas, Barcelona, Spain
34-93-200 12 77, ilb@buigas.com
ALFA Contact: Joely Nicholson

April 28-30, 2010
Transportation Practice Group Seminar
Marriott Marco Island Resort
Marco Island, Florida

Contact Info
Chair: Danny M. Needham
Mullin Hoard & Brown, LLP, Amarillo, Texas
(806) 372-5050, dmneedham@mhba.com
Vice Chair: Peter S. Doody
Higgs, Fletcher & Mack, L.L.P., San Diego, California
(619) 236-1551, doody@higgslaw.com

June 2-14, 2010
Retail Real Estate & Business Litigation Seminar
The Ritz-Carlton Palm Beach
Palm Beach, Florida

Contact Info
Retail Real Estate
Chair: Jeffrey H. Newman
Sills Cummis & Gross P.C., Newark, New Jersey
(973) 643-7000, jnewman@sillscummis.com
Business Litigation
Chair: Patrick W. Michael
Woodward, Hobson & Fulton, L.L.P., Louisville, Kentucky
(502) 581-8000, pmichael@whf-law.com
ALFA Contact: Katie Garcia

June 16-18, 2010
Employment Practices Liability Insurance (EPLI) Seminar
The Ritz-Carlton Battery Park
New York, New York

Contact Info
Insurance
Chair: Jill F. Endicott
Woodward, Hobson & Fulton, L.L.P., Louisville, Kentucky
(502) 581-8000, jendicott@whf-law.com
Labor & Employment
Chair: Ronald G. Polly, Jr.
Hawkins & Parnell, LLP, Atlanta, Georgia
(404) 614-7400, rpolly@hplegal.com
Vice Chair: Michael J. Murphy
Carter, Conboy, Case, Blackmore, Maloney & Laird, Albany, New York
(518) 465-3484, mmurphy@carterconboy.com
ALFA Contact: Joely Nicholson
DISCLAIMER

The materials contained in this newsletter have been prepared by ALFA (American Law Firm Association) International member firms for information purposes only. The information contained is general in nature, and may not apply to particular factual or legal circumstances. In any event, the materials do not constitute legal advice or opinions and should not be relied upon as such. Distribution of the information is not intended to create, and receipt does not constitute, an attorney-client relationship. Readers should not act upon any information in this newsletter without seeking professional counsel. ALFA International makes no representations or warranties with respect to any information, materials or graphics in this newsletter, all of which is provided on a strictly “as is” basis, without warranty of any kind. ALFA International hereby expressly disclaims all warranties with regard to any information, materials or graphics in this newsletter, including all implied warranties or merchantability, fitness for a particular purpose and non-infringement.

This edition of the Products Liability Perspectives was compiled by Mary M. Oldendorph.