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A Word from Our Product Liability Litigation Practice Group Leader . . .

Our practice group and firm recently were recognized for superior client service. In September, our group was recognized as one of the top six national product liability practices most often recommended by corporate counsel. In December, Thompson Hine was named one of the top two law firms in the country for client service and the only firm ranked in the top tier for “provides value for the dollar” according to the *2010 BTI Client Service A-Team: Survey of Law Firm Client Service Performance*. We are honored to receive such recognition and strive to maintain our high standards for client service.

Individual lawyers in our group also have been active. **Fern O'Brian** is Chair of the Searle Civil Justice Institute Board of Overseers. Fern, along with **Barbara Lum**, also authored the chapter “An Overview of Evolving U.S. and International Nanotechnology Regulation” in *Regulating Nanotechnology: Creating Laws and Legal Institutions for Uncertain Risks* (David Dana, ed., Cambridge University Press 2011). Fern also wrote a chapter with **Conor McLaughlin** entitled “Settlement Issues under the Class Action Fairness Act,” for *Settlement Agreements in Commercial Disputes: Negotiating Drafting and Enforcement* (R. Rosen, ed., 2011). **Kip Bollin** was installed last October as the President of the Northern District of Ohio Chapter of the Federal Bar Association and serves on the eight-member Nominations and Elections Committee, which is responsible for nominating and electing national officers of the Federal Bar Association. **Tim Coughlin's** work as Program Vice Chair for the Defense Research Institute's (“DRI”) Toxic Torts and Environmental Law (“TTEL”) culminated in the TTEL Seminar on February 10-11. Also serving in a DRI leadership role, **Bill Hubbard** is the Vice Chair of the Building Products Specialized Litigation Group, which will host a break out session during DRI's Product Liability Conference on April 6-8.

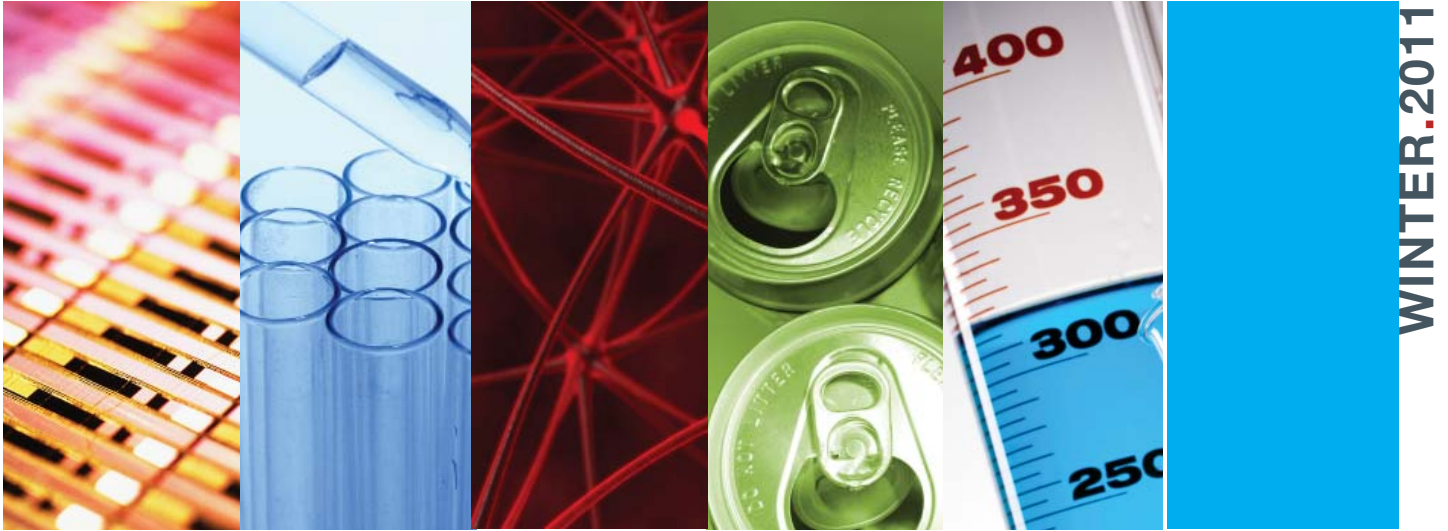
With respect to litigation trends, in 2011, we expect to see drug and medical device litigation expand to include suppliers. With the adoption of tort reform in various jurisdictions, there has been, and likely will continue to be, a decrease in filings related to a single event or occurrence. The plaintiffs' bar creatively has pursued larger matters often in the form of consumer class actions. Recent consumer class actions target the food industry, while others are based on the alleged failure of a product or service to meet or satisfy claims regarding environmental performance or attributes or other “green product” claims. Similarly, we anticipate an increase in consumer class actions related to products containing substances that recently have been banned or limited by federal and state regulation, including phthalates, BPA, and formaldehyde.

On the regulatory front, while the adoption of California's Proposed Green Chemistry Regulations has been postponed, we expect to see state and federal legislatures and agencies continue to implement regulations of chemicals and other products. Many of our clients have renewed focus on their supply chains to ensure that they have the information they need to respond to any new reporting requirements and to limit the risk from increased regulation. Additionally, in March 2011, the Consumer Product Safety Commission will go live with its public database (www.SaferProducts.gov), which will allow consumers to report and search for incidents of harm allegedly related to consumer products. This likely will result in an increase in risk assessment needs as manufacturers and suppliers evaluate how best to respond to reported incidents. On January 24, 2011, we presented a webinar titled “SaferProducts.gov: What Will It Mean For Your Bottom Line?” and we want to thank **Vince Castiglione** of Coby Electronics Corporation very much for joining us on the panel. If you were unable to join us, feel free to email Stacy.Weiner@ThompsonHine.com to obtain a copy of the presentation.

Given these trends, we hope you will find this issue timely and informative. We welcome your feedback and comments, as well as topic suggestions for future issues.

Missy Wright

FOCUS ON CONSUMER CLASS ACTIONS



Consumer class actions continued to proliferate in 2010, with drugs and medical devices, electronics, food and beverages, and appliances just a few of the affected product categories. The law also continued to develop along many fronts, with important rulings on certification issues like the viability of aggregate economic and statistical proof of causation and damages, and the standards for class certification. In this issue, however, we focus on several developments that will help shape when, and how often, plaintiffs can file consumer class actions in the first place.

Shady Grove. In March, a four-justice plurality of the United States Supreme Court, with Justice Stevens concurring, held in *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010), that a class action under state law may be maintained in federal court, even though state law bars class actions, if the bar is procedural rather than substantive, because Federal Rule 23 governs procedure in federal courts. Given the expanded access to federal courts created by the Class Action Fairness Act (“CAFA”), this ruling opened a potentially significant new avenue for consumer and other class actions previously thought to be barred by state law. Lower courts are now sorting through the many state laws containing class action bars to determine which ones are procedural versus substantive and thus ineffective to bar class actions in federal courts. Judge Kathleen O’Malley¹ of the Northern District of Ohio, for example, ruled that the restriction on

class actions in Ohio’s Consumer Sales Practices Act is substantive and bars class actions even in federal court. *McKinney v. Bayer Corp.*, No. 10-CV-224, 2010 U.S. Dist. LEXIS 103516 (N.D. Ohio Sept. 30, 2010). But the results of CAFA and *Shady Grove* may feel less like “fairness” and more like “Heads I win, tails you lose” to defendants when class action bars are found to be procedural rather than substantive.

Bridgestone. A more positive development that may strengthen the tools available to defendants is the impending appellate review of federal injunctions against repeat class actions. Consumer class action defendants perennially confront the problem of protecting their victories. Thanks to frequent one-sided application of preclusion rules and uncertainty in lower courts about the preclusive effect of class certification decisions, a defendant who defeats class certification once might have to do it again and again. The Seventh Circuit gave limited approval to injunctions against repeat class actions in *In re Bridgestone/Firestone, Inc., Tires Prods. Liability Litig.*, 333 F.3d 763 (7th Cir. 2003) (affirming denial of injunction against statewide class actions but reversing and remanding for entry of injunction against nationwide class actions). The soundness and proper scope of these injunctions remained in question, but injunctions against class actions have been approved in two more recent appellate decisions, one of which will be reviewed by the Supreme Court this term in a decision that should provide clarification.

¹ Judge O’Malley now sits on the Federal Circuit Court of Appeals in Washington, D.C.

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Thorogood. In *Thorogood v. Sears Roebuck & Company*, 624 F.3d 842 (7th Cir. 2010), *reh'g denied*, 627 F.3d 289 (7th Cir. 2010), the Seventh Circuit held that a district court abused its discretion by failing to enjoin a putative statewide class action filed in the Northern District of California after the Seventh Circuit had reversed certification of a broader class in the Northern District of Illinois. *Thorogood* was a putative 28-state class action alleging that Sears misled consumers about the stainless steel content of its washer drums. After the district court certified the class, the Seventh Circuit reversed, and the case was dismissed after an offer of judgment. Plaintiffs' counsel then filed a "copycat" action, *Murray v. Sears Roebuck & Company*, in the Northern District of California on behalf of California purchasers. That court, after initially ruling that *Murray* was collaterally estopped from bringing a second class action, allowed the case to proceed as a putative class action based on an amended complaint adding new allegations.

Facing potentially years of expensive discovery and litigation, Sears returned to the Northern District of Illinois for relief and moved to enjoin any further putative class actions by members of the putative *Thorogood* class or their lawyers. Sears invoked the All Writs Act, which gives federal courts the power to enter injunctions to protect their judgments from collateral attack. The District Court found that *Murray's* "copycat" class action was indeed barred by collateral estoppel, but denied Sears its injunction. The Seventh Circuit reversed, finding the denial of an injunction an abuse of discretion, because the harm to Sears in having to defend another putative class action, and facing litigation tactics that included "something close to extortion" was ir-

reparable and had no other remedy at law. *Thorogood* thus extended the scope of injunctions approved in *In re Bridgestone/Firestone* from repeat nationwide class actions to statewide class actions, when the grounds for the original denial would still apply to the statewide class.

Baycol. The injunction in *Thorogood* also applies to actions in state courts as well as in federal courts, which raises the question whether it runs afoul of the Anti-Injunction Act. As the Seventh Circuit itself noted, the Supreme Court has granted *certiorari* to answer that same question in a different case, *In re Baycol Prods. Litig.*, 593 F.3d 716 (8th Cir. 2010), *cert. granted sub. nom. Smith v. Bayer Corp.*, 131 S. Ct. 61 (2010). In *Baycol*, the district court denied certification of nationwide and West Virginia economic loss classes on grounds that commonality and predominance of common issues were lacking, then granted Bayer's motion to enjoin two absent class members from pursuing a similar class action in West Virginia state court. The Eighth Circuit affirmed, holding that the Anti-Injunction Act did not prevent the district court from enjoining re-litigation of its judgment. The Supreme Court heard arguments on January 18 on two questions: whether a district court may enjoin a subsequent class action in state court when neither the plaintiffs nor the issues presented are identical, and whether a district court that denies class certification has jurisdiction to enjoin absent class members.

An important practice note to keep in mind about collateral estoppel and denial of class certification: collateral estoppel and injunctive relief may not be available if the court did not determine that the named plaintiffs satisfied the requirement of

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adequate representation. Otherwise, due process may not allow enforcement against absent – and possibly inadequately represented – class members. Winning on issues like commonality and predominance is better than winning on adequacy.

AT&T. The future effectiveness of arbitration agreements in avoiding class litigation will also be shaped by the appeal from *Laster v. AT&T Mobility*, 584 F.3d 849 (9th Cir. 2009), *cert. granted sub. nom. AT&T Mobility v. Concepcion*, 130 S. Ct. 3322 (2010), in which the Supreme Court on November 9, 2010 heard argument on the question, “Whether the Federal Arbitration Act preempts States from conditioning the enforcement of an arbitration agreement on the availability of particular procedures – here, class-wide arbitration – when those procedures are not necessary to ensure that the parties to the arbitration agreement are able to vindicate their claims.”

Commentary reflects diverging views about what is really at stake in *AT&T*, but this is what happened: the plaintiffs sued over being charged sales tax on cell phones allegedly advertised to be free. Their service agreements with AT&T contained an arbitration clause that barred class or representative proceedings but (as amended) provided other terms strongly favoring consumers, such as a \$7,500 bonus plus doubled attorneys’ fees if the award exceeded AT&T’s final offer. Despite the strongly pro-consumer nature of the arbitration clause, the district court and the Ninth Circuit held that it was unconscionable under California precedent because it prohibited class arbitration.

At the heart of this case is the federal policy favoring enforcement of arbitration agreements, qualified by the Federal Arbitration Act’s “saving

clause,” which provides that arbitration agreements are valid and enforceable as a matter of federal law “save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. Can a state rule of “law or equity” that otherwise would trigger the saving clause go so far in invalidating arbitration agreements as to be preempted? AT&T argues, yes, a state rule of law holding that all class action waivers are unconscionable conflicts with federal law, in effect precluding arbitration agreements in all, but name.

What makes the case striking is that the arbitration agreement at issue was so favorable to consumers, setting up the argument that, by requiring agreements to allow class arbitration, California law in effect disallows arbitration no matter how favorable to consumers. Imposing class arbitration, AT&T argues, effectively transforms it into litigation. The Supreme Court’s ruling should give businesses some clarity about what arbitration terms they can expect to be enforced and, in particular, whether states may forbid class action waivers and, if so, under what terms.

Shaping the future. The trio of Supreme Court decisions in *Shady Grove*, *Baycol*, and *AT&T* will help shape consumer class action practice and strategy into the future. The Court opened one door in *Shady Grove*, and it may either open or close doors in *Baycol* and *AT&T*. Given that the Court also recently accepted a question seeking review of Rule 23(a) standards in *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010), *cert. granted*, 178 L. Ed. 2d 530 (2010), this may prove to be one of the most defining and consequential periods for consumer and other class action practice.

EMERGING TRENDS



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Canada Implements New Lead Limits

Lead is a toxic metal historically popular for use in consumer products because it is soft, pliable, and easy to work with. It also was used as an additive for gasoline and as a base in paints. But high levels of lead exposure can damage the brain and nervous system of children and lead to behavior and learning problems such as hyperactivity. In adults, exposure may lead to reproductive problems, high blood pressure, hypertension, and other nerve disorders.

Lowest allowable levels. The Canadian government recently issued final regulations under its Hazardous Products Act that impose some of the lowest allowable levels for exposure to lead content in the world. The restrictions apply to a variety of consumer products including toys and other children's products. The Consumer Products Containing Lead (Contact with Mouth) Regulations, part of Health Canada's Lead Risk Reduction Strategy for Consumer Products, limit the lead content of accessible parts of certain consumer products to 90 milligrams per kilogram (mg/kg) (0.009 percent) total lead on any parts of those products that can be touched, licked, mouthed, or swallowed. This limit applies to products produced domestically as well to imports.

The products immediately affected by these regulations include those, other than kitchen utensils, that come into contact with the user's mouth as part of normal use and products intended for use in play or learning by children under three years old. These products, known as Group 1 Products under Canadian regulations, include all toys intended for children under three: baby bottle nipples, straws, or other drinking aids; soothers or pacifiers; and sports or musical instrument mouthpieces. The 90 mg/kg limit also affects the amount of lead that can be in surface coating materials such as household paints, primers, clear coats, and pencils and artists' brushes that use a surface coating material.

The applicability of the 90 mg/kg lead limit will be expanded during the first half of 2011 beyond Group 1 children's products to include products intended for play and learning for children aged three to 13, child care articles, and clothing and accessories for children under the age of 14. Following full implementation of lead regulations affecting children's products, Canada will expand the regulations even further to include all products intended for preparing, serving, or storing food, such as kitchen utensils, and products intended to be burned or melted in enclosed spaces, such as candles.

Similar U.S. regulations. U.S. regulations limiting lead emissions and exposure in consumer products have been in effect since the early 1970s. As in Canada, the United States allows 0.03 percent total lead in all products intended for children age 12 and under. In August 2011, the U.S. lead limit for children's products will be reduced to 0.01 percent – slightly higher than the Canadian limit. Similarly, the Reduction of Lead in Drinking Water Act recently passed by the Senate and the House and signed into law by President Obama, amends the Safe Drinking Water Act so that the wetted surface of plumbing pipes, fittings, and fixtures cannot contain more than a weighted average of 0.25 percent lead.

The current U.S. lead regulations were promulgated in response to several high-profile recalls of children's products manufactured in China in 2007. Millions of toys made in China were pulled from the market because of high lead levels, and multiple consumer class actions were filed as a result. Canada's new regulations, in addition to reducing allowable lead levels by 85 percent, authorize its government to prevent importation and sale of products containing excessive amounts of lead.

EMERGING TRENDS



The Expanding Scope of Food-Related Litigation

The food industry is inundated with new legislation and litigation. Last year's health care reform legislation included provisions requiring most restaurants and vending machine companies to provide with nutritional and caloric information at the point of purchase. Another new law limits the types of food that can be sold in schools, and pending legislation promises to further increase regulation of food operations. San Francisco recently passed legislation to ban McDonald's from selling Happy Meals® unless they contain only low-calorie options. A class action lawsuit against McDonald's soon followed.

In addition to the McDonald's lawsuit, the plaintiffs' bar has launched other class action attacks, arguing that food companies contribute to obesity and other health problems in the United States by failing to accurately label their products. Plaintiffs argue that the marketing terminology either is factually incorrect (e.g., the product has more calories than stated) or misleads consumers (e.g., a product marketed as "nutritious" contains partially hydrogenated oils, which allegedly negate the nutritional value). A growing effort is gathering to portray the food industry as consciously producing foods that are physically addictive and to attack companies that market to children. Plaintiffs often seek to certify a class action based on varying legal theories, including state consumer protection statutes, which typically place a lower evidentiary burden on claimants. There are a number of bases for defending

food-related lawsuits. If the descriptive terminology at issue meets the requirements of the Federal Food, Drug, and Cosmetic Act ("FDCA"), plaintiffs' claims should be preempted. Additionally, the basic elements necessary to certify a class action often will be lacking. In particular, the putative class may fail to meet the commonality requirement because it is unlikely that an entire class purchased a particular food for the same reason. The U.S. Supreme Court's recent rulings in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 547 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), also provide a basis for attacking plaintiffs' vague allegations regarding deceptive labeling or the addictive qualities of the food product at issue.

Companies that market and sell food products should review their labeling and marketing strategies now, before litigation strikes. They should look first to whether their terminology complies with the standards set forth under the FDCA. And marketing departments should work with their legal counterparts to develop appropriate qualifying language that eliminates potential consumer misunderstandings. By carefully reviewing labeling and marketing material now, businesses can minimize the risk of being targeted next.

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Formaldehyde Update

The U.S. Environmental Protection Agency (“EPA”) has released a draft human health assessment of formaldehyde for peer review by independent agencies and public comment. The draft assessment concludes that “formaldehyde is carcinogenic to humans” through inhalation exposure. This assessment is consistent with the International Agency for Research on Cancer’s most recent (2009) position, which classified formaldehyde as a Group 1 human carcinogen. These findings are troubling because formaldehyde is ubiquitous in the environment and, according to the EPA, occupational exposures can occur in all work places.

Related to the EPA’s assessment, the Formaldehyde Standards for Composite Wood Products Act (“FSCWPA”), which amends the Toxic Substances Control Act, sets stricter formaldehyde emissions limits for plywood and other composite wood products. FSCWPA sets an emissions standard of roughly 0.09 parts per million (“ppm”) on all composite wood products sold in the United States, beginning on January 1, 2013. To ensure compliance with the new standard, composite wood manufacturers will be required to submit their products for third party testing and certification in time to meet that deadline. The law also directs the EPA to establish a national standard for formaldehyde in domestic and imported composite wood products.

The bill was prompted, in part, by lawsuits alleging toxic formaldehyde emissions from trailers supplied by the Federal Emergency Management Agency (“FEMA”) to New Orleans residents following Hurricanes Katrina and Rita in 2005. According to FEMA and the Centers for Disease Control and Prevention, many of those trailers had formaldehyde levels higher than U.S. residents typically experience. The trailer lawsuits have been consolidated in MDL No. 07-1873, *In re: FEMA Trailer Formaldehyde Products Liability Litigation*, in the U.S. District Court for the Eastern District of Louisiana.

While previous plaintiffs have brought lawsuits over formaldehyde-containing cosmetics and baby products, the plaintiffs in this MDL claim that their exposure to formaldehyde has caused them to suffer from chronic injuries, including respiratory complaints and an increased risk of cancer. So far, two bellwether cases have been tried before juries; both resulted in defense verdicts. Although these verdicts are good news for manufacturers of formaldehyde and formaldehyde-containing products, the EPA’s recent assessments are likely to lead to additional, and expanded, formaldehyde litigation.

For more information about formaldehyde, [click here](#).

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Proposed Revisions to the Green Guides

Responding to consumers' growing demand for environmentally friendly products, many companies have made a conscious effort to "go green" and use green buzzwords such as *recyclable*, *eco-friendly*, or *natural* in their advertisements. To avoid a Federal Trade Commission ("FTC") finding that their "green marketing" is unfair or deceptive, companies must comply with its Guides for the Use of Environmental Marketing Claims ("Green Guides"), which are being revised now.

Although the Green Guides do not have the force of agency regulations, they provide a roadmap to what the FTC generally finds appropriate. They had not been updated, however, since they first were issued in 1992. Recognizing that the green marketing landscape has changed significantly in recent years, and in an effort to protect consumers from deceptive claims and provide companies with further guidance, the FTC issued proposed revisions for public comment in October 2010.

The proposed revisions include changes that place a greater burden on companies to clarify their green terminology. For example, general environmental benefit claims, such as "environmentally friendly" and "eco-friendly," would have to be qualified to explain the basis for their use. Likewise, companies using seals of approval or certifications would be required to explain the scope of the product's green attributes so consumers do not misinterpret the certification or seal as a general environmental benefit claim. The proposed revisions also include changes and additions related to degradability claims, renewable materials/energy claims, and carbon offsets.

The most fundamental change, however, is the FTC's new expectation that companies explain any perceived ambiguity in their green marketing to avoid even the *possibility* of consumer confusion. Thus, green terminology that has been used for years based on widespread assumptions regarding the logical scope of that terminology now must be defined clearly so that consumers do not mistakenly believe that a product has a green attribute that it does not.

In addition to triggering adverse action from the FTC, failing to comply with the Green Guides also can subject a company to litigation. Recent "green litigation" is premised on state consumer protection statutes, which give consumers the right to file lawsuits based on perceived fraudulent or deceptive advertising. Such lawsuits are based on the allegation that unqualified green terminology misleads consumers into believing that a product has greater environmental benefits than it actually does, or that the advertising is misleading because the claimed environmental benefits are so ambiguous as to be unverifiable.

Because deceptive advertising theoretically influences the purchasing habits of countless individuals, causes of action based on such theories can provide the basis for class action litigation, which increases a company's exposure exponentially. Violations of the revised Green Guides could provide plaintiffs new fodder for such claims.

The public comment period ended on December 10, 2010, and the FTC is now finalizing the revised Green Guides. While the FTC has not yet announced when the revised Green Guides will be issued, it is clear the FTC will hold companies to higher green marketing standards. Thus, while awaiting the issuance of the revised Green Guides, companies should evaluate their green marketing practices with an eye to avoiding potential FTC action. Determining now whether terminology currently in use has the potential for ambiguity can help companies forestall green class action litigation.

More information about the regulations and risks associated with going green is available [here](#).

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FDA's Increased Regulatory Powers Over the Food Industry

President Obama recently signed into law the Food and Safety Modernization Act ("FSMA"), which applies to producers and/or distributors of domestic and imported food products other than restaurants and producers of meat and poultry. The FSMA substantially increases the Food and Drug Administration's ("FDA") authority to help prevent food-borne illness outbreaks and to limit their spread when outbreaks do occur.

In an effort to curb the number of outbreaks that occur, the FSMA mandates that the FDA increase the number of inspections at food facilities, with a focus on those determined to be "high risk" – a determination based on several factors, including known safety risks of the facility's food, the facility's compliance history with regard to past food safety violations, and the rigor and effectiveness of its efforts to prevent food-borne illness.

Specifically, the FDA will conduct inspections of high-risk facilities within the first five years after the FSMA's enactment and at least one inspection every three years thereafter. For other U.S. facilities, the FDA will conduct an inspection within the first seven years following FSMA enactment and at least one inspection every five years thereafter. The FDA's authority to inspect food facilities outside the United States has expanded as well. It gradually will increase inspections of foreign food facilities from at least 600 in the first year to nearly 20,000 inspections by the end of the sixth year after enactment.

The FSMA also requires food facilities to create food safety plans that identify potential hazards associated with their food production, and to develop and implement steps to eliminate or greatly reduce those hazards. The FDA will have the authority to review the plans and could require facilities to revise them if it determines that they need to be more robust.

The FDA's expanded powers to prevent outbreaks are not limited to increased inspection activity and the right to review food safety plans. If the FDA determines that a facility's food is likely to cause serious adverse health consequences or death, it will have the authority to suspend that facility's registration.

In addition to the FDA's expanded powers to prevent food-borne illnesses, its ability to limit the scope of any outbreak that does occur also is greatly enhanced. One of the most prominent examples is the FDA's recall powers. Under prior law, if the FDA determined that a recall was warranted, it only had the power to ask companies to voluntarily recall food. Under the FSMA, however, if a company does not issue a voluntary recall, the FDA now has the power to make one mandatory.

To give more meaning to the FDA's new recall powers, the FSMA also creates a pilot program to explore methods to track and trace contaminated food. Through this program, the U.S. Secretary of Health and Human Services is to work with the food industry to explore methods to determine the source and destination of contaminated foods so that the scope of recalls can be limited to the responsible facilities.

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All companies subject to FSMA regulations should review their procedures to ensure they are in compliance. Failure to comply could result in civil penalties under the Food Drug and Cosmetic Act, of which the FSMA is now part.

More information on the FSMA is available [here](#).

Expert Testimony Based on Differential Diagnosis

The Sixth Circuit recently issued a favorable decision confirming that experts purporting to use a “differential diagnosis” analysis to support their opinions must have done so reliably for their testimony to be admissible. Experts frequently attempt to offer causation testimony based on a differential diagnosis analysis, the process-of-elimination methodology used in the medical profession that involves identifying a symptom or condition and then identifying all of its potential causes, followed by tests to rule out as many potential causes as possible. If done effectively, the expert will be left with one remaining potential cause that cannot be ruled out through testing, and this result is a differential diagnosis of the cause of the symptom or condition.

While differential diagnosis analysis has been used in the medical profession for many years, it can be abused in legal processes. In *Tamraz v. Lincoln Elec. Co.*, 620 F.3d 665 (6th Cir. Sept. 8, 2010), the Sixth Circuit articulated a three-part test for determining whether an expert’s opinion based on a differential diagnosis analysis is sufficiently reliable to make the testimony admissible:

- (1) Whether the expert made an accurate diagnosis of the nature of the injuries;
- (2) Whether the expert reliably ruled in the potential causes; and
- (3) Whether the expert reliably ruled out rejected causes.

If a party fails to establish that an expert’s purported differential diagnosis-based opinion meets any of these three elements, that testimony must be excluded. Because the plaintiff in *Tamraz* failed to establish that a physician’s expert testimony satisfied the latter two elements, the Sixth Circuit reversed a \$20.5 million verdict in the plaintiff’s favor.

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The decision in *Tamraz* is applicable beyond medical causation opinions. It can be used by any party seeking to exclude expert testimony based upon a purported process-of-elimination analysis, such as in a product liability case in which an expert attempts to prove that a product defect caused an incident by ruling out all other potential causes. The second element of the test – the requirement that causes first be “ruled in” – is easily overlooked, but this critical step in the analysis can provide the basis for a Daubert challenge. Thus, this is an important and useful decision for defendants in product liability and personal injury litigation.

Federal and Ohio Rule Changes

Federal Court Expert Privileges

On December 1, 2010, Rule 26 of the Federal Rules of Civil Procedure was modified to provide work-product protection to most communications between attorneys and expert witnesses and to drafts of expert reports. Former Rule 26 provided for disclosure and discovery of “data or other information” considered by the expert witness, which courts interpreted to allow broad discovery of all communications between counsel and expert witnesses. This often resulted in the cumbersome, inefficient practice of strictly oral communication between counsel and the expert.

Amended Rule 26, however, should allow attorneys to communicate in writing more freely with their clients’ experts due to the Rule’s added protection for work-product and attorney/expert communications. Amended Rule 26(b)(4)(B) provides work-product protection to drafts of all expert reports and disclosures. Moreover, Amended Rule 26(b)(4)(C) protects most communications between experts and attorneys, with the exception of communications related to the following:

- (1) Expert compensation;
- (2) Facts or data that the attorney provided to the expert and the expert considered in forming his opinions; and
- (3) Assumptions that the attorney asked the expert to rely on in forming his opinions.

These additions are designed to allow counsel and retained experts to communicate openly to develop a theory of the case while keeping costs down.

Further, before the amendment, an employee of a party who would give expert testimony at trial did not have to be disclosed or provide an expert report, so long as the employee’s regular duties did not involve giving expert testimony. Now if a party intends to call such an employee as an expert witness at trial, the employee still need not provide a written report, but the party must disclose the employee and the subject matter on which the employee is expected to testify and provide a summary of the facts and opinions to which the employee is expected to testify.

Litigants should be mindful that these changes to the Federal Rules of Civil Procedure do not affect state rules of civil procedure, where attorney-expert communications and draft reports may still be subject to open discovery rules.

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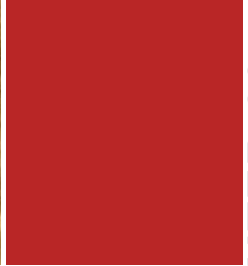
Ohio Pro Hac Vice Admission

Effective January 1, 2011, any non-Ohio attorney wishing to appear *pro hac vice* is subject to substantially revised requirements. Under amended Gov. Bar Rule XII, all Ohio *pro hac vice* admissions are centralized through the Ohio Supreme Court's Office of Attorney Services ("OAS"). Non-Ohio attorneys must file an application, which may be submitted electronically, and pay a \$100 annual registration fee, prior to making an application to appear *pro hac vice*. The OAS will maintain an online public directory of attorneys registered under the Rule and the cases in which they have received permission to appear *pro hac vice*.

It is important to note that non-Ohio attorneys may participate *pro hac vice* in no more than three proceedings in the same calendar year the application is filed. If a proceeding continues beyond that calendar year, it does not count toward the annual limitation; in essence, the count effectively "resets" each calendar year. Appeals, transfers and consolidations also are not counted toward the annual limitation.

Non-Ohio attorneys who fail to comply with the Rule's requirements face administrative termination of privileges to practice *pro hac vice* in Ohio.

WINS



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A Thompson Hine team led by Cleveland office Product Liability practice group members **Andrew Cox** and **Bill Hubbard** obtained a victory for Garmin International in an aviation case related to alleged pilot workload interference from advanced avionics. The action arose from a mid-air collision that plaintiffs' counsel tried to attribute to a pilot's interaction with a Garmin GPS system, claiming the pilot's use of that system distracted him to such an extent that he failed to visually scan for and detect the other aircraft. The Federal District Court entered summary judgment on multiple independent grounds, including a finding that the pilot's dereliction of his federally mandated duty under FAA regulations to "see-and-avoid" other aircraft constituted a superseding cause of the accident and that the danger of simply staring at a GPS display is open and obvious to pilots. The court's decision hopefully will serve as an important bulwark against future attempts by the plaintiff's bar to shift the blame from inattentive operators to product manufacturers.

Product Liability group members **Seth Litman** and **Leslie Suson** in our Atlanta office successfully defended a commercial installer of an insulation product, fiberglass reinforced plastic ("FRP"). Plaintiffs, a commercial chicken processor and its subrogating insurers, claimed more than \$260 million in damages against R&R Insulation Services, Inc. ("R&R") arising from a fire at its chicken processing plant in Gainesville, Georgia. Plaintiffs alleged the FRP caused the fire to spread further than it would have if a more fire-resistant product had been used, which increased their damages exponentially, and asserted negligence and failure-to-warn claims against R&R. The trial court denied R&R's motion for summary judgment in a one-line order, but the Court of Appeals of Georgia accepted an immediate appeal. On November 24, the appellate court reversed the trial court's decision, holding that R&R did not owe a duty to warn the processor and could not be negligent or negligent *per se* because of a lack of causation. It cited, among other evidence, that R&R had recommended an alternative (but more expensive) noncombustible product for the plant, which the processor rejected.

WHAT'S HAPPENING



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Fern O'Brian will speak at the [American Conference Institute's Summit on Drug & Device Product Recalls](#) on March 21-22, 2011 at The Union League in Philadelphia.

Kip Bollin will present "Impact of Shady Grove on Class Actions and the Plaintiffs' Bar Response" at [DRI's Product Liability Conference](#) on April 6-8 in New Orleans.

John Mitchell will speak at the [Ohio Innovation Summit](#) on April 19-20 in Toledo.

Tim Coughlin will speak at the [American Conference Institute's Second Annual Chemical Products Liability and Environmental Litigation](#) event on April 27-28 in Chicago.

Fern O'Brian will present at the [Personal Care Products Council's Annual Legal & Regulatory Conference](#) on May 17-20 in San Francisco.

Elizabeth Wright will speak at [American Conference Institute's Aviation Litigation Conference](#) on June 22-23 in Boston.

OUR CLIENT SERVICE PLEDGE

What Our Clients Can Expect From Us . . .

1. We will know your business.

We make it our business to understand your business. We will invest our time and resources to develop and maintain knowledge of the dynamics that impact both your industry and your organization. Understanding your business will help us provide better counsel to you.

2. We will plan our engagements with you.

We know that clients differ in their goals, risk tolerance and a variety of other factors that must be taken into consideration before work can begin on any matter. At the beginning of every significant matter, we will work with you to develop a plan to meet your strategic goals. By agreeing on a plan at the beginning—and adjusting it as needed—we will stay focused on what is most important to you.

3. We will manage your work as if we were the client.

We will work with you to manage your costs. We will staff every matter with the right resources, and we will manage the work as if we were the client—delivering the highest quality of service on time and in the most cost-effective manner.

4. We will be available when you need us.

We recognize that you often need to make swift decisions and act quickly. We will be ready to act for you when you need us, and we will make ourselves available wherever and whenever necessary.

5. We will communicate often.

Our goal is that you will never be surprised about developments in anything we are handling. We will provide regular updates on the progress of your matters, including all significant developments and changes to scope, timeline or budget.

6. We will provide the highest-quality counsel.

Above all else, we stand for the highest quality. Our lawyers, paralegals and staff take pride in the work they do. From the boardroom to the courtroom, you can count on Thompson Hine for the highest-quality service.

What Our Clients Can Do To Help . . .

1. We ask you to share your goals.

The more we know about your goals, the better we can manage our services to help you attain them. If your goals change as a matter progresses, we ask that you tell us, so we can adjust our approach to meet your expectations.

2. We want to know your preferences for working with us.

We ask you to tell us your preferred methods of communication, invoice and billing procedures, and anything else that is important to you, so that we can deliver our service the way you want it.

3. We need your feedback.

We want your feedback on our performance so that we can continue to meet and exceed your expectations.

About the Group

Our Product Liability lawyers have handled tens of thousands of cases throughout the United States and abroad involving all facets of product liability law. We have litigated product liability and major tort matters in a wide range of industries, including admiralty and maritime, aerospace, automotive, chemicals, commercial and consumer products, electrical, food equipment, mechanical, medical devices, nanotechnology, pharmaceuticals, and plastics.

Our trial lawyers actively are involved in national product liability organizations and have lectured and written extensively on product liability matters. We act as national and regional product liability counsel for Fortune 500 companies, protecting their interests throughout the United States and abroad. Our practice covers all aspects of product liability matters, from preventive counseling and alternative dispute resolution through trial and appeals.

For more information about our practice group and its services, contact: **Elizabeth B. Wright • Practice Group Leader, Product Liability Litigation**

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216.566.5716

About Thompson Hine

Established in 1911, Thompson Hine is a business law firm dedicated to providing superior client service. The firm has been recognized as one of the Best Corporate Law Firms in America in an annual survey of corporate directors conducted by *Corporate Board Member* magazine. With approximately 400 lawyers in offices in **Atlanta, Cincinnati, Columbus, Cleveland, Dayton, New York, and Washington, D.C.**, Thompson Hine serves premier businesses worldwide, including:

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