THOMPSONHINE

WINTER 2015

Product Liability eNewsletter
in this issue

THOMPSON HINE

admiralty & maritime
automotive litigation | food industry
aviation litigation | green products litigation
pharmaceutical & medical device litigation | mass & toxic tort litigation
consumer product safety | risk management | phthalate litigation

THOMPSONHINE

WINTER 2015

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

Our practice has been quite busy since our last edition. We secured significant wins for clients in the aviation, food equipment, industrial hose, maritime, and commercial adhesive industries. We thank these clients for entrusting us with their matters and look forward to continuing to help them achieve their legal and business goals.

In October, **Tim Coughlin** (Cleveland) hosted our first annual Chemical Industry General Counsel Symposium, an interactive two-day forum tailored to our chemical industry clients. Also in October, **Jennifer Mountcastle** (Columbus) and I presented on product warnings to the Outdoor Power Equipment Institute.

In this issue is an article by **Tim Coughlin** and **Barbara Lum** (Cleveland) addressing the impact of *Dukes* on mass toxic tort class certification. **Conor McLaughlin** (Cleveland) and **Neelam Gill** (Washington, D.C.) provide an update on food litigation. **Eric Daniel** (Cleveland) discusses punitive damages in maritime litigation. **Jennifer Mountcastle** and **Carolyn Cole** (Cleveland) explore the use of social media in discovery. **Gary Glass** (Cincinnati) and **Greg Thompson** (Cleveland) discuss the ramifications of compliance with OSHA's Revised HazCom Standard. **Eric Heyer** (Washington, D.C.) and **Neelam Gill** write about product liability concerns arising from the use of lithium ion batteries in e-cigarettes.

We are also pleased to run a guest article from our intellectual property colleagues **Megan Dortenzo** and **Brian Kenney** (both Cleveland) on the U.S. Supreme Court's recent rulings on software and business process patents.

We hope you enjoy our newsletter and, as always, welcome your questions, feedback, and suggestions for future editions.

Regards,

Andrew H. Cox

Food Industry Litigation: An Update on Recent Trends

Food Labeling Claims & Consumer Class Actions

The food industry has been the subject of increased regulation relating to food content and labeling. Last fall, the FDA released new menu labeling rules for chain restaurants, supermarkets, and other venues that prepare food, such as movie theatres and amusement parks.[1] The new regulations require restaurants to conspicuously display calorie information for all standard items on all menus and menu boards; the rules cover alcoholic beverages as well. These new rules potentially open up additional groups of food producers and sellers to deceptive advertising and other consumer claims regarding food ingredients and content.

Plaintiffs continue to assert claims related to food labeling and advertising under state consumer fraud, unfair trade practices, or unfair competition laws. These state statutes provide a viable option to plaintiffs because they are more amenable to class action certification and make it easier for consumers to pursue claims involving minimal individual damages. Further, some statutes authorize attorneys' fees and treble damages. These factors have led to a surge in consumer class actions against food and beverage manufacturers – approximately 150 food class actions have been filed nationwide since 2011, with the majority filed in California courts, followed by New Jersey in number of class action filings.

The current focus of the plaintiffs bar is on "all natural" and health-content claims. A large number of deceptive advertising actions have targeted all natural claims for products that also contain synthetic or artificial ingredients, preservatives, high-fructose corn syrup, or genetically modified ingredients such as corn or soy, among others. For example, in *Astiana v. Ben & Jerry's Homemade,* No. 10-cv-4387 (N.D. Cal.), the plaintiffs brought allegations that the ice cream was mislabeled all natural because it contained chocolate alkalized with synthetic ingredients. The court, however, denied the motion for class certification because the plaintiffs failed to identify an ascertainable class and could not establish a class-wide manner of awarding damages based on price-inflation theory (i.e., that consumers pay premium for natural products). Although the FDA

[1] See Food Labeling: Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments, FDA docket number 2011-FDA-F-0172-0001.

has not yet promulgated a formal definition of the term "natural" foods, it has stated that the use of "natural" on food labeling means that "nothing artificial or synthetic […] has been added to a food that would not normally be expected to be in the food."[2] The FDA's inaction in establishing a formal definition for "natural" has resulted in a lack of judicial uniformity and consistency.

Health-content claims are another popular target for consumer class action lawsuits. These actions often involve allegations that claims about health benefits are unsubstantiated. In one class action, plaintiffs alleged that docosahexaenoic acid (DHA) brain health claims for Dean Foods' Horizon Organic Milk were false because Dean Foods did not have sufficient scientific evidence to support its representation. *Auer v. Dean Foods Company et al.,* No. 2:12-cv-00865 (D. Ariz.). Other allegations simply focus on undisclosed ingredients (e.g., salt, sugar, caffeine) or ingredients represented in a deceptive manner (e.g., representing sugar as "evaporated cane juice"). For instance, energy drinks, which are regulated as "dietary supplements" and not food, often contain undisclosed ingredients, such as large amounts of caffeine, vitamins in amounts greater than the recommended daily amount, artificial flavorings and colors, and are frequent targets for such suits.

To date, these types of taxes have not been widespread. And the food industry was successful in overturning New York City's soda ban and passing legislation in several states, including North Carolina, Mississippi, and Oklahoma, that shield food producers and sellers from liability for obesity-related claims.

The Plaintiffs Bar's Use of the Tobacco Litigation Model

The most alarming trend in food industry litigation is the plaintiffs bar's apparent desire to use the tobacco-litigation model to aggressively target the food industry with obesity-related litigation. Tobacco litigation exploded when Mississippi's attorney general filed a *parens patriae* action that ultimately resulted in a settlement exceeding $200 billion and involving 46 states. In late 2013, a group of plaintiffs lawyers began pitching state attorneys general to initiate similar *parens patriae* lawsuits to make the food industry reimburse state governments for obesity-related health care costs, arguing that medical spending on obesity-related health conditions costs hundreds of billions annually.

There also have been several attempts by municipalities to subject food products to a "sin tax" like tobacco and alcohol. For example, in November 2014, Berkeley, California enacted a one-cent-per-ounce tax on sugar-sweetened beverages and flavored drinks. A similar referendum in San Francisco for a two-cent-per-ounce tax on sugary drinks failed, but the measure did receive nearly 55 percent of the vote (it needed a two-thirds majority to pass). These votes follow other attempts to regulate sugary drinks, such as the ill-fated New York City ban on the sale of sweetened drinks larger than 16 oz. and the multipronged

[2] The FDA stated, "[w]e respectfully decline to make a determination at this time regarding whether […] food products containing ingredients produced using genetically engineered ingredients may or may not be labeled 'natural.'" U.S. Food & Drug Administration, Letter to The Honorable Yvonne Gonzalez Rogers and The Honorable Jeffrey S. White, U.S. District Court of Northern District of California, and The Honorable Keven McNulty, U.S. District Court of District of New Jersey (January 6, 2014).

attack on energy drinks. To date, these types of taxes have not been widespread. And the food industry was successful in overturning New York City's soda ban and passing legislation in several states, including North Carolina, Mississippi, and Oklahoma, that shield food producers and sellers from liability for obesity-related claims.

Other aspects of the general strategy employed against the tobacco industry are taking shape in the form of activists targeting certain foods. For example, activists have pushed fast food restaurants into voluntarily posting calorie information and offering healthier menu alternatives. Further, soda companies have voluntarily agreed to remove sugary drinks from schools and most fast food companies no longer include soda as a standard menu item in kids' meals.

And government intervention is increasing. The state of California and several major cities such as New York and Philadelphia have enacted complete or partial bans on the use of trans fats in food and food production. Additionally, in November 2013, the FDA issued a preliminary determination that partially hydrogenated oils, the source of trans fats, are no longer "generally recognized as safe." Foods containing additives not generally recognized as safe cannot be sold legally in the United States unless such additives have undergone premarket review and approval for that use by the FDA. While the FDA's determination on trans fats is not yet final, it indicates the direction the government is heading.

Defenses Available to the Food Industry

Food companies have several important defenses to consumer fraud class actions. Most importantly, the general attacks are on class ascertainability and the inability of a consumer class action to assert a workable damages model under the U.S. Supreme Court's landmark decision in *Comcast Corp. v. Behrend.* In addition, companies may assert that state law labeling claims are preempted by the Food, Drug and Cosmetic Act as amended by the Nutrition Labeling and Education Act (NLEA). The extensive nature of federal food labeling requirements makes the preemption defense a viable, though not always successful, option. A labeling preemption analysis stems from NLEA's preemption clause prohibiting states from "directly or indirectly establish[ing]" requirements that are "not identical" to FDA requirements for standards of identity, ingredient listing, nutrition content, and health-related claims for FDA-regulated foods. See 21 U.S.C. § 343-1(a)(1)–(5). Generally, labeling statements specifically required or permitted under the FDA's regulations may preempt any conflicting or non-identical state labeling requirements.

Another possible defense is the doctrine of primary jurisdiction. Under this doctrine, a district court has discretion to stay the case while an administrative agency considers an issue and retain jurisdiction or dismiss the case without prejudice, provided the parties are not unfairly disadvantaged. An advantage of this approach is that it coordinates judicial and administrative decision-making and promotes consistent and uniform standards. A primary jurisdiction defense is particularly feasible when an agency such as the FDA is actively considering an issue raised in the litigation. Although courts may stay matters for a limited time to allow agencies an opportunity to advise on the issue, the stay may be lifted if the agency does not address the issue within the specified time period due to a lack of resources.

Conclusion

The landscape of food litigation is evolving rapidly and taking on some of the early characteristics of tobacco litigation. Plaintiffs lawyers will continue asserting obesity-related claims focused on the social and medical costs of obesity, hoping to lay those costs at the food industry's doorstep. In the meantime, the food industry will continue to defend against a wide range of food labeling and consumer class action claims.

E-Cigarettes: Product Liability & Lithium Ion Batteries

Introduction

E-cigarettes, also commonly known as personal vaporizers or electronic nicotine delivery systems, are an alternative to conventional combustible cigarettes. E-cigarettes use a heating element such as an atomizer or cartomizer to vaporize a nicotine-based "e-liquid" solution. They are available in automatic or manual variations. Manual e-cigarettes require the user (or "vaper") to activate an external switch to power the heating element, whereas automatic e-cigarettes activate the heater when the user inhales from the e-cigarette. Despite differences in design and use characteristics, both types rely on batteries for their power. Rechargeable lithium ion batteries are among the most common types of batteries used. The ubiquitous lithium ion batteries are also found in other portable consumer electronic products such as cellphones, laptops, tablets, MP3 players, radios, and GPS devices. Given their prevalence and significance for product performance, batteries are often subject to a number of standards and testing methods. The following is a brief overview of how federal government regulations govern lithium ion battery use in e-cigarettes.

Food and Drug Administration

Through the Family Smoking Prevention and Tobacco Control Act enacted in 2009, the FDA was granted jurisdiction to regulate tobacco products. In April 2014, the FDA published proposed regulations that would deem e-cigarettes to be tobacco products, thus bringing this relatively new and thus far unregulated product category under the regulatory authority of the FDA.

While the FDA's attention to e-cigarettes so far has focused primarily on health concerns associated with their use, other aspects of these products, such as the battery component, are starting to receive additional attention as the agency works to establish product standards and an overall regulatory framework for these products. While the FDA does not directly regulate batteries, it is responsible for regulating the safety and performance of medical devices and thus may indirectly regulate batteries in this context. To this end, it is actively considering how manufacturers are currently using standards and accredited laboratories for battery testing, including Underwriter Laboratories (UL) Standard for Safety 1642: Lithium Batteries; UL Standard for Safety 2054: Household and Commercial Batteries; and International Electrotechnical Commission (IEC) Standard 62133, among others. Because these standards focus on the safety of the batteries alone and do not address overall product safety testing of the entire e-cigarette, it is likely that the FDA will impose specific requirements for overall product testing as part of its final regulatory scheme governing the sale of e-cigarettes and their components in the United States.

U.S. Postal Service

The United States Postal Service (USPS) updated its mailing standards on international mail shipments containing certain lithium batteries in 2012. The Mailing Standards of the United States Postal Service, International Mail Manual, sections 135.6 and 136.1, were revised to remove a previous prohibition against mailing lithium metal or lithium ion batteries internationally. Other prohibitions remain in effect, however, such as the shipment of lithium metal or lithium ion batteries to some countries or the prohibition on shipping to ***any*** country using Global Express Guaranteed Service. As of November 15, 2012, certain limited quantities of lithium metal or lithium ion batteries may be mailed internationally, provided they are properly packaged and installed in the equipment they are intended to operate. Furthermore, USPS regulations require both primary lithium (nonrechargeable) and secondary lithium ion (rechargeable) cells and batteries to meet testing requirements specified in the UN Manual of Tests and Criteria, part III and subsection

38.3 as referenced in the Department of Transportation's hazardous materials regulations at 49 CFR § 171.7.

Consumer Product Safety Commission

The U.S. Consumer Product Safety Commission (CPSC) is responsible for administering several statutes, including the Consumer Product Safety Act (CPSA) and Federal Hazardous Substances Act (FHSA). The CPSA excludes from the definition of a "consumer product," and thus from the CPSC's jurisdiction, "tobacco" and "tobacco products."[3] The legislative history of the exclusions in the CPSA and FHSA make it apparent that Congress intended that CPSC not regulate any hazards associated with traditional cigarettes. While the CPSC has advised that traditional tobacco products do not fall under its jurisdiction,[4] it has not yet addressed the issue of whether it would define the term "tobacco products" as used in the CPSA to include e-cigarettes or whether they and their components are subject to certain testing standards that apply to other consumer products. The use of the same defined term "tobacco product" in the more recent Family Smoking Prevention and Tobacco Control Act, extending FDA's authority over all tobacco products, would suggest that e-cigarettes would be exempt from CPSC's jurisdiction.

U.S. Fire Administration

As an entity of the U.S. Department of Homeland Security's Federal Emergency Management Agency, the U.S. Fire Administration (USFA) is responsible for providing a foundation for fire prevention, preparedness and response. In October 2014, USFA issued a report that presents an overview of e-cigarettes, recent fire and explosion incidents, and the impact of lithium ion battery failures. According to this report, 25 incidents of explosion and fire involving an e-cigarette were reported by the U.S. media between 2009 and August 2014. Two incidents occurred during use, and one incident occurred during transportation on a cargo aircraft. Interestingly, most incidents (approximately 80 percent) occurred while charging, and USFA noted that a variety of charging sources were used, including laptop USB ports, auto USB adapters, desktop computer USB ports, and wall adapter USB ports. One of the conclusions presented in USFA's report was that many fires and explosions can be prevented simply by using proper charging techniques and charging batteries in accordance with the manufacturer's instructions.

Pipeline & Hazardous Materials Safety Administration

U.S. Department of Transportation's (DOT) Pipeline and Hazardous Materials Safety Administration (PHMSA) oversees the transportation of hazardous materials by air, rail, highway, and water in the United States. On August 6, 2014, the PHMSA published a final rule revising U.S. transportation regulations for lithium batteries. It developed this rule in close

[3] *See* section 3(a)(5)(B) of the CPSA, 15 U.S.C. § 2052(a)(5)(B).

[4] *See* U.S. Consumer Product Safety Commission Advisory Ruling No. 252 (March 15, 1984) (available at http://www.cpsc.gov//PageFiles/107052/252.pdf).

coordination with the Federal Aviation Administration, and revisions significantly enhanced safety conditions for the shipment of lithium cells and batteries. A few of the revisions focused specifically on shipments by air to ensure that lithium cells and batteries are able to withstand normal transportation conditions and are packaged to reduce the possibility of damage. The final rule also attempts to harmonize hazard communication and packaging provisions for lithium batteries and the Hazardous Materials Regulations with international transportation regulations, such as the United Nations Model Regulations, the International Civil Aviation Organization's Technical Instructions for the Safe Transport of Dangerous Goods by Air, and the International Maritime Dangerous Goods Code. For instance, the rule requires replacing equivalent lithium content with watt-hours for lithium ion cells and batteries. Compliance with these amended regulations is mandatory by February 6, 2015.

Other PHMSA regulations provide information on the exceptions and packaging for shipping based on details of weights, tests, and classifications, as well as a hazardous materials table that provides related shipping information. Further, importers of batteries must fully understand their obligations to provide complete shipping and shipper's certification information at the place of entry into the United States and to follow recordkeeping requirements, among others. 49 C.F.R. § 171.22(f).

Conclusion

Lithium ion batteries potentially pose significant product liability challenges for electronic cigarette manufacturers due to their role in proper product performance and the inherent dangers associated with design and construction failures. Although federal government regulations currently govern some aspects of lithium ion battery use in e-cigarettes, such as mail delivery and transportation, there is currently a lack of regulation addressing overall product safety. The FDA may fill this gap by imposing specific requirements for product testing as part of its final regulatory scheme governing e-cigarettes and their components. In the meantime, the growing popularity of e-cigarettes and constantly evolving technological advancements will continue to pose product liability challenges for manufacturers.

The Latest Discovery Tool: Social Media

Not too long ago individuals documented the details of their lives with pen and paper. Serving discovery requests seeking journals and calendars was a typical strategy to find admissions or other information that might undermine the veracity of a personal injury plaintiff's claims. We can find such information, and much more, using today's technology. The average social networking profile can provide a wealth of information about parties, witnesses, and even potential jurors, including data on an individual's age, occupation, hometown, education, relationships, interests, activities, health, and feelings.

Information discovered on social media increasingly is becoming key evidence in litigation.[5] In a recent product liability multidistrict litigation case, for example, the claims of a bellwether trial plaintiff were dismissed after photos discovered by the defendants on Facebook appeared to show the plaintiff competing in strenuous high-speed powerboat races, discrediting his claim of permanent and severe disability.[6] Detailed below are some of the best practices for engaging in social media discovery and laying the groundwork for its admission at trial.

Accessing Social Media Information

Finding public information on most social media websites is easy. Sites such as Facebook typically have a search function – simply type in an individual's name and view his or her profile. The information shown is considered public information, free to view and use. Be thoughtful about who is asked to capture information found through internet searches, however, as it may be necessary to have the searcher become a witness to authenticate the information.

Many individuals now impose privacy settings on their social media accounts, which means certain information can only be seen by individuals of their choosing, such as "friends." An attorney or client should not "friend request" an opposing party, witness, or juror to see their private information; such contact (whether by a lawyer, client, or third party acting at their direction) is no different than contact through means other than social media and, therefore, can be deemed unethical, depending on the target's role in the litigation. Private information on parties and third party witnesses must be sought through formal discovery procedures, discussed further below.

The Litigation Hold

When issuing a litigation hold letter to the plaintiff's attorney, consider including smartphone activities, computers, social media accounts, blogging activity, and other webpages where comments are posted. Not only will the letter help prevent spoliation of evidence, it will send a signal to opposing counsel that you intend to defend the case aggressively. If a litigation hold was issued and it is later discovered that information from a social media website or email account was deleted, the deleting party likely will be sanctioned, such as with an adverse inference instruction to the jury that whatever has been deleted can be assumed to include information damaging to the opposing party's case.[7]

Whom to Obtain Social Media Discovery From

Because social media activity involves both a user and a provider of the service, the first issue is to whom to direct social media discovery requests. It likely will be easier to obtain discovery from the user whose activity you are interested in, such as the plaintiff, than from the provider. While enacted long before the advent of social media, providers have successfully challenged subpoenas seeking user activity by invoking the

[5] *Dexter v. Dexter,* 2007 WL 1532084, *1 (Ohio App. Div. May 25, 2007).

[6] *In re Welding Fume Products Liability Litigation,* MDL 1535, No. 03-17000 (N.D. Ohio).

[7] See *Gatto v. United Air Lines, Ltd.,* No. 10-cv-1090-ES-SCM, 2013 U.S. Dist. LEXIS 41909, at *15 (D. N.J. March 25, 2013) (granting defendant's request for adverse jury instruction against plaintiff when plaintiff deleted Facebook account).

Stored Communications Act, which prohibits service providers from disclosing content of electronic communications they store unless the party to the communication consents to its disclosure.

What to Request

In both written and oral discovery of parties and appropriate key witnesses, fully explore the following:

- All social media accounts held and history and frequency of use;
- Blogging activity, both on blogs maintained by the individual and by others;
- Other webpages where comments have been posted, such as news websites and other online forums regularly visited;
- Usernames used in online activities so that posts authored by the individual can be identified;
- Smartphone activities, including texting, gaming, and internet activities; and
- Information about computers used for online activities.

Request printouts of all online activity, both public and private, that relate to the subject matter of the lawsuit. In a personal injury case, seek from the plaintiff all content, including posts and photographs, relating to the accident that allegedly caused injury, the plaintiff's alleged injuries and damages, and, depending on the nature of the alleged damages, all content that relates to those damages, such as posts regarding health, emotional state, education, work, and relationships.

No Fishing

Be careful to properly tailor your requests, as courts have found overbroad requests to be "fishing expeditions."[9] With respect to social media activities, a court likely would not approve of requests for all private content, regardless of subject matter, without some showing that relevant posts are likely to be found in nonpublic postings and have not been provided.[10] Thus, it is important to lay the foundation for demonstrating that access to private posts is warranted, such as because it is based on the content of public posts or through deposition testimony.

Also think very carefully before asking for passwords. Not only have some courts held that such requests are improper,[11] accessing another individual's account exposes the requesting attorney or party to claims that they altered or deleted content while accessing it. The better course, where the circumstances clearly warrant a request for confirmation that all relevant private content has been provided, is to request that the court review the content *in camera,* require the plaintiff to execute a consent authorizing the service provider to produce the information to the requesting party, or authorize a third party vendor to access and provide the information.

In addition, before aggressively pursuing social media discovery, make sure the strategy will not backfire if plaintiff's counsel turns the tables on you. Evaluate the defendant's social media policies and activities to ensure it is not engaging in activities that would yield unfavorable evidence if social media requests are served upon it.

[8] *Id.* at *5.

[9] *See Tompkins v. Detroit Metro. Airport,* 278 F.R.D. 387, 389 (E.D. Mich. 2012); *See also Mailhoit v. Home Depot U.S.A., Inc.,* 285 F.R.D. 566, 572 (C.D. Cal. 2012) (rejecting request for "any profiles, postings or messages" from any social media site for a seven-year period).

[10] *See Zimmerman v. Weis Markets, Inc.,* No. CV-09-1535, 2011 Pa. Dist. & Cnty. Dec. LEXIS 187, at *10 (Pa. C.P. Northumberland May 19, 2011).

[11] *Howell v. Buckeye Ranch, Inc.,* No. 2:11-CV-1014, 2012 U.S. Dist. LEXIS 141368, at *3 (S.D. Ohio Oct. 1, 2012).

Using Social Media Information at Trial: Authentication Issues

One of the greatest challenges to using social media evidence at trial is authentication. The law, particularly regarding authentication of posts, is still developing. If the user will not authenticate the evidence, courts have used Federal Rules of Evidence Rule 901(a) as a basis for determining whether the information has been sufficiently authenticated. The rule provides that "[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." But courts have varied on what this requires, from simply asking whether a jury could reasonably find the evidence to be authentic, to requiring deposition testimony from the user attesting to its authenticity. In *State v. Bell,* the court admitted printouts of online conversations and email messages between one of the victims and the appellant based on testimony by the victim that the printouts were true and accurate copies of the alleged online conversations and emails, and explained how he retrieved them.[12] Other options include having a witness testify that she visited the website, read the information on it, and can accurately identify it, or bringing in a forensic computer expert to testify as to the printout's origin.

Be prepared for an opposing party to object to social media information on hearsay grounds.[13] While an opposing party's posts will come in as an opposing party statement under FRE 801(d)(2), posts and tweets by others may be considered hearsay. Posts, tweets, or texts that describe an event while the user is perceiving it or immediately thereafter may be admissible as a present sense impression under FRE 803(1).[14]

Conclusion

Plaintiffs in personal injury cases have had the upper hand in discovery for quite some time, particularly with the relatively recent advent of ESI discovery. Plaintiffs' counsel could request expansive, costly discovery, knowing their client did not have such materials. While the increase in the use of social media, and corresponding creation of information potentially relevant to litigation, may not completely level the playing field, it certainly helps. Plaintiffs' counsel may think twice about serving burdensome ESI requests now that the favor can be returned. The development of an aggressive social media discovery strategy can both help uncover helpful information to defend the case and provide leverage to contain costs and achieve a favorable resolution.

[12]*State v. Bell,* 882 N.E.2d 502, 512 (Ohio Ct. Com. Pl. 2009), aff'd, No. CA 2008-05-044, 2009 WL 1395857 (Ohio Ct. App. May 18, 2009). *See also State v. Jaros,* No. L-10-1101, 2011 Ohio App. LEXIS 4155, 2011 WL 4529312 (Ohio Ct. App., Lucas County Sept. 30, 2011) (holding that text messages were properly authenticated by a witness who identified messages sent to her cell phone from defendant's email address).

State v. Yates, No. 96774, 2012 Ohio App. LEXIS 809 (Ohio Ct. App., Cuyahoga County Mar. 8, 2012) (holding that testimony from a representative of MySpace and a witness whose photograph was on the account was sufficient to support a finding that "the matter in question is what its proponent claims it to be").

[13]See, e.g., *Miles v. Raycom Media, Inc.,* No. 1:09CV713-LG-RHW, 2010 U.S. Dist. LEXIS 122712, at *6 (S.D. Miss. Nov. 18, 2010) (holding that unsworn statements made on Facebook pages by nonparties were inadmissible under Fed. R. Evid. 801). But *see Witt v. Franklin Cnty. Bd. of Educ.,* No. CV-11-S-1031-NW, 2013 U.S. Dist. LEXIS 27446 (N.D. Ala. Feb. 28, 2013) (admitting three Facebook messages on summary judgment even though they were "classic hearsay" because plaintiffs could reduce them to admissible form by calling witnesses).

[14]*See e.g., State v. Damper,* 225 P.3d 1148, 1152 (Ariz. App. 2010).

To Comply or Not to Comply: Has OSHA's Revised HazCom Standard Created a Catch-22 for Chemical Manufacturers?

Under OSHA's revised hazard communication (HazCom) standard (29 C.F.R. 1920.1200), chemical manufacturers must revise their safety data sheets[15] and product labels by June 1, 2015. The new HazCom standard also mandates that after December 1, 2015, no distributor shall ship a chemical without a new HazCom label. The goal of the revised HazCom standard is to bring the U.S. standard in line with the United Nations Globally Harmonized System (GHS) for Classification and Labeling of Chemicals. Its purpose is to promote international trade and improve the safety of workers everywhere by ensuring that different manufacturers label the same chemicals the same way.

Modeled on the GHS standard, the revised HazCom standard requires chemical manufacturers to evaluate and warn about the hazardous effects of their chemicals consistently. Chemical manufacturers are required to provide uniform product labels with harmonized signal words, pictograms, hazard statements, and precautionary statements. They are also required to provide a safety data sheet for their chemicals in a new format that contains 16 required sections.

The revised HazCom standard also requires manufacturers to follow specific criteria when they classify and categorize the health and physical hazards of their chemicals and prepare their safety data sheets and product labels. One of the most significant changes in the revised standard is in Appendix A, which provides the detailed criteria and methods for classifying and categorizing chemical health hazards, especially the determination whether exposure to a given chemical poses acute and chronic adverse health effects.

Weighing the Evidence

Under HazCom and the GHS, manufacturers must classify the hazards posed by their chemicals by weighing all available evidence. This includes information from human epidemiological and clinical studies, in vitro testing, structure activity relationship models, case reports, extrapolations, and animal studies – many of which do not pass muster as "good science" under *Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. 579 (1993) and its progeny.

For example, the criteria under the new HazCom standard and GHS require hazard classification and categorization of certain chemicals even without human epidemiological evidence. Thus, the criteria provide a more relaxed standard for establishing causation than is permitted under *Daubert.* Under the new standard, hazard classifications are required so long as the criteria in Appendix A are satisfied, notwithstanding that the evidence allowed under the criteria may not be admissible under *Daubert* because it has not been validated through accepted scientific methodology. And therein lies the "rub."

Catch-22

Some commentators have speculated that compliance with the revised HazCom standard is a "Catch-22" for chemical manufacturers. The argument goes something like this: To comply with the new HazCom standard, chemical manufacturers essentially must admit (after applying the criteria in the Appendix A) that their product poses certain hazards. They also must provide warnings about those hazards based upon the hazard classification mandated by the standard, even though exposure to the product might not be considered a "hazard" under a *Daubert* analysis. In other words, they may be required to classify their chemical as a "hazard" under the standard even if the methodology for

[15]Safety data sheets (SDS) were formerly termed material safety data sheets (MSDS).

determining causation is not generally accepted or validated through acceptable methodology.

The rub is that a plaintiff may then attempt to use the manufacturer's own hazard classification, which also is found in its warnings and safety data sheets, as a sword against the manufacturer in litigation. The plaintiff's argument would be that since the manufacturer identified certain risks on its product labels and safety data sheets, it has admitted for purposes of trial that its chemical caused the plaintiff's injuries. Such an admission on general causation is compelling evidence at trial.

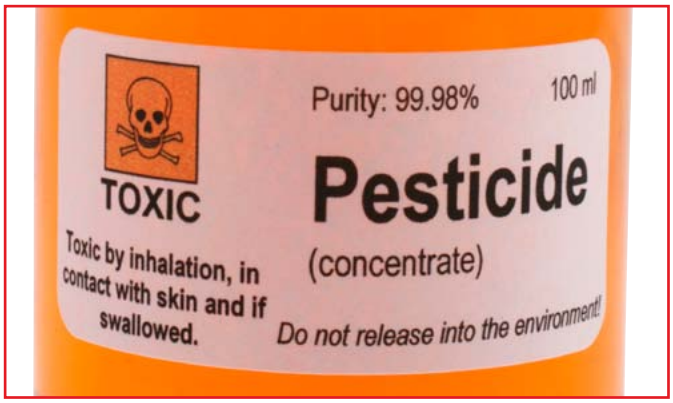
This result seems unlikely, however. First, there is no indication that the strict requirements for reliable science under *Daubert* will be ignored just because a chemical manufacturer has fulfilled its obligations to comply with OSHA's revised HazCom standard. Second, material safety data sheets (the predecessor to safety data sheets required under the revised standard) historically have had limited evidentiary weight at trial in proving causation.

Compliance v. Risk

The prudent course of action dictates that manufacturers should comply with the revised HazCom standard notwithstanding the risk that their hazard classification and warnings may be used against them in litigation. Manufacturers can explain their hazard classification at trial by arguing that the HazCom standard provides a more relaxed standard on causation and does not necessarily follow scientifically acceptable methods. They also can explain that their safety data sheets and labels were merely designed to identify general hazards of their product, provide general information on consequences of overexposure or exposure in different circumstances, and methods to prevent or reduce exposure. The manufacturer can further explain that this does not mean that the plaintiff's exposure to the chemical at issue in the litigation caused injury.

Moreover, if the manufacturer complies with the HazCom standard and provides the required warnings, this may be persuasive evidence in defending against a failure-to-warn claim. The manufacturer can argue it has discharged its duty to warn because it has provided information on the dangerous propensities of its product on its safety data sheets and labels and it reasonably expected this information to be communicated to the plaintiff and other end users.

This area of the law will continue to evolve as chemical manufacturers wrestle with the new criteria for classifying hazards and the warnings required on safety data sheets and product labels. In early 2015, OSHA plans to issue some guidance on how to apply the new criteria for hazard classification. Until then, it is important for chemical companies to ensure they comply with the new HazCom standard and stay abreast of new developments.



Corralling Punitive Damages: *En Banc* 5th Circuit Holds Punitive Damages Not Available in Maritime Unseaworthiness Causes of Action

For more than two decades there was little doubt that punitive damages were unavailable in seamen's maritime actions against a shipowner employer, a presumption stemming from the U.S. Supreme Court's landmark case *Miles v. Apex Marine Corp.,* 498 U.S. 19, 32-33 (1990). In *Miles,* the Supreme Court expressly limited a seaman's recovery for general maritime unseaworthiness to the damages authorized by the Jones Act. Noting that the Act provides an express limitation of available damages, *Miles* held that plaintiffs could not seek a type of damages unavailable in the Jones Act simply by filing parallel claims under general maritime law. Following *Miles,* it was generally accepted that punitive damages were not available in a seaman's maritime tort claims, whether under the Jones Act or under general maritime law.

Maintenance & Cure Claims

All this was called into question, however, following the U.S. Supreme Court's *Townsend* decision. *Atlantic Sounding Co., Inc. v. Townsend,* 557 U.S. 404 (U.S. 2009). In *Townsend,* the Supreme Court considered the limited issue of whether punitive damages could be recovered in maritime maintenance and cure actions. In holding that punitive damages are available for maintenance and cure claims, the Court set forth a three-pronged analysis: (1) maintenance and cure claims pre-dated the enactment of the Jones Act; (2) punitive damages were historically available in maintenance and cure actions; and (3) neither the Jones Act nor any other federal statute has since limited the scope of recoverable damages in maintenance and cure claims.

Notably, the Court did not overturn its decision in *Miles* and specifically stated that "[t]he reasoning of Miles remains sound."

Diverging Conclusions

Notwithstanding the *Townsend* decision's limitation to maintenance and cure actions, the plaintiff bar has used the decision to argue that (1) *Townsend* overruled *Miles* and (2) punitive damages are now recoverable for general maritime unseaworthiness claims. So far, district courts considering the issue have reached diverging conclusions, some agreeing punitive damages are now available in unseaworthiness claims. *See In re Ingram Barge Co.,* 2014 WL 4817189 (D. Ill. Sept. 29, 2014) (holding that punitive damages are recoverable for unseaworthiness claims); *In re: Asbestos Products Liability Litigation,* 2014 WL 3353044 (E.D. Pa. July 9, 2014) (permitting injured individuals to recover punitive damages for unseaworthiness claims but denying recovery of punitive damages in seamen's survival or wrongful death actions). Confusing the issue was a lack of guidance from any circuit courts.

That confusion, however, was lessened when a divided 5th Circuit, sitting *en banc,* became the first circuit court to directly consider whether punitive damages are available for unseaworthiness claims post-*Townsend. McBride v. Estis Well Service, L.L.C.,* 768 F.3d 382 (5th Cir. 2014). In concluding that punitive damages remain unavailable in unseaworthiness claims, the court relied heavily on the *Miles* decision and noted that, despite competing policy concerns related to the availability of punitive damages in maritime actions, Congress already has weighed the issues and reached a conclusion, as set forth in the Jones Act, that recoverable damages are limited to pecuniary losses. Moreover, the court noted that *Townsend's* holding is limited to cases involving maintenance and cure claims.

Still Unavailable

Although more circuits will need to address the issue of punitive damages post-*Townsend* before we have clarity regarding the limitations of punitive damages recovery, *McBride* is a well-reasoned decision supporting the proposition that, with the exception of maintenance and cure causes of action, punitive damages remain unavailable in seamen's maritime cases. We note, however, that the plaintiff in *McBride* filed a petition for certiorari with the U.S. Supreme Court on December 24, 2014, requesting that the Supreme Court review the 5th Circuit opinion in *McBride.*

Changing Times: How *Dukes* Circumscribes Mass Toxic Tort Class Certification

In the few years since the U.S. Supreme Court issued its landmark decision in *Wal-Mart Stores v. Dukes,* 131 S. Ct. 2541 (2011), courts have grown more stringent about requiring plaintiffs to prove, at the class certification stage, that putative class members have suffered a common injury and that the class action contains claims that can be resolved on common proof. In *Dukes,* the Supreme Court rejected certification of an employment discrimination class consisting of approximately 1.5 million plaintiffs, which it described as "one of the most expansive class actions ever." *Id.* at 2547. The opinion emphasized several themes:

- **Heightened evidence standard.** "Rule 23 does not set forth a mere pleading standard"; rather, a party seeking class certification must provide "significant" evidence to "affirmatively demonstrate his compliance with the Rule"; that is, he must prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc.;

- **Heightened "commonality" requirements.** "Commonality" under Rule 23(a) requires a plaintiff to demonstrate that class members have suffered the same injury, and their claims must depend upon a common contention "of such a nature that it is capable of class-wide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." In other words, common answers and not just common questions; and

- **Rigorous analysis.** The "rigorous analysis" required of a petition for class certification "will entail some overlap with the merits of the plaintiff's underlying claim." *Id.* at 2551-2552.

Since *Dukes,* courts evaluating putative mass tort class actions have placed an onerous burden on plaintiffs to affirmatively demonstrate that putative class members have suffered the same injury, and that their claims are capable of class-wide resolution despite potential differences between them.

In *Parko v. Shell Oil Co.,* for instance, the Seventh Circuit reversed the district court's certification of a class of property owners who alleged that an oil refinery leaked benzene and other contaminants into the groundwater under the class members' homes. 739 F.3d 1083, 1084 (8th Cir. 2014). Specifically, the Seventh Circuit castigated the district court for failing to engage in a rigorous analysis, which should have

included "investigat[ing] the realism of the plaintiffs' injury and damage model" and requiring the plaintiffs to present credible evidence of a connection between benzene leaks and property values, or between specific defendants and the leaks. *Id.* at 1086-87. Moreover, the Seventh Circuit found that too many individual factual issues predominated where the putative class members could have experienced different levels of contamination, implying different damages, caused by different polluters over a 90-year period that included the financial crisis and collapse of the housing bubble. *Id.* at 1085.

In *Georgia Pacific Consumer Prods. v. Ratner,* the Supreme Court of Georgia relied on *Dukes* in reversing the trial court's certification of a property damage claim, finding that the trial court had abused its discretion in certifying the class. 2014 Ga. LEXIS 582 (Ga. July 11, 2014). Specifically, the court noted the absence of any evidence of the amounts of gas released from the defendant's sludge fields, the rate of release, the extent to which the amounts released and rates of release varied over time, how the gas would be expected to move through the air upon its release, or air quality in the class area at any time. *Id.* at *11-12. The plaintiffs' scant evidence regarding the direction of the alleged gas release and the expected rate of dissipation was likewise insufficient. *Id.* The court chastised the trial court for "fall[ing] into the very analytical trap against which the United States Supreme Court warned in *Dukes";* namely reciting a list of "common" questions but failing to require plaintiffs to affirmatively prove that their "common contention" was capable of resolution on a class-wide basis on common proof. *Id.* at *9, fn. 10-12.

After *Dukes,* as courts move toward imposing more stringent requirements for class certification, putative class plaintiffs will face an increasingly uphill battle as they seek class certification. This will be particularly true in mass tort class actions, which are often fact-intensive and usually involve years of conduct. Indeed, this environment of rigorous scrutiny may present an insurmountable bar for some plaintiffs. While it will not always be clear how lower courts will apply the class certification standards adopted by the U.S. Supreme Court, what is clear is that *Dukes* and its progeny will continue to provide defendants with an expanding arsenal of heightened evidentiary standards with which to fight class certification in sprawling mass tort class actions.

Will Your Software Patent Survive *Alice?*

Megan D. Dortenzo & **Brian D. Kenney**

Megan Dortenzo is a Thompson Hine partner and the leader of the firm's Intellectual Property practice group. Brian Kenney is an associate in the group.

The life expectancy of software patents has been a hot topic of debate for some time. On June 19, 2014, the U.S. Supreme Court issued a long-awaited decision that did nothing more than further cloud murky waters. In the case of *Alice Corporation Pty Ltd v. CLS Bank International, et al.,* case No. 13-298, the Supreme Court may have invalidated a software (and business method) patent, but in doing so it not only confirmed the legitimacy of business method and software-related patents, it also attempted to define a framework to determine the patentability of computer implementation of an abstract idea.

In *Alice,* the Court held that the claims of a patent directed to computer-implemented schemes to manage or mitigate settlement risk by using a third party intermediary were patent ineligible because simply implementing a known process with a computer system failed to transform the abstract idea into something significantly more. The question presented was whether the patent claims are proper subject matter and eligible for patentability under Section 101 of the Patent Act (35 U.S.C. §§101, et seq.), or whether the claims are instead drawn to a patent-ineligible abstract idea.

Building Blocks & Something Significantly More

The Court confirmed its longstanding principle of §101 having implicit exceptions that are not patent-eligible subject matter; i.e., abstract ideas, because they are the basic tools of scientific and technological work, and monopolization of these tools through the grant of a patent might tend to impede innovation more than it would tend to promote it. However, the Court continued in stating that courts must distinguish between patents that claim the building blocks of human ingenuity (patent ineligible) and those that integrate the building blocks into something significantly more, thereby transforming them into a patent-eligible invention.

In determining patent-eligible subject matter, the Court affirmed the framework set forth in its 2012 decision in *Mayo Collaborative Services v. Prometheus Laboratories, Inc.,* 556 U.S. ____, 132 S. Ct. 1289 (2012). All claims directed to the judicial exceptions to §101, which include business method and software-related patents, should be analyzed using the *Mayo* two-step analysis: (1) determine whether the claims at issue are directed to one of the patent-ineligible exceptions, and (2) if yes, then determine what, if any, additional elements are in the claims that transform them into being patent eligible. The Court described this process as a search for an

inventive concept; i.e., an element or combination of elements sufficient to ensure the patent in practice amounts to significantly more than a patent upon the ineligible concept itself. Yet despite all of its discussion on patent-eligible claims, the Court does not tell us exactly what an abstract idea is.

In *Alice,* the Court determined that the concept of using an intermediary for mitigating settlement risk is a fundamental economic practice long prevalent in our system of commerce, as well as a building block of the modern economy. It is, therefore, an abstract idea beyond the scope of §101. The Court continued to step two of the *Mayo* analysis and explained that the *Alice* patent claims merely implemented a known process with a generic computer system, thereby failing to transform an abstract idea into a patent-eligible invention such as a new and useful application of the idea.

Further Guidance Needed

As the U.S. Patent and Trademark Office (USPTO) explained in its preliminary examining instructions issued on June 26, 2014, *Alice* does not create a *per se* excluded category of subject matter (e.g., business method or software-related patents), nor impose any special requirements for patent eligibility for such inventions. However, the USPTO hedged these instructions by stating that further guidance will be provided once further consideration of the decision is complete and public feedback is factored in. Interim guidance was then published by the USPTO in December 2014. However, parties on all sides are still digesting the interim guidance and trying to determine how the courts will proceed.

In *Alice,* the Court determined that the concept of using an intermediary for mitigating settlement risk is a fundamental economic practice long prevalent in our system of commerce, as well as a building block of the modern economy.

In one of its first post-*Alice* decisions, on July 11, 2014 the Federal Circuit invalidated a patent directed to digital image processing. *Digitech Image Techs. v. Electronics for Imaging,* 2014 U.S. App. LEXIS 13149, *12 (Fed. Cir. July 11, 2014). The Federal Circuit cited *Alice,* ruling the claims are not patent eligible because they cover an abstract way of organizing information as data. The claims employ mathematical algorithms to manipulate data and create new data, and do not claim a processor's use of that information to capture, transform, or render the digital image.

Ask *Alice*

What will become of business method and software-related patents? Time will tell. All eyes are on the district courts, the Federal Circuit, and the USPTO as they start to apply the *Alice* framework to both pending and granted patents. In the meantime, a company should recognize the impact of *Alice* on its business and software-related patent portfolio. In litigation, patent claims should be carefully reviewed to determine the validity (and enforceability) of claims under *Alice.* In prosecuting patents, granted and proposed claims should be similarly reviewed to determine if additional detail is needed to transform what is now thought to be an abstract idea into an inventive concept.

FEATURED WINS

Defense Verdict for De-Icing Equipment Manufacturer in Aviation Case

On September 25, 2014, after a 3.5-week trial, Thompson Hine attorneys **Elizabeth Wright, Andrew Cox,** and **Stacey Greenwell** secured a defense verdict for an aircraft de-icing equipment manufacturer in a product liability action in Douglas County, Nebraska. The plaintiff was injured on February 8, 2007 when he crashed his aircraft into a metal building while on approach to the Alliance, Nebraska Municipal Airport. The plaintiff claimed the aircraft suffered an ice-contaminated tailplane stall that resulted in part from the aircraft's allegedly defective de-icing system, and the plaintiff asserted negligence and strict product liability claims against the de-icing system manufacturer. The manufacturer defended the plaintiff's claim on several grounds, including that there was no evidence the plaintiff activated the aircraft's de-icing system during the accident flight, the amount of ice that accumulated on the aircraft was not sufficient to have caused an ice-contaminated tailplane stall, and there was no evidence the de-icing components were defective or caused the accident. In addition, there were two other defendants at trial, the aircraft manufacturer and the aircraft maintenance company.

After more than five years of litigation, the jury returned a verdict in favor of all the defendants, finding the plaintiff failed to prove any of his claims against any of them.

Summary Judgment for Roofing Adhesive Manufacturer

On September 11, 2014, **Andrew Cox** and **Conor McLaughlin** obtained summary judgment on all claims in a product liability action against a roofing adhesive manufacturer in the U.S. District Court for the Southern District of Ohio. The plaintiff, a roofer, used an applicator tool designed by a codefendant to dispense the roofing adhesive. He claimed that pressure rapidly built up within the adhesive's canister, which then "exploded," causing his hand to get caught in a pinch point on the applicator tool, resulting in serious injuries. The plaintiff alleged the adhesive was defective in design, manufacture, and warnings, and sought punitive damages.

The court expressed skepticism of the plaintiff's experts and the scientific plausibility of the claim that the adhesive caused an explosion. After examining the evidence, the court held that the plaintiff had failed to establish a *prima facie* case on any of his claims. **Greg Thompson** and **George Musekamp** also worked on the case.

Summary Judgment in Medical Device Case

A team of Thompson Hine professionals, led by **Ileana Martinez** and **Leslie Suson** and including **Alex Chanin, Kelly Thomas,** Cheryl Williams, and Darla Cira, scored a victory for a medical device distributor by winning summary judgment in a case involving a patient's injury allegedly caused by dental equipment. The patient, a Georgia lawyer, asserted the distributor's service technician negligently left a wire in an air-polishing system used in dental cleanings when the technician serviced the equipment the day before the patient's dental hygiene appointment. The patient claimed that while undergoing his dental cleaning, the wire shot out of the air-polishing system, undetected by him or the dental hygienist, and traveled down his throat into his stomach and embedded itself in his pancreas, requiring surgical removal. His wife also sued for loss of consortium.

Our team successfully blocked the plaintiff lawyer's attempts to depose the distributor's employees and convinced the court of the implausibility of the plaintiff's story, leaving the court no choice but to enter judgment in favor of the distributor and award its litigation costs.

Dismissal for Lack of Personal Jurisdiction for Hundreds of Shipowner Defendants in Maritime Asbestos MDL

In a victory more than 20 years in the making, Thompson Hine's maritime team, led by **Hal Henderson, Rob Burger, Susan Dirks,** and **Eric Daniel,** obtained dismissal of thousands of maritime asbestos cases on behalf of shipowner-defendant clients for lack of personal jurisdiction. Beginning in the 1980s, plaintiffs—various merchant marines and their representatives, survivors, and spouses—filed actions in Michigan, New York, Ohio, and the U.S. Virgin Islands alleging merchant marines developed diseases caused by asbestos exposure while aboard the shipowner defendants' vessels. In 1991, the cases were consolidated and transferred to the maritime multidistrict asbestos litigation docket (MARDOC) in the U.S. District Court for the Eastern District of Pennsylvania.

With the help of maritime team members **Laura Watson Aquila, Ryan Winkler, Greg Thompson,** and **Greg Feldkamp,** Thompson Hine filed motions to dismiss, asserting the court lacked general personal jurisdiction because the shipowner defendants lacked sufficient contacts with the jurisdictions in which the cases were originally filed. The shipowner defendants argued general jurisdiction was lacking because they were not "at home" in these jurisdictions—a requirement according to recent U.S. Supreme Court precedent. The MARDOC court agreed, noting that the Supreme Court has substantially curtailed the application of general jurisdiction over corporate defendants in recent years. The plaintiffs also lacked specific personal jurisdiction because the injuries did not occur in the relevant jurisdictions. To date, the court has dismissed more than 11,100 actions against shipowner defendants, with the majority of those defendants represented by Thompson Hine.

Summary Judgment for Lack of Causation for Shipowner Defendants in Maritime Asbestos MDL

In another victory for the Thompson Hine maritime team, the MARDOC court has granted summary judgment in favor of shipowner defendants for lack of causation in more than 360 cases. The plaintiffs asserted claims of negligence under the Jones Act and unseaworthiness under general maritime law for injuries allegedly sustained from asbestos exposure while working aboard various vessels owned by the shipowner defendants. We moved for summary judgment in many cases, arguing there was insufficient evidence to establish that the decedent was exposed to asbestos while on any vessel owned by the shipowner defendants and that exposure cannot be presumed. The plaintiffs attempted to rely on medical and scientific literature, expert testimony, and testimony of other merchant marines to survive summary judgment.

Our team successfully argued that, because the decedent was unable to testify and the plaintiff failed to identify any co-workers to testify as to the decedent's alleged asbestos exposure while working aboard the shipowner defendants' vessels, causation was not established. Thompson Hine has filed more than 1,300 similar motions on behalf of shipowner clients.

FEATURED WINS

Industrial Hose Manufacturer Prevails

Barbara Lum obtained summary judgment on behalf of an industrial hose manufacturer in a product liability case in Pennsylvania. The plaintiff alleged she suffered severe and permanent injuries when sprayed with gasoline at a gas pump, asserting claims against multiple defendants who manufactured components of the pump. However, the gas station owner neglected to retain the pump's hose and nozzle. Identifying the lack of physical evidence to support the plaintiff's claims, Thompson Hine pushed early for summary judgment before undertaking costly fact and expert discovery. The court agreed that without the product, the plaintiff would never be able to support her claims, and summary judgment was warranted.

AWARD WINNER
BENCHMARK LITIGATION
2015

Selected by Euromoney's *Benchmark Litigation* as its Ohio Litigation Firm of the Year. Also recommended the firm in Georgia and Washington, D.C.

Elizabeth Wright was named a BTI Client Service All-Star. This is Wright's second time to be recognized.

BTI
CLIENT SERVICE
All-Stars
2015

OUT & ABOUT

Greg Thompson and **Ryan Winkler** attended the ABA Young Lawyers Division Spring Conference in Pittsburgh, May 15-17, 2014.

Stacey Greenwell attended the American Conference Institute Consumer Product Seminar in Chicago, June 11-12, 2014.

Neelam Gill attended the South Asian Bar Association Annual Convention in Chicago, June 19-22, 2014.

John Hofstetter, Barbara Lum, Greg Thompson, and **Ryan Winkler** attended the DRI Young Lawyers Seminar in Denver, June 25-29, 2014.

Bill Hubbard, Conor McLaughlin, Jennifer Mountcastle, and **Brian Troyer** attended the DRI Class Actions Seminar in Washington, D.C., July 23-25, 2014.

John Mitchell attended the Federation of Defense and Corporate Counsel Annual Meeting in White Sulphur Springs, West Virginia, July 27-August 2, 2014.

Kip Bollin served as a board member at the National Federal Bar Association Convention in Providence, Rhode Island, September 3-7, 2014.

John Mitchell served as Committee Chair for an FDCC seminar on Defending the Company in Phoenix, September 16-17, 2014.

Andrew Cox and **Jennifer Mountcastle** gave a presentation on product warnings to the Outdoor Power Equipment Institute in Alexandria, Virginia, October 8, 2014.

Eric Daniel attended the Maritime Law Association Fall Meeting in Philadelphia on October 22-24, 2014. As the Young Lawyer Liaison for the Uniformity of Law Committee, he presented on the topic of punitive damages in unseaworthiness cases.

Kip Bollin, Tim Coughlin, and **Barbara Lum** attended the DRI Annual Meeting in San Francisco, October 22-26, 2014.

Barbara Lum attended the National Asian Pacific Bar Association Annual Convention in Phoenix, November 6-9, 2014.

Seth Litman, Ileana Martinez, Jennifer Mountcastle, Brian Troyer, and **Elizabeth Wright** attended the ACI Drug and Medical Device Litigation Conference in New York, December 8-10, 2014. **Elizabeth** also served as the moderator for the Chief Litigation Counsel Roundtable: Proactively Spotting Litigation Red Flags Based on Current Hot Button Issues in Product Liability.

Jennifer Mountcastle and **Eric Daniel** presented a webinar, Effective Strategies for Rebutting Personal Injury Damage Claims, for Lorman, December 16, 2014.

Kip Bollin and **Eric Daniel** authored a guest editorial, "Why Silica Litigation Is Not the 'New Asbestos,'" for Gradient, an environmental and risk sciences consulting firm, published January 2015.

Tim Coughlin will serve as Committee Chair for the DRI Toxic Torts and Environmental Law Conference on March 26-27, 2015, Austin.

Elizabeth Wright will present "Communicating With Your Jurors: From Baby Boomers to Millenials" at the SMU Air Law Symposium on March 26-27, 2015, Dallas.

THOMPSON HINE

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:
Andrew H. Cox • Practice Group Leader, Product Liability Litigation,
Andrew.Cox@ThompsonHine.com, 216.566.5747.

Thompson Hine LLP, established in 1911, is a full-service business law firm with approximately 400 lawyers in 7 offices. Thompson Hine is ranked as one of the top 5 firms in the country for overall Client Service Excellence and one of the top 4 firms for "Value for the Dollar" and "Commitment to Help" in an independent survey of over 300 in-house counsel. For the second straight year, the firm is ranked in all categories of Service Delivery Innovation, and is one of only 7 U.S. firms noted for "making changes to improve the client experience," in the *BTI Brand Elite.* The firm's commitment to innovation is exemplified by Thompson Hine SmartPaTH℠, which offers a smarter way to work – predictable, efficient and aligned with client goals. Key components of SmartPaTH include Legal Project Management, Value-Based Pricing, Flexible Staffing and Process Efficiency. Rated a leading law firm in *Chambers USA* for 12 consecutive years, Thompson Hine serves premier businesses worldwide. For more information, please visit **www.ThompsonHine.com** and read about SmartPaTH at **www.ThompsonHine.com/about/SmartPaTH.**

SmartPaTH℠

AkzoNobel
American Chemistry Council
AmTrust Financial Services, Inc.
Buckeye Power, Inc.
Cache, Inc.
CH Energy Group, Inc.
Chiquita Brands International, Inc.
Columbus Zoo and Aquarium/Zoombezi Bay
Crown Equipment Corporation
The Davey Tree Expert Company
DDR Corp.
Dieffenbacher GmbH
Duke Energy
Eaton Corporation
Energizer/Eveready
Fifth Third Bank
Ford Motor Company
Forest City Enterprises, Inc.
Formica Corporation
Goodrich Corporation, a UTC Aerospace Systems Company
ITW Food Equipment Group LLC
Jo-Ann Stores, LLC
Key
MeadWestvaco Corporation
Milacron LLC
Mission Essential Personnel LLC
National Interstate
Nationwide Mutual Insurance Company
NetJets Inc.
Nordson Corporation
Parker Hannifin Corporation
PolyOne Corporation
PPG Industries
Pratt & Whitney
Pro Mach, Inc.
R+L Carriers, Inc.
STERIS Corporation
The Toro Company
United Technologies Corporation
Verizon Wireless
Windstream Communications

Client Service Pledge

What Our Clients Can Expect From Us . . .

1. We will know your business.
2. We will plan our engagements with you.
3. We will manage your work as if we were the client.
4. We will be available when you need us.
5. We will communicate often.
6. We will provide the highest-quality counsel.

What Our Clients Can Do To Help . . .

1. We ask you to share your goals.
2. We want to know your preferences for working with us.
3. We need your feedback.