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Product Liability eNewsletter

in this issue

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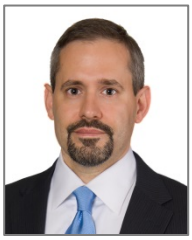

A Word From Our Product Liability Litigation Practice Group Leader…

Thompson Hine's Product Liability Litigation Practice Group has been hard at work since the last edition of our newsletter. The group once again obtained noteworthy victories for clients in the aviation, building product, and food equipment industries, including a defense verdict on behalf of an aviation component manufacturer following a two-week trial. As always, we appreciate the opportunity to serve these clients.

Our members have continued to take leadership roles in the legal community at the national level. **Kip Bollin** (Cleveland) was elected Treasurer of the Federal Bar Association recently, and **Eric Daniel** (Cleveland) was invited to join the Board of Directors for the Federal Bar Association's Admiralty Law Section. **Tim Coughlin** (Cleveland) continues to serve as Committee Chair of the Defense Research Institute's Toxic Tort and Environmental Law Committee. Tim again hosted Thompson Hine's annual Chemical Industry General Counsel Symposium on October 27-28.

In this edition we present an article by **Kip Bollin** and **Carolyn Cole** (Cleveland) addressing the impact an active approach to attorney fee requests has on prospective class actions. **Gary Glass** (Cincinnati), **Barry Friedman** (Washington, D.C.), and **Neelam Gill** (Washington) provide an update on Consumer Product Safety Commission compliance programs. **Jason Tutrone** (Washington) and **Conor McLaughlin** (Cleveland) explore potential regulatory and product liability issues associated with aerial drones. **Gabrielle Vázquez** (New York) and **Carolyn Cole** discuss the expansion of general jurisdiction after *Daimler*. And **Ryan Winkler** (Cleveland) and I provide a crash course on the open-and-obvious-danger defense as it applies to failure-to-warn claims.

We are also pleased to include a guest article from our Employee Benefits & Executive Compensation practice colleagues **Julia Love** and **Stephen Penrod** on the Affordable Care Act's impact on the Cadillac Tax.

As always, we hope you enjoy our newsletter and look forward to your questions and suggestions for future editions.

Regards,

Andrew H. Cox


Intense Scrutiny of Class Counsel Fees

Taking an active approach to attorney fee requests can help discourage class counsel from pursuing class actions. Over the past several years, defendants have fought back against an influx of class actions; through a series of landmark cases, they have successfully challenged plaintiffs' ability to aggregate claims. Now that defendants win those battles more routinely, focus is shifting to another, previously ignored, element essential to the decision to file a class action: class counsel fees.

Because "realism requires recognition that probably all that class counsel really care about is their fees," *Pearson v. NBTY, Inc.,* 772 F.3d 778, 783 (7th Cir. 2014), it makes sense for defendants to consider how class counsel are paid and to limit their pecuniary motivation to pursue a class action. Further, because a negotiated settlement is the most common vehicle for paying class counsel, we will focus on the courts' recent scrutiny of class counsel fee applications negotiated as part of class action settlements. By taking guidance from these opinions, defendants can limit the amount of class counsel fees and thereby discourage plaintiff attorneys from pursing class action lawsuits.

Class Counsel's Internal Conflict

In an individual lawsuit, courts can rightly presume a settlement is fair and reasonable; there is a "built-in conflict of interest in class action suits" that "requires more than a judicial rubber stamp." *Redman v. Radioshack Corp.,* 768 F.3d 622, 629 (7th Cir. 2014) (Posner, J.). In class actions, that conflict of interest lies not between the opposing attorneys, but instead involves the inherent internal conflict for class counsel: They generally want to maximize their fees, but they are also ethically bound to protect the interests of a class.

So who looks out for the class members? It certainly is not, and indeed cannot be, a defendant or the defendant's counsel. A defense attorney is by definition adverse to the class members. Moreover, a defendant is interested in the bottom-line cost of resolving a suit, without much regard to how the money is allocated; it is the defense attorney's job to advocate on the client's behalf to achieve a low settlement amount. As recognized by Judge Posner in three Seventh Circuit opinions in 2014, **no party has an incentive in class action settlements to scrutinize class counsel's fees.** See *Eubank v. Pella Corp.,* 753 F.3d 718 (7th Cir. 2014); *Redman v. Radioshack Corp.,* 768 F.3d 622, 629 (7th Cir. 2014); and *Pearson v. NBTY, Inc.,* 772 F.3d 778 (7th Cir. 2014). Accordingly, the trial court must step in to fill this void.

Intense Judicial Scrutiny Needed

Judge Posner, writing for a panel of the Seventh Circuit, identified the need for intense judicial scrutiny as a check on inflated attorneys' fees in *Eubank v. Pella Corp.,* 753 F.3d 718 (7th Cir. 2014). *Eubank* was a class action based on an alleged defective window design for which the settlement approved by the district court included an award of $11 million to class counsel. *Id.* at 723. Class counsel justified the award by claiming the total settlement was worth $90 million to the class members, so 12 percent of that total settlement was reasonable. *Id.* The problem, as Judge Posner pointed out, was that no attempt was made to ensure the accuracy of the estimated $90 million benefit to the class.

Under *Eubank's* settlement terms, the class members could either file a claim limited to $750 per affected structure or file a claim and submit it to arbitration, where the class member could receive up to $6,000 per structure. *Id.* at 725. Class counsel based its $90 million estimate on the assumption that the majority of, if not all, class members would file claims and recover the maximum amount. Of course this was completely unrealistic. Additionally, the claim form the class members would use was 12 pages long, and according to the court was confusing to navigate, making it even more unlikely that every member of the class would file a claim. *Id.* Further, the settlement provided the opportunity for the defendants to submit defenses to each claim (as is required), making it less likely that each class member would recover, and certainly not for the full amount. *Id.* Finally, some of the class members were entitled only to a warranty extension rather than a payout, reducing the $90 million estimate even further.

Base Fees on a More Accurate Recovery

After taking these factors into consideration, the court determined that a more accurate estimated class recovery totaled less than $8.5 million, as opposed to the $90 million class counsel had suggested. *Id.* at 727. So, rather than comprising 12 percent of the total amount, the attorneys' fees actually comprised 56 percent of the total benefit to the class ($11 million of $19.5 million), making the request clearly unreasonable. *Id.* The court concluded that the settlement proposal "flunked the 'fairness' standard." It reversed the judgment and remanded the case for further proceedings based on Judge Posner's opinion. *Id.* at 729.

Eubank highlights class counsel's ability to inflate attorneys' fees by improperly overestimating the number of class members who will file claims and the amount that they will likely recover, and the opinion was the first in a series that requires courts, and by extension the parties, to scrutinize intensely the bases for class counsel fee awards. *Id.* at 721.

Consider the Benefit to the Class

The need for intense judicial scrutiny to prevent such tactics was promptly reinforced in two other Seventh Circuit decisions authored by Judge Posner. The first of these, *Redman v. Radioshack Corp.,* 768 F.3d 622, 629 (7th Cir. 2014), involved a putative class action filed on behalf of consumers who bought products at RadioShack stores using credit or debit cards, who then received electronically printed receipts that included the card's expiration date, which violates the Fair and Accurate Credit Transactions Act (FACTA).

The proposed class settlement entitled each class member to receive a $10 coupon redeemable at any RadioShack store if the class member responded to the notice of the settlement. *Redman v. Radioshack Corp.,* 768 F.3d 622, 629 (7th Cir. 2014). The proposed settlement included attorneys' fees for class counsel in the amount of $1 million. *Id.* Class counsel justified the fee request based on an estimated total recovery and cost of $4.1 million, concluding that 25 percent of the total payout ($1 million of $4.1 million) was reasonable. *Id.*

But again, the Seventh Circuit looked behind the numbers to the bases for the $4.1 million recovery estimate. First, while the class was estimated as having 16 million members, for undisclosed reasons, notice was sent to only five million members. *Id.* Of those five million members, only 83,000 submitted claims for the coupon. *Id.* Thus, even in the unlikely event that every single member who received the coupon used it, class members would recover only $830,000, less than the requested fees for class counsel.

Maximizing Strategies in the Spotlight

In rejecting the proposed settlement, Judge Posner highlighted the strategies used by class counsel to maximize their fees. First, he explained that class counsel had used administrative costs to drive up the total cost of the settlement in an effort to make a sizable attorneys' fee award seem more reasonable. But because administrative costs do not benefit class members and so should not be used to evaluate the reasonableness of class counsel fees. *Id.* at 630. The calculation that should be used to determine whether attorneys' fees are reasonable in class actions is the proportion of attorneys' fees compared to the combined total of attorneys' fees plus the amount that the class members will recover. *Id.* In *Redmond,* excluding the $2.2 million in administrative costs from the class counsel fee calculation raised the proportion of attorneys' fees to an outrageous 55 percent of the settlement amount ($1 million of $1.83 million), as opposed to the 25 percent submitted by class counsel, which included the $2.2 million in administrative costs in the calculation. *Id.*

Next, Judge Posner called for increased scrutiny of class counsel fee requests in settlements when class members will receive coupons, because of the difficulty in predicting the coupon redemption rate and therefore the difficulty in determining the benefit to the class. Absent an accurate picture of the total benefit class members will receive, it becomes impossible to know whether the attorneys' fees are proportionate. Thus, his intense scrutiny intends to prevent class counsel from overestimating the benefit class members will actually recover to justify a large attorneys' fee award.

Intense Scrutiny of *Cy Pres* Awards & Reversion Provisions

The last of the trio of opinions is *Pearson v. NBTY, Inc.,* in which NBTY was accused of making false claims regarding the efficacy of glucosamine, a supplement that was said to "help rebuild cartilage" and "maintain the structural integrity of joints." *Pearson v. NBTY, Inc.,* 772 F.3d 778, 779 (7th Cir. 2014). The proposed settlement in *Pearson* required the defendant to pay $5.63 million dollars in total, including $1.3 million in attorneys' fees, plus an additional $179,676 for attorneys' expenses. *Id.* at 780. The remainder was divided as follows:

- $1.3 million to the Orthopedic Research and Education Foundation (a *cy pres* award),
- $865,284 to the class members who submitted claims, and
- $30,000 to the named plaintiffs. *Id.*

The proposed settlement in *Pearson* also included a "reversion" or "kicker" clause, which entitled the defendant, rather than the class members, to recover the excess money if the judge were to reduce the amount of attorneys' fees agreed to in the proposed settlement. *Id.* at 780.

Once again, Judge Posner made clear that the ratio used to determine the reasonableness of attorneys' fees should be the attorneys' fees divided by the total of the attorneys' fees plus the benefit to class members. Nothing else, including administrative costs, a *cy pres* award, or an injunction, should be considered in the calculation, because those amounts do not benefit the class members. *Id.* at 781. In this case, the class itself received only $865,284, and the attorneys' fees totaled $1.3 million dollars. Thus, class counsel was to receive an unreasonable 69 percent of the aggregate value of the settlement. *Id.* Judge Posner rejected class counsel's attorneys' fee award and again stressed the importance of determining a settlement's benefit to the class with accuracy based on the number of class members likely to recover, the amount that each individual would likely recover, and the complexity of the claims process. *Id.* at 782.

In *Pearson,* Judge Posner was particularly adamant that *cy pres* awards did not benefit the class members and should not be considered when determining class counsel's fee award. *Id.* at 784. *Cy pres* means "as near as possible" and was originally developed in the trust arena, where courts would reinterpret the terms of a charitable trust when a literal interpretation was impossible or illegal. *Cy pres* would allow the proceeds to be redirected to another person or entity, such as a nonprofit organization with a mission similar to the original intended beneficiary, to come as near as possible to carrying out the original intentions of the intended beneficiary. Judge Posner cited this familiar example of *cy pres:* when polio was cured, the March of Dimes was permitted to redirect its resources to improving the health of mothers and babies. *Id.*

Unfortunately, *cy pres* is now used as a tool to inflate class counsel fees. It works like this: Class counsel designates a portion of a settlement as a *cy pres* award to charity, which allegedly will enhance class members' interests. After adding the *cy pres* funds to the amount paid to the class, class counsel fees appear reasonable, and class counsel reaps the added benefit of appearing to be a generous benefactor by delivering a hefty check to a charity of choice. But as Judge Posner points out in *Pearson,* the purpose of a settlement should be to benefit the class members, not a charity. *Id.* Therefore, *cy pres* awards should be used only when it is impossible to compensate the actual class members. *Id.* If that impossibility has not been demonstrated, cy pres awards should not be used. Even if a settlement does involve a cy pres award, it certainly should not be included in calculating attorneys' fees, because a cy pres award does not benefit the class members. Pearson, 772 F.3d at 784. Like administrative costs, a *cy pres* award should not be included in the total benefit to a class or serve as a basis for calculating class counsel fees.

Judge Posner also expressed concern about the settlement's reversion clause, which provided that if the court reduced the amount of class counsel's agreed fees, the "savings" would revert to the defendant. Id. at 780. Judge Posner believes reversion clauses remove incentive to keep class counsel in check: The defendant cares only about the "total liability," not how a settlement allocates the proceeds, so defense counsel will not object, and the class members will not object to unreasonable fees because they cannot recover any of the "savings" for themselves. Id. at 786. His Pearson opinion was especially critical of combining a reversion clause with a "clear-sailing" agreement, in which the defendant agrees not to challenge an attorneys' fee request by class counsel. Without a motive to object to the attorneys' fees, there is nothing to check class counsel's ability to maximize their profit – yet another reason for intense judicial scrutiny of class counsel fee request.

Lessons Learned

Recognizing that defendants have no duty and little incentive to object to an inflated class counsel fee request, and that class counsel have every incentive to increase their fees, Judge Posner and the Seventh Circuit have filled this void by directing "intense judicial scrutiny" of class counsel fee awards. In doing so, the court identified issues all counsel now should consider when crafting a class action settlement they want to pass judicial muster.

All counsel should consider the proportion of the requested attorneys' fees to the total of the attorneys' fees plus the actual benefit conferred to members of the class. According to the Seventh Circuit, administrative costs and *cy pres* awards are **not** class benefits and therefore should not be included in the calculation. Further, courts may intensely scrutinize settlements where class notice is insufficient or involve excessively complicated claims procedures to determine if the estimated benefit to the class has been inflated. Finally, given the judicial suspicion that a reversion clause may be a hallmark of overreaching, settling parties may choose not to include one in a proposed settlement agreement – which will give a defendant an even greater incentive to challenge an inflated fee calculation rather than leave that task to the court, which might award surplus fees to the class.

Other Courts Looking Hard at Class Counsel Fee Awards

The Seventh Circuit is not alone in its intense judicial scrutiny of class action settlements. Courts in the Third, Fifth, Sixth, Eighth, and Ninth Circuits have recently taken a less deferential approach to class counsel fee requests. In *In re Dry Max Pampers Litig.,* 724 F.3d 713, 715 (6th Cir. 2013), a product liability case alleging that disposable diapers caused diaper rash, class representatives were to receive an award of $1,000 per child, and class counsel a fee of $2.73 million. The district court approved the settlement, but the Sixth Circuit reversed, finding it unfair that class counsel would receive a large fee early in the case while class members would receive only a medley of injunctive relief and a refund program that required parents to "clip and retain Pampers UPC codes for years on end." *Id.* at 721. The Sixth Circuit held that the $1,000-per-child payments created a disincentive, not an incentive, for class members to care about whether the unnamed class members would receive adequate relief, and the court reversed and remanded the case. *Id.* at 722.

In an in-chambers ruling, *Final Ruling on Plaintiff's Renewed Motion for Attorney's Fees,* a California federal court rejected a class action settlement agreement that provided $3.3 million in attorneys' fees. *Evangeline Red. et al. v. Kraft Foods. Inc.,* No. 10-CV-1028-GW, Docket No. 356 (C. D. Cal. April 29, 2015). The suit involved misleading claims that products were nutritious when they actually included trans fats. *Id.* at 1. Plaintiffs' counsel arrived at the $3.3 million figure by increasing their $1.43 million lodestar calculation by a 2.3 multiplier for "exceptional results." *Id.* at 2. After characterizing the fee request as "grossly inflated," particularly for a case they "pretty much lost," the court instead awarded class counsel a mere $11,368. *Id.* at 7. The judge chastised class counsel for attempting to recover fees for work that the court had already considered, in a case where class counsel had achieved "virtually nothing they set out to obtain through litigation." *Id.* at 6. See also *Van Horn v. Nationwide Prop. & Cas. Ins. Co.,* 436 F. App'x 496 (6th Cir. 2011) (affirming a 46-percent reduction in attorneys' fees to class counsel); *Klee v. Nissan North America, Inc.,* No. 2:12-cv-08238-BRO-PJW (C.D. Cal .Nov. 10, 2013) (where Judge Kozinski from the Ninth Circuit served as an objector to a class action settlement involving a Nissan Leaf electric car due to the unreasonableness of a $1.9 million attorneys' fee award, calling the proposed settlement "a sham, benefiting only class counsel, the named plaintiffs, and Nissan").

In *Dennis v. Kellogg Co.,* 697 F.3d 858, 861 (9th Cir. 2012), the court vacated a district court-approved settlement after determining attorneys' fees amounting to 38.9 percent of the total class settlement were excessive. The court criticized the *cy pres* award and excluded it from the total amount, concluding that charities that fed the indigent were not sufficiently tied to false advertisements of foods under consumer protection laws. *Id.* at 866. See also *In re Baby Products Antitrust Litig.,* 707 F.3d 163, 169 (3rd Cir. 2013) (vacating the attorneys' fees and *cy pres* awards because the direct benefit to the class was not considered in calculating the fees, and ordering case-by-case analysis to determine fees where a portion of funds is distributed *cy pres*); *Principles of the Law of Aggregate Litigation* § 3.13 comment a (2010) ("court[s] need not give *[cy pres]* settlements the same full value for purposes of setting attorneys' fees as would be given to direct recoveries by the class.").

Defendant Counsel's Duty

Traditionally, defendants negotiate the best – meaning the lowest – settlement sum and then leave allocation of those proceeds to plaintiffs' counsel, who may or may not overreach to the detriment of class members. Given the recent scrutiny courts are applying to class action settlements, however, defendants should now consider that allocation more closely, including methods by which class counsel may seek, by inflating the apparent value of a class settlement, to increase their fees.

Defendants counsel should reject attempts to include administrative costs or *cy pres* awards as part of the total "class recovery" when negotiating class counsel's fee. Otherwise, the risk that a judge or appellate court will reject the settlement will loom, thereby increasing time and costs.

Defendants should also be realistic and resist, or at least avoid complicity, when class counsel overestimates the number of class members predicted to recover in a class action when claim procedures, or practical shortcomings involved in providing notice to class members, clearly would reduce the predicted recovery achieved by a settlement. Many defendants might have objected in the past to some class counsel fee proposals if doing so did not threaten to derail a settlement that was otherwise in that defendant's best interest. Now, we are on notice (and in some jurisdictions, that notice has the weight of precedent) that for a class action settlement agreement to be found enforceable, the class counsel fee provision also will need to survive intense judicial scrutiny.

Eighteen Thompson Hine lawyers have been selected for inclusion in Euromoney's Benchmark Litigation 2016. Receiving accolades from peers are Ugo Colella, Timothy J. Coughlin, Frank R. DeSantis, Tom Feher, David J. Hooker, William W. Jacobs, Scott A. King, Brian J. Lamb, Seth A. Litman, John R. Mitchell, James D. Robenalt, Russell J. Rogers, Brian A. Troyer, Anthony C. White, David A. Wilson, and Elizabeth B. Wright, who are listed as Litigation Stars. In addition, Andrew H. Cox and Robert F. Ware are listed as Future Stars.

CPSC Demands Effective Compliance Programs

What's in a compliance program? Apparently a lot, according to the U.S. Consumer Safety Product Commission (CPSC). It is now stressing more than ever the need for all firms in the product-supply chain (manufacturers, distributors, and retailers – particularly those who act as direct importers) to establish procedures to evaluate and report potential consumer product defects and hazards. A compliance program is an effective way for consumer product providers to ensure they comply with the safety statutes and regulations enforced by the CPSC. The significance of these compliance programs has been emphasized in recent CPSC civil penalty settlements between it and, for example, a major consumer appliance manufacturer, a consumer electric tool manufacturer, and a major supplier of office goods and services. These settlements required stringent policies for internal and CPSC reporting of potential consumer product defects and violations of CPSC regulatory requirements and procedures for corrective action to address deficiencies.

Settlement Examples

The importance of effective compliance programs was highlighted in the CPSC's and U.S. Department of Justice's (DOJ) joint Section 15 suit against Michaels Stores, Inc. and Michaels Stores Procurement Co., Inc. (Michaels), a retail arts and crafts supplies chain. As reported in a DOJ news release issued in April 2015, the complaint alleges that Michaels failed to timely report safety hazards associated with glass vases (i.e., the glass was too thin for the intended use and caused consumer injuries during handling) and represented itself as a "retailer" to circumvent full reporting and recall obligations. The complaint also alleges that Michaels "had no internal procedures or internal controls to identify potential defects and escalate these issues to management, no central safety database to track product incidents, and no system for its employees to record customers' reasons for product returns."[1] The complaint demands civil penalties and injunctive relief to require Michaels to comply with the reporting requirements of the Consumer Product Safety Act (CPSA) and to establish internal recordkeeping and monitoring systems to ensure compliance with CPSC reporting requirements.

CPSC settlements have also required companies to implement compliance programs. As reported in a CPSC news release, in February 2015, a major consumer appliance manufacturer agreed to pay a $3.5 million penalty for failing to report defects and serious injury risks associated with a number of range and dishwater models. In addition to the hefty civil penalty, the manufacturer agreed to maintain a compliance program that includes procedures for recording and reporting safety issues, confidential employee reporting of compliance issues, compliance training, and senior management responsibility for compliance.

Likewise, as reported in a CPSC news release, in April 2015 a consumer electric tool manufacturer agreed to pay a $1.58 million penalty for its delay in reporting hazards in cordless electric lawnmowers and to be bound by terms of a consent decree that prohibits the company from committing future violations of the CPSA. The consent decree requires the manufacturer to continue to implement and maintain a robust compliance program that ensures timely, truthful, complete, and accurate reporting to the CPSC. It also is required to maintain a system of internal controls and procedures designed to ensure prompt disclosure of deficiencies be made to company management. Its system of internal controls also must include:

- Standards and policies for confidential employee reporting of compliance issues,
- Procedures to review claims and reports of safety concerns,
- Ways to implement corrective action when deficiencies or violations are identified,
- Effective communication of compliance policies and procedures, and
- Record retention.

The manufacturer also agreed to provide the CPSC with written documentation of these improvements, processes, and controls.

In May 2015, the CPSC issued a news release about reaching a settlement with a major office goods and services supplier chain in a similar case. The supplier settled charges alleging that it knowingly failed to report product defects and unreasonable risks of serious injury related to certain office chair models. It agreed to pay a $3.4 million penalty and institute a compliance program. The compliance program is required to include:

- Written standards and policies designed to convey information (from sources such as complaints, parts requests, and incident reports, among others) that relate to or impact CPSA compliance,
- A mechanism for confidential employee reporting,
- Giving senior management CPSA-compliance responsibility,
- Record retention of all CPSA compliance-related records for at least five years, and
- Maintenance of written documentation of its internal controls and procedures.

CPSC Rulemaking

Settlement agreements are not the only context in which the CPSC has emphasized the importance of robust compliance programs. In a 2013 CPSC Notice of Proposed Rulemaking (NPRM), it established guidelines for information that should be included in voluntary recall notices provided as part of corrective action plans under Section 15 of the CPSA.[2] The proposed rule, yet to be finalized, explicitly provides that corrective action plans should include compliance program requirements. The NPRM acknowledges that "[i]nclusion of compliance program requirements as an element of voluntary corrective action plans ***would echo compliance program requirements incorporated as part of recent civil penalty settlement agreements."***[3]

The 2013 NPRM also offers guidance regarding necessary elements for effective compliance programs. The proposed version of 16 C.F.R. § 1115.20(b) provides the following examples that may be included in effective compliance programs:

- Maintaining and enforcing a system of internal controls and procedures to ensure that a firm promptly, completely, and accurately reports required information about its products to the Commission;
- Ensuring that information required to be disclosed by the firm to the Commission is recorded, processed, and reported, in accordance with applicable law;
- Establishing an effective program to ensure the firm remains in compliance with safety statutes and regulations enforced by the Commission;
- Providing firm employees with written standards and policies, compliance training, and the means to report compliance-related concerns confidentially;
- Ensuring that prompt disclosure is made to the firm's management of any significant deficiencies or material weaknesses in the design or operation of such internal controls that are reasonably likely to affect adversely, in any material respect, the firm's ability to report to the Commission;

- Providing the Commission with written documentation, upon request, of the firm's improvements, processes, and controls related to the firm's reporting procedures; or making available all information, materials, and personnel deemed necessary to the Commission to evaluate the firm's compliance with the terms of the agreement.[4]

The CPSC retains broad discretion to require voluntary compliance programs as part of a settlement. The NPRM recognizes this by stating that provisions in voluntary compliance programs may vary depending on the nature and circumstances of a company's behavior that leads the CPSC to determine a settlement requiring a compliance program is in the public interest.

The CPSC's *Handbook for Manufacturing Safer Consumer Products* also is instructive on some of the compliance program elements mentioned above. For instance, it discusses aspects of effective employee training programs and stresses that "training is an important factor in developing and implementing comprehensive safety systems programs."[5]

A Cautionary Conclusion

Given the CPSC's recent attention to compliance programs, all consumer product retailers, manufacturers, and importers should evaluate their CPSC reporting practices and compliance programs. Where necessary, they should implement new compliance programs or revisit their existing programs to make sure they include the common elements the CPSC has identified in recent settlement agreements and instructions. Companies should have a transparent and accessible policy for evaluating potential product hazards and ensure the policy is up to date, and that employees are properly trained and understand the requirements. Record retention procedures should also be evaluated to ensure that detailed documentation of consumer product issues are retained and assessed, and that there is a central safety database to track product incidents and reasons for product returns. Companies also should have procedures to investigate complaints, as well as risk management and corrective action protocols so that they can immediately address any product safety issues.

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[1] *U.S. v. Michaels Stores Inc. et al*, U.S. District Court, Northern District of Texas, No. 15-01203; Compl. ¶ 37.
[2] *Consumer Product Safety Commission: Voluntary Remedial Actions and Guidelines for Voluntary Recall Notices; Notice of Proposed Rulemaking,* 78 Fed. Reg. 69793 (proposed November 21, 2013) (to be codified at 16 C.F.R. § 1115) (emphasis added).
[3] *Id*. at 69795.
[4] *Id*.
[5] U.S. Consumer Product Safety Commission, *Handbook for Manufacturing Safer Consumer Products* at 19 (July 2006) (available at https://www.cpsc.gov//PageFiles/113818/handbookenglishaug05.pdf).



The Brave New World of Unmanned Aircraft Systems

The drone age of aviation has arrived. Unmanned aircraft systems (UAS), or drones, have become sufficiently advanced, easy to use, and inexpensive enough to be viable for commercial applications. As businesses embrace this new technology, so must the law. But the law and regulators have been slow to adapt.

UAS Are Taking Off

Historically, the Federal Aviation Administration (FAA) has barred commercial UAS operations. The statutes the FAA administers require all civil aircraft to possess an FAA airworthiness certificate. Yet it has not issued airworthiness certificates to UAS, except some special airworthiness certificates that impose substantial usage restrictions. The FAA also designed its regulations for manned aviation. In effect, complying with FAA regulations has been impractical or impossible for nearly all commercial UAS operations.

Congress, however, cleared a path for commercial UAS use with the FAA Modernization and Reform Act of 2012, which directs the FAA to devise regulations that allow commercial use of small UAS (sUAS), that weigh less than 55 pounds, and to integrate drones into the National Airspace System. Additionally, the FAA has interpreted Section 333 of the Act as enabling it to permit commercial UAS operations on a case-by-case basis, before issuing regulations allowing them. Specifically, through Section 333, the FAA can exempt UAS from the airworthiness certification requirement that applies to all aircraft. All users operating under a Section 333 exemption must operate in accordance with a Certificate of Authorization or Waiver (COA) the FAA issues to them. COAs specify operating parameters (e.g., altitude restrictions, airspeed restrictions, etc.).

Pressured by Congress and the public, the FAA has begun opening the skies to UAS. Since mid-2014, it has granted more than 1,100 Section 333 exemptions.[1] Since March 2015, it has also, with each Section 333 exemption for sUAS, issued a "blanket" COA allowing commercial UAS use at or below 200 feet, subject to certain limitations.[2] If the blanket COA is insufficient or inapplicable, a user can seek another that will allow its operations. The FAA has made progress in issuing sUAS regulations. In February 2015, it published a proposed rule to allow commercial sUAS operation without special authorization.[3]

Businesses are now using Section 333 exemptions and special airworthiness certificates to explore myriad commercial UAS applications:

- Power companies are devising ways for UAS to identify damaged infrastructure while keeping their personnel out of harm's way;
- Amazon and other companies are exploring ways to deliver packages using UAS, which could make package delivery more efficient and reduce traffic;
- Real estate and construction companies are using UAS to photograph and survey property;
- Manufacturing facilities are devising ways for UAS to conduct facility inspections, including inspections of hard-to-reach infrastructure such as smokestacks;
- Motion picture and news companies now use UAS to capture events and scenes without the use of cranes, helicopters, and manned airplanes; and

- Agriculture companies and UAS manufacturers are exploring UAS uses for precision agriculture. For example, Yamaha is developing crop-dusting functionality with which miniature unmanned helicopters spray only those crops that need fertilizer or pesticides. Other applications include crop monitoring, with UAS photographing crops using infrared and other technology that can show which crops are ready for harvest or need more attention.

Once the FAA finalizes its sUAS rules, which may take another two years, commercial sUAS operations should increase substantially. In fact, analysts project a booming industry, predicting:

- By 2019, the sUAS market will exceed $8.4 billion;[4]
- By 2025, UAS manufacturing will have created 100,000 U.S. jobs;[5] and
- From 2015-2025, the total economic impact of UAS will exceed $82 billion in the United States.[6]

Increased Use Will Lead to Litigation

As businesses integrate UAS into their operations and they become more common, accidents involving them will increase. Inevitably, UAS accidents will result in product liability lawsuits. Because UAS are a relatively new technology, the legal landscape for UAS incidents is not yet well developed.

Like aviation accidents, UAS accidents fall under the National Transportation Safety Board's (NTSB) purview, requiring that accidents be reported to the NTSB, which then may investigate. The NTSB will thus generate factual reports and causation analyses for at least some UAS accidents.[7] The NTSB's probable cause determination, however, is inadmissible in court and does not limit a litigant's ability to develop an alternative theory about the cause of the accident. As a result, UAS-related lawsuits will likely mimic those related to piloted aircraft accidents, in which the NTSB's determination of pilot error is ignored by aggressive plaintiffs' attorneys and their hired-gun experts.

Providing some insight into the potential focus of UAS claims, a comprehensive study by the U.S. Air Force of noncombat UAS mishaps from 2004 to 2013 has identified the leading causes of UAS accidents and mishaps. While the single most common cause was pilot/human error, 60 percent of accidents were attributed to "manufacturing defects" and other alleged mechanical and component failures. Common part failures included the engine, electrical circuitry, and propeller.[8] Litigation targets will likely include:

- Airframe manufacturers;
- Avionics manufacturers;
- Engine manufacturers;
- GPS and navigation manufacturers;
- Manufacturers of operation/control components; and
- Developers and manufacturers of object-sensing and collision-avoidance software

The main issue in any future UAS-related lawsuit will be whether the crash arose from human error or part failure.

The "internet of things" and the remote-control operation of UAS give rise to additional potential claims. According to recent high-profile news reports, automobile manufacturers are testing vehicles for susceptibility to being hacked and remotely controlled. There are similar concerns with UAS; in fact, several operators of crashed UAS have claimed their systems were hacked and they lost functional control of the UAS. Hacking

presents a particular problem for UAS manufacturers, because it might be hard to disprove a claim that a UAS crashed because it was hacked.

While the regulations are not yet final and the landscape on UAS remains in flux, there is no question that use of UAS will dramatically increase in the coming decade. With increased use comes increased incidents and resulting litigation. UAS lawsuits will have much in common with traditional aviation lawsuits, but it also is possible that different kinds of claims will arise, for which manufacturers should be prepared.

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[1] Fed. Aviation Admin., Section 333, **www.faa.gov/uas/legislative_programs/section_333/** (last visited Aug. 10, 2015).
[2] Fed. Aviation Admin., "Petitioning for Exemption Under Section 333," **www.faa.gov/uas/legislative_programs/section_333/how_to_file_a_petition/** (last visited Aug. 10, 2015).
[3] "Operation and Certification of Small Unmanned Aircraft Systems," 80 Fed. Reg. 9543 (Feb. 23, 2015).
[4] Beth Stevenson, "Small UAV Market to Be Worth $8.4 Billion by 2019," Flightglobal.com, Jan. 6, 2015, **www.flightglobal.com/news/articles/small-uav-market-to-be-worth-8.4-billion-by-2019-407643/**.
[5] Darryl Jenkins & Bijan Vasigh, Ass'n for Unmanned Vehicle Sys. Int'l, "The Economic Impact of Unmanned Aircraft Systems Integration in the United States" 2 (2013), **www.auvsi.org/econreport**.
[6] *Id.*
[7] 49 U.S.C. § 1132.
[8] Beyer, Dulo, Townsley, and Wu, "Risk, Product Liability Trends, Triggers, and Insurance in Commercial Aerial Robots," WE ROBOT Conference on Legal & Policy Issues Relating to Robotics, University of Miami School of Law, April 4-5, 2014, at 4-8, **http://robots.law.miami.edu/2014/wp-content/uploads/2013/06/Beyer-Dulo-Townsley-and-Wu_Unmanned-Systems-Liability-and-Insurance-Trends_WE-ROBOT-2014-Conference.pdf** (last visited August 11, 2015).

Consent Through Registration: Expanding General Jurisdiction After *Daimler*

The future of general jurisdiction jurisprudence in the immediate wake of the 2014 *Daimler AG v. Bauman* decision seems to have been dramatically narrowed. As Justice Ginsburg foreshadowed in 2011 during oral arguments in *Goodyear v. Brown,* consent to general jurisdiction through registration to do business remains an open issue.[1]

Daimler

A court with general "all-purpose" jurisdiction over a defendant is authorized to hear any and all claims against that defendant regardless of where the claim arose. In 2014, the U.S. Supreme Court narrowed the availability of general jurisdiction to states in which a company is "at home," which in almost all situations is limited to those states where a company is incorporated and maintains its principal place of business. The Court noted that a broader application of general jurisdiction would be "exorbitant" and "unacceptably grasping."[2] While many initially presumed that *Daimler* therefore curtailed all sweeping attempts to confer general jurisdiction over companies in states where the company was not "at home," courts and litigants have since turned their attention to registering to do business as a possible alternative, largely centering on the question of whether registration constitutes consent.

Post-*Daimler* Jurisprudence

Courts across the country have weighed in on this debate on all sides; for our purposes here, however, we highlight two jurisdictions: Delaware and New York.

Courts in Delaware are split on whether registration to do business is consent to general jurisdiction. Judge Stark, writing for the District Court for the District of Delaware in *Acorda Therapeutics, Inc. v. Mylan Pharms. Inc.,* found that "Daimler does not eliminate consent as a basis for a state to establish general jurisdiction over a corporation which has appointed an agent for service of process in that state, as is required as part of registering to do business in that state."[3] Judge Sleet, on the other hand, also writing for the District Court for the District of Delaware in *AstraZeneca AB v. Mylan Pharms., Inc.,* reached a contrary conclusion, that "[i]n light of the holding in *Daimler* . . . compliance with Delaware's registration statutes – mandatory for doing business within the state – cannot constitute consent to jurisdiction."[4]

New York courts are also in disagreement. The New York Supreme Court in *Bailen v. Air & Liquid Syst. Corp.* held that it has general jurisdiction over corporations that register to do business as foreign corporations and designate local agents for service of process, "regardless of whether [they are] 'at home' in New York."[5] Taking the contrary position, the District Court for the Southern District of New York in *Chatwal Hotels & Resorts LLC v. Dollywood Co.* held that it does not have general jurisdiction over a foreign company registered to do business in New York, finding "the mere fact of being registered to do business is insufficient to confer general jurisdiction in a state that is neither [the] state of incorporation [n]or [the] principal place of business."[6]

Post-*Daimler* Legislation

Courts and litigants are not the only players in the "registration as consent to general jurisdiction" debate; legislators are now involved too. The New York Senate is considering legislation that provides that a foreign corporation's application for authority to do business in New York constitutes consent to jurisdiction, and a surrender of such application constitutes withdrawal of such consent.[7] This proposed legislation expressly seeks to curtail the impact of *Daimler* by ensuring that registration to do business in New York is statutorily defined as consent to general jurisdiction in an effort to eliminate any due process concerns.

If enacted, this proposed legislation has a potentially grave impact on national companies, because it forces a decision between (1) doing business in New York in exchange for agreeing to suit there for anything and everything, or (2) giving up the right to do business in New York to forgo being hailed into New York for every conceivable suit. While some may not see this as a significant change from the pre-*Daimler* paradigm in New York, with its broad exercise of general jurisdiction it is a dangerous precedent. Should other states follow suit, it would potentially cripple national companies with cross-country litigations.

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[1] Justice Ginsburg asked counsel for the United States to "suppose it's just a corporation that's registered to do business in North Carolina, and the connection with that registration – it says: I appoint so-and-so my agent to receive process for any and all claims." *Goodyear* Oral Argument at 15-16, available at **http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-76.pdf**

[2] *Daimler AG v. Bauman*, 134 S. Ct. 746, 760-761 (2014).

[3] *Acorda Therapeutics, Inc. v. Mylan Pharms. Inc.*, 14-cv-935, 2015 U.S. Dist. LEXIS 4056, at *11 (D. Del. Jan. 14, 2015).

[4] *AstraZeneca AB v. Mylan Pharms., Inc.*, 14-cv-696, 2014 U.S. Dist. LEXIS 180548, at *14 (D. Del. Nov. 5, 2014) (emphasis in original).

[5] *Bailen v. Air & Liquid Syst. Corp.*, 2014 N.Y. Misc. LEXIS 3554, at *9 (N.Y. Sup. Ct. Oct. 24, 2014).

[6] *Chatwal Hotels & Resorts LLC v. Dollywood Co.*, 14-cv-8679, 2015 U.S. Dist. LEXIS 15976, at *12-13 (S.D.N.Y. Feb. 6, 2015).

[7] Bill No. S4846, available at **http://open.nysenate.gov/legislation/bill/S4846-2015**

The Open & Obvious Danger Defense to Failure to Warn Claims

To a plaintiff's lawyer, every products liability case presents a failure to warn issue. Standing in their way is the "open and obvious" doctrine – there is no duty to warn of a risk or danger that is open and obvious. To circumvent this doctrine and survive summary judgment, plaintiff lawyers often employ tactics that confuse the issue to create the impression that issues of fact exist. This article discusses some of those tactics and how to handle them.

The Basics

The duty to warn arose from the judicial recognition that a manufacturer should warn of dangers that are latent or hidden to the buyer. In duty to warn cases, "the stress has always been upon the duty of guarding against hidden defects and giving notice of concealed dangers."[1] Put differently, "to impress liability upon manufacturers, the defect must be hidden and not normally observable, constituting a latent danger in the use of the product."[2] The corollary is that a manufacturer has no duty to warn of open and obvious dangers. A danger is open and obvious when "the danger, or potentiality of danger, is generally known and recognized."[3]

Failure to Warn v. Design Defect

Courts overwhelmingly agree that a manufacturer has no duty to warn of open and obvious or generally known dangers,[4] but most jurisdictions have rejected the open and obvious doctrine as a complete defense to a design defect claim.[5] Rather, the obviousness of the danger is but one factor to consider. Plaintiff counsel and courts alike can confuse the two issues. Understanding the contrast between the open and obvious rule as it applies to failure to warn and design defect claims is critical.

In a design defect claim, "the obviousness of the danger does not necessarily preclude the possibility that an alternative design could reduce the risk cost-effectively."[6] In a failure to warn claim, however, "assuming that some risks are patently obvious, the obviousness of a product-related risk invariably serves the same function as a warning that the risk is present."[7] "There is certainly no usual duty to warn the purchaser that a knife or an axe will cut, a match will take fire, dynamite will explode, or a hammer may mash a finger."[8] In other words, there is nothing to be gained by warning of a danger that is already apparent. Moreover, courts have noted that "warnings would lose their efficacy and meaning if they were placed on every instrument known to be dangerous[.]"[9] Counsel for manufacturers should be prepared for plaintiff's counsel to argue that the obvious nature of a product's risk is only one factor for courts to consider. If so, it may be necessary to educate the court on the proper standard.

Risk v. Consequences

Next, plaintiff's counsel may argue that the exact consequences of encountering the product's harmful aspect were not open and obvious. For example, in *Bunch v. Hoffinger Indus., Inc.,*[10] the plaintiff was rendered a quadriplegic after she dove into a 4 ft.-deep swimming pool. The manufacturer of the replacement pool liner provided a warning that cautioned against diving in shallow water but did not warn of the consequences. The plaintiff argued this was insufficient, and a California court agreed, finding the "lack of a persuasive label outlining the consequences of diving into the pool was a substantial factor in causing the injury."[11]

Savvy defense counsel should be prepared to remind the court that it is the obviousness of the risk itself, rather than the obviousness of the exact consequences of that risk, that vitiate a manufacturer's duty to warn. After all, "[t]o adopt a requirement that persons voluntarily confronting open and obvious dangers must also be subjectively aware of each and every potential consequence of their actions would be to effectively extinguish the doctrine itself."[12] The correct open and obvious analysis is found in *Glittenberg v. Doughboy Recreational Indus.*[13] There, plaintiffs brought failure to warn claims against a pool manufacturer after diving into a shallow, above-ground pool and becoming paralyzed. The court held that "[w]here a warning is not needed because the product's potentially dangerous condition (and not the consequences of ignoring that condition) is fully evident, providing a warning does not serve to make the product safer."

Objective v. Subjective Standard

Similarly, plaintiff's counsel may attempt to misdirect the court to a subjective standard when evaluating whether the danger is open and obvious. That is, plaintiff's counsel may argue that while the danger may be obvious to the ordinary user, it was not obvious to the plaintiff. Courts, however, apply an objective standard to determine whether a danger is obvious: Whether a reasonable person would consider the danger to be obvious.[14]

Specifically, be prepared for plaintiff counsel's attempt to litter the record with the client's lack of subjective understanding of the obvious danger.[15] They may argue the plaintiff was new to the job, or an inexperienced user of the product, or unaware that safety devices had been removed from the product, or lacked any training or instruction. This tactic is particularly dangerous, because courts can confuse the objective analysis concerning a reasonably prudent person with subjective analysis concerning the plaintiff's state of mind, the latter of which is used in an assumption-of-the-risk analysis. Under the appropriate standard, if the danger is obvious to the ordinary user, the plaintiff's lack of awareness should be irrelevant to establishing the open and obvious defense.

The plaintiff's subjective awareness of the risk, however, can be relevant to establishing a related defense. That is, there is no duty to warn the plaintiff of what he or she already knows. Thus, at deposition, ask what the plaintiff could see, hear, or otherwise sense as it pertains to the risk of harm. Ask whether the plaintiff was careful in using the product and why. It is human nature to portray oneself as observant and careful, and the plaintiff may readily describe the harmful aspect of the product and efforts to avoid it, revealing a subjective awareness of the risk of harm.

Conclusion

No matter the plaintiff's tactic, understanding the origin of, and theory behind, the open and obvious danger rule is paramount to defending against a failure to warn claim. While various jurisdictions approach the doctrine differently, the theory behind the defense remains the same: Manufacturers owe no duty to warn of a danger that a reasonable person would recognize. When fully understood, the open and obvious danger doctrine becomes a potent weapon for defense counsel.

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[1] *Branton v. Draper Corp.*, 185 Ga. App. 820, 822 (Ga. Ct. App. 1988), *citing Stoval & Co. v. Tate*, 124 Ga. App. 605, 611 (Ga. Ct. App. 1977).
[2] *Bemis Co. v. Rubush*, 427 N.E.2d 1058, 1061 (Ind. 1981).

[3] Restatement (Second) of Torts: § 402A cmt. j (1977); *accord Branton*, 185 Ga. App. at 822 ("a manufacturer has no duty to warn of obvious common dangers connected with the use of a product."); *Lundgren v. Ferno-Washington Co*., 80 Md. App. 522, 530 (Md. Ct. Spec. App. 1989) (If the dangerous condition is obvious, "the very nature of the article gives notice and warning of the consequences to be expected, of the injuries to be suffered.").
[4] Restatement (Third) of Torts: Products Liability § 2 cmt. j (1997).
[5] *Id*. at § 2[C]
[6] *Id*. at cmt. j, *quoting* James A. Hendereson, Jr. and Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. Rev. 265, 282 (1990).
[7] *Id*.
[8] *Peppin v. W.H. Brady Co.*, 372 N.W.2d 369, 375 (Minn. App. 1975) (quoting WILLIAM PROSSER, HANDBOOK ON THE LAW OF TORTS § 96 (4th Ed. 1971)).
[9] *Mathews v. Univ. Loft Co.*, 903 A.2d 1120, 1128029 (N.J. Super. Ct. App. Div. 2006).
[10] *Bunch v. Hoffinger Indus., Inc.* 123 Cal. App. 4th 1278 (2004) (emphasis added).
[11] The court also found that the danger of diving into a shallow pool may not be, as a matter of law, open and obvious to an 11-year-old swimmer, like the plaintiff. Nonetheless, the court went on to opine, incorrectly, that the failure to outline the consequences was relevant to the open and obvious analysis.
[12] *Kirk v. Hanes Corp.*, 771 F. Supp. 856, 858 (E.D. Mich. 1991).
[13] *Glittenberg v. Doughboy Recreational Indus*., 441 Mich. 379 (1992).
[14] *Koske v. Townsend Eng'g Co.*, 551 N.E.2d 437, 440-41 (Ind. 1990) (the warning claim is actionable if the condition of danger is "to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."); Restatement (Third), at § 2 cmt. j., *quoting Friedman v. Houston Sports Ass'n*., 731 S.W.2d 572, 575 (Tex.Ct.App.1987) (no duty to warn of risks of a product that are within the "ordinary knowledge common to the community."); 2-12 Products Liability § 12.07, *citing* (among others) *Fleck v. KDI Sylvan Pools, Inc*., 981 F.2d 107, 119 (3d Cir. 1992) ("Whether a product has obvious dangers requires an objective standard.").
[15] Note, however, that considering the user's subjective situation and circumstance is still appropriate in some contexts. *See, e.g.*, *Klen v. Asahi Pool, Inc*., 268 Ill. App.3d 1031 (1994); *Sauder Custom Fabrication, Inc. v. Boyd*, 967 S.W.2d 349, 351 (Tex. 1998) ("ignoring a particular user's knowledge and experience does not entail ignoring an ordinary user's knowledge and experience").

GUEST ARTICLE

The ACA Is Here to Stay: Prepare for the Cadillac Tax

by **Julia Love** & **Stephen Penrod**, Partners, Employee Benefits & Executive Compensation Practice Group

When the Patient Protection and Affordable Care Act (ACA) was passed in 2010, employers and practitioners wondered about the so-called Cadillac Tax, which was to become effective eight years later, in 2018. Many questioned whether the ACA itself would survive legal and constitutional challenges, and if so, whether the Cadillac Tax would survive to look anything like its first iteration in Section 4980I of the Internal Revenue Code (Code).

Well, the ACA has survived two U.S. Supreme Court challenges, and the Internal Revenue Service (IRS) and U.S. Department of Treasury (DOT) have recently issued two Notices[1] offering suggested guidance on the Cadillac Tax and seeking comments from interested stakeholders. As a result, unless congressional action to amend Section 4980I of the Code is successful, the Cadillac Tax will go into effect in 2018. Employers therefore need to review their employer sponsored group health plan arrangements to determine how the Cadillac Tax will affect them in 2018 and beyond.

What Is the Cadillac Tax?

The Cadillac Tax is a 40-percent excise tax on the aggregate cost of employer-sponsored group health plan coverage that exceeds specified statutory dollar limits. For 2018, the statutory dollar limits are $10,200 for single coverage and $27,500 for other coverage.

The statutory limits are expected to be indexed for inflation and subject to an age and gender adjustment, if applicable for an employer, and higher dollar limits apply for qualified retirees and employees engaged in high-risk professions or employed to repair or install electrical or telecommunication lines.

Aggregate Cost of Employer-Sponsored Coverage

No proposed or final regulations have been issued about determining the aggregate cost of employer-sponsored coverage for purposes of the Cadillac Tax. Two notices issued by the IRS and DOT, however, give insight into how regulators are thinking in connection with how to determine the aggregate cost of employer-sponsored coverage, and what constitutes employer-sponsored coverage.

In general, the aggregate cost of employer-sponsored coverage is to be determined under rules similar to those used for determining the applicable premium cost for continuation coverage under the Consolidated Omnibus Budget Reconciliation Act (COBRA).

COBRA premiums are determined based on the cost of coverage for similarly situated non-COBRA beneficiaries. For an insured plan, the cost of COBRA coverage is the premium charged by the insurance company for the coverage plus an administrative charge of up to 2 percent. For a self-insured plan, the cost of

coverage can be determined using the actuarial basis method[2] or the past cost method[3] plus an administrative charge of up to 2 percent.

Similarly, for purposes of the Cadillac Tax, the IRS and DOT have suggested that the aggregate cost of coverage for each employee is to be determined based on the average cost of that type of applicable coverage for that employee and all similarly situated employees. For an insured plan, the average cost of coverage is to be determined based on the premiums charged by the insurance company. For a self-insured plan, the average cost of coverage is to be determined using the actuarial basis method or the past cost method.

What Is Employer-Sponsored Coverage?

Its' the million-dollar question, really. Employer-sponsored coverage, at least if the proposals announced in the notices are adopted, is:

- Coverage under any group health plan made available to an employee by the employer, which is excludable from the employee's gross income under Section 106 of the Code.
- Coverage under a Medical Flexible Spending Account (FSA).
- Coverage under a Health Savings Account (HSA).
- Coverage under a Health Reimbursement Arrangement (HRA).
- Coverage for executive physicals.
- Coverage at an onsite medical clinic other than an onsite medical clinic that offers only first aid and other *de minimis* medical care to employees.
- Retiree coverage.
- Coverage under a multiemployer plan.
- Coverage under arrangements providing coverage for a specified disease or illness, or under hospital indemnity or other fixed indemnity insurance (if paid on a pretax basis or subject to a deduction).

Under the notices, the following do NOT constitute employer-sponsored coverage for purposes of the Cadillac Tax:

- Coverage under which medical benefits are secondary or incidental to other insurance benefits.
- Coverage under long-term care insurance.
- Coverage under limited scope dental and vision insurance (whether insured or self-insured).
- Coverage under an employee assistance program that is an excepted benefit for ACA purposes.
- Coverage under arrangements providing coverage for a specified disease, or illness or under hospital indemnity or other fixed indemnity insurance (if paid on an after-tax basis or not subject to a deduction).

What Employers Should Do, Now

Based on all currently available guidance, employers should determine whether their group health plan arrangements will cause them to be subject to the Cadillac Tax in 2018 or in later years. If so, and if they want to avoid the Cadillac Tax, they should consider the following strategies to reduce the aggregate cost of their employer-sponsored coverage:

- Reduce benefits over time to avoid the applicable thresholds;
- Move to a full replacement high-deductible health plan model;
- Implement strategies to reduce overall costs, thus reducing premium costs;
- Reduce contributions to or eliminate account-based plans such as FSAs, HRAs, and HSAs;

- Eliminate executive physical programs;
- Reduce the scope of services available at onsite medical clinics to only first aid and other *de minimis* medical services; and
- Eliminate pretax specified disease or fixed indemnity insurance.

Additionally, employers should monitor further developments relating to the Cadillac Tax and be prepared to make changes to their group health plan arrangements if necessary to avoid it. Employers who ignore the Cadillac Tax risk feeling like they have been hit by a domestic luxury car when they pay an excise tax for providing group health plan coverage that exceeds the specified statutory dollar limits.

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[1] Notice 2015-16 and Notice 2015-52.
[2] Under the actuarial basis method, premiums are determined based on the overall expected claims experience for the plan year.
[3] Under the past cost method, premiums are determined based on the past claims experience of the plan.

Wins

Elizabeth Wright, Andrew Cox, and **Stacey Greenwell** secured a defense verdict for a components manufacturer in an aviation product liability action in Greene County, Ohio. The plaintiffs represented the estates of a pilot and two passengers who died in a 2005 accident involving a 1974 Grumman AA-5 Traveler. The plaintiffs alleged the aircraft's muffler system, manufactured by a predecessor of our client, was defectively designed, resulting in its internal components blocking the engine's exhaust and causing a loss of engine power. After more than eight years of litigation, the jury returned a defense verdict on all five claims submitted.

Brian Troyer and **Bill Hubbard** led a team effort successfully defeating class certification on behalf of a manufacturer of wood-plastic composite decking and railing products. The plaintiffs alleged that our client's products prematurely crack, split, and warp. The plaintiffs asserted claims including express and implied warranty, unjust enrichment, negligent design, negligent misrepresentation, and violations of state-specific consumer protection statutes. In their complaint, they sought certification of a nationwide class of all owners of property on which decking had been installed. After more than three and a half years of intense litigation, however, the court denied class certification, finding the plaintiffs failed to satisfy the requirements of commonality, typicality, and adequacy. Stating the plaintiffs failed even to satisfy these Rule 23(a) requirements, the court found it unnecessary to consider the requirements of Rule 23(b). The lawsuit is being litigated by a consortium of six plaintiff law firms that have successfully litigated a number of similar class actions against other building products manufacturers.

Andrew Cox, Christopher Fox, and **John Hofstetter** obtained summary judgment in the U.S. District Court for the Northern District of Georgia on all claims in a product liability action against a commercial food equipment manufacturer. The plaintiff, the general manager of an fast casual restaurant who was using a meat slicer designed and manufactured by our client, suffered serious injuries when two of her fingers came into contact with the machine's running blade. She claimed that when her colleague turned the machine on, it suddenly switched from manual to automatic mode, pushing her hand into the blade. The plaintiff claimed the meat slicer was defective in design and manufacture, and further alleged that our client's service technicians improperly serviced the machine prior to her injury.

Seth Litman prevailed on summary judgment for a pharmaceutical company in a multimillion-dollar product liability action pending in federal court in Georgia. This case involved a plaintiff who alleged she contracted and suffered permanently from idiopathic intracranial hypertension, a debilitating rise in spinal fluid pressure, as a result of her use of the company's product. After extensive discovery, we moved for summary judgment, arguing that the plaintiff, who failed to present expert testimony on causation, could not proceed with her case under Georgia law without such expert testimony. The court agreed, and granted summary judgment to our client due to a lack of evidence supporting causation.

John Hofstetter and **Andrew Cox** obtained summary judgment in the New York State Supreme Court, Erie County, on all claims in a product liability action against a food equipment manufacturer. The plaintiff, a supermarket clerk, was using a Hobart meat tenderizer when she caught her hand in the machine's rotating blades. She claimed the tenderizer was defective in design, specifically that the interlock failed due to a product defect. Plaintiff's expert theorized the interlock relay switch should have been watertight and that, if it had been, it would not have corroded and failed. We argued the plaintiff's claim could only be characterized as wear and tear, which is not a product defect. Moreover, the employer's failure to have the tenderizer repaired amounted to a product modification. The court agreed, concluding the plaintiff had presented a wear and tear claim, and that

our client could not be held liable for its product wearing out over time. The court elaborated on this doctrine, noting that "the law of products liability and negligence do not function as a lifetime guarantee of the operability of a product or its component parts." In addition, the court agreed there had been a substantial alteration of the tenderizer, which rendered "the otherwise completely safe product unsafe."

Tim Coughlin, Andrea Daloia, and **Chris Klasa** obtained a dismissal of a toxic tort action in Lexington, Kentucky for a chemical company client on a claim of DNA damage and miscarriage resulting from TCE exposure.

Conor McLaughlin and **Andrew Cox** won an appeal before the U.S. Court of Appeals for the Sixth Circuit in a product liability action related to a roofing adhesive designed and manufactured by a construction products company. Our team had obtained summary judgment, and the plaintiff appealed, arguing the district court misapplied Ohio law regarding defects in design and warnings. Specifically, the plaintiff claimed the adhesive was defective because pressure built up in the adhesive's canister, which then "exploded," causing his hand to get caught in a pinch point on the tool used to apply the adhesive, resulting in serious injuries. However, the appellate court agreed that even accepting all of the plaintiff's allegations as true, he could not establish claims for design or warning defect under the Ohio Product Liability Act because he failed to show that the incident was reasonably foreseeable or that the risks of the adhesive's design outweighed its benefits.

Ileana Martinez and **Leslie Suson** obtained summary judgment in a Texas case on behalf of two diabetes infusion set manufacturers located in Denmark and Mexico. An infusion set is a plastic tubing device that connects an insulin pump to the user's body, and an insulin pump is a small, portable electronic device used to deliver insulin for the management of diabetes. The plaintiff asserted multiple product liability claims related to the use of an insulin pump and infusion set. Prior to the filing of the complaint against the infusion set manufacturers, plaintiff had executed a settlement agreement with the insulin pump manufacturer, in which plaintiff released all of her claims against "Released Parties." "Released Parties" was defined to include "suppliers." Because the infusion set manufacturers were suppliers to the insulin pump manufacturer, we filed a motion for summary judgment, arguing that plaintiff's settlement agreement with the insulin pump manufacturer had the effect of releasing all claims against the infusion set manufacturers. The court agreed and granted summary judgment to the infusion set manufacturers.

Andrew Cox, Conor McLaughlin, and **Ryan Winkler** obtained summary judgment on all claims in a product liability action against a commercial food equipment manufacturer in the U.S. District Court for the Central District of California. The plaintiff, a grocery store employee, was using a commercial meat mixer-grinder. She suffered serious injuries when she opened the machine's lid and her arm was caught in the machine's mixing paddles. The plaintiff alleged that the mixer-grinder was defective in design, manufacture, and warnings, specifically alleging that a defect allowed the mixer-grinder to continue operating with the lid open. The plaintiff also brought a claim for failure to recall and sought punitive damages. Plaintiff's defect claims were based exclusively on the opinions of her expert witnesses. Our team moved *in limine* to exclude those experts and for summary judgment, arguing, among other things, that the plaintiff could not prove her claims without supporting expert testimony. The court agreed the plaintiff's experts' opinions were scientifically unreliable and not supported by appropriate testing or analysis and, therefore, inadmissible. After excluding the plaintiff's experts, the court held the plaintiff had failed to establish a *prima facie* case on any of her claims and granted summary judgment to the defense.

What's Happening

Barbara Lum and **Conor McLaughlin** co-authored "The Proof Is in the Pudding: Food Litigation Class Actions After *Dukes* and *Comcast*," DRI For the Defense, April 2015.

Eric Daniel attended the Maritime Law Association's spring meeting in New York City, April 29 to May 1, 2015.

Gary Glass led a panel discussion on process safety management compliance On May 5, at OCTC's annual conference. He also presented on the subject of "OSHA's Increased Targeting of Chemical Facilities: Are You Prepared?"

Neelam Gill attended the South Asian Bar Association of North America's annual convention in Orlando on June 11-13, 2015

Tim Coughlin hosted and chaired the DRI TTEL Steering Committee meeting in Chicago June 11-12, 2015.

Tim Coughlin and **Chris Klasa's** article, "The Ongoing Anti-BPA Crusade in the States: A Disservice to Science and Consumers," appears on the Washington Legal Foundation's website on July 10, 2015.

Kip Bollin presented with the Seventh Circuit's Judge Richard Posner and DRI President Laura Proctor at DRI's annual Class Action Seminar, "It's All About the Money: Limits on Class Counsel Fees," on July 23, 2015. **Conor McLaughlin** also attended the conference and served on the conference's steering committee.

Kip Bollin and **Carolyn Cole** jointly authored "Intense Scrutiny of Class Counsel's Fees: DRI For the Defense" in August 2015.

Tim Coughlin attended "Strategic Planning" at the Ohio Chemistry and Technology Council, September 14-15, 2015.

Neelam Gill attended Women in Bio's "Business of Biotech: It Takes a Village!" event in Baltimore on September 17, 105

Tim Coughlin hosted the Toxic Torts and Environmental Law business meeting at the DRI annual meeting in Washington, October 7-11, 2015. Also in attendance at the Annual Meeting were **Neelam Gill, Bill Hubbard,** and **Barbara Lum.**

Bill Hubbard presented "Discovery of Social Media" at the Network of Trial Law Firm's conference, Litigation Management: In-House Counsel Facing the Future, on Friday, October 23, 2015, in Laguna Beach.

Thompson Hine hosted our annual Chemical Industry GC Symposium on October 27-28 in Cleveland.

Bill Hubbard will participate on a panel, "The 'Common' but Un-Manifested Defect: Implications of the Growing Construction Defect Class Action Movement" at the Construction SuperConference in San Diego on December 9, 2015.

Bill Hubbard will present “In the Crosshairs: The Targeting of Building Products by California’s Green Chemistry Initiative” and other regulations focusing on environmental exposure to toxins at the Defense Research Institute’s Product Liability Conference on February 3, 2016 in New Orleans.

On March 17th, 2016, **Bill Hubbard** will moderate a panel on “How Technology Continues to Change the Practice of Law” during the Defense Research Institute’s Toxic Tort and Environmental Law Seminar in New Orleans.

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.

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