



## U.S. SUPREME COURT CONSIDERS PUNITIVE DAMAGES FOR THIRD TIME IN CIGARETTE CASE

The U.S. Supreme Court heard oral argument in *Philip Morris USA, Inc. v. Williams*, No. 07-1216, on December 3, 2008, to consider for the third time whether the award to a smoker's widow of punitive damages that are nearly 100 times the compensatory damages is excessive under the U.S. Constitution. The Court first returned the case to the Oregon Supreme Court in 2003 and last returned the case to the state court in February 2007, stating that a punitive damage award violates due process if it is based in part on a jury's desire to punish a wrongdoer for harming non-parties or "strangers to the litigation." The jury had been instructed in a way that allowed it to consider harm to non-parties when making its punitive award determination. The Court did not consider the second question raised in the second appeal, that is, whether the verdict was excessive.

On remand, the Oregon Supreme Court again upheld the award because it found that the instruction proffered by the defendant was not "clear and correct in all respects ... and altogether free from error." Because it misstated Oregon law, the court found that the trial judge did not err in refusing to give it. Philip Morris brought the case before the U.S. Supreme Court for a third time, arguing that (i) once the U.S. Supreme Court told the state court to apply the proper constitutional standard, the state court had no authority to instead rely on a state procedural rule to decide the issue, and (ii) the punitive award was excessive as a matter of constitutional due process.

According to U.S. Supreme Court watchers, during oral argument, some of the justices were concerned that overturning the verdict would entail dictating how state courts address state law issues; other justices suggested that affirming the Oregon court would invite state courts to create an array of state procedural bars to nullify U.S. Supreme Court decisions. Chief Justice John Roberts apparently proposed a solution to the problem, saying that the Court could opt to finally decide whether the Constitution permits a nearly 100-to-1 ratio of punitive to compensatory damages. "Why don't we just do that?," he reportedly asked. See *WSJ Law Blog*, December 3, 2008.

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## TOYMAKERS RESOLVE CALIFORNIA LEAD LAWSUIT

A number of toy manufacturers, including Mattel Inc., have **settled** claims filed against them by California and the city of Los Angeles, alleging that they sold products containing lead, listed as a toxic substance under Proposition 65 since 1987, without providing warnings to consumers. The lawsuit apparently arose out of massive recalls that occurred in 2007, after the discovery of high lead levels in toys imported from China.

Under the terms of the agreement, the companies began complying with new federal lead standards on December 1, 2008, months before the federal standards are scheduled to go into effect. If the companies find that their products exceed the standards, they will stop selling and distributing them, regardless of when they were made. According to California Attorney General Edmund (Jerry) Brown Jr., "These consumer protection agreements will safeguard California's children from lead-contaminated toys this Christmas."

While the companies did not admit to any wrongdoing, they also agreed to pay \$548,500 in civil penalties, \$550,000 into a fund to test toys for lead and improve outreach about future recalls, and an additional \$460,000 to the state's and city's Proposition 65 enforcement activities. The companies also agreed to undergo an expedited enforcement process if they violate the lead standard in the future. The settlement does not resolve similar claims filed against some other manufacturers and retail outlets.

Proposition (Prop.) 65 is a voter-approved initiative that requires those doing business in California to provide warnings on their products about chemicals known to the state to cause cancer and reproductive harm. It is enforced through lawsuits instituted by private parties, the state attorney general or city attorneys in cities of a certain size. The governor publishes the Prop. 65 list of chemicals; lead has been listed as both a reproductive toxicant and a carcinogen. See *The Los Angeles Times*, December 5, 2008.

## COMPANY SANCTIONED FOR FAILING TO DISCLOSE PATENTS IN STANDARD-SETTING VENUE

The Federal Circuit Court of Appeals has agreed with a district court that Qualcomm Inc. breached its duty to disclose its patents before a private standard-setting organization but remanded this patent-infringement case, finding the unenforceability judgment too broad. [\*\*Qualcomm Inc. v. Broadcom Corp., Nos. 2007-1545 & 2008-1162 \(Fed. Cir., decided December 1, 2008\).\*\*](#)

The patents involved a technology that was the subject of proceedings before the Joint Video Team (JVT), a private standard-setting organization established as a joint project of the International Organization for Standardization (ISO), the International Electrotechnical Commission (IEC) and others. JVT's focus was the development of a single "technically aligned, fully interoperable" industry standard for video compression technology, which was the subject of two patents Qualcomm owned. The company participated in the JVT but failed to disclose its patents before the H.264 standard was published in May 2003. In 2005, Qualcomm sued Broadcom, alleging that Broadcom, by making H.264-compliant products, infringed Qualcomm's patents.

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The district court ruled that Qualcomm waived the right to assert its patents due to its conduct before the JVT. According to the appeals court, Qualcomm long insisted both before and after the case was tried that it did not participate in the JVT and “repeatedly represented to the court that it had no ... documents or emails” relating to its JVT participation. On one of the last days of trial, however, “a Qualcomm witness testified that she had emails that Qualcomm previously maintained did not exist.” Apparently, the 21 e-mails belonging to this witness and produced that day at trial “were just the ‘tip of the iceberg,’ as over two hundred thousand more pages of emails and electronic documents were produced post-trial.”

The district court, characterizing the company’s “concealment efforts” as “the carefully orchestrated plan and the deadly determination of Qualcomm to achieve its goal of holding hostage the entire industry desiring to practice the H.264 standard,” found Qualcomm’s patents unenforceable against the world. The court also granted Broadcomm its attorney’s fees, referred six of Qualcomm’s lawyers to the California State Bar for investigation and possible sanctions and ordered Qualcomm and its sanctioned attorneys to participate in a discovery obligations program.

The JVT’s standard development policy and guidelines did not provide an express requirement to disclose patents “unless a member submits a technical proposal.” Yet, the district court found that the members treated the policy “as imposing a duty of disclosure on participants apart from the submission of technical proposals.” Because the JVT’s parent organizations, to which Qualcomm belonged, have disclosure duties, the appeals court agreed with the district court “that JVT participants also had to disclose patents prior to final approval of a standard.”

Despite ruling that “a district court may in appropriate circumstances order patents unenforceable as a result of silence in the face of a [standard-setting organization’s] disclosure duty,” the appeals court limited that remedy “in relation to the underlying breach.” Thus, the appeals court determined that the broadest permissible unenforceability remedy would be to render the two patents at issue unenforceable only against all H.264-compliant products. Because product safety features can involve patents, product manufacturers that participate in private standard-setting organizations will have to consider whether they have a duty to disclose their patents, particularly where the patents “reasonably might be necessary” to practice the standard developed.

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## ADVOCACY ORGANIZATIONS SUE CPSC TO STOP SALE OF PRODUCTS WITH PHTHALATES

Public Citizen and the Natural Resources Defense Council (NRDC) have filed a complaint in a federal district court against the Consumer Product Safety Commission (CPSC), seeking a declaration that its decision not to apply a new phthalate law retroactively violates the law and an order directing the CPSC to rescind the challenged decision. [NRDC v. CPSC, No. 08-10507 \(U.S. Dist. Ct., S.D.N.Y., filed December 4, 2008\).](#)



According to the complaint, the Consumer Product Safety Improvement Act, enacted in August 2008, bans “the manufacture, sale, distribution, and import of all child care articles and children’s toys containing more than 0.1 percent of any of three phthalates.” The complaint also contends that Congress “banned, pending further study and rulemaking, the manufacture, sale, distribution, and import of children’s toys that can be placed in a child’s mouth and child care articles, if any such toy or article contains more than 0.1 percent of three other phthalates.” The plaintiffs claim that the bans are effective February 10, 2009.

The plaintiffs allege that CPSC’s general counsel indicated in a letter dated November 17, 2008, that “the phthalate ban does not apply to any toy or child care product manufactured before the effective date of February 10, 2009.” Claiming that this decision authorizes and will encourage manufacturers to make and stockpile banned products now, for sale after the statute’s effective date, the plaintiffs refer to a letter from Senator Barbara Boxer (D-Calif.) to the CPSC stating that its decision “to allow the continued sale of children’s toys and child care products that contain harmful phthalates beyond February 10, 2009[,] violates the clear language of that Act.” The plaintiffs also contend that the decision “constitutes agency action not in accordance with the law in violation” of the Administrative Procedures Act, which requires public notice and an opportunity to comment.

An NRDC scientist was quoted as saying, “The Consumer Product Safety Commission is ignoring the will of Congress and threatening our children’s health. Overwhelming evidence led Congress to ban these toys, a ban that some retailers have already started to adopt. The CPSC decision completely undermines those efforts by allowing banned toys to sit on the same shelves as the safe ones.” Phthalates are used in plastic products to soften them; the chemicals have purportedly been linked to reproductive abnormalities. See *Public Citizen Press Release*, December 4, 2008.

## MDL COURT ORDERS PIPE-FITTING DEFENDANT TO PRODUCE WITNESS ON POSSIBLE EVIDENCE DESTRUCTION

A multidistrict litigation (MDL) court has issued an order requiring the defendant in a case involving allegedly defective brass pipe fittings to produce a witness who can testify about whether the company conducted research regarding the defect and then destroyed or altered that information. *In re: Zurn Pex Plumbing Prods. Liab. Litig.*, MDL No. 08-1958 (U.S. Dist. Ct., D. Minn., decided November 26, 2008). The court also ordered the company to identify the author of an e-mail from an unnamed product distributor who purportedly described the selling of Zurn fittings as “playing Russian roulette.”

According to the court, Zurn was told by its general counsel in 2004 that an increased frequency of warranty claims on its brass fittings “was creating an identifiable risk of litigation regarding these fittings.” She also apparently advised Zurn to submit selected brass fittings for testing by an independent lab, a process that began in fall 2004. The first case against Zurn was filed in 2007, and Zurn claimed that it issued a document preservation notice once that case commenced.

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Plaintiffs sought to depose a company representative about its document retention policies and potential spoliation issues “surrounding the lack of a document retention notice in 2004,” when the company was purportedly on notice of reasonably foreseeable litigation. The court rejected Zurn’s claims that (i) the plaintiffs have no reason to believe evidence has been destroyed; (ii) the request was not reasonably calculated to lead to the discovery of relevant evidence; (iii) the request was unreasonably burdensome; and (iv) the request violated prior discovery orders.

According to the court, while plaintiffs had not shown that evidence had actually been destroyed, they “reasonably seek to depose a Zurn representative to determine if discoverable evidence has been inadvertently destroyed and attempt to open avenues to address any potential damage.” The court limited the scope of the deposition to prevent it from becoming burdensome.

## CONSERVATIVE THINK TANK STUDY CALLS FOR “LOSER PAYS” SYSTEM IN THE UNITED STATES

A senior fellow with the Manhattan Institute’s Center for Legal Policy has published a report titled “[Greater Justice, Lower Cost: How a ‘Loser Pays’ Rule Would Improve the American Legal System.](#)” Marie Gryphon suggests that forcing the losing party to pay the winner’s litigation costs “could be an important part of a larger effort to reduce litigation costs, better compensate prevailing litigants, and better align tort law with its goal of deterring socially harmful conduct.” Gryphon reports that tort litigation costs U.S. citizens billions of dollars annually and that mass tort litigation is “rife with fraud.” She claims that a loser-pays rule would discourage meritless lawsuits, but, to protect plaintiffs of modest means, also calls for a litigation insurance industry to cover plaintiffs’ costs, and for a cap on recoverable fees.

Gryphon’s paper discusses how the existing U.S. civil justice system works, focusing on lawyers who file “low-merit lawsuits.” Relying on scholarly literature, she also examines how loser pays would affect the American legal system, and reviews what occurred in Alaska and Florida, which apparently have some experience with the loser-pays system. Gryphon provides an overview of how litigation insurance would work to “ensure access to justice for poor and middle-class plaintiffs.” She concludes, “The United States pays a high price for a system of justice that uniquely encourages abusive litigation, but it need not continue to do so. Thoughtful reforms in state and federal law can bring our civil justice system into sync with the rest of the world by replacing the American rule for attorneys’ fees with a loser-pays system.”

## CLAIMANTS BEGIN COLLECTING DAMAGES IN EXXON VALDEZ OIL SPILL LITIGATION

ExxonMobil has reportedly started paying \$507.5 million in punitive damages to more than 32,000 people affected by the 1989 Exxon Valdez oil spill responsible for dumping 11 million gallons of crude oil into the Prince William Sound off the coast of Alaska. The U.S. Supreme Court earlier this year reduced the damages to one-tenth of the original jury award, which meted \$5 billion as

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a deterrent against future corporate negligence. The court ruled that punitive damages in maritime cases could not outstrip the actual damages inflicted—in this case, \$287 million. As a result, the payments will average \$15,000 per claimant. “We’re a bunch of hungry dogs out here getting a very small bone, when at one point we thought we were going to get a nice, big steak,” one salmon fisherman was quoted as saying. *See Los Angeles Times*, December 6, 2008.

Meanwhile, the *New York Times*’ Sidebar law blog has noted that the U.S. Supreme Court’s 5-to-3 decision also considered the impact of Exxon-sponsored research on its ruling. According to Sidebar author Adam Liptak, Justice David Souter wrote in a footnote that the court declined to rely on certain articles “funded in part by Exxon,” prompting a fierce academic debate about the relationships between corporate interests, legal analysis and scientific literature. “People who conduct empirical legal research say their work should be considered on the merits. Others accuse Justice Souter of being disingenuous, noting that the court largely adopted the approach advocated by the Exxon studies, disclaimer or no. Still others say the court mishandled the studies it cited with approval,” writes Liptak, who nevertheless concludes that “focusing on financing rather than quality is only a partial solution.” *See Sidebar*, November 24, 2008.

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## ALL THINGS LEGISLATIVE AND REGULATORY

### CPSC Seeks Comments on Voluntary Crib Safety Standards

The Consumer Product Safety Commission (CPSC) has **issued** an advanced notice of proposed rulemaking to begin its assessment of voluntary safety standards for cribs. As required by section 104 of the Consumer Product Safety Improvement Act of 2008, CPSC has asked “consumer groups, juvenile product manufacturers, and independent child product engineers and experts” to submit written comments “concerning the risks of injury associated with full size and non-full-size cribs, possible ways to address these risks, and the economic impact of various regulatory alternatives.”

CPSC plans to examine “potential design and durability issues” and is seeking information on hardware systems, assembly and instructional problems, and wood quality/strength issues for cribs with stationary or drop-side construction. “The Office of Compliance staff has opened seven investigative cases pertaining to crib hazards since the initiation of the CPSC early warning system in November 2007. Five of these investigations resulted in recalls of over 2.5 million cribs and pertain to such issues as drop-side-hardware defect, wood quality issues, and dimensional defects,” according to CPSC, which will accept comments until January 26, 2009.

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## LEGAL LITERATURE REVIEW

### Mark Moller, "A New Look at the Original Meaning of the Diversity Clause," November 22, 2008

DePaul University-College of Law Assistant Professor Mark Moller, troubled by an apparent jurisdiction problem raised by the Class Action Fairness Act (CAFA) searches legal history to determine what the framers of the U.S. Constitution intended by the Diversity Clause, which gives federal courts jurisdiction over "controversies between citizens of different states." Moller contends that original intent limits the outer reach of diversity jurisdiction by federal rules of preclusion.

As Moller explains, CAFA, which was enacted to remove class actions from state to federal courts, "jettisons the complete diversity rule, allowing federal court[s] to exercise jurisdiction over multi-state class actions if a class action exhibits minimum diversity." Thus, "CAFA allows federal courts to consider citizenship of absent class members before a class has been certified when determining whether minimum diversity exists." Because a constitutional "controversy" exists only between the named plaintiff and defendant when a putative class action is filed, "it is difficult to imagine how diversity jurisdiction can be constitutionally maintained [based on class members' citizenship] prior to certification of the class."

Moller's article explains how Congress cannot, consistent with the framers' intent, "authorize courts to exercise jurisdiction on a minimum diversity theory based on the citizenship of persons courts cannot bind," that is, members of a class not yet certified. This is so, if absent class members are beyond the preclusive reach of the courts before the issuance of notice to the class and the expiration of the Rule 23 "opt out" period. Moller suggests that Congress should "speak clearly about the preclusive effect of federal judgments before exercising diversity jurisdiction based on the citizenship of persons" and make it clear that federal courts "can bind adequately represented absent class members to a certification denial without notice and opt out." According to Moller, "[a]pplying a clear statement rule captures both the federalism and separation of powers benefits of the Diversity Clause, originally understood."

### Todd Peppers & Christopher Zorn, "Law Clerk Influence on Supreme Court Decision Making: An Empirical Assessment," *DePaul Law Review* (2008)

This article, authored by political science professors, describes how they undertook to determine whether the political leanings of U.S. Supreme Court law clerks have an influence on how the justices decide the cases before them. According to *New York Times* Supreme Court correspondent Adam Liptak, writing in his *Sidebar* column about this article, a former Court clerk and chief justice first broke the code of silence among law clerks about their Court tenures when he published an essay in a 1957 issue of *U.S. News & World Report* to express his fear that the political views of Supreme Court law clerks were shifting the Court to the left. Chief Justice William Rehnquist responded to critics of his essay by saying, "The resolution of these disagreements must await a thorough, impartial study of the matter." According to Liptak, the Peppers and Zorn article takes the first step in that assessment.

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Constructing a model based on responses to a survey question about political party affiliation posed to hundreds of former law clerks and predictions about those who chose not to respond, the professors conclude that (i) “when all else is equal, more ideologically liberal Justices will be more likely to select clerks whose political party affiliation is Democratic, while more conservative Justices will be more likely to choose Republican clerks”; and (ii) “[t]he evidence, then, supports the proposition that, over and above the influence of the Justices’ own policy preferences, their clerks’ policy preferences have an independent effect on their votes.”

The authors caution that “it is important to underscore that our findings offer no support for any particular causal model of that influence. As discussed above, the mechanisms by which clerks might influence their Justices’ behavior are many and varied; cert memoranda, bench memoranda, and informal conversations are all possible avenues through which law clerks can express their policy preferences. Moreover, to shape their Justices’ perception of a case, law clerks might wield both appropriate methods, such as engaging in candid and open policy debates, as well as inappropriate methods, such as deception in memoranda writing.” The article concludes by calling for further research and a more complete understanding of how law clerk ideology might play a role in U.S. Supreme Court decision making. See *The New York Times Sidebar*, December 9, 2008.

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## LAW BLOG ROUNDUP

### Tort Reform Can Start with a Legislative Drafting Checklist

“In Schuck’s mind, too many laws are created without lawmakers giving thought to a handful—a checklist—of key issues. Instead, these issues too often end up getting resolved in courtrooms across the country.” *Wall Street* writer Ashby Jones, blogging about Yale Law Professor Peter Schuck’s proposal to cut down on unnecessary litigation by having lawmakers follow a checklist before passing a bill. Among the issues that should be addressed by any new law, according to Schuck, would be whether the statute permits a private cause of action for damages, which courts have subject-matter jurisdiction, whether the new law will be retroactive, and, most importantly, whether the law preempts state laws, regulations and litigation.

WSJ Law Blog, December 2, 2008.

*“In Schuck’s mind, too many laws are created without lawmakers giving thought to a handful—a checklist—of key issues. Instead, these issues too often end up getting resolved in courtrooms across the country.”*

### Riveting Return to Punitive Damages in U.S. Supreme Court?

“I was somewhat worried about keeping my focus during the arguments, but fortunately Justice Souter struck early with some of his most pointed questions ever about why the Supreme Court should be stepping in to the case and cutting off state law claims. From then on, it was 60 minutes of non-stop action.” ABC News legal correspondent Jan Crawford Greenburg, discussing the U.S. Supreme Court’s consideration, for the third time, of the punitive damages



awarded to the widow of a smoker from Oregon that are nearly 100 times the compensatory damages. The Oregon Supreme Court has twice reaffirmed the punitive award against a cigarette manufacturer.

Legalities Blog, December 3, 2008.

## THE FINAL WORD

**Dave Barry, "Do Not Read While Sleeping, *Green County Dailies*, November 21, 2008**

"One big reason that consumers don't read manuals is that the typical manual starts out with 15 to 25 pages of warnings, informing you of numerous highly unlikely ways in which you could use the product to injure or kill yourself," writes humor columnist Dave Barry in this article about the typical consumer's experience with product manuals. Barry concludes that most product warnings result from the unfortunate fact that "somewhere, sometime, some consumer with the IQ of a radish actually DID do one these bizarre things, got a lawyer and sued, and a jury decided, what the heck \$300 million sounds about right, but let's not tell the judge right away because first we should order a pizza." He advises companies on several ways to coax reluctant (male) buyers to actually read the product instructions, but ultimately predicts that, without these remedies, the day will come when "every product you buy will come with an actual living lawyer inside the box, sealed in plastic; as soon as you break the seal, the lawyer will emerge and start preparing your product-liability lawsuit."

## UPCOMING CONFERENCES AND SEMINARS

[American Bar Association](#), Phoenix, Arizona – April 2-3, 2009 – "2009 Emerging Issues in Motor Vehicle Product Liability Litigation." Shook, Hardy & Bacon Tort Partner [Frank Kelly](#) joins a distinguished faculty to serve on a panel discussing "The Science Behind the Sentiment: Understanding Punitive Damages in an Era of Anti-Corporate Bias." CLE credit is available for this program, which is presented by the ABA's Tort Trial & Insurance Practice Section; Products, General Liability and Consumer Law Committee and Automobile Law Committee.

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