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PRACTICE TIP

Playing Poker With Experts

Part Two of a Two-Part Article

By James H. Rotondo

Part One of this article described problems arising out of the substitution of experts, and discussed some recent case law. The conclusion herein presents some suggested ways of dealing with the situation.

Suggested Approach

Every expert deposition needs to be thorough and explore the factual and theoretical bases of the expert's opinions. This approach is necessary to identify the types of experts to respond to the plaintiff's expert, to prepare *Daubert* and/or *Kumho* motions seeking to preclude the expert, to cross-examine the expert at trial, and to identify topics that are to be addressed in the testimony of your fact and expert witnesses at trial. This article does not advocate taking a superficial or sloppy expert deposition.

'Playing All Your Cards'

Nevertheless, the willingness of some courts to allow the untimely substitution of expert witnesses, particularly where the only justification for that substitution is that the deposition revealed his lack of qualifications and veracity, suggests that little is gained by "playing all of your cards" at the deposition of the opposing expert. Your client may be better served by your holding back some lines of

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CA Case to Decide Whether the Duty to Warn Covers Hazards Posed By Products Of Others

By Malcolm Myers, Mark A. Behrens and Cary Silverman

Product liability law typically places liability for injuries upon a manufacturer or seller that exercises control over the product at issue, profits from its sale, or has developed a duty to the injured party. In essence, the law recognizes that the public expects reputable sellers to stand behind their goods. But what about products made by third parties, such as replacement internal parts or external parts that are attached to a product post-sale? The California Supreme Court is considering a case where the question is whether a duty to warn may be imposed on the manufacturer or seller of one product for hazards associated with products that are manufactured and sold by third parties. The issue, which arises in the context of asbestos litigation, could have significantly broader liability and policy implications.

A Radical Expansion of Tort Law

Traditional product liability principles generally do not hold a manufacturer or seller responsible for harm from the products of third parties. After all, the basis of strict liability is that a seller, by marketing its product, undertakes a special responsibility toward consumers who may be injured by it. A defendant that manufactures or sells a product is in the best position to know the dangerous aspects of its product. Tying liability to the injury-producing product recognizes that manufacturers cannot be expected to determine dangers associated with products that they did not manufacture or sell and do not have an opportunity to inspect. In addition, the law recognizes that those who market a product ought bear the burden of accidental injuries because they are in a position to internalize such costs in the price of the product and may obtain liability insurance against loss.

Similar reasoning applies in negligence claims, where the plaintiff must establish the existence of a duty owed directly to the injured person. Some plaintiffs' lawyers argue that it is appropriate to impose liability on a manufacturer for failure to warn about the risks of asbestos-containing replacement internal parts

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or external parts made by others on the theory that it was foreseeable to the manufacturer that these parts could be used with its product. Foreseeability of harm alone, however, is not sufficient to create a tort duty. As the California Supreme Court explained in *Thing v. La Chusa*, 771 P.2d 814, 830 (Cal. 1989), “there are clear judicial days on which a court can foresee forever and thus determine liability but none on which the foresight alone provides a socially and judicially acceptable limit on recovery of damages for [an] injury.” For this reason, courts look to various public policy considerations to establish if a duty exists, *e.g.*, whether the connection between the defendant’s conduct and the injury is direct or attenuated, and whether the defendant profited from the conduct.

Courts generally recognize only a few situations where manufacturers may be liable for harms caused by others’ products, such as where a component part maker substantially participated in the integration of its product into the design of a finished product, or two otherwise safe products combine to create a new, synergistic hazard. Courts must draw a reasonable line, and this line has been in place throughout the common law.

An Attempt to Expand the Law

Since asbestos litigation emerged over three decades ago, lawyers who bring such claims have continually sought out new defendants or raised new theories of liability. An emerging theory promoted by some plaintiffs’ counsel is that makers of nondefective products, such as pumps or valves, should be held liable for harms allegedly caused by asbestos-containing replacement parts manufactured or sold by third parties (*i.e.*, replacement internal gaskets or packing or replacement external flange gaskets) or asbestos-containing external thermal insulation manufactured and sold by third parties and attached post-sale, *e.g.*, by the U.S. Navy.

It is easy to see what is suddenly driving this novel theory: Most major manufacturers of asbestos-containing products have filed for bankruptcy, and the Navy enjoys sovereign immunity. As a substitute, plaintiffs’ lawyers have sought to impose liability on solvent manufacturers for harms caused by products they never made, sold, installed, or profited from. The implications of this theory should be of concern to any company that manufactures or sells products.

Two appellate decisions in Washington State accepted the radical new third-party duty-to-warn theory proposed by asbestos plaintiffs’ lawyers, but the momentum the rulings created was short-lived. In 2008, the state’s highest court rejected component maker liability for failure to warn of asbestos-related hazards in products made by others. In *Simonetta v. Viad Corp.*, 197 P.3d 127 (Wash. 2008), the Washington Supreme Court held that a manufacturer may not be held liable in common law negligence or strict liability actions for failure to warn of the dangers of asbestos exposure resulting from another manufacturer’s insulation applied to its products after sale of the products to the Navy. There, the court ruled that an evaporator manufacturer was only responsible for the “chain of distribution” of its product and that the addition of asbestos-containing insulation manufactured by another company represented a separate chain of distribution. In a companion case, *Braaten v. Saberhagen Holdings*, 198 P.3d 493 (Wash. 2008), the court rejected failure-to-warn claims against pump and valve manufacturers relating to replacement packing and replacement gaskets made by others. In both instances, the court rejected plaintiffs’ claims that the foreseeability of harm gave rise to a duty owed.

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Supreme Court Adopts Nerve Center Test for Corporate Citizenship

By John Sear

"[W]e conclude that the phrase 'principal place of business' refers to the place where the corporation's high level officers direct, control, and coordinate the corporation's activities," Justice Breyer wrote earlier this year for the unanimous Supreme Court in *Hertz Corp. v. Friend*, 559 U.S. ___, 130 S. Ct. 1181, 1186 (2010), to resolve the conflict among the Circuits about how to determine a corporation's citizenship for purposes of federal diversity jurisdiction under 28 U.S.C. § 1332.In adopting the "nerve center" test for determining corporate citizenship, the Court in *Hertz Corp.* rejected the far more complex "business activities" approach that attempts to determine citizenship based upon the volume of business a corporation carried on within a particular state. The "nerve center" approach, according to the Court, is superior to other approaches because it comports with the language and legislative history of § 1332 and promotes administrative simplicity and economy.

Facts

The plaintiffs in *Hertz Corp.* filed a class action in California state court, claiming that Hertz violated California's wage and hour laws. Hertz removed the case, invoking the federal court's diversity of citizenship jurisdiction under § 1332. When the plaintiffs moved to remand, Hertz filed a declaration of one of its employees spelling out Hertz's business connections to California compared with other states, including the number of rental car locations in California (273 of 1,606 total locations), the amount of revenue generated from California operations ($811 million of $4.371 billion total revenues), the number of employees in California (2,300 of 11,230 total full-time employees), and the performance of core executive functions in states other than California.

The district court accepted Hertz's statement of facts as undisputed, but nonetheless remanded the case to state court after analyzing Hertz's citizenship under prevailing Ninth Circuit precedent. Under Ninth Circuit law, courts engage in a two-step analysis to determine the corporation's "principal place of business." They first analyze a corporation's business activity "state by state"; if the amount is "significantly larger" or "substantially predominates" in one state, that state is the corporation's principal place of business. If the amount of business activity is not significantly larger or substantially predominant in one state, then courts conclude that the corporation's "nerve center" — "the place where the majority of its executive and administrative functions are performed" — was the principal place of business.

From the order remanding the case to state court, Hertz appealed to the Ninth Circuit. Although remand orders are generally "not reviewable on appeal," 28 U.S.C. § 1447(d), the Class Action Fairness Act of 2005 permits appeal of orders granting or denying motions to remand class actions. *See* 28 U.S.C. § 1453(c)(1) ("a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not less than seven days after entry of the order"). The Ninth Circuit affirmed.

But the Supreme Court granted Hertz's petition for writ of certiorari, vacated the Ninth Circuit's judgment, and remanded the case to give the plaintiffs "a fair opportunity to litigate their case in light of [the Court's] holding."130 S. Ct. at 1195.

Opinion and Reasoning

In rejecting the various complicated and often tortured approaches Circuits had taken in determining "principal places of business," the Court pulled no punches, characterizing the approaches as "doomed to failure":

> This complexity may reflect an unmediated judicial effort to apply the statutory phrase "principal place of business" in light of the general purpose of diversity jurisdiction, *i.e.*, an effort to find the State where a corporation is least likely to suffer out-of-state prejudice when it is sued in a local court. But, if so, that task seems doomed to failure. After all, the relevant purposive concern — prejudice against an out-of-state party — will often depend upon factors that courts cannot easily measure, for example, a corporation's image, its history, and its advertising, while the factors that courts can more easily measure, for example, its office or plant location, its sales, its employment, or the nature of the goods or services it supplies, will sometimes bear no more than a distant relation to the likelihood of prejudice. At the same time, this approach is at war with administrative simplicity. And it has failed to achieve a nationally uniform interpretation of federal law, an unfortunate consequence in a federal legal system.

130 S. Ct. at 1192 (citation omitted).

In place of the splintered approaches employed by the Circuits, the Court sought "to find a single, more uniform interpretation of the statutory phrase." *Id.* Adopting the "nerve center" test, according to the Court, accomplished that objective:

> We conclude that "principal place of business" is best read as referring to the place where a corporation's officers direct, control, and coordinate the corporation's activities. It is the place that Courts of Appeals have called the corporation's 'nerve center.' And in practice it should normally be the place where the corporation maintains its headquarters — provided that the headquarters is the actual center of direction, control, and coordination, *i.e.*, the "nerve center," and not simply an office where the corporation holds its board meetings (for example, attended by directors and officers who have traveled there for the occasion).
>
> *Id.*

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Better But Imperfect

Three considerations convinced the Court that the test "is superior to other possibilities." *Id*.

First, the "nerve center" test comports with the statutory language, which connotes a single principal place of business within a state. The state itself is not the principal place of business. By contrast, the approach taken by the Ninth Circuit and others would result in California citizenship for virtually every national retailer simply because their business activities reflect California's larger population. Federal jurisdiction, in the Court's view, should not depend upon a state's population.

Second, the "nerve center" test promotes administrative simplicity by eliminating much of the litigation caused by application of complicated citizenship tests. According to the Court, complicated tests "produce appeals and reversals, encourage gamesmanship, and, again, diminish the likelihood that results and settlements will reflect a claim's legal and factual merits." *Id*. at 1193. The simpler "nerve center" test is comparatively easier to apply and offers greater predictability for all litigants.

Finally, the "nerve center" test comports with the legislative history of § 1332. The Judicial Conference of the United States initially proposed in 1951 a "numerical test" akin to the Ninth Circuit's test, but later rejected that test in favor of the "nerve center" test that Congress ultimately embraced in 1958.

While finding that the "nerve center" test offers benefits other tests do not, the Court acknowledged that the test is imperfect and may still lead to "hard cases." For example, according to the Court, "in this era of telecommuting, some corporations may divide their command and coordinating functions among officers who work at several different locations, perhaps communicating over the Internet." 130 S. Ct. at 1194. The "nerve center" test, however, will point in a single direction, towards the center of overall direction, control, and coordination." *Id*.

Likewise, the "nerve center" test may produce results that run counter to the underlying rationale of diversity jurisdiction — minimizing prejudice against defendants who are not citizens of the forum state. If, for example, the corporation's publicly visible activities occur in New Jersey but its control and coordination take place in New York, the corporation could not remove a case filed in New Jersey state court, even though it may experience less prejudice there compared to New York. *Id*. The Court recognized such anomalies could arise, but accepted them "in view of the necessity of having a clearer rule." *Id*. As the Court explained, "Accepting occasionally counterintuitive results is the price the legal system must pay to avoid overly complex jurisdictional administration while producing the benefits that accompany a more uniform legal system." *Id*.

Strategies for Corporate Defendants

A corporate defendant hoping to remove a case from state court may maximize the benefits of the "nerve center" test by pursuing some simple strategies. A defendant should affirmatively allege in its notice of removal that the corporation's headquarters is its principal place of business. A defendant should allege in its notice of removal that the headquarters is its "nerve center" and "the actual center of direction, control, and coordination" of the corporation's business. A defendant should consistently assert in removal notices and other jurisdictional papers that the headquarters, and nowhere else, is the principal place of business, and ensure consistency between those papers and corporate records regarding the actual center of direction, control, and coordination of the corporation's business — inconsistency can lead to costly disputes and unfavorable consequences for the corporate defendant sued in unfavorable venues.

Conclusion

Hertz Corp. benefits corporate defendants in product liability litigation because it prevents pro-plaintiff federal judges from finding non-diversity of citizenship simply because a corporation has a significant presence in a particular state but headquarters in another one. Under *Hertz Corp.*, therefore, a corporation's headquarters presumptively will be its "nerve center" and, hence, its principal place of business for purposes of determining diversity of citizenship. Corporate defendants can maximize the benefits of *Hertz Corp.* through careful, consistent jurisdictional pleading and ensuring consistency between legal papers and corporate records.

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Facing defeat in Washington, plaintiffs' lawyers then tried to export their novel theory to California, where it was also rejected by four out of the five intermediate appellate courts that considered the issue. *See Taylor v. Elliott Turbomachinery Co., Inc.*, 171 Cal. App. 4th 564 (1st Dist. 2009), review denied (Cal. June 10, 2009); *Hall v. Warren Pumps, LLC*, 2010 WL 528489 (Cal. App. 2d Dist. Div. 2 Feb. 16, 2010) (unpublished), review granted (May 12, 2010); *Merrill v. Leslie Controls, Inc.*, 179 Cal. App. 4th 262 (2d Dist. Div. 3 2009), review granted and opinion superseded, 224 P.3d 919 (Cal. 2010); *Walton v. William Powell Co.*, 183 Cal. App. 4th 1470 (2d Dist. Div. 4), review granted and opinion superseded, 232 P.3d 1201 (Cal. 2010).

Other courts around the country have rejected similar claims. For example, the U.S. Court of Appeals for the Sixth Circuit has found that a pump manufacturer could not have caused a merchant seaman's illness from exposure to insulation used on the pumps or the replacement gaskets that were supplied by third parties. *See Lindstrom v. A-C Prod. Liab. Trust*, 424 F.3d 488 (6th Cir. 2005). Federal and state courts have also found that vehicle manufacturers are liable only for defective components incorporated into their own finished products; they have no duty to warn of dangers involved

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The Basics of Pension Damages

By Chad L. Staller and Brian Conley

An ironworker suffers a severe injury at the work site and is rendered totally disabled. His economic damages include past and future medical expenses, of course, and lost income through to his projected retirement age. In addition, he may have a claim for another element of loss — pension benefits.

Since pension benefits can account for 50% or more of the damages in a wrongful death or injury matter, a working knowledge of the various types of pensions and how benefits accrue can be extremely useful in evaluating damages. Here, we present an overview of the basic types of pensions and some issues that arise in determining lost pension benefits.

Introduction

Most pensions in the United States are either "defined-benefit" plans or "defined-contribution" plans. Defined-benefit plans pay a certain predetermined amount to the recipients according to the pension-plan formula. In defined-contribution plans, the employer, the employee or both make contributions to the employee's retirement fund, but the ultimate benefits are not predetermined.

Historically, U.S. workers have enjoyed defined-benefit plans, but in the 1980s, most private employers began moving away from this type of plan in favor of the defined contribution plan. Now, defined-benefit plans are found mostly in union and public-sector employment. Some employers provide benefits under both types of plans. Union workers may have defined-benefits plans, but also may receive benefits from a union "annuity fund" set up as a defined-contribution plan. Schoolteachers are typically eligible for both defined benefits and benefits from defined-contribution plans.

Defined-Benefit Plans

In a defined-benefit plan, the amount of the pension is determined by a set formula outlined in the pension plan or in a union's collective-bargaining agreement. Defined-benefit plans typically require contributions from the employee as well as the employer. Under a typical collective-bargaining agreement, employer contributions to a union pension fund are a function of hours worked by the union members. The union member contributes to the pension fund via union dues.

Formulas for determining defined-benefit payouts vary significantly. They include:

- *Years of Service and Final Average Salary*. Under this formula, the annual benefit is determined by a set percentage of the worker's final average salary multiplied by years of service. The multiplier is usually 1%-3% of the final average salary — typically, the final three or five years of employment, although some plans employ a "High 3" or "High 5" factor rather than a final average salary. In these plans, the average of the highest three or five years of pay is used as the basis of the pension, regardless of when they occurred during the employee's tenure. "Years of Service" comprise the employee's tenure with the company/union/retirement system. Many unions require a minimum number of hours worked in order to receive credit for that year.
- *Years of Service Only*. This formula is typically seen only in union collective-bargaining agreements, most notably Ironworkers. Benefits are determined by multiplying a set dollar amount by years of service. Because this type of plan lacks a salary component, employees with equal service time receive equivalent benefits, regardless of position or salary throughout their tenure. While some of these plans periodically increase the dollar multiplier to account for inflation, many plans of this type have been forced to "freeze" the dollar multiplier to avoid depleting their pension funds as the number of retired members grows. Typical damages calculations for litigation purposes assume periodic inflationary increases to the multiplier. In the wake of multiplier "freezes," this may result in an overstatement of any pension loss.
- *"Pension Equity" Plans*. These plans are based on "Pension Equity" points (PEP), which are typically determined using a sliding scale. Rather than relying solely on years of service, the number of PEP points received in a given year is determined by the sum of the employee's age and years of service. The age-plus-years-of-service sums are broken into "bands," and a number of PEP points are assigned to each band. For example, the first band might comprise workers with less than 36 combined age and years of service and may equal two PEP points, while workers in the 36-45 band have four PEP points; those in the 46-55 band have seven PEP points, and the 56-65 band workers have 10 PEP points. Thus, a 35-year-old employee with ten years' service would have four PEP points and a 60-year-old employee with one year of service would have 13 PEP points.

One of the primary criticisms of defined-benefit plans is that they are biased toward older employees (*i.e.*, benefit accrual is back-weighted to the end of a career). This bias is even more exaggerated under the Pension Equity Plan formula due to the disproportionate effect of age in determining PEP points. While this can be seen as an incentive for older employees to remain loyal to the company, it could also be a distinct disincentive to hiring older employees, as they will immediately begin to accrue significant pension benefits.

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On retirement, workers with defined benefit plans typically have several payout options, including:

- Single life annuity. This option gives the retired worker the maximum monthly payment until death. Payments cease at death with no continuing benefits to any beneficiaries.
- Full survivor benefits. In exchange for taking a reduced monthly benefit, a beneficiary continues to receive full monthly payments after the death of the retired worker.
- Reduced survivor benefits. In exchange for reduced monthly benefits, a named beneficiary continues to receive a reduced benefit after the retired worker's death.

Defined Contribution Plans

In the 1980s, employers moved away from defined-benefit plans due in large part to increased life expectancy and the mass of baby-boomers in the workplace. This created an imbalance between those receiving benefits and contributing workers; as with the federal Social Security system, fewer and fewer younger workers had to contribute more and more to maintain the benefits to already retired workers.

These pensions, which include the popular 401(k) plan, sometimes entail contributions from the employer and sometimes are funded entirely by employee contributions. Employer contributions are either automatic or matching. In automatic plans, the employer contributes a set amount, either a percentage of salary or an amount per hours worked. In matching plans, the employer will match any contribution made by the employee up to a set percentage of salary. Typical matching arrangements include 100% (dollar-for-dollar), 50% (50 cents for each dollar contributed by the employee) and hybrids (*e.g.*, 100% for the first 2% of salary and 50% on the next 6%).

On retirement, rather than receiving an annuity, the worker gains access to the retirement account and, typically, can decide on the rate of withdrawal from the account. Therefore, there is some risk that the account may be depleted before the retired worker's death. And, unlike defined-benefit plans, defined contribution plans are subject to investment risk — pension plan funds can suffer significant losses. The federal Pension Benefit Guaranty Corporation (PBGC) guarantees payment of certain retirement benefits for participants in most private defined-benefit plans if the plan is terminated without enough money to pay all of the promised benefits, but the PBGC does not guarantee benefit payments for defined-contribution plans.

Pension As an Element of Damages

Since pensions can be such a significant element of loss in injury and death claims, both plaintiffs and defendants should engage in focused discovery on this point. Key documents include collective bargaining agreements and the pension's "Summary Plan Description," outlining the details of the particular plan. The forensic economist needs all relevant pension-plan details to produce an accurate assessment of pension-related damages. Beyond the details of individual pension plans, the claim itself needs to be carefully examined. Some pension-claims are questionable in light of trends in specific industries or the economy in general.

For example, a union ironworker recently claimed lost pension benefits based on an age-62 retirement projection, with the pension multiplier growing at the rate of 7.2% annually. However, an examination of the plan liabilities and assets showed a $147 million deficit, with a steady decline in hours worked by union members. The construction industry trend is toward concrete buildings — steel construction, and employment for ironworkers, has significantly diminished since 9/11. Thus, it is unlikely that that iron worker would have enjoyed a full pension.

Conclusion

A forensic economist, retained early in the case evaluation and preparation process, can help guide discovery, ensuring that no significant pension-plan details are overlooked, and also examine the relative health of the pension plan in light on the general economy and the particular industry involved.

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examination until trial, and not unnecessarily putting opposing counsel on notice that he or she needs a new expert — allowing opposing counsel to spend months trying to figure out how to deflect the lines of questioning that so flustered the expert during the deposition.

By conducting a thorough investigation of the expert before the deposition, you may be able to identify prior articles, reports and deposition, and trial testimony that will allow you to cross-examine the expert at trial on a number of critical issues that do not need to be raised at the deposition. If, for example, that investigation reveals that the expert has testified for plaintiff's lawyers in your case on 50 prior occasions, has testified that 40 different products are defective, or has written articles inconsistent with his key opinions in this case, generally very little is gained by bringing those facts out at the deposition. Similarly, if you learn through investigation that the expert obtained his Ph.D. at a correspondence school or flunked several courses in college in the area of his supposed expertise, bringing those facts out at deposition does not necessarily advance your case significantly.

Bias and Veracity

Questions on these issues primarily relate to bias and veracity, and will have their greatest impact if asked at trial without prior notice. Plaintiff's counsel may be unaware of these deficiencies, and either may not anticipate these questions in his direct trial examination in an effort to deflect the impact of these questions, or may not prepare the expert on how to respond to cross examination. At best, asking these types

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Defending NJ Class Actions

By Neal Walters and Mike Carroll

Companies defending consumer product class actions in New Jersey have received additional support for fighting these proliferating claims. On June 30, the District of New Jersey added to the growing list of cases in which federal and state courts in New Jersey have dismissed product defect claims for economic loss under the New Jersey Consumer Fraud Act (CFA) based on the finding that such claims are subsumed by the New Jersey Products Liability Act (PLA).

The Case

In *Nafar v. Hollywood Tanning Systems, Inc.*, the plaintiff brought suit on behalf of a purported class, claiming, in part, that the defendant had failed to warn her about the potential dangers of UV ray exposure from its tanning machines. Significantly, the plaintiff affirmatively disclaimed any damages for physical injury, claiming only economic loss and seeking reimbursement of the price paid. However, as is often necessary in such cases, the plaintiff contended that if she had been properly warned of the health risks, she would not have purchased the services.

Other Decisions

While *Nafar* was pending, three New Jersey state courts issued opinions holding that when the essential claim in a matter relates to harm or the potential for harm from a product, the claim must be brought under the PLA (*In re Lead Paint Litigation, McDarby v. Merck & Co.*, and *Sinclair v. Merck & Co.*). While considering the plaintiff's class certification motion, the *Nafar* district court applied these decisions and found that the plaintiff's consumer fraud claims, premised on a "failure to warn" about a risk of harm from the tanning machines, were subsumed by the PLA and must be dismissed. The court left open the possibility that the plaintiff's consumer fraud claims premised on misrepresented benefits of the product could proceed, but required that she modify her class certification motion in light of this opinion.

What This Means

The import of these decisions is that even when a plaintiff purposefully limits a claim to economic loss — a typical approach in consumer fraud class actions — the PLA trumps the CFA if the core evidence to be presented involves the risk of personal harm related to a product. To be more specific, defendants may argue, based on these helpful cases, that a plaintiff cannot maintain a consumer fraud action when — in order to support the materiality or causation elements of a consumer fraud claim — the allegedly omitted information relates to health risks from the product. In the wake of a subsumption ruling, a plaintiff's claims may be dismissed outright and will at least be unlikely to sustain class treatment.

Conclusion

Nafar is one of a number of recent dismissals in New Jersey state and federal courts based on the increasingly well-developed theory of PLA subsumption.

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of questions at deposition might prompt settlement discussions, but if the case does not resolve, asking these questions at deposition allows plaintiff's counsel and the expert to develop strategies to respond to these questions at trial. Those questions also may suggest to opposing counsel that he needs a new expert.

Similarly, if the expert has made some obvious mathematical errors, you may be able to avoid the topic altogether at the deposition, or just ask enough questions to set up your cross-examination without revealing the precise line of questions to be asked at trial. These errors need to be of the type that can be explained fairly quickly to the jury. There may, of course, be situations where the mathematical formulas involved are complicated and need to be examined during the deposition so that you understand how those formulas factor into the expert's opinions. By avoiding questioning about obvious mathematical errors, however, you may be able to preserve an effective line of questioning for trial.

Late Substitution

In opposing the late substitution of a new expert, you should anticipate that the court may allow the relief requested; consequently, you should request in the alternative that the court award attorneys' fees and expenses for the cost of preparing to rebut the original expert report and for the deposition of the original expert.

When the opposing side has disclosed a weak expert, counsel also should consider not moving to preclude that expert because that motion may increase the risk that the other side will respond by seeking another expert who is better qualified than the original one. Instead, your client might be better off by having you demonstrate to the jury the expert's weaknesses on cross-examination.

Conclusion

Taking a solid expert deposition can be a daunting proposition under the best of circumstances. In addition to the possibility that you may not have asked enough questions to prepare all of the necessary defenses to the case, you need to consider whether you have asked too many questions that are not critical to an anticipated motion to preclude. Careful consideration needs to be given to asking enough tough questions at

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Movers & Shakers

Kurt Stitcher, who has 20 years of experience as a trial lawyer, has joined **Baker & Daniels LLP** as a partner in the law firm's Chicago office. He will focus his practice on product liability, toxic and mass torts, complex commercial and class action litigation, and white collar criminal defense, compliance and internal investigations.

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an expert's deposition to establish a record that will support a persuasive motion to preclude the expert. At the same time, you do not want to ask unnecessary questions about information developed through investigation regarding bias and credibility, which would be more effective on cross-examination, and which would invite opposing counsel to seek to substitute experts.

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in replacement parts made by others. *See, e.g., Ford Motor Co. v. Wood*, 703 A.2d 1315 (Md. Ct. Spec. App.), cert. denied, 709 A.2d 139 (Md. 1998), abrogated on other grounds, *John Crane, Inc. v. Scribner*, 800 A.2d 727 (Md. 2002); *Baughman v. General Motors Corp.*, 780 F.2d 1131, 1132-33 (4th Cir. 1986). Recently, Pennsylvania and Maine courts firmly adhered to traditional principles of liability, holding that a manufacturer cannot be held liable for a product it neither manufactured nor supplied. *See, e.g., Schaffner v. Aesys Tech., LLC*, 2010 WL 6052750, at *5-6 (Pa. Super. Jan. 21, 2010); *Rumery v. Garlock Sealing Tech., Inc.*, 2009 WL 1747857, at *6 (Me. Super. Ct. Cumberland County Apr. 24, 2009).

In one California appellate district, however, the plaintiffs' theory found support. *See O'Neil v. Crane Co.*, 177 Cal. App. 4th 1019 (2d Dist. Div. 5), review granted and opinion superseded, 223 P3d 1 (Cal. 2009). The court ruled that a plaintiff who served aboard an aircraft carrier could sue those that supplied the ship with pumps and valves because it was foreseeable that those products would be used with replacement parts or external parts supplied by others that contained asbestos. At press time, the *O'Neil* case was pending before the California Supreme Court.

Implications of *O'Neil*

If the California Supreme Court adopts the plaintiffs' novel theory in *O'Neil*, the case could breathe new life into this discredited theory of liability. Such a rule would affect all product manufacturers and have adverse, far-reaching public policy implications.

Most directly, imposing liability on manufacturers for products made by others would worsen asbestos litigation and invite a flood of new cases. Hundreds of companies made products that arguably were used in the vicinity of asbestos insulation, which in earlier years was ubiquitous in industry and buildings. Many of these companies may have never manufactured a product containing asbestos (*e.g.*, manufacturers of steel pipe and pipe hangers; makers of nuts, bolts, washers, wire, and other fasteners of pipe systems; makers of any equipment attached to and using the pipe system; and paint manufacturers), but they could nonetheless be held liable under such a theory.

The effects of accepting such a theory extend well beyond asbestos litigation. In the real world of product design and usage, virtually every product is connected in some manner with many others in ways that could conceivably be anticipated if courts were willing to extend foresight far enough. Such a duty rule would require every product supplier to warn of the foreseeable dangers of numerous other manufacturers' products that might be used in conjunction with or near their own. For example, makers of bread or jam would be required to warn of peanut allergies, as a peanut butter and jelly sandwich is a foreseeable use of their products. Door or drywall manufacturers could be held liable for failure to warn about the dangers of lead paint made by others and applied to their products post-sale. The only limit on such an expansive legal requirement would be the imagination of creative plaintiffs' lawyers.

If a manufacturer's duty were defined by foreseeable uses of other products, the chain of warnings and liability would be so endless, so unpredictable, and so speculative as to be worthless. No rational manufacturer could operate under such a system. Manufacturers also cannot be expected to have R&D facilities to identify potential dangers with respect to all products that may be used in conjunction with or in the vicinity of their own products. Consumer safety could be undermined by the potential for over-warning (the "Boy Who Cried Wolf" problem) and through conflicting information that may be provided by manufacturers of different components and by makers of finished products.

Conclusion

In sum, none of the policies supporting product liability support imposing liability on those who did not market or sell the product that allegedly caused a plaintiff's injury and that derived no income from the sale of those parts. The California Supreme Court in *O'Neil* should adhere to traditional principles, adopt the reasoning of the Washington Supreme Court and the majority of California appellate courts, and reject the plaintiffs' third-party duty-to-warn theory.

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