



Products Liability Perspectives

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From the Chair



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The ALFA Products Liability Committee is very pleased to present the first quarterly electronic Newsletter, *Products Liability Per-*

spectives. The Newsletter is designed to present practice issues of interest to ALFA members and clients both on the national and international fronts, to increase member communication and inform ALFA clients of the latest legal developments and happenings in this area of the law. The Newsletter will include articles authored by ALFA attorneys on various products liability issues, case summaries of notable products liability cases and legislation, and brief summaries of

courtroom successes and achievements of ALFA attorneys. Sharing your knowledge of successful legal strategies, practice pointers, or the potential impact of legal opinions on products liability law in your jurisdiction will inure to the benefit of all ALFA members. Please let our editors know if you desire to publish an article or otherwise contribute to its content. We hope you find the Newsletters informative and useful in your practice.

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Caps on Damages: The “Lay of the Land” By: Ed Higgins, Esq. and Said A. Taleb, Esq. Plunkett & Cooney, P.C., Detroit, Michigan



Your company manufactures, assembles, designs, distributes, leases and/or sells products used throughout the United States. You are a key player in the company’s legal or risk management department. While the vast majority of your fellow employees spend their workdays contributing to the very purpose of the company, *i.e.*, making profit, you are

charged with doing your best to retain as much of that profit as is reasonably possible – or at least be able to accurately predict the ultimate cost of that most recent personal injury lawsuit to the company’s bottom line.

Indeed, the evaluation of liability exposure and litigation costs attendant to any particular

personal injury claim can be fraught with peril, and is anything but an exact science. Of course, it does not help you that this is the last thing management and engineers want to hear from you. In recent history, however, a modicum of assistance with this daunting task has come from what some might consider an unlikely source: various state govern-



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ments. Under the banner of “tort reform,” many states have enacted legislation that limits the amount of various types of damages recoverable in personal injury actions. Granted, none of these caps on damages truly “cap” the damages you might have to pay in any given lawsuit – at least not to the extent that you can define a maximum judgment in any given case. The limitations invariably apply to only *some* of the blanks on the jury verdict form, such as punitive or non-economic damages. Many of them are riddled with exceptions that will void or mitigate the cap depending upon the degree of the defendant’s misconduct or the severity of the plaintiff’s injuries; the applicability of these exceptions is often left to the highly unpredictable discretion of the jury. They are typically subject to annual increases to account for inflation. Generally speaking, the caps are so high that they only become a real factor in cases of significant exposure.

So, it is fair to say that “caps” legislation is not exactly a panacea. It should come as no surprise, however, that attorneys who make their living on the plaintiff’s side of the bar have not been particularly fond of tort reform legislation in general, and damages caps, in particular. After all, a fair percentage of every dollar saved by a defendant as a result of the “caps” would have otherwise wound up in a plaintiff attorney’s pocket. Consequently, it was predictable that we would ultimately see challenges to this legislation.

Caps and Constitutional Challenges

To date, almost half of the fifty states have enacted “caps” legislation that could potentially limit recovery of certain types of damages in a personal injury action filed against a product manufacturer or seller. A couple of other states have introduced bills that could lead to caps. The reality is that the absence, existence and/or preservation of tort reform legislation in any particular state is often a factor of the political climate in that state. Our research indicates that, to date, constitutional challenges have

worked their way through the to the highest appellate court in at least eleven states that have passed damages cap legislation. In all but two of those states (Illinois and Ohio), the constitutionality of the legislation was ultimately upheld, which would seem to bode well for this type of legislation. More importantly, this success rate would seem to provide us with enough information to formulate some reasonable conclusions – or, at least, educated guesses – about the continued viability of caps that can be relied upon to limit certain areas of exposure faced by product manufacturers and sellers in future personal injury actions.

A Recent Case Study

By way of example, in Michigan, sweeping products liability reform legislation was enacted in 1996. With a conservative, pro-business, Republican governor in office for three terms, and a solid Republican majority in both chambers of the Legislature, not to mention the concomitant “packing” of the appellate courts with like-minded jurists, the conditions were ripe for tort reform that would withstand the foreseeable challenges. The legislation took effect on March 28, 1996. Among other “reform” provisions, the new law provided that the total amount of damages that could be awarded in a products liability action for noneconomic loss could not exceed \$280,000, unless either of the following situations were found to exist: (1) the product defect caused either death or permanent loss of a vital bodily function, in which case the amount of damages awarded for noneconomic loss shall not exceed \$500,000;¹ or (2) at the time of manufacture or distribution, the defendant had actual knowledge that the product was defective and that there was a substantial likelihood that the defect would cause the injury that was the basis of the action, and the defendant willfully disregarded that knowledge in the manufacture or distribution of the product.² It was further provided that the amount of the caps would be adjusted by the state treasurer on an annual basis “to reflect the cumulative annual percentage

change in the consumer price index.”³ As a result of these annual adjustments, these “caps” are presently \$366,000 and \$653,500, respectively.

In July 2004, the Michigan Supreme Court issued an opinion in a “caps case” handled on appeal by a partner at Plunkett & Cooney, Ernest Bazzana. While the case, *Phillips v. Mirac, Inc.*,⁴ involved constitutional challenges to a statute which limited the amount of a lessor’s statutory vicarious liability in rental car agreements, the court’s opinion upholding the statute as constitutional will be controlling in any future challenge to the constitutionality of Michigan’s product liability caps on damages.

As is common in such challenges, the plaintiff in *Phillips* argued that the Michigan legislation was unconstitutional because it violated her rights to (1) a jury trial, (2) equal protection and (3) due process. The supreme court first concluded that the subject statute did not violate the plaintiff’s right to a jury trial for two reasons. First, the court explained that, while the finder of fact may decide that “a defendant acted negligently and the amount of damages occasioned thereby,”⁵ it is ultimately left to the court to decide the legal consequences of these findings. For instance, the court may rule that a defendant is not liable for its negligence and the damages proximately caused to the plaintiff because of governmental immunity statutes. On the other hand, the court may enter a post-trial judgment which doubles or trebles the damages found by the jury, in accordance with a variety of different statutes. Consequently, the court reasoned that the amount actually received by a plaintiff, as opposed to the amount that the plaintiff has been found to suffer, “was never within those things a jury can decide.”⁶ Second, the court explained that if the legislature can create or abolish causes of action, even those based on common law, it must be able to take the “less drastic step” of modifying a cause of action by limiting the amount of damages recoverable from a particular defendant.⁷

The equal protection challenge in *Phillips* was based on the argument that the plaintiff, unlike litigants pursuing other types of claims, was being prevented from recovering an amount decided by a jury to be her

damages.⁸ After first pointing out that legislatures are in the business of drawing lines and enacting laws that inherently treat individuals differently, the court determined that Ms. Phillips' equal protection claim would be properly analyzed by applying the rational basis test, because the statute "does not result in discrimination by race, national origin, or ethnicity, nor affect an interest that is fundamental" (which would invoke the strict scrutiny test), nor did the statute discriminate on the basis of gender or illegitimacy (which would invoke the heightened scrutiny test).⁹ The court concluded that the legislation satisfied the rational basis test because it is rationally related to a legitimate governmental interest, i.e., reduced insurance costs for automobile lessors would increase the number of providers available to Michigan consumers.¹⁰ Since the plaintiff's substantive due process claim invoked the same rational basis test, it met with the same result.¹¹

Withstanding Scrutiny in Other States

The Alaska Supreme Court explained that in a substantive due process challenge to a "cap" on noneconomic and punitive damages, where only economic interests are at stake, only a "fair and substantial relationship" between the statute and a legitimate state objective was required, i.e., a limited rational basis test.¹² In its earlier discussion of its basis for rejecting a plaintiff's equal protection challenge, the Alaska Supreme Court recognized discouragement of frivolous litigation to decrease the cost of litigation and liability insurance as a legitimate state objective.¹³ Similarly, the North Carolina Supreme Court identified the state's need to preserve its economic development, public confidence in the judicial system and the importance of clear notice to defendants of possible penalty as legitimate state objectives justifying a "cap" on punitive damages.¹⁴

It's Not All Good News

Other courts have rejected constitutional challenges to caps based on theories of taking of property without just compensation,¹⁵ vagueness,¹⁶ guarantees to open courts,¹⁷ separation of powers,¹⁸ and prohibitions on special legislation.¹⁹

Lest any products liability defendant become too comfortable with the continued viability of such tort reform legislation, there remains "the other side of the coin." In *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*,²⁰ the Ohio Supreme Court struck down a statute capping punitive damages in tort actions, including product liability claims, to the lesser of \$100,000 (\$250,000 for "large employers") or three times the amount of the compensatory damages awarded, as an unconstitutional violation of the right to jury trial. The court observed that Ohio's tort reform legislation created the "illusion" of constitutional compliance by allowing juries to assess punitive damages, but requiring the court to reduce any such award if it exceeded the cap, which it concluded was no more constitutionally appropriate than precluding the jury from making the determination in the first place.²¹ Interestingly, the Ohio "caps" legislation included a provision that precluded a defendant from being assessed punitive damages more than once. The Ohio Supreme Court found this to be "egregious" in that it effectively instituted a "lottery" whereby the first victim of that company's negligence to collect was rewarded, with all others simply losing their constitutional right to a jury trial as to punitive damages.²²

The Illinois Supreme Court was a bit more creative in finding that state's "caps" legislation unconstitutional. The Illinois legislation limited non-economic damages to \$500,000 in all tort and products liability actions, regardless of whether the court or the jury awarded a larger amount. The Supreme Court, however, concluded that the statute violated the special legislation clause of the Illinois Constitution because the damages cap was arbitrary and not rationally related to a legitimate governmental interest in reducing systemic costs of tort liability.²³ In fact, the court observed that, even if the suggested savings were realized, it ran afoul of the special legislation prohibition to allow the entire burden of same to rest on one class of injured plaintiffs.²⁴ The court further held that the statute violated the separation of powers doctrine by undercutting the power of the judiciary to reduce excessive verdicts by functioning as a legislative remittitur with-

out regard to the specific circumstances of individual awards.²⁵

Where Are We Headed?

"Can't we have some uniformity," you ask? Well, no. While the drumbeat of "federal tort reform" seems to get louder in advance of each presidential election, the reality is that, for the most part, tort law is a matter of state law. Even when tort actions are filed in federal court, based upon diversity of citizenship, the court applies state law to the substantive issues.

To the extent that a "bottom line" can be drawn on this issue for a products liability defendant who can be sued in multiple jurisdictions throughout the United States, it would simply be that there may be a degree of occasional certainty as to the "worst-case scenario" which management can assess. While the issue is jurisdictional-dependent, there is an increasing chance that a given new lawsuit will come with the benefit of a cap, and that, far more often than not, these caps will withstand constitutional scrutiny.

The good news, of course, is that, no matter what state you are sued in, counsel can steer you through "the lay of the land" in their jurisdiction, so that you can be prepared for those tough questions from management about the company's exposure in its next products liability lawsuit.

If you have any questions or comments on these issues, the authors can be contacted at (313) 983-4919 or ehiggins@plunkettcooney.com.

¹ MICH. COMP. LAWS § 600.2946a(1). However, if death or permanent loss of a vital bodily function was the result of the defendant's gross negligence, there is no limitation on noneconomic damages. *Id.* at § 600.2946a(3).

² *Id.* at § 600.2949a.

³ *Id.* at § 600.1483.

⁴ 685 N.W.2d 174 (Mich. 2004).

⁵ *Id.* at 182.

⁶ *Id.* at 183.

⁷ *Id.*

⁸ *Id.* at 183-84.

⁹ *Id.* at 185.

¹⁰ *Id.* at 185-86.

¹¹ *Id.* at 186.

¹² *Evans ex rel. Kutch v. Alaska*, 56 P.3d 1046, 1055 (Alaska 2002).

¹³ *Id.* at 1053.

¹⁴ *Rhynne v. K-Mart Corporation*, 594 S.E.2d 1, 45 (2003).

¹⁵ See, e.g., *id.* at 179.

¹⁶ See, e.g., *id.* at 187.

¹⁷ *Evans, supra*, at 1056-57.

¹⁸ See, e.g., *Smith v. Dep't of Insurance*, 507 So. 2d 1080, 1092

(Fla. 1987).

¹⁹ *Evans, supra*, at 1057.

²⁰ 715 N.E.2d 1062 (1999).

²¹ *Id.* at 1091.

²² *Id.*

²³ *Best v. Taylor Machine Works*, 689 N.E.2d 1057, 1076-77 (Ill. 1997).

²⁴ *Id.* at 1077.

²⁵ *Id.* at 1080-81.

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Editors' Note: As the authors point out in their article, plaintiffs' attorneys are not keen on damages caps. If you are interested in viewing a counter-position, which discusses purported impediments to caps in medical malpractice cases, review the October 8, 2004 edition of *The Wall Street Journal* or e-mail the *Perspectives* editors.



Look Both Ways Before Crossing: Beware of the Implications of Medicare Payments Before Settling Your Case

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Your attorney calls you from the courthouse minutes before jury selection is about to begin in a case where the plaintiff was allegedly injured as a result of a defect in your product. She reports that with some "arm twisting" by the judge, settlement is close at hand. Another \$5,000 authority is all that is needed. As general counsel you authorize the additional \$5,000 believing the case is over and the company has bought peace of mind by resolving the case without any additional financial exposure.

The settlement documents are drafted and the plaintiff signs on the dotted line. You send the settlement check to your attorney who then forwards it on to the plaintiff's attorney. Is the case really over? It depends. What you did not know when you authorized the settlement was that Medicare paid for the plaintiff's medical care. You also assumed that plaintiff's attorney would pay all outstanding bills out of the settlement. Medicare now wants its money and it wants it from your company or your client. Is Medicare entitled to it?

The Medicare Secondary Payer Act ["MSPA"]

Historically, Medicare was intended to provide health insurance coverage for persons 65 and older and persons who are disabled.¹ Typically, Medicare pays a beneficiary's medical bills without seeking reimbursement from any other entity. Medicare is the "primary payer" of the medical bills in this instance.

A different outcome may arise where the Medicare eligible beneficiary receives medical care as a result of an injury or condition purportedly caused by a company's conduct, product or perhaps, medical device. Here, depending on certain factors, which are described below, Medicare may seek reimbursement from the defendant company for payments it made for treatment necessitated by the defendant's alleged wrongdoing.² In this instance, the defendant may be considered the "primary payer" for purposes of reimbursing Medicare!

The MSPA gives Medicare the authority to sue a defendant company for reim-

bursment of medical and hospital costs.³ The MSPA is actually a collection of amendments to the Medicare Provisions of the Social Security Act that were passed in the early 1980s as a response to rising healthcare costs and was designed to make Medicare a "secondary payer", *i.e.*, the government's obligation to pay for medical treatment would be secondary to an entity known as the "primary payer." The primary payer (or "defendant" in our scenario) may be obligated to ultimately pay for medical treatment received by the injured Medicare beneficiary (or "plaintiff") provided the defendant has in place what the MSPA calls a "primary plan." The MSPA defines a "primary plan" as

... a group health plan or large group health plan... a workmen's compensation law or plan, an automobile or liability insurance or plan (including a self-insured plan) or no-fault insurance....

A "self-insured" plan is defined as

an entity that engages in a business, trade or profession shall be deemed to have a self-insured plan if it carries its

own risk (whether by failure to obtain insurance or otherwise) in whole or in part.⁴

At first blush, it seems rather straightforward: a company that is sued by an injured plaintiff who has received Medicare benefits may be liable to the federal government for those benefits as long as the company has a "primary plan." The reality is that in most instances in the past 20+ years since the MSPA was enacted, the courts throughout the United States have held that the government is not entitled to sue the defendant company for Medicare reimbursement.⁵ The common rationale expressed by these courts in rejecting the government's position that it is entitled to reimbursement is that the MSPA's definition of a "primary plan" is limited to the insurance industry and does not apply to the defendant companies directly.⁶

Is the Tide Turning?

The Eleventh Circuit Court of Appeals⁷ broke ranks with the majority of federal courts in 2003 when it decided *United States v. Baxter International, Inc.*, a silicone breast implant class action.⁸ In *Baxter*, the federal government sought reimbursement from the manufacturers of silicone breast implants for medical costs it paid on behalf of women who sued these manufacturers for injuries allegedly caused by the breast implants.⁹ The district court applied the same rationale as the other federal courts in interpreting the MSPA's definition of a "primary plan" and dismissed the government's lawsuit. The Court of Appeals, in reversing the district court, held that the lower court had applied too restrictive a definition of "primary plan." Essentially, the Court characterized the fund that was created on behalf of the manufacturers to settle this class action lawsuit as being a "self-insured" plan within the meaning of the MSPA. The manufacturers asked the United States Supreme Court to consider the case, but the Court rejected their petition.¹⁰

It would appear, therefore, that a company sued in the Eleventh Circuit by an injured plaintiff who has received Medicare benefits should be alert to the possibility that Medicare may very well seek reim-

bursement for the cost of medical care. A company in the Eleventh Circuit may be deemed to have a "primary plan" and thus be considered a "primary payer" within the meaning of the MSPA even though it may not be a "self-insured" in the truest meaning of the term. This is especially significant in the mass tort/class action context where, as in *Baxter*, the defendants may establish a fund for settlement.

In addition, MSPA allows the government to sue for double damages against a "primary payer/primary plan" who, notwithstanding knowledge of the government's right to reimbursement, nevertheless pays the plaintiff beneficiary in settlement without considering paying Medicare as well.¹¹ This could lead to the defendant paying three times: first by way of paying the plaintiff directly in settlement and then double damages as a penalty to the government.

How can defendants protect themselves?

Companies should take certain steps to protect itself from the reach of the federal government. Although there is disagreement in the courts as to whether a defendant company may be liable for Medicare reimbursement, the prudent plan of action is to assume that such liability may exist and take appropriate action to guard against the possibility of paying enhanced damages. Here are some suggestions that may help to avoid falling prey to the Medicare quagmire.

- Determine whether Medicare has paid for plaintiff's medical treatment that is related to the accident or event giving rise to the lawsuit involving your company. This can be done by serving written discovery in the form of interrogatories, requests for production of documents and requests for admissions. Remember, only treatment related to the acts which allegedly caused plaintiff's injury are potentially subject to reimbursement.
- Assuming that Medicare has made payments to plaintiff's healthcare providers, verify the amounts that have been paid. A written request, coupled with a HIPAA-compliant authorization signed by plain-

tiff, addressed to plaintiff's treating doctors, physical therapists, etc., should prove helpful in determining how much Medicare has paid. This should be done even though HIPAA allows for the disclosure of protected health information in a judicial or administrative proceeding if the request for the information is through an order from a court, such as a subpoena. Similarly, you can ask Medicare directly for an itemized statement of benefits paid.

- Once you know the precise amount of Medicare benefits that plaintiff has received, advise plaintiff and his or her attorney that any settlement is conditioned on Medicare being reimbursed out of any settlement proceeds. A letter should be sent to plaintiff's attorney confirming that all liens, including Medicare reimbursement, shall be paid out of the settlement. Also request that the plaintiff's attorney acknowledge in writing that such payment will be made.
- Draft appropriate indemnification and hold harmless language in the release whereby plaintiff agrees to indemnify, defend and hold harmless your company in the event Medicare demands reimbursement. Keep in mind, however, that you may be seeking indemnification from a plaintiff who may, by the time Medicare wants its money, have little, if any, assets from which to indemnify. Nonetheless, such language should be included.

These recommendations, although by no means exhaustive, are designed to increase a settling defendant's chances of keeping the government from knocking on its door demanding Medicare reimbursement. And as the unexpected may happen, as was the case in *Baxter*, a defendant who at least "looks both ways" can minimize the potentially severe impact the MSPA can have on its settlement.

If you have any questions or comments on these issues, the authors can be contacted at (973) 643-7000.

¹42 U.S.C. § 1395y.
²See *United States v. Baxter Int'l, Inc.*, 345 F.3d 866, 875 (11th Cir. 2003).
³42 U.S.C. § 1395y.
⁴42 U.S.C. § 1395y(b)(2)(B)(ii).
⁵See e.g., *United States v. Rhode Island Insurers' Insolvency*

Fund, 80 F.3d 616, 622 (1st Cir. 1996) (MSPA "limits reimbursement to recoveries from 'primary plans,' whose definition lists only entities which are clearly 'within' the insurance industry"); *United States v. Philip Morris Inc.*, 156 F. Supp. 2d 1, 7-8 (D.D.C. 2001) ("The practical effects of the government's conception of MSPA liability would transform the statute, meant primarily for use against insurers, ... into the very 'across-the-board procedural vehicle for suing tortfeasors, which this Court has already declared impermissible."); *United States v. Philip Morris Inc.*, 116 F. Supp. 2d 131, 146 (D.D.C. 2000) ("Courts have uniformly recognized that the statutes clear purpose was to grant the government a right to recover Medicare costs from insurance entities.").

⁶ See *id.*

⁷ The U.S. Court of Appeals for the Eleventh Circuit has jurisdiction over federal cases originating in the states of Alabama, Florida and Georgia.

⁸ 345 F.3d 866 (11th Cir. 2003).

⁹ Interestingly, the settlement agreement between the defendant and the class contained language that made any subrogation-type claims by insurers and governmental agencies the responsibility of the class members. The appellate court dismissed this argument as it sought to "override a statutory right of action afforded to the government by a contractual arrangement to which the government was not a party." 345 F.3d at 873.

¹⁰ *Baxter Int'l, Inc. v. United States*, 124 S. Ct. 2907 (2004)

¹¹ 42 U.S.C. § 1395y(b)(2)(C)(3)(A).

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Products Developments Around the Country/Globe

FEDERAL JURISDICTION

Proposed Tort Reform Measure Passes House of Representatives

On September 14, 2004, the United States House of Representatives passed H.R. 4571, known as the "Lawsuit Abuse Reduction Act of 2004." The act, if passed in its current form, will amend Rule 11 of the Federal Rules of Civil Procedure in several ways. One significant change would require courts to impose sanctions for violations of Rule 11, as opposed to the existing discretionary application of the rule. Also, the legislation authorizes the new Federal Rule 11, upon motion, to be applied to an action in state court if the action "affects interstate commerce." The proposed changes would trigger the initiation of an investigation into attorneys found to have violated the rule three or more times. If the investigation finds that the attorney violated the three-strike provision, he would receive a mandatory one-year suspension from practicing in the federal district court where the violations occurred.

As there is no companion bill in the Senate and no easy vehicle to move it through the Senate, analysts suspect the bill will not be approved.

ALABAMA

EIFS Ruled to Not Be a Product

In *Turner v. Westhampton Court, L.L.C.*, 2004 Ala. Lexis 253 (Ala. 10/1/04), a homeowner sued a number of defendants asserting claims based on the use of an exterior insulating finishing system (EIFS), a synthetic stucco finish used in the construction of their new home. The Alabama Supreme Court relied on a prior holding from *Keck v. Dryvit Systems, Inc.*, 830 So.2d 1 (Ala. 2002) that EIFS is not considered a "product" for purposes of the Alabama Extended Manufacturer's Liability Doctrine (AEMLD). The Court noted that Alabama law recognizes a cause of action for failure to warn, which can be pursued under the AEMLD, a common law theory of negligence, or both. However, central to both theories is the absence of a warning accompanying the sale of a "product." The Court held there was no reason to define "product" differently for purposes of a failure-to-warn claim sounding in negligence.

The Learned-Intermediary Doctrine

In *Walls v. Apharma USPD, Inc.*, 2004 Ala. Lexis 40 (Ala. 3/5/04), the United States District Court for the Northern District of Alabama certified two questions as to a pharmacist's duty to warn of foreseeable injuries from the use of prescription drugs dispensed under Alabama law. The issue was whether the "learned-intermediary" doctrine negated any duty of a pharmacist filling a prescription to warn a consumer of the risks or potential side effects of prescribed medication. If such a duty existed, was it limited to a pharmacist's patient/customer, or did it extend to third parties - in this case an unborn child who suffered numerous medical conditions allegedly linked to the mother's use of the prescription drug during pregnancy?

Under the learned-intermediary doctrine, a manufacturer's duty to warn is limited to an obligation to advise the prescribing physician of any potential dangers that may result from the use of its product. The physician intermediary must "bridge the gap in special cases where the product and related warning are sufficiently complex so as not to be fully appreciated by the consumer." *Toole v. Baxter Healthcare Corp.*, 235 F.3d 1307, 1313 (11th Cir. 2000).

The Court in *Walls* surveyed other jurisdictions, and concluded that the learned-intermediary doctrine "forecloses any duty upon a pharmacist filling a physician's prescription, valid and regular on its face, to warn the physician's patient, the pharmacist's customer, or any other ultimate consumer of the risks or potential side effects of the prescribed medication" unless the prescription, a statute or regulation expressly requires that a warning be included on the label or otherwise delivered. To the extent that the learned-intermediary doctrine applies, the duty to determine whether the medication as prescribed is dangerously defective is owed by the prescribing physician and not by the pharmacist filling the prescription.

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COLORADO

When is a Manufacturer Not a "Manufacturer"?

In *Long v. United States Brass Corporation* the United States District Court in Colorado found that the Supreme Court of Colorado would, if faced with the issue, adopt the apparent manufacturer doctrine. Nos. CIV 03-B-968, 04-B-613, 2004 WL 1858389, (D. Col. Aug. 17, 2004). In *Long*, the plaintiff activated a vacuum cleaner in a room with a propane heater, causing propane that had collected in the room to ignite, resulting in injury to the plaintiff. The cause was determined to be a leak in the pipe connecting the propane source to the heater. The pipe was part of a connection assembly purchased by the contractor who installed the heater. Although the defendant only manufactured the brass fittings for the connection, the defendant packaged and sold the connection assembly as its own. The court found that under the apparent manufacturer doctrine, the defendant induced the public to purchase the connection assembly product based on the defendant's past performance as a manufacturer, and could thus be held liable as the manufacturer. The court also found that the seller of a product may avoid liability under the apparent manufacturer doctrine in one of two ways. First, the seller may, at the point of advertising, distribution, or sale, inform the consumer of the manufacturers of the various parts of the product. Second, the seller may insist that other manufacturers supplying parts for use in the product sold indemnify the seller in its contracts with the suppliers.

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MICHIGAN

Two Caps for the Price of One

In *Wessels v. Garden Way, Inc.*, 2004 Mich. App. Lexis 2503 (September 28, 2004), defendant appealed a judgment entered on a jury verdict in favor of plaintiff Wessels on his product liability claim, and plaintiff Osborne on her loss of consortium claim. Defendant argued on appeal that Michigan's statute capping damages for non-economic damages in product liability actions should have been applied to limit the Plaintiffs' awards to an aggregate total of 280,000.00 (annually adjusted for inflation pursuant to MCL § 600.2946a(1)). The trial court had ruled that each of the two Plaintiffs' awards were subject to separate caps.

Plaintiffs challenged the damages cap claiming it was unconstitutional and, in the alternative, that the annually adjusted cap at the time judgment was entered should be applied, not the adjusted cap at the time the verdict was rendered. The court applied MCL §§ 600.2946a and 2945(f) and held "that the total amount of damages awarded in this case for noneconomic losses, which specifically includes any damages for loss of consortium, that can be awarded is \$280,000.00 as adjusted." In

other words, the aggregate amount of noneconomic damages awarded to the two plaintiffs could not exceed the cap. Finally, the court rejected plaintiffs constitutional challenge to the statutory cap on damages, and further held that the verdict is subject to the cap amount as of the date of the entry by the court and not as of the date the verdict was rendered by the jury.

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When is a Seller Not a "Seller"?

In *Engle et. al, v. Corrigan Company-Mechanical Contractors, Inc. and Terrex Corp.*, Mo. App. E.D. 83241 (August 10, 2004), the Missouri Court of Appeals, in a case of first impression, defined when a seller was not a "seller" for purposes of a product liability action. The defendant Corrigan Company, an independent mechanical contracting company, owned a manlift which it purchased and used in its business in the early 1980's. In 1994, Corrigan sold this manlift, along with numerous other pieces of surplus equipment, to various entities. Imperial Manlift, Inc. purchased one of these manlifts. In 1998, William Engel rented this manlift from Imperial and was killed in an accident caused by an alleged design defect in the it.

Mr. Engel's representatives sued Corrigan, as seller of the manlift, and asserted a defective design claim. The central issue raised at the outset of the lawsuit was whether Corrigan sold the manlift in the course of its business. The court held that Corrigan was not a "seller" for purposes of a product liability action and dismissed Corrigan from the lawsuit. The Missouri Court of Appeals, Eastern District, affirmed the dismissal and commented that Corrigan was more properly classified as an intermediate consumer who made an occasional, incidental sale of surplus property. The court noted that Corrigan's business is mechanical contracting, not selling manlifts. It was therefore not subject to Mo.Rev.Stat § 537.760 (Missouri's codification of § 402A of the Restatement (Second) of Torts), because its sale of the manlift was incidental to and not in the course of its business.

Daubert Becomes, More Firmly, the Standard in Missouri

The Missouri Supreme Court, in *State Board of Regional Healing Arts v. McDonough*, 123 S.W.3d 146, (Mo.banc 2003) established that the Missouri rule for the admissibility of expert testimony was similar to the Daubert standard. Recently, the Missouri Court of Appeals analyzed the admissibility of expert testimony in *In re Michael Goddard v. State of Missouri*, Missouri Court of Appeals No. 25799 (August 10, 2004), using a Daubert analysis, the court allowed the expert's testimony to stand.

In *Goddard*, the State was attempting to commit the defendant as a sexually violent predator. In doing so, the State offered the

testimony of Dr. Rintu Khan. Dr. Khan evaluated the defendant and testified that he believed the defendant was more likely than not to re-offend. As a part of his testimony, Dr. Kahn relied "actuarial instruments" which he indicated were "well accepted" and "widely used" in his field for helping predict a person's future risk. The court allowed the testimony and the defendant was committed.

On appeal, the court pointed out that Dr. Khan's testimony revealed that he used the actuarial instruments as part of his general experience and knowledge (the admissibility of which is governed by the § 490.065.1 standard) and did not use these stud-

ies as part of the "facts or data" for this particular case (reliability of which is governed by § 490.065.3). After making that distinction, the court undertook a Daubert analysis and concluded that Dr. Kahn's testimony satisfied the test. *Goddard* shows us that Missouri is slowly incorporating Daubert into its case law, which is more closely aligning its decisions with what we experience in the federal courts.

JOSEPH R. SMITH, ESQ.
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"In the Trenches" Notable Accomplishments by ALFA Attorneys

Plunkett & Cooney, P.C.
Detroit, Michigan

Shareholder Matt Stanczyk of the Detroit office obtained a defense verdict in U.S. District Court for the Eastern District of Michigan, Southern Division in *Bailey v Winnebago Industries*. This was a product liability action brought by the owner of a 35-foot Winnebago Adventurer RV who sustained multiple fractures to her dominant right wrist along with nerve damage. She sustained permanent ROM loss and some "clawing" of the hand. She was an RN with a masters degree earning in excess of \$85,000/year. Claimed specials at trial were over \$500,000. She fell out of the motor home, when she rolled her left ankle into the side entry door well and claimed it was defectively designed since the door well cut-out encroached into the living space, past the kitchen cabinets by more than two inches. Winnebago subsequently changed the design within two years of the accident, although not in response to the accident, by decreasing the encroachment by four inches. The plaintiff used the subsequent design as the alternative. They also argued that the handrails and door latching system were negligently designed. The jury found no negligence.

Brown & James
St. Louis, Missouri

Joseph R. Swift of the St. Louis ALFA firm of Brown & James obtained a defense verdict in *Montgomery v Karkut Industries*, United States District Court for the Eastern District of Missouri. The case involved a plaintiff that "bivalved" his right thumb while cutting a piece of metal on a band saw manufactured by defendant. Plaintiff claimed the saw's clamping device and guard were defective. The plaintiff demanded \$1.2 million. The defense not only focused on a theory that the saw was safe, but

also that the plaintiff's description of the accident did not make sense. The defense expert was Dr. Tyler Kress, a mechanical and biomechanics engineer. The plaintiff's liability expert was Richard Colbergh, a former Black & Decker employee. The defense was successful in excluding Mr. Colbergh's warnings opinion. The jury returned a defendant's verdict on September 9th, 2004.

Nelson Mullins Riley & Scarborough
Greenville, South Carolina

Marvin Quattlebaum of Nelson Mullins Riley & Scarborough obtained a directed verdict for Ingersoll-Rand in a federal court case tried in Spartanburg, South Carolina. The case stemmed from an accident during the construction of the I-85 Southern Connector Toll Road in April 1999, when a construction worker was killed when her soil compactor flipped several times after going over an embankment edge.

The plaintiff brought a wrongful death and survival action against Ingersoll Rand and others alleging the soil compactor was defective because it did not have seatbelts. After two days of trial, the court awarded the directed verdict to Ingersoll Rand on the basis that the absence of a seatbelt was open and obvious. The court also addressed an issue that impacts many manufacturers with foreign affiliated companies. As a separate ground for granting directed verdict, the court found that Ingersoll-Rand was not responsible for the conduct of its foreign affiliated companies. In making this decision, the court rejected the apparent manufacturer doctrine which the plaintiff had urged the court to adopt. The plaintiff did not file an appeal.

Upcoming ALFA Events

Oct 28, 2004 - Oct 31, 2004

ALFA Annual Business Meeting
Westin Savannah Harbor Resort
Savannah, Georgia
Contact Info
ALFA Contact: Amy Sammon (312) 642-5244

Nov 10, 2004 - Nov 12, 2004

Labor & Employment Practice Group Seminar
Wyndham at Canal Place
New Orleans, Louisiana
Contact Info
Group Chair: James M. Peterson (619) 236-1551
Program Chair: George D. Fagan (504) 585-7500
ALFA Contact: Amy Sammon (312) 642-5244

Mar 10, 2005 - Mar 13, 2005

2005 International Client Seminar
Co-hosted by the Business Litigation and Intellectual
Property & Technology Practice Groups
Boca Raton Beach Resort and Club
Boca Raton, Florida
Contact Info
Group Chair: James W. Semple (302) 888-6800
Program Chair: Patrick W. Michael (502) 581-8000
ALFA Contact: Amy Sammon (312) 642-5244

Apr 27, 2005 - Apr 29, 2005

Transportation Practice Group Seminar
The Ritz-Carlton
Amelia Island, Florida
Contact Info
Group Chair: Tamara Nydell Cook (602) 307-9900
x3055
Group Vice Chair: Larry D. Warren (210) 731-6350
Program Chair: Duke R. Highfield (843) 577-4000
ALFA Contact: Amy Sammon (312) 642-5244

May, 2005

European Membership Meeting
Prague, Czech Republic
Contact Info
ALFA Contact: Amy Sammon (312) 642-5244

Spring 2005

International Law Practice Group Seminar
Singapore
Contact Info
Group Co-Chair: Laurence Watt 44-20-7203-5000
Group Co-Chair: Harvey Jay Cohen (513) 977-8200
Program Chair: Pavel Safár +420 221 990 455
ALFA Contact: Amy Sammon (312) 642-5244

Spring 2005

Pacific Rim Membership Meeting
Beijing, China
Contact Info
Group Chair: Richard L. Wageman (86) (10) 8532-1919

Jun 01, 2005 - Jun 03, 2005

Insurance Law Seminar
The Marriott Financial Center
New York City, NY
Contact Info
Group Chair: J. Snowden Stanley, Jr. (410) 539-5040
Group Vice Chair: George D. Fagan (504) 585-7500
Group Vice Chair: Kevin E. O'Brien (303) 628-3300
ALFA Contact: Amy Sammon (312) 642-5244

October, 2005

Annual Business Meeting
Chicago, IL
Contact Info
ALFA Contact: Amy Sammon (312) 642-5244

Nov 09, 2005 - Nov 11, 2005

Health Care Seminar
The Wyndham Canal Place
New Orleans, LA
Contact Info
Group Chair: Bruce G. Arnold (414) 273-2100
Program Chair: James D. Lantier (315) 474-2911
ALFA Contact: Amy Sammon (312) 642-5244

Editors' Note: On November 9, 2004 in Pasadena, California, a seminar is being offered on Voxx litigation. Information concerning the seminar is available at www.mealeys.com/conferences.

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