

In re Products Liability

NEWSWIRE

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RICO

Supreme Court Uses Strict “Proximate Cause” Standard to Limit Private RICO Actions

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See Anza v. Ideal Steel Supply Corp., No. 04-433, 547 U.S. __ (2006); *Mohawk Industries, Inc. v. Williams*, No. 05-465, 547 U.S. __ (2006)

Since its enactment some 30 years ago, the Racketeer Influenced and Corrupt Organizations Act (RICO) has proved to be an unusually elastic litigation tool. In recent years, it has increasingly been used by private litigants to supplement traditional tort claims, or as a stand alone basis of liability -- thus transforming otherwise garden-variety product liability disputes into alleged federal racketeering violations.

In some ways, a plaintiff's burden of proving a RICO violation has been less rigorous than for traditional torts, such as when it comes to proving proximate causation for instance. A recent decision by the U.S. Supreme Court, requiring a RICO plaintiff to prove direct causation between the claimed injury and the allegedly RICO-violative conduct, will certainly be an important tool for product manufacturers to use in defending RICO lawsuits, going forward. Indeed, this recent articulation by the U.S. Supreme Court that the plaintiff must prove this causal nexus should make the prosecution of civil RICO cases more difficult.

This term, the United States Supreme Court had two closely watched civil RICO cases on its docket -- *Anza* and *Mohawk*, both of which were decided on June 5, 2006. Only *Anza*, however, generated a substantive analysis of RICO law -- as it pertains to the private right

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RICO

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of action created by § 1964(c) for damages “by reason of” RICO violations.¹

Background

Anza involved a dispute between two Bronx-based steel supply companies -- Ideal Steel Supply Corporation and National Steel Supply, Inc. Ideal sued National, and its owners, the Anza brothers, under §§ 1962(a) and 1962(c) of RICO.² In a nutshell, Ideal alleged that it lost sales and market share due to National’s practice -- the racketeering scheme -- of not charging New York sales tax to cash-paying customers, which supposedly allowed “National to reduce its prices without affecting its profit margin.” Slip op. at 2. Ideal argued that National’s submission of fraudulent tax returns constituted the requisite “predicate acts” (mail and wire fraud) and “pattern of racketeering activity” (because its tax returns were submitted on “an ongoing and regular basis”). *Id.*

Procedural History

The district court dismissed Ideal’s complaint for failure to state a claim for relief, holding that the alleged acts of mail and wire fraud required reliance on National’s supposed fraud, which Ideal did not (and could not) allege. *Id.* at 3. Vacating the judgment, the Second Circuit held that “where a complaint alleges a pattern of racketeering activity that was intended to and did give the defendant a competitive advantage over the plaintiff, the complaint adequately pleads proximate cause, and the plaintiff has standing to pursue a civil RICO claim.” *Id.* (quotation omitted).

Holmes and Proximate Cause

Writing for the majority, Justice Kennedy rejected the Second Circuit’s “proximate cause” analysis, stating: “[o]ur analysis begins -- and, as will become evident, largely ends -- with *Holmes*.” *Id.* at 4. In *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268 (1992), the Court “held that a plaintiff may sue under § 1964(c) only if the alleged RICO violation was the proximate cause of the plaintiff’s injury,” *Anza*, slip op. at 1, which it distilled from § 1964(c)’s “by reason of” language, *id.* at 4. Abjuring a broad statutory interpretation “requir[ing] merely

that the claimed violation was a ‘but for’ cause of the plaintiff’s injury,” the Court read § 1964(c) as demanding “some direct relation between the injury asserted and the injurious conduct alleged.” *Id.* at 4-5 (quoting *Holmes*, 503 U.S. at 265-268) (emphasis added).

Ultimately finding too great an “attenuation” between the claimed RICO § 1962(c) violation and injury in *Anza*, the Supreme Court reversed, explaining that the “proper referent of the proximate-cause analysis is an alleged practice of conducting National’s business through a pattern of defrauding the State.” *Id.* at 5-6.³ Stressing the need in a private RICO action to connect “plaintiff’s harm and the claimed RICO violation,” the Court held:

To be sure, Ideal asserts it suffered its own harms when the Anzas failed to charge customers for the applicable sales tax. The cause of Ideal’s asserted harms, however, is a set of actions (offering lower prices) *entirely distinct* from the alleged RICO violation (defrauding the state).

Id. at 6 (emphasis added). Noting that a “RICO plaintiff cannot circumvent the proximate-cause requirement simply by claiming that the defendant’s aim was to increase market share at a competitor’s expense,” *id.* at 9, the Supreme Court advised bench and bar:

When a court evaluates a RICO claim for proximate

¹ In *Mohawk*, the writ of certiorari granted on the question whether a corporation and its agents can constitute a RICO “enterprise” for purposes of a § 1962(c) claim was dismissed (*per curiam*) as improvidently granted, the petition for a writ of certiorari granted, the judgment vacated, and the case remanded to the Eleventh Circuit “for further consideration in light of *Anza*.” Significantly, the original certiorari petition in *Mohawk* also included a RICO proximate cause question, which the Supreme Court did not accept. See *Mohawk*, 547 U.S. ___, slip opinion (June 5, 2006).

² The former makes it unlawful for one who receives income derived from a “pattern of racketeering activity” to use or invest that money in the acquisition, establishment, or operation of a RICO enterprise, *Anza*, slip op. at 3, whereas the latter makes it unlawful for “[a]ny person employed by or associated with any enterprise . . . to conduct or participate . . . in the conduct of such enterprise’s affairs through a pattern of racketeering activity . . .” *Id.* at 2-3.

³ Because the Second Circuit did not address proximate causation in upholding the adequacy of Ideal’s § 1962(a) claim, the Court vacated that part of the judgment and remanded for determination “whether [National’s] alleged violation of § 1962(a) proximately caused the injuries Ideal asserts.” *Id.* at 10.

causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries. In the instant case, the answer is no.

Id.

The Future?

More generally, *Anza* is interesting because it reveals that at least Justice Breyer takes the circumscribing view that RICO does not cover situations where the plaintiff's claimed injury is *immediately* caused by the legitimate commercial acts of the defendant (e.g., sale of a legal product) -- even if this otherwise legitimate business activity is ultimately advanced by allegedly unlawful means. *Id.* at 1. ©

PRIVILEGE

On Precedent Created By Chadbourne Advocacy, Court Rejects Work-Product Waiver Argument

See *ASPCA v. Ringling Bros. and Barnum & Bailey Circus*, 233 F.R.D. 209 (D.D.C. 2006)

This case for declaratory and injunctive relief under the Endangered Species Act, based on defendants' allegedly unlawful handling of Asian elephants, generated a discovery dispute involving the assertion of privilege claims and the operation of Rule 26(b)(5) in the context of documents withheld by a party from production pending decision of an unresolved responsiveness objection.

The Nature of the Discovery Dispute: "Control" and Waiver Issues

Briefly, in response to plaintiffs' document requests, defendants lodged numerous general and specific objections, and produced two boxes of responsive documents

along with a privilege log identifying five documents. Plaintiffs took issue with the adequacy of defendants' response. Following a "meet-and-confer," at which defendants revealed they had withheld from production, as non-responsive, certain documents gathered by counsel (for trial cross-examination purposes) on the basis that they were not within defendants' "possession, custody or control," and otherwise protected against disclosure as work-product, plaintiffs filed a motion to compel. They argued that (a) any documents held by defendants' counsel were, as a matter of law, in defendants' "possession, custody or control," and, further, (b) to the extent the documents were work product, defendants had waived the protection by not including them on the privilege log filed in connection with their original discovery response.

Application of *United States v. Philip Morris* Resolves Waiver Issue

Significantly, the work-product waiver argument was ultimately decided on the basis of D.C. Circuit precedent that Chadbourne & Parke LLP won on interlocutory appeal in the course of our engagement in *United States v. Philip Morris USA, Inc.* (C.A. 99-CV-2496) -- a closely watched civil racketeering case that has been pending decision since the nine-month bench trial ended in June 2005.

Making quick work of defendants' "possession, custody or control" argument, the Magistrate Judge held that "[c]ontrol includes documents that a party has the legal right to obtain on demand" and "[b]ecause a client has the right, and the ready ability, to obtain copies of documents gathered or created by its attorneys pursuant to their representation of that client, such documents are clearly within the client's control . . . Accordingly, defendants cannot object to the production of documents assembled by their counsel . . . on the ground that they were not in defendants' control." *Id.* at 212 (citations omitted). Since the documents had been gathered by trial counsel for impeachment purposes at trial, however, the court held that they "constitute[d] traditional work product," which teed up plaintiffs' waiver argument. *Id.*

Ruling for defendants, the court held that since the obligation to submit a privilege log is triggered only when one withholds "otherwise discoverable" documents according to

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Rule 26(b)(5), the privileged documents sought by plaintiff were not “yet ‘otherwise discoverable’ within the meaning” of the rule given that defendants’ responsiveness objection had not been decided to that point. *Id.* at 212-213. In reaching this conclusion, the court cited *United States v. Philip Morris, Inc.*, holding:

[I]f a party’s pending objections apply to allegedly privileged documents, the party need not log the document until the court rules on its objections. [*United States v. Philip Morris*, 314 F.3d [612] at 621 [D.C. Cir. 2003]]. On the other hand, if the court determines that the objection does not cover the allegedly privileged document, or that the objection was not made in good faith as Rule 26(g) requires . . . the court may then decide whether the party should be deemed to have waived the privilege. *Waiver is not automatic, particularly if the party reasonably believed that its objections applied to the document. United States v. Philip Morris, Inc.*, 347 F.3d 951, 954 (D.C. Cir. 2003) (emphasis added).

Id. at 213.

Finding “no evidence that defendants believed anything other than that their objection was justified,” the court held that they were not required to assert any privilege or “obligated to list the documents on any privilege log,” absent a ruling on their responsiveness objections. *Id.* at 213. Thus, there was no waiver. It declined, however, to require defendants to include the withheld “impeachment” documents on a privilege log -- since even that limited disclosure would reveal counsel’s work product. Moreover, it added, there was no need for a privilege log in this instance, because (a) the documents were publicly available, and (b) defendants had “already provided plaintiffs with enough information to enable them to assess the applicability of the privilege,” which (in the event) plaintiffs had not challenged. *Id.* ☺

Pre-Deposition Review of Privileged Document Does Not Create Automatic Waiver

See *In re: Managed Care Litigation*, 415 F. Supp. 1378 (S.D. Fla. 2006)

The hunt for privileged documents in litigation is in some ways like the search for the Holy Grail -- an extended and difficult quest. The issue often arises, and is at its thorniest, when lawyers are forced to give testimony in cases, which is what happened in *In re: Managed Care* -- where the issue was whether an in-house lawyer’s review of a privileged document in preparation for his 30(b)(6) deposition created an automatic waiver of the attorney-client privilege. The court said no.

Lawyer Was 30(b)(6) Representative

In response to a Rule 30(b)(6) subpoena served by defendants on the American Medical Association (a non-party) requesting testimony about “[a]ny actual or contemplated litigation against any Defendant, including, but not limited to Your assessment o[f] whether to participate as a party in any case consolidated in *In re: [M]anaged Care Litigation*,” the AMA produced an internal lawyer as its representative. *Id.* at 1379. Because he had not been “privy to all of the Board’s discussions and deliberations related to whether the AMA should join” the underlying litigation as a party, *id.*, he reviewed several documents in preparation for his deposition, including a privileged communication.

Waiver Positions

Arguing automatic waiver, defendants moved to compel production of the privileged document under Rule 612 of the Federal Rules of Evidence. Finding the document privileged, and rejecting the waiver claim, the Special Master nevertheless recommended disclosure, apparently in the interest of justice (although his exact rationale is not clear from the

published decision). *Id.* On objection to the district court, the AMA argued that the recommended disclosure was error, on the grounds that (a) it had not been shown that review of the document “had an impact on the testimony of the witness,” and (b) the interests of justice “weigh[ed] against disclosure.” *Id.* at 1379-1380. In response, defendants argued that the AMA had created its own “dilemma” by putting up a witness with no personal knowledge as its 30(b)(6) representative and, further, that the “use of a privileged document to refresh a witness’ recollection results in automatic waiver of the privilege.” *Id.* at 1380.

Balancing the “Interests of Justice” is Required

Echoing the “central importance of the attorney-client privilege to our legal system,” *id.* at 1381, the court reasoned to judgment from the plain language of (and commentary to) Rule 612 -- discerning no room or support in it for defendants’ theory of automatic waiver. Even assuming a privileged communication were used to “refresh” a witness’ memory while or before testifying, it said, waiver is not automatic. For support, it cited the Advisory Committee Notes to Rule 612 -- to the effect that “nothing in the Rule [should] be considered as barring the assertion of a privilege with respect to writings used by a witness to refresh his memory.” *Id.* at 1380.

Essentially finding this language incompatible with defendants’ automatic waiver position, the court turned to the text of the rule itself to conclude that the question of discoverability under Rule 612 “is left to the discretion of the court in the interests of justice,” requiring the competing interests at stake to be balanced in a manner “tailored to the particular privilege asserted.” *Id.* at 1380-1381. Noting the “greater protection” owed privileged attorney-client communications, the court held that the:

relevant inquiry is not simply whether the documents were used to refresh the witness’ recollection, but rather whether the documents were used in a manner which waived the attorney-client privilege.

Id. at 1381.

To this end, observing that “[a]ttorney-client privileged documents are only discoverable upon a showing of waiver,” the

court reviewed the deposition testimony at issue and reasoned that because “[n]one of [the witness’] testimony during the deposition can be construed” as a waiver, disclosure of the privileged document reviewed in advance of his deposition was not in “the interests of justice.” *Id.* ☉

ASBESTOS

New Jersey Supreme Court Breaks New Ground And Imposes Duty to Third Parties Exposed to Asbestos-Contaminated Clothing

See Olivo v. Owens-Illinois, Inc., 895 A.2d 1143 (N.J. 2006)

Breaking ranks with the highest courts of New York and Georgia, the New Jersey Supreme Court has extended the duty landowners owe workers for the foreseeable risk of asbestos exposure to the *spouses* of those workers as well -- based on the foreseeable risk of exposure from asbestos dust carried home on contaminated work clothing.

Background

In *Olivo*, plaintiff, a long-time New Jersey steamfitter and welder, brought a wrongful death action on behalf of his wife, who died in 2001 of mesothelioma allegedly caused by inhaling asbestos dust from her husband’s work clothes, which she laundered each day. *Id.* at 1146. The trial court granted summary judgment for ExxonMobil (the lone non-settling defendant), finding that it would be neither “fair [n]or just” to impose a duty on a landowner for asbestos-related injuries sustained outside the landowner’s premises. *Id.* at 1147. Focusing more on foreseeability than fairness, New Jersey’s Appellate Division reversed, asserting that the risk of harm to Mrs. Olivo was foreseeable and that

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Asbestos

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ExxonMobil was in the best position to have prevented it. *Id.* (citing *Olivo v. Exxon Mobil Corp.*, 872 A.2d 814, 819-20 (N.J. Super. Ct. App. Div. 2005)).

Foreseeability of Need for Laundering Creates Duty of Care

After explaining that premises liability law in New Jersey must be applied with “flexibility” to deter conduct “that creates an unreasonable risk of injury,” the *Olivo* court addressed itself to the principles and policies behind the foreseeability concept to conclude that ExxonMobil owed Mrs. Olivo a duty. *Id.* at 1148 (quotation omitted). Under New Jersey law, it said, foreseeability is “a determinant of a [defendant’s] duty of care . . . [as well] as a determinant of whether a breach of duty is a proximate cause of an ultimate injury.” *Id.* (alterations in original; citations and quotations omitted). Once foreseeability is established, “considerations of fairness and policy” should determine whether the imposition of a duty is warranted under the particular circumstances of a case. *Id.* at 1148.

Finding the summary judgment evidence demonstrated that ExxonMobil was aware (by 1937) that sufficient exposure to asbestos dust was associated with asbestosis, and that since as early as 1916, “industrial hygiene texts recommended that plant owners should provide workers with the opportunity to change in and out of work clothes to avoid bringing contaminants home on their clothes,” *id.* at 1149, *Olivo* ruled “the risk of injury to someone like [Mrs. Olivo] is one that should have been foreseeable to ExxonMobil.” *Id.* Further, “[i]t require[d] no leap of imagination” to realize that plaintiff’s soiled work clothes would have to be laundered, and that “whoever performed that task would come into contact with the asbestos that infiltrated his clothing . . .” *Id.*

With foreseeability established, the Supreme Court did not dawdle long over policy considerations, and “[*did*] not hesitate” to impose a duty on ExxonMobil for the risk of injury to plaintiff’s spouse. *Id.* (emphasis added).¹ In so doing, the Supreme Court discounted -- as “overstated” -- concerns of potentially “limitless exposure to liability” built on mere contact with asbestos-contaminated clothing. Writing for a unanimous court, Justice LaVecchia reasoned that the duty was focused on the “particularized foreseeability of harm to plaintiff’s wife”

given her daily laundering of plaintiff’s work clothes, and “[a]ccordingly, public policy concerns about the fairness and proportionality of the duty . . . should dissipate.” *Id.* at 1150.

Decision Contrary to Approach of Georgia and New York

In contrast to *Olivo*, but under similar facts, the New York Court of Appeals, in *Holdampf v. A.C. & S., Inc.*, refused to charge the Port Authority of New York and New Jersey with a duty of care to an asbestos worker’s wife allegedly exposed to asbestos dust from her husband’s soiled work clothes. *Holdampf v. A.C. & S., Inc. (In re N.Y.C. Asbestos Litig.)*, 5 N.Y.3d 486, 489-90 (N.Y. 2005).

The *Holdampf* court determined that there was no relationship between the Port Authority and the worker’s spouse to justify the imposition of any duty. *Id.* at 495. Although urged by plaintiff to adopt the New Jersey Appellate Division’s reasoning in *Olivo*, the Court of Appeals distinguished New Jersey law, which anchors the duty of care question on foreseeability, from New York law, in which foreseeability determines merely the scope of a duty -- not whether a duty exists in the first instance. *Id.* at 494, 497.² In the final analysis, *Holdampf* expressed concern about extending the duty to a spouse, which it thought created the “specter of limitless liability” that so little troubled the *Olivo* court. *Id.* at 498.

Similarly, in *CSX Transportation, Inc. v. Williams*, the Supreme Court of Georgia, answering a certified question from the Eleventh Circuit, held that “Georgia negligence law does not impose any duty on an employer to a third-party, non-employee, who comes into contact with its employee’s asbestos-tainted work clothing at locations away from the workplace.” 608 S.E.2d 208, 210 (Ga. 2005). The court’s com-

¹ The case was remanded to resolve several fact issues, including whether plaintiff was an employee of an independent contractor to whom ExxonMobil would owe no duty, which in turn would preclude the imposition of a duty to plaintiff’s spouse altogether. *Id.* at 1151.

² The New York Court of Appeals further distinguished *Olivo* on the basis that ExxonMobil allegedly “did nothing to prevent workers from bringing asbestos-covered clothing in the family home,” whereas the Port Authority provided on-premises laundry services to the worker, which he declined to use. *Holdampf*, 5 N.Y.3d at 497.

paratively brief analysis distinguished prior cases -- where the employer was "spreading asbestos dust among the general population, thereby creating a dangerous situation in the world beyond the workplace" -- from the instant case, where the *employee* carried asbestos from the workplace to his home. *Id.*

While the New York and Georgia high courts have traveled a more measured course, *Olivo* may be followed by other courts to expand premises liability far beyond the workplace. ☺

PHARMACEUTICALS

New Jersey Court Affirms Nationwide Class in Vioxx Recoupment Litigation

See International Union of Operating Engineers Local No. 68 Welfare Fund v. Merck & Co., 894 A.2d 1136 (N.J. Super. Ct. App. Div. 2006)

The recoupment of healthcare costs by third-parties (such as government, insurers, unions, and the like) remains a relatively immature liability theory in products litigation. The approach was largely pioneered by state attorneys general who banded together in the mid-1990s to run similar cases against the tobacco industry, mostly in state courts across the county.¹

The emergence of this kind of litigation in the U.S. in the pharmaceutical context, and its potential consequences for European-based drug companies, was the focus of a recent article by two Chadbourne lawyers, in which they explored judicial treatment of such cases, noting:

With the U.S. courts at odds over critical legal issues in third-party payor recoupment cases against drug manufacturers, it is likely that the plaintiffs' bar will continue to press these claims.²

And so they have -- most recently in New Jersey. In *International Union*, an intermediate appellate court upheld

certification of a nationwide class of all non-government, third-party payors of health benefit plans who had funded the purchase of the prescription drug Vioxx, on claims that Merck fraudulently misrepresented and concealed information regarding the comparative safety and efficacy of Vioxx, forcing plaintiff and others to pay higher prescription costs than would have been the case absent Merck's alleged fraud. *Id.* at 1139-1140.³

New Jersey Law Will Govern all Claims

On appeal, Merck claimed error in the lower court's finding that common issues predominated and, further, that the class action format was superior to other methods of adjudication. More particularly, it argued that class members would have to prove proximate cause and "ascertainable loss" attributable to Merck's supposed fraud on an individual basis, and that the need to apply multi-state law precluded class certification. Rejecting Merck's arguments, the Appellate Division held that class-wide expert testimony could adequately establish both "ascertainable loss" and the requisite causal nexus, and that (while admittedly rare) the trial court's decision to apply New Jersey law across the board was neither unprecedented nor error. Applying the governmental interest test to its choice-of-law analysis, the court found that New Jersey's "contacts with the dispute are both extensive and weighty." *Id.* at 1148.⁴

Causal Chain Admittedly "Elongated"

The decision bears further on another issue generally com-

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¹ These suits were eventually resolved by a master settlement which includes ongoing payments reported to be worth \$280 billion over 25 years.

² *See* Allison M. Alcasabas and Philip A. Pfeffer, "Litigation's Changing Face," *Scrip Magazine*, at 30 (April 2006) at <http://www.chadbourne.com/publications/index.html>.

³ According to plaintiff, "Vioxx was introduced at a wholesale cost of approximately \$72 for a 30-day supply," whereas competitor pain medications "wholesaled for \$9.00 or less for the same 30-day supply" (omitting internal quotations).

⁴ More specifically, the court noted that plaintiff class representative was "organized and operating in New Jersey," that Merck was a New Jersey corporation "with its corporate home located in the state," that "Vioxx was primarily developed in New Jersey," and that "ultimate decision-making power regarding Vioxx's marketing and development was exercised in New Jersey."

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mon to third-party payor actions, that being the question of causal remoteness or proximate cause -- on which ground most suits of this sort have typically foundered. *See, e.g., Laborers Local 17 Health and Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229 (2d Cir. 1999). In this regard, plaintiff alleged that by virtue of Merck's alleged fraud, Vioxx (which was more expensive than other pharmaceuticals in its class) gained a favored position on the drug formularies used by insurers, benefit plans, and others to determine coverage for prescription drugs, which in turn encouraged doctors to prescribe the drug more frequently, leading ultimately to decision by benefit plans like plaintiff to cover the costs to members associated with purchase of the drug.

While acknowledging that "the causal chain appears somewhat elongated," the court reasoned it could not say "the alleged fraud was not a cause of [plaintiff's] loss." *Id.* at 1144. ©

FDA Approval of Pharmaceutical Labeling Preempts Warning Claims

See Abramowitz v. Cephalon, Inc., 2006 WL 560639 (N.J. Super Ct., March 3, 2006); *Colacicco v. Apotex, Inc.*, 2006 WL 1443357 (E.D. Pa., May 25, 2006)

In a Chadbourne & Parke LLP Client Alert issued earlier this year, we reported that the FDA had issued revised regulations governing prescription drug labeling requirements generally preempting state laws.¹ Since then, the issue has come to decision in at least two cases favoring pharmaceutical interests -- *Abramowitz* and *Colacicco*.

¹ *See* Chadbourne & Parke LLP Client Alert, "New FDA Rule on Prescription Drug Package Inserts" (January 2006) at <http://www.chadbourne.com/publications/index.html>.

Actiq

Abramowitz appears to have been one of the first reported decisions addressing the preemptive effect of these regulations. It involved allegations that Cephalon -- the maker of a pain medication called Actiq -- had failed to warn plaintiff that use of the drug, which contains sugars used to mask the unpleasant taste of the Fentanyl it contains, was associated with tooth decay.


On summary judgment, *Abramowitz* found that Cephalon had discharged its duty to warn under the "learned intermediary doctrine" by informing plaintiff's treating physician of the risk of tooth decay in "FDA approved package insert[s] and . . . information." *Id.* at *2. In reaching this conclusion, the court held that "the New Jersey courts have limited the availability of [failure-to-warn claims] when the warnings have been FDA approved" by presumption, on the basis that "compliance with FDA regulations serves as compelling evidence that a manufacturer satisfied its duty to warn." *Id.* at *3. On proof that Cephalon had provided plaintiff's physician with information regarding the presence of sugar in Actiq, and the associated risk of tooth decay, along with the fact that it had forwarded "Med Watch" notices of tooth decay to the FDA's attention, the court concluded a "reasonable juror could not find that the defendant did not provide an adequate warning." *Id.*

Past the failure of proof, and of wider significance, the court ruled that plaintiff's failure-to-warn claim was preempted by FDA labeling regulations released on January 18, 2006. Citing New Jersey Supreme Court precedent that "state law can be preempted by a federal regulation when the federal agency intends to preempt state law," the court found the requisite preemptive intent in a preamble statement by the FDA in releasing revised regulations pertaining to package inserts or professional labeling under its statutory authority. *Id.* at *4. There, the FDA stated that "under existing preemption principles, FDA approval of labeling . . . whether it be in the old or new format, preempts conflicting or contrary state law." *Id.* at *3 (citing 71 Fed. Reg. 3922-3997).

Paxil

A similar conclusion regarding the preemptive effect of these regulations was issued some three months later in *Colacicco*, involving the anti-depressant Paxil. Significantly, in this case the FDA submitted an *amicus* brief at the court's

request, stating the position that its regulations impliedly preempted state law failure-to-warn claims. With the benefit of this submission, and thus able to dig deeper than was the case in *Abramowitz*, the *Colacicco* court noted the FDA's position that a manufacturer is not free to alter its labeling for pharmaceutical products absent prior FDA approval, *id.* at *9, *10 and *17, grounding its decision in the end on the observation that "[f]undamentally, a series of Supreme Court decisions point this Court in the direction of deference" to the FDA, *id.* at *7-*15.

A more detailed analysis of the *Colacicco* decision can be found in our Client Alert, "Recent Federal Court Decision Dismissing as Preempted Pharmaceutical Failure-to-Warn Claims" (June 7, 2006).² 

Court Gives Non-Resident Pharmaceutical Claimants "Asylum," Notwithstanding Lack of Relief Under Law of Plaintiff's Home State

See *Rowe v. Hoffmann-La Roche*, 892 A.2d 694 (N.J. Super. Ct. App. Div. 2006)

In light of the recent holding in *International Union v. Merck*, 894 A.2d 1136 (N.J. Super. Ct. App. Div. 2006), *supra* at 7, one has to wonder what New Jersey pharmaceutical companies (and similarly situated others) make of their chosen corporate home. *Rowe*, in effect an open invitation to forum shopping for non-residents against New Jersey-based companies, can only add to the worry and wonder.

Defendant Immunized from Liability Under Michigan Law

In *Rowe*, New Jersey's Appellate Division reversed a trial

court's cogent choice-of-law analysis and dismissal of a Michigan man's action for damages based on claims that "he became severely depressed and attempted suicide several times" after taking Accutane (a drug used in the treatment of severe acne) years earlier. *Id.* at 698. Michigan products liability law -- which the trial court applied in granting summary judgment -- provides that drug warnings approved by the FDA, like those issued by defendant in respect of Accutane, are adequate as a matter of law, and as such immunizes drug manufacturers against failure-to-warn claims like the one filed by Mr. Rowe. *Id.* at 700. New Jersey law, on the other hand, provided that FDA approval created "only a rebuttable presumption" of warning adequacy. *Id.* at 698.

On the basis that New Jersey was defendant's principal place of business (and place of incorporation), and that the state was the "exclusive location" for defendant's "domestic operations" pertaining to the manufacture, sale, distribution, and labeling of Accutane, the Appellate Division reversed, holding "that New Jersey products liability law respecting the effect of prior FDA approval applies to plaintiff's claim." *Id.* at 698-699.

New Jersey's Governmental Interest Trumps Michigan's

Writing for the majority, Judge Wecker held that the New Jersey Supreme Court had adopted a "flexible, government interest analysis" for choice-of-law questions. While conceding that the alleged consequences of plaintiff's Accutane use were visited upon him in Michigan, the court ultimately gave greater weight to the fact that all the relevant testing and manufacturing of Accutane had taken place in New Jersey, tipping the balance in favor of New Jersey law -- notwithstanding the lack of available relief under the law of plaintiff's home state.

Citing *Gantes v. Kason Corp.*, 145 N.J. 478 (1996), the court "rejected the argument that New Jersey did not have an interest in exposing its domestic manufacturers to liability when the law of the state of injury would not hold them liable," noting that New Jersey's highest court had "described New Jersey's strong policy interest in deterring the manufacture of unsafe products within its borders as neither discriminatory nor unnecessarily burdensome." *Rowe*, 891 A.2d at 704.

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² See <http://www.chadbourne.com/publications/index.html>.

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Turning to Michigan's interests in applying its immunity law, the court inferred that the Michigan law was likely intended "to protect Michigan businesses," and finding "no reason to think it was concerned about the business climate in New Jersey or elsewhere," *id.* at 705-706, the majority concluded that application of "Michigan's immunity statute would be contrary to New Jersey's interest." *Id.* at 707. In effect blinding itself to reality, *Rowe* declared:

We see [no] danger that applying New Jersey law in this case will lead to an influx of drug failure-to-warn cases brought by non-residents of New Jersey.

Id. at 708.

The Dissent

In a stinging dissent, Judge Welfing noted (tongue firmly in cheek) that "New Jersey courts are, for whatever reason, the site of much mass-tort litigation," adding:

I am unable to perceive what governmental interest New Jersey has in seeking to assure compensation for a Michigan resident when the Michigan Legislature has determined that compensation is not available . . . New Jersey should not become the asylum for claims asserted by citizens of another state whose legislature has made a policy choice to immunize a particular defendant from such litigation.

Id. at 711. ©

LEAD PAINT

Public Nuisance Liability "Monster" Threatens to "Devour" Lead Paint Makers

See *State of Rhode Island v. Lead Industries Ass'n, C.A. 99-5226*, (R.I. Super. Ct., Feb. 22, 2006); *County of Santa Clara v. Atlantic Richfield Co.*, 40 Cal. Rptr. 3d 313 (6th Dist. Ct. App. 2006)

For almost two decades, paint manufacturers have successfully defended lawsuits alleging that lead-based paint had contaminated homes, supposedly injuring countless home owners and their children. Over the past six months, however, decisions in cases run on novel legal theories may signal a paradigm shift in this litigation.

Rhode Island Verdict

In February, following an earlier hung jury, the State of Rhode Island scored a significant victory against lead-based paint makers, with a jury of six deciding that defendant manufacturers (and their trade association) were liable on a public nuisance theory for Rhode Island's lead paint problems -- putting defendants at risk for the cost of abating the problem in more than 240,000 homes, at an estimated cost of more than \$1 billion.¹

Apart from the immediate cost of this result, the *Rhode Island* verdict may well have greater implications for not only the paint industry (in terms of similar suits pending elsewhere), but for product manufacturers generally, whose traditional approach to products liability claims could be undermined by the use of public nuisance theories of liability, which are riddled with subjectivity and vagueness. See, e.g., Cal. Civ. Code § 3479 ("Anything which is injurious to health . . . or is *indecent or offensive to the senses*, or an *obstruction* to the free use of prop-

¹ Before trial began, defendant DuPont Corporation agreed to pay Rhode Island nearly \$12 million in settlement -- with roughly half earmarked to cover the cost of education, training, community outreach, enforcement, and lead-hazard research, and the other half set aside for abatement of lead hazards in 600 houses.

erty, so as to *interfere* with the *comfortable enjoyment* of life or property . . . is a nuisance.”) (emphasis added).

Reinstatement of Class Action in California

Less than two weeks after the *Rhode Island* verdict, paint makers faced yet another setback in California, where an appeals court reinstated a class action public nuisance suit against them in March. See *County of Santa Clara v. Atlantic Richfield Co.*, 40 Cal. Rptr. 3d 313, 325 (6th Dist. Ct. App. 2006). Brought on behalf of all public entities in California, *Santa Clara* alleges that defendants contributed to the creation of a public nuisance by concealing the dangers of lead, mounting a campaign against regulation of lead, and promoting lead paint for interior use -- even though defendants had known for nearly a century that lead paint was hazardous to human beings. *Id.* at 325.

Nuisance Theory Not “Essentially” Products Liability Claim

Dismissed by the trial court in July 2003, on the basis that suits against paint manufacturers for the production and distribution of lead paint could only be pursued, if at all, under traditional product liability laws, the appellate panel reversed, holding:

A representative public nuisance cause of action seeking abatement of a hazard created by affirmative and knowing promotion of a product for a hazardous use is not “essentially” a products liability action “in the guise of a nuisance action” and does not threaten to permit public nuisance to “become a monster that would devour in one gulp the entire law of tort” . . . A products liability action does not provide an avenue to prevent future harm from a hazardous condition, and it cannot allow a public entity to act on behalf of a community that has been subjected to a widespread public health hazard.

Id. at 328-329 (internal citations omitted).

Other governmental entities throughout the country, many facing budgetary crises leaving little room to fund their own lead paint abatement programs, are pursuing similar claims against lead paint makers under both public nuisance and traditional products liability theories. See, e.g., *City of Milwaukee v. NL Indus. Inc. and Mautz Paint*, No. 01CV000066 (Cir. Ct.

Milwaukee Cty.) (set for trial on January 8, 2007).

Whether the current surge in lead paint litigation will continue to bring further setbacks to paint manufacturers remains to be seen, as does the assertion that novel claims for public nuisance will not “become a monster that [will] devour in one gulp the entire law of tort.” What is prologue, however, suggests otherwise. ☺

CAFA

Tenth Circuit Joins Split Over Removal Trigger for Post-CAFA Amendments

See *Prime Care of Northeast Kansas, LLC v. Humana Insurance Co.*, 2006 WL 1305229 (10th Cir., May 12, 2006)

Well over a year has passed since President Bush signed the Class Action Fairness Act (CAFA) into law in February 2005. As reported in the first issue of *In re Products Liability*, defendants are seizing on post-CAFA pleading amendments by plaintiffs to argue for removal, generating litigation over the character of amendments that can be said to trigger the “commencement” of a new action for CAFA removal purposes.

Newly Added Defendants

In resolving the question “whether CAFA permits the removal of a class action filed before the Act’s effective date if the removing defendant was first added by amendment after the effective date,” *Prime Care* began with a survey of the three different analytical camps around which the CAFA removal wagons are being circled in the federal courts.

The Absolute Position. Some, like the district court in *Prime Care*, have taken an absolute position rooted in the view that since an action can be commenced but once, class actions pre-dating CAFA cannot ever be removed -- regardless of the nature of any post-CAFA pleading amendment. *Id.* at *1 (collecting cases). The Tenth Circuit recoiled from this approach,

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however, noting that “[m]ost courts . . . concede that the addition of a new claim sufficiently distinct from prior pleadings may commence a new action removable under CAFA by the affected parties.” *Id.*

The “Relation-Back” Camp. In another category altogether are those courts allowing removal for amendments that do not relate back to pre-CAFA pleadings, but which divide over “the treatment of amendments that add new defendants to a case.” *Id.* at *2. In this regard, some courts, like the Eighth Circuit, hold that “the relation-back analysis controls the commencement question for all amendments, no distinction being made for amendments adding new defendants.” *Id.* (citing *Plubell v. Merck & Co.*, 434 F.3d 1070, 1071-72 (8th Cir. 2006)).

The “New Defendant” Exception. Others, including the Fifth and Seventh Circuits, hold that “the relation-back analysis controls for all amendments except those adding defendants, which are categorically treated as commencing a new case as to the added defendants.” *Id.* (citing *Braud v. Transp. Serv. Co.*, 445 F.3d 801, 804-809 (5th Cir. 2006); *Schillinger v. Union Pac. R.R.*, 425 F.3d 330, 333 (7th Cir. 2005)).

FRCP Rule 15(c) Provides Answer

Prime Care chose to adopt the Eighth Circuit’s “relation-back” approach to the post-CAFA addition of new defendants. On the reach to this tack, it expressly rejected the “absolute” position that a civil action is “commenced” only once (regardless of the nature of an amendment), noting that “a party brought into court by an amendment, and who has, for the first time, an opportunity to make defense to the action, has a right to treat the proceeding, as to him, as commenced by the process which brings him into court.” *Id.* at *3 (quoting *United States v. Martinez*, 195 U.S. 469, 473 (1904)).

Addressing the Fifth and Seventh Circuit approach -- holding that a post-CAFA addition of new defendants “categorically” commences a new civil action for removal purposes, the Tenth Circuit found it inconsistent with Fed. R. Civ. P. 15(c), which determines when pleading amendments “relate back” to the original pleading date.

Especially telling here, [it said,] is the Advisory Committee’s pointed clarification that, when the addition of a defendant satisfies relation-back criteria, “characterization of the amendment as a new proceeding is not responsive to the reality [sic], but is merely question-begging; and to deny relation back is to defeat unjustly the claimant’s opportunity to prove his case.”

Id. at *4 (quoting Advisory Committee’s 1966 Note on Rule 15(c)).

In the end, *Prime Care* held that “whether a post-CAFA amendment triggers a substantive right of removal under CAFA by the affected parties *depends on whether the amendment relates back to the pre-CAFA pleading that is being amended*,” which the court characterized as the “fundamental underpinning” of the decisional analysis. *Id.* at *4-*5 (emphasis added). ©

FIREARMS

Gun Suit Redux: Federal Court Allows Evidentiary Use of Firearms Database On Finding That What Congress Says Now Does Not Affect What Plaintiffs Obtained Then

See City of New York v. Beretta U.S.A. Corp., 2006 WL 1109758 (E.D.N.Y., April 27, 2006)

Judge Weinstein parses tenses to find support for the City of New York’s public nuisance-based lawsuit against gun makers in *Beretta*.

Congressional Action and Intent

As previously reported, *see In Re Products Liability* at 9 (April

2006), late last year Congress included a budgetary rider in an appropriations bill (the “2006 Rider”) that seemingly prohibited a federal database (maintained by the Bureau of Alcohol, Tobacco, Firearms and Explosives, or ATF) used to track the purchase and sale of firearms from being introduced as evidence in civil liability cases. More specifically, the 2006 Rider provides that the contents of the database “shall be immune from legal process . . . , shall be inadmissible in evidence, and shall not be used, relied on, or disclosed in any manner, nor shall testimony or other evidence be permitted based upon such data, in any civil action pending on or filed after the effective date of this Act.” *Id.* at *3. Before this development, New York City had already obtained the portions of the database it needed to prove its case, in discovery from the ATF.

Through a Loophole on Order to Show Cause

Following passage of the 2006 Rider, the court issued an order for the parties “to show cause why the City’s suit should not be dismissed on the basis of the 2006 Rider, which is read by the defendants as excluding from evidence the ATF trace data in the hands of the parties.” *Id.* at *1.

On April 27, 2006, following intervention by the United States, and a hearing, Judge Weinstein ruled that New York City could use the database information already in its possession to support its case, but could not obtain any new information. In support of his decision, he carefully framed the issue’s context -- stressing that the 2006 Rider was enacted as part of an ATF-related appropriations bill imposing “a series of restrictions on the future use of those appropriated funds” by the agency, and that every paragraph, including the one immunizing the ATF database from any evidentiary use, “deals with the expenditure of federal monies.” *Id.* at *5 (emphasis added).¹ From this position, he reasoned that since the 2006 Rider’s evidentiary restrictions “ha[ve] no application to data that is not to be disclosed through the use of federally appropriated funds,” *id.* at *7 (emphasis added), they “are not designed to be applied to, and

cannot be read to apply to, the trace data already disclosed to the parties and sought to be admitted in this case,” *id.* at *8.

Recognizing, however, that there was “substantial ground for disagreement about” the applicability of the 2006 Rider, Judge Weinstein issued a stay to accommodate interlocutory appeal under 28 U.S.C. § 1292(b). *Id.* at *11. ©

AERONAUTICS

Beryllium Sensitization (Without More) Not a Disease or Cognizable Tort Injury

See Parker v. Brush Wellman, 420 F. Supp. 2d 1355 (N.D. Ga. 2006)

Creative plaintiffs’ lawyers continue to push the outer edge of the envelope in their assertion of “injury” and the quest for a hold on corporate purse strings. On March 10, 2006, however, a federal judge ruled that beryllium sensitivity is not a compensable injury under Georgia law, notwithstanding plaintiffs’ “commendable job” of trying to convince him otherwise.

Torts at a Microscopic Level

Parker involved a putative class action on behalf of otherwise asymptomatic individuals seeking recovery for “sub-clinical, cellular, and sub-cellular damages” supposedly caused by exposure to respirable beryllium residues associated with the manufacture or use of products containing beryllium in the course of work at a Lockheed Martin Corporation facility in Georgia. *Id.* at 1356. In March 2005, on defendants’ motion to dismiss and for judgment on the pleadings, the court ruled that Georgia law did not recognize such effects as actionable injuries. *Id.* As a consequence, it ordered plaintiffs to provide a more definite statement of their claims “and in doing so, to segregate out those plaintiffs who have endured only subclinical, cellular, and subcellular effects

¹ The 2006 Rider begins, “[N]o funds appropriated under this or any other Act . . . may be used to disclose part or all of the contents of the Firearms Trace System database maintained by the National Trace Center of the Bureau of Alcohol, Tobacco, Firearms and Explosives . . . ” *Id.* at *3 (emphasis added).

Aeronautics

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from those who have sustained actionable tort injuries.” *Id.*

Plaintiffs instead filed an amended complaint reiterating their belief that the former effects constituted legally cognizable injuries, and identifying five individuals with “injuries . . . detected by physical examination and/or testing.” *Id.* at 1356-1357. Defendants responded with a motion to enforce the court’s prior order, arguing that plaintiffs’ “so-called injuries are nothing more than *beryllium sensitization* -- meaning that they are capable of developing a beryllium-related injury in the future.” *Id.* at 1357 (emphasis in original). In support, they submitted the affidavit of a pulmonary physician specializing in environmental and occupational lung diseases. Plaintiffs countered with an affidavit by “one of the foremost authorities on beryllium medicine in the world,” taking the view that beryllium sensitization constituted a “present physical injur[y].” *Id.*

“Sensitivity” and “Symptoms” Not Enough

By consent and stipulation, the court treated defendants’ motion under Rule 56. Ruling for defendants, and dismissing the complaint, the court found that “the sensitivity and ‘symptoms’ [plaintiffs] describe fall short of what conditions or effects the Georgia courts (and for that matter, other jurisdictions) have held actionable.” *Id.* at 1358. While both experts agreed that beryllium sensitization -- as measured by a lymphocyte proliferation test (“LPT”) -- constituted an immunological response to an antigen (here, beryllium exposure), they disagreed over whether that response could be characterized as “normal.” *Id.* at 1358-1360. They also disagreed over the question whether beryllium sensitization more likely than not leads to chronic beryllium disease (CBD), the latter being an actual disease that was common ground between the parties. *Id.*

The court ultimately grounded its decision on plaintiffs’ concession that “beryllium sensitization, whether ‘abnormal or not,’ cannot itself be labeled an ‘impairment.’” *Id.* at 1359. Turning to plaintiffs’ contention that beryllium sensitization was nevertheless “an important *precursor*” to CBD, the court reasoned that even if beryllium sensitization increased the risk for CBD, subsequent development of that disease was not “a

reasonable medical certainty.” *Id.* at 1360-1361 (emphasis in original) (internal quotations omitted). The court likewise rejected plaintiffs’ attempt to analogize beryllium sensitization to HIV (as a “precursor” to AIDS) and asbestos-related pleural plaques or thickening, noting that HIV was itself without question a medically recognized disease, and distinguishing pleural thickening as a well-documented “alteration of tissue -- a demonstrable bodily change,” more akin to “the formation of granulomas associated with CBD than with the precursor to the disease, beryllium sensitization.” *Id.* at 1362. ©

EVIDENCE

Evidentiary Use of Novel Computer-Generated Animation Upheld in Pennsylvania

See Commonwealth v. Serge, 896 A.2d 1170 (Pa., April 25, 2006)

Society has become increasingly dependent upon computers in business and in our personal lives. With each technological advancement, the practice of law becomes more sophisticated and, commensurate with this progress, the legal system must adapt. Courts are facing the need to shed any technophobia and become more willing to embrace the advances that have the ability to enhance the efficacy of the legal system.

Id. at 1176.

Visualizing the Theory of the Case

The Pennsylvania Supreme Court recently took up this mantle in *Serge*, a criminal appeal involving the Commonwealth’s use of computer-generated animation (CGA) in a murder trial. Though *Serge* was a criminal action, the issue it addresses -- the standard for admitting CGAs at trial -- is certainly relevant

to product liability litigation, as product manufacturers often use CGAs at trial to illustrate expert testimony (such as testimony relating to automobile accident reconstruction in crash-worthiness lawsuits).

Appellant, a former Lieutenant of Detectives was convicted of shooting and killing his wife. He argued self defense at trial, claiming that his wife had attacked him with a knife. The Commonwealth's theory at trial was that Serge had "used his decades of experience as a police officer to tamper with the crime scene to stage a self-defense setting . . . [by] mov[ing] his wife's body and strategically position[ing] her near a knife that he had placed on the floor." *Id.* at 1175. In support, the Commonwealth used a CGA visually depicting its expert witnesses' opinion about how Serge had killed his wife, including not only the trajectory of the bullets, but the crime scene generally at the time of the murder. *Id.*

Limiting the appeal "solely to the issue of whether the admission of the CGA depicting the Commonwealth's theory of the case was proper," *id.* at 1176, the court focused first on the traditional evidentiary touchstones, declaring that:

CGA should be deemed admissible as demonstrative evidence if it: (1) is *properly authenticated* pursuant to Pa.R.E. 901 as a fair and accurate representation of the evidence it purports to portray; (2) is *relevant* pursuant to Pa.R.E. 401 and 402; and (3) has a *probative value* that is not outweighed by the danger of *unfair prejudice* pursuant to Pa.R.E. 403.

Id. at 1178-1179 (emphasis added). As an added safeguard, the court suggested that trial courts must use "limiting instructions . . . explaining the nature of the specific CGA" at issue. *Id.* at 1179.

Back to the Future

Noting that the difference between the use of CGA and "chalk diagrams or sketches on a blackboard . . . is one of mode, not meaning," the court explained that "[t]he law does not, and should not prohibit proficient professional employment of new technology in the courtroom. This is, after all, the twenty-first century." *Id.* at 1178. It found comfort in the fact that CGA was simply "a graphical presentation of another expert's opinion, not the conclusions or calculations of a computer," *id.* at 1180, as well as the fact that the technology "clearly, concisely, and accu-

rately depicted the Commonwealth's theory of the case and aided the jury in the comprehension of the collective testimonies of the witnesses," *id.* at 1182.

Conducting the usual Rule 403 balancing test, the court found that appellant had not been unfairly prejudiced by the Commonwealth's use of the CGA, largely on the basis that the CGA used by the Commonwealth did not include: "(1) sounds; (2) facial expressions; (3) evocative or even life-like movements; (4) transition between the scenes to suggest a story line or add a subconscious prejudicial effect; or (5) evidence of injury such as blood or other wounds." *Id.* at 1183. In the final analysis, the Court found that any possible unfair prejudice -- owing, for instance, to the "visual nature of the presentation" -- resulted not so much from the "on-screen depiction of the Commonwealth's theory, but rather was inherent to the reprehensible act of murder," and was in the event cured or "viti-ated" by the "thorough cautionary instructions" about the "exact nature and role of a CGA" issued by the trial court. *Id.* at 1182-1186.

In the final analysis, *Serge* was pragmatically grounded on recognition that the law traditionally "has been flexible enough to accommodate scientific progress and technological advances in all fields, and should continue to do so." *Id.* at 1178. ☺

Etcetera

Publications

- © David L. Wallace, "A Dispatch From America's Tobacco Litigation Ranks: Primary Assumption of Risk and Personal Responsibility in a Comparative Fault Age," *Zeitschrift für Stoffrecht: The European Journal for Substances and the Law*, Volume 2:85-88 (May 2006)
- © Allison M. Alcasabas and Philip A. Pfeffer, "Litigation's Changing Face" *Scrip Magazine*, April 2006
- © Allison M. Alcasabas and Philip A. Pfeffer, "Nationwide Vioxx Action Can Proceed Against Merck," *Insurance Day*, May 5, 2006

Speaking Engagements:

- © On September 14, 2006, Mary T. Yelenick will be moderating a panel on National Counsel Coordination of Pharmaceutical Litigation at the ABA Women in Products Liability conference at the Judicial Center in Las Vegas, NV.
- © On October 12, 2006, David L. Wallace and Philip A. Pfeffer will deliver a presentation entitled "Expanded Use of the RICO Statute in Products Liability Litigation" at the Defense Research Institute's Annual Meeting in San Francisco, CA.
- © On October 12-13, 2006, Gregory M. Loss will be presenting on "Products Liability in the Pharmaceutical Industry" at a C5 Conference in Munich, Germany.
- © On November 16, 2006, Phoebe A. Wilkinson will chair a panel at the Annual Regional Meeting of the ABA Section of Litigation, Products Liability Committee/Pharmaceutical Subcommittee, at the Schering Campus in Kenilworth, New Jersey.

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