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PRODUCT LIABILITY CASE DIGEST

2010-2011 Edition

Companion to
The Preparation of a Product Liability Case

Scott Baldwin
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Companion Volume to
The Preparation of a Product Liability Case, Third Edition

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Product Liability Case Digest

2010-2011 Edition

by Scott Baldwin, Francis H. Hare, Jr., and Francis E. McGovern

Highlights of the 2010-2011 Edition

The onslaught of products liability litigation continues unabated. The 2010-2011 Product Liability Case Digest includes cases on a number of important topics, including:

- Key developments in areas that continue to capture media attention, including tobacco, Vioxx, asbestos, Agent Orange, and hurricane victims' formaldehyde exposure:

  —*Tobacco*. The Supreme Court held that neither the federal Cigarette Labeling and Advertising Act's preemption provision, nor the Federal Trade Commission's actions in the field, expressly or impliedly preempted claims related to "smoking and health" under a Maine statute that prohibited deceptive tobacco advertising (*Altria Group v. Good*). Thus, the Court affirmed the First Circuit's decision to reinstate a class action brought by "light" cigarette smokers in Maine under the state consumer protection statutes, who had alleged that Philip Morris violated state statutes by engaging in unfair and deceptive acts or practices. With regard to express presumption, the Court held that the plaintiffs claims did not implicate a "requirement or prohibition based on smoking and health." The claims merely alleged a violation of the "general duty not to deceive" codified in the Maine statute, which said nothing about either "smoking' or 'health." As for implied preemption, the plaintiffs' claims did not conflict with any FTC alleged "longstanding policy" of "promoting the development and consumption of low tar cigarettes" and were, therefore, not preempted. The FTC had no such longstanding policy, and, indeed, the FTC had "disavowed" any policy authorizing "light" and "low tar" descriptors. Finally, the fact that the FTC had never expressly *prohibited* tobacco companies from advertising their cigarettes as "light" did not provide a basis for finding implied preemption. In another case, the Supreme Court dismissed Philip Morris's appeal of a $79.5 punitive damages award in a case brought by a smoker's widow where the non-economic compensatory damages totaled $500,000 (*Williams v. Philip Morris*). The Court dismissed the appeal without

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—*Agent Orange*. The Second Circuit affirmed the federal district court's dismissal of cases brought by U.S. Vietnam War military veterans and their relatives relating to Agent Orange injuries (*In re "Agent Orange" Prod. Liab. Litig.*), based on the government contractor defense. The plaintiffs failed to establish that the defendants did not meet the three-part test, established by the Supreme Court in *Boyle v. United Technologies*, for determining the applicability of the defense: (1) the government approved reasonably precise specifications; (2) the equipment or product at issue conformed to those specifications; and (3) the supplier warned the government about dangers in using the equipment or product that were known to the supplier but not to the government. As for the first requirement, no reasonable jury could find that the government did not exercise sufficient discretion for it to have been said to have "approved" specifications for the herbicides. As for the second requirement, there was no evidence that the manufacturers did not meet the contracts' specifications. As for the third requirement, the record was clear that the manufacturers did not fail to warn of known dangers at the time of Agent Orange's production that would have had an impact on the military's discretionary decision regarding Agent Orange's toxicity.

—*Asbestos*. The Supreme Court reaffirmed *Norfolk & Western Ry. v. Ayers*, that a plaintiff who had asbestosis but not cancer could recover damages for fear of developing cancer under the FELA without proving physical manifestations of the claimed emotional distress. The Court, however, made clear that the plaintiff had to prove that his or her alleged fear was "genuine and serious" (*CSX Transportation v. Hensley*). Thus, the trial court committed "clear error" in refusing the defendant's requested instructions as to the "genuine and serious" standard in the case of a former railroad worker who alleged that he was negligently exposed to toxic chemicals and asbestos on the job, which caused him to develop brain injuries and asbestosis. Consequently, the Supreme Court reversed the $5 million verdict and remanded the case for new proceedings.

—*Formaldehyde exposure*. There have been several decisions by the federal district court that oversees litigation relating to Hurricanes Katrina and Rita victims' lawsuits against mobile home manufacturers and U.S. government over alleged formaldehyde exposure while living in government-issued trailers. In one decision, the court denied a proposed class action consisting of various subclasses: a Louisiana subclass, a Texas subclass, a Mississippi subclass, and an Alabama subclass, as well as subclasses for individuals in need of future medical care (*In re FEMA Trailer Formaldehyde Prods. Liab. Litig.*, MDL-1873 (E.D. La. June 2009)). Each person's claim was unique and, therefore, had to be examined individually. Thus, the subclasses did not meet the numerosity, typicality, and commonality requirements. In addition, while plaintiffs' counsel could

could be liable under the state product liability act even though the defendant-contractors were not the manufacturers of the trailers. Where the alleged formaldehyde-related defect occurred in part because of the assembly process used by the contractors, an alleged defect that manifested itself in the assembly process could impose liability under the state statute on a party when the defect was created by the assembly process.

- Continuing litigation on preemption in various areas, including cigarette labeling, drug labeling, mobile home construction standards, and actions relating to allegedly defectively designed vaccines:

  —*Food, Drug, and Cosmetic Act (FDCA).* The Supreme Court held that state law claims alleging failure to warn and failure to provide adequate warnings for FDA-approved prescription drug labeling were not impliedly preempted by the FDCA and the FDA's implementation of that Act in approving Phenergan, an anti-nausea drug, and its labeling (*Wyeth v. Levine*). The Court held that: (1) the defendant could have changed its labeling in a manner the plaintiff claimed it should have without violating federal law, and (2) allowing states to decide what instructions or warnings should appear on drug labeling was consistent with the FDA's approval decision and Congress's intent in passing the FDCA. First, the Court held that the defendant could comply with both the state-law duties underlying those state law claims and its federal labeling duties. Pursuant to the "changes being effected" regulation, the defendant could have unilaterally added a stronger warning to "reflect newly acquired information" about the risk of gangrene from IV-push administration, since there was no evidence that the FDA would ultimately have rejected such a labeling change. In addition, the defendant's assertion that unilaterally changing the label would have violated federal law governing unauthorized distribution and misbranding of drugs was based on its "fundamental misunderstanding" that the FDA, rather than the manufacturer, bore primary responsibility for drug labeling. Next, the Court held that the defendant relied on an overbroad view of the FDA's power to preempt law when it rejected the defendant's argument that requiring it to comply with a state law duty to provide a stronger warning would interfere with Congress' purpose of entrusting an expert agency with drug labeling decisions. The legislative history of the FDCA showed that Congress did not intend to preempt state law failure to warn actions.

  —*Federal Cigarette Labeling and Advertising Act.* As noted above, the Supreme Court affirmed the First Circuit's decision to reinstate a class action brought by "light" cigarette smokers in Maine under the state consumer protection statutes. The court had held that their claims were not preempted by the Cigarette Labeling and Advertising Act (*Good v. Altria Group*).

warranty claims. In another case, the court held that the economic loss doctrine precluded recovery for tort damages to barbecue seasoning that incorporated a defective paprika ingredient (*International Flavors & Fragrances v. McCormick & Co.*). Because the barbecue seasoning was used as a component in the final product, and the final product was damaged, the final product was not damage to "other property" as claimed by the plaintiff. However, material issues of fact existed regarding the plaintiff's fraudulent concealment claim, and the economic loss doctrine does not necessarily preclude recovery for fraud claims.

Noteworthy decisions on the admissibility of expert testimony. Where the plaintiffs claimed that the defendant's nasal spray caused permanent impairment of their senses of smell and taste, the Eighth Circuit affirmed the district court' exclusion of causation testimony by the plaintiffs' expert, a professor of otolaryngology at the University of Colorado School of Medicine (*Polski v. Quigley Corp.*). Although the witness was a qualified nasal health expert, his causation testimony was based on his untested belief that the nasal spray, when used as directed, traveled in a straight-line liquid movement capable of reaching the olfactory epithelium through the nasal passage, allowing the zinc ions in the drug to come into contact with the difficult to access olfactory epithelium. Once the court excluded the plaintiffs' expert's causation testimony, the plaintiffs could not make a *prima facie* case, and the district court properly granted summary judgment. Similarly, a federal district court excluded the forensic pathologist's opinion that the TASER was the cause of death in a case where the decedent died after police officers used a stun gun to subdue him (*Lomax v. Las Vegas Metropolitan Police Dept.*). The witness had no expertise in the effects of electronic control devices, he did not review the decedent's medical history, and his testimony lacked a medical and/or scientific basis. The emergency room physician's testimony was also inadmissible. Despite his testimony that the decedent's death resulted from multiple factors, including obesity, phencyclidine (also known as Angel Dust) use, fibrosis in the heart muscle, bronchopneumonia and his prolonged struggle with police, he concluded that the TASER decreased the decedent's ability to ventilate. His opinions lacked a scientific or medical basis as he could not point to any study or experiments that supported his theory. There was no admissible expert medical testimony as to causation, and the case was dismissed.

11/09

—*Manufactured Home Construction and Safety Standards Act.* As noted above, in lawsuits arising from Hurricane Katrina and Rita victims' alleged exposure to formaldehyde while living in government-issued trailers, the federal district court dismissed some of the plaintiffs' state product liability law claims against mobile home manufacturer defendants, on the basis of implied federal preemption (*In re FEMA Trailer Formaldehyde Prods. Liab. Litig.*). If the court were to permit the plaintiffs to proceed with their claims raising the ambient air standard, the defendants in the mobile home industry would essentially be required to deviate (in ways variable from state to state) from those federal standards that were so carefully developed by HUD in its enforcement of the Manufactured Home Construction and Safety Standards Act.

—*National Childhood Vaccine Injury Compensation Act.* The Georgia Supreme Court affirmed a ruling that this Act did not preempt a product liability lawsuit by the plaintiffs against vaccine makers alleging that their son suffered severe neurological disorders after receiving several vaccines that used thimerosal, a mercury-containing preservative (*American Home Prods. v. Ferrari*). The court held that the Act provided immunity for defective design only if the side effects were determined on a case-by-case basis to be "unavoidable." In its decision, the court noted contradictory rulings by federal district courts in Pennsylvania and Texas, and by a New York appellate court which had held all such claims to be preempted. These cases rejected the application of a case-by-case determination of whether certain side effects were unavoidable. The Third Circuit, in affirming the Pennsylvania district court's decision, held that even if Congress did not intend to preempt all design defect claims, the scope of preemption *expressly* included strict liability defect claims and all design defect claims, including those based in negligence (*Bruesewitz v. Wyeth*). Because of the contradictory rulings, in June 2009, the Supreme Court asked the U.S. Solicitor General to file a written brief indicating the government's view on the issue.

- Significant cases on the economic loss doctrine. Summary judgment was granted to all defendants—the seller of a yacht, the manufacturer of the yacht, and the manufacturer of the yacht's stern thruster—on both strict liability and warranty claims (including Magnuson-Moss Warranty Act claims) where yacht was destroyed by fire (*Fanok v. Carver Boat Corp.*). As for product liability claim, the plaintiff failed to demonstrate a specific defect to the yacht's stern thruster. Use of circumstantial evidence to create an inference of a defect was only available in a personal injury product liability claim and, under economic loss doctrine, tort recovery was not available in a case that only involved the destruction of the vessel. There was also no recovery for breach of warranty, since the plaintiff did not show a defect. Magnuson-Moss Warranty Act claims were dependent on state law

adequately represent the subclasses, the named plaintiffs each presented unique issues and were not adequate representatives. The court also denied subclasses for individuals in need of future medical care. The plaintiffs' exposure to formaldehyde and their increased risk of contracting serious latent diseases associated with exposure presented individual issues, including other exposures, past and present cigarette use, formaldehyde-containing cosmetics use, individual level of and duration of formaldehyde exposure, and individual risk factors for contracting particular injuries or diseases. The plaintiffs also did not show the required "manifest medical injury" that they allegedly suffered as "cellular and molecular" damage. Whether formaldehyde exposure caused this damage depended upon individual considerations. The plaintiffs also did not show whether differences in the various applicable state laws were manageable. Finally, the court would not order that defendants pay for monitoring and treatment before there was finding of liability. In another decision, the district court dismissed some of the plaintiffs' state law claims against the mobile home manufacturer defendants, based on implied federal preemption. Had the court allowed the plaintiffs to proceed with their state product liability claims raising the ambient air standard, the defendants in the mobile home industry would essentially be required to deviate (in ways variable from state to state) from those federal standards that were so carefully developed by HUD in enforcing the Manufactured Home Construction and Safety Standards Act. That Act also clearly stated that any state regulation on safety matters that federal law already covered (*e.g.*, formaldehyde emissions) had to be "identical" with that federal mandated standard. Similarly, the court dismissed claims alleging inadequate warnings of exposure to purportedly high levels of formaldehyde contained in the trailers, which required more than the federal label standards. On the other hand, state law claims alleging non-compliance with federal formaldehyde regulations were parallel claims and were, therefore, not preempted. In another ruling, the court would not dismiss government contractors that hauled and installed the trailers as defendants in the lawsuit who the plaintiff added as additional defendants. Despite the contention that the plaintiffs were not linked with any particular defendant, the original complaint linked the plaintiffs with particular trailer manufacturers and/or distributors. Accordingly, the original plaintiffs had standing to add defendants in the chain of distribution. The plaintiffs' claims were also cognizable under the Louisiana Products Liability Act. First, the plaintiffs' claims were not necessarily prescribed one year after the first trailer suit was filed. It was impossible to determine in advance exactly when each plaintiff became aware of his or her injuries, since these facts were not evident from the face of the complaints and could only be considered case-by-case. Second, the defendants

issuing an opinion. Twice before, the Court had vacated the punitive damages award and remanded the case to the Oregon courts for reconsideration. Each time, the courts reinstated the award.

There were also non-Supreme Court cases relating to tobacco. In the Justice Department's landmark racketeering action against several tobacco companies (initially filed in 1999), the D.C. Circuit Court largely affirmed the federal district court's ruling that cigarette companies deceived the public for decades about the health hazards of smoking, and they, therefore, were guilty of fraud and violating racketeering laws (*United States v. Philip Morris USA*). The court also largely affirmed the remedies imposed by the district court, which had ordered a variety of marketing, sales, and advertising restrictions on the industry. At the same time, the circuit court agreed that the district court had no authority to either order the tobacco companies to pay millions of dollars to the government in disgorgement or to order the companies to fund a national smoking-cessation campaign. In another case, the New York Court of Appeals held that tobacco companies were not liable to a smoker and her husband for negligent product design based on their failure to adjust the levels of tar and nicotine in their "regular" cigarettes (*Adamo v. Brown & Williamson Tobacco Corp.*). In claiming the feasibility of a safer design, the plaintiff must be able to show the potential for designing the product so that it is both safer and remains functional. The plaintiffs, however, failed to prove an essential element of their case: that "light" cigarettes were equivalent in function, or utility, to "regular" ones.

—*Vioxx*. A California Superior Court judge rejected a proposed class action by state residents who took Vioxx before it was removed from the market and by health insurance plans who paid for the drug (*In re Vioxx Consolidated Class Action*). The plaintiffs seek to recover economic, rather than personal injury, losses for what they paid for the painkiller. The amount of money the plaintiffs paid was not subject to common proof, since the plaintiffs paid different amounts for Vioxx. Also, claims by the former users would require examination of each user's medical history and prescription decisions. In addition, the Supreme Court agreed to hear Merck's appeal in a securities fraud class action lawsuit by shareholders who claim that the company misled them by downplaying data suggesting that Vioxx raised the risk of heart attacks (*In re Merck & Co., Securities, Derivative & ERISA Litig.*). While the federal district court dismissed the case ruling that the two-year fraud statute of limitations expired before the lawsuit was filed, a panel of the Third Circuit Court reinstated the suit. While Merck argues that there was enough Vioxx data publicly available by 2001 to start the clock on the statute of limitations, the appellate court held that there was insufficient information publicly available by that time for the shareholders to pursue their action.

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How to Use This Book

Products are listed alphabetically in seven main categories:

Construction Equipment and Materials
Consumer Products
Farm Machinery and Products
Medical Products
Miscellaneous Toxic Torts
Motor Vehicles
Workplace Products

Within each main category, products are listed alphabetically by type. Within each product listing, cases are digested and presented in reverse chronological order, alphabetically by jurisdiction. Federal cases are alphabetized by the state whose law is applied.

Within each case discussion, product names and brand names are in **boldface** (for example, **asbestos**) to further aid the reader.

It is the intent of the publisher to update and reissue *Product Liability Case Digest* on an annual basis. Comments, suggestions, and criticisms are welcome and can be sent to:

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Personal Injuries

FEDERAL SUPREME AND CIRCUIT COURT CASES

CSX Transp. v. Hensley, 129 S. Ct. 2139, 173 L. Ed. 2d 1184 (2009), *rev'g Hensley v. CSX Transp., 278 S.W.3d 282 (Tenn. Ct. App., 2008)*. Court reaffirmed *Norfolk & Western Ry. v. Ayers* (discussed below) which had held that plaintiff who had **asbestosis** but not cancer could recover damages for **fear of developing cancer** under FELA without proving physical manifestations of claimed emotional distress. However, plaintiff had to prove that alleged fear was "genuine and serious." Thus, trial court committed "clear error" in refusing defendant's requested instructions as to "genuine and serious" standard in case where former railroad worker alleged negligent exposure to toxic chemicals and asbestos while on job, which caused brain injuries and asbestosis. Accordingly, Court reversed $5 million verdict and remanded case to trial court for new proceedings.

Norfolk & Western Ry. v. Ayers, 538 U.S. 135, 123 S. Ct. 1210, 155 L. Ed. 2d 261 (2003). Court upheld jury award of almost $5 million for six retired West Virginia railroad workers who brought FELA action after developing **asbestosis**, noncancerous disease, resulting from exposure to **asbestos dust**. While asbestosis, itself, did not lead to more serious and, often, deadly cancer, mesothelioma, court stressed that workers who suffered from asbestosis were statistically susceptible to cancer, which "must necessarily have a most depressing effect upon the injured person." Court indicated that person seeking recovery must establish that "alleged fear is genuine and serious." In this case, fear was real given workers' physical condition plus long latency period for developing cancer—in some case as long as 30 to 40 years. Court clarified landmark ruling in previous asbestos case, *Buckley v. Metro North R.R.*, 521 U.S. 424, 117 S. Ct. 2113, 138 L. Ed. 2d 560 (1997), where it had held that mere fear of illness could not be basis for damages recovery, absent manifestation of symptoms of disease. Unlike *Ayers*, where workers allegedly suffered from asbestosis, workers in *Buckley*, had manifested no symptoms of asbestosis or other asbestos disease.