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Fraudulent Joinder in the Face of *Bell Atlantic Corp. v. Twombly*

By Lisa M. Baird, Tracy G. Weiss and Michael W. King

Introduction

Practitioners in the pharmaceutical litigation field unfortunately are quite familiar with state court complaints that include additional defendants named for the sole purpose of defeating diversity jurisdiction and removal to federal court. Motion practice attacking these "fraudulently joined" defendants is common and, all too often, traditionally has been fruitless. The Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), provides defendants with additional ammunition to use in attacking fraudulently joined defendants.

Pleading Standards

Rule 8 of the Federal Rules of Civil Procedure requires pleadings to set forth "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The Federal Rules require that claims have some factual basis, and failure to adequately state a claim is ground for dismissal pursuant to Rule 12(b)(6).

But courts long interpreted Rule 8 liberally, allowing claims to proceed to discovery so long as they "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957). Under this traditional formulation, "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley*, 355 U.S. at 46-47.

The well-established "no set of facts" language set forth in *Conley* remained the standard for notice pleading in this country for nearly 50 years - but no more. In May 2007, the United States Supreme Court held that "after puzzling the profession for 50 years, this famous observation has earned its retirement." *Twombly*, 127 S. Ct. at 1969.

Twombly involved class action antitrust claims brought under Section 1 of the Sherman Act over an alleged conspiracy to restrain trade in connection with telephone and high-speed internet services. *Id.* at 1962. The complaint broadly asserted that "[i]n the absence of any meaningful competition" and each defendant's "parallel course of conduct," plaintiffs believed defendants had "entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets." *Id.* at 1962-63.

After the Southern District of New York dismissed the complaint for failure to state a claim upon which relief could be granted and the Second Circuit reversed, the Supreme Court granted certiorari "to address the proper standard for pleading an antitrust conspiracy." *Id.* at 1963.

The United States Supreme Court ultimately held that "[w]hile a complaint attacked by Rule 12(b)(6) motion to dismiss does not

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Membership in the Mass Torts Committee continues to grow. Subcommittee co-chairs are working on the Committee's first ever strategic plan to expand the number of substantive programs that the Committee co-sponsors with other ABA substantive committees. We and the Products Liability Committee will co-sponsor the *"Current Issues In Medical Device Litigation Regional CLE Workshop"* on October 7, 2008, at Alcon Laboratories in Fort Worth, Texas.

You will find that the website has been improved. The website subcommittee has added a new section entitled *"News and Developments,"* which provides members with news briefs on topics of interest in the mass torts arena. A committed group of our members is providing an analysis of important cases within days after they have been decided in our "Recent Updates Section." We believe this will be a benefit to committee members.

The ABA Annual Meeting will be held in New York City from August 7-12, 2008. Also, save the date for the 2009 CLE Summit, which the Mass Torts Committee co-sponsors with the Products Liability Committee and the Environmental Litigation Committee. It will be held at Vail Cascade Resort in Colorado from January 22-25, 2009. This is an excellent program and provides excellent CLE, networking opportunities and a good time.

If you wish to become more involved in the Mass Torts Committee, please do not hesitate to contact us.

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need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 1963-65 (internal citations omitted). *Twombly*'s pleading standard thus focuses on the "plausibility" of the plaintiff's claims (rather than mere possibilities), and requires a complaint to set forth "enough facts to state a claim to relief that is plausible on its face." *Id.* at 1974.

Some commentators have questioned whether *Twombly*'s pleading standard displaced the traditional "no set of facts" formulation outside of the antitrust context. In this regard, the Court did grant certiorari regarding "the proper standard for pleading an antitrust conspiracy," and also cited the "potentially massive factual controversy" and associated expenses in antitrust cases as one reason for its decision. *See Twombly*, 127 S. Ct. at 1963, 1967-68 (the *Twombly* plaintiff purported to represent a putative class of at least 90 percent of all subscribers to local telephone or high-speed Internet service in the continental United States).

The *Twombly* court also cautioned against converting Rule 8 into too high a standard, stressing that "[i]n reaching this conclusion, we do not apply any 'heightened' pleading standard, nor do we seek to broaden the scope of Federal Rule of Civil Procedure 9. . . . Here . . . the complaint warranted dismissal because it failed *in toto*, to render plaintiffs' entitlement to relief plausible." *Id.* at 1973, n. 14 (internal citations omitted); *see also id.* at 1965 ("a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely").

Nonetheless, there is good reason to conclude *Twombly* altered pleading requirements across the federal civil litigation landscape. *Twombly* itself sanctioned broad application of its holding, noting that it was applying "general standards to a § 1 claim" when requiring a complaint to set forth "plausible grounds" for relief. *See id.* at 1965. Furthermore, in expressly overruling the long-held *Conley* "no set of facts" standard, the court did so without qualification or limitation to the realm of Sherman Act antitrust litigation. *See id.* at 1969.

Indeed, several factors were at work in *Twombly* that led the court away from the broad standards enunciated in *Conley*. First, the court discounted the notion that minimalist pleadings are made sufficient by "the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues." *Conley*, 355 U.S. at 47-48. Instead, the Court acknowledged that "[i]t is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through careful case management, given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side." *Twombly*, 127 S. Ct. at 1967. Second, the Court focused on the cost of defending sweeping litigation predicated on implausible allegations, as well as the burden such cases placed on the judiciary. *Id.* at 1966 ("this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court").

More than a year after the *Twombly* decision, lower courts continue to digest its holding and consider its application to other types of litigation, with numerous courts applying the *Twombly* standard outside the antitrust context. *See, e.g., Heck v. American Medical Systems, Inc.*, No CCB-07-2101, 2008 WL 1990710 (D. Md. April 30, 2008) (applying *Twombly* in the context of prescription medical device litigation); *In*

re Bausch & Lomb Inc. Products Liab. Litig., MDL No. 1785, 2007 U.S. Dist. LEXIS 76657 (D. S.C. October 11, 2007) (applying *Twombly* to multiple claims for economic loss stemming from discarded contact solution); *Soroe v. State Farm Fire & Casualty Co.*, No. 1:07CV134, 2008 U.S. Dist. LEXIS 22340 (S.D. Miss. March 10, 2008) (applying *Twombly* in the context of insurance claims litigation).

Twombly's Role in Fraudulent Joinder Analyses

So what does *Twombly* mean in the context of fraudulent joinder? Generally, "[f]raudulent joinder occurs when a plaintiff's assertion of a claim against a defendant who is a citizen of the same state is done 'without any purpose to prosecute the action in good faith as against him and with the purpose of fraudulently defeating the [defendant's] right of removal.'" *Pascale Service Corp. v. Int'l Truck and Engine Corp.*, No. 07-0247-S, 2007 WL 2905622, *2 (D.R.I. Oct. 1, 2007) (quoting *Arriaga v. New England Gas Co.*, 483 F. Supp.2d 177, 181 (D.R.I. 2007)). In seeking to invoke diversity jurisdiction on removal, defendants typically are confronted with a heavy burden to demonstrate that a party has been fraudulently joined. *See, e.g., Pascale*, 2007 WL 2905622 at *2 (requiring proof of fraudulent joinder by "clear and convincing evidence") (citing *Gabrielle v. Allegro Resorts Hotels*, 210 F. Supp. 2d 62, 67 (D.R.I. 2002); *see also Taylor v. Shelter Lincoln Mercury, Ltd.*, No. 2:07-CV-0097, 2007 WL 3244701, *1 (W.D. La. Nov. 2, 2007) (party "seeking removal bears a heavy burden of demonstrating that joinder of the in-state party was improper.")(citing *Travis v. Irby*, 326 F.3d 644, 646-47 (5th Cir. 2003)).

One court has addressed the issue in the context of multiple insurance coverage claims following Hurricane Katrina, and its decisions also shed light on the standard for assessing the sufficiency of claims brought against non-diverse defendants allegedly for the purpose of destroying diversity.

While there is not complete agreement among the courts as to what standard is applied in the context of removal [*see generally Arriaga*, 483 F. Supp.2d at 186 (discussing various standards)], courts recently have invoked *Twombly*'s pleading standards as a component of the fraudulent joinder analysis.

For example, in *Pascale*, the District of Rhode Island applied *Twombly* in addressing a fraudulent joiner challenge, noting that "a plaintiff's obligation 'to provide the grounds of his entitle[ment] to relief requires more than labels and conclusions.'" *Pascale*, 2007 WL 2905622 at *3 (quoting *Twombly*, 127 S. Ct. at 1964-65.). The *Pascale* court acknowledged that though "the above standard has been established in reference to Rule 12(b)(6) motions to dismiss, it is equally applicable here." *Pascale*, 2007 WL 2905622 at *3.

Similarly, in *Taylor*, the Western District of Louisiana conducted "a Federal Rule 12(b)(6)-type analysis to determine whether the plaintiff's complaint states a claim against the defendants under state law." *Taylor*, 2007 WL 3244701 at *1. Thus, "when filing a complaint, 'a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.'" *Id.* at *1 (quoting *Twombly*, 127 S.Ct. at 1964-65). A similar result was reached in the Eastern District of Louisiana, which has expressly ruled, in the context of *Twombly*, that "[t]he standard for evaluating a claim of improper joinder is similar to that used in evaluating a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6)." *Tippen v. Republic Fire & Casualty Ins. Co.*, No. 06-7701, 2007 U.S. Dist. LEXIS 87351 (E.D. La. November 28, 2007); *see also Results Marketing, Inc. v. Buffalo-Lake Erie Wireless Systems Co., LLC*, No. 3:CV-08-0382, 2008 U.S. Dist. LEXIS 39924 (M.D. Pa. May 16, 2008) (invoking *Twombly* and dismissing non-diverse defendant where plaintiff failed to make showing of plausible breach of contract of quantum meruit claim).

One court has addressed the issue in the context of multiple insurance coverage claims following Hurricane Katrina, and its decisions also shed light on the standard for assessing the sufficiency of claims brought against non-diverse defendants allegedly for the purpose of destroying diversity. In *Soroe v. State Farm Fire and Casualty Co.*, the plaintiff asserted claims against a non-diverse insurance agent as well as a diverse insurance company, and the defendants moved to dismiss on the ground that the agent was fraudulently joined. *Soroe*, 2008 U.S. Dist. LEXIS at *1. The complaint included three general allegations that the broker misrepresented policy terms, arranged for inadequate coverage, and failed to advise that increased coverage was available when he had a fiduciary duty to do so. *Id.* at *5-6.

To succeed in establishing that the agent was fraudulently joined, the defendants had to demonstrate that the facts alleged were not "sufficient to raise a claim for relief above the speculative level, . . . even if those facts may be doubtful." *Id.* at *4. Citing numerous factual deficiencies in the plaintiff's allegations against the insurance agent and the lack of any opposition to an affidavit filed by the defendant agent, the court concluded the agent had been fraudulently joined, and dismissed him. *Id.* at *5-*8; see also *Positive Whitehead-Rojas v. American Family Mutual Ins. Co.*, No 08-cv-00103, 2008 U.S. Dist. LEXIS 38306 (D. Co. April 28, 2008) (dismissing non-diverse insurance agent pursuant to *Twombly*); *Hill v. John Alden Life Ins. Co.*, No 3:07-0728, 2008 U.S. Dist. LEXIS 33201 (S.D. W.V. April 18, 2008) (same); *Chester v. State Farm Fire & Casualty Co.*, No. 1:07CV132, 2008

U.S. Dist. LEXIS 22356 (S.D. Miss. March 6, 2008) (same); Remel v. State Farm Fire & Casualty Co., No. 1:07CV126, 2008 U.S. Dist. LEXIS 22361 (S.D. Miss. March 6, 2008) (same); *Zar v. State Farm Fire & Casualty Co.*, No. 1:07CV133, 2008 U.S. Dist. LEXIS 17357 (S.D. Miss. March 5, 2008) (same).

But *Twombly* has not meant successful fraudulent joinder challenges in all such cases. In *LaFrance v. State Farm Fire & Casualty Co.*, the plaintiff set forth claims very similar to the plaintiff in *Soroe*, also relating to insurance coverage following Hurricane Katrina. *LaFrance v. State Farm Fire & Casualty Co.*, No. 1:07CV125, 2008 U.S. Dist. LEXIS 22362 (S.D. Miss. March 10, 2008). This time, however, the court concluded that the allegations were "supplemented by a different and more specific allegation of misrepresentation" in an affidavit from the plaintiff. *Id.* at *7. The supplemental affidavit was sufficient to overcome the defendants' motion to dismiss, because "for the purpose of deciding whether an improper or fraudulent joinder has occurred, the plaintiffs' allegations must be accepted as true; they must be granted all reasonable inferences in favor of their theory of recovery; and any doubtful issues of state law must be resolved in their favor." *Id.* at *12; *see also LaFleur v. State Farm Fire & Casualty Co.*, No. 1:07CV527, 2008 U.S. Dist. LEXIS 25727 (S.D. Miss. March 26, 2008) (remanding case to state court where claims against non-diverse insurance agent were not implausible under *Twombly* due to factual allegations set forth in affidavit submitted by plaintiff).

Conclusion

Because *Twombly* requires plaintiffs to assert plausible factual allegations against all defendants, defendants who hope to show that a non-diverse defendant was fraudulently joined to defeat removal to federal court have new arguments to make. Where the complaint simply alleges the non-diverse defendant's name and residence with factually bare legal claims, it is no longer enough for plaintiff to rely on the argument that discovery might lead to facts supporting it, and a fraudulent joinder challenge now stands a better chance of success. This may be particularly true in the case of mass torts, where the economic burdens of allowing implausible claims to proceed to discovery fall most heavily.

The Fallacy in "Diminution-In-Value" Product Liability Class Action Claims: A Case Study

By John M. Thomas and Peter W. Herzog III

Iannacchino v. Ford Motor Co.[1], decided June 13, 2008 by the Massachusetts Supreme Judicial Court, is, with one twist, a classic "no injury" product liability class action in which the plaintiffs alleged that they owned a product whose value was diminished because it was "defective." The facts of the case, a question raised but not answered at oral argument, a recent ruling of a federal regulatory agency, and the Supreme Judicial Court's analysis all help illuminate why the vast majority of courts that have rejected such claims have ruled correctly.[2]

The named Plaintiffs in *Iannacchino* purported to represent a class consisting of all current owners of certain 1997-2000 Ford trucks and SUVs, and they alleged that the outside door handle system on these vehicles was "unsafe" and "defective" because in some collisions the doors could conceivably come open and that might result in serious injury or death. They also alleged that the door handle system on these vehicles did not comply with the relevant federal and Canadian governmental motor vehicle standards because Ford improperly evaluated compliance with these standards using an outdated methodology.

The named Plaintiffs did not allege that they have ever been in a collision in their vehicles, that the doors on their vehicles had ever opened in such a collision, or that they had ever suffered any personal injury in such a collision. In fact, although vehicles with the alleged defect have now been on the road for more than a decade, Plaintiffs did not allege that anyone had ever been injured in any of these vehicles as a result of doors opening in *any* type of collision. Plaintiffs did not allege that they ceased using their vehicles, or that they restricted their use of their vehicles in any fashion. They did not allege that they made any attempt to, or incurred any expense to, replace their door handles. They did not allege that they sold their vehicles at a loss, or that they ever tried unsuccessfully to sell their vehicles. But they did allege that, as a result of the defect, their vehicles were worth less than they would be worth if they complied with all safety standards (i.e., "diminution-in-value" damages).

The trial court dismissed Plaintiffs' claim based on the Massachusetts Consumer Protection Act ("CPA"), finding that Plaintiffs had not alleged an injury within the meaning of that statute. But the trial court refused to dismiss Plaintiffs' claim for breach of the implied warranty of merchantability. Plaintiffs' interlocutory appeal was accepted for review by the Massachusetts Supreme Judicial Court, which heard oral argument on February 4, 2008. In its June 8 decision, the Supreme Judicial Court unanimously held that both the CPA and the implied warranty claims should have been dismissed.[3] The Court ruled that (1) Plaintiffs had effectively abandoned their claim that the vehicles did not comply federal regulations because Ford used the wrong test, and (2) it did not suffice to state a viable claim to simply allege that a product is "defective" because "the term 'defect' is conclusory and can be subjective as well."[4] "When the standard that a product allegedly fails to meet is not one legally required by and enforced by the government, a claim of economic injury based on overpayment lacks the premise that the purchase price entitled the plaintiffs to a product that met that standard."[5]

The unanimous decision was something of a surprise to some observers, who thought the Justices at oral argument appeared skeptical of Ford's position. And yet, the seeds of the analysis ultimately adopted by the Court can perhaps be seen in a question asked of Ford's counsel by Justice Greaney. "What if I own one of these trucks," Justice Greaney hypothesized, "and I am an intelligent person and I meet Mr. Narwold [Plaintiffs' counsel] at a cocktail party and he tells me about this [defect]. And then I want to sell the car. Am I under a duty to explain to the purchaser that he or

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she may have to shell out five or six hundred dollars to fix it?"[6] Unfortunately, this perceptive question never received a complete answer, because other comments and questions from other Justices diverted the discussion to other topics. But on reflection, the correct answer seems obvious: *Of course* the seller would have no duty to disclose to prospective purchasers allegations made by a plaintiffs' lawyer, whether those allegations are made at a cocktail party or in a filed complaint. If such a duty existed, every seller of a used vehicle would have to disclose every alleged defect he or she had read or heard about from friends, newspaper articles, or television stories. No one expects such allegations to be disclosed, because such allegations of product defect are made routinely by plaintiffs' lawyers in litigation against manufacturers of virtually all products—and are sometimes accepted and sometimes rejected by juries. In fact, disclosure of such allegations would be misleading and potentially harmful to purchasers unless accompanied by disclosure of all of the additional information that would be necessary to allow those allegations to be evaluated. In this particular case, for example, people who bought the subject vehicles prior to June of this year might also have wanted want to consider the facts that (1) Plaintiffs' lawyers were not even alleging that the "defect" had ever caused an actual injury in the decade the vehicles had been on the road, (2) *neither* the National Highway Traffic Safety Administration ("NHTSA") in the United States nor Transport Canada had found that a defect exists in the vehicles, and (3) at least one federal court had expressly *rejected* the theory of defect espoused by Plaintiffs.[7]

If this is the correct answer to Justice Greaney's question, it exposes a problem that lies at the core of "diminution in value" claims made in typical "no injury" class actions like *Iannacchino*. Plaintiffs' logic in these cases is both simple and simplistic: (1) a defective product is by definition worth less than a non-defective product; (2) a verdict of the jury in the class action finding that the product is defective conclusively establishes that the product is in fact defective, and (3) therefore, the product is worth less than a non-defective product, and Plaintiffs and the class they purport to represent have suffered an actual, compensable loss. The problem is a disconnect between points 1 and 2 of this syllogism: the "defect" found by one jury in one case by a preponderance of the evidence is not the type of defect that, by definition, makes the product worth less than a non-defective product. Rather, the verdict of such a jury merely confirms that the opinions expressed by the hypothetical Plaintiffs' lawyer to Justice Greaney at the hypothetical cocktail party are sufficiently plausible that other reasonable people might share those opinions. But Justice Greaney surely would not need such a jury verdict to know that his companion at the cocktail party, like most good lawyers, was an intelligent and rational person capable of persuading people to his point of view. Nor would the mere existence of such a jury verdict suggest to an experienced jurist that the opinion of his companion could not be refuted by other equally persuasive lawyers capable of persuading other people to the opposite point of view.

The *Iannacchino* case well illustrates this point. A door handle system is not necessarily "defective" merely because it does not prevent doors from opening in all collisions. Rather, in a case involving a door that actually opened in a collision, a jury in Massachusetts, as in most other states, would be instructed to consider various factors in determining whether the door handle system was "defective" or unmerchantable: the likelihood that the doors would come open in certain types of collision, the extent to which differently designed door latches and handles could reduce this likelihood, the effect of such differently designed latches and handles on the safety of the vehicle in other types of collisions, the financial cost of the differently designed latches and handles, and any other adverse consequences associated with the differently designed latches.[8] Most of these factors cannot be known with precision. Moreover, the jury must weigh these competing factors in a balancing analysis for which there is no objective scale and which, in the end, requires an exercise of largely subjective judgment about how much safety is enough.

Thus, in the typical design-defect case, the question of whether a product is defective is indeed "conclusory and can be subjective," as the Supreme Judicial Court recognized.[9] "The very notion of how much design safety is enough . . . involves a morass of conceptual, political, and practical issues on which juries, courts, commentators, and legislatures strongly disagree."[10] If the issue is one on which reasonable people can disagree, verdicts rejecting Plaintiffs' claim can reasonably be expected, if enough cases are tried, either before a verdict in the class action or after.

It follows from this that whatever conclusion the jury in any particular case happens to reach on whether the vehicles are "defective"—class action or not—it permits no conclusion whatsoever about the actual, intrinsic value of those vehicles at the time they were sold. A verdict by the jury in this case finding that the vehicles are defective would simply confirm that Plaintiffs had a claim sufficiently plausible that at least some jurors could find it persuasive, based on a mere preponderance of the evidence. It would not establish that other reasonable people, other reasonable jurors, the Canadian government, or the United States government could not reach the opposite conclusion. Thus, if a finding of defect by this one jury in this one case establishes that the plaintiffs were injured because they paid more than the vehicles were intrinsically worth, any buyer who purchases a product that some plaintiff can plausibly claim was defective has been injured in exactly the same fashion—no matter what a jury in any particular case might find.

This same difficulty does not arise where Plaintiffs claim that the alleged defect caused other types of damages and where causation and damages issues can be considered independently of the defect issue. For example, if a jury in a personal injury case finds by a preponderance of the evidence that the door latch system is defective, the causation issues are relatively straightforward: did the door come open, would the plaintiff have been injured if the door had not come open, and would an alternative design have prevented the door from coming open. In such a case, resolution of the factual issues relevant to causation and damages—unlike the issue of the vehicle's intrinsic value at the time of sale—does not require consideration of the inherent uncertainty in the defect finding itself.

Moreover, even indulging the fiction that a finding of "defect" by one jury in one case permits a conclusion that the product is theoretically worth less than a "non-defective" product, it remains speculative whether this theoretical loss will ever be realized. Once again, *Iannacchino* provides an excellent example of why this is so. First, those buyers who used or will use their vehicles safely and without incident for the entire useful lives of those vehicles have or will receive exactly what they bargained for and will never realize the purely theoretical loss. Moreover, owners who sold their vehicles before August 2004—when Plaintiffs counsel began to publicize their allegations[11]—received full value both while they used their vehicles *and* when they sold them for prices that did not reflect any discount for the alleged defect. Even after August 2004, buyers of used vehicles who saw the publicity may well have dismissed it as simply more litigation of the type routinely filed against all products and against all motor vehicles in particular. If so, even sellers who sold their vehicles after August 2004 obtained prices unreduced by any alleged defect and therefore realized no loss.

But even assuming that Plaintiffs' 2004 media campaign did influence buyers of used vehicles, those buyers presumably negotiated the appropriate lower price for their vehicles based on the alleged defect and therefore suffered no harm when they purchased their vehicles.[12] Then, in March 2005, the federal court in *Strickland* squarely rejected Plaintiffs' claim that Ford used the wrong methodology to certify compliance with FMVSS 206. If Plaintiffs' 2004 allegations caused a reduction in the market price of used vehicles, this 2005 holding presumably restored those values, providing a windfall to the buyers who negotiated a lower price based on Plaintiffs' rejected allegations and eliminating the unrealized potential loss "suffered" by people who held their vehicles and used them safely and without incident for the entire period.

If a finding of defect by this one jury in this one case establishes that the plaintiffs were injured because they paid more than the vehicles were intrinsically worth, any buyer who purchases a product that some plaintiff can plausibly claim was defective has been injured in exactly the same fashion—no matter what a jury in any particular case might find.

There is no reason to expect the relevant circumstances to remain static. If additional personal injury cases are filed and tried, some judges or juries may find for plaintiffs only to be followed by other judges or juries who find for Ford. If buyers view such verdicts as routine and having no significant impact on vehicle values, owners who sell will never suffer any loss. But if buyers view such verdicts as significant, whether any particular owner suffers a loss or a windfall depends on when in the cycle he or she buys or sells.

Given all of these variables that can affect the resale values of the vehicles at issue—and countless other variables unrelated to the door handle system—it was sheer speculation to assume that any actual loss would ever be realized by any of the current owners in the purported class. Indeed, for directly analogous reasons, the United States Supreme Court has held that a claim of securities fraud cannot rest upon a mere allegation that the purchaser paid an inflated price for the security:

> [I]f, say, the purchaser sells the shares quickly before the relevant truth leaks out, the misrepresentation will not have lead to any loss. If the purchaser sells later after the truth makes its way into the marketplace, an initially inflated purchase price might mean a later loss. But that is far from inevitably so. When the purchaser subsequently sells such shares, even at a lower price, that lower price may reflect, not the earlier misrepresentation, but changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events, which taken separately or together account for some or all of that lower price. . . . .
>
> Given the tangle of factors affecting price, the most logic alone permits us to say is that the higher purchase price will sometimes play a role in bringing about a future loss.[13]

These comments apply equally to "no injury" product liability class actions, with the added complication that, as noted above, "the truth" of whether a product is defective is typically something that cannot be ascertained with certainty and about which reasonable people are likely to disagree.

It is apparent from the decision of the Supreme Judicial Court in *Iannacchino* that the Court would have allowed Plaintiffs' claim to proceed if they had not effectively abandoned their claim that the vehicles failed to comply with federal regulations. Even so, the allegation that the product does not comply with a federal safety standard serves to highlight the problems with cases of this nature generally. First, the interpretation of NHTSA's own regulation is at issue, and the Complaint itself alleged that NHTSA "will" order a recall of vehicles that it finds do not comply with that regulation. But no recall was ever ordered. This by itself demonstrates how speculative it is to claim that the value of the vehicles at issue, either at the time of sale or at any time thereafter, could be affected by the potential that a jury might find a regulatory violation when the relevant governmental agency itself has not. Moreover, at the time *Iannacchino* was orally argued in the Massachusetts Supreme Judicial Court, it still would have been possible for NHTSA to take affirmative action on Plaintiffs' claims. If NHTSA accepted Plaintiffs'

arguments, it would have been statutorily obligated to order a repair at no cost to Plaintiffs, thereby bringing the vehicles into compliance and eliminating any possible diminution in value attributable to non-compliance.[14]

Perhaps recognizing some of these issues, the Supreme Judicial Court also recognized that "where there is a regulatory agency with relevant technical expertise and jurisdiction . . . principles of primary jurisdiction may dictate that the agency should have an opportunity to consider the claim prior to a judicial hearing."[15] Coincidentally, in fact, NHTSA did take action just 8 days prior to the Supreme Judicial Court's decision—it *rejected* a petition to find that the subject vehicles did not comply and recognized that the agency itself had previously approved the methodology used by Ford to certify compliance with that standard.[16] With this ruling, the true nature of Plaintiffs' diminution in value claim became starkly apparent—Plaintiffs were claiming that the vehicles were worth less simply because some juries might agree with them, without regard to what NHTSA, Transport Canada, other juries, other courts, or anyone else might think.

But Justice Greaney's question, and the obvious answer to that question, is sufficient even without a decision by NHTSA to demonstrate that this was the true nature of Plaintiffs' claim all along. The reasonable likelihood that NHTSA, other reasonable people, judges, and juries will disagree with the views expressed by a plaintiffs' lawyer at a cocktail party or in a courtroom is sufficient to demonstrate that a finding of defect by one jury does not permit a conclusion that there is any actual or even theoretical diminution in the market value of the product. And even if some theoretical diminution were assumed, the likelihood that any actual consumer will ever suffer any actual loss was virtually nonexistent.

In short, the tortured history of Ford's door latch litigation should demonstrate beyond any doubt that plaintiffs in the typical "no injury" product liability class action have in fact suffered no actual or compensable injury, just as the vast majority of courts—including, now, the Massachusetts Supreme Judicial Court—have recognized.

Endnotes

1 2008 WL 2375179 (Mass. 2008).

2 *See, e.g., In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1014-15, 1017 (7th Cir. 2002)("most states would not entertain the sort of theory that plaintiffs press," i.e., claims for diminution in value of properly performing products based on the risk of future failure); *accord, e.g., Feinstein v. Firestone Tire & Rubber Co.*, 535 F. Supp. 595 (S.D.N.Y. 1982); *Briehl v. General Motors Corp.*, 172 F.3d 623 (8th Cir. 1999); *Frank v. DaimlerChrysler Corp.*, 741 N.Y.S. 2d 9, 11, 17 (N.Y. App. 2002); *American Suzuki Motor Corp. v. Superior Court*, 37 Cal. App. 4th 1291, 44 Cal. Rptr. 526 (1995); *Ford Motor Co. v. Rice*, 726 So.2d 626 (Ala. 1998); *Wallis v. Ford Motor Co.*, 208 S.W.3d 153 (Ark. 2005); *Tietsworth v. Harley Davidson, Inc.*, 677 N.W.2d 233 (Wis. 2004); *Ziegelmann v. DaimlerChrysler Corp.*, 649 N.W.2d 556 (N.D. 2002); *Wilson v. Style Crest Products, Inc.*, 627 S.E. 2d 733 (S.C. 2006).

3 2008 WL 2375179 (Mass. 2008).

4 *Id.* at *5.

5 *Id.*

6 The argument can be viewed in its entirety at http://www.suffolk.edu/sjc/archive/2008/SJC_10059.html

7 *Strickland v. Ford Motor Co.*, No 4:00-1391-27 (D. S.C., decided March 6, 2005).

8 *See generally Back v. Wickes Corp.*, 375 Mass. 633, 642, 378 N.E. 2d 964, 970 (1978) (discussing relevant factors); *Restatement (Third) of Torts: Products Liability* § 2, comment f (same).

9 2008 WL 2375179 at *5,

10 David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1, 37 (1982).

11 The press releases issued by Plaintiffs counsel can be found on their website, www.motleyrice.com/news/releases/2004/NewsRelease3.asp and www.motleyrice.com/news/releases/2004/NewsRelease5.asp.

12 On the other hand, of course, the publicity generated by Plaintiffs' counsel would have succeeded in creating a corresponding loss for the sellers of those vehicles. Ironically, the clearly uninjured post-August 2004 buyers would have been part of the class of current owners the *Iannachino* Plaintiffs purported to represent, but the potentially injured post-2004 sellers, as former owners, would not have been members of that class.

13 *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 342-43 (2005) (emphasis in original).

14 *See* 49 U.S.C. 30118.

15 2008 WL 2375179 at n. 17. The Court was careful to observe that it was not deciding any issues relating to preemption or primary jurisdiction, because no such issues were before the Court. *Id.* at n. 19.

16 73 Fed. Reg No. 109 (June 5, 2008).

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Duckies and Bottles and Toys, Oh My! The Debate over Phthalates and BPA

By Brendan M. Ford

Few news stories attract national attention faster than those involving toxic children's products. Over the last year or two, parents have been inundated with stories concerning lead paint on toys, dangerous toys from China, small magnets that can be ingested, among others. A simple Google search for the phrase "toxic toys" generates 104,000 hits. Parents, understandably concerned for their child's health, are alarmed whenever an agency, advocacy group, or study claims that a children's product is dangerous.

The newest chapter in the toxic children's product saga involves phthalates (pronounced "tha-lates") and bisphenol A ("BPA"). These chemicals are found in a wide variety of consumer products, including toys, personal care products, and medical equipment. Although the science is disputed, there are studies linking exposure to these chemicals by fetuses, infants, and children to numerous conditions, including changes in the prostate and mammary glands, puberty disruption, and changes in brain structure, among others.

Several factors suggest that phthalates and BPA may become the next mass tort *du jour*: (1) the products containing phthalates and BPA are widely sold, thereby creating a massive group of potential plaintiffs; (2) the alleged risks associated with an infant or child's exposure to phthalates and BPA are severe; (3) the plaintiffs—infants and children—are sympathetic; (4) local, state, and international governments have determined that certain phthalates and BPA are unsafe, thereby bolstering a potential plaintiff's case; and (5) several manufacturers and retailers have removed children's products containing phthalates and BPA from their stores. This article will give a basic overview of these issues.

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What Are Phthalates and BPA?

Phthalates are a family of compounds made from alcohols and phthalic anhydride. They are commonly used as plasticizers, or substances designed to make plastic (including polyvinyl chloride, or PVC) more flexible. Phthalates are oily, colorless, odorless liquids that do not evaporate readily.

Phthalates are ubiquitous; they are used in the manufacture of countless industrial and household products, including toys, rattles, teethers, lubricants, car interiors (phthalates are believed to be responsible for "new car smell"), shower curtains, soft plastic fishing lures, adhesives, caulk, and paint pigments, among others. In the medical field, phthalates are used to make tubing, catheters, and intravenous bags. Because of their ability to make fragrance last longer, they are used in several personal care products, including perfume, lotions, shampoo, baby powder, and other cosmetics. Another type of phthalate is used in nail polish, tool handles, and outdoor signs to prevent chipping and breaking.

Bisphenol A (BPA) is a chemical produced in large quantities for use primarily in the production of polycarbonate plastics and epoxy resins. BPA, which is used to make plastics clear, strong and shatter-resistant, is present in water bottles, baby bottles, food containers, some dental fillings, and the coatings for the inside of cans containing food. According to the National Institutes of Health, "[i]n 2004, the estimated production of bisphenol A in the United States was approximately 2.3 billion pounds, most of which was used in polycarbonate plastics and resins."[1]

Exposure to Phthalates and BPA

Exposure to phthalates and BPA occurs in a variety of forms. Because phthalates are not chemically bound to the products containing them, phthalates are continuously released in the air and leached into liquids. As such, exposure to phthalates can occur through ingestion, dermal transfer, and inhalation.[2]

As the National Toxicology Program of the National Institutes of Health (NIH) explains, the primary source of exposure to BPA for most people is through the diet. Although exposure can occur through air, dust, and water, BPA in food and beverages accounts for most daily human exposure. BPA can migrate into food from food and beverage containers with internal epoxy resin coatings and from consumer products such as polycarbonate tableware, food containers, water bottles, and baby bottles. The degree to which bisphenol A leaches from polycarbonate bottles into liquid may depend

more on the temperature of the liquid or bottle, than the age of the container. BPA can also be found in breast milk.[3]

Nearly all Americans have been exposed to phthalates and BPA. According to the NIH, "[t]he ubiquitous use of phthalates results in human exposure via dietary ingestion of foods (such as milk, butter, and meats), dermal absorption of low-molecular-weight phthalates, inhalation of the more volatile phthalates, and parenteral exposure from medical devices containing phthalates." As a result, "four phthalate metabolites were found in the urine samples of > 75% of approximately 2,550 participants of the National Health Nutrition and Examination Survey (NHANES) 1999–2000."[4] In a 2005 NIH study, "BPA was detected in 95% of the samples examined at concentrations 0.1 microgram per litre of urine.[5]

Scientific Studies on the Risks of Phthalates and BPA

Studies involving phthalates and BPA have linked low-level exposure to a variety of conditions, most involving the endocrine system. Phthalates and BPA are often referred to as "endocrine receptors." Certain studies have shown that these chemicals can mimic hormones that the body releases, and are believed to be capable of interfering with the reproductive systems of fetuses and babies, even at extremely low doses.

The National Toxicology Program, part of the United States Department of Health and Human Services, concluded that one type of phthalate used in intravenous tubing, catheters, and other plastic medical equipment (DEHP) could pose a risk to the development of boys' reproductive tract.

Phthalates can block the male hormone androgen, which governs testosterone production. According to the FDA, infants who spend weeks in neonatal intensive care units may be exposed to high levels of the chemical.[6]

Likewise, BPA is also an endocrine disruptor, and has been linked to a number of different conditions, including permanent changes to the genital tract, increased risk of breast cancer, increased risk of prostate cancer, decline in testicular testosterone, and signs of early puberty in females. According to the various studies, these risks arise from exposure ranging from 0.025-30 micrograms per kilogram per day.[7]

These findings (if accepted) are troubling, since the National Toxicology Program estimates that the ranges of daily BPA intake, in micrograms per kilogram per day, are as follows[8]:

Infant (0-6 months):	1-11
Formula-fed Infant (0-6 months):	0.2-1
Breast-fed Infant (6-12 months):	1.65-13
Child (1.5 – 6 years):	0.043-14.7
Adult:	0.008-1.5

The science on the effects of phthalates and BPA is underdeveloped. As a result, parties on both sides of this debate are quick to criticize the science and methodology of any study that leads to results contrary to their interests. For example, those who work on behalf of the manufacturers of phthalates and BPA criticize the fact that most of the studies supporting the alleged risks of these chemicals were performed on rodents, not humans. Moreover, the results of these studies have been mixed. For example, a 2004 study by the Children's National Medical Center and the George Washington University School of Medicine in Washington D.C. found that "adolescents exposed to significant quantities of DEHP as neonates showed no significant adverse effects on their physical growth and pubertal maturity."[9]

Indeed, this debate even extends to governmental entities. A 2008 draft report by the U.S. National Toxicology Program regarding BPA concluded that "there is some concern for neural and behavioral effect in fetuses, infants, and children at current human exposures," and that "there is some concern for bisphenol A exposure in these populations based on effects in the prostate gland, mammary gland, and an earlier age for puberty in females."[10] The Canadian government also concluded that BPA may pose a risk to infants, and proposed classifying the chemical as "toxic to human health and the environment."[11]

Other governments disagree with these findings. For example, the German Federal Institute for Risk Assessment announced that baby bottles with BPA are safe and that the research on the risks of BPA is "difficult to interpret and occasionally contradictory."[12] The European Union also questions the validity and reliability of rodents-based research to justify conclusions regarding BPA.[13]

Government Response

Several states have enacted legislation that will restrict the use of phthalates in children's products. In California, effective January 1, 2009, "no person or entity shall manufacture, sell, or distribute in commerce any toy or child care article that contains" DEHP, DBP, or BBP "in concentrations exceeding 0.1 percent."[14] The legislation is broad; "toy" is defined as "all products designed or intended by the manufacturer to be used by children when they play," and "child care article" is defined as "all products designed or intended by the manufacturer to facilitate sleep, relaxation, or the feeding of children, or to help children with sucking or teething."[15]

Washington State has passed legislation effective July 1, 2009 whereby "no manufacturer, wholesaler, or retailer may manufacture, knowingly sell, offer for sale, distribute for sale, or distribute for use in this state a children's product or product component containing the following: … (c) Phthalates, individually or in combination, at more than 0.10 percent by weight (one thousand parts per million)."[16]

The United States Senate is currently considering a bill, S. 2663, "to reform the Consumer Product Safety Commission to provide greater protection for children's products, to improve the screening of

noncompliant consumer products, to improve the effectiveness of consumer product recall programs, and for other purposes." Senator Dianne Feinstein of California recently proposed an amendment to this bill—substantially similar to the California statute—that would prohibit the use of specified phthalates in toys and "child care articles."[17]

The European Union has also restricted the use of phthalates in toys. The European regulation states that DINP, DIDP, and DNOP phthalates "shall not be used as substances or as constituents of preparations, at concentrations of greater than 0,1 % by mass of the plasticised material, in toys and childcare articles which can be placed in the mouth by children. Such toys and childcare articles containing these phthalates in a concentration greater than the limit mentioned above shall not be placed on the market." In addition, DEHP, DBP, and BBP "shall not be used as substances or as constituents of preparations, at concentrations of greater than 0,1 % by mass of the plasticised material, in toys and childcare articles. Such toys and childcare articles containing these phthalates in a concentration greater than the limit mentioned above shall not be placed on the market."[18]

State governments and Congress are also acting to restrict or ban BPA from children's products. Ten states, including California and Maryland have pending legislation.[19] More specifically, the California Senate is now considering SB 1713, the "Toxin-Free Toddlers and Babies Act." The bill would ban any detectable level of BPA from all toys and child care products sold in California.

Lawsuits seeking class action certification have been filed in several states, including Connecticut, Ohio, and California. Several websites for plaintiffs' attorneys are currently soliciting clients for potential lawsuits involving phthalates. Depending on the results of these cases, similar lawsuits may proliferate nationwide.

Based largely on the National Toxicology Program report concerning BPA, Senators Schumer (D-NY) and Feinstein (D-CA) introduced the "BPA-Free Kids Act of 2008" (S. 2928). The bill states that "[b]eginning on the date that is 180 days after the date of enactment of this Act, any children's product that contains a detectable amount of bisphenol A (commonly known as 'BPA') shall be treated as a banned hazardous substance under the Federal Hazardous Substances Act (15 U.S.C. § 1261 et seq.) and the prohibitions contained in section 4 of such Act shall apply." Notably, "children's product" is defined as designed or intended for use by a child 7 years old or younger.

Manufacturers and Retailers Respond

One week after the Draft National Toxicology Program Report was released, Wal-Mart announced that it was immediately removing baby bottles and all other products that contain BPA from its Canadian stores, would phase out baby bottles from its United States stores by early 2009.[20] Shortly thereafter, Toys-R-Us followed suit.[21] In addition, Wal-Mart and Toys-R-Us have both required that their suppliers cease manufacturing toys with phthalates, a decision that garnered praise by Senator Feinstein.[22]

As a further result of the NTP report, Nalgene intends to phase out all BPA-containing bottles.[23] In addition, Playtex will stop using BPA in all products by year's end.[24]

Legal Action

In the weeks following NTP and Health Canada reports on BPA, lawsuits were filed across the country. These lawsuits "seek[] nationwide class-action status to represent what it says are thousands of people who bought plastic bottles containing [BPA] from Playtex or other companies."[25] Lawsuits seeking class action certification have been filed in several states, including Connecticut, Ohio, and California. Several websites for plaintiffs' attorneys are currently soliciting clients for potential lawsuits involving phthalates. Depending on the results of these cases, similar lawsuits may proliferate nationwide.

Conclusion

In light of the issues outlined above, it is highly likely that BPA and phthalates litigation will be the next frontier in mass torts. This is particularly true in light of the underdeveloped and inconsistent scientific studies evaluating phthalates and BPA, as well as the differing opinions that can be cited, depending on one's interest. Both plaintiffs and defendants in phthalates and BPA litigation would be well-served by understanding the current and evolving science, legislative, and regulatory environment.

Endnotes

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[5] http://www.ehponline.org/members/2004/7534/7534.pdf

[6] http://www.usatoday.com/news/health/2007-10-30-plastics-cover_N.htm

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[11] "Government of Canada Takes Action on Another Chemical of Concern: Bisphenol A," available at http://www.chemicalsubstanceschimiques.gc.ca/challenge-defi/bisphenol-a_e.html

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[17] 154 Cong. Rec. S1531-02 (March 4, 2008)

[18] EU Restrictions on the use of phthalates in toys, available at http://www.pvc-toys.com/restrictions

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In re Seroquel: A Reminder to Use Care When Showing Documents to Witnesses During Deposition Preparation Sessions

By Stacey L. Drentlaw

Recent decisions issued in the *In re Seroquel* Products Liability Litigation required Defendants AstraZeneca Pharmaceuticals LP and AstraZeneca LP (collectively "AstraZeneca") to identify and produce documents reviewed by company witnesses in preparation for their depositions.[1] Although, as described herein, this author respectfully disagrees with the Court's analysis, they serve as an important reminder to attorneys that care should be used when showing documents to witnesses in preparation for depositions. This article will outline the Court's decisions, explain why this author disagrees with the Court's analysis, identify other decisions where courts have required the production or identification of documents used during deposition preparation sessions, and offer some practical tips that counsel should consider before showing documents to witnesses in preparation for depositions and before taking the depositions of an opposing party's witnesses.

The *In Re Seroquel* Decisions

Factual Background

The *In re Seroquel* Products Liability Litigation is venued in the United States Federal District Court for the Middle District of Florida, before the Honorable Judge Anne C. Conway and the Honorable Magistrate Judge David A. Baker. In this multi-district litigation, plaintiffs have sued AstraZeneca, alleging that Seroquel, an atypical psychotropic medication, causes diabetes and related disorders. When the plaintiffs deposed AstraZeneca corporate representatives, they inquired about the documents the witnesses reviewed in preparation for their depositions. The witnesses refused to answer these questions based on counsel's instruction not to answer, which was based upon the attorney-client and work product privilege.[2] The plaintiffs filed a motion to compel the identification and production of documents reviewed in preparation for depositions, which was granted by Magistrate Judge Baker and affirmed by Judge Conway.

In addressing the motion to compel, the Court outlined the facts surrounding the deposition of Athena Ruhl, a twenty-year AstraZeneca employee. In preparation for her deposition, Ms. Ruhl met with attorney Jan Dodd, Esq. for "a number of hours over a period of six days."[3] Per Ms. Dodd's declaration in opposition to the plaintiffs' motion to compel:

> In advance of my meetings with Ms. Ruhl, I conducted several levels of review of the vast documents that have been produced to plaintiffs in this litigation. Initially I reviewed a voluminous subset of 15,835 previously produced documents. Upon careful review I reduced the initial cut to a subset of 195 documents. I then further narrowed the subset to 67 documents that, in exercising my profession judgment, I believed was important to share with Ms. Ruhl when we met. In the time I met with Ms. Ruhl, I actually reviewed with her *approximately 42 documents*. I made the selection as to what was important based on my understanding of the legal issues in this litigation and my perception of her relationship to the underlying facts.... Before showing any document to Ms. Ruhl, I confirmed that the document had previously been produced to plaintiffs in this litigation ... The *only* documents reviewed by Ms. Ruhl in preparation for her deposition *were at my selection and under my direction*.[4]

The Court found that Ms. Ruhl did no independent preparation to familiarize herself with the documents prior to her deposition testimony, and noted that Astra-Zeneca did not provide "the documents *in camera* or otherwise and does not contend that they individually are 'factual' or 'opinion/core' work product."[5]

The Court noted that "[t]he record does not show any improper witness 'coaching,'" but then added that "when the *only* documents reviewed by a twenty-year employee over the course of *six days* of preparation are 42 documents out of 15,835 exclusively selected by counsel, such preparation suggests the substitution of the lawyer's judgment for the witness's recollections."[6] The Court further stated that "[b]y using counsel's selection of documents as the only source for the witness's re-familiarization with matters of record, Astra-Zeneca exposes that selection to scrutiny."[7]

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Based on Magistrate Judge Baker's findings and application of the law, the Court granted the plaintiffs' motion to compel and ordered that "documents reviewed by a witness will be identified and produced unless the individual document standing alone is protected by a privilege."[8] This order was affirmed by Judge Conway, over the objections of AstraZeneca.

Legal Analysis in Magistrate Baker's January 24, 2008 Order

The Order's analysis begins by referencing Federal Rule of Evidence 612, which provides that an adverse party is entitled to the production of a document if a witness uses the document to refresh his or her recollection either before or after testifying if the court, in its discretion, determines that production is necessary in the interests of justice.[9] The Order also references Federal Rule of Civil Procedure 26(b)(3), which protects an attorney's work product, and then states that "[w]hen a witness uses attorney work product to refresh his memory, the potential for conflict exists between Rule 612, which favors disclosure of materials used to refresh a witness's recollection, and the work-product privilege."[10]

After briefly discussing the interplay between Federal Rule of Evidence 612 and Federal Rule of Civil Procedure 26(b)(3), the Court's Order references two appellate decisions that discuss the work product implications of documents selected by counsel prior to depositions: one in the context of selecting and using documents to prepare a witness for deposition, and the other in the context of selecting documents to be used as deposition exhibits. The first decision, *Sporck v. Peil*,[11] is a Third Circuit Court of Appeals decision that held that documents used during deposition preparation sessions were protected by the work product privilege, and that absent testimony that a witness relied on specific documents or that the documents actually influenced a witness's testimony, such documents should not be disclosed to opposing counsel. Per the Third Circuit, "the selection and compilation of documents by counsel … in preparation for pretrial discovery [depositions] falls within the highly-protected category of opinion work product."[12] Such privileged documents become discoverable only if a proper foundation is laid establishing that the witness relied on a specific document or that a document refreshed the recollection of the witness.

> In seeking identification of all documents reviewed by petitioner prior to asking petitioner any questions concerning the subject matter of the deposition, respondent's counsel failed to establish either that petitioner relied on any documents in giving his testimony, or that those documents influenced his testimony. Without first eliciting the testimony, there existed no basis for asking petitioner the source of that testimony.[13]

Based on this reasoning, and a fact pattern analogous to the facts in the *In re Seroquel* litigation, the Third Circuit held that the trial court erred in ordering the production of documents that a witness reviewed in preparation for a deposition.

The Order then references, without analysis, the First Circuit's decision in the *In re San Juan Dupont Plaza Hotel Fire Litigation*,[14] as an example of a case not following *Sporck*.[15] Although the *San Juan* decision contains some language critical of *Sporck*, the *San Juan* does not address the production of privileged documents used during deposition preparation sessions. Rather, the decision addresses a district court's order requiring the parties to identify documents that would be used as deposition exhibits five days prior to depositions.[16] The First Circuit determined that because the identity of deposition exhibits would be revealed during the deposition, they did not constitute opinion work product and their pre-deposition identification did not "constitute an impermissible per se intrusion into the lawyer's protected zone of privacy."[17]

Citing to *In re San Juan* and other decisions that distinguish *Sporck*, the Order criticizes AstraZeneca's reliance on the on-point *Sporck* decision. The Order then adopts a balancing test to reconcile the competing interests of the "need for full disclosure" and "the need to protect the integrity of the adversary system protected by the work-product doctrine," referencing Federal Rule of Civil Procedure 26(b)(3) and Federal Rule of Evidence 612.[18] The Court cites three factors that courts have relied on when deciding whether to order the production of privileged materials: "(1) whether witness 'coaching' may have occurred; (2) whether the documents reviewed constitute 'factual' or 'opinion/core' work product; or (3) whether the request constitutes a fishing expedition."[19] In addition to these factors, the court cites other factors as well:

> The inability for the adverse party to obtain access to the matters related by the writing through means other than production of the writing, the absence of opinion work product, discrepancies between a witness's testimony and the contents of the writing used to refresh, heavy reliance on a particular document by the witness, testimony that is especially important, disclosure of a significant part of the writing in the witness's testimony, and evidence that witness "coaching" may have occurred.[20]

Without thoroughly analyzing the factors it adopted, the Court ordered the identification and production of all documents, other than those that are individually privileged, used during the preparation of AstraZeneca witnesses.

Legal Analysis in Judge Conway's February 28, 2008 Decision

AstraZeneca objected to the Court's January 24, 2008 Order, arguing that (1) the Order failed to require the plaintiffs to meet the requirements of Federal Rule of Evidence 612; and (2) it compelled AstraZeneca to disclose documents protected by the attorney "opinion" work product doctrine.[21] The Court overruled the first objection because "Rule 612 did not form the basis for the magistrate judges conclusion that the documents should be disclosed."[22] In analyzing the second objection, that AstraZeneca was being compelled to disclose "opinion" work product, the Court discussed and compared *Sporck* and *In re San Juan Dupont Hotel Fire Litigation*. After discussing

both cases, the Court stated that neither decision was controlling authority in the Middle District of Florida, and then affirmed the Magistrate Judge's reliance on *In re san Juan Dupont Hotel Fire Litigation*: "the magistrate judge was in the unenviable position of deciding an issue for which there exists no clearly established legal principle in this jurisdiction. In circumstances such as these, the Court cannot say that the magistrate's selection of the *San Juan* case, as well as other related caselaw, in support of what he deemed to be the more persuasive view on the issue, was a legal mis-step."[23] Accordingly, the Magistrate Judge's Order requiring AstraZeneca to identify and produce documents used to prepare company witnesses for deposition was affirmed.

Respectful Disagreement with the Court's Analysis

As noted at the outset of this article, this author respectfully disagrees with the analysis in the two *In re Seroqel* decisions. First, the Magistrate Judge's Order suggests that it adopts the balancing factors used to determine whether the documents should be disclosed because of the interplay between Federal Rule of Evidence 612 and Federal Rule of Civil Procedure 26(b)(3).

> Courts have generally found that a balancing test applied on a case-by-case basis can reconcile the competing interests in the need for full disclosure and the need to protect the integrity of the adversary system protected by the work-product rule. The rules may be reconciled because the "interests of justice" standard of Rule 612 incorporates as part of the balancing analysis the protection afforded by the work-product doctrine, while the "substantial need" requirement of Rule 26 can take into account the need for disclosure under Rule 612.[24]

Although the Court relied on Rule 612 when adopting its balancing factors, it did not require the plaintiffs to establish Rule 612's necessary prerequisite that the witnesses used any of the documents to refresh their recollection or that the witness's testimony was actually influenced by the documents reviewed.[25]

Second, although the Court adopted a balancing test to determine whether the documents at issue should be produced, it did not fully analyze or apply its own factors. The January 24, 2008 Order indicates that the record does not contain evidence of improper coaching, and does not address whether the plaintiffs' request for documents is a fishing expedition. Although the Order notes that AstraZeneca does not contend that individual documents used to prepare the witnesses are opinion work product, the real issue is whether the compilation of documents constitutes opinion work product. Based on the Court's Order, the plaintiffs did not argue or establish that there was an inability to obtain access to the matters contained in the documents at issues, and in fact, it is clear from the record that only documents that had been produced to the plaintiffs were used during the deposition preparation sessions, so plaintiffs had full access to all information at issue. Further, while several of the factors relate to a witness's reliance on a document or the use of a document to refresh the witness's recollection, the plaintiffs did not create a record to support these factors.[26] A comparison of the factors adopted by the Magistrate Judge does not clearly support the Order requiring the production of a privileged compilation of documents used during pre-deposition sessions with the company witnesses.

Based on Magistrate Judge Baker's findings and application of the law, the Court granted the plaintiffs' motion to compel and ordered that "documents reviewed by a witness will be identified and produced unless the individual document standing alone is protected by a privilege."

Finally, the *In re San Juan Dupont Hotel Fire Litigation* decision on which the Magistrate and District Judge rely does not support the ordered production, and in fact, explains why the documents should have been protected by the work product privilege. In the *San Juan* decision, the First Circuit reviewed a district court order requiring parties to identify the documents they intended to use as deposition exhibits five days prior to the deposition.[27] Citing *Sporck*, the plaintiffs objected to this order, arguing that their selection of deposition exhibits was protected "opinion" work product because they had screened 70,000 documents in order to identify the exhibits they would use at the deposition. The First Circuit distinguished *Sporck*, finding that documents intended to be used as deposition exhibits were different than documents used to prepare a witness for deposition.

> … Much depends on whether the fruits of the screening would soon be revealed in any event. Indeed, *Sporck* should be distinguished because, unlike in this case, the lawyer's selection process there was never designed to see the light of day; the exhibits had been selected not for use in examination, but for a markedly more private purpose – preparation of the attorney's own client. We believe the distinction is a critical one.[28]

Thus, although the First Circuit affirmed an order requiring the advance disclosure of exhibits intended for use at deposition, it is unlikely that it would have affirmed the ordered disclosure of documents used by an attorney to prepare his or her own client for de-

position. As such, the *Seroquel* Court's reliance on the *San Juan* case is flawed.

Although there is room to disagree with the Court's analysis in the *In re Seroquel* Orders, the fact remains that there are cases where courts have required the production of documents used during deposition preparation sessions between an attorney and his or her client. Thus, while there is room to disagree with the *Seroquel* decisions, they serve as a valuable reminder that documents used during deposition preparation sessions may not be immune from the discovery process.

Rule 612 and Decisions Requiring Production or Identification of Privileged Documents

As discussed, although the *Seroquel* Court did not base its decision on Federal Rule of Evidence 612, other courts have used Rule 612 as the basis for ordering the production of privileged documents used during deposition preparation sessions. As such, attorneys should use caution when showing documents to witnesses, particularly those documents that have not been produced in discovery, either because they are privileged or because they are not responsive to discovery requests served in the case.

If the witness testifies that some documents refreshed his or her recollection, that he or she relied on certain documents, or that his or her testimony was influenced by the documents reviewed, ask the witness to identify the specific documents.

Rule 612, Writing Used to Refresh Memory, provides:

> Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh memory for purposes of testifying, either –
>
> (1) while testifying, or
>
> (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness.[29]

Courts have interpreted Rule 612 as requiring the disclosure of documents used during an attorney's preparation of witnesses for deposition or trial.

For example, in *Berkey Photo, Inc. v. Eastman Kodak Co.*,[30] the United States District Court for the Southern District of New York analyzed Rule 612's applicability to four notebooks prepared by Kodak's counsel and shown to an expert witness as "background" while preparing for deposition. When Berkey sought discovery of the notebooks because they had been used by the expert to prepare for deposition, Kodak argued that they were privileged work product. After determining that the notebooks had "an impact upon the testimony of the witness," the court proceeded to determine whether "a privilege bars production or outweighs the benefits of production in order to assess whether production of the notebooks was "necessary in the interests of justice."[31] Although the court found that the notebooks constituted work product, it cited Rule 612 and other policy rationales that favored the production of the notebooks. "[I] t is disquieting to posit that a party's lawyer may 'aid' a witness with items of work product and then prevent totally the access that might reveal and counteract the effects of such assistance."[32] The court found that going forward, if privileged documents were provided to witnesses prior to a witness's testimony, those documents would be subject to discovery.[33]

> [T]here is not a compelling rationale for the view that counsel may (1) deliver work product to an expert or other witness to be "useful to the client," but then (2) withhold the material from an adversary who seeks to exploit the fact of this assistance in cross-examining the witness. … To put the point succinctly, there will be hereafter powerful reason to hold that materials considered work product should be withheld from prospective witnesses if they are to be withheld from opposing parties.[34]

See also Wheeling-Pittsburgh Steel Corp. v. Underwriters Laboratories, Inc.[35] (Rule 612 required waiver of privilege where witness reviewed privileged communication file in preparation for his deposition); *James Julian, Inc. v. Raytheon Co.*[36] (Although binder of documents constituted privileged work product, Rule 612 required waiver of privilege where binder used to prepare witnesses for deposition); *In re Joint Eastern and Southern District Asbestos Litigation*[37] ("Product book" reviewed by plaintiff in preparation for his deposition was subject to disclosure based upon a showing of substantial need or evidence that it was used by the witness to refresh his recollection); *Bailey v. Neister Brau, Inc.*[38] (Production of privileged documents required when documents used to refresh a witness's recollection in preparation for deposition). Because the law on this issue is somewhat unsettled, there are also courts that have held, like *Sporck*, that documents reviewed in preparation for deposition are not subject to discovery. *See Carter-Wallace, Inc. v. Hartz Mountain Industries, Inc.*[39] (Work

product privilege not waived by using documents to refresh witness recollection prior to depositions); *In re Managed Care Litigation*[40] (Privilege not waived when witness reviewed privileged documents in preparation for deposition); *Jos. Schlitz Brewing Co. v. Muller & Phipps (Hawaii) Ltd.*[41] (Privilege not waived by reviewing documents prior to deposition).

Practical Tips

Given Rule 612 and differing judicial interpretations on whether documents used to prepare witnesses for depositions must be disclosed, counsel preparing witnesses for depositions, and counsel taking depositions, should consider the following practical tips.

Preparing Witnesses

First and foremost, know the law where the case is pending so that you are aware of the risks or protections available to you if you plan to use documents while preparing witnesses for deposition. If the law in a given jurisdiction is unsettled, keep in mind that the court could follow case law requiring the production of documents reviewed by a witness during a deposition preparation session.

"The fact that a witness, in six days of preparation, herself felt no need to consult other documents suggests either a preternatural memory or extraordinary reliance on counsel to determine what would be foremost in her mind."

Consider not showing documents to witnesses during deposition preparation sessions. The content of key documents can be discussed in detail without actually identifying the document or showing the document to the witness. Such conversations should be protected by the attorney-client or work product privilege. If it is necessary to show documents to the witness, avoid showing the witness documents that are protected by the attorney-client or work product privilege to avoid waiving the privilege. In addition, avoid showing the witness documents that have not been produced in discovery, either because they are privileged or because they are not responsive to discovery requests. Further, avoid showing the witness key documents that opposing counsel has not already focused on during prior depositions, discovery requests, or motion practice. Finally, prior to showing a document to a witness, discuss the document to determine if the witness remembers the document and background details about the document in order to counter the argument that the document was used to refresh the witness's recollection or to influence his or her testimony.

Taking Depositions

When taking a deposition, know the law of your jurisdiction so that you know what facts you need to establish if you want opposing counsel to disclose documents reviewed in preparation for depositions. Always ask the witness if they looked at any documents, photographs, or other materials when preparing for their deposition. If the witness answers affirmatively, make a request on the record that those documents be identified and produced, and then serve a written discovery request seeking the identification and production of documents used during witness preparation session. In addition to requesting the documents, ask the witness questions about the number of documents reviewed with counsel; whether he or she reviewed any documents on their own prior to meeting with counsel; whether those documents were selected by the witness or identified/provided by counsel; whether any of the documents helped the witness remember details about the document, its creation, or the underlying subject matter; whether the witness relied on any documents in preparing for their testimony; and whether reviewing the documents influenced their testimony. If the witness testifies that some documents refreshed his or her recollection, that he or she relied on certain documents, or that his or her testimony was influenced by the documents reviewed, ask the witness to identify the specific documents. These questions may draw objections, but you will have created a record that you attempted to elicit information and facts to support a motion to compel. Finally, repeat your questions about whether documents were reviewed, influenced testimony, or refreshed a witness's recollection after discussing points integral to your theory of the case and when showing deposition exhibits to the witness to bolster your potential argument that documents influenced a witness's testimony or were used to refresh the witness's recollection. These facts may be key to a court's determination of whether you are entitled to discover the identity of documents reviewed during deposition preparation.

The recent decisions in the *In re Seroquel* multi-district litigation should serve as an important reminder to counsel who are preparing witnesses for their depositions, and for attorneys taking depositions. Courts can, and in some cases, will, require the identification and production of documents used during witness preparation sessions. Thus, counsel should know the law of the relevant jurisdiction, and proceed with caution when using documents to prepare witnesss.

Endnotes

[1] *See In re Seroquel Products Liability Litigation*, No. 6:06-md-1769-Orl-22DAB, 2008 WL 215707 (M.D. Fla., Jan. 24, 2008); *In re Se-*

roquel Products Liability Litigation, No. 6:06-md-1769-Orl-22DAB, 2008 WL 591929 (M.D. Fla., Feb. 28, 2008).

[2] *In re Seqoquel*, 2008 WL 215707, at *1.

[3] *Id.*, at *4.

[4] *Id.* (emphasis added by court).

[5] *Id.*

[6] *Id.* at *5.

[7] *Id.* at *4.

[8] *Id.* at *5.

[9] *Id.* at *2.

[10] *Id.*

[11] 759 F.2d 312 (3d Cir. 1985).

[12] *Id.* at 316.

[13] *Id.* at 318.

[14] 859 F.2d 1007 (1st Cir. 1988).

[15] *In re Seroquel*, 2008 WL 215707 at *2 (citing *In re San Juan Dupont Plaza Hotel Fire Litigation*, 859 F.2d 1007).

[16] 859 F.2d at 1009.

[17] *Id.* at 1018.

[18] *Id.* at *3.

[19] *Id.*

[20] *Id.* at *4.

[21] *In re Seroquel*, 2008 WL 591929, at *1.

[22] *Id.*

[23] *Id.* at *4.

[24] *In re Seroquel*, 2008 WL 215707, at *3.

[25] Although not established by the record cited in the Order, the Court infers that the witness was influenced by the documents reviewed during her deposition preparation sessions. "It is clear that the witness, a twenty-year employee of AstraZeneca, did no independent preparation to familiarize herself with the relevant documentation in order to provide appropriate testimony. The fact that a witness, in six days of preparation, herself felt no need to consult other documents suggests either a preternatural memory or extraordinary reliance on counsel to determine what would be foremost in her mind." *Id.* at *4.

[26] The Order acknowledges that the record does not establish that the documents reviewed refreshed the witness's recollection: "[I]t is not even clear that Plaintiffs' counsel inquired whether particular documents refreshed Ms. Ruhl's recollection. Once Ms. Dodd invoked the privilege, Plaintiffs' counsel need not have inquired further." *Id.* at *5, n.3.

[27] *In re San Juan Dupont Plaza Hotel Fire Litigation*, 859 F.2d at 1009.

[28] *Id.* at 1018.

[29] Fed. R. Evid. 612.

[30] 74 F.R.D. 613, 614 (S.D. N.Y. 1977).

[31] *Id.* at 615.

[32] *Id.* at 616. This quote is also cited by the *Seroquel* Order. 2008 WL 215707, at *4.

[33] The *Berkey* Court did not order production because counsel was "not vividly aware of the potential for a stark choice between withholding the notebooks from the experts or turning them over to opposing counsel." 74 F.R.D. at 616.

[34] *Id.* at 617.

[35] 81 F.R.D. 8 (N.D. Ill. 1978).

[36] 93 F.R.D. 138 (D. Del. 1982).

[37] 119 F.R.D. 4 (E.D. and S.D. N.Y. 1988).

[38] 57 F.R.D. 11 (N.D. Ill. 1972).

[39] 553 F. Supp. 45 (S.D. N.Y. 1982).

[40] 415 F. Supp. 2d 1378 (S.D. Fla. 2006).

[41] 85 F.R.D. 118 (W.D. Mo. 1980).

Young Lawyer's Corner

A Young Lawyer's Guide to Mass Tort Resources on the Internet and Blogosphere

By Jaime E. Muscar and Douglas S. Rosenbloom

As a young lawyer working on issues of mass tort litigation, you may have found that Internet resources can be as overwhelming as they can be helpful. We offer the following short list of websites and blogs as a useful reference guide. During our first year of practice, we often turned to these resources for research memoranda, client alerts, and background information on various drugs, products, and related legal and regulatory issues. Some of these websites and blogs are specific to products liability, particularly pharmaceutical and medical device litigation, as these issues are often implicated in mass tort litigation practice. All but the two subscription services, listed last, offer free access to their publications and other resources. Whether you are just beginning your practice or have many years of mass tort litigation experience, we hope that this guide will serve as a helpful starting point for your online research.

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Drug & Device Law Blog

www.druganddevicelaw.blogspot.com

Edited by two practicing lawyers, including the author of the popular The Curmudgeon's Guide to Practicing Law, this blog features an in-depth discussion of developments in case law and litigation related to the pharmaceutical and medical device industries. The bloggers present regulatory and statutory developments with an eye toward their ramifications for ongoing and potential lawsuits. For example, the day after the FDA proposed revisions to the drug-labeling subsections affecting pregnancy and childbirth, the blog's authors highlighted the proposal's implications for defendants' preemption defenses. The blog also includes links to many other blogs and internet resources.

Federal Judicial Center

http://www.fjc.gov

The Federal Judicial Center online publications library houses a number of resources related to mass tort litigation. The online publications and video catalog allows browsing by subject matter, including mass torts, class action litigation, complex litigation, and multi-district litigation. The website offers many publications available for download, including the latest edition of the Manual for Complex Litigation. The Manual for Complex Litigation is published by the Federal Judicial Center and provides guidance on how to manage complex cases. The Manual is a great resource for lawyers wanting practical guidance on case management or for young lawyers seeking professional reading material. The fourth edition also includes

sections on electronic discovery, an increasingly important issue in mass tort litigation.

Fierce Pharma

http://www.fiercepharma.com

FiercePharma offers free daily and archived (searchable) news coverage of pharmaceutical companies and matters affecting the industry. From corporate leadership and company financial news to products liability litigation and regulatory developments, FiercePharma's daily newsletters are a great resource for pharmaceutical litigation. There are also sister websites for the biotech, vaccine, bioresearch, and healthcare industries.

Food and Drug Administration

www.fda.gov

The FDA's useful website provides links to public notices, filings, and other background information about food, drugs, medical devices, vaccines, cosmetics, and other products. It features an index to drug-specific information, which links to information sheets for healthcare professionals, patients, and consumers; medication guides; and information pages for hundreds of drugs. The link to its companion site, Drugs@FDA, includes information on all FDA-approved drug products, The website also has sections for general research on clinical trials, product approval, product recalls, and federal regulations.

Mass Tort Litigation Blog

http://lawprofessors.typepad.com/mass_tort_litigation

Edited by several law professors, this blog is a great resource to stay up-to-date on the most recent developments in mass tort litigation. The archives date back to 2006, and the site also maintains a topical archive, allowing you to search for posts on common topics such as class actions, medical devices, and punitive damages. The editors often block-quote extensively from news articles, court documents, and press statements. The site's coverage of the sex-abuse litigation involving the Catholic church links to books and articles that more generally address the role of mass tort litigation in areas of policy and social science.

National Center for State Courts Mass Torts Resource Guide

http://www.ncsconline.org/wc/CourTopics/ResourceGuide.asp?topic=MaTort

To learn how a particular state deals with mass tort litigation, this website may be a good place to start. This website provides useful links to state reports on their mass tort management systems as well as court documents from actual litigation in the mass tort systems. The non-uniform depth of state-by-state coverage reflects the varying degree to which individual states confront and manage mass tort litigation. Resources are also grouped by topics such as asbestos, case management, and Multi-District Litigation. Also, the NCSC provides a toll-free phone number where you can reach a live person to help you navigate the NCSC Library and databases or track down other resources pertaining to mass tort litigation in state courts.

RAND Institute for Civil Justice, Class Action Lawsuits & Mass Torts

http://www.rand.org/icj/research/class.html

Unlike many other websites listed here which focus on industry news, the RAND Institute for Civil Justice's website provides articles and studies that focus on how class action lawsuits and mass tort litigation affect citizens' access to the courts and the functioning of our civil justice system. The website includes several publications related to class actions and mass tort litigation, particularly in the area of asbestos litigation. Electronic versions of the publications are downloadable for free.

Paid Subscription Services: The BNA and Law 360 Series

www.bna.com

www.law360.com

Finally, we mention two well-known subscription-required resources, the BNA series and the Law360 series. Both services offer frequent, sometimes daily, email news bulletins on a wide variety of topics such as products liability, toxic torts, and healthcare. Relevant BNA products include the Class Action Litigation Report and subscriptions for specific areas of tort litigation such as digital discovery, expert evidence, medical devices, product liability, product safety, and toxic torts. Law360 offers Product Liability Law360, a daily newsletter reporting news in mass torts and product liability litigation. Law360's website also houses articles on product liability and industries relevant to mass tort litigation such as the health, pharmaceutical, and biotech industries.

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