

# Product Liability and Toxic Tort

Special Section of the Connecticut Law Tribune

ALM

## Evidence

# DESTRUCTION

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**SPOILIATION** *Remedy*

# NO MORE BENEFITING FROM A BAD ACT

## New tort punishes those who engage in evidence destruction

By **MICHAEL A. STRATTON**

Prior to Oct. 3, 2006, a plaintiff had no effective remedy against a defendant who intentionally destroyed evidence critical to the plaintiff's cause of action. In those cases, under prior law, the plaintiff was limited to asking for sanctions or an adverse inference instruction to the jury. Neither of these "fixes," however, allowed a plaintiff to proceed with the case absent enough evidence to prove a *prima facie* case.

As such, if the defendant's destruction of evidence also destroyed the plaintiff's cause of action, the plaintiff had no recourse—and the defendant unfairly reaped benefits from his bad act.

*Rizzuto v. Home Depot*, 280 Conn. 225 (2006), resolved this inequity in the law by adopting the tort of intentional spoliation of evidence. In short, if a defendant intentionally destroys evidence that is vital to the

plaintiff's ability to prevail in a civil action, the plaintiff has an independent tort action for damage caused by the spoliation.

The *Rizzuto* court reasoned that the existing non-tort remedies were insufficient to compensate victims of spoliation and to deter future spoliation when a party defendant destroys evidence intentionally with the purpose and effect of precluding a plaintiff from fulfilling the burden of production in a civil case.

For instance, in *Beers v. Bayliner Marine Corporation*, 236 Conn. 769 (1996), the Supreme Court held that the trial court could charge the jury that an adverse inference may be appropriate

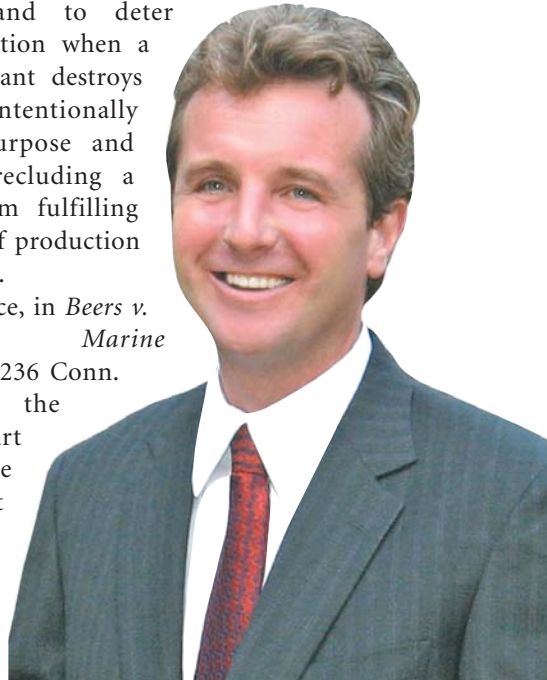
where a party destroys key evidence. In *Rizzuto*, the court recognized that an adverse inference is not an effective sub-

stitute for proof of a *prima facie* case, and therefore a proper tort remedy was necessary.

### Five Elements

The essential elements of the new tort

offered, a rebuttable presumption is created that the plaintiff would have prevailed in the underlying litigation. This presumption may then be rebutted by the defendant through a showing that the case would have been lost even with the missing evidence.



**The *Rizzuto* court reasoned that the existing non-tort remedies were insufficient to compensate victims of spoliation and to deter future spoliation when a party defendant destroys evidence intentionally with the purpose of precluding a plaintiff from fulfilling the burden of production in a civil case.**

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that must be pleaded and proven are the following:

- 1) The defendant's knowledge of a pending or impending civil action involving the plaintiff;
- 2) The defendant's destruction of evidence;
- 3) The defendant's destruction, in bad faith, that is to deprive the plaintiff of his cause of action;
- 4) The plaintiff's inability to establish a *prima facie* case without the spoliated evidence;
- 5) Damages.

The court noted that this new tort raised problems of proof, but placed the burden of this difficulty on the defendant due to its improper destruction of evidence. In particular, the court attempted to clarify the plaintiff's burden of proof on causation.

Under *Rizzuto*, the plaintiff must prove that the defendant's intentional, bad faith destruction of evidence rendered the plaintiff unable to establish a *prima facie* case in the underlying litigation. The plaintiff need not actually try the underlying case to establish such proof, as this would be a waste of judicial resources, nor must the plaintiff prove some probability of success in the underlying case.

However, the plaintiff must prove that the evidence was so important to the cause of action that he or she would not have survived a directed verdict. If such proof is

As to the proof necessary to show that the spoliation was intentional, the court noted such proof may be circumstantial. Types of evidence that might establish proof of intent includes, but is not limited to:

- 1) Proof of destruction of evidence by the defendant in other cases;
- 2) The number of preservation requests made by the spoliation victim;
- 3) The repeated failure of the defendant to acknowledge preservation requests;
- 4) The timing of the destruction (after the defendant's expert views the product or after suit is filed).

Finally, the new tort of spoliation allows a plaintiff to recover those damages that would have been recovered in the underlying suit. In *Rizzuto*, the defendant had argued that such a measure of damages represented a windfall to the plaintiff.

The court disagreed and noted the defendant that destroys evidence intentionally cannot be heard to complain, especially when it is given the opportunity to rebut the claim that the plaintiff would have prevailed in the underlying case.

The new tort of intentional spoliation fills an important gap in our tort law that had allowed spoliating tortfeasors to escape liability. The tort strikes the proper balance between the rights of the plaintiff and the liability of defendant by requiring proof of intentional spoliation while allowing full damages. ■



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**PHYSICIANS' liability**

# NO SIMPLE MATTER OF BLACK AND WHITE

## How effective are warnings on prescription drug packages?

By **JOHN ZEN JACKSON**  
and **ALLANA L. NASON**

All drugs have potential adverse reactions and side effects. Prescription drugs are commonly (but not invariably) viewed as unavoidably unsafe. These medical products would be characterized as "defective" if not accompanied by an adequate warning.

The federal Food and Drug Administration has required a number of drugs to be given additional warnings in black boxes to highlight information concerning the drugs' dangers. These "black box warnings" (BBWs) have been characterized as "the strongest warning the FDA requires." Physicians using BBW drugs face tort liability. Pending legislation puts the tort issue at an intersection with health care policy concerns and professional discipline.

Typically with prescription drugs, the manufacturer warns the prescribing physician, not the patient, as the medication's ultimate user. This is the pharmaceutical manufacturer's "learned intermediary doctrine" defense.

The learned intermediary has a multifaceted duty. The physician selects an appropriate drug and dosage for treatment, obtains consent by informing the patient of the risks and benefits, alternatives, and consequences of the treatment, and provides instructions regarding safe use and warning signs of possible adverse reactions. The physician must monitor and intervene to reverse or ameliorate reactions to hopefully avoid injury.

To discharge this duty, the physician must be knowledgeable regarding the drug. One source of knowledge is the manufacturer's package insert accompanying the drug and in the annually-published *Physician's Desk Reference* (PDR). The package insert is developed with FDA approval. Where a warning or instruction for a drug or device has been approved or prescribed by the FDA, there is a "rebuttable presumption" that the warning is adequate.

### Insert Format

FDA regulations mandate a particular format and structure for the package insert. The pertinent sections are: contraindications, warnings, precautions and adverse reactions. Frequently, this is a "laundry list of possible side effects" without comment or guidance; it does little to inform. The provisions regarding "boxed warnings" are found in 21 CFR § 201.57(c)(1): "Certain contraindications or serious warnings, particularly those that may lead



to death or serious injury, may be required by the FDA to be presented in a box." The summary must be bolded, hence the "black box warning" terminology. Only the FDA can require a BBW in a package insert. This may be required when the drug is newly approved or later, as a result of post-marketing experience. There are more than 200 BBW drugs.

Manufacturers have multiple reasons for including information in an insert. These include complying with FDA regulations, providing information to physicians, limiting liability for failure to warn, and advertising. Most jurisdictions recognize that the package insert does not establish the standard of care and is not admissible by itself to prove a claim for medical malpractice. After a drug has been on the market, physicians rely more on their own experience and the professional publications of others than on a drug manufacturer's advertisements or PDR entries. But the package insert provides notice to physicians of the drug's dangers.

Physician liability for a delay in diagnosing a medication reaction has been based on an adverse reaction in a BBW. In *Kasongo v. United States*, 2007 WL 2075632 (N.D. Ill. 2007), a patient began receiving the drug in 2000 at a federally-funded clinic; in late 2001 she was diagnosed with lactic acidosis and died. The court pointed to the presence of BBWs about lactic acidosis in patients taking this medication starting in 1999.

The BBW regarding potential risks to a fetus from oral contraceptives was relied on in *Basten v. United States*, 848 F. Supp. 962 (M.D. Ala. 1994). The failure to warn the

pregnant woman of possible fetal abnormalities deprived her of the opportunity to have testing done for a neural tube defect and the opportunity to terminate the pregnancy.

The presence of a BBW does not appear to have precipitated any special analysis regarding informed consent issues. For example, in *Hanson v. Horecka*, 1995 WL 46263 (Minn. App. 1995), the patient died in the hospital two days after her hypertension medicine was discontinued. Her death was apparently due to a heart attack related to heart disease. Plaintiff's expert referred to the BBW for Inderal, advising gradual reduction of dosages and cautioning against interruption of therapy to avoid "exacerbation of angina and in some cases myocardial infarction."

Plaintiff testified that had the defendant informed him of the risk when the medication was stopped, as his mother's caretaker, he would have considered the risk significant. The Minnesota Court of Appeals reversed a directed verdict as to the "negligent nondisclosure claim." It concluded there was a jury question regarding consent to change the regime.

### Effectiveness Questioned

The effectiveness of BBWs as a risk communication tool has been questioned. Four types of noncompliance were evaluated in Wagner, "FDA drug prescribing warnings: is the black box half empty or half full?" 15 *Pharmacoepidemiology & Drug Safety* 369 (2006). These were (a) laboratory monitoring before commencing therapy, (b) labora-

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■ See **BLACK BOX** on **PAGE 5**

**SETTLEMENT** *Aftermath***VIOXX PACT IS A BEGINNING, NOT AN END**

Pharmaceutical maker still faces lawsuits by states and insurance companies

By **Julie Kay**  
ALM Media

While touted as a virtual end to Vioxx litigation, the recent \$4.85 billion settlement struck by Merck & Co. Inc. to resolve products liability claims does not get the pharmaceutical giant out of the woods.

In reality, a number of lawsuits are still pending against Merck in both state and federal courts around the country.

Other pending Vioxx actions include: suits brought by attorneys general in four states to recover Medicaid funds they paid for the drug; third-payor lawsuits filed by insurance companies; securities class actions brought against the directors on behalf of shareholders; and stock loss class actions on behalf of Merck's employees and unions.

Houston-based plaintiffs' attorney Mark Lanier — who has tried three major Vioxx cases in the United States — noted that there are also foreign cases being filed in Germany, Israel and London. Lanier, of the W. Mark Lanier Law Firm in Houston, is a consultant on the German cases and estimates there could be several thousand.

If that wasn't enough, the settlement, which includes attorney fees, must be approved by 85 percent of stroke and heart

attack victims — and that's hardly a done deal.

Merck referred calls to its public relations consultant, APCO Worldwide Inc. New Orleans attorney Russ Herman, chairman of the plaintiffs' negotiating team and liaison to the multidistrict litigation panel that dealt with the settlement, said he expects the settlement to be "overwhelmingly approved."

"We are getting a lot of questions [from attorneys], but overall the reception has been 90 percent positive," said Herman of New Orleans' Herman, Herman, Katz & Cotlar.

**The Fight Continues**

Ted Mayer, of New York's Hughes Hubbard & Reed, lead defense counsel for Merck, said of the other litigation: "We continue to fight on other fronts and defend other cases vigorously."

He added that Merck has already retained lawyers in Germany, Israel and England to defend the foreign cases. His estimate of pending foreign cases is much lower than Lanier's. Mayer placed the total at "fewer than 300."

"In non-U.S. jurisdictions, the law is different," he said. "They are at different stages and they are different systems. The assessment of damages are different."

The large variety of class actions that have been filed against Merck is not unusual, legal experts note. It happened with Fen-phen, asbestos, breast implants, Ephedra and Baycol.

"Anytime there's a controversy over the safety of the product, you can get a variety of lawsuits," said Richard A. Nagareda, a professor at Vanderbilt University Law School and author of a book on mass torts. "You are seeing efforts to expand what is fundamentally a tort controversy

into a different cubbyhole because it enhances lawyers' chances of getting the class certified."

Merck pulled Vioxx, a drug that was prescribed for muscle spasm and inflammation, from the market in 2004 following reports of strokes and heart attacks. Since then, plaintiffs' lawyers have filed a slew of lawsuits using a variety of legal theories in different courts around the country.

To put out the fires, Merck hired Hughes Hubbard and Washington-based Williams & Connolly as co-lead counsel. The defense team also includes O'Melveny & Myers, Bartlit Beck Herman Palenchar & Scott of Chicago and Dechert. Hughes Hubbard hired Washington-based APCO to handle its public relations and damage control.

Merck has set aside \$1.9 billion for legal fees, according to Kent Jarrell of APCO. Most of the products liability suits are in four consolidated cases — the federal New Orleans case and three state court cases in California, New Jersey and Texas. Judges in all four cases helped craft the settlement, which would apply to plaintiffs in all four if an agreement is reached.

The settlement "is a step in the right direction," said John Ruiz, a Miami attorney who handles 1,200 Vioxx cases nationally. "At least we are putting money into the hands of those injured rather than in the hands of defense counsel."

**Learning From Fen-Phen**

Merck's defense team carefully studied other major products liability cases such as Fen-phen, Baycol and Ephedra to "learn what was done right and what was done wrong, and apply that to our own unique case," Jarrell said.

What is unusual about the Merck proposed settlement is that it caps damages — which Nagareda called a smart move for the

company. "The important thing is it's a fixed sum," he said. "The price tag is fixed. I know that they looked very, very carefully at prior settlements."

Litigators said Merck would do well to avoid the pitfalls that befell Fen-phen. "It was tantamount to a disaster," said Ruiz, who had 1,000 Fen-phen cases. "I still have cases that haven't been compensated. They would lose EKG reports, medical reports, they would put the wrong number on files. The claims administrator changed a

couple times."

But Lanier said Merck's massive settlement is far from resolved.

"I have another three or four months before I'm convinced this settlement will happen," he said. "But this is a significant corner. Merck never put money on the table in any case dealing with Vioxx. If this case is settled, the other cases will by and large find resolution."

Plaintiffs' lawyers filed Vioxx product liability cases in New Jersey because Merck is based there and in other states if a Merck employee or a pharmacy that dispensed the drug was based there.

Consumer fraud class actions have been brought in Illinois, Kansas and Missouri by former users seeking to be reimbursed for out-of-pocket prescription costs.

Additionally, class actions were brought by attorneys general in Alaska, Louisiana, Mississippi, Montana, New York, Texas and Utah seeking repayment of Medicaid funds for Vioxx prescriptions.

Along the same lines, third-party payor suits have been filed by

insurance companies seeking reimbursement for prescription costs.

Securities suits were also brought by shareholders in Oregon state court and New Jersey federal and state courts. Some of the suits target the board of directors for allegedly knowing about problems with Vioxx and failing to take action.

Finally, suits have been brought by Merck employees and unions trying to get compensated for the hits to their retirement accounts brought about by the stock nose-dive when reports about Vioxx first surfaced in 2004. The stock has since rebounded.

On the criminal front, Merck has been under investigation by the Department of Justice, as part of a federal health care investigation, over its research, marketing and sales activities related to Vioxx. ■

**Evaluating and Accepting Cases Involving**

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# PRODUCT LIABILITY FIRM LOSES MILLIONS

Texas case offers lesson about including expenses amounts in contracts

By **BRENDA SAPINO JEFFREYS**  
ALM Media

The saga of a Texas product liability law firm can serve as a lesson to other firms in Texas, and perhaps, throughout the nation. In September, an arbitration panel ordered John M. O'Quinn's firm to pay a class of 3,450 former breast implant clients nearly \$42 million because the fee contracts did not include language permitting the firm to charge for general expenses.

The suit, *Martha Wood, et al. v. John M. O'Quinn, P.C.*, was filed in 1999 in state district court in Rusk County, Texas. It went to arbitration because of a clause in the fee agreements. In their petition, the plaintiffs alleged that O'Quinn's firm wrongfully deducted Breast Implant General Expenses — expenses such as the costs of taking depositions that were relevant to all the suits — and other fees from their settlement checks.

In March, a majority of the three-member panel found that the fee agreements between O'Quinn's firm and the class members did not allow for the deduction of general breast implant expenses, certain expenses charged to the class members were

inappropriate, and the firm's actions were not authorized by the fee agreements.

In July, the three-member arbitration panel ordered O'Quinn's firm to pay \$35.7 million in damages to the class. According to Houston plaintiffs lawyer Joseph Jamail, the lead lawyer for the class members in the suit against O'Quinn's firm, O'Quinn's firm "arbitrarily change[d] the contract, breach[d] the contract, and overcharge[d] the clients." He added: "You are obligated to have it in writing what your expenses [are], your dispersals are."

The July 18 majority order found the

O'Quinn firm improperly deducted \$10.7 million in expenses from client settlement payments for Breast Implant General Expenses and should refund that money, plus interest, to the clients. The order awarded the plaintiffs' lawyers in *Wood* a contingent fee equal to 25 percent of the damages awarded to the plaintiffs, plus \$500,000 in expenses. In addition, the majority ordered O'Quinn's firm to partially forfeit its fees. (The Texas Supreme Court's 1999 opinion in *Burrow v. Arce*, 997 S.W.3d 229 (Tex. 1999), provides for fee forfeiture for breach of fiduciary duty.)

The panel found that the O'Quinn firm breached a fiduciary duty to the clients because the Breast Implant General Expense account had run a surplus since 2000; the firm never audited the account, and it never informed the class members of the surplus.

### Fiduciary Duty Breach

The panel majority found O'Quinn's firm made about \$263.4 million in fees for representing the class members in breast

■ See **WRITTEN** on **PAGE 8**

## BLACK BOX WARNINGS

■ From **NO SIMPLE** on **PAGE 3**

tory monitoring during continued therapy, (c) co-prescribing of contraindicated medications, and (d) prescribing during pregnancy. The authors noted the substantial debate over the effectiveness of liver testing to prevent drug-induced liver failure, and thus many physicians did not do that recommended monitoring.

In addition, the authors attributed noncompliance to the absence of clear guidelines for the events, prompting FDA to require a BBW. The same point was made in recent reviews by the federal Government Accountability Office. There have been a number of articles challenging the lack of scientific support for some BBWs. This uncertainty as to the validity and over-use of BBWs undermines their effectiveness.

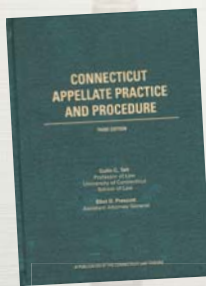
A BBW does not prohibit a physician's use of a drug. Indeed, even an off-label use of a BBW drug may be justified when there is no better therapy despite the potential risk establishing the warning. The PDR states that the FDA has always recognized that it does not have the authority to limit how a physician uses an approved drug.

Physician disclosure of the content of the medical risks encompassed by the black box is likely required by the "material information" standard. That the federal government concluded there is a risk of "death or serious injury" supports the notion that a reasonable patient would want to know this information. ■

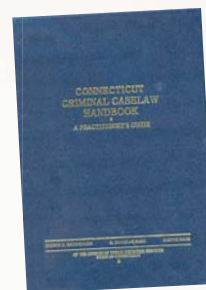
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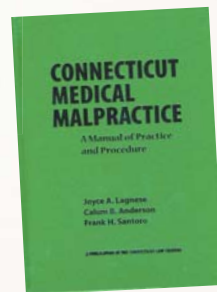
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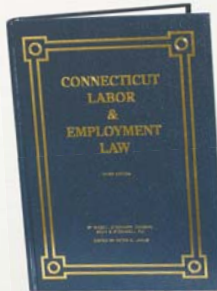
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# SUITS FILED OVER TOY PROBLEMS

Litigators seek class action status for lead paint claims

By **GINA PASSARELLA**  
ALM Media

As with other defective Chinese products of late, U.S. consumers are looking for some accountability from the domestic importers.

Two Pennsylvania law firms have filed class action suits against toy company Mattel Inc. The suits were filed in an effort to compel Mattel, the importer of millions of Chinese-made toys that have been recalled recently due to lead paint and small magnets, to pay for lead testing for children who may have been affected by the toys.

In *Monroe v. Mattel Inc.*, 2:2007cv03410 (E.D. Pa., Aug. 17, 2007), the parents of Nydia Monroe also seek to set up a medical-monitoring fund for the testing for lead poisoning. The plaintiffs seek damages in excess of \$5 million, which would include the costs of medical monitoring, interest, attorneys' fees, and other costs, according to the complaint.

Jeffrey Killino, of Woloshon & Killino in Philadelphia, said the class size in his case could reach into the millions. He said he is inclined to move into other countries where the toys were sold as well.

Killino teamed up with Los Angeles-based Engstrom Lipscomb & Lack — one of the firms highlighted in the Erin Brockovich movie — to file *Powell v. Mattel*, No. BC376231 (Cal. Super.Ct., Los Angeles,

Aug. 20, 2007) on behalf of Michael and Adrian Powell, who wanted their children tested for lead poisoning.

## Chinese Tires

Killino is not a stranger to problems with Chinese-made products in the United States. He was involved recently with a death-and-injury lawsuit filed on behalf of three victims of a fatal rollover crash caused by a defective Chinese-made tire. The suit prompted U.S. tire importer and distributor Foreign Tire Sales to ask the National Highway Traffic Safety Administration for help in recalling nearly half a million Chinese-made light truck tires. Killino had filed a class action suit against Foreign Tire Sales before it had agreed to submit to the recall.

The goal in the Powell case is to set up a fund from which parents can draw to pay for lead testing. It will also create a system, Killino said, in which parents or insurance companies who have already paid for the testing can get reimbursed. Killino said he had not yet spoken with Mattel about voluntarily creating the fund.

Millions of toys manufactured by Mattel have been recalled by the U.S. Consumer Product Safety Commission. According to reports on the commission's web site, all of the recalled toys were manufactured in China.

The complaint in *Powell v. Mattel* says



that the potential class is not seeking any damages for personal injury. The causes of action are based on theories of strict product liability, negligence, and violations of the business professions code of California, according to the complaint. The *Monroe* case alleges only negligence.

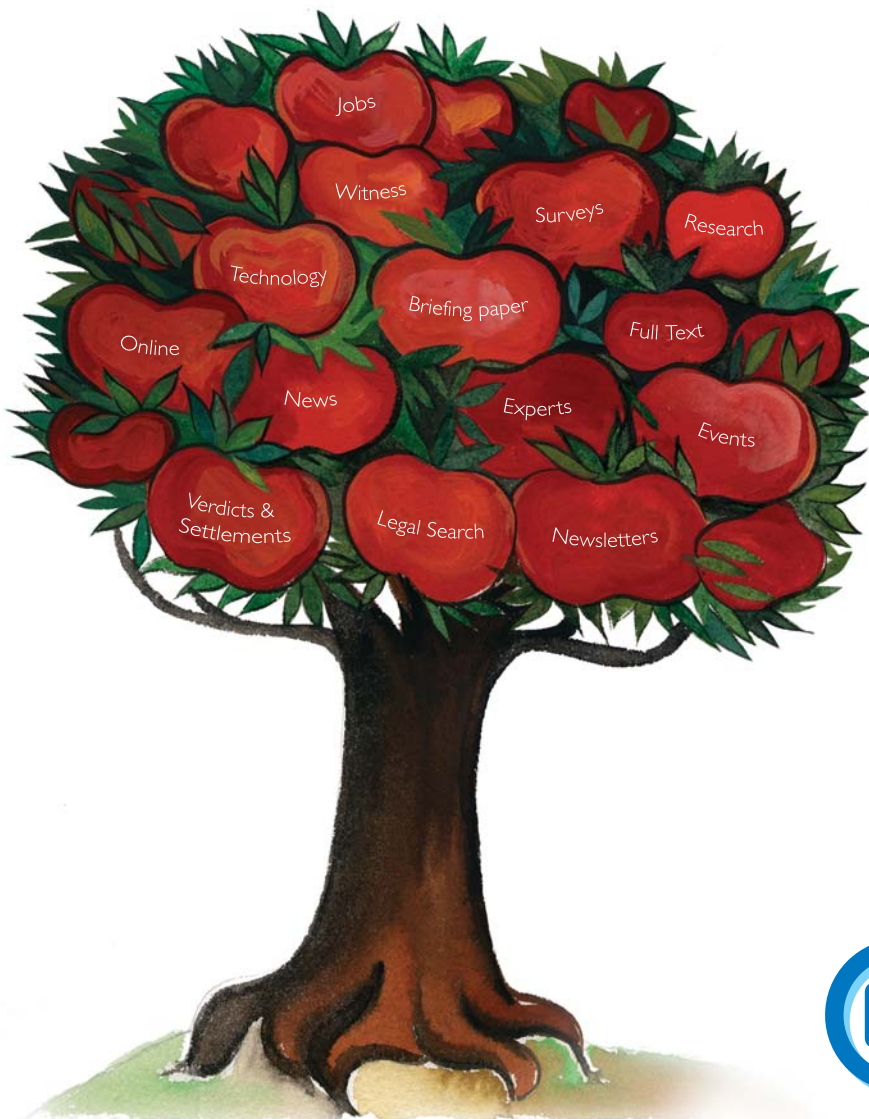
According to the Powell complaint: "The only reasonable way to determine whether plaintiffs and the class members have suffered lead poisoning is to have them undergo preventative medical screening and monitoring, including but not limited to blood tests."

It also alleges that members of the class

would be sufficiently available:

"According to public statements of [Mattel], 1.22 million product units were manufactured with surface lead-based paint. The defendants' conduct has received widespread media coverage and the class members can easily be identified through a notice campaign similar to the recall campaign presently being made by defendants."

The complaint also seeks disgorgement and/or restitution and prejudgment interest. Killino said any disgorgement would more likely than not go toward making the class whole through medical monitoring. ■



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# SUING AUTO MAKER IS NO FOREIGN CONCEPT

## Failure to name overseas manufacturers in lawsuits can hinder discovery

By **LAWRENCE GOLDHIRSCH**

Foreign auto manufacturers often have American subsidiaries that import their products and market them with a warranty from the importer. If such a product injures an American due to a design defect, do you need to sue the manufacturer as well as the importer/seller/warrantor?

If you sue only the product importer, the importer may avoid discovery of the design of the product. Often the importer argues that it was not the entity that designed and manufactured the vehicle in question, and, therefore, it should not be responsible for producing any such discovery.

If the plaintiff's attorney has not sued the product manufacturer, he/she may be relegated to obtain discovery from the manufacturer as a non-party witness, in the same way as one does in the United States; however, this may be an impossible undertaking. To begin with, many foreign countries prohibit pretrial discovery. It is usually not done overseas.

Other nations will permit some documentary discovery but not allow depositions. Even where depositions are permitted, they may be restricted or cross-examination, which is a common-law practice, may be prohibited. All of these problems can be avoided if the manufacturer is made a defendant. As a practical matter, making the manufacturer a party may spell the difference between winning and losing. Therefore, the question is not whether to sue, but how to serve the foreign manufacturer.

### Minimum Contacts

In order to sue a foreign manufacturer, the plaintiff must show that minimum contacts exist between the manufacturer and the state, *Worldwide Volkswagen v. Woodson*, 444 U.S. 286 (1980). Of course, where a foreign manufacturer contracts in a state or ships a vehicle into a state, it will be subject to that state's jurisdiction if a product defect results in injury. In most cases, the foreign manufacturer has set up a wholly owned subsidiary, often with the same name, to be the importer/seller/warrantor.

However, courts generally do not permit service of process on the subsidiary to obtain jurisdiction over the foreign manufacturer where they have maintained separate corporate identities. In most states, to obtain jurisdiction over the manufacturer by serving its subsidiary, the subsidiary has to be found to be the "agent" or "mere department" of the foreign parent, terms of art whose meaning depends on the jurisdiction.

Moreover, many courts do not allow mailing of process to the foreign defendant in order to obtain jurisdiction, even where undertaken by the local secretary of state. Only where the forum state has a service statute that considers service on a subsidiary to be service on the manufacturer, can the court exercise jurisdiction. See

*Volkswagenwerk v. Schlunk*, 486 U.S. 694 (1988). In the absence of such a statute, jurisdiction must be obtained via some other method.

If the manufacturer is located in a country that is a signatory to the Hague Service Convention, service must be made through that treaty (the convention and signatories can be viewed at [www.hcch.net](http://www.hcch.net)). Most major auto-producing countries (e.g., Japan, Germany, Korea, Italy, and Sweden) are signatories. The convention is a multi-lateral treaty enacted to create a simple and expeditious procedure for serving process

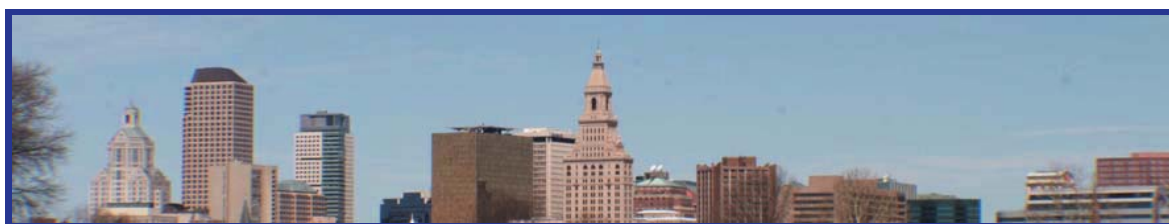
on foreign defendants in an effort to encourage judicial assistance and cooperation.

The basic method of service under the treaty is through a central authority designated by each signatory country. In the United States, the central authority is the Office of International Judicial Assistance at the Department of Justice in Washington, D.C. Each country's central authority that receives a request in the proper form is required to serve the documents by an allowable local method.

Despite its good intentions, there are

many pitfalls in using the treaty. For example, some courts have followed the treaty's requirement that the papers be translated into the language of the country of service; however, not all courts have required the translations. Although service by mail is authorized by the treaty, some countries have filed an exception to the treaty that prohibits such service. Another problem is the 120-day requirement in which to serve process after filing. That time limit may be too short for overseas service. The simplest

■ See **AUTO** on **PAGE 8**



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# WRITTEN AGREEMENT SHOULD INCLUDE FEES

■ From **PRODUCT** on **PAGE 5**

implant litigation, but the firm should forfeit only \$25 million of those fees, because the class members may have benefited from the use of the Breast Implant General Expenses.

The dissenting arbitrator agreed with the majority that O'Quinn's firm breached its fiduciary duty to its clients and that the firm breached its contingent-fee contract with all class members, but he found that the defendant should pay less in actual damages and should forfeit more fees.

Instead of finding O'Quinn's firm should refund \$10.7 million to the breast implant clients — money deducted from their settlements for Breast Implant General Expenses — the refund should total \$6 million, a sum which closely parallels the amount of money taken from the general expense fund to pay for a public relations campaign in breast implant litigation and to fund a medical study that looked at the connection between exposure to silicone breast implants and diseases alleged by the plaintiffs.

## 'A Bit Strong'

The dissenter said the O'Quinn firm should forfeit more than \$25 million in fees to "deter such a breach of fiduciary duty." He noted that plaintiffs' lawyers have been struggling for years on how to handle general expenses in a mass tort case, and O'Quinn's model for handling general

expenses — which called for a deduction of 1.5 percent from each settlement — was very close to perfect.

However, the dissenting opinion continued, the majority found that O'Quinn breached the contracts with the clients, because the general expenses issue should have been addressed in the written fee agreements with the clients. Adding that the panel did not question the success of the O'Quinn firm in obtaining outstanding results for its clients, the failure to address general fee expenses in the fee contracts resulted in their finding of breach of contract because the general expenses issue should have been addressed in the written

fee agreements with the clients.

O'Quinn has denied the allegations against his firm. He says the panel's finding that his firm breached a fiduciary duty was "a bit strong." Because there was no judicial guidance from a Texas appellate court, he says lawyers have been compelled to find a way to spread the general expenses out among the clients. According to O'Quinn, his firm uses the same method used by other major firms. He points to the dissenter's concurring and dissenting opinion that plaintiffs lawyers have struggled for years over the best way to handle general expenses in mass tort litigation.

Then, in an order issued on Sept. 11, the

arbitration panel ordered the firm to pay a little more to the class — a total of \$41,465,950. That \$41.5 million breaks down to \$9,979,364 for breach of contract damages, \$2,494,841 for attorneys' fees on the breach of contract claim, \$3,991,745 in interest on the breach of contract claim, and \$25 million for fee forfeiture. The panel allocated \$500,000 for expenses and \$10,241,487 for attorneys' fees, leaving \$30,724,463 to be distributed to class members.

In the future, O'Quinn says he will include a clause in fee contracts that says the firm will charge a certain percentage for general expenses. ■

## AUTO LAWSUITS

■ From **SUING AUTO** on **PAGE 7**

and probably least expensive way to achieve service under Hague is to employ a professional process server, which can be found on any Internet search engine under "Hague Service."

If the foreign manufacturer is in a country that is not a signatory to Hague, then service that complies with the law of the forum, as well as the foreign manufacturer's home, must be undertaken. See FRCP 4(f). This is also no easy task.

Another problem arises if the foreign manufacturer is a company that is wholly or partially owned by a foreign government. Then, service must be accomplished under the Foreign Sovereign Immunities Act, 28 USC 1608, a much more exacting statute than the Hague Convention. This subject is too complex to cover in this article.

The failure to serve properly, at least in the federal courts, usually results in the court's quashing service rather than a dismissal. For this reason, the careful plaintiff's attorney should, when available, commence an action against the foreign auto manufacturer in the federal court.

So the answer to the question, "Do I have to sue foreign auto manufacturers with American subsidiaries?" is "Definitely." ■

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