# Toxic Tort & Product Liability Quarterly

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# I. EXPERTS

## Oregon Court of Appeals Finds Multiple Chemical Sensitivity Diagnosis Sufficiently Reliable for Jury's Consideration

Departing from most federal and state court precedents, the Oregon Court of Appeals held that a medical diagnosis of "multiple chemical sensitivity" ("MCS") has sufficient support in the scientific community to allow a jury to consider it. S*ee Kennedy v. Eden Advanced Pest Techs.*, 222 Ore. App. 431 (Or. Ct. App. Oct. 1, 2008). Believing he was acutely sensitive to chemicals, the plaintiff hired the defendant pest-control company and instructed its employees to treat his home with a designated non-toxic pesticide. *Kennedy*, 222 Ore. App. at 433–34. Subsequently, the plaintiff suffered various physical ailments and learned that, contrary to the plaintiff's instructions, the defendant had applied chemical pesticides different from that designated by the plaintiff. *Id*. at 434.

Alleging $750,000 in damages, the plaintiff brought claims for fraud, violation of the Unlawful Trade Practices Act, negligence, intentional infliction of emotional distress, and trespass. *Id*. at 435. The plaintiff sought to use the testimony of the physician who diagnosed his MCS and who also determined that pesticide exposure exacerbated an alleged pre-existing chemical sensitivity; in response, the defendant challenged the admission of the plaintiff's physician's testimony with expert testimony that MCS is not generally accepted by the medical community. *Id*. at 440–46. Agreeing with the defendant's expert, the trial court excluded the testimony of the plaintiff's expert and found that evidence of MCS is not scientifically reliable under *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993) and related state law. *Id*. at 436–37. Despite the trial court's award of $120,000 to the plaintiff on the negligence and trespass claims, the plaintiff appealed the exclusion of MCS evidence. *Id*. at 436.

The appellate court reversed the trial court, finding that it erred in its role as the gatekeeper of evidence. Specifically, the court noted the existence of "a controversy in the medical community about whether MCS is a valid diagnosis," and stated that, when qualified experts disagree about the validity of a medical diagnosis or other scientific evidence, "judges are in no better position to resolve that dispute than are juries." *Id*. at 447, 452. That the defendant offered expert testimony attacking the credibility of scientific conclusions regarding MCS did not justify exclusion where the plaintiff offered evidence that "many legitimate entities view MCS as a legitimate diagnosis." *Id*. at 449. Although the vast majority of courts have not found evidence of MCS to be scientifically reliable, the Oregon appellate court emphasized that MCS is recognized by the U.S. Social Security Administration, the U.S. Housing Authority, the Canadian government, and the International Classification of Diseases (Ninth Revision). *Id*. at 449–50.

## District Court Dismisses Negligence Claim Where Plaintiffs Failed to Meet "But-for" Test

The United States District Court for the District of New Mexico dismissed a negligence suit because the plaintiffs' experts failed to testify that exposure to both radioactive and nonradioactive hazardous substances was more than a "contributing factor" to the plaintiffs' cancers and therefore did not establish "but-for" causation. *See Wilcox v. Homestake Mining Co.*, No. Civ. 04-534 (D.N.M. Oct. 23, 2008), *available at* http://www.nmcourt.fed.us/Drs-Web/view-file?full-path-file-name=%2Fdata%2Fdrs%2Fdm%2Fdocuments%2Fcadd%2F2008%2F10%2F23%2F0001921395-0000000000-04cv00534.pdf. Current and former residents of neighborhoods adjacent to a uranium milling facility brought suit against the facility owner for the alleged release of hazardous substances. *Wilcox*, Slip Op. at 1. Defendants argued that the affidavits of the plaintiffs' experts failed to establish a prima facie case of specific causation. *Id*. at

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2. Despite plaintiffs' acknowledgment that the cause of their cancer was unknown, the plaintiffs nonetheless argued that the causation burden had been met when their expert testified that exposure was a "contributing factor" to their cancers. *Id*. at 4.

The court held that, although a plaintiff does not have to negate every potential cause of his injury in order to prove but-for causation, *id.* at 4, "there is no indication in New Mexico case law that the but-for clause is no longer a required element of causation." *Id*. at 7 (citing *Talbott v. Roswell Hosp. Corp.*, 118 P.3d 194, 201 (N.M. Ct. App. 2005)). The district court noted that the Court of Appeals of New Mexico had specifically declined to relax this standard of causation to a "more lenient" standard requiring proof of only a "substantial possibility" that the injury at issue would have been avoided but for the tortious conduct. *Id*. (citing *Baer v. Regents of the Univ. of Calif.*, 972 P.2d 9 (N.M. Ct. App. 1998)). Therefore, to establish causation for a negligence claim, "a plaintiff must show that he was exposed to chemicals that could have caused the [complained-of] injuries . . . and that his exposure did in fact result in those injuries." *Id*. at 8 (quoting *Golden v. CH2M Hill Handford Group, Inc.*, 528 F.3d 681, 683 (9th Cir. 2008)).

## Advisory Committee Proposes Amendments to Federal Rules on Expert Witness Disclosures

With respect to expert discovery issues, the United States Judicial Conference's Civil Rules Advisory Committee proposed two amendments to Rule 26 of the Federal Rules of Civil Procedure in mid-2008. *See* Honorable Lee H. Rosenthal, Chair, Standing Committee on Rules of Practice and Procedure, Report of the Civil Rules Advisory Committee (June 30, 2008), *available at* http://www.uscourts.gov/rules/Reports/CV_Report.pdf. One amendment would limit discovery of draft expert disclosure statements or reports as well as many communications between expert witnesses and counsel. The Committee has found fault with the current rule, which allows discovery of such drafts and communications, because it has led to protracted discovery disputes over drafts or communications that might undermine an expert's testimony. These disputes have driven the cost of litigation higher in numerous ways, from time-consuming depositions to counsel retaining both a testifying and a consulting expert. *Id*. at 3–4. The proposed rule would still require disclosure of lawyer-expert communications related to compensation, as well as communications related to the identification of facts and assumptions considered by the expert in forming opinions.

The other proposed change stems from confusion as to whether courts should require reports from those experts who fall outside the parameters of Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure. Typically, these experts are treating physicians, whom some courts have required to submit a full report. *Id.* at 2. Under Rule 26(a)(2)(B), an expert witness must prepare and disclose a written report summarizing proposed testimony only if the witness "is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony." The amended rule would require parties to disclose a document of much less breadth and scope than a full expert report — a summary of the expected subject matter, facts, and opinions — for any witness not covered by Rule 26(a)(2)(B) if that witness is expected to be used at trial to present evidence under Federal Rule of Evidence 702, 703, or 705. The Committee believes this amendment would foster better preparation for witness depositions and, in some cases, would eliminate the need for depositions altogether. *Id*.

The Advisory Committee is seeking public comment on the proposed amendments through February 17, 2009. Comments may be submitted via e-mail to the Advisory Committee at Rules_Comments@ao.uscourts.gov or in hard copy to the Secretary of the Committee on Rules of Practice and Procedure, Administrative Office of the United States Courts, Washington, D.C. 20544. After the comment period, the Advisory Committee will submit a draft to the Standing Committee on Rules of Practice and Procedure. If approved by the Standing Committee, the

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amendments must also obtain approval from the Judicial Conference and the United States Supreme Court.

## II. PUNITIVE DAMAGES

### Missouri Court of Appeals Vacates $20 Million Punitive Damages Award Due to Lack of Evidence on Two of Three Claims

After a jury awarded $20 million in punitive damages in a tobacco suit, the Missouri Court of Appeals vacated the award because the plaintiffs had not offered sufficient evidence to submit the issue of punitive damages to the jury for two of three claims, and the court remanded the other claim for a new trial on punitive damages. *See Smith v. Brown & Williamson Tobacco Corp.*, No. WD65542 (Mo. Ct. App. Dec. 16, 2008), *available at* http://www.courts.mo.gov/file/Opinion_WD65542.pdf. The survivors of a deceased smoker filed a wrongful death action against the tobacco company Brown & Williamson ("B&W") for negligent failure to warn, negligent design, strict liability, and other claims. *Smith*, Slip Op. at 3. Finding for the plaintiffs, the jury awarded $2 million in compensatory damages, which the judge reduced to $500,000, and $20 million in punitive damages. *Id*. B&W raised numerous issues on appeal, including a challenge to the punitive damage award as violative of due process.

Although the Missouri Court of Appeals did not reach the due process issue, it did hold that the plaintiffs' evidence was not sufficient to submit the issue of punitive damages to the jury for negligent failure to warn and negligent design. *Id*. at 93, 98, 102. To submit a claim for punitive damages to a jury in Missouri, a plaintiff must establish clear and convincing evidence sufficient for a reasonable juror to conclude that the defendant's conduct was "outrageous because of evil motive or reckless indifference," and that the defendant knew or should have known of the likelihood of injury resulting from the conduct. *Id*. at 81, 84. Applying this standard to the claim of negligent failure to warn, the appellate court held that evidence establishing B&W's knowledge of nicotine's addictive qualities, attempts to increase the amount of nicotine in cigarettes, and repeated denials regarding the dangers of cigarettes was not "tantamount to intentional wrongdoing" and did not suffice to submit the issue of punitive damages to the jury. *Id*. at 92–93. Similarly, on the claim of negligent design, the court reasoned that B&W's decision to stop researching a safer cigarette out of concern that sales of its other cigarettes might decline was offset by expert testimony that a so-called safe cigarette was impossible; and this formed the basis of the court's holding that the plaintiffs had not presented clear and convincing evidence of B&W conduct "tantamount to intentional wrongdoing" or sufficient to submit the issue of punitive damages to the jury. *Id*. at 98.

By contrast, for the strict liability claim, plaintiffs presented evidence that B&W repeatedly prevented information on the harms of smoking from reaching the public, attempted to create controversy surrounding the issue of the hazards of smoking and the addictiveness of nicotine, and disputed every Surgeon General's report on smoking, regardless of the basis of the report. *Id.* at 101. Based on this evidence, the court ruled that the plaintiffs had presented sufficient evidence to submit the issue of punitive damages to the jury and ordered the case remanded for a new trial on the issue of punitive damages for the strict liability claim only. *Id*. at 101–02.

## III. PRODUCTS LIABILITY

### Washington Supreme Court Limits Liability to Chain of Distribution

By a 6-3 vote, the Supreme Court of Washington held that, under Washington common law, a manufacturer cannot be deemed negligent or strictly liable for failing to warn of the dangers

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of asbestos insulation supplied by another company. *See Simonetta v. Viad Corp.*, No. 80076-6 (Wash. Dec 11, 2008), *available at* http://www.courts.wa.gov/opinions/pdf/800766.opn.pdf. The plaintiff claimed that his lung cancer resulted from exposure to asbestos while performing maintenance on an evaporator, a device used by the Navy to desalinate seawater. *Simonetta*, Slip Op. at 1–2. The evaporator was manufactured by Griscom Russell, to which the defendant, Viad, was the purported successor. *Id.* at 2. Griscom shipped the evaporator, and an unknown company supplied the asbestos insulation that was installed on the evaporator. *Id*.

The Supreme Court of Washington rejected liability for both negligence and strict liability. First, the court held that, under Washington common law, "the duty to warn is limited to those in the chain of distribution of the hazardous product." *Id*. at 17. Since Viad did not manufacture or supply the asbestos used to insulate the evaporator, Viad owed no duty to Simonetta to warn of the dangers of the insulation. *Id*. Second, the court held that Viad could not be held strictly liable because the evaporator was sold without asbestos insulation and because the evaporator worked as intended; therefore the evaporator was not an unreasonably dangerous product. *Id*. at 32–34. Moreover, since Viad was not in the chain of distribution of the asbestos insulation, it had no control over the Navy's choice of insulation and derived no revenue from insulation sales. *Id*. at 34.

On the same day, the Supreme Court of Washington applied *Simonetta* to another asbestos case, holding that defendant manufacturers had no duty to warn of the dangers of asbestos-containing insulation that was later applied to their products, since the manufacturers were not in the chain of distribution. *See generally Braaten v. Saberhagen Holdings*, No. 80251-3 (Wash. Dec. 11, 2008), *available at* http://www.courts.wa.gov/opinions/pdf/802513.opn.pdf.

## Ohio Supreme Court Rules That Case Imposing Strict Liability on Non-Manufacturing Sellers Does Not Apply Retroactively

On October 22, 2008, the Supreme Court of Ohio held that its decision in *Temple v. Wean United, Inc.*, 364 N.E.2d 267 (Ohio 1977), which imposed strict liability on non-manufacturing sellers of defective products, should apply on a prospective basis only. *See DiCenzo v. A-Best Prods. Co., Inc.*, No. 2008-Ohio-5327 (Ohio), *available at* www.supremecourtofohio.gov/rod/docs/pdf/0/2008/2008-Ohio-5327.pdf. The widow of a steel mill employee filed suit against several defendants, alleging strict liability and other causes of action for asbestos exposure. *DiCenzo*, Slip Op. at 2. One of the defendants, a supplier but not a manufacturer of the products at issue, moved for summary judgment on the basis that it could not be strictly liable for supplying products prior to the issuance of *Temple* in 1977. *Id*. at 2–3. Though the lower court's three-judge panel unanimously granted the defendant's motion, the Court of Appeals of Ohio remanded the action for further proceedings, holding that *Temple* should instead apply retroactively pursuant to a three-prong test set forth by the Supreme Court of the United States in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). *Id*. at 3.

On appeal, the Supreme Court of Ohio reversed the appellate court's ruling and reinstated the judgment of the lower court. Although the court agreed with the appellate court's conclusion that the three-prong test set forth in *Chevron Oil Co*. was consistent with Ohio law and governed the decision, the court nevertheless overturned the appellate court's application of the test to the *Temple* decision. *Id*. at 6–8, 17. While a state-court decision generally "applies retrospectively unless a party has contract rights or vested rights under the prior decision," *id.* at 10, a court has discretion to apply its decision on a purely prospective basis after weighing the following considerations: (1) whether the decision establishes a new principle of law that was not foreshadowed in prior decisions; (2) whether retroactive application of the decision promotes or retards the purpose behind the decision; and (3) whether retroactive application of the decision causes an inequitable result. *Id*. at 10–11 (citing *Chevron Oil Co*., 404 U.S. at 106–07).

The Ohio Supreme Court found, in applying the three-prong test, that *Temple* should be

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limited to prospective application because: (1) *Temple* announced a new rule allowing non-manufacturing sellers of defective products to be held liable; (2) retroactive application of *Temple* to non-manufacturing sellers of asbestos products, which had not been sold for approximately 30 years, would neither promote nor impede the purpose of the strict liability doctrine of inducing manufacturers and suppliers to make those products safer; and (3) the imposition of such a potential financial burden on non-manufacturing suppliers of asbestos products for such an unforeseeable obligation would result in "great inequity." *Id.* at 12–17.

## IV. SUBSURFACE CONTAMINATION

### California Court Finds Settlement Resolving Contamination Claims Does Not Preclude Similar Suit at Same Sites

A California Court of Appeal ruled that a settlement agreement between ExxonMobil and a citizens' group for alleged violations of the Safe Drinking Water and Toxic Enforcement Act of 1986 ("Proposition 65") did not preclude a nearly identical lawsuit by another citizens' group. *See Consumer Advocacy Group, Inc. v. ExxonMobil Corp.,* No. B201245 (Cal. Ct. App. Nov. 20, 2008), *available at* http://www.courtinfo.ca.gov/opinions/documents/B201245.PDF. In 1999, the Consumer Advocacy Group ("CAG") filed an action alleging that ExxonMobil violated Proposition 65 by knowingly allowing benzene, toluene, and lead to leak into drinking water at various locations throughout California. *Consumer Advocacy Group, Inc.*, Slip Op. at 2. After CAG filed suit, Communities for a Better Environment ("CBE") filed a lawsuit claiming that ExxonMobil violated Proposition 65 by knowingly allowing benzene and toluene — but not lead — to leak into drinking water at sites in California. *Id.* at 3. In 2004, a San Francisco trial court approved a settlement agreement between ExxonMobil and CBE that purported to resolve the site-specific allegations of benzene and toluene contamination, including liability for some sites listed in CAG's complaint. *Id.* ExxonMobil then moved for summary judgment on the "overlapping" sites in the CAG lawsuit based on res judicata, and a Los Angeles trial court held that the CBE settlement precluded the CAG lawsuit. *Id.*

On appeal, CAG argued that res judicata did not bar its lawsuit, and the Court of Appeal agreed. *Id.* at 13. Although the CBE settlement was a final judgment on the merits, it did not resolve liability for alleged releases of lead by ExxonMobil, and the settlement therefore did not preclude CAG's entire lawsuit at the overlapping sites. *Id.* at 11–13.

## V. CLASS ACTIONS

### District Court Denies Class Certification in Teflon Multi-District Products Liability Litigation

In the multi-district litigation of Teflon product liability claims, the United States District Court of Iowa denied a motion for class certification of 23 proposed classes of plaintiffs who used DuPont cookware featuring non-stick cookware coatings ("NSCC"), which, plaintiffs allege, can decompose and release harmful levels of perfluorooctanoic acid. *See In re Teflon Prods. Liab. Litig.*, MDL No. 1733, Civ. No. 4-06-md-01733 (S.D. Iowa Dec. 5, 2008), *available at* http://www.iasd.uscourts.gov/iasd/opinions.nsf/55fa4cbb8063b06c862568620076059d/038942f8441af2c486257519005a305d/$FILE/Teflon.cla.pdf. Instead of seeking damages for physical injuries, plaintiffs sought only economic damages and injunctive relief. *In re Teflon Prods. Liab. Litig.*, Slip Op. at 5, 22. The district court held that the plaintiffs failed to satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure — i.e., typicality, cohesion, and the predominance of common issues and facts — as well as the implicit requirements of Rule 23, such as a clear definition of the class and that all representatives are members of the proposed class. *Id.* at 31.

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The court offered numerous examples for each requirement of Rule 23. For the implicit requirements, the court noted a lack of clarity as to whether each representative was a member of the class because the proposed representatives could not establish whether or when they had purchased DuPont cookware with NSCC. *Id*. at 9–12. With regard to the "typicality" requirements of Rule 23(a), since the class representatives had decided to forgo claims of physical injury, the court expressed concerns that class members could be precluded from litigating claims of physical injury in the future. *Id*. at 22–23. The court emphasized that the mere fact of ownership of DuPont non-stick cookware did not provide the cohesion necessary to satisfy Rule 23(b)(2). *Id*. at 26–28.

## District Court Denies Motion for Class Certification in FEMA Trailer Multi-District Litigation

The federal district court overseeing the multi-district litigation concerning formaldehyde exposure from Federal Emergency Management Agency ("FEMA") trailers refused to certify any of plaintiffs' proposed classes. *See In re FEMA Trailer Formaldehyde Prods. Liab. Litig.*, MDL No. 07-1873 (E.D. La. Dec. 29, 2008), *available at* http://www.laed.uscourts.gov/FEMA07md1873/Orders/order1014.pdf. Plaintiffs sought damages as a result of formaldehyde exposure from emergency housing units ("EHUs") provided by FEMA after Hurricanes Katrina and Rita. *In re FEMA Trailer Formaldehyde Prods. Liab. Litig.*, Slip Op. at 3. Plaintiffs named both the United States and manufacturers of the EHUs as defendants.

The court ruled that the plaintiffs failed to meet the class certification requirements of Rule 23 of the Federal Rules of Civil Procedure for all six of the proposed sub-classes. *Id*. at 22. Among other reasons, the court noted that factual differences underlying each plaintiff's case precluded a finding of commonality under Rule 23(a) because no single product caused plaintiffs' injuries and because each plaintiff's exposure to formaldehyde differed based on the EHU that the individual plaintiff occupied. *Id*. at 11–12. Moreover, since each plaintiff's medical history, injuries, and exposure to formaldehyde involved unique facts, the class representatives' claims were not typical of the class. *Id*. at 17. The court also held that the plaintiffs failed to meet the predominance and superiority requirements of Rule 23(b)(3) because each plaintiff had a different level of exposure to formaldehyde and suffered different injuries; different federal and state laws applied to particular plaintiffs' claims; and dozens of defendants planned to present individual defenses and witnesses. *Id*. at 24–25, 31. Accordingly, the court concluded that a class action was not superior to individual litigation and refused to certify any of the proposed classes, including subclasses related to medical services and economic loss. *Id*. at 31, 37, 40.