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PRODUCT LIABILITY

LAW SECTION · STATE BAR OF GEORGIA

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Section Activities

December 7, 2000
Product Liability Seminar
Atlanta, Georgia

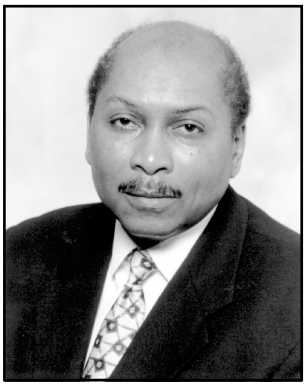
January 11-13, 2001
Midyear Meeting
State Bar of Georgia
Atlanta – Swissôtel

February 21-23, 2001
Defense Research Institute
Product Liability Conference
Las Vegas, Nevada
(312) 795-1101

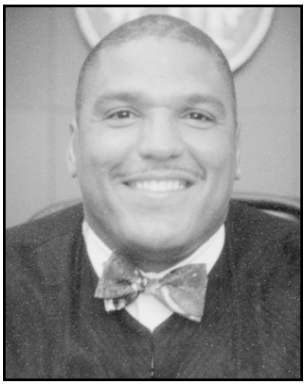
March 15-18, 2001
ABA
Product Liability Annual
Committee Meeting
New Orleans, Louisiana
(312) 988-6256

June 2001
ABA
Tort & Insurance Practice
Product Liability
Megaconference

December 7 Seminar on Nuts and Bolts of Product Liability Law



Bernard Taylor



Judge Gino Brogdon

Ileana Martinez

Plan to join us for an interesting CLE program on the Nuts and Bolts of Product Liability Law on December 7, 2000 at the Ritz-Carlton Downtown Hotel in Atlanta. Special Moderator for the program will be Bernard Taylor of Alston & Bird. Mr. Taylor is on a national trial team for product litigation for Baxter Healthcare Corporation and Allegiance Healthcare Corporation, and he recently achieved a defense judgment in a product liability trial in California. We are also delighted that Judge Gino Brogden will be participating in the panel on Discovery Issues, drawing from his current experience on the bench as well as his useful insight from his past experiences representing both plaintiffs and defendants. Defense counsel, Jay Bryan, and plaintiff's counsel, Chris Farmer, will be panelists along with Judge Brogden on Discovery Issues. In addition, during the morning session, Ileana Martinez and Bryan Vroon will participate in a panel discussion on Pretrial Considerations.

The luncheon speaker is Mark Herrmann of Jones, Day, Reavis & Pogue. Mr. Herrmann is a partner who handles product liability cases and who

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The seminar registration form is available on page 13.

Message from the Chair

Stephanie E. Parker
Jones, Day, Reavis & Pogue

Section Achievement Award

I am very pleased to announce that our Section received an Achievement Award at the Annual Meeting of the State Bar. The award was made possible by the hard work of many lawyers who spoke at our Product Liability seminars and who contributed articles to this newsletter over the past year. Thank you!

I am also pleased to report that our Section ended the 1999-2000 Bar year with its highest-ever number of members – 466.

December 7 Seminar

Laura Owens of Alston & Bird is co-chairing our next seminar, which is set for December 7. Laura has practiced Product Liability law for 15 years and specializes in product liability litigation involving medical devices and pharmaceuticals. She has been a speaker at national Product Liability seminars and has brought wonderful energy and ideas to our seminar. We have a terrific line-up of speakers from the plaintiff's bar, the defense bar, and the Bench. I hope you can join us.

Over the past year, we have received many requests for a "Nuts & Bolts" seminar, especially focused on discovery and trial issues. As you will see elsewhere in this newsletter, those topics will be fully covered at the seminar.

Thank you

A very special thank you to Lesley Smith for her assistance with Section activities. She has recently provided us with several new ideas for Section activities that have been used with success by other Sections. Also, many thanks to Larry Jones and his helpful staff for their continued assistance with our Product Liability seminars, including the one in December.

Best wishes for the upcoming Holidays. Please contact me if the Section can ever be of assistance to you.

Stephanie E. Parker
Jones, Day, Reavis & Pogue
3500 SunTrust Plaza
303 Peachtree Street, NW
Atlanta, Georgia 30308
(404) 581-8552
(404) 581-8330 - FAX
SEParker@JonesDay.com

Significant Changes To Federal Rules Of Civil Procedure To Take Effect On December 1, 2000

By Gregory Hanthorn
Jones, Day, Reavis & Pogue

If you have not already done so, take a look at the amendments to the Federal Rules of Civil Procedure that go into effect on December 1, 2000. Some of the differences are significant and major, including:

– The scope of discovery established by Rule 26(b) has been changed. The amendments set up a two tier system for discovery -- "party-controlled" and "court-ordered." A party, without order of court or stipulation, can obtain discovery only of "matter, not privileged, that is relevant to the claim or defense of any party, ..." Broader discovery "[f] or good cause" can be ordered, of "any matter [presumably also not privileged] relevant to the subject matter involved in the action." The Advisory Notes state -- "The rule change signals to the court that it has the authority to confine discovery to the claims and defenses asserted in the pleadings, and signals to the parties that they have no entitlement to discovery to develop claims or defenses that are not already identified in the pleadings." Adv. Ctee Note to Amended R. 26(b). As a practical matter, for discovery that is not plainly directed to the claims or defenses in the

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Product Liability Institute Held In June

by Shannon Singleton
Stoll, Keenon & Park

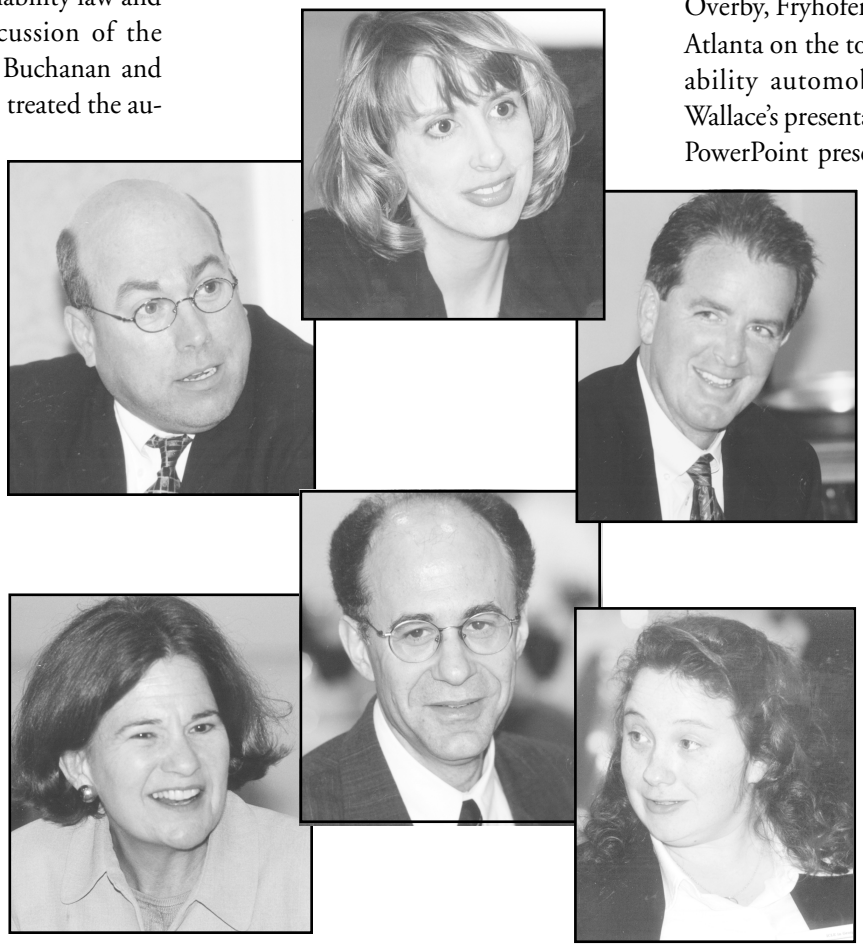
On June 9, 2000, the Product Liability Law Section of the State Bar of Georgia held its Ninth Annual Product Liability Institute Seminar in Atlanta. The day-long series of lectures and panel discussions was enjoyed by over 75 attorneys.

The morning session began with a panel discussion of litigators on both sides of the bar, as well as in-house counsel. Sara Turnipseed of Nelson, Mullins, Riley & Scarborough in Atlanta acted as moderator. Panelists included Christine Buchanan of GTE Service Corporation, Michael McGlamry of Pope, McGlamry, Kilpatrick & Morrison in Atlanta, and John Barrow of Winburn, Lewis & Barrow in Athens. The panel discussion focused on emerging trends in Georgia product liability law and included an in-depth discussion of the Ogletree decisions by Ms. Buchanan and Mr. Barrow. These panelists treated the audience to a "behind-the-scenes" look at the case. Mr. Barrow and his firm represent the plaintiff in this case and Ms. Buchanan was Judge Wendy Shoob's law clerk on the case.

Much of the focus of this year's Product Liability Institute Seminar was on the growing importance of class action lawsuits. During the morning session, Richard "Doc" Schneider of King & Spalding discussed the Plaintiff's bar's increasing use of class action procedural devices to expand the scope — and costs — of litigation. Mr. Schneider relied heavily on his experience in the Engle case, the massive smoking and health tobacco litigation class action that recently concluded in Miami, Florida. During the afternoon session, Robert Klonoff of Jones, Day, Reavis & Pogue's Washington, D.C. office addressed some "cutting-edge" issues in product liability class actions, including the 1998 Amendment to Rule 23 — Rule of Civil Procedure 23 (f) — whereby Courts of Appeals may permit an immediate appeal of a district court's class action certification decision. Mr. Klonoff, who is the author of West's Nutshell on Class Actions, also addressed the growing propensity of Plaintiff's counsel to file class action lawsuits in state court and Congress's initiatives to curb this pattern. Specifically, Mr. Klonoff identified pending bills in both the House of Representatives and Senate that would amend the diversity jurisdiction requirements for class action cases so that removal to federal court would be easier.

During the lunch hour, William Cannon, Jr. of Cannon & Meyer von Bremen in Albany and a former President of the State Bar of Georgia discussed State Bar initiatives to change the public's perception of attorneys. Mr. Cannon's presentation included a videotape and radio announcements produced by the State Bar in conjunction with its efforts to create a better image for lawyers in our communities.

Other programs included a presentation by Lee Wallace of Butler, Wooten, Overby, Fryhofer, Daughtery & Sullivan in Atlanta on the topic of plaintiff product liability automobile accident cases. Ms. Wallace's presentation included an excellent PowerPoint presentation showing what to look for — and what to avoid — when confronted with a product liability automobile case. Dart Meadows, who has been actively involved with DRI, gave a talk on recent case updates and provided the attendees with a very useful summary of recent cases. Finally, William Plybon of Alston & Bird in Atlanta, and Jonathan Engram of Womble, Carlyle, Sandridge & Rice of Winston-Salem, North Carolina discussed medical experts and other medical issues. The conversation included a discussion of requests for autopsy or testing and motions in limine.



Seminar speakers clockwise from top left: Doc Schneider, King & Spalding; Lee Wallace, Butler, Wooten; Dart Meadows, Meadows, Ichter & Trigg; Christine Buchanan, GTE; Robert Klonoff, Jones, Day, Reavis & Pogue; Sara Turnipseed, Nelson, Mullins.

Financial Damages in Product Liability

by Denise Hipps
Phillips Hitchner Group, Inc.

Product liability lawsuits, particularly those that involve wrongful death or personal injury, often require the services of a financial expert. In such situations the financial expert can play an integral part in the discovery process with respect to document requests and deposition questions and calculating damages for expert testimony or for use in the settlement process. This article will highlight the typical areas of financial damages in product liability matters and common mistakes that experts often make in the calculation of damages.

Damages related to wrongful death and personal injury matters are those that can be calculated with "reasonable certainty". The types of damages in these cases include lost earnings, lost fringe benefits, household services, medical expenses and the loss in value of a business due to the injury or death of a key person. Reliable statistical data, which can be used as a basis for these calculations, can be found in sources such as the Bureau of Labor Statistics work life expectancy tables, Vital Statistics Division of the National Center for Health Statistics life expectancy tables, Department of Labor and U.S. Chamber of Commerce statistics about fringe benefits, and industry, as well as state and local government, data about salaries. Medical and vocational experts can provide a reliable basis to compute future medical and rehabilitation costs. There are many references and guides to personal injury and wrongful death damages that provide outlines and checklists for items included in damages.

In addition to these more traditional categories of damages, some experts will proffer more controversial damages such as hedonic losses, or those resulting from the lost enjoyment of life. Not only is quantification of these types of losses difficult and often speculative, due to the lack of statistical evidence, they are not accepted in many jurisdictions. "Lost active leisure", which is accepted in some jurisdictions, applies to the time an injured party was active in leisure activities such as jogging, tennis, or any other activity that the injured party can no longer enjoy. Losses are typically based on the opportunity cost for doing the activity.

A financial expert can often be asked to assess reasonable punitive damages or what is the maximum amount that is not considered excessive. For example, the California Supreme Court ruled that a defendant's financial condition must be presented to the jury before punitive damages can be imposed, because without this information, a court is unable to determine whether or not the award is excessive. Cases in both New York and New Mexico have also considered the wealth of the defendant admissible for assessing punitive damages, and many courts are now following suit.

Financial experts make a number of common mistakes in determining damages for personal injury and wrongful death suits. The following is a list of mistakes to look for in a report:

1. Earnings base: Past earnings are not necessarily indicative of the future, such as with impending retirement or a line of work that requires upgrades in skills to retain a level of earnings or to increase earnings. Also, the injured party may be working in a declining industry. Experts often mistake the time period for lost earnings to be the life expectancy of the injured or deceased, rather than the work life expectancy. As in employment suits, often experts don't consider the highest level of work that the injured party may be able to reach or may have attained if the injured had lived.

2. Employee benefits: Common errors here include leaving benefits out of the calculation or failing to consider anticipated changes in the level of benefits.
3. Personal consumption: Plaintiff's heirs are not entitled to recover the deceased's personal consumption spending; however, personal consumption expenses are ignored in personal injury claims.
4. Growth and discount rates: These rates should be properly used in tandem or growth rates may be ignored if the "real rate" for discounting to the present value is used rather than the "nominal rate". Improper selection and use of these rates is perhaps the most common mistake made by experts. Growth rates for true growth of

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Case Updates

$2.6 Million Verdict Reversed on Discovery Ground

International Harvester Co. v. Cunningham, 245 Ga. App. 736 (2000)

The plaintiff was severely injured when a crank handle broke off a disc harrow and hit him in the face. The Court of Appeals reversed the jury verdict in plaintiff's favor because the trial court abused its discretion when it refused to compel the plaintiff to produce the crank handle for an expert inspection. The plaintiff's expert had unlimited access to the crank handle, yet International had only been given one opportunity to test the handle. The court wrote:

"By preventing the parties from having equal access to the pivotal piece of evidence, the trial court's denial of International's request thwarted the very purpose of discovery."

Product Liability Claim Against Pharmacy and Pharmacist

Robinson v. Williamson, 245 Ga. App. 17 (2000)

This action, with claims for both medical malpractice and product liability, was filed against Revco Discount Drug Centers and one of its pharmacists. The product liability claim was based on the theory that the defendants sold a defectively packaged and mislabeled product. The Georgia Court of Appeals held that, under O.C.G.A. § 51-1-11.1 (b), the strict product liability statute applies only to a manufacturer, not a product seller. The appellate court then held that a pharmacist and pharmacy are product sellers, not manufacturers. The court held that the remaining claims were barred by the medical malpractice statute of repose.

Insufficient Evidence of Product Liability Defect in Thanksgiving Ham

Mann v. D.L. Lee & Sons, Inc. 245 Ga. App. 224 (2000)

The plaintiffs here claimed that defendant's Thanksgiving ham was defective, thus causing food poisoning. The trial court granted summary judgment, and the Court of Appeals confirmed. Finding that the plaintiffs had introduced no direct evidence that the ham was tainted, the court held that the plaintiffs had not carried their burden of excluding every other reasonable hypothesis as to the cause of their illness. The court further found that the mere fact that the plaintiffs became sick after eating the ham was insufficient, given that the plaintiffs ate other foods at the same time they ate the ham, that the ham had not been tested, and that the ham did not look, smell or taste bad.

Significant Changes to Federal Rules

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pleading, the burden of demonstrating "good cause" will rest upon the requesting party.

– Rule 26(a)(1) has been revised so that the initial disclosures cannot be obviated by local rules. BUT, if "a party objects during the [Rule 26(f)] conference that initial disclosures are not appropriate in the circumstances of the action and states the objection in the Rule 26(f) discovery plan," then the disclosures will not have to be made until the court resolves the objection. Amended R. 26(a)(1).

– Rule 26(a)(1) disclosures have been narrowed to only require disclosure of material which the disclosing party intends to "use to support its claims or defenses." This replaces the "relevant to disputed facts alleged with particularity in the pleadings" standard of current Rule 26(a)(1). CAVEAT — the "use to support" is to be given a broad meaning. The Advisory Committee Notes state that "use" includes use in motion practice, court conferences, and even "use of a document to question a witness during a deposition." Adv. Ctee Note to Amended R. 26(a).

– Absent court order, Amended Rule 30 now limits depositions to one day of 7 hours, excluding breaks.

As expressed by Committee members at an October 26 ALI-ABA CLE, the rule changes are designed to encourage/prod District Judges to take a more active role in policing overly broad, abusive discovery.

Industrywide Aggregated Claims
Potential Claims by the United States

by Peter Bierstecker
Jones, Day, Reavis & Pogue

In the last few years, insurers, State governments, and the United States have made headlines by suing tobacco companies on the theory that smoking caused or exacerbated illnesses for which the insurers and governments had to pay the costs of treatment; the suits seek to recoup those costs. While it may be tempting to ignore these suits as simply another aggressive new weapon in the tobacco wars, that would be imprudent. To the contrary, this general theory applies equally to manufacturers of every product in America that could be argued to cause or exacerbate illness or injury.

Manufacturers of medical drugs and devices have particular reason to be concerned. In its suit against the tobacco industry, the United States has invoked the very same statutory provisions — the Federal Medical Care Recovery Act ("MCRA"), 42 U.S.C. §§2651-2653; and the Medicare Secondary Payer provisions of the Social Security Act ("MSP"), 42 U.S.C. §1395y(b)(2) — upon which it relied to intervene in class action settlements involving pacemaker leads, bone screws, breast implants, and diet drugs. *See, e.g., Wilson v. Siemens Pacesetter, Inc., et al.,* Case No. C-1-93-0188 (S.D. Ohio); *Report of the Advisory Committee on Civil Rules and the Working Group on Mass Tort to the Chief Justice of the United States and to the Judicial Conference of the United States,* February 15, 1999, App. at 79 (bone screws); *U.S. v. Baxter Int'l, Inc., et al.,* Case No. CV-00-BU-0837-S (N.D. Alabama) (breast implants); and *In Re: Diet Drugs (Phentenmine, Fenfluramine, Dexafenfluramine) Products Liability Litigation,* MDL Doc. No. 1203 (E.D. Pennsylvania).

In ways that threaten every industry, including drug and medical device manufacturers, the United States, in its pursuit of the tobacco industry, unjustifiably seeks to expand the reach of these statutes and to pursue aggregate claims, dispensing with individualized proof of tort liability traditionally required by the Constitution.

Stretching the Reach of MCRA

The MCRA belatedly was adopted in response to the Supreme Court's decision in *United States v. Standard Oil,* 332 U.S. 301 (1947). *See, e.g., United States v. Trammel, 899 F.2d 1483, 1486 (6th Cir. 1990). Standard Oil* held that, absent explicit congressional authorization, the United States had no right of action against a tortfeasor to recover medical expenditures incurred by the United States as a result of tortious injury to a soldier. 332 U.S. at 304.

As originally enacted in 1962, MCRA authorized the Government to recover the "reasonable value" of medical care that it "furnished" to "a person who is injured or suffers a disease . . . under circumstances creating a tort liability upon some third person . . . to pay damages therefor." Pub. L. No. 87-693, §1, 76 Stat. 593 (1962). Despite the express statutory language limiting the right of recovery to health care "furnished" by the Government, Federal agencies and most courts interpreted this provision as reaching health care either directly furnished by the United States or paid for out of general Government revenues. *See, e.g.,* 32 C.F.R. § 199.12(e) (1986) (Department of Defense); 32 C.F.R. § 842.118 (1990) (Air Force); *Commercial Union Ins. Co. v. United States*, 999 F.2d 581, 586 (D.C. Cir. 1993) (reading "furnished" to encompass medical expenses "paid for by the Government"); *but see Guyote v. Mississippi Valley Gas Co.,* 715 F. Supp. 778, 780 (S.D. Miss. 1989) and *United States v. Fort Benning Rifle & Pistol Club,* 387 F.2d 884, 887 (5th Cir. 1967) (both questioning whether MCRA reached medical care paid for out of general Federal funds but not directly furnished by the Government). A conforming and clarifying amendment accordingly was made to MCRA in 1996, authorizing recovery for healthcare costs that the Government either "furnished" or "paid for." Pub. L. No. 104-201, §1075(c)(4), 110 Stat. 2663 (1996) (codified at 42 U.S.C. §2651(a)).

Since its enactment in 1962 and continuing after its amendment in 1996, MCRA consistently has been applied only to recoup the costs of medical care either directly furnished by the Government or paid for out of general Federal revenues, such as the costs of health care provided to

military personnel and veterans. MCRA has never been applied to recover the costs of medical care under social or private insurance programs, particularly health care provided through Medicare, 42 U.S.C. §§ 1395i, 1395t, or the Federal Employee Health Benefits Act, 5 U.S.C. § 8901, *et seq.* ("FEHBA"). At no time have the agencies directly responsible for administering social and private insurance programs, such as Medicare and FEHBA programs, adopted regulations to implement MCRA. To the contrary, they have expressly determined that MCRA is inapplicable precisely because the health-care programs they administered are a form of insurance. *See, e.g.,* Health Care Financing Administration ("HCFA") Ruling 79-4 (1979), *reprinted in* 52 *Fed Reg.* at 26,088, 26,089 (1987) (explaining inapplicability of MCRA to Medicare because "the nature of Title XVIII [*i.e.,* Medicare] reimbursement as social insurance" stands "in contrast to those 'government payments' specified by the Federal Medical Care Recovery Act."). Government recovery of health-care costs under insurance programs, instead, is governed by and has been pursued under separate statutory provisions, such as the MSP, 42 U.S.C. §1395y(b)(2), or contractual subrogation provisions.

In its lawsuit against the tobacco industry, the United States nonetheless argues, for the first time, that MCRA is much more expansive. It contends that, since 1962, the "plain language" of MCRA has authorized recovery for medical care provided by all Government programs, including insurance programs, such as Medicare and FEHBA programs.

Whatever one thinks of the merits, it is clear that, if adopted, the Government's new-found position would increase substantially the potential liability of everybody, not just cigarette manufacturers, under MCRA. For example, Medicare and FEHBA health-care expenditures, according to a Government report, total about $225 billion annually; they are nearly seven times as large as those of the Veterans and Defense Department programs combined. *See,* General Accounting Office, *Federal Health Programs*, at Table 1.1 (August 7, 1998).

Extending MSP Beyond Primary Insurance Plans

The Medicare Secondary Payer provisions of the Social Security Act, the decisional law, the legislative history, and HCFA's own construction of the MSP make clear that the MSP permits recovery against insurance plans, but it does not authorize lawsuits against alleged tortfeasors.

By its terms, the MSP specifically authorizes Medicare to seek recovery of health care expenditures "against any entity which is required or responsible . . . to pay . . . under a primary plan." 42 U.S.C. §1395y(b)(2)(B)(ii). A "primary plan" means "a group health plan or large group health plan . . . a workmen's compensation law or plan, an automobile or liability insurance policy or plan (including a self-insured plan) or no fault insurance . . ." *Id.* §1395y(b)(2)(A).

The decisional law comports with the language of the MSP, expressly noting that recovery is limited to insurers, not tortfeasors. *See, e.g., United States v. Rhode Island Insurers' Insolvency Fund,* 80 F.3d 616, 619-621 (1st Cir. 1996) (distinguishing statutes that apply to insurers and tortfeasors from MSP which "specifically adverts to insurance"); *Health Insurance Ass'n v. Shalala,* 23 F.3d 412, 427 (D.C. Cir. 1994) ("[T]he MSP statute plainly intends to allow recovery only from an insurer"); *Evanston Hosp. v. Hauck,* 1 F.3d 540, 544 (7th Cir. 1993) (MSP applies to contractual obligations to pay insurance, not to tortfeasors); *In re Dow Corning*, No. 95-20512 (Bankr. E.D. Mich.) June 22, 2000 slip. op. at 57-59 (granting, in part, summary judgment against the Government).

The legislative history, moreover, makes no mention of tortfeasors, focusing exclusively on insurers. *See, e.g.,* H.R. Rep. No. 96-1479 at 133 *reprinted in* 1980 U.S.C.C.A.N. 5903,5924; H.R. Rep. No. 96-1167 at 389, *reprinted in* 1980 U.S.C.C.A.N. 5526, 5752. As to the agency responsible for administering Medicare, HCFA, nothing in its MSP regulations provides that MSP suits may be maintained against tortfeasors. *See, e.g.,* 42 C.F.R. §§ 411.200-411.206; HCFA's FY 2000 Annual Performance Plan. Nor is there a single reported case in which Medicare brought an MSP lawsuit against an alleged tortfeasor both to establish tort liability and to recover Medicare expenditures.

The United States now asserts, in its lawsuit against the tobacco industry, that MSP permits recovery not only against cigarette manufacturers but all other alleged tortfeasors because they either have liability insurance or have a "self-insured plan." The Government's position plainly would increase the exposure of all alleged tortfeasors, including drug and medical device manufacturers, permitting the Government to bring MSP lawsuits to establish liability where it previously participated only after damages were awarded or a settlement fund was established.

No Basis for Aggregate Action by United States

The United States, as would any complaining party, must prove an underlying tort, including proximate causation. The MCRA, for example, permits recovery by the United States only where "a person . . . is injured . . . under circumstances creating a tort liability upon some third person . . . to pay damages therefor." 42 U.S.C. §2651(a). The MSP, likewise, authorizes the United States to recover only against entities who are "required or responsible . . . to make payment . . . ." 42 U.S.C. §1395y(b)(2)(B)(ii); *see also In re Dow Corning*, slip. op. at 63 ("[A] liability insurer will be required or responsible to reimburse the Government for a Medicare payment only after it is established that such medical care was necessitated by the commission of a tort against the Medicare beneficiary by the insured.").

The federal courts repeatedly have held that individual smokers cannot aggregate their tort claims as a class action, through joinder, or other procedural devices. *See, e.g., Barnes v. American Tobacco Co. Inc.,* 161 F.3d 127, 143 n. 9 (3rd Cir. 1998); *Castano v. American Tobacco Co. Inc.,* 84 F.3d 734 (5th Cir. 1996); *Arkansas Blue Cross Blue Shield, et al. v. Philip Morris, Inc. et al.*, No. 98-CV-2612, slip op. (N.D. Ill. Jan. 20, 2000); *Thompson v. American Tobacco Co. Inc.*, 189 F.D.R. 544, 1999 WL 1054681 (D. Minn. Nov. 22, 1999); *Clay v. American Tobacco Co. Inc.*, 188 F.R.D. 483 (S.D. Ill. 1999); *Emig v. American Tobacco Co. Inc.*, 184 F.R.D. 379 (D. Kan. 1998); *Insolia v. Philip Morris,* 186 F.R.D. 535 (W.D. Wis. 1998); *Barreras Ruiz v. American Tobacco Co. Inc.*, 180 F.R.D. 194 (D.P.R. 1998); *Walker v. Liggett Group,* 175 F.R.D. 226 (S.D. W. Va. 1997); *Smith v. Brown & Williamson Tobacco Corp.,* 174 F.R.D. 90 (W.D. Mo. 1997); *Arch v. American Tobacco Co. Inc.*, 175 F.R.D. 469 (E.D. Pa. 1997).

More generally, nationwide, mass personal-injury products liability actions usually are unfit for such aggregated treatment. *See, e.g., Amchem Products, Inc. v. Windsor,* 521 U.S. 591 (1997) (rejecting class treatment of asbestos claims); *Georgine v. Amchem Products,* 83 F.3d 610 (3rd Cir. 1996) (same); *In re American Med. Sys. Inc.,* 75 F.3d 1069 (6th Cir. 1996) (rejecting class treatment of products liability claims); *In re Rhone-Poulenc Rorer,* 51 F.3d 1293 (7th Cir. 1995) (same); *In re Repetitive Stress Injury Litig.*, 11 F.3d 368 (2nd Cir. 1993) (rejecting attempt to aggregate 44 products liability cases); *Cimino v. Raymark Industries, Inc.*, 151 F.3d 297 (5th Cir. 1998) (rejecting attempt to aggregate over 2,000 asbestos claims extrapolating the results of sample trials); and *In re Fibreboard,* 893 F.2d 706 (5th Cir. 1990) (rejecting attempted consolidation of asbestos cases); *see also Abdullah v. ACands*, 30 F.3d 264 (1st Cir. 1994) (joinder of 1,000 asbestos plaintiffs inappropriate).

The rationale for these decisions is two-fold. First, variegated State strict liability, negligence, and consumer protection laws do not permit a single jury in a single proceeding to adjudicate a nationwide aggregation of personal-injury claims. *See, e.g.*, *Castano*, 84 F.3d at 734; *Georgine,* 83 F.3d at 627; *American Med. Sys.*, 75 F.3d at 1088; *Rhone-Poulenc*, 51 F.3d at 1300-02; *Repetitive Stress*, 11 F.3d at 373.

Second, even where the law of only a single jurisdiction applies, mass-tort personal injury victims cannot present aggregate proof of quintessentially individual factual issues, such as proximate causation, reliance, assumption of the risk, and comparative or contributory negligence. *See, e.g., Barnes*, 161 F.3d at 149; *Cimino,* 151 F.3d at 313-316; *Abdullah*, 30 F.3d at 264; *Fibreboard,* 893 F.2d at 711-12; *Thompson*, 189 F.R.D. 544, 1999 WL 1054681, at *7-*8; and *Arch,* 175 F.R.D. at 486-89.

There does not appear to be anything about the MCRA or the MSP that circumvents the traditional obstacles to aggregate determinations of mass-tort liability for personal injury. To the contrary, the MCRA and the MSP, coupled with the available precedent, suggest the Government's suit poses the same problems.

First, MCRA claims are governed by applicable state law. 32 C.F.R. § 537.22(a)(1) (applying the "law of the place where the injury occurred"); *Thomas v. Shelton,* 740 F.2d 478, 481 (7th Cir. 1984). So, too, are its MSP claims. *In re Dow Corning,* slip. op. at 66 ("[T]he Government's [MSP] claim . . . will be governed by the tort law of the applicable state."). Thus, the intractability of applying the law of 51 different jurisdictions in a single proceeding remains a formidable obstacle to the Government's action.

Second, under both MCRA and MSP, the Government still must prove the essential and individualized elements of tort liability, such as reliance and proximate causation. MCRA, for example, expressly provides that "the United States shall have a right to recover [independent of the rights of the injured or diseased person] from said third person [i.e., the tortfeasor]," and "shall, as to this right be subrogated to any right or claim that the injured or

diseased person . . . has against such third person." 42 U.S.C. § 2651(a). The Government's MCRA claims are independent in two ways: (1) they are not subject to certain procedural defenses applicable to the injured or diseased person, such as the statute of limitations; and (2) the Government's claims are unaffected by any settlement or judgment of an injured or diseased person's claims. *See, e.g., Commercial Union,* 999 F.2d at 587; *Trammel,* 899 F.2d at 1487-88; *In re Dow Corning,* slip. op. at 38-48. However, the Government remains a "subrogee" and, thus, "steps into [the injured person's] shoes" and "does not secure rights superior to" the injured person. *Commercial Union*, 999 F.2d at 587.

The same is true of MSP claims. *Waters v. Farmers Texas County Mut. Ins. Co.*, 9 F.3d 397, 400-01 (5th Cir. 1997) (The MSP "does not put the government in a position superior to [the injured person's] own claim [against the insurance company];" "the government stands exactly in [the injured person's] shoes."); *Health Ins. Ass'n v. Shalala*, 23 F.3d at 419 (MSP claims are "somewhat parallel" to those under MCRA); *In re Dow Corning,* slip. op. at 66-75.

Nothing in either MCRA or MSP gives the Government "a special right in derogation of established procedural law" that applies "simply because the Government is a party plaintiff." *United States v. Farm Bureau Ins. Co.,* 527 F.2d 564, 567 (8th Cir. 1976); *see also Commercial Union,* 999 F.2d at 587 (The Government, under MCRA, "does not secure rights superior to those of its employee."). There accordingly appears to be little or no basis for the Government's assertion that it should be permitted to prosecute an aggregate claim to establish tort liability to millions of recipients of Government-funded health care, even though the recipients could not do so themselves.

Statistical Evidence Cannot Prove Individual Tort Liability

The United States, in its tobacco lawsuit, has done more than assert an aggregate mass-tort claim for millions of recipients. It further contends that it can meet its burden of proof without any testimony from any individual, not even a named class representative, that the alleged misconduct of the cigarette manufacturers proximately caused them to begin or to continue smoking which, in turn, caused the individual to contract a smoking-related disease for which the United States provided reasonably necessary medical treatment. The United States, instead, intends to present only aggregate, statistical evidence to estimate the proportion of beneficiaries who have valid underlying tort claims, using statistical data to prove the essential tort elements (such as reliance, proximate causation, and injury), as well as the absence of affirmative defenses (such as assumption of the risk, or contributory or comparative fault).

The United States' proposed wholesale substitution of statistical evidence for individual testimony and cross-examination raises significant constitutional issues, even if the Government ultimately develops statistically reliable and valid aggregate evidence of individual factual issues, such as proximate causation and reliance, sufficient to pass muster under *Daubert v. Merrill Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993).

There are significant Due Process and Seventh Amendment concerns that arise when tort liability itself is estimated based solely on statistical proof. As the Fifth Circuit observed in *In re Fibreboard Corp.,* 893 F.2d 706, 709-10 (5th Cir. 1990), the trial judge's comparatively limited use of statistical proof to aggregate for decision some 3,000 asbestos claims caused it "profound disquiet" as a matter of due process. *See also Arch,* 175 F.R.D. at 489 n. 21 (shorthand methods to "establish the elements of causation and injury — without cross-examination or rebuttal evidence — would violate defendants' due process rights"); *In re Masonite Corp.,* 170 F.R.D. at 425 (defendants "cannot receive a fair trial without a process that permits a thorough and discrete presentation of [their] defenses"). Subsequently, in *Cimino*, the Fifth Circuit squarely held that the trial court's determination of liability and damages for some 3,000 asbestos claims by extrapolating statistically from 160 individually-litigated "sample" cases violated defendants' Due Process and Seventh Amendment rights to have a jury make a "litigated determination" of the "distinct and separable issues" of causation and damages with respect to "each individual plaintiff." 151 F.3d at 311, 314, 319-21.

Although not couched in constitutional terms, similar concerns about the fairness of aggregate proof in mass-tort cases were expressed in a recent breast implant case in which the Government asserted about $100 million in MCRA and MSP claims on behalf of approximately 15,000 recipients of Government-funded health care against a bankrupt manufacturer of breast implants:

> In the Government's view: it is under no obligation to identify the beneficiaries to whom such medical care was provided; it is under no obligation to specify the medical

care that was furnished to each of these beneficiaries; it is under no obligation to provide a detailed breakdown of the costs of such care; and it does not have a duty to demonstrate that each incidence of medical care for which the Government seeks reimbursement was necessitated by an injury caused by the Debtor. …If the United States [were] suing a defendant over a single federal beneficiary's treatment, [could] it prevail without identifying the patient, the benefits provided or the costs of the benefits? The answer to this question is obviously no. And if it cannot do so under those circumstances, why should it be able to do so when it is suing for benefits supplied to 100 patients?

The manifest unfairness of the Government's position is obvious. Fortunately, there is no legal authority that supports the Government's extreme argument.

In re Dow Corning, slip. op at 101; s*ee also Repetitive Stress* 11 F.3d at 373-74 (granting mandamus vacating consolidation of 44 separate actions and cautioning that "aggregate litigations must not be allowed to trump our dedication to individual justice, and we must take care that each individual plaintiff's — and defendant's — cause not be lost in the shadow of a towering mass litigation. . . . It is possible to go too far in the interests of expediency and to sacrifice basic fairness in the process."); *Malcolm v. National Gypsum,* 995 F.2d 346, 350 (2nd Cir. 1993) (consolidation for trial of 48 asbestos plaintiffs constituted abuse of discretion: "the benefits of efficiency can never be purchased at the cost of fairness").

The Potential For Abuse

Apart from the significant legal impediments to the Government's position that it may bring aggregate cases supported only by statistical evidence, placing such a weapon in the hands of the Executive Branch of Government is fraught with the potential for abuse. The Government's recent case against the tobacco industry provides a chilling example.

The health risks posed by smoking have long been known to the Government, which, after all, issued its first Surgeon General's Report on tobacco in 1964, before Medicare even existed. Congress nonetheless chose to proceed in this area — not by creating some huge potential Medicare liability to the Government or by banning the sale of cigarettes — but by requiring explicit warnings on every pack of cigarettes and by collecting billions of dollars in tobacco excise taxes annually.

The Clinton Administration, however, was not content with this state of affairs. It supported legislation to exact hundreds of billions of additional dollars from the tobacco industry as compensation to the Government for excess health-care costs it incurred in various programs, including Medicare, because of the existence of smoking. In June 1998, Congress rejected that legislative initiative. Undeterred, the President of the United States, in his next State of the Union address, instructed the Department of Justice to prepare a lawsuit against the tobacco industry. Previously, the Attorney General and a Department of Justice spokesperson had concluded publicly that the Government had no cause of action against the cigarette manufacturers:

DOJ Spokesperson Joe Krovisky: "Medicare and Medicaid statutes do not provide explicit authority for the federal government to pursue suit [against the tobacco industry]." *Federal Filings Business News*, Apr. 29, 1997. "Right now, it would seem we don't have authority to sue [the tobacco industry]." *The (Bergen County, N.J.) Record*, Apr. 30, 1997 at A4.

Attorney General Reno: Responding to a question regarding "whether the administration will sue the tobacco companies to reimburse the government for Medicare and Medicaid costs," Attorney General Reno responded "what we have determined was that it was the state's cause of action and that we needed to work with the states, that the federal government does not have an independent cause of action." U.S. Senate Committee on Judiciary Hearings on Justice Department Operations, 105th Cong., 1997 WL 210888 (Apr. 30, 1997).

One week later, responding at a press conference to a question about whether "the federal government [would] get involved in the tobacco cases to get Medicare and other health care costs," Attorney General Reno said, "Again, as I testified at the oversight hearing, an early decision was made that the federal government did not have an independent cause of action." *Federal News Service,* May 8, 1997.

Despite the Department of Justice's prior considered opinions, it commenced its lawsuit against the tobacco industry to recover Medicare and other health-care expenditures under MCRA and MSP before the next State of the Union address.

The Government's recent aggregate MCRA and MSP claims — *e.g.,*

$20 billion annually from the tobacco industry or $100 million from the bankrupt Dow Corning — are substantial. The amounts claimed are enough to threaten any targeted defendant with potential bankruptcy. Under these circumstances, there is a real risk that the Government will coerce defendants into settling unmeritorious claims to avoid the risk of financial ruin and will seek to extract supplemental non-monetary concessions that could not otherwise be obtained lawfully, such as, in the case of tobacco, Food and Drug Administration jurisdiction over tobacco products. *See, e.g., FDA v. Brown & Williamson Tobacco Corp., 120 S.Ct. 1291,* 2000 WL 289576 (U.S. Mar. 21, 2000). The danger to everybody is palpable.

This article originally appeared in the September 2000, Defense Research Institute's **For The Defense**. *It is reprinted here with permission.*

Since the original publication of this article, the United States District Court for the District of Columbia granted the defendant tobacco companies' motion to dismiss the federal government's Medical Care Recovery Act and Medicare Supplemental Payer Act claims on grounds that closely parallel those developed in the first two sections of this article. United States v. Philip Morris, Inc., et al., 116 F.Supp.2d 131 (September 28, 2000). The federal government is seeking to have those claims partially reinstated; the tobacco companies are resisting based, in part, on the aggregation issues developed in later sections of this article.

Nuts and Bolts of Product Liability Law

continued from page 1

is an adjunct professor of law at Case Western Reserve University School of Law. He is a graduate of Princeton and Michigan and clerked for Judge Nelson of the U.S. Court of Appeals for the Ninth Circuit. The afternoon will be devoted to Trial Issues, with Ted Eichelberger and Michael McGlamry discussing Plaintiff's Trial Issues, and Richard Hines V, Robert Monyak, and Paul Painter discussing Defense Trial Issues. The diversity and years of experience offered by these panelists should make this a useful program for everyone from the newest to the most experienced lawyers working on product liability litigation. The registration form is reprinted in this newsletter. The program carries 6 CLE hours, including 1 Professionalism Hour and 3 Trial Hours. The registration fee includes lunch.

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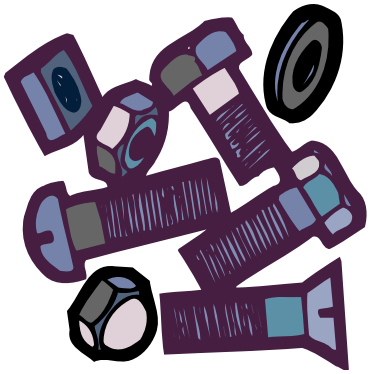
The Product Liability Newsletter welcomes submission of articles and case summaries involving issues of interest to product liability lawyers. If you are aware of a significant or interesting case, please bring it to our attention. We are also interested in short articles.

Thank you to Christine Panchur of Jones, Day, Reavis & Pogue for contributing the design and layout of this newsletter.



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Laura Lewis Owens, Program Co-chair; Alston & Bird LLP, Atlanta

MORNING SESSION

8:00 **REGISTRATION**
(All attendees must check in upon arrival. A removable sweater or jacket is recommended.)

9:00 **WELCOME AND PROGRAM OVERVIEW**
Stephanie E. Parker

9:10 **DISCOVERY ISSUES**
Moderator: *Bernard Taylor,* Alston & Bird, LLP, Atlanta
Panelists: *Honorable M. Gino Brogdon*, Judge, State Court of Fulton County, Atlanta
Jay B. Bryan, Hunton & Williams, Atlanta
Christopher M. Farmer, Harper, Walden & Craig, Atlanta

10:30 **BREAK**

10:45 **PRETRIAL CONSIDERATIONS**
Moderator: Laura Lewis Owens
Panelists: *Z. Ileana Martinez,* Alembik, Fine & Callner, P.A., Atlanta
Bryan A. Vroon, Pursley, Howell, Lowery & Meeks, Atlanta

AFTERNOON SESSION

12:00 **LUNCHEON** (Included in registration fee)
LUNCHEON SPEAKER:
Mark Herrmann, Jones, Day, Reavis & Pogue, Cleveland, OH

1:30 **PLAINTIFF'S TRIAL ISSUES**
Moderator: *TBA*
Panelists: *Theodore B. Eichelberger*, The Eichelberger Law Firm, Atlanta
Michael L. McGlamry, Pope, McGlamry, Kilpatrick & Morrison, Atlanta

2:30 **DEFENSE TRIAL ISSUES**
Moderator: *Bernard Taylor,* Alston & Bird, LLP, Atlanta
Panelists: *Richard K. Hines V,* Nelson, Mullins, Riley & Scarborough, LLP, Atlanta
Robert P. Monyak, Love & Willingham, Atlanta
Paul W. Painter Jr., Ellis, Painter, Ratterree & Bart LLP, Savannah

3:30 **ADJOURN**

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Financial Damages in Product Liability

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the injured party's career may be appropriate even when inflation rates should not be used due to the selection of the discount rate. Often the appropriate discount rate is the real portion of a risk free rate, such as Treasury Bills.

5. Prejudgment interest: Often ignored yet, many jurisdictions establish a statutory rate and method for given types of damages.
6. Mitigation: Often experts ignore mitigation even though most cases require its consideration. For instance, in a personal injury matter, the individual may still be able to work after the injury, but in a different job. The mitigating factors in the case that may reduce the loss include the salary for an alternative job, including annual increases, along with any applicable benefits. Unless it is determined the person cannot fill that position, damages would be reduced by that amount, even if the person decides not to work. The expert should look into the injured party's history to determine previous lines of work or qualifications that may provide feasible jobs after the injury.

Denise Hipps is a shareholder in Phillips Hitchner Group, Inc., a litigation and valuation services firm located in Atlanta, Georgia. DIRECT 404-898-2787; email: dhipps@phillips-hitchner.com; www.phillips-hitchner.com.

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