Wilson Elser
Product Liability Practice

For more than 30 years, Wilson Elser has built an enviable track record of defending against product liability and mass tort actions in a variety of categories. Our practice is among the largest and most diversified in the United States, with more than 70 seasoned product liability litigation attorneys across 23 offices. We represent not only U.S.-based businesses, but have for decades been at the forefront of representing foreign manufacturing companies confronting exposures arising from U.S. products liability litigation.

We work in integrated teams, marshaling those resources – and only those resources – required to properly advise our clients and to mount vigorous defenses for their products. Our shared knowledge ensures a coordinated, cost-effective approach, whether a claim arises out of a product’s design, manufacture or marketing.

Our clients include domestic and international corporations headquartered in North and South America, Europe and the Far East and representing a broad spectrum of industries and products.

A cornerstone of Wilson Elser’s Product Liability practice is our immersion in our clients’ businesses. We walk the production lines, visit quality control facilities and stay abreast of the latest government and industry compliance standards. Our attorneys also attend and speak at conferences, author articles for business publications and engage with clients and other counsel to reinforce our standing as consummate legal and business advisors.

We are frequently hired to try large, complex product liability matters in various jurisdictions throughout the country, often involving catastrophic injuries. Trial lawyers at heart, we’re not afraid to resolve matters in court when that path will best advance our clients’ objectives. Our attorneys routinely employ state-of-the-art computerized defense techniques in connection with product liability and mass tort cases. When appropriate, we call on the skills of specialized investigators and forensic experts in such areas as engineering design, medicine, biomechanics, full-scale burn testing, forensic failure analysis and information technology. We also conduct mock trials and engage fully in jury selection to shape the most effective strategy, overcome prejudices and access exposure.

Hydrofracking in the Marcellus Shale: The Shifting Litigation and Legislative Landscape

By Carl Pernicone and Samuel Reich

According to the U.S. Department of Energy’s Geological Survey, shale formations in the United States hold trillions of barrels of oil and trillions of cubic feet of natural gas. As energy companies tap these vast resources using a process called hydrofracking, like any new venture of this type, it will attract questions about safety and concerns about pollution. As with any human endeavor, progress brings with it a new set of potential liabilities. Hydrofracking in the Marcellus Shale is no exception. Some commentators have called it the “next asbestos.” This article provides an overview of these issues and offers some preliminary insight as to who may have to defend against Marcellus Shale–related suits.

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By John Henderson, Sean Higgins and Bryan Pollard

In a far-reaching decision that will benefit prescription drug manufacturers, the Texas Supreme Court adopted the “learned intermediary doctrine.” The court held that a prescription drug manufacturer fulfills its duty to warn an end user by providing the prescribing physician with an adequate warning. The court declined the invitation to create an exception for direct-to-consumer (DTC) advertising.

To request additional information regarding these product liability news articles, please contact Frank Manchisi via email at francis.manchisi@wilsonelser.com or Deborah J. Denenberg at deborah.denenberg@wilsonelser.com. Both may be reached by phone in our New York City office at 212.490.3000.
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According to the U.S. Department of Energy’s Geological Survey, shale formations in the United States hold trillions of barrels of oil and trillions of cubic feet of natural gas. The Marcellus Shale and the Utica Shale (located a few thousand feet below the Marcellus Shale, which is larger and thicker), covering much of the Eastern United States, constitute the largest deposit. As energy companies tap these vast resources using a process called hydrofracking, like any new venture of this type, it will attract questions about safety and concerns about pollution.

Briefly, hydraulic fracturing – or “hydrofracking” – involves drilling first a vertical well then a horizontal well, going deep below the surface under the shale rock formations, then injecting a pressurized solution of water, sand and chemicals to loosen the shale and release the gas. This is achieved by lowering a so-called “perforation gun” to the bottom of the well. When fired, the gun produces micro-fractures in the shale, releasing the trapped gas, which flows under natural pressure up the well pipe to the surface.

The Litigation Horizon

As with any human endeavor, progress brings with it a new set of potential liabilities. Hydrofracking in the Marcellus Shale is no exception. Some commentators have called it the “next asbestos.”

In defending against Marcellus Shale–related litigation, it is critically important for in-house counsel to ask these questions: Who are the plaintiffs and defendants likely to be? What entities are they likely to target as defendants, and what defenses can be raised?

The answers can enable in-house counsel to marshal the corporate resources needed to develop an effective “game plan” for defending against suits in this emerging liability area. This article provides an overview of these issues and offers some preliminary guidance and insight to counsel who may have to defend against Marcellus Shale–related suits.

POTENTIAL PLAINTIFFS

Categories of potential plaintiffs in Marcellus Shale litigation include environmental citizens groups, municipalities and individual citizens.

POTENTIAL DEFENDANTS

Among the many potential defendants in Marcellus Shale litigation are energy and drilling companies; designers and manufacturers of drilling- and well-related equipment, including well pads; waste transporters and waste storage companies; states, counties, and municipalities; insurance companies (subject to direct action under the New York Navigation Law); and various federal, state, and county agencies and municipalities. As the owners of property on which drilling operations are occurring, landowners – including individual homeowners – are another class of potential defendants. They face vicarious liability for any damage that the drillers may cause.

To date, no litigation has been brought against the designers and manufacturers of drilling- and well-related equipment. Nevertheless, if experience in other litigation areas is any guide, product liability suits may be pursued against these entities, premised on theories of design and/or manufacturing defects as well as failure to warn. Waste haulers and waste storage companies are also potentially in the crosshairs of this litigation as the entities responsible for transporting and disposing of the waste water that was injected into the shale to cause the fracking. This waste water contains contaminants, including the chemicals injected into the shale as well as heavy metals, brines, and other byproducts generated from close contact with the shale. It needs to be handled in a safe manner, invoking a technical process that exposes these types of businesses to potential suits.

Engineering consultants are another potential category of defendants. They may have provided advice regarding the placement of the well pads and cement casings around the well boring. Consultants who provide advice during the planning stages of the construction of a drilling site may become potential litigation targets – depending on how far down the chain a litigant wants to pursue.

Drilling operators could also face environmental class action lawsuits brought by large groups of allegedly “similarly situated” Marcellus Shale plaintiffs. Plaintiffs who allegedly suffered similar injuries could try to bring one major lawsuit, seeking certification as an identifiable Marcellus Shale “class.”

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Defenses Available to Defendants

It is important for in-house counsel to be aware of the defenses available in Marcellus Shale-related suits.

CONTRIBUTORY/COMPARATIVE NEGLIGENCE AND CAUSATION

Contributory/comparative negligence allows a jury to consider the plaintiffs’ own negligence (involvement) in bringing about the claimed damages. Plaintiffs have had trouble proving causation; that is, linking the drilling to their claimed damages. Plaintiffs must demonstrate that the contaminant to which they have been exposed has been identified as a potential cause of alleged illness or disease.

STATUTORY DEFENSES

Where appropriate, in-house counsel should take steps to ensure that their companies are complying with any applicable regulations and permit requirements. Doing so will make cases based on statutory claims or common law theories—particularly negligence per se, typical negligence and nuisance cases—difficult to prove.

PROCEDURAL DEFENSES

To bring citizen suit claims under most federal and state statutory provisions, potential plaintiffs must satisfy various notice and other procedural requirements and demonstrate that the particular environmental agency is not diligently pursuing enforcement. Defendants confronting potential citizen suit litigation may be able to preclude these actions by negotiating an administrative consent agreement with the regulatory agency to establish a corrective action program.

MEDICAL MONITORING DEFENSES

To effectively defend against medical monitoring claims, the defendant needs to attack one or more of the seven recognized elements of proof: (1) exposure greater than normal background levels (2) to a proven hazardous substance (3) caused by the defendant’s negligence and (4) as a proximate result of exposure, (5) plaintiff has a significantly increased risk of contracting a serious latent disease, and (6) a monitoring procedure exists that makes the early detection of the disease possible and (7) the prescribed monitoring regime is different from that normally recommended in the absence of the exposure and the prescribed monitoring regime is reasonably necessary according to contemporary scientific principles. If a defendant can refute any one of these elements, a medical monitoring claim will not succeed.

ADMISSIBILITY OF EXPERT OPINIONS

Another area of concern for in-house counsel is, of course, the admissibility of expert opinions. The U.S. Supreme Court articulated the standard for determining the admissibility of expert opinions in federal cases in its landmark opinion in Daubert v. Merrell Dow Pharmaceuticals. The Daubert standard requires the court to examine whether scientific evidence will assist the trier of fact and whether the evidence is the product of reliable and scientifically valid methodology. Further, in-house counsel for defendants should consider retaining expert witnesses to attack the merits of plaintiffs’ suits.

OTHER DEFENSES

Other potential defenses that should be considered are contractual in nature, including indemnity and defense, statute of limitations, impossibility and unconscionable terms.

Emerging Legislation

On the legislative front, at least one state, Vermont, has banned hydrofracking altogether. In New Jersey, faced with a veto threat from the governor, the legislature retreated from legislation totally banning hydrofracking in exchange for a one-year ban. In New York, a moratorium on new hydrofracking continues to be in effect while supporters and proponents of the process remain locked in a battle as to whether, and to what extent, it should be allowed.

In other states that allow hydrofracking, steps are being taken to actively regulate drilling. These states have either passed or are considering legislation requiring energy companies to disclose constituent ingredients and chemicals used in hydrofracking operations.

At the national level, the National Fracturing Responsibility and Awareness of Chemicals Act (FRAC Act) was re-introduced in both houses of the 112th United States Congress and remains in committee.

Conclusion

In spite of the apparent environmental risks associated with hydrofracking, it appears that drilling for natural gas using the hydrofracking process is here to stay. It will change the energy landscape – where we get our energy – and it will significantly reduce our dependence on foreign oil. There are huge dollar amounts at stake.

Litigation surrounding Marcellus Shale drilling is just beginning. New cases and hydrofracking issues arise almost daily. Thus, it will be left to the courts and the regulators to shape the hydrofracking landscape.

For more information on hydrofracking in the Marcellus Shale, including an analysis of its implications for litigation strategies, see the full article published in the Winter 2012 issue of DRI’s In-House Defense Quarterly. (Read full article)

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By Bob Harrison and Patrick Kearns

Wilson Elser recently obtained a defense verdict on behalf of a client, Grammer Inc., in a product liability case where the plaintiff sought more than $43 million in damages.

The case involved an accident stemming from the plaintiff’s use of a commercial tractor/mower. Grammer was the manufacturer of the seat that was installed on the subject tractor and that contained an operator presence “seat switch,” a primary issue in the case. The plaintiff was seriously injured when he was ejected from the seat of the tractor and run over while aerating a sports field as part of his duties as an employee of a San Diego school district. The “safety interlock system” on the tractor was designed to shut off power to the engine if the operator left the seat while the machine was in drive mode or there was power to an attachment. On the day of the accident the tractor continued to operate and move forward despite the plaintiff’s ejection from the seat and ran over him, causing substantial injuries.

The plaintiff brought suit against numerous parties, including the manufacturer of the tractor, Excel Industries; the manufacturer of the seat, Wilson Elser’s client Grammer; and the dealership, the manufacturer of the aerator and various manufacturers of the electrical components. Plaintiff alleged the safety system, including the “seat switch” in Grammer’s seat, was defective and caused the accident. Plaintiff also alleged that the failure of the tractor to have a seat belt – an optional feature on Grammer’s seats – was a design defect.

During more than two years of litigation against Grammer, plaintiff and defense expert tests consistently indicated that it was a “neutral lock switch” on the tractor itself, not the Grammer seat switch, which had malfunctioned causing a failure of the safety interlock system. Eventually, every defendant except Grammer settled out of the case.

Just days before trial, plaintiff’s counsel reportedly visited the school district office and interviewed a “key” witness without notice to Wilson Elser, and that witness changed critical testimony previously given in deposition more than two years prior. As a result, less than a week before trial began plaintiff’s primary liability expert changed his opinion and now claimed it was the Grammer seat switch that had malfunctioned and not the neutral lock switch.

Plaintiff based this new “theory” primarily on a prior recall that Grammer had initiated years earlier to replace its seat switch due to unspecified reports “from the field” that there were occasional problems with the Grammer seat switch. Although plaintiff’s counsel relied heavily on evidence of the prior recall at trial, there was no “direct” evidence the seat switch had actually failed. The plaintiff’s expert opined that despite his own testing the subject seat switch was prone to intermittent failure and that this had caused the accident. Liability was also premised on the absence of a seat belt, despite the tractor’s lack of a ROPS (rollover protective system) and the fact the seat as designed provided a seat belt as an option. Evidence was introduced that the standard in the tractor industry is that seat belts should not be used without a ROPS.

Trial lasted approximately three and a half weeks. The plaintiff asked the jury for approximately $3.6 million in economic damages and a total of $40 million in non-economic damages. The jury was instructed on causes of action for Strict Product Liability/Manufacturing Defect with respect to the Grammer seat switch and Strict Product Liability/Design Defect with respect to the lack of a seatbelt. The jury was given California’s “Risk / Benefit” test to determine whether a design defect was present.

The jury deliberated approximately five hours before returning a defense verdict on both counts. The lowest demand was approximately $600,000 and the last offer from the defense was $35,000.

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Texas Supreme Court Adopts “Learned Intermediary Doctrine” in Prescription Drug Cases; Rejects Exception for Direct-to-Consumer Advertising

By John Henderson, Sean Higgins and Bryan Pollard

Overview
In a far-reaching decision that will benefit prescription drug manufacturers, the Texas Supreme Court, in Centocor, Inc. v. Hamilton, No. 10-0223 (Tex. June 8, 2012), adopted the “learned intermediary doctrine.” The court held that a prescription drug manufacturer fulfills its duty to warn an end user by providing the prescribing physician with an adequate warning. The court declined the invitation to create an exception for direct-to-consumer (DTC) advertising.

Background
In a prescription drug product liability case, the plaintiff typically alleges that the manufacturer failed to provide adequate warnings of risks that may be associated with a drug. Typically, plaintiffs argue that they would not have taken the drug if an adequate warning had been provided. Often, plaintiffs also contend that a warning would have led them to seek an alternative drug from the physician.

Under the learned intermediary doctrine, a drug manufacturer will not be liable as long as it provided adequate warnings to the plaintiff’s physician. While a majority of states now recognize the doctrine, courts still struggle over its application. In particular, some courts have shown reluctance to apply the doctrine in cases where the plaintiff alleges that he or she received information about the drug through DTC advertising in print media, television ads or informational videos.

Issues
In Centocor, the Texas Supreme Court considered three issues: (1) whether to recognize the learned intermediary doctrine, (2) whether to apply the doctrine in cases where DTC advertising has occurred; and (3) whether the doctrine applies to claims for fraud by omission or negligent misrepresentation that are based on an alleged failure to warn.

Decision
By formally adopting the learned intermediary doctrine, the court placed Texas in line with the majority of states. The Supreme Court explained that while it had not previously announced its position on the learned intermediary doctrine, lower Texas courts had followed the rule for several years. The court also noted that the majority of other states have adopted the learned intermediary doctrine in some form. In fact, according to the court, West Virginia is the only state that has rejected the doctrine in its entirety.

While the plaintiffs argued that the doctrine should not apply based on the DTC exception, the court declined to adopt that exception on the facts presented. The court noted that only a few states have recognized a DTC exception. The court, however, left open the possibility for an exception where a manufacturer has used DTC to convey intentionally misleading information.

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Texas Supreme Court Adopts “Learned Intermediary Doctrine” in Prescription Drug Cases; Rejects Exception for Direct-to-Consumer Advertising (Continued)

The court further held that the learned intermediary doctrine applies to claims for negligence and common law fraud by omission. In reality, the court explained, these claims were nothing more than failure to warn claims. The plaintiffs could not evade the learned intermediary doctrine by pleading their claims under a different legal theory.

Of additional interest to defendants, the court clarified that the learned intermediary doctrine is not an affirmative defense that the manufacturer must plead and prove. Rather, the doctrine is a common law rule that imposes a duty on the drug manufacturer to direct its warnings to the physician.

Comment

In short, the Supreme Court’s decision in Centocor will provide an effective shield for drug manufacturers who convey appropriate warnings to physicians.

The court correctly held that the doctrine applies to claims for fraud by omission, negligent misrepresentation and other legal theories. In actuality, all of these theories are based on a claim that warnings or instructions are inadequate. Thus, applying the doctrine to these claims is a matter of common sense.

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