Issue 3, 2019

Welcome

Welcome to the third 2019 issue of *Product Lines* – our quarterly e-newsletter that focuses on toxic torts and products liability issues.

For this edition, we are reporting on several important and timely legal issues. As you will see, we strive to make these e-blasts both informative and valuable by having our attorneys comment on WHY these issues are important and how they could affect your business.

As always, if you have a particular topic you would like to hear more about, please let us know. Thank you for reading.

The Toxic Tort Litigation and Product Liability Litigation Practice Groups

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Vitamin E Found in Cannabis-Containing Vape Products Linked to Deadly Lung Infections Across U.S.

"New York State health investigators announced they believe cannabis-containing e-cigarette, or vape, products may be responsible for a string of mysterious lung-related illnesses reported across the state."

Why this is important: According to state and federal health investigators in New York, the 34 patients who recently suffered lung infections or other pulmonary illnesses after using vape products all reported using at least one cannabis-containing product. Based upon samples collected throughout the state, officials believe the cannabinoid vapes may have included high levels of vitamin E acetate, an additive not approved for use in New York State Medical Marijuana Program-authorized vape products. Because recreational marijuana is not legal in New York, state and federal health officials suspect the vape-related lung illnesses are due to counterfeit “off the street” products. Any litigation involving federally regulated vape products should investigate the patient's use of cannabinoid-containing vapes and whether such products were purchased "off the street." --- Dennise R. Smith

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What You Need to Know About Vaping-Related Lung Illness

"Hundreds of people across the country have been sickened by a severe lung illness linked to vaping, and a handful have died, according to public health officials."

Why this is important: Public concern over e-cigarettes and other vaping devices has hit an all-time high. Companies such as JUUL already face lawsuits for allegedly targeting teenagers with deceptive marketing tactics. Now, many public health officials believe that some dangerous chemical may have been introduced into the vaping supply chain, resulting in a surge of reported vaping-related lung illnesses. Many reported cases seem to involve vaping products containing THC, the psychoactive chemical in marijuana, and other vaping products purchased on the black market. Other cases, however, appear to involve vaping products containing nicotine, presumably purchased from legitimate retailers. While the vaping industry is finding itself surrounded by a cloud of uncertainty, it seems likely this increase in vaping-related lung illnesses will prompt a new wave of products liability actions against vaping manufactures, suppliers, and retailers. --- Joseph A. Ford

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Pointless CBD Bans Are Spreading Like, Well, CBD

"As the Washington Post noted in June, the current regulatory confusion around CBD begins with the FDA, which ostensibly regulates most of the foods to which CBD is or could be added."

Why this is important: The growing assault on CBD, an active ingredient in cannabis, at the federal and state level is a contemporary example of the dangers of legislating for no other discernable purpose than to legislate. Washington recently was added to the list of states banning the sale of CBD products. However, it is difficult to determine who will be affected by the ban and how it will be enforced. The confusing and sometimes conflicting state laws regarding CBD products stem from the FDA's lackluster effort to regulate the industry. The FDA prohibits marketing CBD products and states simply follow suit. To be sure, some states with a CBD ban are the very states that have legalized recreational marijuana, so it is difficult to determine a reasonable justification for such action. This is important because, given the claimed benefits of CBD and the ever-expanding CBD market, expected to top $5 billion in sales by the end of 2019, federal and state legislators must be called upon to replace the chaotic and conflicting regulatory framework currently in place with rational and justifiable legislation. --- Heather Heiskell Jones and Joseph C. Unger

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Colorado Adopts California Electric Vehicle Mandate

"With the move, Colorado is one of ten other states to observe California's ZEV standards, which include a mandate that a certain portion of electric vehicles sold in the state be some combination of battery electric cars, plug-in hybrids, or potentially fuel-cell vehicles."

Why this is important: Although 10 states have implemented zero emission vehicle standards, the Trump administration has proposed holding fuel efficiency standards at 2020 levels through 2026 and forbidding states from setting requirements for zero emission vehicle sales. The administration is expected to finalize regulation this fall. Should the states challenge these expected federal regulations, the legal battle could place the auto industry in an uncertain and difficult situation. --- Christina S. Terek

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A Unanimous Supreme Court Splits: *'Merck v. Albrecht'*

"The majority of the court added a new wrinkle with its conclusion that judges, not juries, should decide whether federal drug regulation preempts state-law tort claims."

Why this is important: Every day plaintiffs' attorneys across the United States seek to recover millions of dollars from what they allege are “bad drugs.” The most advantageous laws for these actions are generally individual state laws. This case provided an important clarification on how courts should determine whether federal law preempts state law claims in these lawsuits. In *Merck*, a drug known as Fosamax (used to treat and prevent osteoporosis in post-menopausal women) was alleged to cause atypical femoral fractures in 500 individuals between 1999 and 2010. Apparently, after 1995, the medical community determined these fractures were a side effect of Fosamax. Merck Sharp & Dohme Corporation, the manufacturer of Fosomax, asserted that because the FDA had rejected a change to the label of the drug earlier, it would have rejected a change to the label warning of the atypical femoral fractures. Prior to the *Merck* decision, the Supreme Court of the United States held in *Wyeth v. Levine,* 555 U.S. 555 (2009) that a state law "failure to warn" claim is preempted by federal law where there is “clear evidence” the FDA would not have approved a change to the label. In *Merck*, due to varying outcomes in the lower courts, the Third Circuit Court of Appeals requested the Supreme Court of the United States clarify this holding in *Wyeth*. The Court held that "clear evidence" is evidence that shows the court the drug manufacturer fully informed the FDA of the justifications for the warning required by state law and the FDA, in turn, informed the drug manufacturer that the FDA would not approve a change to the drug's label to include that warning. This is important because the Supreme Court’s decision confirms that in all but exceptional circumstances, consumers can still recover under state law after being injured by a brand name prescription drug. However, the Supreme Court added a new wrinkle to the standard by declaring this preemption conclusion is to be made by the judge, rather than a jury. Accordingly, in order to preempt state law tort claims, drug manufacturers will now need to present clear evidence to a judge they notified the FDA of a specific warning and the FDA rejected such a warning. --- Laura E. Hayes

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If you have any toxic tort or product liability questions, please feel free to contact our Toxic Tort Practice Group or our Product Liability Litigation Practice Group .