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Attorneys at Law

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PERSPECTIVES

End Run to Limit Victims' Rights

Most of you know that President Bush has been involved in an ongoing campaign to limit medical malpractice and products liability lawsuits. To date, Congress has been unwilling to pass restrictive "tort reform" to limit victims' rights to bring these actions. The executive branch, however, through the Food and Drug Administration (FDA),



has taken its own steps to try to limit lawsuits against drug manufacturers.

The FDA implemented new regulations in 2006 that require drug companies to

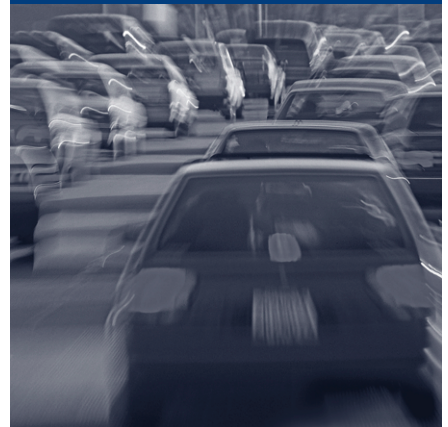
obtain FDA approval before making any changes in drug labeling. Prior to 2006, FDA approval was not required for label changes. The preamble to the new regulation states that the FDA intends that FDA regulations preempt state tort claims. What this means, specifically, is that the FDA wants to eliminate lawsuits against drug companies for inadequate label warnings (sometimes called "failure to warn" cases).

The judicial branch has now stepped in to interpret the new rules, and at least one court has agreed that the new FDA regulations do preempt (eliminate) state court claims against drug companies for inadequate warnings.

In a case from the Eastern District of Pennsylvania called *Colacicco v. Apotex, Inc.*, the plaintiff's wife allegedly took a generic brand of the anti-depressant Paxil, and then

The executive branch...has taken its own steps to try to limit lawsuits against drug manufacturers.

ROAD HAZARDS



Investigating and Identifying Dangerous Cars

With disheartening regularity, we meet the friends and family of car accident victims. Often these people are seriously injured, or even killed, in accidents where their car mates walk away relatively unharmed.

In many instances, the injuries suffered in a car accident are not the result of the initial collision. Instead, they are caused by a "second accident" that occurs when the vehicle fails to perform as it should in a foreseeable crash. In these situations, we bring a products liability lawsuit against a manufacturer where we establish that the improper design or improper manufacture of the vehicle created an unreasonably dangerous situation.

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continued on page 2

continued on page 2



Victims' Rights, continued from page 1

committed suicide. The plaintiff sued the manufacturer claiming that the manufacturer failed to warn of the suicide risk. The drug company argued that, under the new regulations, the FDA controlled the content of the warning label, and not the drug company. The drug company also argued that the FDA stated its intention to preempt state court claims, so that the Plaintiff could not bring this type of "failure to warn" lawsuit.

The federal district court judge held that when imposing state tort liability for failure to warn conflicts with FDA-approved labeling, the federal regulations preempt state tort law.

There are several cases working their way through the federal court system right now, and the United States Supreme Court will have to render a final ruling on the "preemption" issue.

In the meantime, the federal Department of Transportation, through the National Highway Traffic Safety Administration (NHTSA), is in the process of promulgating regulations regarding roof-crush standards and crashworthiness that will contain the same "preemption" language. If the United States Supreme Court agrees that the FDA



regulations preempts state tort "failure to warn" cases, then it is likely that the Court will also agree that the NHTSA regulations will preempt state court tort claims for inadequate roof strength or crash protection. And our executive branch will have accomplished its "tort reform" goals with no congressional involvement at all.

—Jim Dyer

Road Hazards, continued from page 1

There are several common defects that come up over and over:

- Rollovers: SUVs have a greater tendency—up to 15 times greater—to roll over during foreseeable driving maneuvers because of their shorter wheel base and higher center of gravity.
- Tire failures: Tires should be designed to have their tread wear out before they fail. Properly inflated and maintained tires should not suffer a de-tread in the absence of a defect. Often a tire failure leads to secondary problems such as a rollover or roof crush.
- Roof crush: Many SUVs and passenger vehicles are designed with a roof that is too weak to protect occupants in a rollover. Federal regulations currently require that a passenger car's roof be able to withstand 1.5 times the vehicle's weight. Trucks and SUVs don't even have to pass this test. Consumer advocates are critical of the current test and argue that a roof must withstand three times the vehicle's weight to properly protect occupants.

- Post-collision fires: Fuel leaks from punctured fuel tanks can ignite subsequent to a collision. Often these leaks are caused by the improper placement or shielding of the vehicle's fuel tank. You may remember that Ford came under immense criticism when several police officers were horrifically burned after their police cruisers were hit and exploded.

To properly evaluate whether a dangerous products case exists, it is essential that the vehicle be preserved and photographed. It is also important to have a qualified expert look at the vehicle as soon as possible before the evidence is lost to time. If you or your loved ones are involved in an accident where you suspect the vehicle did not perform as it should have, please take steps to preserve and document the vehicle and accident scene so that all aspects of any potential case can be investigated.

— Dev Sethi

There are several common defects that come up over and over.

Why Isn't My Defective Lawnmower Case A Garden Variety Case?

John flips the switch to turn off his lawnmower when unexpectedly he gets an electrical shock that knocks him off his feet and unconscious. When he is finally feeling of sorts he gives me a call to find out what he can do about it. I tell John to come in with his owner's manual and sales documents for the mower. Fortunately, the mower is not very old so I am able to show John how to return it to the store and get his money back or a new mower based upon the manufacturer's warranty.

I then ask John about his injury. He explains that he did see his doctor who ran a CT scan and found no brain injury. He had a headache the day the mower shocked him but has been pretty much back to normal since. I explain to John that although technically he has a strict products liability case against the manufacturer, it may not be worth pursuing.

Under Arizona law, manufacturers and sellers of defective products which are unreasonably dangerous and cause injury or death can be sued in strict products liability and be made to pay damages for medical expenses, lost wages, pain, suffering, disfigurement, disability, and lost enjoyment of life. However, the road to a recovery is neither paved nor downhill.

In order to prevail in a products liability case, in addition to the usual witnesses, we will also need experts on the product itself. These experts are usually engineers with experience in the industry who can testify how and why the product is defective and how it caused the injury. These experts are not

always easy to find and they are almost always very expensive.

It is also often necessary to obtain information exclusively in the hands of the manufacturers and sellers regarding the history of the product, its design, and prior failures. This is not information these parties typically release freely. Often, motions and court arguments on each piece of evidence sought must be presented.

Networking with attorneys around the country who have cases is often a good idea, but you have to know how to find them and this also adds expense to the case.

Where the party actually responsible for designing and manufacturing the defect is not an Arizona or even a U.S. company, the ability to sue it in Arizona and to obtain and collect a judgment may become difficult. If the company is no longer in business, is bankrupt, or has been bought by another

company, additional legal hurdles must be overcome to find a "responsible party" capable of paying a significant settlement or judgment.

In short, these cases can be fascinating, and where death or serious injury has occurred, may often result in significant settlements and verdicts. But to be successful with products liability claims, you must have experience in handling the cases, the financial ability to advance as much as \$100,000 in costs to pursue the case, connections with attorneys and experts around the country who have handled similar claims, and the results in other cases to prove to the other side that you mean business.

John was lucky. He recovered quickly without a permanent injury. His case does not justify the time and expense necessary to go forward with a products liability case against the lawnmower manufacturer. He should, however, report his injury to the lawnmower manufacturer and the U.S. Consumer Product Safety Commission (see adjacent article on page 4) in order to make a record of his lawnmower's defect and perhaps protect future consumers from even more severe injuries.

— Ted Schmidt



Recalling Unsafe Products: The CPSC's Role

Product recalls hit the news almost daily. Many of these are issued by the U.S. Consumer Product

If you are harmed by a consumer product or believe a product is unsafe, you should report it to CPSC.

Safety Commission, a federal agency charged with protecting us from the unreasonable risk of serious injury or death from more than 15,000 types of consumer products. CPSC protects consumers from products that can injure children or pose a fire, electrical, chemical, or mechanical hazard. It does not test products prior to sale, but gathers data on

injuries from products, issues safety recalls, and develops and enforces product safety standards. The agency has jurisdiction over products used in and around the home and in sports, recreation, and schools. It does not have any control over cars and other on-road vehicles, alcohol, tobacco, firearms, food, cosmetics, drugs, or other medical devices. These types of products are regulated by other federal agencies like the Food and Drug Administration.

If you are harmed by a consumer product or believe a product is unsafe, you should report it to CPSC by calling 800-638-2772 x650 or sending an email to hazard@cpsc.gov. The agency will add your complaint to its database, which it uses to identify patterns of injuries and hazards associated with particular products. CPSC uses this information to correct potentially unsafe products with consumer education, safety guidelines, and product recalls. CPSC's injury data is also available to the general public, and can prove invaluable to lawyers representing consumers injured by defective products.

CPSC's website at www.cpsc.gov contains information on more than 4,000 product recalls. When a recall on a product you own hits the news, this website should be your first stop. You can use it to pull up detailed instructions on how to identify and handle your recalled product. Recall instructions can vary widely depending on the

type of defect. Here are a few examples of recently recalled children's toys and their recall instructions:

- **Easy-Bake Oven.**
Entrapment and burn hazard. Contact manufacturer for retrofit kit.
- **MagneBlocks Magnetic Construction Toy.**
Aspiration and intestinal hazard. Do not allow children under 6 to play with magnet toys. Return defective blocks to manufacturer for replacement.
- **Plush Baby Rattle and Photo Frame Ornament.**
Choking hazard. Return toy to Target store in exchange for gift card.
- **Holiday Time Stuffed Christmas Beagle.**
Choking hazard. Return toy to Wal-Mart store for full refund.
- **Polly Pocket Dolls and Magnetic Accessories.**
Swallowing and intestinal perforation hazard. Contact Mattel to return toy and receive voucher for replacement toy of customer's choice.

—Erica McCallum




Investing in the Lives of Women and Girls

KBSDS supports the Women's Foundation of Southern Arizona, which has been fostering equity and opportunity for women and girls since 1993.

Through gender-focused grant-making, the Foundation has supported innovative programs that create meaningful change for women and girls in Pima, Cochise, and Santa Cruz counties. This year, it expects to award nearly \$150,000 to programs that promote health, safety, and economic equity.

Women are disproportionately adversely affected by issues such as poverty, homelessness, and access to health care. And since women are often the primary caregivers for their children, improving the status of women ensures that future generations will grow up to be healthy, educated, and economically self-sufficient. When women and girls thrive, the entire community benefits.

For more information about the Women's Foundation of Southern Arizona, please contact Laura Penny, Executive Director, at 520-622-8886, or visit their website at www.womengiving.org.



The Women's Foundation
of Southern Arizona

14th Annual Luncheon

honoring Mary Ann Dobras

Tuesday, April 17, 2007
11:00 a.m. - 1:30 p.m.
Tucson Convention Center

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*We believe
if you've been injured,
you should be
fairly compensated
by those responsible.
Period.*

For more than 40 years, the attorneys of KINERK BEAL SCHMIDT DYER & SETHI have been representing people in Tucson and Southern Arizona, squaring off against large and powerful adversaries - insurance companies, automakers, hospitals, and government entities - and beating them. We are proud to put our trial skills and our in-depth knowledge of the law to work for our clients.

Exclusively representing individuals in personal injury, medical malpractice, product liability and wrongful death matters.

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By the time you read this, the new **Kinerk Beal Schmidt Dyer & Sethi** website will be live and in color! The site contains in-depth information regarding our lawyers' skills and experience, updates on developments in the law, detailed answers to frequently asked questions, and links to our newsletters and other useful information for attorneys and potential clients.

Please take a few minutes to visit www.kbsds.com and let us know what you think.

KBSDS IN THE COMMUNITY

The Gift of Hope

In celebrating another holiday season, we at KBSDS wanted to make sure that other members of our community were given the opportunity to enjoy a safe and healthy new year. It's become a tradition for the staff to select a local charity as the recipient of our holiday giving. **The Brewster Center for Domestic Violence** was the unanimous choice again this year. With our financial support, the Brewster Center continues to offer safety and support to victims of domestic violence through advocacy, community education, and social change. Our donation will enable the Brewster Center to provide families with hope for a future free from domestic violence.



Welcome to Our New Secretary



KBSDS is pleased to announce that **Maria Rivera** has joined the firm as a legal secretary. Maria comes to our firm with ten years of experience in the legal profession. She recently returned to Tucson from Phoenix, where she was a secretary at Squire, Sanders & Dempsey. Maria is also the mother of three children: Gaby,

Jacob, and Cristian. Please join us in welcoming Maria and her family back to Tucson.

The Arizona Trial Lawyers Association

We are proud members of the Association. We think their mission statement is a worthy reminder of what guides us and what we aspire to.

ARIZONA TRIAL LAWYERS ASSOCIATION MISSION STATEMENT

OUR MISSION IS TO:

Preserve, protect and promote a fair and effective justice system, including the right to trial by jury;

•

Protect the health and safety of Arizona families;

•

Educate the public about consumer and constitutional issues;

•

Support the ethical efforts of lawyers to help any person who is injured by the misconduct and negligence of others to obtain justice in the courts of Arizona; and

•

Uphold and defend the Constitutions of the United States of America and Arizona.

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If you would like to be added or removed from our mailing list, please contact Bea Flesher at (520) 545-1674 or bflesher@kbsds.com.

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