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[DRI News](#)

[This Week's Double Feature](#)

[And The Defense Wins](#)

[Quote of the Week](#)

[DRI CLE Calendar](#)

DRI Publications

[Professional Liability Insurance: A Compendium of State Law](#)

DRI News

DRI Officer Elected ALI Member

DRI First Vice President, [Mary Massaron Ross](#), was elected to membership in **The American Law Institute (ALI)** on December 27, 2010. She was nominated by former Chief Justice Marilyn Kelly of the Michigan Supreme Court, and her nomination was seconded by Judge Harris Hartz of the United States Court of Appeals for the Tenth Circuit and Patrick Daugherty of **Foley & Lardner LLP**. As a member, Ms. Ross will be participating in the ALI's Members Consultative Groups on projects of interest. These groups offer input on ALI projects, including efforts to rewrite the various restatements. Ms. Ross is a partner and head of the appellate practice group at the law firm of **Plunkett Cooney** in Detroit.

Rosenhek Recognized by Ontario Bar Association

DRI member [Steven F. Rosenhek](#), a litigation partner with **Fasken Martineau DuMoulin LLP** in Toronto, Canada, received the Ontario Bar Association (OBA) Award for Distinguished Service in 2010. The award recognizes exceptional career contributions and achievements by an OBA member to the legal profession, jurisprudence, or the residents of Ontario. Mr. Rosenhek is a former president of the OBA, which is the largest branch of the Canadian Bar Association.

Free CLE for Corporate Counsel

DRI has announced an exciting new program that is designed to increase the presence of in-house counsel at DRI events. All in-house counsel who are members of DRI and members of the [DRI Corporate Counsel Committee](#) are eligible for free registration to DRI seminars. In addition, we encourage all DRI members to bring an in-house attorney who is not a DRI member to a DRI seminar at no additional registration charge. In order to qualify for free attendance, the invited in-house attorney must be eligible to become a DRI member and a member of DRI's Corporate Counsel Committee. The invited in-house attorney may take advantage of this offer only one time. Regardless of whether the invited in-house attorney joins the organization, the individual DRI member retains the right to invite other in-house counsel to future seminars. To register a non-member, simply [download the registration form](#). Questions? Contact DRI Customer Service at 312.795.1101 or custservice@dri.org.

Viva Las Vegas at the 2011 Damages Seminar

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Attendees will also have the opportunity to participate in our Wednesday program featuring a presentation by a nationally known marketing expert who can help you strengthen your business efforts. Additionally, you will participate in roundtable discussions with attorneys from across the country. This program, included at no additional cost, will provide marketing tips and an opportunity to network with litigators nationwide.

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Commentary from The Court Reporter

[The Court Reporter](#), sponsored by [Plunkett Cooney](#), is a comprehensive online guide to court news and analysis specifically relevant to the civil defense practitioner. The Court Reporter provides convenient access to significant cases affecting the Defense Bar. In the past week, The Court Reporter has featured the following commentary:

[DRI Files Amicus Brief in *Philip Morris USA Inc., et al. v. Jackson \(No. 10-735\)*](#)

[Matrixx v. Siracusano Oral Argument](#)

[Judges Welcome Arguments on Personal Jurisdiction at the Supreme Court](#)

New on the DRI Blog

Share your insights with the DRI Community by discussing today's most talked about topics on the [DRI Blog](#). Preview this week's topics

below.

Does Paralysis Satisfy "Dismemberment" Requirement?

Posted on January 10, 2011 02:29 by D. Michael Reilly

Must a beneficiary have his/her hands or feet at least partially "cut off" to qualify for Accidental Death and Dismemberment benefits? What does the term "dismemberment by severance" in an ERISA plan mean? Isn't paralysis enough? No.

Here's the case of *Fier v. UNUM Life Insurance Co.*, F.3d... [\[read more\]](#)

More Dangers of Social Media for Employers

Posted on January 10, 2011 07:18 by Jim Pattillo

Often times employers are concerned about rogue employees posting comments in social media that could be attributed to the company via respondeat superior. There are also frequently concerns about employees airing their grievances ... [\[read more\]](#)

This Week's Double Feature

Exposure Does Not Equal Causation: Defeating Claims that a Given Product Contributed to a Plaintiff's Injury

by Scott J. Wilkov, Tucker Ellis & West LLP, Cleveland, Ohio

Exposure does not equal causation. Sounds obvious, right? Yet, all too often, plaintiffs in toxic exposure cases try to build a case solely upon product identification coupled with evidence of a disease process which the offending chemical may cause. The defense bar even accepts this at times. Perhaps this is why the Kentucky Supreme Court recently noted the frequent "confusion between exposure (*i.e.*, the opportunity for causation) and evidence of causation itself (*i.e.*, that the exposure was the legal cause of the plaintiff's injury). Though evidence of exposure may be related to causation (*e.g.*, testimony about the length and intensity of exposure), it is not exactly what we mean when we require a plaintiff to prove causation." *Certainfeed Corp. v. Ava Nell Dexter, et al.*, KY Sup Ct 2008-SC-000886-DG (Dec. 16, 2010) (establishing criteria for apportionment of liability among empty-chair defendants in an asbestos case).

The Elements of Causation

Two significant federal courts of appeals decisions during recent months serve as reminders of the critical distinction between general and specific causation. See *Myers v. Illinois Central Railroad Company*, Case No. 10-1279 (7th Cir. Dec. 15, 2010); *Tamraz v. Lincoln Elec. Co.*, 620 F.3d 665 (6th Cir. 2010). Although not a toxic exposure case, *Myers* addressed the quality of evidence required for a plaintiff to attribute cumulative trauma to his work on the railroad and limited the scope of his expert testimony in that regard. The court harkened to "a scenario similar to what many plaintiffs face in toxic tort cases: an expert can testify that a chemical can cause the plaintiff's malady but he may not be qualified to testify that *this* chemical caused *this* particular plaintiff's malady." *Myers* at *9.

The ruling in *Tamraz v. Lincoln Electric* underscores this distinction. *Tamraz* arose out of the welding fume multi-district litigation; there,

the Sixth Circuit vacated a trial court ruling rejecting a *Daubert* challenge to plaintiff's treating doctor's testimony. *Tamraz*, 620 F.3d at 667. Finding error in the trial court's allowing a doctor to attribute plaintiff's Parkinson's disease to manganese exposure, the Sixth Circuit ruled: "Tamraz conflates diagnosis with etiology, eliding the distinction between Tamraz's disease and what caused it. Diagnosis and etiology, however, both were in play in this case." *Id.* at 673. The Sixth Circuit found that *Daubert* only permitted the treating neurologist to testify to the diagnosis of Parkinson's disease, but not its etiology. *Id.* at 677.

Proof of a disease is an entirely different question from what caused it. Understanding the distinction between the concepts of general causation and specific causation allows the defense lawyer in toxic exposure cases to focus his attacks. "To prove causation in a toxic tort case, a plaintiff must show both that the alleged toxin is capable of causing injuries like that suffered by the plaintiff in human beings subjected to the same level of exposure as the plaintiff, and that the toxin was the cause of the plaintiff's injury. In other words, the plaintiff must put forth sufficient evidence for a jury to conclude that the product was capable of causing her injuries, and that it did." *Bonner v. ISP Technologies, Inc.*, 259 F. 3d 924, 928 (8th Cir. 2001) (cited with approval by *In re Hanford Nuclear Reservation Litigation*, 292 F. 3d 1124 (9th Cir. 2002))

Challenging Plaintiff's Causation Evidence

The *Tamraz* decision provides a useful reminder of the many avenues by which to defeat plaintiff's specific causation case, among them a strong *Daubert* challenge to limit an expert's opinions. With this decision as a guide, this article shall suggest ways for the defense to avail itself of the many tools available to challenge plaintiff's specific causation evidence. While best known for establishing criteria for the admissibility of expert testimony, the *Daubert* court noted: "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 586, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

The Devastating Cross-Examination

The most obvious angle from which to attack specific causation is by cross-examination of plaintiff's expert at trial. The causation expert's misinformation, assumptions, and reliance on facts only supplied by plaintiff or his counsel are all likely to impact the weight a jury accords the opinion testimony more so than its admissibility.

In that case, the doctor can easily be made to appear ignorant, biased, or both. If the plaintiff is truly held to his burden to prove by a preponderance of the evidence that the product at issue was a cause-in-fact of plaintiff's disease, counsel should inquire about all of the alternative general causes which the doctor ruled out for no apparent reason. For example, in an asbestos personal injury case brought by a mesothelioma plaintiff, published medical literature provides the good faith basis to ask a series of questions regarding radiation exposure. See generally, *J. Goodman, et al.*, "Ionizing Radiation: A Risk Factor for Mesothelioma," *Cancer Causes & Control*, Vol. 20, pp. 1237-1254 (2009). A small part of the cross-examination might sound something like this:

Therapeutic radiation is a recognized cause of mesothelioma, right? Did you review plaintiff's records of medical care and treatment to ascertain whether he had any radiation treatment when he was in his 30s?

How about his in 40s? In his 50s? In his 60s?

In fact, you didn't review any medical records pre-dating plaintiff's first symptoms? Did you ask plaintiff's counsel for them?

The proverbial "one question too many" would be: "So, you cannot rule out exposure to excessive doses of therapeutic radiation as a cause of plaintiff's disease?" This point must be reserved for argument. One need not worry about how this testimony will come across, however, if plaintiff never gets to offer it. With greater forethought and the good fortune of a judge willing to exercise her gate-keeping responsibilities, one can mount a credible challenge to the full scope of the expert's testimony.

Exploiting *Daubert's* Full Potential

The expert's methodology is unreliable where it is based on insufficient facts or data. See *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997) (no abuse of discretion in finding proffered animal

studies failed to show increased risk of cancer from PCB exposure). While that case arose in the context of a general causation analysis, its guidance is equally applicable to specific causation. The *Tamraz* court distinguished a differential diagnosis from a differential etiology and emphasized the requirement that the expert employ a reliable methodology for attributing a cause to the injury and not just a label to plaintiff's symptoms. *Tamraz*, 620 F.3d at 674-675.

Consider again the example of an asbestos plaintiff diagnosed with mesothelioma. While asbestos may be widely accepted as capable of causing this lung disease, plaintiff's medical expert must have a sufficient basis to attribute the condition to a specific defendant's product. Therefore, the deposition of this expert should inquire into his unfamiliarity with the product and work practices associated with it, his failure to examine this product or any of its specifications, and his lack of knowledge of any testing of the product for its potential to release asbestos fibers. In the usual case, plaintiff's medical expert will blame a plaintiff's mesothelioma on any product plaintiff said he worked with which he believed contained asbestos. But, this testimony is devoid of any reliable foundation. Therefore, it is fertile ground for a *Daubert* challenge. In such a case, defense lawyers should routinely move to preclude plaintiff's expert from offering the ultimate opinion that the defendant's product at issue caused plaintiff's disease.

The appellate courts should provide a receptive audience to this type of challenge, even if it falls on deaf ears at the trial level. In a recent Washington case, plaintiff sued the contractor operating a nuclear power plant for injuries stemming from exposure to radioactive materials. Because plaintiff's treating doctor could not attribute plaintiff's symptoms to his exposure to a reasonable degree of medical certainty, the court sustained summary judgment for the contractor. The Ninth Circuit justified the decision as follows: "An assumption made for purposes of treatment doesn't establish causation. In prescribing treatment, physicians err on the side of caution and consider potential causes—even if they are remote—because a failure to treat may risk permanent injury or death. That Golden's physician considered a potential cause in prescribing treatment doesn't mean that Golden's exposure in fact caused his injuries." *Golden v. CH2M Hill Hanford Group, Inc.*, 528 F.3d 681, 683 (9th Cir. 2008)

Golden and *Tamraz* make clear that just because differential diagnosis is a generally accepted methodology for treating patients in a clinical setting, that does not remove it from the rigors of a *Daubert* analysis. The Sixth Circuit explained in *Tamraz*: "Calling something a 'differential diagnosis' or 'differential etiology' does not by itself answer the reliability question but prompts three more: (1) Did the expert make an accurate diagnosis of the nature of the disease? (2) Did the expert reliably rule in the possible causes of it? (3) Did the expert reliably rule out the rejected causes? If the court answers 'no' to any of these questions, the court must exclude the ultimate conclusion reached." *Tamraz*, 620 F.3d at 674.

Plaintiff's expert must have sufficient facts or data to justify his conclusion regarding the etiology of plaintiff's symptoms. Courts have made clear that a medical expert is not required to rule out all potential alternate causes of a plaintiff's injury, but for the testimony to be reliable, where a plausible alternative is suggested there must be a valid justification for excluding it. See *Heller v. Shaw Industries, Inc.*, 167 F.3d 146, 156 (3rd Cir. 1999) (permitting testimony that volatile organic compounds from new carpet installation caused the illness based on the temporal relationship between the event and the symptoms). Therefore, defense lawyers should routinely challenge plaintiff's experts to provide the basis for ruling out other potential etiologies.

Affirmative Proof of Alternate Causes

Defense attorneys need not limit their specific causation challenges to simply probing the basis for plaintiff's experts' opinions. A little research may yield fruit which is worth presenting in the defense case-in-chief. Even in cases where a plaintiff's diagnosis is confirmed, counsel should discuss the symptoms revealed in medical records with an occupational medicine physician, industrial hygiene expert, and perhaps toxicologist. They may be able to suggest alternative contributing factors. For example, while tobacco smoke may be a leading form of lung cancer, countless other possibilities exist.

The defense team can learn a great deal from an hour's worth of internet research. Relevant to the lung cancer example above, in recent weeks, *The Washington Post* reported on a study showing

concerning levels of hexavalent chromium in the water supplies of 31 cities across the country ("Study Finds Probable Carcinogen in Tap Water of 31 U.S. Cities," *The Washington Post*, Dec. 20, 2010). While it has long been known that inhaling so-called Chromium VI can lead to lung cancer, the reported study followed up on animal research showing that ingestion of the chemical may be equally as cancerous. This shows that in every toxic exposure case, defense counsel should ask what other contaminants could plaintiff could have been exposed to in the water he drank. How about in the air around his home? How about in the air or water at work?

While one never knows what exposures might be reported in the local newspaper, defense lawyers can conduct more efficient research through government documents and publications. In asbestos litigation, counsel frequently request records of worksite inspections from the Occupational Safety and Health Administration. But, many similar resources exist. Many states have their own agencies devoted to occupational or environmental safety; they may have inspected plaintiff's worksite. Likewise the National Institute for Occupational Safety and Health routinely conducts health hazard evaluations based on reports of an excess number of injuries or illnesses at worksites around the country.

There are also countless sources of information regarding environmental exposures in the vicinity of a plaintiff's home. The Environmental Protection Agency and Centers for Disease Control both have robust websites allowing for inquiries concerning a specific locality. By the same token, state public health departments may conduct inspections or analyze data which provides information on the air, ground, or water contamination around plaintiff's home.

Once counsel identifies all of the other potential exposures, one must consider how to them into evidence. Certified copies of reports of a public agency easily come into evidence under Federal Rule of Evidence 803(8). Many states have equivalent rules which except from the definition of hearsay, "Records... or data compilations, in any form, of public offices or agencies, setting forth ... matters observed pursuant to duty imposed by law as to which matters there was a duty to report." Fed. R. Evid. 803(8). Even if the evidence of alternative exposure packaged nicely in a government report, an expert may well be able to testify to it. "If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted." Fed. R. Evid. 703. The creative practitioner can use this rule to justify the offer of expert testimony on all sorts of relevant facts that may not be independently admissible.

By way of example, industrial hygienists routinely refer to material safety data sheets (MSDS) for guidance on the hazards presented by different routes of exposure to a given chemical substance. Plaintiff's deposition might reveal that he worked in an occupational setting which required him to handle countless materials whose risks were unknown to him. Any one of those materials might also be a risk factor for the very injury or illness at issue. In a recent case this author defended, plaintiff claimed excessive exposure to silica dust caused his lung cancer. We could not confirm a smoking history or underlying asbestosis. But, we learned plaintiff also worked in a pulp and paper mill. Industrial hygiene literature reported on the risk of various cancers developing in mill workers potentially exposed to toxic substances used in paper processing. We seized on the MSDS for those chemicals which listed lung cancer as a hazard. This provided an effective alternate causation theory for the defense to advance in its case.

Pitfalls

The savvy defense lawyer must always consider how the other side will react to his evidence. Therefore, in the presentation of evidence on alternate causes, one must anticipate the potential *Daubert* challenge. After all, what's good for the goose is good for the gander. To that end, be selective in the method you choose for presenting your evidence. Will a *Daubert* motion against plaintiff's experts backfire on the defense? Can the defense epidemiology or occupational medicine expert support your alternative causation theory?

A Texas Supreme Court decision which can be a powerful weapon for attacking a plaintiff's causation case might also prove to be the defense's Achilles heel. See *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 SW 2d 706 (Tex. 1997) (excluding epidemiological studies as causation evidence where relative risk of the injury from exposure is less than 2.0). "To raise a fact issue on causation and thus to survive legal sufficiency review, a claimant must do more than

simply introduce into evidence epidemiological studies that show a substantially elevated risk. A claimant must show that he or she is similar to those in the studies. This would include proof that the injured person was exposed to the same substance, that the exposure or dose levels were comparable to or greater than those in the studies, that the exposure occurred before the onset of injury, and that the timing of the onset of injury was consistent with that experienced by those in the study." *Id.* at 720.

The *Havner* case involved a challenge to plaintiff's use of expert testimony relying on an epidemiological study to establish that the Bendectin drug caused a limb reduction birth defect. *Id.* at 708. Noting that epidemiological studies can only show an association and not the actual cause of an individual's condition, the court described the issue as one of general causation. *Id.* at 715. Nevertheless, the analysis is pertinent here because a defendant's proof of alternate causes must survive the same scrutiny of its reliability as do plaintiff's claims.

Conclusion

Whether it is the epidemiology, facts, or other data which is lacking in plaintiff's case, defense counsel should consider the many alternative approaches to challenging plaintiff's specific causation evidence. And, the defense may present its own proof of alternate causes. Practitioners will do well to remember that toxic exposure plaintiffs must do more than prove that a product is capable of causing the condition diagnosed; they must prove that the toxic agent, in fact, caused the illness or injury claimed. Exposure does not equal causation.

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Too Loko? Safety of Caffeinated Alcoholic Beverages Comes into Question: FDA Issues Warning Letters to Manufacturers of Popular Products Four Loko and Joose

by John J. Richardson and Nicholas J. Godfrey, Dinsmore & Shohl LLP, Pittsburgh, PA

On November 18, 2010, the Food and Drug Administration (FDA) issued Warning Letters to Phusion Projects, LLC (Phusion), United Brands Company, Inc. (United), Charge Beverages Corporation (Charge), and New Century Brewing Company, LLC (New Century Brewing), alerting the companies that their pre-packaged caffeinated alcoholic products are adulterated beverages in violation of § 402(a)(2)(C) of the Federal Food Drug and Cosmetic Act (the Act).

In recent months, these beverages have come under intense scrutiny from the media and legislators at the local, state and federal levels of government because of the cheap and allegedly dangerous high that detractors say they provide to college students and young adults. Sold in attractive, single-serve cans and available in a variety of fruity flavors, these products mix caffeine and up to 12% alcohol by volume, or the alcoholic equivalent of four to five cans of beer, per serving package. Although not new to the market (MillerCoors and Anheuser-Busch previously pulled similar products in 2008 after pressure from state governments), efforts to ban these products increased again this fall after Phusion Projects' popular Four Loko product was implicated in a number of recent accidents and the deaths of at least five individuals, four of whom were under the legal drinking age of 21.

As concerns about the dangerous effects of combining caffeine with alcohol grew, the affected manufacturers attempted to quell the negative publicity that their products were receiving by claiming that they were no different than typical drinks served at bars, such as Red Bull and vodkas or rum and colas. Phusion also pointed out that flavored alcoholic beverages already exist on the market in the form of bubblegum, raspberry and blueberry vodkas, all of which contain several times the alcohol by volume of a can of Four Loko. Likewise, United maintained that its "Joose" product contains only half the caffeine quantity of a Red Bull or Monster energy drink, and less caffeine per ounce than found in a can of carbonated cola. Additionally, both Phusion and United cited aggressive "responsible drinking policies" aimed at promoting safe and legal consumption of their products to retailers and consumers alike.

Officials countered by claiming that the combination of the companies' extreme marketing campaigns, attractive packaging, fruity flavors, and low prices (Four Loko sells for approximately \$2.50 per can) make the products overly attractive to young, inexperienced, and potentially underage drinkers. A number of colleges and universities across the nation warned their students to avoid the products. Several states, including Washington, Utah, Michigan, Oregon and New York, went a step further by banning the products outright, citing concerns that the products are marketed specifically to young adults and college students, who they claim are especially susceptible to the adverse health effects associated with consumption of the products. Meanwhile, federal government officials, led by Senator Charles E. Schumer (D-NY) began pushing for a national ban on the products, which Schumer referred to as "toxic brews."

The FDA began the process of instituting a ban by issuing Warning Letters to the four companies, citing violations of the Federal Food, Drug and Cosmetic Act. Specifically, the agency found that the direct, purposeful addition of caffeine into alcoholic beverages violated § 402(a)(2)(C)'s prohibition against the manufacture and production of adulterated food products, or those containing unsafe food additives. Under § 409 of the Act, a food additive is considered to be unsafe unless it is the subject of prior approval, has generally been recognized as safe (GRAS) by a consensus of qualified experts, or a regulation is in effect that prescribes the conditions under which the additive may be safely used. According to the Warning Letters, the FDA was not aware of any information to establish that caffeine added directly to alcoholic beverages is the subject of a prior sanction or that it had been generally recognized as safe. Similarly, there is no regulation in effect authorizing the use of caffeine as a direct addition to alcoholic beverages.

While Warning Letters do not constitute official agency action nor require responsive action on the part of affected companies or individuals, they are generally seen as an integral part of the process to remove dangerous products from the market. The FDA issues Warning Letters to provide notice of alleged violations of the Federal Food, Drug and Cosmetic Act with the expectation that affected companies will take voluntary action to correct any alleged violations. The FDA also uses the Warning Letter as its chief means of establishing prior notice of such violations, and will later cite to receipt of a Warning Letter to enhance its position in enforcement actions taken against companies who do not take prompt steps to come into compliance with the violations outlined in Warning Letters. Under the Act, such companies face the risk of subjecting themselves to punishment such as product seizure or court ordered injunctions against future manufacture of the product.

In response to the Warning Letters, all four companies took the steps necessary to avoid any such enforcement action by the FDA. Phusion and United informed the agency that they had ceased shipping their caffeinated alcoholic beverages and expected to have remaining products off retail shelves by December 13, 2010. While New Century has argued that its product was unfairly included in the FDA's crackdown, it too has ceased manufacture for the time being. Charge also advised the FDA that it had ceased manufacture of its affected products. Interestingly, Phusion has begun to manufacture new versions of its product without caffeine, while Charge has continued to market its already existing non-caffeinated alcoholic beverages.

While it may seem that the Letters were a knee-jerk reaction by the FDA to the pressures created by the national attention given to the issue, the Warning Letters were actually the culmination of a nearly year-long agency investigation into the safety of caffeinated alcoholic beverages. The FDA had sent letters to the four companies, along with more than 20 other manufacturers of similar products on November 12, 2009, directing them that the agency would take action to remove the products from the marketplace unless the companies could provide evidence that the products were either subject to prior approval or had been generally recognized as safe.

Although Phusion, United and New Century responded to the initial agency letter, the FDA pressed forward with the issuance of the Warning Letters, maintaining that it still had serious safety concerns about the addition of caffeine into alcoholic beverages. While the FDA noted that the companies had attempted to undermine the reliability of some of the studies into the safety of caffeine added directly to alcohol, the agency maintained that the doubt raised by the studies as a whole was sufficient to raise legitimate safety concerns to which the agency response was necessary.

The FDA also acknowledged that all four companies had applied for and received a Certification/Exemption of Label/Bottle Approval from

the Alcohol and Tobacco Tax Bureau (TTB), and in their applications had informed the TTB that their products would contain caffeine. Such approvals, however, do not absolve the companies of their responsibility to comply with the provisions of the Food, Drug and Cosmetic Act.

While the Warning Letters do raise the possibility of future research being necessary in order to fully understand the negative consequences of the addition of caffeine to alcoholic beverages, compliance with the agency's interpretation of the Act provides the companies with time to determine whether it is fiscally advisable and/or responsible to participate in such research. Compliance also gives the companies the opportunity to determine whether they can remain economically successful and viable through the sale and marketing of non-caffeinated alcoholic beverages, which could render participation in future research unnecessary.

As evidenced by the issuance of the initial letters in November 2009 and the follow-up Warning Letters issued in November 2010, it is FDA policy to work with affected individuals and companies to allow them to bring their products into compliance with the Act. Therefore, when notified by the FDA of potential violations of the Act, it is advisable for the affected industry to engage either inside or outside counsel in order to formulate a timely and effective plan for responding to FDA communications.

The myriad of legal and public relations issues presented by this matter may seem overwhelming. Not only must the affected companies deal with federal regulatory compliance issues and negative media attention, Phusion has been named in a number of recent lawsuits which claim that the caffeine in their products desensitizes drinkers to the symptoms of intoxication, thus increasing the possibility of physical injuries and death.

Companies faced with impending and/or potential enforcement action from Federal agencies should consult counsel experienced in dealing with regulatory compliance issues. Action taken by federal agencies increases public awareness of the issue and attracts the attention of the plaintiff's bar, increasing the likelihood of future lawsuits. Accordingly, such counsel should also be familiar with and prepared to defend complex product liability suits.

In dealing with alleged violations of federal regulatory laws, affected industry must take prompt and effective remedial and preventive action. Not only is such action crucial to the continued success and viability of the affected companies, it demonstrates to the responsible agencies that the companies are taking their obligations to comply with applicable federal law seriously. Affected companies and individuals should be aware that changes in company policy and/or practice may be necessary in order to avoid further enforcement action and to ensure future compliance. Companies should not be deterred from making such changes because of the potential negative implications that such changes could have on the defense of pending and potential lawsuits. Due to public policy considerations, evidence of voluntary, subsequent remedial measures, such as the responsive action taken by Phusion, United, Charge and New Century, is generally not admissible in litigation to prove negligence or culpable conduct.

Specific to this issue, the affected companies may want to examine the feasibility of participating in future research and/or studies to determine whether caffeine may be safely added to alcoholic beverages. However, the companies will want to ensure that communications and debate with the FDA regarding such research be relevant, on point, and supported by scientific research and studies that have been conducted or endorsed by well-qualified and knowledgeable experts.

Conclusion

Companies who become subject to FDA investigations should not attempt to deal with the agency on their own. Because of the complex nature of the legal and public relations issues involved, the assistance of counsel experienced in handling regulatory compliance issues and products liability cases is highly advisable in order to ensure that affected companies and individuals are taking proper remedial and responsive action to minimize the negative effects that such cases can have on a company's continued commercial success and viability.

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And The Defense Wins

Laura E. Proctor, Christopher B. Parkerson, Charles A. (Chuck) Stewart III, Scott Burnett Smith



DRI members [Laura E. Proctor](#) of Louisiana-Pacific Corporation (LP) in Nashville, [Christopher B. Parkerson](#) of Campbell Campbell Edwards & Conroy, PC in Boston, and [Charles A. "Chuck" Stewart III](#) and [Scott Burnett Smith](#) of Bradley Arant Boul Cummings LLP in Montgomery and Huntsville, Alabama, respectively, secured a defense verdict for Louisiana-Pacific Corporation in a multi-million dollar case filed in Middlesex County, Massachusetts, after three brick masons were seriously injured in a construction site accident.

The lawsuit claimed that the polyester strapping that is used to bundle LP's oriented strand board (OSB) tongue-in-groove flooring product was negligently welded, which allowed over 30 sheets (weighing 75 pounds each) of the product to cascade down an incomplete elevator shaft like a "deck of cards," injuring the workers who were working in the shaft. The plaintiffs sued the general contractor, the framing subcontractor, LP and LP's retailer.

In the fourth week of trial, the jury returned a verdict for the plaintiffs against the general contractor and the subcontractor in the amount of \$3.2 million. However, LP and its retailer received defense verdicts on all claims against them, both product and negligence claims. During trial, LP also convinced the court to exclude a Tuft University chemist's opinion that the welds on the straps were defective, and to prevent a mechanical engineer from testifying about his testing of exemplar straps. LP was represented by Chuck Stewart, vice chair of DRI's Product Liability Committee, with appellate assistance from his partner, Scott Smith, chair of DRI's Appellate Advocacy Committee; Christopher Parkerson, a new member of DRI, as local counsel; and Laura Proctor, Secretary/Treasurer of DRI.

H. George Kagan



"Just another attempted murder case with a *Palsgraf* defense, Judge." So did [H. George Kagan](#), immediate past chair of DRI Workers' Compensation Committee and senior partner with **Miller Kagan Rodriguez & Silver** in its West Palm Beach office, roughly summarize a recent test of the "arising out of employment" requirement of the law wherein a blameless injured worker, at home and in bed, was certainly not "in the course of employment" at the time of injury.

The claimant, a dealership service writer, became the envy of a female coworker who felt short-changed on commissions and complained about it bitterly at work—and also at home—to her male companion. She lifted the claimant's address from his personnel file and put it on a Post-It note on the refrigerator, intending, she testified, to speak to the claimant directly if the "problem" (the employer did not see one) persisted. One night following a quarrel over finances, her companion left the house, consumed some alcohol, and then at 2:00 a.m. drove to his companion's coworker's doorstep, armed with a knife and crowbar. The claimant was stabbed multiple times and sustained permanent injuries; his assailant was sentenced to 70 years in prison. A claim followed which cited work as the inescapable "cause" of the claimant's catastrophic injuries under a case law doctrine allowing for off premises, after-hours injuries, but only where there is an unbroken line from work to injury.

Attorney Kagan, who tried the case and also defended the recently concluded appeal, argued successfully that the perpetrator's intervening, unilateral, irrational and probably intoxicated criminal attack, while concededly having an "origin" in the employment, failed to follow an unbroken line from work to injury even viewed strictly in terms of causation, whereas work must be "the major" contributing

cause of injury. Countering the claimant's policy arguments, the defense cited the "proximate cause" analysis from *Palsgraf v. Long Island Railroad Company*; such an assault can neither be reasonably foreseen nor can the employer effect measures to protect either itself or its workers from the same. As such, while constituting a sympathetic claim, its consequences—being more of a societal than workplace problem—should not be factored into the cost of production. And the defense wins!

Howard L. Murphy



DRI member [Howard L. Murphy](#) of **Deutsch Kerrigan & Stiles** in New Orleans defended Stewart Development, L.L.C. and Stirling Properties, L.L.C., the owner and manager respectively, of a high rise office building located in Metairie, Louisiana, against claims brought by the worker of a tenant, who fell and sustained a severe fracture of the left hip and other injuries when traversing an entranceway that connected a multi-level parking garage to the building's lobby. The plaintiff claimed the entranceway was defectively designed, constructed and maintained.

The jury returned a verdict in favor of the defendants, finding that the entranceway posed no risk of harm.

Fredrick Rohrbacker v. Stewart Development, L.L.C., No. 659-219, 24th Judicial District Court for the Parish of Jefferson, State of Louisiana

Samuel Phillips



DRI member [Samuel Phillips](#), a partner with **Borton Petrini, LLP** in San Jose, California, teamed with colleagues recently to obtain a unanimous defense binding arbitration verdict in San Francisco. The binding arbitration was heard before AAA Arbitration, pursuant to binding arbitration agreement following a settlement of the underlying case in 2006. The claimant, a 44-year-old Boulder Creek resident, claimed that the defendant, a graduate seminary, had breached a settlement agreement and failed to confer a Master of Divinity and Master of Theology degree upon the claimant. He also alleged fraud, intentional misrepresentation, breach of fiduciary duty, negligence and conspiracy, among numerous causes of action. The claimant also alleged punitive damages against the seminary and three of its employees.

The present lawsuit relates back to a settlement in a lawsuit filed in 2003 between the seminary and the plaintiff. The plaintiff had been suspended from the school because of a violation of the seminary student conduct code at the graduate seminary. In the underlying suit, the claimant had filed an action alleging defamation and other causes of action. The matter had been resolved at a settlement conference/mediation that took place over four days. The settlement agreement provided for payment of a certain monetary sum that was to be paid within 30 days and, after that, the claimant was to receive two graduate degrees. He received one graduate degree but refused to attend the college for the second.

The plaintiff claimed that he was not provided appropriate graduate degrees, even though he matriculated and finished one graduate degree and stated that the second degree would be a "fraudulent degree." The claimant alleged that there were multiple violations of the California Educational Code and that he would be provided with a fraudulent degree.

The defense argued that the seminary was not negligent and it fully complied with the settlement provisions in all respects. The AAA Arbitrator, Matthew Geyer, found that there had been no breach of the agreement and awarded a full defense verdict after the four-day hearing. Costs were awarded to the defense.

The claimant/plaintiff's demand of over \$1 million was not reduced prior to the arbitration. A minor offer had been indicated by defendants, but, given the extent of the demand, no final negotiations were conducted prior to the hearing.

The arbitration verdict was confirmed by the Santa Clara County Superior Court, and judgment was entered following the verdict.

Jim Strenski and Dennis Cantrell



DRI members [Jim Strenski](#) and [Dennis Cantrell](#), partners at the Indianapolis-based law firm of **Cantrell, Strenski & Mehriinger, LLP**, secured a defense verdict after a three-day jury trial in Marion County (Indianapolis) Indiana Superior Court on October 12-14, 2010. The plaintiff and insured, a local funeral home, claimed that representations made by a State Farm agent bound the principal, State Farm Fire and Casualty Company, to loss of business income coverage above and beyond what was afforded by the written insurance policy. The agent denied ever having made the representations, and it was further argued that, even if any such representations were made, it was unreasonable for the insured to have relied on such representations.

After the plaintiff requested \$2.1 million in closing argument, the jury took approximately two hours to reach a defense verdict.

De Martenson and David L. Brown, Jr.



A Montgomery County, Alabama, jury returned a unanimous defense verdict recently in favor of Yamaha Motor Co., Ltd., Yamaha Motor Manufacturing Corporation of America and Yamaha Motor Corp., U.S.A. in a product liability case involving the Yamaha Rhino. DRI members [De Martenson](#) and [David L. Brown, Jr.](#) of **Huie, Fernambucq & Stewart, LLP** in Birmingham, Alabama, successfully represented the defendants.

The plaintiffs, Jacklyn and Donald McMahon, sued under the Alabama Extended Manufacturer's Liability Doctrine—Alabama's version of strict product liability—and negligence, wantonness and failure to warn theories. Mrs. McMahon suffered a de-gloving injury to her left foot and bilateral arm/wrist fractures on July 26, 2007, while operating a 2007 Yamaha Rhino that overturned.

The plaintiffs claimed that the Rhino was defective due to its handling and stability characteristics, because it would overturn at "relatively low speeds" on "flat level terrain." The plaintiffs also contended the Rhino should have been equipped with a half sculpted door to prevent lower extremity injuries in the event of an overturn. The plaintiffs received a letter offer from Yamaha in August 2007 (approximately a month after the accident) to have sculpted doors added free of charge. During trial, the plaintiffs argued that Yamaha's warnings failed to adequately warn the plaintiffs of the Rhino's "rollover risk." The plaintiffs also alleged that Yamaha failed to adequately report other Rhino incidents to the Consumer Product Safety Commission. They sought compensatory and punitive damages.

Yamaha contended that the Rhino was reasonably safe and that the rollover was due entirely to the operator's unreasonable operation of the Rhino under the circumstances. In addition, Yamaha argued that the injuries resulted from the plaintiff's failure to wear her seatbelt and, consequently, that the presence of the sculpted door would not have prevented the injuries.

The trial lasted three weeks, and the jury deliberated for approximately 30 minutes before returning their unanimous verdict.

Keep those defense wins coming! Send a short summary in Word format and a recent photo (.jpg or .tif attachment) of yourself to Barb Lowery by email (blowery@dri.org). Please note that it could take 2-3 months for your win to get published. Just as the defense victories continue to pile up, the same is true for the submissions!

Quote of the Week

All labor that uplifts humanity has dignity and importance and should be undertaken with painstaking excellence.

— *Martin Luther King, Jr.*

DRI CLE Calendar

Civil Rights and Governmental Tort Liability

January 26-28, 2011

The Ritz-Carlton New Orleans, New Orleans, LA

Sharing Success— A Seminar for Women Lawyers

February 3-4, 2011

Fontainebleau Miami Beach, Miami Beach, FL

Toxic Torts and Environmental Law

February 10-11, 2011

New Orleans Marriott, New Orleans, LA

Keeping Your Expert in the Case: Avoiding Expert Exclusions

(webcast)

February 17, 2011

Medical Liability and Health Care Law

March 10-11, 2011

Palace Hotel, San Francisco, CA

Appellate Advocacy

March 10-11, 2011

JW Marriott Orlando, Grande Lakes, Orlando, FL

Damages

March 23-25, 2011

Bally's Las Vegas, Las Vegas, NV

Insurance Coverage and Claims

March 30-April 1, 2011

Fairmont Chicago Millennium Park, Chicago, IL

Product Liability

April 6-8, 2011

Hilton New Orleans Riverside, New Orleans, LA

Business Litigation and Intellectual Property Seminar

April 14-15, 2011

InterContinental Chicago, Chicago, IL

For all other seminars and webcasts, [click here](#).