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Claims Judicial and Legislative Affairs Quarterly Digest

December 2025

“Recognizing that today’s economic and litigation environments are top of mind for our customers, Zurich has devoted a team of subject matter professionals to address their concerns. The Claims Judicial and Legislative Affairs (CJLA) group studies social inflation and its drivers, providing insights and information to Zurich’s customers and brokers; our claims and risk engineering teams; and others who may influence our industry and the legislative environment. As a founding member and instrumental leader amongst a growing coalition of industry partners, we are proud to share this information in our *Quarterly Digest* and *Regional Recap*.”

Keith Daly
ZNA Chief Claims Officer

Social inflation is increasingly responsible for rising claims costs. This may affect how companies do business, interact with their communities, and connect with their customers. Zurich remains dedicated to working collaboratively with our customers, brokers, and risk mitigation industry members to tackle these challenges.

The **CJLA *Quarterly Digest*** highlights issues which touch the industry on a global, national, and state level. Trending topics as well as successful trial tactics are also shared. The articles contain direct links for more in-depth information. The **CJLA *Quarterly Digest*** publishes once a quarter.

The **CJLA *Regional Recap*** captures the latest legislative enactments and judicial decisions that impact social inflation and the insurance industry. For ease of use, these are indexed by region and by state with direct links to the exact legislation or citation. The **CJLA *Regional Recap*** publishes four times a year.

Education is only the beginning of the solution. Leveling the playing field requires that all be involved.

To join Zurich in combatting social inflation – or for questions or submission of topics for future issues – please contact lisa.bellino@zurichna.com

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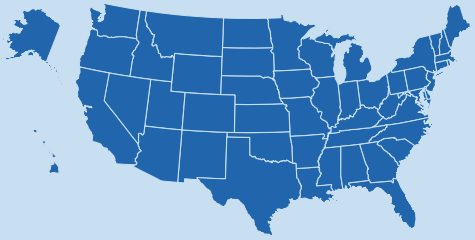

A product by any other name:
The modern evolution of products liability law

Products liability litigation is a world-wide phenomenon. In the United States, the products liability landscape is ever-changing, with judicial determinations, rules, and regulations impacting outcomes. Some of these changes are highlighted below.

Expanding the U.S. definition of "product" and product liability theories

The field of products liability law has evolved significantly. Initially, the law required contractual "privity" or that a direct contractual relationship exist between and buyer and seller of a product in order for the buyer to file a lawsuit against the seller. This doctrine of privity largely prevented individuals from suing manufacturers, save for a few narrow exceptions. However, in the landmark case of *MacPherson v. Buick Motor Co.*, Judge Benjamin Cardozo effectively abolished this requirement thereby allowing just about anyone allegedly harmed by a defective product the ability to file suit. Judge Cardozo's opinion in *MacPherson* replaced the privity of contract theory with a public-oriented duty in tort law – a concept that will continue to develop as society's definition of "a product" changes.

The traditional definition of "product" has evolved, moving beyond tangible goods to now encompass intangibles like software and automated systems. This evolution, fueled by the rise of AI and new technology, introduces complex challenges for assigning liability. Legal standards may need to start taking into consideration liability for autonomous behavior such as software driven failures and cybersecurity risks.

For example, as we see automobile manufacturers enhance vehicles with more autonomous features, we may also need to factor in that such autonomous features can lead to allegations of liability. In one notable case, a Florida jury found an automobile manufacturer partially liable for an alleged flaw with its driver assist autopilot system despite evidence that the driver admitted to being distracted by a cell phone at the time of the accident. Here, an intangible, such as software, was considered a product. Similarly, claims have been filed against the same manufacturer alleging that its electronic door systems hinder rescue efforts after accidents. The critical question remains: will the legal burden in autonomous vehicle incidents continue to shift from the driver to the manufacturer as operating systems take on more control?

Another example where products liability law has expanded to include intangibles are the social media lawsuits that concern negative impacts on youth mental health. Lawsuits have been filed by states and individuals against various social media platforms for failing to protect minors from harm and/or violating consumer privacy laws. New York City recently filed a lawsuit against several of the largest social media companies under similar theories. The lawsuit has been transferred and is now part of the multi-district litigation captioned as *In re Social Media Adolescent Addiction / Personal Injury Products Liability Litigation*. The legal arguments are that the platform's design, not just the user-generated content, makes them liable. Social media companies have historically relied on Section 230 of the Communications Decency Act to shield them from liability for user-generated content; however, plaintiffs' claim that Section 230 does not apply in these cases because the lawsuits allege the platform's own design choices, such as algorithms and notifications, are at issue. A California MDL judge recently agreed with plaintiffs and rejected the social media companies' argument that Section 230 applies. The U.S. Supreme Court declined to weigh in on appeal.

Additionally, there are attempts to expand the theory of products liability to include defendants' manufacturing processes into what a California court coined as a "hybrid theory" of strict liability. As set forth in the Court's opinion denying defendant's motion for summary adjudication (*In re Rantidine Cases*) the court held such "hybrid theory," blending separate concepts of design and manufacturing defect with negligence concepts of intent was sufficient to survive summary adjudication. Yet, California law is clear that plaintiff cannot substitute a process defect for a product defect. There have also been attempts to expand the area of products liability to involve public nuisance theories. For example, such attempt was made in the opioid litigation. The Ohio Supreme Court rejected plaintiffs' argument

that pharmacies alleged failure to monitor suspicious prescriptions for opioids was a public nuisance. However, the U.S. Court of Appeals for the Fourth Circuit recently reversed and remanded a 2022 decision in a West Virginia opioids case seeking $2.5 billion in abatement. The Fourth Circuit decision held that the lower court judge erred when ruling that West Virginia's public nuisance law did not apply to the lawsuit involving the distribution of opioids.

Expanding the U.S. litigation landscape

Large scale products liability litigation has dramatically expanded in the United States, primarily through two mechanisms: Multidistrict Litigation (MDL) and class action litigation.

MDL has become the dominant mechanism for aggregating lawsuits. This procedure centralizes similar cases from across the country into one federal district court solely for pretrial purposes. According to the United States Courts' Federal Judicial Caseload Statistics, civil filings surged by 22% in 2024. This dramatic growth is largely attributable to multidistrict litigation, which saw a 78% increase in products liability and a 98% increase in health care/pharmaceutical MDL cases. MDL accounts for nearly two thirds of all private civil cases on the federal docket. The increasing number of lawsuits, however, raises concerns about the merit of such cases. Research from the U.S. Chamber Institute for Legal Reform's research suggests 20-30% (or potentially as high as 50%) of mass tort MDL filings may be marginal and/or frivolous. Despite the possibility that some of the MDL filings may not be able to prove actual product use or alleged injury, MDL continues to grow and extract sizeable settlements from defendants who see increasing legal expenses as litigation plods on and may be wary of trial.

The second major avenue for product liability litigation is class action lawsuits, which aggregates the claims of numerous individuals into a single case represented by a single plaintiff. Like MDL, class action litigation is marked by increasing settlement trends. For the third consecutive year, settlement numbers exceeded the $40 billion mark, with product liability claims constituting the largest portion at $23.4 billion. While Federal Rule of Civil Procedure 23 requires that the court certify a class action in order to proceed as such, the lack of mirrored rules in certain state jurisdictions creates more favorable forums for plaintiffs, typically influencing where claims are filed.

Fueling the litigation machine for products liability MDL or class action litigation is the heavy advertising by plaintiffs' attorney seeking to recruit plaintiffs. The American Tort Reform Association, estimates that approximately $2.5 billion was spent on more than 26.9 million ads across various media, with legal advertising spend increasing 39% between 2020 and 2024.

The sheer scale of MDL and class action lawsuits creates significant settlement leverage for plaintiffs. Conversely, it translates to increased legal risk for the defense, as the potential for a negative ruling, the high cost of defense, and resulting media scrutiny create uncertainty and pressure for a resolution.

Expanding U.S. financial implications and damages

Data from the U.S. Chamber of Commerce Institute for Legal Reform, indicates a consistent escalation in nuclear verdicts (verdicts of $10 million or more) between 2013 and 2022, with 23.3% of nuclear verdicts being in the products liability sector. The composition of these large awards reveals a trend: they are heavily weighted toward noneconomic damage awards rather than quantifiable economic losses. In fact, for six out of the ten years analyzed, the noneconomic damages component surpassed the total amount of economic and punitive damages combined.

The size of noneconomic damage awards can be heavily influenced by courtroom tactics such as anchoring, where plaintiff's counsel requests a high-value damage amount from the jury early on in the process, sometimes during *voir dire*. Additionally, juries have the discretion to impose punitive damages, which are intended solely to punish a defendant for intention or severe misconduct.

Despite the volatility introduced by these massive awards, legislative reform is lacking. Only a limited number of states have implemented caps on noneconomic or punitive damages in products liability litigation.

By: Rebecca Fozo, Zurich CJLA

Nuisance no more:
New law redefines "public nuisance"

The expanding theories of liability within the concept of public nuisance have swept the country. As has been discussed in previous *Quarterly Digests*, the original concept from English common law to address impediments to accessing public lands is now being used to sue manufacturers in an attempt to address larger societal concerns such as climate change.

The American Tort Reform Association (ATRA) has termed public nuisance a "super tort," which is the practice of plaintiff's attorneys representing government entities to sue manufacturers and sellers of lawful products, purportedly in order to address societal issues. The causation requirements are lax, and the marketing plays on the public's desire to address community issues.

Proponents of limiting expansion of public nuisance have stated that societal problems require legislative solutions rather than litigation. Similarly, the U.S. Chamber of Commerce Institute for Legal Reform (ILR) has identified the need to limit public nuisance as part of a larger strategy to support civil justice reforms in the states. Specifically, ILR recommended redefining "public nuisance" more narrowly, confining products liability cases to this area of law, and requiring causal connection between harms to individual plaintiffs rather than to the public in its 2022 report.

Montana has been a leader in passing strong tort reform legislation. Furthering the trend, the governor signed HB 791 (the Act) into law in May of this year. The bill amends the then-existing law with the aim of curbing expansive use of public nuisance, following some of the ATRA and ILR recommendations and becoming effective as of October 1, 2025.

Montana's Definition of Public Nuisance

Montana's amendment now defines public nuisance as:

(a) a condition arising out of the use of real property that unlawfully interferes with a public right by endangering communal safety, being indecent to the community, or being offensive to the community; or

(b) a condition that unlawfully interferes with the public right to free passage or use . . . of a navigable lake, river, bay, stream, canal or basin or a public park, square, street, road, or highway.

This definition aligns more closely with the traditional notion of public nuisance based in the use of land rather than interference with public welfare. It also delineates between public nuisance versus private nuisance by creating separate sections in the definition for each. In providing a new definition, the statute is designed to prevent creative and expansive interpretations derived from the common law rules. The Act tethers the concept of public nuisance to its origins as a real estate-based tort.

The amendment further provides a nonexclusive list of actions or conditions that do not constitute a cause of action for public nuisance such as:

- Lawful actions
- Actions approved by government entities pursuant to regulation or law
- Noise from and sale of firearms
- Design, manufacturing, distributing, selling, labeling, or marketing of a product

As ILR commented, public nuisance theories had veered into products liability and regulatory law more recently. Suits for lead paint, opioids, and firearms have become the exemplars for modern application of public nuisance. The Montana list serves to confine lawsuits based on products liability, consumer protection, and public nuisance into their own respective lanes. Now, under the Montana law, manufacturers and sellers cannot be held liable under overlapping theories with different causation standards when operating legally.

Stricter Causation Requirements

The newly added section 4 makes significant changes to the causation requirement in public nuisance cases. It states:

> A person may be subject to a public nuisance cause of action only if that person proximately caused the public nuisance at the time the public nuisance was created, which includes controlling, or instructing another person to engage, the activity that proximately caused the public nuisance.

As in the lead paint cases, defendants have struggled with causation standards by being held liable even in cases where they may not have known a potential for harm existed at all. With Montana's stricter causation requirement, plaintiff must prove the defendant was the "proximate cause" of an alleged nuisance. Under common law, the standard relied on foreseeability or an even looser interpretation implying fault of a manufacturer or seller introducing a product to market, even if done so legally. With the Montana proximate cause standard, plaintiffs must demonstrate a causal link, an established standard under tort, between defendant's behavior and the nuisance as opposed to mere presence of a product deemed unfavorable in public opinion.

Limits on Damages and Abrogation

The newly added section 5 provides limits on damages. If the public nuisance is within the jurisdiction of a specific government entity, it may have a public nuisance claim. However, any expenditures made by a governmental entity in response to a public nuisance does not automatically permit the action. Furthermore, in a public nuisance action brought by a governmental entity, only three remedies are available: indictment or information; injunctive relief; and reasonable monetary and nonmonetary resources, if quantifiable, to abate the public nuisance based on several factors. Any such resources remedying this must be spent to abate the public nuisance itself.

By prohibiting traditional damages and costs for future nuisance, the Act reduced the financial incentives for bringing these suits. Instead, the Act focuses on ending the behavior creating an alleged nuisance with costs limited to abatement efforts. As ATRA indicated in its report, "super-torts" generate attorney's fees for firms willing to test new theories.

Lastly, the Act specifically states it abrogates common law when in conflict. As such, Montana's new public nuisance law reflects a multifaceted and comprehensive attempt to limit the scope and potential for lawsuits. The statute addresses several concerns outlined by ILR and ATRA in the proliferation of lawsuits and the resulting increase in costs. It provides an exemplar for other states looking to implement similar reforms.

By: Mahima Raghav, Zurich CJLA

A possible acetaminophen MDL revival:
Can publicity sway the court?

Approximately two years ago, U.S. District Court Judge Denise Cote excluded all of plaintiffs' general causation experts in the Acetaminophen MDL litigation. The Court noted that the "issues explored by this litigation have great public health significance. It matters to get this right." The Court further acknowledged that the FDA has followed this area of research closely and medical associations have weighed in - "there is no generally accepted scientific conclusion that *in utero* exposure to acetaminophen causes either ASD or ADHD" and "plaintiffs' experts have not reliably opined so either." In making her ruling, Judge Cote closely analyzed plaintiffs' experts' methodology, including that of epidemiologist Dr. Baccarelli, finding he failed to distinguish between ADHD and ASD, failed to conduct a reliable Bradford Hill or other analysis, cherry-picked and misrepresented study results, and refused to acknowledge the role of genetics in the etiology of ASD or ADHD.

In rendering its opinion, the Court cited the recently amended Rule 702, stressing its responsibility as a "gatekeeper" and affirmed the basis for experts' opinions are not just questions of weight, but rather require scrutiny to decide if the testimony should be admitted at all. The Court's decision to exclude plaintiffs' experts' testimony resulted in dismissal of over 500 cases.

That was nearly two years ago. However, over the course of the last several months the alleged causal link between prenatal use of acetaminophen and ASD or ADHD has resurfaced. Plaintiffs filed an appeal with the Second Circuit Court of Appeals and oral argument was scheduled for October 6, 2025. Two weeks before the scheduled oral argument, President Trump and Health and Human Services (HHS) Secretary Robert F. Kennedy Jr. publicly announced an association between acetaminophen taken during pregnancy and autism.

President Trump, joined by administration officials, announced:

> FACT: Evidence suggests acetaminophen use in pregnant women, especially late in pregnancy, may cause long-term neurological effects in their children.

The White House announcement went on to cite Dr. Baccarelli (plaintiffs' expert previously dismissed in the MDL) stating, "We found evidence of an association between exposure to acetaminophen during pregnancy and increased incidence of neurodevelopmental disorders in children."

Secretary Kennedy also pledged a "nationwide public service campaign" and that "HHS will act on acetaminophen. Today, the FDA will issue a physician notice and begin the process to initiate a safety label change for acetaminophen (Tylenol and similar products)."

Coinciding with President Trump and HHS' announcement, the Informed Consent Action Network (ICAN) filed a Citizen Petition with the Federal Food and Drug Administration, requesting changes be made to the labeling of over-the-counter acetaminophen products for use during pregnancy. In response to the Citizen Petition, Kenvue (a maker of acetaminophen product Tylenol), submitted a 42-page response calling on the FDA to reject the request for a change in labeling requirements and citing that the FDA has "fully evaluated the emerging scientific evidence and repeatedly concluded that the data do not support a causal association between acetaminophen use in pregnancy and neurodevelopmental disorders such as autism."

In response to the government's announcements, the American Academy of Pediatrics (AAP) and American College of Obstetricians and Gynecologists (ACOG) publicly reaffirmed its position on prenatal use of acetaminophen – that acetaminophen is recommended as a first line medication for pain and fever in pregnant women. In a statement the President of ACOG found it "highly unsettling that our federal health agencies are willing to make an announcement that will affect the health and well-being of millions of people without the backing of reliable data." ACOG's statement went on to clarify:

> In more than two decades of research on the use of acetaminophen in pregnancy, not a single reputable study has successfully concluded that the use of acetaminophen in any trimester of pregnancy causes neurodevelopmental disorders in children. In fact, the two highest-quality studies on this subject – one of which was published in JAMA last year – found no significant associations between use of acetaminophen during pregnancy and children's risk of autism, ADHD, or intellectual disability.

The opposing viewpoints did not appear to go unnoticed by the Second Circuit as the news of President Trump and HHS Kennedy's announcements were highly publicized. Oral arguments were postponed from October 6, 2025, until November 17, 2025. During the November oral argument, the Court expressed concern that MDL Judge Cote overexerted gatekeeping responsibilities as the court should not be acting as an "amateur scientist." The Second Circuit judges' comments indicated that they might want a jury to now decide this issue, which would reverse Judge Cote's decision and revive all of these cases.

By: Rebecca Fozo, Zurich CJLA

Sovereign immunity:
Challenges at all levels

Allegedly aggrieved parties oftentimes seek to pursue novel legal methods to collect from parties that they perceive to have caused their injuries, even when there are legal barriers that prevent the recovery they seek. Parties have challenged the workers' compensation bar, jurisdictional restriction, and other prohibitions to recovery. One longstanding legal obstacle for a plaintiff's recovery has been the doctrine of sovereign immunity. Sovereign immunity shields a governmental entity from claims of negligence unless it otherwise waives its immunity. This doctrine has long been considered sacrosanct because without it, governmental entities would have a great deal of exposure, given how pervasive government is in just about every aspect of life. However, the importance of this doctrine has not prevented challenges to the extent and scope of such immunity.

Recently in Pennsylvania, challenges have been made to the immunity of the Southeastern Pennsylvania Transportation Authority ("SEPTA"), the governmental entity that handles mass transit for the City of Philadelphia and surrounding counties. Pennsylvania's Tort Claims Act allows limited exceptions for when the government can be sued. Within those areas where lawsuits are permitted, recoverable damages are limited to $500,000 against local entities such as SEPTA. Similarly, Pennsylvania's Sovereign Immunity Act has limited exceptions where lawsuits are permitted and under this Act, damages against Commonwealth entities are limited to $250,000 for any individual or $1,000,000 in the aggregate.

In the recent case of *White v. McGill*, a SEPTA bus struck and killed a woman as well as injured her minor son. SEPTA and the driver of the bus conceded negligence for the accident. However, plaintiffs pursued an additional theory – that SEPTA and the SEPTA officers could be held liable for conduct that fell outside the scope of their statutory authority for allowing the use of an allegedly flawed mirror system with known blind spots. The court permitted the "outside the scope" argument during the trial. Thereafter, the jury apportioned liability among SEPTA, the driver, and the bus manufacturer. On appeal, the appellate court soundly rejected the "outside the scope" theory. It described the theory put forth by plaintiffs as "the SEPTA Officers must have been acting outside the scope of their statutory authority because they were negligent and negligence is not within their statutory authority." The appellate court held that this theory "would swallow the rule and eliminate all sovereign immunity from all claims of negligence," ruling that SEPTA and its officers were "indisputably entitled" to sovereign immunity from the plaintiffs' claims.

Sovereign immunity involving SEPTA as a defendant is currently pending before the Pennsylvania Supreme Court in another matter. *Frelich v. SEPTA* involves a plaintiff who suffered catastrophic injuries after being struck by a SEPTA bus. The parties agreed to a stipulated verdict of $7,000,000 which was then molded to conform to the $250,000 cap under the Sovereign Immunity Act. Plaintiff appealed to the Commonwealth Court arguing that the statutory cap violated her right to a jury trial under the Pennsylvania Constitution. The Commonwealth Court expressed sympathy for the plaintiff but held that it was bound by the statute as well as Pennsylvania Supreme Court precedent and enforced the existing cap on damages. Oral argument was held in March 2025, but no decision has been handed down.

The issue of sovereign immunity is even set to go before the United States Supreme Court. In the case of *Galette v. New Jersey Transit*, the Court will be deciding if New Jersey Transit, as a state-created corporation, is entitled to sovereign immunity when sued in an out-of-state court (the two consolidated cases being heard involve Pennsylvania and New York) for out-of-state accidents. The Pennsylvania Supreme Court addressed the case in its state and said that NJ Transit is immune when its bus is involved in an accident within the Commonwealth. Contrarily, New York Court of Appeals heard the case and held that New Jersey Transit was not immune for a bus accident that occurred in New York City. One of the

issues to be determined is whether NJ Transit can be considered an "arm of the state" for purposes of sovereign immunity. Another issue in the case is the injured party's ability to bring a lawsuit in the state where the injury occurred. The Court is scheduled to hear arguments in this matter on January 14, 2026. This decision could have wide-reaching impact on other state entities that do business in or with other states.

As of now, the sovereign immunity doctrine is still intact. However, as these cases demonstrate, even the most fundamental principles of the law are subject to attack which could bring about change. The outcomes of *Frelich* and *Galette* could significantly impact how state entities operate. Moreover, even if these decisions do not change existing sovereign immunity law, they could influence legislative action that modifies existing statutes.

By: Christopher Morgan, Zurich Staff Legal

Trending topics

Fraudulent joinder:
The federal courts look at "real intent"

The federal courts have subject matter jurisdiction over two types of cases: one which deals with federal question, and the other in which the parties are diverse and the amount in controversy is over $75,000. The issue of fraudulent joinder arises in the latter, as for the parties to be diverse, a plaintiff may not be from the same state as any defendant. For example, if the plaintiff lives in Texas and one of the defendants has its headquarters in Texas, there is no diversity, and the federal court would not have jurisdiction over that case. This is an issue most frequently seen in products liability cases.

Sometimes, because a plaintiff may think that a state court is more advantageous, the plaintiff may sue a defendant from the same state, intending to keep the federal court from having diversity jurisdiction. The intent to avoid federal court jurisdiction by naming such a defendant without any real intent to pursue a judgment or demonstrate potential liability may constitute fraudulent joinder. It seems that this tactic has gained attention recently. Three cases highlight this growing issue, with one going all the way to the United States Supreme Court.

First, in *the Hain Celestial Group, Inc. v. Palmquist*, the issue of fraudulent joinder was the basis for Palmquist to request a "do over" after final judgment had been entered for Hain Celestial Group, Inc. ("Hain") in federal court. In that matter, Palmquists lived in Texas, suing all defendants, including the local retailers from which they purchased an allegedly harmful baby food, in Texas state court. Hain removed the case to the U.S. District Court for the Southern District of Texas, asserting that the retailer was fraudulently joined to destroy federal diversity. Ultimately, the federal court agreed that the retailer was fraudulently joined, dismissing it and proceeding with the now-diverse parties. After almost two years, the matter went to trial where the court ruled that as a matter of law, plaintiffs' theory was not supported by science and therefore they could not establish general causation as to Hain's product.

After the entry of judgment in favor of Hain, plaintiffs appealed noting that the district court lacked jurisdiction to hear the matter as the court erroneously dismissed the retailer. The appellate court noted that while plaintiffs' original, state court complaint may not have stated a viable claim against the retailer, the new factual allegations in the complaint filed after the case was removed to federal court were "broad enough to encompass" colorable claims against Hain. These claims were that the retailer "specifically" represented to its customers that the product was of the "highest quality" and would have refused "to sell a product with harmful ingredients." Thus, the Fifth Circuit Court of Appeals vacated the final judgment, as the district court was without diversity subject matter jurisdiction, and remanded the case to the state court. Given the magnitude of the Fifth Circuit's determination, the U.S. Supreme Court granted *certiorari* and heard oral argument on November 4, 2025. An opinion is not expected until 2026.

In the second example, *In re: Abbott Laboratories, et al.*, hundreds of cases were filed against the various defendants, alleging that the infant formula products they manufactured caused necrotizing enterocolitis in preterm infants. Because some of the minor plaintiffs were fed this formula in Pennsylvania hospitals, those hospitals were named as defendants in cases filed in Philadelphia. The manufacturing defendants attempted to remove the cases twice to federal court without success as the hospital defendants destroyed diversity. Later, the Philadelphia court dismissed the hospital defendants as there was no recognizable claim under Pennsylvania law to establish their liability. The Plaintiffs advised they would not appeal this ruling. With the hospital defendants no longer in these state court cases, the manufacturing defendants removed them to the U.S. District Court for the Northern District of Illinois, asserting that the hospital defendants had been fraudulently joined to destroy federal diversity jurisdiction in the initial action.

To ascertain whether there was indeed a fraudulent joinder, Judge Rebecca Pallmeyer had to answer whether "unnecessary nondiverse defendants are named in the *initial* complaint to defeat removal." Stating that the record "leaves little doubt" that the hospitals were named "for the sole purpose of defeating diversity jurisdiction," Judge Pallmeyer noted that no Illinois hospitals had been named as defendants. Moreover, no discovery was seriously pursued against the Pennsylvania hospitals in the years of litigation. Plaintiffs never moved to compel the hospital defendants to respond to discovery requests unanswered for nineteen months, demonstrating that those answers were of no consequence. Furthermore, plaintiffs, despite opportunities to do so, provided no evidence of efforts to pursue claims against the hospitals. Finding that the plaintiffs had "no real intent to pursue" the hospitals to judgment, Judge Pallmeyer concluded that they had been fraudulently joined. Given the gravamen of her opinion, she immediately certified the issue for appeal. Given the ramifications of the appellate decision, this case may be headed to the U.S. Supreme Court as well.

Although not a products liability case, *Madrid v. Wal-mart Stores, L.P.* highlights the same issue facing the court. Here, however, Judge Pappert of the U.S. District Court for the Eastern District of Pennsylvania noted that "lawyers must 'stop, look and listen' before they go around suing others" as a basis for imposing sanctions for the fraudulent joinder. In this slip and fall case, plaintiff had named an individual manager of the store – albeit the incorrect individual – to keep the case in the Philadelphia courts, asserting that the manager was legally responsible for the safety of the premises. When the defendant removed the case to federal court, plaintiff sought to amend the complaint to insert a different manager and thus defeat diversity. Finding that the manager did not actively participate in bringing about the plaintiff's alleged harm, the Court noted there was "no reasonable basis in fact or colorable ground" for the claims against the original manager. In the proposed amended complaint (which sought to name the second manager), the same theory of liability failed on its face. The court foreshadowed that it would "suspect" that plaintiff was trying to "defeat federal jurisdiction."

Because of this "transparent" attempt, the court denied the amendment of managers and sanctioned plaintiff's counsel. While the sanctions were not monetary, counsel were required to perform tasks that demonstrated a desire to "reform." The matter remained in federal court and was later settled.

These three cases demonstrate that fraudulent joinder can affect any type of case. These decisions shed light on an issue which has the potential to burden the courts and the parties with litigation that bounces between state and federal courts and then which can be undone on appeal. The U.S. Supreme Court's holding in *Palmquist* will be telling and may ultimately lead to some review of the rules and their ramifications.

By: Lisa M. Bellino, Zurich CJLA

Trials & tribulations

Dashcam footage:
Making all the difference

In this case, how the incident occurred was never in dispute. It was always known that the employee driver had finished work for the day and gone home. Later, he used his assigned work vehicle to go out on personal business (which was permitted) that ultimately led him to a local bar. Consuming alcohol while using the employer vehicle was not permitted, but the employee driver claimed he had one non-alcoholic beer while he was at the bar. After leaving the bar, as the employee driver was pulling out from a parallel street parking spot, he struck and scraped down the entire driver side of a vehicle parked across the street, hitting the outside driver side mirror and knocking this several yards down the road. The employee driver did not stop, initially fleeing the scene. He did, however, return later to the bar advising the manager of the happening and giving the name of the employer company as the owner of the vehicle he had been driving.

However, the three claims, brought by individuals through their attorney, asserting that they were sitting in the parked vehicle when it was struck, were injured as a result, and were entitled to financial compensation were always in dispute. Because of this dispute, when the claims were denied questioning whether these three were actually occupying the struck vehicle at the time, suit was ultimately filed.

Of course, what these three claimants and their counsel didn't know, was that there was dashcam footage from the employer vehicle. And what they didn't know would make all the difference.

This footage revealed several significant pieces of information. First, it showed that for more than four minutes before the employee driver pulled away from the parked location, he was standing outside the employer vehicle interacting with an unknown female, who was the driver of a vehicle parked directly ahead of him. This potential witness was still at the scene after the driver fled and might be able to answer whether anyone got out of the struck vehicle afterwards. The struck vehicle was in the dashcam view the entire time, with no person entering the vehicle and no obvious movement inside the vehicle – although it was at night with no street lighting and the struck vehicle had heavily tinted windows. After initially striking the other vehicle, the employer vehicle stopped for a few seconds, scraped down the driver side and stopped again, before moving forward again, knocking off the mirror. The total time elapsed from the point of first contact to striking the mirror was approximately fourteen seconds. With the windows heavily tinted it could not be entirely ruled out that someone was possibly sitting in the driver seat or the rear driver side position. However, at no time did the footage show any attempts by any occupants to try to open either driver side door – although from the footage the employer vehicle was in such close proximity that it would have not been possible to open the doors. Still, the footage did not show any faces or hands inside at the driver side windows, or the door jams moving even an incrementally small amount in an unsuccessful attempt to open a door. No one exited the struck vehicle from the passenger side either. Finally, the footage showed a small blinking light on the dashboard around the steering wheel, suggestive of an active alarm.

The bar manager, who had taken the employee driver's report of the incident after he returned to the scene, gave a statement. This statement included her providing that at some point in time, an individual came into the bar claiming to be the owner of a vehicle that had been struck. The statement was not at all clear on any chronology of events, or whether the vehicle owner claimed to have been in the vehicle when it was struck.

The evidence strongly pointed to there being no occupants in the struck vehicle and that these were all fraudulent claims, so more detail from these potential witnesses was essential.

A specially retained investigator secured the detail needed by contacting the bar manager and tracking down the eyewitness at the scene. The bar manager's statement to defense counsel revealed she was actually standing outside the bar with a number of customers and witnessed the incident. One of those customers even exclaimed at the time that he was the owner of the struck vehicle. As he was one of the plaintiffs, and clearly not inside the vehicle when it was struck, the bar manager's statement was extremely helpful in disproving his claim. The other by-stander eyewitness corroborated that she was present for some time following the collision, after the employee driver left the scene, and that there were not any occupants in the struck vehicle.

All of this was shown to plaintiffs' counsel, who was left with no alternative but to dismiss the case with prejudice. Although the facts of how the incident occurred were known and never disputed, the dashcam footage demonstrated to plaintiffs that it's what you don't know that can make all the difference.

By: Colin Bell, Zurich Staff Legal

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For questions, submissions, or topics for discussion, contact lisa.bellino@zurichna.com.

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