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California Products Liability Bulletin is published periodically by the law firm of Wilson Petty Kosmo & Turner LLP for the benefit and enjoyment of its clients and friends. While the information set forth in each article is accurate, every situation is unique in its facts and legal considerations. The information provided is intended to summarize recent developments, but not to provide legal advice. We, therefore, encourage the reader to contact legal counsel to ensure receipt of proper legal advice.

The Products Liability and Warranty Practice Group at Wilson Petty Kosmo & Turner LLP consists of trial lawyers with extensive experience representing manufacturers and sellers in products liability and warranty matters. The firm's experience includes representing manufacturers and retail sellers of automobiles, industrial equipment, pharmaceutical products, medical devices and consumer goods in all aspects of complex litigation, including trial, arbitration and mediation.

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U.S. SUPREME COURT LIMITS SUITS OVER MEDICAL DEVICES

In an 8-1 decision, the United States Supreme Court has held that the preemption clause of the Medical Device Amendments, 21 U.S.C.S. § 360k(a) ["MDA"], bars state common-law tort claims that challenge the safety and effectiveness of a manufacturer's heart catheter because that device had received pre-market approval from the FDA.

The case, *Riegel v. Medtronic, Inc.*, No. 06-179 (U.S. Feb. 20, 2008), involved a New York man who was injured in 1996 when a doctor inflated a balloon catheter during an artery-clearing procedure. Medtronic said the doctor in the case used the catheter contrary to labeling instructions and in a patient for whom it was not recommended. The patient's widow sued Medtronic in a New York district court, alleging strict liability and negligence in design, testing, marketing, and labeling, among other claims. The court dismissed the lawsuit, finding the plaintiff's state law claims were preempted. A U.S. appeals court agreed that the lawsuit was pre-empted by federal law, and the Supreme Court has now upheld that decision.

In the opinion, the high court outlines the "rigorous" review and approval process for Class III medical devices. Noting that the MDA expressly pre-empts only state requirements "different from, or in addition to, any requirement applicable . . . to the device" under federal law (§ 360(a)(1)), the decision, authored by Justice Scalia, opines that New York's common law duties in negligence, strict liability, and implied warranty impose such "requirements" under the ordinary meaning of that term.

This decision is being touted by legal commentators as "significant" in making it harder for consumers to sue manufacturers of federally approved medical devices. However, they have cautioned that other cases involving drugs and drug-labeling are still pending before the high court. In the lone dissent to *Riegel*, Justice Ruth Bader Ginsburg wrote that Congress never intended "a radical curtailment of state common-law suits seeking compensation for injuries caused by defectively designed or labeled medical devices."

**MANUFACTURER ENTITLED TO SUMMARY JUDGMENT WHERE
PLAINTIFFS CANNOT MEET BURDEN TO SHOW DEFENDANT
MANUFACTURED OR DISTRIBUTED PRODUCT**

In *DiCola v. White Brothers Performance Products, Inc.*, 158 Cal.App.4th 666 (Jan. 5, 2008), a California Court of Appeal affirmed the trial court's grant of summary judgment in favor of a distributor and manufacturer in a wrongful death and products liability action brought by the surviving family members of a motorcycle accident victim.

The complaint alleged that the accident occurred because a motorcycle side stand failed to retract. The distributor presented evidence that it did not sell the type of side stand involved in the accident. The manufacturer presented expert declarations stating that the side stand involved in the accident differed significantly from its product. Opposing experts compared the side stand involved [See *DiCola Continued* on back of this newsletter.]

FOR COPIES of these opinions or further information regarding the issues raised, please contact WPKT.

MANUFACTURER ENTITLED TO SUMMARY JUDGMENT IN MOTORCYCLE WARRANTY CASE

In *Dominguez v. American Suzuki Motor Corporation*, No. G038373 (Feb. 15, 2008), the Fourth District Court of Appeal reversed a trial court's denial of summary judgment on behalf of the vehicle manufacturer in an action brought by a consumer under the Song-Beverly Consumer Warranty Act (Civ. Code, § 1790 et seq.).

The consumer complained of a problem with a new motorcycle. After several repair attempts, his counsel sent letters to the manufacturer and the dealer requesting that they repurchase or replace the motorcycle and pay his attorney's fees and costs. The manufacturer responded with a letter explaining that the mechanics had been unable to duplicate the reported problem and requested the consumer submit the motorcycle to an authorized dealer for repair. A month later, the manufacturer offered to repurchase the motorcycle and pay an amount of attorney's fees that was less than the amount the consumer had demanded. The consumer then filed suit under Civ. Code § 1794, subd. (a). The trial court denied the manufacturer's motion for summary judgment, ruling that it had failed to comply with Civil Code § 1793.2(d). The parties stipulated to entry of judgment to facilitate an appeal pursuant to *Building Industry Assn. v. City of Camarillo* (1986) 41 Cal.3d 810, and the trial court entered judgment. Suzuki timely appealed.

The Court of Appeal reversed, holding that the manufacturer was entitled to summary judgment because it agreed to refund the consumer's money in response to his prelitigation demand for repurchase or replacement of the motorcycle. Its letter requesting another opportunity to repair the motorcycle was not a refusal to comply with Civ. Code, § 1793.2, subd. (d)(1). The remedial provisions of Civ. Code, § 1794, subd. (e), did not apply because this motorcycle was not considered a new motor vehicle as defined by Civ. Code, § 1793.2, subd. (d)(2).

NHTSA AGREES TO DELAY IMPLEMENTATION OF EVENT DATA RECORDER REGULATIONS

The National Highway Traffic Safety Administration announced it will postpone until September 1, 2012 requirements for manufacturers to comply with its final rules regarding event data recorders (EDRs), i.e., devices that record safety information about motor vehicles involved in crashes. Those rules do not require manufacturers to install EDRs in vehicles, but

instead require that the EDRs voluntarily installed record a minimum set of specified data elements useful for crash investigations, analysis of the performance of safety equipment, and automatic collision notification systems.

The regulations also address increasing the survivability of the EDRs and their data by requiring that the EDRs function during and after the front, side and rear vehicle crash tests specified in several federal motor vehicle safety standards; require vehicle manufacturers to make commercially available download tools that would enable crash investigators to retrieve data from the EDR; and require vehicle manufacturers to include a brief standardized statement in the owner's manual indicating that the vehicle is equipped with an EDR and describing the purposes of EDRs.

Under the rules, examples of data elements to be recorded in vehicles with an EDR include: the longitudinal Delta-V, the status of the safety belt of the driver; front air bag lamp and service brake; front air bag deployment, including multi-event/number of events; time from event 1 to event 2; and speed. The final NHTSA rule has been published at 73 Fed. Reg. 2168 (January 14, 2008).

TORTFEASOR CAN REDUCE NON-ECONOMIC DAMAGE LIABILITY BY PROVING CONTRIBUTING MEDICAL NEGLIGENCE OF TREATER OF INJURY

The Second District Court of Appeal, in *Henry v. Superior Court*, B200690 (Feb. 25, 2008) granted a writ of mandate, finding that the original tortfeasor in a personal injury action is entitled to reduce exposure to non-economic damages by proving that treating medical professionals share fault for the aggravated injuries suffered by plaintiff.

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in the accident to an exemplar and found the two products similar. The family members' counsel submitted a declaration stating that she had obtained the exemplar side stand in its original packaging, from a person who told counsel it came from the defendant-distributor. The Court of Appeal held that the defense had presented *prima facie* evidence that it did not manufacture or distribute the product at issue and thus met its initial burden on summary judgment. The Court's decision, authored by Justice O'Rourke, held that the plaintiff's evidence was insufficient to raise a triable issue of material fact. The court ruled that counsel's declaration and the packaging and instruction sheet of the exemplar side stand were inadmissible hearsay.

WILSON PETTY KOSMO & TURNER LLP
LITIGATION AREAS:

➤ Products Liability
➤ Pharmaceutical & Medical Devices
➤ Warranty

➤ Employment Law
➤ Contract Disputes
➤ Business Litigation

➤ First Amendment
➤ Class Action
➤ Trade Secret

➤ Real Property
➤ Healthcare
➤ Libel

