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The Wiggin and Dana U.S. Product Liability Law E-Newsletter is a periodic newsletter designed to inform clients and others about recent developments in the field of product liability law. Nothing in the E-Newsletter constitutes legal advice, which can only be obtained as a result of personal consultation with an attorney. The information published here is believed to be accurate at the time of publication, but is subject to change and does not purport to be a complete statement of all relevant issues.

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APPELLATE COURT RULINGS IN FLORIDA (CLASS ACTIONS) AND PENNSYLVANIA (SPOILIATION) RECENTLY CAUGHT MY EYE.

In a July 6, 2006 decision in the seemingly never-ending tobacco wars the Florida Supreme Court in *Engle v. Liggett Group, Inc.* managed to include some good news for each side. Industry defendants were pleased by the Court's decision affirming an intermediate appellate court's reversal of a July 2000 jury verdict awarding a class of 700,000 Florida smokers \$145 billion (\$207,142 each!) in punitive damages. The Court held that individualized facts made it unfeasible to decide liability and damages on a class basis and decertified the class for those purposes. On the other hand, the Court found that certain issues—such as whether cigarettes are defective, addictive and a cause of a number of major diseases—could be decided on a class basis and that jury findings on such issues adverse to the industry defendants would be res judicata (i.e., already decided) in subsequent individual trials.

This sensible ruling continues the trend of appellate courts and legislatures in the U.S. over the last few years to tightly control improper attempts to recover huge awards through trials and the threat of trials in class action cases.

On June 17, a Pennsylvania intermediate appellate court in the case of *Creazzo v. Medtronic Inc.* sustained a trial court dismissal of a case against a medical device manufacturer as a sanction for spoliation of evidence. The case concerned an allegedly defective electrical stimulus device intended to relieve chronic pain after surgical implantation. According to the court, after the malfunctioning device was removed plaintiff and her counsel failed to act reasonably to see that it was preserved by the hospital at which the

removal surgery occurred. The fact that the hospital actually discarded or misplaced the device did not relieve plaintiff of her responsibility to see that it was preserved as evidence.

Plaintiff argued for a less onerous sanction than court dismissal (such as allowing the jury to infer that the unavailable evidence would have been favorable to the defendant). However, the court held that it was required to consider four factors to determine an appropriate sanction: (1) the degree of fault of the offending party; (2) the degree of prejudice to the opposing party; (3) whether the wrong could be remedied by imposition of a lesser sanction; and (4) whether in the case of serious wrongdoing a severe sanction will serve to deter similar conduct by future litigants. Although plaintiff argued that there was not great prejudice to the defendant because the issue of alleged defective design could be resolved without examining the specific device which allegedly failed, the court disagreed and held that this was really a manufacturing defect case. That is, even if the product's design gave rise to an unacceptable risk of failure after implantation, whether the device implanted in plaintiff actually failed because of a design flaw could only be established by examining the device in question.

U.S. courts have traditionally been reluctant to impose the sanction of dismissal against an injured plaintiff when someone else—counsel or a third party—has failed to preserve evidence. This appellate decision is important because of the emphasis given to a product manufacturer's inability to effectively defend a case due to such conduct.

I hope this is helpful. As always, please let me know if you have questions or comments.