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Contacts**New York Office**

200 Park Avenue, 52nd Floor
New York, New York 10166
(212) 309-1000
(212) 309-1100 fax

Brian V. Otero

(212) 309-1020
botero@hunton.com

Stephen R. Blacklocks

(212) 309-1052
sblacklocks@hunton.com

Eighth Circuit Holds Drug Manufacturers Not Liable for Social Costs of Drug Misuse

The U.S. Court of Appeals for the Eighth Circuit has denied an attempt by several Arkansas counties to hold manufacturers of over-the-counter drugs containing ephedrine or pseudoephedrine liable for the costs of dealing with the societal effects of methamphetamine made from the defendants' products. *Ashley County, Arkansas v. Pfizer, Inc.*, 2009 WL 17992 (8th Cir. Jan. 5, 2009).

The plaintiff counties alleged that they had spent funds combating methamphetamine production, jailing users and dealers, and treating persons injured by methamphetamine use. Although the defendants did not sell their products directly to methamphetamine producers, the counties alleged that the manufacturers knew that their products would be purchased from retailers and "cooked" to make methamphetamine. The counties sought damages under the common law, the Arkansas Deceptive Trade Practices Act, and the Arkansas crime victims civil liability statute.

The district court granted the defendants' motion for judgment on the pleadings and the Eighth Circuit affirmed, holding that the plaintiffs had to plead and prove that the defendants' conduct was the proximate cause of the counties' injuries.

Arkansas' definition of proximate cause requires "a natural and continuous sequence, unbroken by an efficient intervening cause," between a defendant's conduct and the plaintiff's injury. *Id.* at *4 (quoting *City of Caddo Valley v. George*, 9 S.W.3d 481, 487 (Ark. 2000)). The counties conceded that there were acts intervening between the defendants' conduct and the counties' injuries — e.g., the purchase by methamphetamine manufacturers and subsequent cooking to make methamphetamine — but argued that those intervening acts were not sufficient to establish on a motion on the pleadings that the defendants' actions were not the proximate cause of their injuries.

To resolve the issue of proximate cause, the court looked to cases in which gun manufacturers were held not to be liable to local governments for the cost of providing government services resulting from illegal gun use, such as *City of Philadelphia v. Beretta U.S.A. Corp.*, 227 F.3d 415 (3d Cir. 2002). The Eighth Circuit observed that underlying the *Beretta* decision was the "long and tortuous" route from the manufacturers to the illegal use of the guns, the manufacturers' lack of intent to harm citizens, and the derivative nature of the city's injuries. *Id.* at *7. The

court further noted that the Arkansas Supreme Court had rejected efforts to hold gun manufacturers liable for harm caused by the illegal use of guns because the manufacturers had no control over the dealers who sold their guns. *Id.* (citing *First Commercial Trust Co. v. Lorcin Eng'g, Inc.*, 900 S.W.2d 202, 205 (Ark. 1995)).

The Eighth Circuit concluded that the defendants' actions could not be the proximate cause of the plaintiffs' injuries. As in the gun cases, the defendants were not alleged to have violated any statute or regulation in manufacturing or distributing their products, and they "sold their products to legitimate independent retailers" prior to those products being misused. *Id.* The court held that the illegal actions of individuals using the defendants'

products to produce methamphetamine were "sufficient to stand as the cause of the [plaintiffs'] injury" and were "totally independent" of the defendants' actions — even if the defendants knew that their products would be used in methamphetamine production. *Id.* at *8 (quoting *City of Caddo Valley*, 9 S.W.3d at 487).

The court explained that its decision was ultimately premised on public policy. It expressed reluctance to set off the "avalanche" of cases it predicted would follow if it were to hold the counties had a cause of action, and found it was appropriate to use the concept of proximate cause to block the proliferation of similar lawsuits against all types of commercial enterprises. *Id.* at *9.

The Eighth Circuit's decision is a significant contribution to what is now

a fairly long line of cases employing the concept of proximate cause to limit a manufacturer's liability for even foreseeable economic consequences to nonusers resulting from the use or misuse of its products. The Eighth Circuit looked to gun cases for instruction; it could as well have looked to a series of decisions from Circuit Courts holding as a matter of law that cigarette manufacturers were not liable to public and private health care payers for the costs of treating smokers. *E.g.*, *Laborers Local 17 Health and Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229 (2d Cir. 1999). The Eighth Circuit's decision is a clear-sighted recognition of the public policy choices that underlie such suits, and provides a road map on how to use the concept of proximate cause to restrict novel theories of economic injury to nonusers of a product.