

Information-Related Tort Claims – New Science and New Rules

Legacy liabilities typically arise when yesterday's decisions result in today's liabilities. Oftentimes, today's liabilities arise because science has

KIRK T. HARLEY

evolved and now indicates that substance or process X "causes" disease 1, 2 or 3.

When the claims are litigated, they tend to focus on alleged deficiencies in the interpretation or distribution of information regarding the substance or the process. The legal labels for the claims are often colorful: Fraud. Fraudulent misrepresentation. Failure to warn. Fraud on the FDA. Conspiracy to suppress information.

The overall point of this article is that scientific knowledge is growing exponentially, and radically new processes and structures are unfolding with respect to distribution of scientific and technical information, so it is logical that there will be changes in the battlefield of information-related tort claims. From this seat, it seems inevitable that companies and their advisors need to both create and respond to new strategies and issue arising from the changes in science and distribution of information. To stimulate that conversation, this article notes a few of the many changes in information technology and science, and explores just a few of the many possible places where there are or will be opportunities to redefine the issues and substantive standards involved in pressing or defending against information-related tort claims.

Changes in Information and Science

There is no one simple measure of the increases in the quantity and quality of scientific information. Information experts, however, see profound changes already and are predicting radical new kinds of scientific research and information sharing. In an online paper titled *Speculations on the Future of Science*, Kevin Kelly envisions a wide range of new scientific techniques, including even triple blind studies. http://www.kk.org/thetechnium/archives/2006/03/speculations_on_1.php.

Equally important are the present and expected future major changes in publishing and archiving online scientific information. The variations are many, but the general label is "open access literature," with "OA" as the short-hand term. Numerous OA journals execute peer review as do traditional sources, but the journal articles and related data usually are free to users and easy to download, share and use (provided that the source is properly attributed).

Another more profound change consists of OA archives. These archives maintain wide ranges of scientific information, including for example pre-publication drafts of scientific articles. Sometimes hosted by a university with a specialty in the substantive area, OA archives may even include comments and responses from peer reviewers, and all underlying data. Cornell's arXiv.org, for example, covers a wide range of information on physics and other areas of science. The OA entire topic is discussed in easy to follow detail by Professor Peter Suber. <http://www.earlham.edu/~peters/fos/overview.htm#journals>. Meanwhile, scientists already are debating whether, how or when to "regulate" access to open archives. See <http://www.fourmilab.ch/fourmilog/archives/2006-03/000663.html>.

Substantive Reasons to Care About Changes in Access to Information

How may science and information technology changes benefit tort defendants facing information-related claims? Start with a basic issue such as a statute of limitations defense. When are plaintiffs deemed to know information easily found through a Google search?

Move to another level and think about the sophisticated user defense that depends in part on the flow of information between suppliers/manufacturers and employers. There plainly are ways that information flow from manufacturers to users may be reshaped to document the facts needed for defenses for suppliers/manufacturers. Think similarly about new methods for documenting distribution of product warning data aimed at end-users.

Consider also more exotic issues. Suppose a plaintiff claims that a defendant suppressed scientific information. Can such claims survive proximate cause scrutiny today if the information supposedly suppressed has been on the Internet for a decade? Suppose a company financially supported a scientific article with a supposedly “misleading” conclusion, but the author also published all of the data on the Internet. Can the article itself be deemed a cause of anything when the data was available on the Internet to potential plaintiffs, their lawyers, and their potential scientific experts?

Rightly or wrongly, the product liability caselaw for years has included statements asserting that manufacturers are deemed to have “constructive knowledge” of the “medical literature.” How will courts apply that standard tomorrow? For example, does the “medical literature” include views and opinions expressed in blogs and discussion groups?

Speed is Another Reason to Care About Changes In Science

Consider the following recent example of how quickly risks and strategies may change when science changes. During the week of October 23, 2006, The New England Journal of Medicine published a new study by Henschke et al. The study claimed to show that annual CT scans will in fact pick up lung cancer earlier and result in what appear to be materially better survival rates. A story on the research was published in the New York Times on October 26. <http://www.nytimes.com/2006/10/26/health/26lung.html>.

Less than a week later, the study was cited by a plaintiff's expert speaking at an asbestos litigation seminar in London. By November 14, plaintiff's lawyers in New York had cited the new study as relevant to new medical monitoring lawsuit seeking CT scans for long-time smokers, and a new lawsuit was filed in Massachusetts on December 14. <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1163498720002>. Thus, three weeks from new science to use in new lawsuits.

Res Judicata and Science

Common law courts created res judicata rules when science was not nearly so fluid. When and how will res judicata rules change now that science is evolving so rapidly? Will new res judicata issues be resolved first in

abortion-rights cases, tort cases or some other set of cases? Will or should the answer be the same for all sets of cases?

New Science Leads to New Regulatory Approaches in the US and EU

Advances in science also are changing the regulatory landscape in the US and around the globe. For example, in 2005, the U.S. EPA dramatically overhauled its approach to regulating “carcinogens.” The changes are profound; some of the regulations are specific to the now partially known “Mode of Action” for particular “carcinogens.” In other words, the regulatory process is changing now that science lets us see — to some degree — how “carcinogens” actually do what they do, and when/how it happens. See <http://www.tera.org/pubs/haber%20et%20al%202006.pdf> (commenting on EPA's new approach).

Meanwhile, in December 2006, the EU approved the controversial REACH legislation (Registration, Evaluation and Authorization of Chemicals). The new EU approach in part reverses existing de facto presumptions by requiring companies to prove that substances in everyday products are “safe.” Implementing regulations are due in 2007, and no doubt companies, industry groups and NGO's will take positions based on their respective views of scientific information. Those views undoubtedly will end up more or less online, and will provide grist for new legal and evidentiary arguments about the use and distribution of scientific information.

Conclusion

Every day, scientific information becomes more important, more available and more subject to change. It therefore seems inevitable that there will be changes in the rules, issues and evidence for information-related tort claims. Today, more than ever, it's time for companies and their advisors to think proactively and try out new legal and risk management paths that do not yet exist.

Kirk T. Hartley is a partner of Butler Rubin Saltarelli & Boyd LLP, a Chicago litigation boutique. He is a member of the firm's Legacy Liability practice group. The views expressed are personal to the author.



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