

## Product Liability & Toxic Torts

### Reducing the Impact of the Internet On Product-Liability Jury Trials

By Beth S. Rose and Vincent Lodato

According to the Pew Internet and American Life Project, more than half of all American adults report using online social networks, and almost 40 percent of American adults who own mobile phones use their devices to access the Internet. Considering the extent to which technology has permeated all aspects of our daily lives, it is no surprise that the Internet and social media have the potential to impact product liability jury trials as well.

For example, in September 2009, the South Dakota Supreme Court upheld a trial court's decision to vacate a jury's no-cause verdict in a case involving an alleged defective seatbelt. The trial court vacated the award after attorneys learned that a juror had "Googled" the defendants

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to determine whether they had faced any other lawsuits involving seatbelt failures. The juror then shared his research findings with his fellow jurors. *See Russo v. Takata Corp.*, 774 N.W.2d 441 (S.D. 2009).

New Jersey courts are home to numerous product liability cases, including those designated by our Supreme Court as mass torts. Of course, an attorney trying any case needs to consider and anticipate the effect the Internet may have on the jury. But when the case involves a product or a mass tort, the potential for the jury to be tempted and influenced by the Internet or social media is particularly acute for several reasons.

First, the subject matter of a complex product liability case is often unfamiliar to jurors. Product liability and mass tort trials typically involve pharmaceuticals, medical devices or similarly complex products. Most jurors are not familiar with how these types of products work, how they are designed or manufactured and how they operate. Jurors may be tempted to do their own Internet research on the product or the company involved in the lawsuit.

Second, most product liability trials, especially those involving pharmaceuticals and medical devices, involve complex scientific

and medical issues. Although the parties will present expert testimony discussing those scientific and medical issues, jurors may not fully understand the witness's testimony or may desire more information on the subject. Again, jurors might wish to turn to the Internet to do their own research.

Third, many products that are the subject of product liability and mass tort lawsuits are regulated by the government. For example, pharmaceuticals and medical devices are heavily regulated by the Food and Drug Administration (FDA). Jurors in a product liability suit involving an FDA-regulated product may be tempted to visit the FDA's website to learn how the regulatory process works and whether there is any information on the product or company involved in the lawsuit. The FDA makes numerous types of regulatory documents available to the public on its website, such as adverse event reports, recall notices and warning letters, which may not be relevant to the trial and/or may have been specifically excluded by the trial judge.

New Jersey courts have tried to address these potential problems by updating jury instructions to specifically prohibit jurors' use of the Internet and

social media. The New Jersey Supreme Court, for example, amended its civil jury instructions in May 2010 to specifically advise jurors that they may not use the Internet to conduct research or to “communicate with others about the case, either personally or through computers, cell phones, text messaging, instant messaging, blogs, Twitter, Facebook, Myspace, personal electronic and media devices or other forms of wireless communication.” See New Jersey Model Civil Jury Charge 1.11C. The Third Circuit also updated its civil jury instructions to incorporate similar changes that the Judicial Conference of the United States recommended in December 2009. See Third Circuit Model Civil Jury Instruction 1.3. Despite these efforts, reports of jurors using the Internet and social media to research and discuss cases continue to surface. The following strategies may increase juror compliance with the court’s instructions.

#### **Improving Jury Instructions and Juror Awareness**

Although the New Jersey Supreme Court and Third Circuit have modernized the model jury instructions, their improvements may not go far enough. For example, a juror may not fully appreciate that the instructions prohibit her from using Google to obtain the definition of a scientific or medical term she does not understand. Or she may not realize that “tweeting” her observations of a witness’s demeanor is prohibited conduct because she may not believe that she is engaging in a “discussion.” Jury instructions could be supplemented to provide specific examples of the types of Internet and social media usage that is not permitted.

Jurors may be motivated to follow the court’s instructions if the rationale for the restrictions is explained to them. For example, New Jersey Model Civil Jury Charge 1.11C explains that these restrictions are necessary to ensure that: (1) all jurors are making their decisions based on the same information; and (2) each party has an opportunity to explain or refute the information the jury is relying on.

Finally, juror compliance may be increased if jurors are advised of these

restrictions *before* they appear for jury duty and are regularly provided with reminders throughout the trial, including before they are dismissed for breaks and overnight recesses. In September 2010, the American College of Trial Lawyers published its recommendations on jurors’ use of the Internet and social networks and recommended including language about such prohibitions in the jury summons and referring potential jurors to the court’s website for more detailed information.

#### **Requiring Jurors To Sign Pledges or Declarations**

Some trial judges have required impaneled jurors to sign a pledge or declaration confirming that they are aware of the restrictions on Internet and social network usage and that any violations may subject them to penalties for contempt or perjury. In 2009, a San Diego Superior Court judge required jurors to sign such a declaration before trying a well-publicized civil case involving a woman who died while participating in a radio station contest. In October, Judge Shira Scheindlin of the United States District Court for the Southern District of New York also required jurors to sign a pledge prior to serving on the highly publicized criminal trial of Viktor Bout, an alleged arms dealer and terrorist supporter. By advising jurors that any misconduct could result in criminal penalties (including fines and potential jail time), these pledges/declarations reinforce to jurors the importance of the court’s instructions and help them to err on the side of caution in the event they are unsure whether certain Internet or social media usage violates the court’s instructions.

#### **Limiting Jurors’ Use of Mobile Devices**

In September 2010, a defense attorney in Colorado requested that the trial judge prohibit jurors from bringing their cell phones and mobile devices to court in order to prevent them from researching or discussing the case. The judge denied the request because it would impose an undue hardship on jurors’ ability to keep in touch with their families and employers. Given the widespread reliance on cell phones and mobile devices, it is unlikely that trial

judges will grant requests to prohibit jurors from bringing their devices to court. On the other hand, judges may be receptive to requests that jurors leave their phones and devices with court personnel while the trial is in session and during deliberations. Jurors would be able to use their phones and devices during breaks.

#### **Voir Dire**

The use of jury questionnaires in mass tort trials has become commonplace. Attorneys may want to use jury questionnaires or voir dire to learn whether potential jurors obtain information from the Internet and use social media sites and whether they are capable of complying with the court’s restrictions. An attorney whose client has received negative media coverage may decide that she does not want a juror with a high Internet presence. In addition to uncovering background information on potential jurors, these types of questions may also deter jurors from violating the court’s instructions. On the other hand, attorneys using voir dire to ascertain potential jurors’ Internet and social media usage should be cautious as some jurors may view these questions as an invasion of their privacy.

#### **Allowing the Jury To Ask Questions**

Jurors may conduct their own independent research because they are confused by certain terms or they feel that counsel has not asked an important question. The New Jersey Supreme Court’s pilot program to investigate juror questions showed that jurors supported the opportunity to ask questions. Rule 1:8-8(c) of the New Jersey Court Rules allows parties, prior to voir dire, to request that the court allow jury questions. Trial counsel should consider whether allowing the jury to ask questions could reduce the possibility that jurors will engage in their own Internet research.

When preparing to try a product liability case, the potential influence of the Internet and social media on jurors should be anticipated. Trial attorneys should consider these and potentially other strategies to minimize the risk of juror reliance on the Internet or social media during their jury service. ■