



The Status of Cell Phone as Carcinogens Litigations

By: Gregory T. Casamento, Sarah M. Chen and Robert W. Mouton

Recent years have seen an increase in litigation against cell phone manufacturers, distributors and wireless providers by plaintiffs alleging that their cell phones were carcinogenic. Greater focus by plaintiffs' attorneys looking for the next big litigation issue suggests that the number of cases filed against cell phone companies may multiply.

Cell phones function by transmitting information between a radio transmitter and a base station, and during that communication cell phones emit a low level of radio frequency ("RF") radiation.¹ The Federal Communications Commission ("FCC"), which began regulating RF emissions from cell phones at the behest of Congress in 1996,² "has stated that any cell phone legally sold in the United States is a 'safe' phone."³ To date, in light of the FCC's regulatory scheme, many courts have dismissed individual actions on conflict-preemption grounds,⁴ while other courts have excluded plaintiffs' expert evidence on *Daubert* grounds. These defenses, while previously effective, may erode as more artfully drafted pleadings are filed and as scientists continue to study a possible link between cell phone use and associated medical issues.

Conflict-Preemption Defense

In *Farina v. Nokia Inc.*,⁵ plaintiff brought a putative class action against cell phone manufacturers asserting breach of warranty arising from alleged conspiracy to suppress knowledge of adverse effects from RF emissions. The Third Circuit dismissed the case after holding that "[a] jury determination that cell phones in compliance with the FCC's ... guidelines were still unreasonably dangerous would, in essence, permit a jury to second guess the FCC." Similarly, in *Murray v. Motorola, Inc.*,⁶ the D.C. Court of Appeals affirmed a decision that the plaintiffs' claims were barred by "conflict-preemption" because "if successful, [they] would stand as an 'obstacle' to the accomplishment of federal objectives."

Artful pleading, however, allowed plaintiffs in *Pinney v. Nokia, Inc.*,⁷ to avoid dismissal. In *Pinney*, plaintiffs alleged that Nokia had "negligently and fraudulently endangered the consuming public by marketing wireless telephones without headsets."⁸ The Fourth Circuit held that in enacting the Federal Communications Act, Congress sought "to ensure the availability of a nationwide network of wireless service coverage,"⁹ rather than to achieve "national RF radiation standards."¹⁰ In addition, the Fourth Circuit noted that "Congress ... specifically allowed for preemptive national RF radiation standards only for personal wireless service facilities" and that two savings clauses allowed the case to proceed.¹¹

Daubert Defense

Reynard v. NEC Corp.,¹² decided in 1995 before the FCC had begun to regulate RF emissions from cell phones, was nonetheless decided in defendants' favor after the court precluded plaintiffs' expert



witnesses' testimony under *Daubert v. Merrell Dow Pharmaceuticals*.¹³ The court held that the plaintiffs' medical expert's affidavit did not meet the *Daubert* standard, because it contained no reference to research performed independent of the litigation and where "there is no proffered evidence that the studies, analysis, and conclusions of [the] affidavit have been subjected to the normal scientific scrutiny through peer review and publication." Similarly, in *Newman v. Motorola, Inc.*,¹⁴ the court excluded expert testimony proffered to support causation where the doctor's papers had not been accepted for publication in a peer-reviewed journal and the validity of his results were suspect.¹⁵

WHO & Supreme Court Action

On May 31, 2011, the International Agency for Research on Cancer of the World Health Organization ("WHO") announced that it was classifying cell phones as possibly carcinogenic.¹⁶ That same day, and following a petition to the U.S. Supreme Court in *Farina*,¹⁷ the Supreme Court invited the Acting Solicitor General to file a brief expressing the view of the U.S. in the case. The Amicus Curiae Brief argued that the petition for a writ of certiorari should be denied,¹⁸ as indeed it was.¹⁹

While the initial cases generally have been decided in favor of defendants, the WHO's actions and the level of interest by the Supreme Court²⁰ indicate that this issue may continue to evolve, thus cell phone manufacturers, distributors, wireless service providers, and insurance carriers providing coverage for such claims should monitor its progress.

Endnotes

- 1 *Farina v. Nokia Inc.*, 625 F.3d 97, 104 (3d Cir. 2010)
- 2 *Farina v. Nokia Inc.*, 625 F.3d 97, 107 (3d Cir. 2010)
- 3 *Farina v. Nokia Inc.*, 625 F.3d 97, 105 (3d Cir. 2010)
- 4 *Id.* at 105. The current standards are codified at 47 C.F.R. § 2.1093(d), and all cell phones sold in the United States must comply with those regulations, 47 C.F.R. §§ 2.803(a)(1), 24.51-.52.
- 5 625 F.3d 97, 125-126 (3d Cir. 2010)
- 6 982 A.2d 764, 771, 778 (D.C. 2009)
- 7 402 F.3d 430 (4th Cir. 2005)
- 8 *Pinney v. Nokia, Inc.*, 402 F.3d 430, 440 (4th Cir. 2005)
- 9 *Pinney v. Nokia, Inc.*, 402 F.3d 430, 457 (4th Cir. 2005)
- 10 *Pinney v. Nokia, Inc.*, 402 F.3d 430, 457 (4th Cir. 2005)
- 11 *Pinney v. Nokia, Inc.*, 402 F.3d 430, 458 (4th Cir. 2005)
- 12 887 F. Supp. 1500, 1508 (M.D. Fl. 1995)
- 13 509 U.S. 579 (1993). *Daubert* sets forth certain standards that must be met before testimony concerning scientific, technical or other specialized knowledge offered in support of a party's claim can be admitted.
- 14 218 F. Supp. 2d 769 (D. Md. 2002)
- 15 *Id.* at 778-779
- 16 http://www.iarc.fr/en/media-centre/pr/2011/pdfs/pr208_E.pdf
- 17 <http://www.scotusblog.com/case-files/cases/farina-v-nokia-inc/>
- 18 <http://sblog.s3.amazonaws.com/wp-content/uploads/2011/09/09-26-Farina-CVSG.pdf>
- 19 <http://www.scotusblog.com/case-files/cases/farina-v-nokia-inc/>
- 20 See, e.g., Siddhartha Mukherjee's *Do Cell Phones Cause Cancer*, *New York Times*, April 13, 2011, at http://www.nytimes.com/2011/04/17/magazine/mag-17cellphones-t.html?_r=3&hp=&pagewanted=all

For more information on the matters discussed in this *Locke Lord QuickStudy*, please contact the authors:

Gregory T. Casamento | T: 212-812-8325 | gcasamento@lockelord.com

Sarah M. Chen | T: 212-812-8303 | schen@lockelord.com

Robert W. Mouton | T: 504-558-5113 | rmouton@lockelord.com