

# MAK NEWS

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## Les Eng Takes Construction Defect Trial Back To School

For his most recent trial, Les Eng went back to school. The supervising attorney of MAK's trial team recently took a 42-home construction defect case to the jury not in a courtroom, but in the classroom of a Riverside County Public High School. It was a real case alright, but the sheer size of the case combined with the lack of an available courtroom caused the entire matter to be tried amidst blackboards, thumbtacks, chalk and erasers. "It was a surreal experience," Eng says of the five month trial which resulted in handsome awards for the firm's clients. "In trial you should always expect the unexpected. Well, this one was a first for me."

Les Eng joined MAK as lead trial counsel in January 2006. The firm decided to



Les Eng

create a trial team built around Eng which would work in tandem with each of the firm's construction defect lawyers to help them prepare their respective cases for trial. Les oversees the work of the trial team attorney and paralegal staff and coordinates their efforts with the attorney assigned to each case and his/her legal assistants.

Taking a multi-party complex case to trial is a monumental undertaking. Distillation of tens of thousands of exhibits into an organized, logical, and compelling presentation begins months before trial and continues after the jury is sworn. The effort requires state-of-the-art computers and specialized software. This cutting edge technology presents new opportunities for trying complex cases, leading Les to note, "Complex civil litigation on this scale is virtually impossible without modern technology. Twenty years ago, an effective trial for these types of cases was simply unmanageable; for example, my first secretary used carbon paper when typing briefs to create copies. Powerful computers and modern software provide the tools necessary for effective trials of significant scope."



Les joined MAK with a passion for trying cases and faith in the jury trial process. "While most litigation activities can become tremendously antagonistic, trying a case in front of a jury is always the most enjoyable and satisfying aspect of practicing law." In private practice since 1986, Les has tried 16 jury trials and has represented both plaintiffs and defendants. On the defense side, he represented a San Diego homeowner against claims asserted on behalf of a bicyclist who suffered brain death from an accident. The bicyclist's family alleged that the homeowner's motorhome partially blocked a residential street in Point Loma, causing the accident which rendered the cyclist profoundly disabled.

At trial, emotions ran high in light of the catastrophic injuries. However, Les obtained a jury verdict in favor of his client, and jurors expressed their faith in a correct verdict, despite tragic circumstances. On the plaintiff's side, Les represented a personal injury plaintiff before a jury in Ventura County. Immediately prior to his closing argument, Les obtained a settlement

which was 20 times greater than the offer received immediately prior to empanelling the jury. Opposing counsel said, "I'll be the first to praise him as a trial lawyer. He really did a great job for his client."

Les's application to the prestigious American Board of Trial Advocates (ABOTA) on a trials/point-equivalency basis is currently pending. He is also an adjunct professor at Loyola Law School and Whittier College of Law where he taught Civil Trial Advocacy. In addition, he has served as a judge pro-tem and court-appointed arbitrator for the Superior Court of Ventura County, where he resides.

The impact of having access to someone with Les's experience and a full-time trial team hasn't been lost on the younger MAK lawyers. "One of my cases was getting close to trial, but I have 35 other cases to attend to," said Mark Masterson, one of the firm's lawyers. "Les came in and helped me get organized, made sure I didn't miss anything, and got started with the expert depositions. It was huge help." The trial is still pending. "Hopefully it will be in a courtroom," Les says with a laugh.

**Milstein, Adelman, & Kreger, LLP**

A full service plaintiff's litigation firm specializing in construction defect and consumer class action cases.

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## LEGAL TRENDS

### DOUBLE-SECRET PREEMPTION

#### YOU SHOULD KNOW YOUR RIGHTS

Whatever the outcome of the United States Supreme Court case known as *Wyeth v. Levine*, the dubious legacy of federal preemption will be a bitter pill to swallow for consumers, lawyers and consumer rights advocates for years to come. Even with the onset of the Obama Administration, the Bush Administration is mounting a back room effort to further erode consumer protection laws in the waning days of their reign. The new name of the tort reform game is "federal preemption", which means that where a federal agency has acted, and sometimes even when it hasn't, if the area is within the agency's federal regulatory sphere, states are barred from taking stronger action, or any action at all, and consumers are barred from pursuing lawsuits under state law.

Here's how it works: federal agencies, under pressure from the Bush Administration, have become very aggressive in unilaterally declaring that their regulations preempt state law. Such declarations often flout or even contradict the intent of Congress, which is the traditional standard of whether federal statutes or federal agency regulations override state law. In at least one instance the federal agency has snuck in preemption language after the proposed regulation was published for public comment.

The reality is that preemption affects more than just drugs and medical devices that fall under the FDA. For example, federal preemption helped precipitate the current subprime mortgage meltdown when in 2003, the federal government's Comptroller sided with lenders in a dispute with states that wanted tighter regulation over predatory lending and out-of-control lenders. The states wanted more latitude to limit exorbitant interest rates and fine-print fees, but the government sided with lenders by preempting state laws from reining in lenders.

Other clear examples of how federal agencies, at the direction of the Bush Administration, have attempted to protect corporations that commit wrongful acts that injure or kill innocent victims include The National Highway Traffic Safety Administration (preempting cases concerning seat belts, roof-crush resistance and rear-object detection systems); The Consumer Product Safety Commission (preempting

flammability standards for mattresses); The Department of Homeland Security (preempting laws governing chemical-facility safety); The Federal Railroad Administration (railroad companies exempted from lawsuits involving commuter train derailment. This came just four days after Congress approved a measure that preserved the right of victims to sue railroad companies in such instances).

Interestingly, documents just released by Rep. Henry Waxman (D, Calif.) contradict the FDA's position in *Levine*; whereas the FDA took the

position that federal drug-approval and warning-label standards should trump stricter state laws, two FDA officials said in the memos that it is wrong to assume that FDA-approved drug labels are completely reliable or that they are based on full disclosure of safety risks by drug makers.

The issue before the Court in *Levine* was whether the existence of federal regulation regarding drug labeling by the FDA prohibits states from allowing victims to file state law product liability lawsuits in state courts. The High Court, in reviewing the case, must decide whether a regulatory agency can ignore Congress and actually ignore the constitutional rights of individual citizens. Most observers of the November 3 oral argument opined that even if the Justices find for preemption, the ruling is likely to be narrow. Considerable skepticism from Justices Alito, Kennedy and Ginsberg give hope to consumers and trial lawyers that

a further erosion of consumer's rights will abide. The Court's opinion is expected in June.

If the Court finds for Wyeth, as it did in February for Medtronic in a case where the justices held that the medical device amendments to the FDC Act barred state law claims against the maker of a balloon catheter that burst during an angioplasty (*Riegel v. Medtronic*), it will leave consumers without any avenue for them to redress their injuries in the courts. Such injuries will no longer be compensable through state tort law unless congress and the new administration act.

Meanwhile, some 50 new rules are being fast-tracked by Bush Administration officials in a further effort to eradicate many tort laws altogether. It's high time that somebody stands up for the American consumer.



## RECENT RESULTS

### MAK IS PLEASED TO REPORT THE FOLLOWING FAVORABLE RULINGS AND CASE RESOLUTIONS:

#### Court Of Appeal

Motion for Summary Judgment REVERSED. The Second District of the California Court of Appeal agreed with MAK lawyers representing consumers of an anti-anxiety medication and in a published decision reversed an order of the Superior Court of Los Angeles County (California) which granted respondent drug manufacturer's motion for summary adjudication, precluding the consumers from proceeding as a class action. The trial court ruled that the consumers' lawsuit sought to certify the identical putative class, pursuing the same legal claims, as had been disallowed in prior federal court actions against the manufacturer. The Court of Appeal reversed the trial court's order granting summary judgment on the class certification issues, holding: (1) issue of adequate representation of class in prior proceeding was not identical to representation issue in current proceeding; (2) prior proceeding wherein district court rejected certification of national class did not collaterally estop motion to certify class of all California users; and (3) rejection of class certification in prior proceeding did not collaterally estop motion to certify class under the primary right theory.

#### Trial Court

Class Certification GRANTED. In a first-of-its-kind case in the United States, MAK lawyers certified a class of consumers against a boutique pet shop that sold sick puppy mill dogs to unwitting consumers who thought they were buying locally bred, pure breed dogs. The case is a blow to the puppy mill industry and to retailers who unscrupulously prey on consumers and animals alike. Trial will occur next year.



#### Verdicts And Settlements

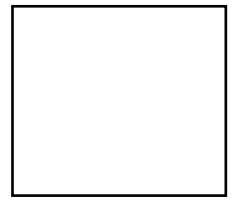
- \$3,150,000 - Complex multi-party construction defect litigation on behalf of residential homeowners in San Jose, California.
- \$993,000 - Complex multi-party construction defect litigation on behalf of residential homeowners in Castaic, California.
- \$1,988,000 - Complex multi-party construction defect litigation on behalf of residential homeowners in Sacramento, California.
- \$983,000 - Complex multi-party construction defect litigation on behalf of residential homeowners in Antelope, California.
- \$979,000 - Complex multi-party construction defect litigation on behalf of residential homeowners in Chula Vista, California.
- \$972,000 - Complex multi-party construction defect litigation on behalf of residential homeowners in Saugus, California.
- \$1,362,000 - Complex multi-party construction defect litigation on behalf of residential homeowners in Moreno Valley, California.
- \$961,000 - Complex multi-party construction defect litigation on behalf of residential homeowners in Fontana, California.
- \$910,000 - Complex multi-party construction defect litigation on behalf of residential homeowners in Bakersfield, California.
- \$810,000 - Complex multi-party construction defect litigation on behalf of residential homeowners in Chula Vista, California.

# MAK

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## UPCOMING EVENTS & ANNOUNCEMENTS

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## HAPPY HOLIDAYS FROM MAK

MAK lawyers and managers pitch in at the Westside Food Bank in Santa Monica prior to Thanksgiving

### SPEAKING OF...

**Mark Milstein:**  
**Mealeys Construction Defect Seminar**  
Las Vegas, November 5  
Insurance Coverage Issues in Construction Defect Cases

**Wayne Kreger:**  
**Louisiana Trial Lawyers Association**  
New Orleans, December 11 & 12  
New Developments in California Class Action Practice

### WE KEEP GROWING!

Raquel Flaherty has joined the firm as an associate. Raquel attended Pacific West College of law and is a fourth year lawyer. She will work primarily with the firm's construction defect group.

### MAK Law School Scholarship

MAK has endowed a \$25,000 annual scholarship to pay the tuition of a California law student who has chosen to focus their studies on public interest law. This year's recipient is Jessica Oats, who is attending Stanford.



MAK senior partner Fred Adelman awards Jessica Oats the 2008 MAK Law School Scholarship

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