Shook, Hardy & Bacon L.L.P.

# Product Liability Litigation Report

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## *CERTIORARI* PETITION FILED IN HAZARDOUS SUBSTANCE EXPOSURE CASE

In January 2007, a divided Alabama Supreme Court decided that a man who was exposed to benzene from 1968 to 1987 but did not contract leukemia allegedly as a result of that exposure until 1995 is barred by the applicable statute of limitations from bringing product-liability claims against the chemical's manufacturers. In Alabama, the statute of limitations begins to run when a plaintiff is last exposed to the substance alleged to be the cause of harm, regardless when injury manifests. Thus, if the plaintiff had sued within the applicable time period, but had no injury, his suit would have been summarily dismissed; because he waited until he was injured, his suit was dismissed because it was filed too late.

While the Alabama Legislature has attempted to adopt a discovery rule that would toll the limitations period until a plaintiff discovers or should have discovered the injury, it has only been successful with regard to asbestos exposure. Nevertheless, the dissenting justices would have allowed the action to proceed, finding that, under fundamental tort-law principles and stated legislative policy, a cause of action does not accrue, and thus cannot be prosecuted, until injury occurs. The U.S. Supreme Court has been asked to grant review in the case. *Cline v. Ashland, Inc.,* No. 06-1329 (petition for writ of *certiorari* filed April 2, 2007). According to legal commentators, Alabama is the only state with a statute that bars those injured by toxic exposures from suing under these circumstances. *See Jere Beasely Report,* January 29, 2007.

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## FEDERAL JUDGE DISMISSES CLAIMS FOR INJURIES ALLEGEDLY CAUSED BY NUCLEAR INCIDENTS

A federal district court in Colorado has determined that plaintiffs who claim they sustained injury from "alleged nuclear incidents occurring at uranium milling and mining facilities in Montrose, Colorado, between 1936 and 1984," failed to make a *prima facie* showing that the defendants' conduct was the proximate cause of their diseases. *June v. Union Carbide Corp.,* No. 04-cv-00123 (U.S. Dist. Ct., Colorado, decided March 27, 2007). Accordingly, the court dismissed their personal-injury claims with prejudice. While plaintiffs' experts

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opined that radiation exposure was a substantial factor contributing to the plaintiffs' purported illness, their proposed testimony did not meet Colorado's causation standard that "but for" the exposure to radiation, the plaintiffs would not have become ill.

The court further determined that it lacked subject-matter jurisdiction to consider the medical-monitoring claims brought under the Price Andersen Act, legislation that permits suits for injuries arising from nuclear incidents, finding that DNA or cell damage does not constitute bodily injury under the Act. The court acknowledged that this issue is a matter of first impression in the Tenth Circuit Court of Appeals and made the transcript of the summary-judgment hearing at which she announced her decision available to the parties for purposes of any appeal that may be filed.

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## OHIO ATTORNEY GENERAL FILES LEAD-PAINT LAWSUIT

Ohio's attorney general has filed a public nuisance lawsuit against paint and chemical companies, alleging that they created an unreasonable risk to the state and its residents by manufacturing, marketing and selling lead-based paint without disclosing its purported hazards. The complaint seeks a detection and abatement program, a public education campaign, medical monitoring, compensatory and punitive damages, costs, and attorney's fees. *Ohio v. Sherwin-Williams Co.,* No. n/a (filed April 2, 2007). When it filed the complaint, the state also filed a motion to consolidate its action with a similar action filed by the city of Columbus and a motion to stay its action. Ohio's governor recently vetoed a bill that would have included public nuisance claims under the definition of product-liability claims, and legislative leaders filed a mandamus action in the Ohio Supreme Court to judicially override the veto. According to the attorney general, its complaint was filed to preserve the right to bring a common-law public-nuisance action until the other matter, which involves the continuing viability of such actions, is decided.

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## CLASS-ACTION COMPLAINT FILED OVER TAINTED PET FOOD

An Illinois resident has filed a putative class action in federal court against Menu Foods, Inc., which recently recalled numerous brands of cat and dog food after it was allegedly found to cause renal failure and death in some animals that ingested it. *Majerczyk v. Menu Foods, Inc.,* No. n/a (U.S. Dist. Ct., N.D. Ill., Eastern Div., filed March 20, 2007). Seeking to represent a nationwide class of claimants, Dawn Majerczyk alleges breach of warranties and negligence. She seeks class certification, the cost of the pet food and veterinary bills, injunctive relief, medical-monitoring damages, attorney's fees, and costs. While she alleges emotional loss for herself and her children, Majerczyk does not allege emotional distress or claim any related damages; such relief is not available for the loss of an animal in most, if not all, U.S. jurisdictions, despite the intense attachments many Americans form with their pets.

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## RAND CORPORATION ISSUES REPORT ON CLASS ACTIONS PRIOR TO CAFA

A recent RAND Corp. report claims that the number of class actions against insurers "increased sharply" in the years preceding the Class Action Fairness Act of 2005 (CAFA). Nicholas Pace, et al., "Insurance Class Actions in the United States," *RAND Institute for Civil Justice,* April 2007. Researchers surveyed 57 U.S. insurance companies named as defendants in a total of 748 class-action lawsuits, concluding that from 1992 to 2002, there was a 23.5-percent compound annual growth rate in filings. The authors also claim that (i) cases certified as class actions were more likely to settle; (ii) the median benefit available to individual class members was $97, ranging from $3.50 to $61,000 per class member ; and (iii) "just a fraction" of settlement class members received payment. Of the lawsuits under review, 89 percent were filed in state courts and two-thirds were resolved in the defendants' favor or dismissed by the plaintiffs, according to the report. "In class actions before CAFA, we saw many cases filed, litigated and resolved in relative obscurity," said lead author Nicholas Pace. "This shadow litigation happened outside the view of many interested parties. That probably does not serve the public interest."

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The case study also alleged a wide variation in attorney's fees, which reportedly ranged from 12 to 41 percent of the settlement fund, with a median of 30 percent. "However, when viewing attorney's fees and expenses in relation to the payment actually made (rather than just the amounts potentially available), attorney fees and expenses rose to a median of 47 percent in the 36 cases with complete information," according to RAND, which stated that in five cases, attorney's fees exceeded 90 percent of actual payments. The RAND Corp. is a nonprofit organization that conducts research and analysis to address national and global challenges. Its core research areas include civil justice, energy and the environment, science and technology, international affairs, and terrorism and homeland security. *See RAND Corp. Press Release,* April 4, 2007.

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## FEN-PHEN LAW FIRM TO STAND TRIAL FOR ETHICS VIOLATIONS

New York State Supreme Court Justice Charles Ramos has reportedly ordered a law firm to stand trial for alleged ethics violations in a case involving the diet drug fen-phen. Ramos ordered the trial after accusations surfaced that Napoli Bern Ripka LLP, which settled with fenfluramine-manufacturer American Home Products for an estimated $1 billion, lied to more than 5,000 plaintiffs about how the claims were distributed. "Claimants who were Napoli firm clients were offered disproportionately larger settlements because the firm unfairly inflated settlement offers for its clients so that the attorney's fees earned by the firm would be greater," alleged a former Napoli attorney, who said the firm also favored clients that retained Napoli Bern from the outset. Ramos has also apparently questioned whether Napoli Bern was "forthright" when obtaining outside legal advice in drafting its client agreements. *See The Washington Post,* March 29, 2007.

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## EDITORIAL EXAMINES THE IMPACT OF LITIGATION ON NEUROLOGIC RESEARCH

A recent Washington University School of Medicine report claims that litigation may negatively affect neurologic research, a field that continues to gain importance in legal circles as evidence links products to disease development. Brad Racette, et al., "The Impact of Litigation on Neurologic Research," *Neurology*, December 2006. "Any hint of scientific data that support a cause and effect relationship often encourages plaintiffs' attorneys to file suits against corporations alleging harm to their clients forcing corporations and employers to defend themselves," writes lead author, Brad Racette, M.D., about the complex relationship between attorneys and medical researchers, many of whom are retained as expert witnesses or subpoenaed at a financial loss to universities. Racette argues that litigation has the potential to corrupt scientific investigations, in addition to potentially violating the confidentiality of research participants. "Litigation and its peripheral effects may bias investigators, impede research efforts, and harm research participants, thereby undermining efforts to understand the cause of neurologic disease," concludes Racette, who in 2001 reportedly received a consultant's fee for meeting with defense and plaintiffs' counsel in a welding-related medical matter.

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*"Any hint of scientific data that support a cause and effect relationship often encourages plaintiffs' attorneys to file suits against corporations alleging harm to their clients forcing corporations and employers to defend themselves."*

## ALL THINGS LEGISLATIVE AND REGULATORY

### President Bush Taps Susan Dudley to Oversee OIRA

President George Bush last week used a recess appointment to fill a top-level vacancy in the Office of Information and Regulatory Affairs (OIRA), a division of the Office of Management and Budget that reviews all federal agency regulations. Susan Dudley, former director of regulatory studies at George Mason University's Mercatus Center, will serve as OIRA administrator for the remainder of the 110th Congress, which concludes in December 2008. First nominated in 2006, Dudley has drawn fire from Democratic leaders and advocacy groups that claim her "anti-regulatory" approach will weaken consumer-safety laws. In a report titled *The Cost Is Too High: How Susan Dudley Threatens Public Protections,* Public Citizen and OMB Watch argued that, if appointed, "Dudley would be in a position to cripple critical safeguards that protect the public from such dangers as unsafe products and environmental toxins." The report alleges that her documented support of market-driven safety reforms will undermine widely accepted federal regulations, such as those governing air-bag standards. Public Citizen and OMB Watch also criticized her Mercatus Center ties to regulated industry, although previous OIRA administrators have reportedly described Dudley as a "nominee of integrity, experience and relevant training."

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## LEGAL LITERATURE REVIEW

**William Childs, "The Overlapping Magisteria of Law and Science: When Litigation and Science Collide," *Nebraska Law Review* (forthcoming)**

Law Professor William Childs examines what happened when the courts began linking the admissibility of expert testimony to scientific standards of reliability in the aftermath of *Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. 579 (1993). He contends that the first unexpected consequence of relying on peer-reviewed publication was "aggressive litigation discovery into the peer review process," which has been described as "harassment to silence independent research and an effort to create a chilling effect on folks who tell the truth." A second unexpected consequence is "litigation-driven scholarship," i.e., experts conduct litigation-related research and submit their expert reports to peer-reviewed journals "in what appears to be, at least in part, an attempt to bolster the likelihood of their testimony being admitted." Childs suggests that while such overlaps of the respective disciplines could weaken them, the "cross-fertilization" should be welcomed because it has the potential to strengthen the law and science.

**Alexandra Lahav, "The Law and Large Numbers: Preserving Adjudication in Complex Litigation," *Florida Law Review*, 2007**

In this article, Law Professor Alexandra Lahav discusses the problems that arise when mass torts are resolved by means of a settlement trust fund. She contends that such bureaucratic, privatized administrative paradigms can "alienate litigants, permit interest groups to capture the administrative system, and result in errors." Lahav discusses a case study, *In re Diet Drugs Products Liability Litigation,* to address the paradigm's shortcomings and concludes by proposing a "better bureaucracy" involving greater judicial oversight. She contends that the injured and tortfeasors would be better served if judges oversaw settlement administration and made claims administration public. "For example, judges should determine maximum acceptable error rates. Furthermore, pursuant to their continued oversight of settlements, judges should be required to oversee an audit of the performance of the agency and publish an evaluation of the extent to which the agency is meeting the goals set forth in the settlement." Lahav also recommends that judges (i) ensure that all affected parties are involved in negotiations and (ii) meet with "randomly selected claimants who have been through the process to determine the extent to which the administrative agency is meeting expectations." The goal would be to humanize the process and make it more public.

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**Lester Brickman, "Disparities Between Asbestosis and Silicosis Claims Generated by Litigation Screenings and Clinical Studies," *Cardozo Legal Studies Research Paper*, March 2007**

According to Law Professor Lester Brickman, "Based on the evidence I examined, I concluded that the majority of the hundreds of thousands of medical reports generated by the [asbestos] litigation screenings were not the product of

good faith medical practice; rather they were produced in the course of business transactions involving the sale of X-ray readings and diagnoses for tens of millions of dollars in fees." This article is another installment in his review of findings related to the litigation screenings in light of a 2005 federal district court decision rejecting the validity of thousands of medical reports based on these screenings in silica-related litigation. He concludes, "The evidence reviewed in this article is to the effect that Judge Jack's findings with regard to silica litigation applies with at least equal force to nonmalignant asbestos litigation: the diagnoses are mostly manufactured for money."

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## LAW BLOG ROUNDUP

### Did Report Inflate Costs of U.S. Tort System?

"The authors' estimate of the benefits (= costs) of the average foreign tort system, when subtracted from the $865 billion 'cost' of our system, results (with some further adjustments) in an estimate of an annual excess of costs over benefits of almost $600 billion. The figure, however – the authors' estimate of the net social loss created by our tort system – is, as I have tried to show, fictitious." Federal Judge Richard Posner, commenting on a recent report issued by the Pacific Research Institute, *Jackpot Justice: The Cost of America's Tort System.* Posner's blogging cohort, University of Chicago Professor Gary Becker, calls his comments "right on the mark, as the authors of the study considerably exaggerate the cost of the tort system. Still, I agree with them that the tort system is not efficient and can be improved."

becker-posner-blog.com, April 1, 2007.

*"The figure, however – the authors' estimate of the net social loss created by our tort system – is, as I have tried to show, fictitious."*

### Does U.S. Tort System Cause Needless Death?

"This just in … A group of conservative scholars has concluded definitively that not only is tort litigation a tax on every pocketbook, but it's lethal, too!" Blogger Stephanie Mencimer, commenting on the Pacific Research Institute's conclusion that 114,000 people have died needlessly over the past 20 years due to lawsuits that have purportedly restricted access to health care and kept life-saving products out of the marketplace. She notes that a pro-business lobbyist wrote the report's introduction and remarks on "the obvious silliness in the Merchants of Death warning that lawsuits are lethal."

thetortellini.com, March 28, 2007.

### Report Estimates Appear Just About Right

"I haven't had a chance to analyze the PRI report in detail, but their figure of $865 billion/year (6.6% of the GNP), which includes the effect of the tort system on safety, employment, innovation, rent-seeking, and rent-avoidance, is around the right order of magnitude." Ted Frank, attorney and director, American

Enterprise Institute Liability Project, commenting that previous estimates of the cost of the tort system are flawed because they fail to measure "second-order effects." Frank later notes that Becker and Posner were not impressed with the PRI study's methodology, but he contends that the U.S. tort system does not produce safer products and better medical care than European systems costing half as much.

pointoflaw.com, March 27 and April 2, 2007.

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## THE FINAL WORD

### Federalist Society Publish *Class Action Watch*

The March 2007 issue of the Federalist Society's *Class Action Watch* includes articles about the litigation spawned by the withdrawal of Merck's painkiller Vioxx® from the market, the fraud ruling in *Kananian v. Lorillard Tobacco Co.* that barred a class-action law firm from the court for deceitful representation, and the problems faced by Milberg Weiss, one of the nation's largest class-action firms, which has been the subject of an ongoing federal investigation. Other articles explore the "welding fume" cases that have brought mixed results to the plaintiffs' bar and a new trend in Illinois Supreme Court rulings which have made the state a less desirable jurisdiction of choice for nationwide class actions.