Shook, Hardy & Bacon L.L.P.

AUGUST 11, 2011

PRODUCT LIABILITY LITIGATION REPORT

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MONTANA SUPREME COURT CONSIDERS LIABILITY ISSUES IN ALUMINUM BAT AND AUTO ACCIDENT CASES

The Montana Supreme Court recently issued rulings in two product liability cases; one involved purportedly inadequate warnings about the risks to ballplayers of using aluminum bats, and the other involved a question of first impression on the admissibility of evidence regarding seat belt use in a rollover accident lawsuit raising negligence and strict liability claims. ***Patch v. Hillerich & Bradsby Co. d/b/a Louisville Slugger*, No. 2011 MT 175 (Mont., decided July 21, 2011)**; and ***Stokes v. Mont. 13th Jud. Dist. Ct.*, No. 2011 MT 182 (Mont., decided August 1, 2011)**.

The parents of an 18-year-old who pitched in an American Legion ball game and died when struck by a ball hit with an aluminum bat sued its manufacturer for wrongful death, alleging manufacturing and design defect, as well as failure to warn. They claimed that the bat increased the speed of a batted ball, thus decreasing infielders' reaction times and resulting in a greater number of high-energy batted balls in the infield.

The trial court granted the defendant's motion for summary judgment on the manufacturing defect claim, but denied summary judgment on the design defect and failure to warn claims. The court also excluded the manufacturer's assumption of the risk defense before trial. A jury determined that the aluminum bat was not defectively designed, but found that it was in a defective condition because the manufacturer failed to warn of enhanced risks associated with its use. The boy's parents were awarded $850,000, and the court denied the manufacturer's motion for judgment as a matter of law.

According to the supreme court, which upheld the jury verdict, manufacturers owe a duty to adequately warn bystanders as well as others of potential product risks. The court stated, "The realities of the game of baseball support the District Court's decision to submit [plaintiffs'] failure to warn claim to the jury. The bat is an indispensable part of the game. The risk of harm accompanying the bat's use extends beyond the player who holds the bat in his or her hands. … [The defendant] is subject to liability to all players in the game, including [the decedent], for the physical harm caused by its bat's increased exit speed." The court also noted that warnings to bystanders were "workable" because they could be provided with advertisements, posters and media releases, in addition to printed warnings on the bat itself.

SHB offers expert, efficient and innovative representation to clients targeted by class action and complex litigation. We know that the successful resolution of products liability claims requires a comprehensive strategy developed in partnership with our clients.

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Rejecting the defendant's argument that the trial court erred in applying a "read and heed" inference when ruling on its motion for judgment as a matter of law, Montana's high court noted that case law is flexible on this issue. Because the pitcher died, the court found that it was appropriate to allow the jury to infer that he would have heeded a warning if one had been given. In this regard, the court observed, "Testimony that [the decedent] followed guidelines and that his teammates quit using aluminum bats and switched to wood bats after his death warranted submitting [the plaintiffs'] failure to warn claim to the jury."

The Montana Supreme Court has directed a trial court to admit evidence of seatbelt use in a wrongful death case alleging that a seatbelt defect in a rollover automobile accident caused the decedent's fatal head injury. The representative of the decedent's estate alleged negligence and strict products liability against the manufacturer, an auto rental company and another driver involved in the accident.

The trial court granted the manufacturer's motion to exclude evidence that the decedent was using his seatbelt when the accident happened. According to the lower court, state law prohibits evidence of seatbelt use or nonuse in product liability claims but not in negligence claims, and, because it would confuse the jury to prohibit the evidence as to one part of the case but not the other, the plaintiff would have to drop his negligence claims against the defendants if he chose to use the evidence of seatbelt use when trying his strict liability claims. The plaintiff sought supervisory control of the matter from the supreme court, which agreed to do so citing the case's "extraordinary circumstances."

According to the court, state law prohibits the introduction of seatbelt use or nonuse "in any civil action for personal injury or property damages resulting from the use or operation of a motor vehicle." The court notes that the statute's purpose "is to encourage seatbelt use" and that its sole sanction for failure to wear a seatbelt is a $20 fine. Thus, the state legislature did not intend to penalize a person "in a civil proceeding by connotations of fault for choosing not to wear a seatbelt." Because the vehicle's occupant restraint system was directly at issue in this case, the court determined that "evidence relating to seatbelt use or nonuse must be allowed." The court remanded the matter with instructions to the trial court to fashion an appropriate limiting instruction to the jury advising it that the evidence cannot be used to determine whether the plaintiff was at fault for his own injuries.

EVIDENCE OF FLESH-SENSING TECHNOLOGY CANNOT BE USED IN CASE ALLEGING INJURY FROM PORTABLE BENCH SAW

The Alabama Supreme Court has directed a trial court to vacate its order allowing one of the plaintiff's experts to access "flesh-sensing technology" developed by a bench-saw manufacturers' joint venture, including the defendant. ***Ex parte Delta Int'l Mach. Corp.*, No. 1091049 (Ala., decided July 29, 2011)**. The issue arose in a case involving a portable bench saw that allegedly amputated one of the plaintiff's fingers and caused

other hand injuries when the blade came into contact with his hand while he was using it. The parties agreed to a protective order to ensure that certain confidential materials would not be released to the plaintiff's expert witness, who was employed by the defendant's competitor, which was not part of the joint venture.

Thereafter, the plaintiff filed a motion to inspect, seeking access to all saws equipped with the flesh-sensing technology and "any and all flesh sensing technology developed by the Joint Venture." The trial court rejected the defendant's claims that the technology was irrelevant and confidential and that its competitor's employee should not have access to it. The supreme court agreed with the defendant that the technology was irrelevant, citing the testimony of one of the joint venture representatives indicating that the technology did not actually exist for the type of saw at issue when it was manufactured. The court also determined that the technology was protected as a trade secret given the confidentiality agreements among the joint venture's participating companies and the details missing from publicly available materials related to the technology.

DELAWARE SUPREME COURT UPHOLDS $3.95 MILLION IN SANCTIONS FOR DESTROYING DOCUMENTS

The Delaware Supreme Court has ruled that a lower court properly imposed $3.95 million in sanctions against a party who effectively removed documents from his work computer while under a preservation order. ***Genger v. TR Investors, LLC*, No. 592, 2010 (Del., decided July 18, 2011)**. The issue arose in a dispute over who held a controlling interest in a corporation.

After the parties stipulated that the Trump Group held the controlling interest, the group sought to reopen the proceedings when it discovered that certain documents that should have been located on the defendant's computer were not there in violation of a preservation order imposed by the Court of Chancery. Evidence showed that the defendant deleted the computer files and then directed an employee to use special software that "wiped" the unallocated free space on his computer's hard drive and a company server. This action "made it impossible, even by use of computer forensic techniques, to recover any deleted files that were stored in those computers' unallocated free space." Among other matters, including imposing a heavier burden of proof on the defendant as to remaining issues in the case, the court awarded the Trump Group $750,000 in fees incurred to investigate and litigate the spoliation claims. The parties later apparently agreed that the defendant would pay an additional fee of $3.2 million to the group for all of the related, unreimbursed spoliation expenses.

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The defendant argued that the preservation order did not expressly require that he preserve unallocated free space on his computer's hard drive and thus that the

trial court erred by adjudicating him in contempt. He also argued that requiring the preservation of a computer's unallocated free space "whenever a document-retention policy is in place, would impossibly burden a company-litigant by effectively requiring the company to refrain from using its computers entirely." According to the supreme court, the contempt findings were based on specific, narrow factual grounds, that is, the defendant "despite knowing he had a duty to preserve documents, intentionally took affirmative actions to destroy several relevant documents on his work computer." These actions prevented the Trump Group from recovering the deleted documents, and their absence prejudiced the group.

The court carefully limited its ruling so as not to entirely preclude the use of "wiping" programs in all cases particularly when that use falls within ordinary routine data retention and deletion procedures. The court also suggested that, in future cases, "the parties and the trial court address any unallocated free space question that might arise before a document retention and preservation order is put in place." The court further ruled that the additional $3.2 million in sanctions imposed was not unreasonable because the defendant waived his right to challenge it on that basis and because the figure was not arbitrarily determined and thus did not constitute plain error.

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NEVADA HIGH COURT SAYS NURSES MAY BE QUALIFIED TO OFFER MEDICAL CAUSATION TESTIMONY

The Supreme Court of Nevada has determined, in consolidated cases, that nurses may testify as experts regarding medical causation, only if sufficiently qualified. ***Williams v. 8th Jud. Dist. Ct.; Sicor, Inc. v. 8th Jud. Dist. Ct.*, Nos. 56928, 57079 (Nev., decided July 28, 2011)**. The court also clarified the standard for defense expert testimony on medical causation, ruling that it differs "depending on how the defendant utilizes the expert's testimony." Where the defendant "purports to establish an independent causation theory, the testimony must be stated to a reasonable degree of medical probability." But where the defendant's alternative causation theory "controverts an element of the plaintiff's prima facie case where the plaintiff bears the burden of proof, the [expert] testimony need not be stated to a reasonable degree of medical probability, but it must be relevant and supported by competent medical research."

The issues arose from two separate actions involving a hepatitis C outbreak in a Las Vegas clinic. The plaintiffs alleged that medical personnel injected contaminated needles into purportedly defective anesthetic vials and then reused the vials and injected the plaintiffs with "the now-contaminated" anesthetic. The defendant relied on the opinions of a registered nurse and a professor of medicine, who testified that improper cleaning and disinfection techniques may have caused the plaintiffs to contract hepatitis C, but could not identify a specific piece of equipment that transmitted the virus.

The supreme court disagreed with the plaintiffs that because nurses cannot make medical diagnoses under the law, they are "per se precluded from testifying as to medical causation." The court agreed, however, that the nurse "did not meet the requirements to testify as an expert regarding medical causation here." While the nurse had extensive experience with infection control and had written and spoken on the topic, he had "little, if any, experience in diagnosing the cause of hepatitis C." Accordingly, the court ruled that he could testify as an expert witness "on the subjects of proper cleaning and sterilization procedures for endoscopic equipment" but not as to medical causation.

ALL THINGS LEGISLATIVE AND REGULATORY

Congress Approves Bill Amending CPSIA, Including Lead Rule for Children's Toys

Both houses of Congress recently passed bipartisan legislation (**H.R. 2715**) amending the Consumer Product Safety Improvement Act of 2008 (CPSIA). Intended to give the Consumer Product Safety Commission (CPSC) greater flexibility in enforcing consumer product safety laws, the legislation awaits President Barack Obama's (D) signature. Introduced on August 1, it passed the same day by a 421-2 vote in the House and unanimously in the Senate.

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Among other matters, the law would clarify that a new rule reducing the amount of total lead in children's products from 300 parts per million (ppm) to 100 ppm applies to those products manufactured after August 14, 2011, only. Some manufacturers had argued that the lead-content limits, created to allay fears that children could be harmed by lead poisoning after chewing on toys, were overly burdensome to small businesses with older inventory.

The law would exempt some products, such as used children's toys—except metal jewelry or other items known to violate the lead limits—bicycles, all-terrain vehicles, and printed books, from the new lower threshold. Other provisions exclude third-party testing for "small batch" manufacturers and exclude inaccessible component parts from CPSIA's phthalate limits. The bill, if signed into law, will give CPSC the authority to exclude specific products or product classes from tracking-label requirements.

The bill would also make minor changes to CPSC's consumer product safety database, including requiring that the agency stay posting an incident report if it "receives notice that the information in such report or comment is materially inaccurate." Previously, the law required CPSC to "determine" that an incident report is materially inaccurate. The bill would also add a paragraph requiring the agency to seek model or serial numbers from those submitting reports about specific consumer products, or a photograph if the numbers are not available. This information would have to be forwarded immediately to manufacturers.

Calling the bill a "win for everyone," the bill's sponsor, Representative Mary Bono Mack (R-Calif.), asserted in a press release that the measure strikes a balance

between protecting children and regulations that burden businesses. "It's good for American consumers and American businesses and will save American jobs," she said. *See U.S. Rep. Mary Bono Mack Press Release,* August 1, 2011.

Lawmakers Seek to Bar Rental Car Companies from Leasing, Selling Recalled Cars

Seeking to stop car rental companies from renting or selling potentially unsafe vehicles to consumers, a group of U.S. senators has introduced the Raechel and Jacqueline Houck Safe Rental Car Act of 2011 (**S. 1445**), which would prohibit these companies from allowing consumers to rent or sell vehicles subject to a manufacturer's recall.

Sponsored by Senator Charles Schumer (D-N.Y.), the bill would also require the National Highway Traffic Safety Administration (NHTSA) to investigate whether the companies are renting cars without standard safety features, such as air bags. Schumer said that the proposed legislation "will make it clear that if there is a defect in a car it either gets fixed, or it doesn't get rented." It would provide civil penalties of up to $11,000 per day per violation and ensure enforcement through the Federal Trade Commission and state attorneys general.

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According to Schumer, the bill was named for California sisters who died when their rented vehicle, which had been recalled because of possible leaking power-steering fluid, caught fire and crashed into an oncoming semi-tractor trailer. It would require NHTSA to investigate and report to Congress (i) sales to rental companies of motor vehicles lacking standard safety features, and (ii) sales by rental companies from the time a recall description is posted on the NHTSA Website to the time the rental company receives official notification about it. *See U.S. Sen. Charles Schumer Press Release,* July 28, 2011.

CPSC Adopts Third-Party Testing Requirements for Phthalates in Children's Toys, Child Care Products

The Consumer Product Safety Commission (CPSC) has unanimously adopted new third-party testing requirements for phthalates in children's toys and child care articles to ensure that the products meet federal phthalate limits. Phthalates are a type of chemical used to make plastics and other materials more flexible. Although manufacturers and importers of these products have been required to comply with phthalate limits since February 2009, CPSC had previously allowed manufacturers, importers and private labelers additional time to put an independent testing and certification program in place. Under the new requirements, the commission has agreed to a stay of enforcement for third-party testing until December 31, 2011.

The Consumer Product Safety Improvement Act of 2008 permanently prohibited the use of three phthalates in concentrations greater than 0.1 percent in children's toys and child care articles and temporarily banned—pending further study—the use of three others in concentrations greater than 0.1 percent in children's toys that can be "mouthed, sucked or chewed." Under the new rules, testing applies to "only those plastic parts or other product parts which could conceivably contain phthalates," CPSC

said. "[U]ntreated/unfinished wood, metal, natural fibers, natural latex and mineral products" that are not expected to inherently contain phthalates need not be tested, however, "unless they are treated or adulterated with materials that could result in the addition of phthalates into the product or material." *See Law360,* July 28, 2011; *CPSC Press Release,* July 29, 2011.

CPSC Publishes Proposed Amendments to Registration of Durable Infant and Toddler Products

The Consumer Product Safety Commission (CPSC) has issued a **notice** of proposed rulemaking to amend a rule finalized in December 2009 requiring manufacturers of durable infant or toddler products to establish a consumer registration program. Under the rule, these manufacturers must provide with each product a postage-paid consumer registration form; keep records of registered consumers and permanently affix the manufacturer's name, contact information, model name and number, and the date of manufacture on each product. In response to manufacturer comments, CPSC has proposed amending the rule by making certain changes to the registration forms and instructions. Comments are requested by October 24, 2011. *See Federal Register*, August 8, 2011.

NHTSA Finalizes Rule on Lamps, Reflective Devices and Associated Equipment

The National Highway Traffic Safety Administration (NHTSA) has issued a **final rule**, correcting several technical errors and partially responding to petitions for reconsideration of a final rule published in December 2007, addressing vehicle safety standards for lamps, reflective devices and associated equipment. The final rule takes effect December 1, 2012, and voluntary early compliance may begin August 8. The agency will publish a separate notice addressing remaining items in the petitions for reconsideration before the effective date.

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According to NHTSA, several petitions for reconsideration contended that some aspects of the December 2007 rule "failed to adhere to the agency's stated goal of not substantively modifying the standard's existing requirements." Other petitions apparently identified formatting and grammatical errors, and another submission questioned "the discussion of the preemptive effect of [Federal Motor Vehicle Safety Standard] FMVSS No. 108 included in the preamble of the final rule." In response, NHTSA "is amending FMVSS No. 108 in order to correct technical errors within the final rule."

NHTSA also notes, in response to the petition about preemption in the preamble, "NHTSA does not intend that this rule preempt state tort law that would effectively impose a higher standard on motor vehicle manufacturers than FMVSS No. 108. Establishment of a higher standard by means of State tort law would not conflict with the minimum standard announced in FMVSS No. 108. Without any conflict, there could not be any implied preemption of a State common law tort cause of

action." Still, the agency refused to remove the general preemption discussion in the preamble, because a conflict could exist, if the standard at issue is both a minimum and a maximum standard. *See Federal Register*, August 8, 2011.

U.S. Administrative Conference Announces Rulemaking Committee Meeting to Address e-Rulemaking Innovations

The Committee on Rulemaking of the Assembly of the Administrative Conference of the United States will conduct a **public meeting** on August 24, 2011, to consider draft recommendations on agency innovations in e-rulemaking and discuss (i) using agency Websites and social media to promote participation in rulemaking proceedings, and (ii) improving access for non-English speakers, the disabled and those without access to broadband Internet services. Comments are requested by August 19. *See Federal Register*, August 8, 2011.

ABA Approves Resolution on Judicial Conflict-of-Interest Rules

The American Bar Association's (ABA's) House of Delegates has reportedly approved a resolution that calls on states to establish procedures for disqualifying judges from presiding over cases in which their relationships with the litigants could raise questions about their impartiality. While the resolution does not apparently include a model law or rule, it also urges states to require disclosures of lawyers and litigants contributing to the campaigns of the judges before whom they appear. A committee report supporting the resolution stated, "In recent years, judicial disqualification has emerged as an important policy issue in several states and an important focus of discussion and debate on ways to improve both the reality—and the public perception—of the fairness and impartiality of our court system. That focus has been sharpened because of intense public scrutiny and criticism in several highly publicized cases of refusals by judges to recuse themselves in circumstances where 'the judge's impartiality might reasonably be questioned.'" *See The National Law Journal*, August 8, 2011.

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Tweeting Jurors Could Go to Jail in California

California Governor Jerry Brown (D) has signed a law (**A.B. 141**) that makes it a misdemeanor for a juror to willfully disobey "a court admonishment related to the prohibition on any form of communication or research about the case, including all forms of electronic or wireless communication or research." The law also requires courts to explain this obligation to jurors if they are permitted to separate during trial or after a case is submitted to them.

Passed unanimously in the Assembly and Senate, the bill was sponsored by Assemblyman Filipe Fuentes (D-Los Angeles) who observed that "'Tweeting' and 'Googling' jurors have caused numerous mistrials … the fact that this kind of

communication is not expressly included [in jury admonitions] has resulted in increased problem in courts across the country." According to a news source, the state Assembly previously approved the measure, but it was vetoed by former Governor Arnold Schwarzenegger (R) who indicated that the matter should be left to the courts. *See Law360*, August 8, 2011.

LEGAL LITERATURE REVIEW

Marin Levy, "The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts," *Duke Law Journal* (forthcoming 2011)

Duke University School of Law Lecturing Fellow Marin Levy has examined the case management practices of five federal circuit courts of appeals from initial case screening through disposition. According to Levy, the practices "vary enormously" and can be explained, in part, by differences in caseload size and makeup. Because "[d]ecisions about which cases will receive oral argument, which will have dispositions written by staff attorneys in lieu of judges, and which will result in unpublished opinions exert a powerful influence on the quality of justice that can be obtained from the federal appellate courts," Levy recommends that information sharing among the circuits and transparency about case management practices could go a long way toward improving the quality of our justice system.

Lonny Hoffman, "*Twombly* and *Iqbal's* Measure: An Assessment of the Federal Judicial Center's Study of Motions to Dismiss," *University of Houston Law Center Working Paper Series* (August 2011)

Authored by University of Houston Law Center Research Professor Lonny Hoffman, this article examines the data compiled by the Federal Judicial Center on motions to dismiss in the federal courts after the U.S. Supreme Court adopted a plausibility pleading standard. Hoffman contends that the center's "study unintentionally confuses the reader into missing *Twombly* and *Iqbals'* consequential impacts." While the study indicates that "no statistically significant increase in the likelihood that a motion to dismiss would be granted" is shown by the data, this article suggests that (i) it has been much more likely after *Iqbal* that a court would grant the motion to dismiss; and (ii) the real issue to be concerned about is the "substantive significance" of the findings.

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According to Hoffman, a "sizeable increase" in motions to dismiss filed at the pleading stage "represents a marked departure from the steady filing rate observed over the last several decades. The increased filing rate means, among other consequences, added costs for plaintiffs who have to defend more frequently against these motions. Some plaintiffs (and prospective plaintiffs) will be unable to bear the additional expenses, or will lack access to the information sought, and so either will be deterred from bringing suit or unable to stave off dismissal." Hoffman concludes that the most important lesson from the last center data assessment "is that empirical study cannot resolve all of the policy questions that *Twombly* and *Iqbal* raise."

Matthew Lyon, "*Shady Grove*, the Rules Enabling Act, and the Application of State Summary Judgment Standards in Federal Diversity Cases," *St. John's Law Review*, 2011

Lincoln Memorial University – Duncan School of Law Assistant Professor Matthew Lyon explores how some courts have been applying the U.S. Supreme Court's determination in *Shady Grove Orthopedic Associates v. Allstate Insurance Co.,* that federal procedural rules displace competing state rules. Lower courts have apparently been using the test set forth in the concurring opinion of Justice John Paul Stevens to invalidate the applicable federal procedural rule under the Rules Enabling Act. Noting the ongoing difficulty the courts have in determining whether a rule of procedure affects substantive rights, Lyon suggests that litigants have a "strong argument that a state's summary judgment standard is part of the state's network of substantive rights and remedies, or at least is so intertwined with those rights that it serves to define their scope" and renders the standard "functionally substantive." While this area of the law remains in flux, Lyon contends that Justice Stevens's opinion "has opened the door for invalidation of a federal rule where it abridges, enlarges, or modifies a substantive state right."

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LAW BLOG ROUNDUP

CPSIA Amendments Applauded on Both Sides of the Aisle

"Unlike previous attempts to 'fix' the [Consumer Product Safety Improvement Act] CPSIA, this bill received bipartisan support. Viewed as a win-win, supporters say it will give the Consumer Product Safety Commission (CPSC) greater flexibility in enforcing safety laws, ease regulatory burden on U.S. manufacturers, and maintain consumer health protections against lead." OMB Watch Regulatory Policy Analyst Katie Greenhaw, blogging about a bill enacted before Congress left Washington, D.C., after a bruising battle over deficits and the debt ceiling. Representative Henry Waxman (D-Calif.) said on the House floor that the bill will "fix valid problems and keep in place valuable health and safety protections for children."

OMB Watch, August 2, 2011.

THE FINAL WORD

Asbestos Defendant Fights Back, Accuses Plaintiffs' Law Firm of RICO Violations and Mail Fraud

A transportation company that has been the target of asbestos-related lawsuits involving thousands of claimants has reportedly charged a Pittsburgh, Pennsylvania-based plaintiffs' law firm with violations of federal racketeering law, wire fraud and mail fraud in the firm's pursuit of asbestos claimants and settlements. The company

has apparently alleged that Robert Peirce and Associates, which gathered thousands of current and former employees and filed numerous lawsuits against the company, relied on "intentionally unreliable mass screenings" involving a radiologist with a criminal history and a doctor who has allegedly tailored diagnoses to fit lawsuits.

According to the company, in at least 11 cases, Peirce-paid professionals initially found no signs of asbestos in an employee but later screened the employee and found the disease. The law firm has evidently filed a counterclaim, accusing the company of withholding a document that would have resulted in the early dismissal of one of these 11 cases, thus saving time and money.

Legal commentators have reportedly been unable to recall whether any other mass-tort defendant has retaliated by filing claims under the Racketeer Influenced and Corrupt Organizations Act (RICO). Some, including Shook, Hardy & Bacon Public Policy Partner **Mark Behrens**, call it a healthy development for the judicial system; he reportedly said that the company is "sending a powerful message to the plaintiff's lawyers: That if you want to sue us, you'd better be very careful and send legitimate claims, or we're going to make it costly for you." Others, noting that RICO claims are hard to prove, suggest that the unusual allegations may not go far in court. *See Pittsburgh Post-Gazette*, July 31, 2011. ■

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Shook attorneys have unparalleled experience in organizing defense strategies, developing defense themes and trying high-profile cases. The firm is enormously proud of its track record for achieving favorable results for clients under the most contentious circumstances in both federal and state courts.

The firm's clients include many large multinational companies in the tobacco, pharmaceutical, medical device, automotive, chemical, food and beverage, oil and gas, telecommunications, agricultural, and retail industries.

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