Shook, Hardy & Bacon L.L.P.

MARCH 26, 2009

PRODUCT LIABILITY LITIGATION REPORT

CONTENTS

U.S. SUPREME COURT SURPRISES COURT WATCHERS WITH RULING IN DRUG PREEMPTION CASE

When the U.S. Supreme Court issued its 6-3 decision in *Wyeth v. Levine* on March 4, 2009, the legal community, expecting a decision that would favor defendants by finding the federal preemption of state-law failure-to-warn claims involving prescription drugs regulated by the Food and Drug Administration (FDA), was apparently stunned that the court upheld plaintiff Diane Levine's $6.7 million damages award. Court reporter Adam Liptak, writing in *The New York Times*, called the ruling "a major setback for business groups" with "significant implications beyond drug manufacturing," and quoted a spokesperson for the defendant who said, "We believe state courts should not be second-guessing the doctors and scientists at the FDA." *See The New York Times*, March 5, 2009.

Liptak also noted, "Producers of goods as different as antifreeze, fireworks, popcorn, cigarettes and light bulbs have sought to take refuge behind federal oversight in recent years to fend off litigation. After Wednesday's decision, those efforts are most likely to succeed if they are based on express language in a Congressional statute or a specific regulatory action that makes compliance with state requirements impossible." Shook, Hardy & Bacon Pharmaceutical and Medical Device Litigation Partner **Harvey Kaplan** responded to the ruling by reportedly noting that it simply represented a reversion to the status quo because drug companies rarely succeeded in getting cases dismissed on preemption grounds. According to Kaplan, "From our standpoint, it's business as usual." *See The Kansas City Star*, March 10, 2009.

The Manhattan Institute for Policy Research has issued a **report**, "In the Wake of *Wyeth v. Levine*: Making the Case for FDA Preemption and Administrative Compensation," that calls for Congress to "broadly preempt state tort lawsuits seeking to hold drugs and medical devices responsible for claimants' illnesses and injuries." According to the report, its recommendation "rests on the conviction that the FDA's regulatory regime, while imperfect in many respects, is nonetheless better suited to weighing the benefits and risks of new medicines than state courts, which may consider only liability for harm to the particular plaintiffs before them." The authors also call for the establishment of a system modeled on the Vaccine Injury Compensation Program, which, they contend, offers "timely and fair compensation to the victims of rare vaccine side effects, while incurring much lower transaction costs than the tort system."

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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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TIMING OF FDA APPROVAL DEEMED IRRELEVANT TO MEDICAL-DEVICE PREEMPTION

A federal court in Tennessee has dismissed product-defect claims filed against the manufacturer of silicone breast implants that received Food and Drug Administration (FDA) approval after they were implanted in and removed from the plaintiff. *Dorsey v. Allergan, Inc.*, No. 3:08-0731 (U.S. Dist. Ct., M.D. Tenn., Nashville Div., decided March 11, 2009).

In November 2005, the plaintiff signed a consent form to participate in a breast-implant clinical study that involved silicone implants for use in breast augmentation. She underwent the implant surgery on November 9 and, following months of purported aches, pains, fatigue, insomnia, memory loss, and other neurological symptoms, had them removed in September 2006. The FDA gave the implants pre-market approval in November 2006. Claims of lingering pain and cognitive issues led the plaintiff to sue the manufacturer in state court, alleging strict liability for a defective and/or unreasonably dangerous product.

The defendants removed the case to federal court and filed a motion for summary judgment, arguing that her claim was preempted by federal law. Noting that the Medical Device Amendments to the Food, Drug, and Cosmetic Act include an express preemption provision and citing *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999 (2008), the court granted the defendants' motion. So ruling, the court rejected the plaintiff's effort to distinguish *Riegel* because the catheter in that case had received pre-market approval before the defendant's surgery, while the breast implants in her case did not receive pre-market approval until after her surgery. The court called this "a distinction without a difference."

According to the court, by approving the breast-implant model at issue, "FDA necessarily conducted a 'federal safety review' and determined that the device was reasonably safe and effective." Because "there is no suggestion that the implants she received were somehow different than those ultimately approved by the FDA," the court ruled that the agency's "subsequent approval" barred her strict-liability claims.

JURY FOREMAN EXPLAINED LEGAL ISSUES TO JURORS; VERDICT REVERSED

A New Jersey appeals court has reversed an $876,000 verdict in a slip-and-fall case, finding that the trial court erred by failing to stop plaintiff's counsel from making prejudicial and unfounded remarks during trial and that the actions of the jury foreperson improperly influenced the verdict, thus depriving the defendant of a fair trial. *Barber v. Shoprite of Englewood & Assocs., Inc.*, No. A-6311-05T2 (N.J. Super. Ct., App. Div., decided March 19, 2009). The jury foreperson was a lawyer, law professor and state senator, who authored an article about his jury service, noting that he explained the law to the jurors during deliberations and claimed to have had an effect on the amount of damages awarded.

In the article, the jury foreperson stated, "Over the course of our deliberations I became increasingly aware that other jurors were relying on me for assistance, especially in dealing with abstract legal concepts and procedural issues. For example, I was asked to clarify what the judge meant by 'proximate cause' and its significance in proving a negligence claim. I do think my familiarity with the law proved helpful to fellow jurors …. I am convinced that in our case my opinions swayed other jurors and were extremely influential in the final outcome." The article was published while the case was pending on appeal, and the appeals court remanded the case for the trial court to question the jurors about their deliberations.

During the hearing on remand, the jurors apparently had some difficulty recalling what specifically happened when they deliberated a year earlier, but did remember that the foreperson was particularly influential during the damages discussion. One juror testified that she did not feel the case was decided fairly and impartially. Discussing the role of a jury foreperson, the appeals court said that it was not up to the foreperson "to explain legal concepts to the other jurors" and was convinced that his "explanations to the jury had a 'tendency' to influence the verdict." This improper influence coupled with the cumulative effect of plaintiff counsel's conduct at trial led the appeals court to grant the defendant's motion for new trial.

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EXPERT OPINIONS PROPERLY EXCLUDED BUT UNNECESSARY FOR PLAINTIFFS' CLAIMS TO SURVIVE SUMMARY JUDGMENT

A divided Sixth Circuit Court of Appeals panel has determined that plaintiffs may pursue their claims that the application of pesticides in their hotel room caused them personal injury. ***Gass v. Marriott Hotel Servs., Inc.*, No. 07-1733 (6th Cir., decided March 3, 2009)**. The district court granted defendants' motion for summary judgment after excluding the "causation opinions" of plaintiffs' treating physicians under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), finding that no reasonable jury could conclude that defendants' purported negligence caused plaintiffs' injuries.

According to the district court, the physicians were not qualified to testify about anything other than their diagnoses of acute pesticide exposure. They apparently had no scientifically reliable method to support their conclusions as to causation because they did not base their causation opinions on any testing data and the only blood tests they relied on "did not reveal any detectable levels for the products the lab tested for." While the appeals court agreed that the district court properly excluded their testimony about where and when plaintiffs were exposed to pesticides, the majority found that, for purposes of deciding a motion for summary judgment, such testimony was not needed.

The appeals court determined that plaintiffs are not required to present expert testimony about the standard of care applicable to spraying chemicals in the confined quarters of an occupied room. "A reasonable person would understand that he or she could seriously injure another person by filling an occupied hotel room with a cloud of toxic or hazardous chemicals," stated the court. "Based on this fact, and the evidence introduced by Plaintiffs indicating that Defendants were aware that at least some of the chemicals they routinely use could cause serious illness, a jury reasonably could find that Defendants were negligent in inundating an occupied hotel room with pesticide spray in the absence of any warnings to the occupants."

The dissenting judge questioned the majority's logic and argued that plaintiffs needed expert testimony to explain "what amount constitutes a high dose or how much exposure makes a chemical toxic to the human body."

JURORS' ACCESS TO INTERNET PROMPTS INCREASED COURTROOM HAVOC

The use of BlackBerrys® and iPhones® by jurors gathering and sending information during trials is wreaking disorder in courtrooms around the country, according to a *New York Times* article. For example, a federal judge in Florida declared a mistrial when he learned that nine jurors in a big drug case directly violated his instructions and centuries of legal rules when they admitted they had been doing Internet research about the case. The mistrial reportedly wasted eight weeks of work by federal prosecutors and defense lawyers.

For example, a federal judge in Florida declared a mistrial when he learned that nine jurors in a big drug case directly violated his instructions and centuries of legal rules when they admitted they had been doing Internet research about the case.

"We were stunned," the defense lawyer was quoted as saying. "It's the first time modern technology struck us in that fashion, and it hit us right over the head."

The article cited other cases in which jurors' Internet research caused trial mayhem. A former Pennsylvania state senator recently being tried for federal corruption demanded a mistrial after a juror posted updates about the case on Twitter® and Facebook®. The judge decided to let the trial continue. Lawyers for the senator, who was found guilty, plan to appeal because of the Internet postings. And earlier in March, an Arkansas court overturned a $12.6 million judgment after a juror used Twitter® to send updates during the civil trial.

The president of the American Society of Trial Consultants was quoted as saying that because technology has changed so much, today's judge "has to explain why this is crucial, and not just go through boilerplate instructions." *See The New York Times*, March 18, 2009.

DISCOVERY DISPUTES FOUND TO DELAY RESOLUTION OF LITIGATION

The Institute for the Advancement of the American Legal System at the University of Denver has released a report that found several factors which contribute to delays in the resolution of civil cases, including protracted discovery periods and late filing of disputed discovery and dispositive motions. Titled "Civil Case Processing in the Federal District Court: A 21st Century Analysis," the report analyzed data from 7,700 cases closed between October 1, 2005, and September 30, 2006, and found that, while 40 percent were resolved in less than six months, some 35 percent took more than a year to conclude.

Among the report's specific findings are:

- "Cases in which: (1) a trial date is set early, (2) discovery issues are raised and resolved within the set discovery period, and (3) dispositive motions are filed as early as possible tend to be resolved more quickly than cases where these things do not occur."
- "Rule 16 scheduling conferences are held in less than half of all civil cases."
- "The time it takes a judge to rule on motions on disputed discovery, motions to dismiss, and motions for summary judgment varies significantly across courts."
- "Holding a hearing is associated with faster times to ruling for motions on disputed discovery, although the evidence is less clear with respect to dispositive motions."
- "Many cases settle shortly after a motion to dismiss or a motion for summary judgment is denied."
- "About 90% of all motions to extend deadlines are granted in every court, but in courts with faster average overall times, many fewer motions to extend deadlines are filed."
- "External reporting of case management data does appear to encourage courts to rule more rapidly on certain motions than might otherwise be the case."

On the basis of its findings, the institute recommends that courts set firm dates and maintain them "except in rare and truly unusual circumstances," rule expeditiously on motions, limit the number of extensions sought by the parties during any phase of the case, and foster a local legal culture that accepts efficient case processing as the norm. The institute also recommends that attorneys agree to realistic deadlines early in the case and not seek deviations from them, start discovery early in the discovery period to allow disputes to be resolved well before deadline, and file dispositive motions as early as possible.

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FEDERAL COURT FILINGS INCREASE IN FISCAL YEAR 2008

According to **data** released by the Administrative Office of the U.S. Courts, civil filings and appeals each increased in the federal courts by 4 percent from fiscal year (FY) 2007 to FY2008.

The rise in civil filings was apparently due mainly "to a 22 percent increase in diversity of citizenship filings," which could be "traced to the number of personal injury cases [19,500] related to asbestos and diet drugs filed in the Eastern District of Pennsylvania." On the other hand, civil filings invoking the courts' federal question jurisdiction decreased 3 percent with personal injury cases dropping 46 percent "as a result of large decreases in the Southern District of New York, where personal injury cases were down after a surge of filings related to September 11, 2001, and in the Northern District of Alabama, where filings of labor law cases fell after an increase in 2007."

THINKING GLOBALLY

Court Orders Banana-Plantation Litigants to Address Potential Termination of Litigation

A California judge has reportedly ordered the parties to litigation over the exposure of banana-plantation workers to a pesticide that allegedly caused their sterility to explain why two lawsuits should not be dismissed as a sanction for the alleged misconduct of the plaintiffs and their lawyers. *Mejia v. Dole*, No. BC340049 (Cal. Super. Ct., Los Angeles County). In 2008, a jury awarded six Nicaraguan workers $5.8 million in damages in the first of several such cases to be tried in the United States; the court reduced the verdict by half, and the case is on appeal.

Thereafter, the defendant began filing the depositions of Nicaraguan witnesses who claimed that (i) some of the plaintiffs had never worked on banana farms, (ii) work certificates and lab reports had been falsified, and (iii) some of the plaintiffs have children, despite their sterility claims. The court reportedly stayed the personal-injury lawsuits and ordered a separate trial on the fraud charges, but, in March 2009, decided not to conduct that trial because of concerns over witness safety and orders to "beat" and "club" defendant's investigators in Nicaragua.

The court has also apparently allowed depositions to be taken of the plaintiffs' law firm employees, citing the crime-fraud exception to attorney-client privilege. Law Professor Lester Brickman remarked on the rarity of sanctions such as termination of litigation for attorney misconduct and law firm depositions, saying this could indicate "the court thought the lawyers had a significant role in creating this scheme." *See Law.com*, March 24, 2009.

ALL THINGS LEGISLATIVE AND REGULATORY

Lawmakers Attempt to Reverse Supreme Court's Medical-Device Decision

In February 2008, the U.S. Supreme Court for the first time gave medical-device companies blanket immunity from lawsuits brought by patients allegedly injured by certain medical devices and denied injured patients the ability to seek compensation under state law for such injuries. On March 11, 2009, two U.S. congressmen introduced **legislation** which would reverse that decision.

U.S. Representatives Frank Pallone Jr. (D-N.J.), chair of the Energy and Commerce Subcommittee on Health, and Henry Waxman (D-Calif.), chair of the Energy and Commerce Committee, introduced the Medical Device Safety Act of 2009 that would protect patients from purportedly dangerous and defective medical devices. The legislation expressly clarifies that state product liability laws are preserved. The congressmen claim that the U.S. Supreme Court's decision in *Riegel v. Medtronic, Inc.* incorrectly interpreted the Medical Device Amendments of 1976.

The congressmen claim that the U.S. Supreme Court's decision in Riegel v. Medtronic, Inc. incorrectly interpreted the Medical Device Amendments of 1976.

Referring to the Court's more recent *Wyeth v. Levine* ruling, which found that federal law does not preempt state-law claims involving prescription drugs, Pallone said that the Court, "rightfully upheld a patient's right to legal recourse after sustaining an injury from a pharmaceutical product." Waxman added, "The Court noted that these lawsuits 'uncover unknown drug hazards and provide incentives for drug manufacturers to disclose safety risks promptly.' The same is true for medical devices."

The Medical Device Safety Act of 2009 is apparently endorsed by a number of organizations, including the National Conference of State Legislatures, *New England Journal of Medicine*, American Bar Association, AARP, Center for Justice & Democracy, Consumer Federation of America, Consumers Union, Progressive States Network, and Public Citizen. U.S. Senators Edward Kennedy (D-Mass.), chair of the Senate Health, Education, Labor & Pension Committee, and Patrick Leahy, (D-Vt.), chair of the Senate Judiciary Committee, have introduced a companion bill in the U.S. Senate.

CPSC Issues Final Rule for Children's Products Containing Lead

The Consumer Product Safety Commission (CPSC) has issued a **final rule** on the procedures and requirements to be used when manufacturers request a CPSC determination that a commodity or class of materials or a specific material or product does not exceed the lead content limits specified in the Consumer Product Safety Improvement Act of 2008 (CPSIA). The product safety agency also issued procedures and requirements for exclusions from the law's lead limits that will not result in the absorption of lead into the human body nor have any other adverse impact on public health and safety. The regulation became effective March 11, 2009.

The CPSIA regulates the amount of lead content allowed in children's products, including jewelry and other items. Applicable to products that are designed or intended primarily for children age 12 or younger, the law provides that the legal limit for lead content in metal components of children's jewelry and other products is 600 parts per million. That number will drop to 300 parts per million on August 14, 2009. Exclusions to the rule can be applied if the CPSC determines that the lower limit is not technologically feasible. *See Federal Register*, March 11, 2009.

Meanwhile, in a related development, the CPSC has written Congress saying it was overwhelmed implementing the new law. "The deadlines mandated in the [legislation] have jeopardized our ability to meet Commission priorities and proven to be too much for a relatively small agency to handle all at once," the letter stated. The CPSC has asked Congress to allow risk-based assessments to prioritize the law's testing requirement, stating that lead in a bicycle might be less dangerous than lead in children's jewelry, which could readily be handled and ingested. *See CongressDaily*, March 20, 2009.

CPSC Proposes New Amendment for Mandatory Recall Notices

The Consumer Product Safety Commission (CPSC) has proposed an **amendment** to its implementing regulations under the Consumer Product Safety Improvement Act of 2008 (CPSIA) to provide guidance to manufacturers about the content and form of mandatory recall notices.

Written comments must be received by April 20, 2009.

The CPSIA requires the CPSC to establish by rule guidelines and requirements for recall notices ordered by the commission or a U.S. district court under the Consumer Product Safety Act. The new proposal would establish the guidelines and requirements to satisfy that provision. Written comments must be received by April 20, 2009.

In general, the proposed rule would establish a new subpart C titled, "Guidelines and Requirements for Mandatory Recall Notices," in part 1115 of Title 16 of the Code of Federal Regulations. The proposed guidelines would provide not only guidance concerning the content and form of such notices, but, as required by the CPSIA, would also specify the content required in such recall notices.

Another proposed amendment would explain that the requirements in subpart C apply to manufacturers (including importers), retailers and distributors of consumer products. *See Federal Register,* March 20, 2009.

OMB Seeks Comments on Federal Rulemaking Processes

The White House Office of Management and Budget (OMB) is "developing a new Executive Order on Federal regulatory review," and **seeks** public comments "on how to improve the process and principles governing" that review. Specifically, the president seeks recommendations and suggestions relating to, among other

matters, (i) disclosure and transparency, (ii) encouraging public participation, (iii) the role of cost-benefit analysis in federal agency rulemaking, (iv) ways to ensure that regulatory review does not produce undue delay, (v) the role of behavioral sciences in formulating policy, and (vi) the best tools to achieve public goals through rule-making. The comment deadline has been extended to March 31, 2009. *See Federal Register*, March 17, 2009.

LEGAL LITERATURE REVIEW

Victor Schwartz, Cary Silverman, Michael Hulka & Christopher Appel, "Marketing Pharmaceutical Products in the Twenty-First Century: An Analysis of the Continued Viability of Traditional Principals of Law in the Age of Direct-to-Consumer Advertising," *Harvard Journal of Law & Public Policy*, Vol. 32, No. 1

Shook, Hardy & Bacon Public Policy Partner **Victor Schwartz**, Of Counsel **Cary Silverman**, and Staff Attorney **Christopher Appel** have co-authored this article, which explores how pharmaceuticals have been marketed and sold through the 18th and 19th centuries in the United States and how they came to be regulated by the Food and Drug Administration. The authors review traditional legal principles, such as the learned intermediary doctrine and preemption, which have been applied to personal-injury claims involving pharmaceuticals. They suggest that direct-to-consumer advertising, a multi-billion dollar enterprise, does not change the public policy supporting the legal principles discussed.

James Michalowicz & Madeleine McDonough, "You Can't Always Get What You Want … But If You Focus on the Case and Follow the Rules, You Can Get What You Need," BNA, Inc. *Digital Discovery & E-Evidence*, March 1, 2009

Shook, Hardy & Bacon Pharmaceutical and Medical Device Litigation Partner **Madeleine McDonough** has co-authored an article discussing the mechanisms implicit in the Federal Rules of Civil Procedure that can be used to "keep overbroad discovery requests in check." Among the practical steps for limiting discovery and streamlining the litigation process mentioned in the article are (i) carefully reviewing requests for over breadth and working to "narrow, prioritize, and sequence the type and amount of data and documents to be produced"; (ii) considering sampling and rolling productions; (iii) narrowing the list of custodians; and (iv) hiring "excellent electronic discovery service providers."

Charles Silver & Geoffrey Miller, "The Quasi-Class Action Method of Managing Multidistrict Litigations: Problems and a Proposal," *NYU Law & Economic Research Paper*, March 10, 2009

University of Texas School of Law Professor Charles Silver and New York University School of Law Geoffrey Miller discuss recent multidistrict litigation (MDL) involving drugs and medical devices that resulted in "massive settlements" to address the downsides of resolving mass tort cases in MDL courts. They examine how lawyers

are selected and paid, which, they claim, results in making "lawyers financially dependent on judges and, therefore, loyal to judges rather than clients." The authors suggest the adoption of legislation that "would place MDLs under the control of management committees composed of attorneys with valuable client inventories—attorneys with the right incentives and expertise to properly manage the common benefit work. The management committee would then select, retain, and monitor other attorneys who perform the common benefit work under privately negotiated fee agreements." In this way, the authors conclude, "[t]he court would stand back from the process, exercising only a limited backup authority to prevent potential abuse."

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LAW BLOG ROUNDUP

Lessons Learned

"A little Law Blog lesson to lawyers and law professors: If you do get chosen to serve on a jury, try to keep from explaining legal concepts to the other jury members. That's frowned upon. But if you just can't help it, and, during deliberations, you find yourself, say, lecturing on how the law of contributory negligence has developed since the middle ages, don't write about your harangue in a newspaper later on." Journalist Ashby Jones, blogging about the verdict overturned in New Jersey after the court learned about the jury foreman's lectures on the law to his fellow jurors from an article the foreman, a law professor, authored.

WSJ Law Blog, March 20, 2009.

Marching on Washington for Hearings on Consumer Product Safety Law

"Coming up April 1, but not a joke: Since [Representative] Henry Waxman [D-Calif.] and other CPSIA defenders on Capitol Hill are still stonewalling demands for hearings on the law's catastrophic effects, some citizen-activists are preparing an alternative event for the nation's capital in which persons from many affected constituencies will have a chance to tell their stories; there may also be 'rally' activities, as well as events in other states for those who find it more convenient to protest there." Manhattan Institute Senior Fellow Walter Olson, discussing protests against the 2008 law that requires product manufacturers to remove the lead and phthalates from consumer goods intended for children younger than age 12. The rally has its own **Web site**.

Overlawyered.com, March 16, 2009.

Court Allows Burial to Proceed After Turning Down Autopsy Request

"It could have made an interesting plotline in [the television show] **Six Feet Under**: A court stays the burial of a man who sued two companies for causing his fatal cancer so the company could perform an evidence-gathering autopsy on the

man's body." Journalist Ashby Jones, writing about the nearly month-long delay in the burial of a man who claimed asbestos caused his mesothelioma. His family apparently objected to autopsies on religious and moral grounds, and a New Jersey appeals court allowed them to prevail in a dispute with the companies which had sought tissue samples from his lungs. Because the sampling could not have been done if the man had lived through trial, the court found that defendants'"trial preparation was in no way hampered by the denial of their request for a limited autopsy."

WSJ Law Blog, March 19, 2009.

THE FINAL WORD

Autism by Any Other Name …

The *Huffington Post* recently published a blog with two articles titled "Vaccine Court: Autism Debate Continues" and "A New Theory of Autism Causation," that discuss the test cases decided in February 2009 by the nation's vaccine court and contrast them with other rulings that have awarded damages to families who claimed that their children's disorders were caused by vaccines. Additional details about the test cases, which found no link between autism and vaccines, appear in the February 26, 2009, issue of this Report.

The first article, authored by Robert F. Kennedy Jr., observes how children with "all the classic symptoms of regressive autism" after vaccination have been able to recover damages by avoiding use of the "radioactive word 'autism.'" He writes, "The Vaccine Court, in other words, seems quite willing to award millions of dollars in taxpayer-funded compensation to vaccine-injured autistic children, so long as they don't have to call the injury by the loaded term 'autism.'" Thus, a number of families have apparently decided to opt out of the Omnibus Autism Proceedings that led to the adverse test-case rulings.

"The Vaccine Court, in other words, seems quite willing to award millions of dollars in taxpayer-funded compensation to vaccine-injured autistic children, so long as they don't have to call the injury by the loaded term 'autism.'"

David Kirby also discusses the test cases in which the vaccine court "inferred that the vaccine-autism theory was the stuff of Alice in Wonderland fantasy, and virtually accused the children's physicians of medical malpractice." Kirby provides additional detail about a case in which the court decided to award compensation, reporting that "[t]here was quite a bit of back-and-forth on [the child's] diagnosis in the ruling, whose heading included the term 'Non-autistic developmental delay.' At several points in the proceedings, witnesses took great pains to say that [the child] does not have 'autism' which, technically speaking, is true." Yet, he does, apparently have a diagnosis on the list of autism spectrum disorders.

Kirby concludes, "Robert Kennedy, Jr. and I would love nothing more than to reassure parents that the nation's current vaccine program is 100% safe for all kids, and that zero credible evidence has been presented to link vaccines with autism. But that simply isn't true—as at least two court cases have found."

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UPCOMING CONFERENCES AND SEMINARS

American Bar Association, Phoenix, Arizona – April 2-3, 2009 – "2009 Emerging Issues in Motor Vehicle Product Liability Litigation." Shook, Hardy & Bacon Tort Partner Frank Kelly joins a distinguished faculty to serve on a panel discussing "The Science Behind the Sentiment: Understanding Punitive Damages in an Era of Anti-Corporate Bias." CLE credit is available for this program, which is presented by the ABA's Tort Trial & Insurance Practice Section; Products, General Liability and Consumer Law Committee and Automobile Law Committee.

Wake Forest University School of Law, Winston-Salem, North Carolina – April 2-3, 2009 – "A Symposium of the Third Restatement of Torts." Shook, Hardy & Bacon Public Policy Partner Victor Schwartz joins preeminent scholars and jurists who will explore the American Law Institute's updated principles for negligence and strict liability claims, under development for more than 12 years and nearing completion with one chapter remaining to be approved in 2009. Schwartz will serve on a panel discussing issues related to "duty" under the Restatement.

DRI, New York, New York – May 14-15, 2009 – "Drug and Medical Device Seminar." Shook, Hardy & Bacon Pharmaceutical and Medical Device Litigation Partner Scott Sayler chairs this 25th annual program, which provides individual presentations, panel debates and trial skills demonstrations addressing the key litigation issues facing the industry and its counsel. Among the distinguished speakers is Shook, Hardy & Bacon Pharmaceutical and Medical Device Litigation Partner Gene Williams, who will serve on a panel discussing "Preparing and Protecting the Foreign Employee Deponent in Drug and Device Cases."

American Bar Association, Chicago, Illinois – May 22, 2009 – "Third Annual National Institute on E-Discovery." Shook, Hardy & Bacon Tort Partner John Barkett is chairing this event for which a brochure is not yet available. Barkett frequently speaks and writes about electronic discovery issues and has authored two books on the subject: *The Ethics of E-Discovery* and *E-Discovery: Twenty Questions and Answers*." ■

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ABOUT SHB

Shook, Hardy & Bacon is widely recognized as a premier litigation firm in the United States and abroad. For more than a century, the firm has defended clients in some of the most substantial national and international product liability and mass tort litigations.

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.

With 93 percent of our more than 500 lawyers focused on litigation, Shook has the highest concentration of litigation attorneys among those firms listed on the *AmLaw* 100, *The American Lawyer's* list of the largest firms in the United States (by revenue).