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Product Liability Litigation Report

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FEDERAL JURIST IN MINNESOTA QUESTIONS META-ANALYSIS VALIDITY

When individual scientific studies do not prove a proposition at issue in litigation, such as a causal link between a toxic exposure and a particular disease endpoint, some experts will combine the results of a number of studies by means of a meta-analysis and then claim that, in the aggregate, the link exists. In *Entertainment Software Ass'n v. Hatch,* No. 06-CV-2268 (U.S. District Court, District of Minnesota, decided July 31, 2006), the court rejected such an effort, stating "Dr. Anderson's meta-analysis seems to suggest that one can take a number of studies, each of which he admits do not prove the proposition in question, and 'stack them up' until a collective proof emerges. It is fair to say that his article does not, on its face, demonstrate the validity of this thesis."

The issue arose in a case involving the constitutionality of a statute intended to bar youths from renting or purchasing violent or other adult-content video games. Having questioned the expert's methodology and finding that his article did not support the state's claim that exposure to violent video games is related to aggressive behavior in minors, the court saw no need to determine whether the meta-analysis would be admissible under *Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579 (1993).

CALIFORNIA JURY REJECTS CLAIMED LINK BETWEEN PAINKILLER USE AND HEART ATTACK

According to news sources, a jury in Los Angeles, California, has determined that Merck & Co. was not responsible for the heart attack of a 71-year-old who had taken its painkiller Vioxx for two years. Jurors were quoted as saying "We don't feel there was a case that was ever made between Vioxx and heart attacks," and "[t]he plaintiffs focused too much on marketing." *See The Wall Street Journal Online,* August 3, 2006.

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GLOBAL CLIMATE CHANGE TO SPAWN TORT CLAIMS?

International environmentalists, frustrated with the lack of effective governmental action on global climate change, are reportedly exploring whether legal action might bring about reductions in greenhouse gas emissions. Legal commentators have suggested that people who suffer a loss of beachfront property from melting icecaps or catastrophic harm caused by intense weather events, which they contend have been caused by global warming, could bring viable products liability claims. "Plaintiffs alleging harm from global warming might argue, for instance, that there are better and safer designs for automobiles that would have mitigated the harm caused by greenhouse gas emissions had the defendants used them." Cases premised on public nuisance theories have already been brought in the global climate change arena, but have not yet been allowed to go forward. *See ABA Journal,* July 2006.

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"Plaintiffs alleging harm from global warming might argue, for instance, that there are better and safer designs for automobiles that would have mitigated the harm caused by green-house gas emissions had the defendants used them."

RODENT DIETS MAY HAVE SKEWED DECADES OF BIOMEDICAL RESEARCH

Scientists have apparently been feeding the rats and mice used in biomedical research rodent feed that contains phytoestrogens, which could be altering the animals' physiology and affecting the conclusions that researchers have been making for decades about the causes of disease. The U.S. government reportedly planned to meet with scientists and rodent feed manufacturers in early August 2006 to discuss the issue and to submit any recommendations to a peer-reviewed journal. Of most concern are rodent studies that have involved hormones, the differences between genders, and cancer and heart disease.

Phytoestrogens are contained in the soy used in rodent feed and are also found in hundreds of other plants. They can be powerful enough to cause fertility problems in grazing animals. The chemical can apparently affect many aspects of growth, disease progression, behavior, and metabolism. Scientists were alerted to the problems posed by varying levels of the chemical in different feeds when rodent experiments done for years no longer seemed to work and results could not be replicated. Because so few articles in scientific journals specify the feed used, legitimate questions could be raised if experts rely on such literature when they testify. *See DallasNews.com,* August 1, 2006.

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ANDREW MAYNARD, "NANOTECHNOLOGY: A RESEARCH STRATEGY FOR ADDRESSING RISK," WOODROW WILSON INTERNATIONAL CENTER FOR SCHOLARS, JULY 2006

This paper contends that the potential risks to human health and the environment presented by the commercial application of nanotechnologies are not being adequately studied. By rearranging atoms and molecules, scientists are now creating products ranging from stain-repellant fabrics and food packaging that can detect spoilage to new sunscreens and moisturizers. The global market in goods and services using these innovative technologies will soon reach $1 trillion,

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and scientist Andrew Maynard is concerned that insufficient attention is being paid to study of the technologies' risks. He notes that carbon nanotubes, which are much smaller than a human hair, but have incredible strength and the ability to conduct heat and electricity, can cause lung inflammation in animals. The author contends that government and industry must fill the gaps of risk research or face poorly understood perils to human health in the future.

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ALL THINGS LEGISLATIVE AND REGULATORY

House Energy and Commerce Subcommittee Grills Silica Plaintiffs' Attorneys

In late July 2006, the Subcommittee on Oversight and Investigations of the U.S. House Committee on Energy and Commerce held the fourth in a series of hearings dealing with the conduct of silicosis litigation. The witnesses, lawyers who represent plaintiffs in silicosis lawsuits, were asked to address mass tort screening and public health issues. The subcommittee began its investigation after a U.S. District Court judge issued an opinion in 2005 concluding that silicosis diagnoses "were about litigation rather than health care" and "were driven by neither health nor justice [but] were manufactured for money." Evidence to date apparently shows that physicians, lawyers and screening companies, in concert, have generated thousands of silicosis plaintiffs through questionable mass screenings. Further details about the hearings can be found at the committee's **Web site**.

Energy and Commerce Committee Chair Representative Joe Barton (R-Texas) issued a press release in which he stated that these lawyers had not done anything to help their clients. "It appears that once the client signed on the bottom line, they became just a part of that particular lawsuit's inventory." Barton also claimed that the law firms representing the claimants refused staff requests to interview their clients, asserting attorney-client privilege. He stated that the committee wanted to know whether a doctor was present during the screening, anyone took a work history and anyone discussed where and how to obtain follow-up medical treatment.

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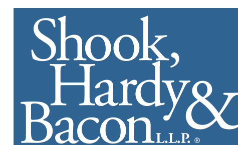
Utah Senator Introduces Multidistrict Litigation Legislation

Senator Orrin Hatch (R-Utah) has introduced a bill (**S. 3734**) that would give a federal judge to whom cases involving common questions of fact have been transferred by the Judicial Panel on Multidistrict Litigation the authority to retain jurisdiction over the cases after pretrial matters have been adjudicated. The bill states that transferee courts for some three decades were typically retaining jurisdiction over their transferred cases, but that in 1998 the U.S. Supreme Court ruled that these cases must be remanded for trial to the districts from which the actions were originally referred.



Stating that the pre-1998 process worked well "because the transferee court was well-versed in the facts and law of the centralized litigation and the court could assist all parties to settle when appropriate," the proposed legislation would allow the transferee court to retain jurisdiction if convenient to the parties and witnesses and "in the interests of justice." The legislation specifically includes "products liability cases" among the civil actions subject to the multidistrict requirements. The bill, which was introduced on July 26, 2006, has been referred to the Senate Committee on the Judiciary.

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CPSC Clarifies Product Hazard Reporting Rules

The Consumer Product Safety Commission (CPSC) has issued a **final interpretative rule**, effective July 25, 2006, that clarifies (i) the factors that the agency will consider when assessing whether a product is defective, and (ii) what role compliance with voluntary and mandatory product safety standards will play when a product defect has been reported to the agency.

Under the Consumer Product Safety Act (CPSA), consumer-product manufacturers, importers, distributors, and retailers are required to report to the CPSC product defects that could create a substantial product hazard. The provisions that CPSC is adding to its implementing regulations will allow agency staff to consider additional factors in determining whether the risk of injury associated with a product is the type of risk which will render the product defective. Those factors include "the obviousness of such risk; the adequacy of warnings and instructions to mitigate such risk; the role of consumer misuse of the product and the foreseeability of such misuse." Several commenters apparently pointed out that courts already use these factors when faced with products liability issues.

Under the Consumer Product Safety Act (CPSA), consumer-product manufacturers, importers, distributors, and retailers are required to report to the CPSC product defects that could create a substantial product hazard.

The new interpretative rule also indicates that compliance with voluntary product safety standards "may be relevant to the Commission staff's preliminary determination of whether that product presents a substantial product hazard under section 15 of the CPSA." And the rule specifies that compliance with mandatory consumer product safety standards may not necessarily "relieve a firm from the need to report to the Commission a product defect that creates a substantial product hazard," but "it will be considered by staff in making the determination of whether and what type of corrective action may be required."

… compliance with voluntary product safety standards "may be relevant to the Commission staff's preliminary determination of whether that product presents a substantial product hazard under section 15 of the CPSA."

Meanwhile, Michael Lemov, former general counsel to the House committee that authored the CPSA, is calling for voluntary standard setting organizations to change their processes to increase non-industry, public-interest participation. He suggests that strengthening voluntary product safety standards will lead to greater CPSC reliance on voluntary standards, "particularly in areas where the Commission's own limited resources make it impractical for it to develop government safety standards for consumer products." Congress has mandated that CPSC rely on voluntary standards when they eliminate or adequately reduce a risk of injury that the CPSC has identified and it is likely that there will be substantial compliance with the voluntary standard. Lemov notes that voluntary standards are often created by the people to whom they are to be applied and, thus, have a built-in weakness. *See BNA Product Safety & Liability Reporter,* July 24, 2006.

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ABA Tort Section Withdraws Preemption Proposal

In-fighting among the 36,000 members of the American Bar Association's Tort Trial and Insurance Practice Section has reportedly caused the group to pull its recommendation from House of Delegates' consideration. The recommendation proposed that the ABA adopt a policy opposing federal agency promulgation of rules or regulations that expressly preempt state-tort and consumer-protection laws. Further information about this proposal appears in the July 27, 2006, issue of this Report. *See The National Law Journal,* August 1, 2006.

In a related development, the ABA's Task Force on Attorney-Client Privilege submitted to the House of Delegates a **recommendation** that the ABA support "the preservation of the attorney-client privilege and work product doctrine in connection with audits of company financial statements." **According to the task force**, regulatory authorities have been seeking privileged materials in connection with company audits, which raises substantial concerns about waiver. The House of Delegates was scheduled to meet to consider this and a number of other recommendations during the ABA's annual meeting in Honolulu, August 3-8, 2006. *See United States Law Week,* August 1, 2006.

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LEGAL LITERATURE REVIEW

Mark Behrens, "States Address Asbestos Litigation Crisis and Curb Silica Litigation Fraud," *Texas Civil Justice League J.,* Summer 2006

Shook, Hardy & Bacon Public Policy Partner **Mark Behrens** discusses recent state initiatives to curb litigation abuses that have bankrupted asbestos manufacturers and depleted compensation funds which should have been available to plaintiffs who are actually sick. The article begins by citing studies which show that up to 90 percent of claimants who file asbestos claims are not sick. According to Behrens, states that require claimants to (i) submit "credible and objective evidence of physical impairment," (ii) adopt rules that curb forum-shopping and joinder abuse, and (iii) place limits on the vicarious asbestos-related liability of successor corporations are having a positive impact on the tort-litigation environment. He notes that the lawyers who brought asbestos claims are now turning to the silica (industrial sand) industry to bring new mass lawsuits.

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Victor Schwartz and Phil Goldberg, "The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort," 45 *Washburn L.J.* 541, 2006

In this article, Shook, Hardy and Bacon Public Policy attorneys **Victor Schwartz** and **Phil Goldberg** explore the history of public nuisance theory from its origins in 12th-century English common law and describe how it is being used against product manufacturers "to circumvent the well-defined structure of products

liability law." They claim that most recent attempts to use the theory have involved redefining the injury from an interference with a public right to anything that involves potential harm, inconvenience or annoying activity, such as asbestos exposure, gun manufacture and lead paint. According to the authors, most courts are wisely exercising restraint and adhering to "the fundamental principles of public nuisance theory."

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John Goldberg, "Two Conceptions of Tort Damages: Fair v. Full Compensation," 55 *DePaul L. Rev.* 435, 2006

Vanderbilt Law School Professor John Goldberg explores the nature of tort claims and the purpose of tort damages in this **article**. In so doing, he focuses on the differing theories that underlie tort theory, i.e. (i) Blackstone's conception of a "fair compensation" system that is connected to a rights- and wrongs-driven theory by which basic individual rights give rise to a right to retaliate against wrongdoers, and (ii) a more modern "full compensation" system that arises from a "top-down, remedy-driven conception" derived from the sovereign's interest in deterring people from engaging in wrongful conduct and ensuring that wrongdoers pick up the tab that a claimant faces. The shorthand reference to these opposing theories is "justice-based" and "welfarist." Goldberg contends that make-whole damages, which are forward-looking and did not emerge until the mid- to late-19th century, are not built into "the very definition of a tort claim," which involves backward-looking notions of restoration.

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LAW BLOG ROUNDUP

Board Game for Future Litigators

"It seems someone has patented one. Per its description: This game unabashedly introduces kids to the realities of being a legal eagle, including: crippling law school debt; outrageous hourly fees; filling your office with expensive and intimidating leather bound books; product-liability cash cows; and the hazy definition of 'emotional distress.'" Walter Olson, writer and senior fellow at the Manhattan Institute, blogging about a lawsuit board game. Overlawyered.com, August 4, 2006.

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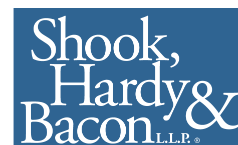
"The day's coming when blogs will be liberally cited by lawyers and judges."

The Day of the Living Blog

"The day's coming when blogs will be liberally cited by lawyers and judges." Trial lawyer Kevin O'Keefe, commenting on an opinion dissenting from a Ninth Circuit Court of Appeals denial of an *en banc* rehearing that quotes from a blog written by UCLA School of Law Professor Eugene Volokh. Kevin.lexblog.com, July 31, 2006.



"No law review article criticizing the opinion [originally handed down in April 2006] could be written, submitted, edited, and published in a traditional law review within that time frame. Professor Volokh's blog post, by contrast, was published within hours after the opinion was announced. Only a blog can be so timely." Plaintiff's class action attorney Kimberly Kralowec, providing additional comment on the Ninth Circuit's blog quote. Uclpractitioner.com, August 1, 2006.

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Point of Information on Mass Torts

"[T]he New Jersey court system maintains a highly organized website it calls the Mass Tort Information Center with copious information about various product liability and other mass tort cases currently or recently the subject of much litigation in the Garden State." Writer and blogger Walter Olson with news you can use. PointofLaw.com, July 22, 2006.

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THE FINAL WORD

Carl Cranor, *Toxic Torts: Science, Law, and the Possibility of Justice,* 2006

According to reviewers, this book explores the tensions between toxic tort litigation and sound science and provides a "good primer" for lawyers who must present scientific evidence to support or defend toxic tort claims. The author, a philosophy professor at the University of California, Riverside, apparently calls for a loosening of the standard the U.S. Supreme Court established in *Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579 (1993), for the admissibility of scientific evidence, because he is concerned that the law requires more certainty than science can deliver. *See Mealey's Emerging Toxic Torts,* July 21, 2006.

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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, and food industries.

With 93 percent of its nearly 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).

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