Shook, Hardy & Bacon L.L.P.

Product Liability Litigation Report

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FLORIDA APPEALS COURT REVERSES RECORD-BREAKING $1.57 BILLION AWARD IN CASE OFFERING E-DISCOVERY LESSONS

A Florida court of appeal has determined that plaintiff did not prove his compensatory damages and has reversed a $1.57 billion judgment in a securities fraud case that received significant attention in the legal community for the e-discovery sanctions imposed on banking giant Morgan Stanley. ***Morgan Stanley & Co. v. Coleman (Parent) Holdings, Inc.*, No. 05-2602 (Fla. Ct. App., decided March 21, 2007)**. Before trial began, the court entered a partial default judgment against Morgan Stanley for its failure to produce e-mail related to a corporate merger, ruling that the plaintiff would have to prove only that he relied on the bank's misstatements about the financial health of one of the firms involved in the merger to recover damages. Because the appeals court focused on the damages issue, it did not reach the discovery-misconduct sanction when it remanded the case for entry of a judgment for Morgan Stanley. The plaintiff has reportedly indicated that he will appeal the 2-1 ruling. *See Bloomberg.com,* March 21, 2007.

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FEDERAL APPEALS COURT AFFIRMS *DAUBERT* RULINGS IN BENZENE EXPOSURE CASE

The Fifth Circuit Court of Appeals has affirmed the entry of summary judgment in defendants' favor in a case involving cancer allegedly caused by occupational benzene exposure. ***Knight v. Kirby Inland Marine, Inc.*, No. 06-60134 (5th Cir., decided March 19, 2007)**. So ruling, the court determined that the trial court properly (i) excluded the testimony of a "highly qualified epidemiologist and physician" following a *Daubert* hearing, and (ii) denied a request that defendants pay for the cost of the expert's hearing testimony.

According to the appeals court, the expert's testimony was not reliable under the admissibility standard of *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993), because it was based on studies which failed to show that the types of chemicals plaintiffs were exposed to could cause their particular

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injuries in the general population. "Because the data relied on by Dr. Levy failed to provide a 'relevant' link with the facts at issue, his expert opinion was not based on 'good grounds.'" The court further determined that the trial court correctly concluded that the Federal Rules of Civil Procedure do not allow *Daubert* hearing expenses to be shifted to the party seeking discovery. In this regard, the court states, "A *Daubert* hearing is not a discovery proceeding but an evidentiary hearing designed to screen expert testimony."

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MISSOURI SUPREME COURT ALLOWS MEDICAL-MONITORING CLASS FOR TOXIC EXPOSURE TO PROCEED

In a split decision, the Missouri Supreme Court has determined that a trial court properly certified a medical-monitoring class involving children exposed to toxins from a lead smelter that operated in their community. ***Meyer v. Fluor Corp.*, No. 87771 (Mo., decided March 20, 2007)**. According to the court, the circuit court denied class certification by finding that "individual issues will necessarily predominate over common issues." The factors the circuit court identified as individual were "primarily relevant to a personal injury action, not a medical monitoring claim for which there is no necessity of establishing a present physical injury," so the supreme court concluded that the lower court had misapplied the law. The dissenting judges would have ruled that the claims of the named plaintiff were not typical of the class because she had a separate, present-physical-injury lawsuit pending against the same defendant yet was seeking to represent children "who have been exposed to those same toxins, but who have not yet exhibited or recognized symptoms of illness." The majority contended, in this regard, that that the circuit court had not addressed the typicality requirement of class certification and that it would, therefore, be inappropriate for the appeals court to do so.

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MULTIDISTRICT LITIGATION PANEL IN THE SPOTLIGHT

In an article about the Judicial Panel on Multidistrict Litigation, *National Law Journal* writer Peter Geier examines "questions and criticisms about the panel, as well as some apprehension expressed over the potential for abuse of power." Appointed by the chief justice of the U.S. Supreme Court, the MDL panel's seven members decide whether to consolidate and centralize related cases for pretrial proceedings, sometimes sending them to a panelist's district or to a court "far removed" from either party. "From 1968 to 2001, 170,690 civil actions – almost three quarters of which were asbestos, breast implant and Bridgestone/Firestone Tire cases – were centralized into 924 MDLs," according to Geier, who also contends that the Class Action Fairness Act of 2005, in part, has "helped to make federal MDLs the leading forum for mass torts."

Responding to this recent surge in MDLs, several unnamed lawyers reportedly told Geier that although the panel has not yet shown any clear bias, its lack of transparency is becoming worrisome. One law partner was quoted as saying that the MDL process works well when both parties can agree on a venue, but the panel will often "ship 'em to Mars" if a squabble cannot be resolved.

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As for appointments, "nobody outside the judiciary knows how or why the chief justice makes his selection for special tribunals," law professor Theodore Ruger charged, noting that the panel's current members were all assigned to their benches by Republican presidents. "Nothing in the statute prevents the chief justice from handpicking judges who share his ideological preferences on the issues that the tribunal is created to resolve," he argued, despite being "hard-pressed to find any such patterns" in his research. Two panelists are slated to step down this year when their terms expire, leaving Chief Justice John Roberts to fill the vacancies. *See National Law Journal,* March 26, 2007.

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STUDY FINDS STATE LEGISLATION INADEQUATE FOR REPORTING PHARMACEUTICAL COMPANY PAYMENTS TO DOCTORS

A study co-authored by the watchdog group Public Citizen claims that state laws requiring physicians to report pharmaceutical company payments are inadequate, but nevertheless indicate "substantial numbers" of gifts in excess of $100. Joseph Ross, et al., "Pharmaceutical Company Payments to Physicians: Early Experiences with Disclosure Laws in Vermont and Minnesota," *The Journal of the American Medical Association,* March 21, 2007. Five states and the District of Columbia currently require doctors to report payments from pharmaceutical companies, and Vermont and Minnesota make this information available to the public. The researchers allege that Vermont physicians accepted more than $2.18 million in gifts over two years, with $1.01 million coming from median payments of $177. The study also finds that of the 6,238 payments exceeding $100 made to Minnesota doctors, 46 percent were allocated for "unspecified purposes," while 27 percent were targeted to education and 13 percent to speakers.

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Public Citizen researchers nevertheless argue that the information gathered in these states was often insufficient to conduct in-depth reviews of this practice. "States that enact public disclosure laws in the future should learn from these mistakes and require a more consistent and easily understandable system to report these kinds of payments," said Peter Lurie, M.D., of Public Citizen, which sued Vermont's attorney general to obtain additional records not included in the study.

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LAW AND MEDICINE SYMPOSIUM FOCUSES ON CHILDHOOD OBESITY

The Spring 2007 **issue** of the *Journal of Law, Medicine & Ethics* has devoted more than 150 pages to symposium articles about childhood obesity. Editor Ted Hutchinson sets the tone for the symposium by noting in his letter, "Children's weight is clearly a result not only of diet and exercise but more specifically of what they are offered for food in schools, how foods are marketed to them in the media, and how children are able to function in the 'built environment' that exists around them." As anti-tobacco activist Richard Daynard contends in a symposium **article** he co-authored, obesity has been framed by

industry as an individual choice issue when it is actually a result of legal policy that has shaped "the situational and environmental influences that drive both dietary intake and physical activity." He continues to believe that litigation will have a role in addressing the nation's problems with obesity but argues that it must "focus on the needs of the population rather than of individual clients." The article also discusses the obstacles facing those who turn to government for legislative and regulatory solutions.

The symposium articles are divided into sections. The first addresses potential causes for childhood obesity; the second contains articles outlining possible strategies "for stemming the epidemic." Among the articles in the second section is a **piece** by food activist and psychology professor Kelly Brownell who claims that the issue must be reframed from one of personal responsibility to that of "a toxic environment." Brownell states that humans are innately predisposed to overeat fatty, salty and sweet foods, and we live in an environment that makes such foods easy to find and ready to eat. He calls for a major research effort and "sensitivity to global factors that affect diet and activity and take into account broad social forces such as economics and the influence of industry."

McDonald's Corp. Vice-President Catherine Adams was given an opportunity to **contribute** to the symposium and reinforces the company's commitment to food quality, nutrition information and educational messages. According to Adams, the company's current "focus is on the foods that experts around the world generally agree people should eat more often – fruits and vegetables." She emphasizes that the company relies on the advice of nutrition experts and has demonstrated its commitment to customer health and well-being. "We do not offer 'fast food'; rather, we provide 'good food fast.'" Adams concludes by stating, "McDonald's has taken a seat at the table of the obesity discussion, but our role is not apologetic – it is as a partner equally dedicated to sensible, responsible and sustainable solutions."

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ALL THINGS LEGISLATIVE AND REGULATORY

CPSC Launches Online Safety Information Initiative

The U.S. Consumer Product Safety Commission recently announced the "Drive to 1 Million" initiative, a free e-mail notification system that provides subscribers with product recall and safety information. "It is vital for consumers to check their own homes for hazardous products that have been recalled," said acting chair Nancy Nord. "Consumers can literally save lives with the click of their computer mouse." Product categories covered in the recall notifications include (i) outdoor products, such as grills and outdoor furniture; (ii) outdoor power equipment; (iii) power tools; (iv) children's products; (v) household products; and (vi) electronics. Interested consumers can register for the free service at **www.cpsc.gov**. *See CPSC Press Release,* March 19, 2007.

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Illinois House Judiciary Committee Rejects Tort Reform Bills

The Illinois House Judiciary Committee recently voted against several tort reform bills designed to tighten standards for asbestos and class action claims, require venue filings where the cause of action arose, and establish expert witness qualifications. The rejected House bills included H.B. 1893, a class-action reform which would have established (i) a state residency requirement for class members; (ii) a condition that the cause of action arose in Illinois; and (iii) a provision to ensure that class action would be the best method of adjudication. Lawmakers also squashed a bill supporting mandatory pretrial hearings on the admissibility of expert testimony, as well as limits on non-expert testimony in tort cases. This measure apparently would have "move[d] Illinois out of its *Frye* regime and into the *Daubert* column," according to **www.daubertontheweb.com**, a law blog that nevertheless characterized pretrial hearings as a "marked departure from the federal model whose emulation the bill otherwise proposes."

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Opposing this tort reform package, the Illinois Trial Lawyers Association (ITLA) also brought witnesses before the purportedly "trial-lawyer friendly" committee, which voted primarily along party lines to defeat the bills. Meanwhile, an ITLA-backed bill has proposed expanding recoverable damages under the Illinois Wrongful Death Act to include grief, sorrow and mental suffering. H.B. 1798, which the committee approved, was called "unconscionable" by Illinois Association of Defense Trial Counsel President Jeff Hebrank, who argued that plaintiffs' lawyers will now "get a windfall of money they were never entitled to under the law." *See The Madison Record,* March 27, 2007.

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LEGAL LITERATURE REVIEW

Shook Lawyers Write "Letter" to Nation's Trial Judges About Asbestos Claims

Shook, Hardy & Bacon Public Policy lawyers **Victor Schwartz** and **Phil Goldberg** have co-authored an article in the *American Journal of Trial Advocacy* styled as a letter to U.S. trial judges explaining how various efforts to deal with overwhelming numbers of asbestos-related personal-injury claims have had mixed effects. While some courts and state legislatures have made changes that resulted in a renewed focus on actual physical injury, "others have had disastrous, unintended consequences that have exacerbated the scope of the litigation and caused inaccurate, highly skewed litigation results." The authors contend that individuals seriously injured with mesothelioma and cancer must be treated fairly, without exhausting the dwindling assets of peripheral defendants. Among their suggestions are (i) "adhere to the fundamental principles of tort law"; (ii) "empower jurors to make informed decisions" by allowing them, for example, to see evidence of alternative sources of exposure and learn about collateral sources of plaintiffs' compensation; (iii) "assure awards are reasonable, not windfalls"; and (iv) "put a stop to those who try to game the United States judicial system."

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Mark Behrens, "Asbestos and Silica Litigation Reform: Helping the Sick, Curbing Fraud, and Providing Liability Fairness," *American Legislative Exchange Council,* February 2007

Shook, Hardy & Bacon Public Policy Partner **Mark Behrens** writes about model legislation, developed by the American Legislative Exchange Council (ALEC), to address some of the problems that have occurred as courts attempt to deal with asbestos- and silica-related claims made by people who are not sick against companies bankrupted by such lawsuits. The ALEC models are called the Asbestos and Silica Claims Priorities Act and the Successor Asbestos-Related Liability Fairness Act. A number of states have adopted reforms similar to those ALEC has proposed; Behrens discusses why such legislation is needed and how the bills can protect the most seriously injured plaintiffs while limiting the liability of innocent successor corporations.

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David Stras and Ryan Scott, "Are Senior Judges Unconstitutional?," *Cornell Law Review* (2007)

While noting that senior judges often provide yeoman service to the federal judiciary, University of Minnesota Law Professor David Stras and Department of Justice Law Clerk Ryan Scott contend that some aspects of the senior judge program violate the U.S. Constitution. In particular, they suggest that (i) requiring by statute that "senior judges be designated and assigned by another federal judge before performing any judicial work violates the tenure protection of Article III"; (ii) "allowing judges to elect senior status, without a second intervening appointment violates the Appointments Clause"; (iii) requiring a senior judge to perform only administrative work violates Article III by allowing her to hold judicial office without performing judicial duties; and (iv) assigning a senior judge to sit exclusively on courts outside her home district or circuit violates the Appointments Clause, because her selection and approval by the president and Senate required primary service on a particular court. The authors note that the issue has not been raised or pursued in any litigation, but they offer recommended changes that Congress, the Judicial Conference and the courts can make to preserve the legitimacy of senior judges who play a vital role as caseloads expand and judicial vacancies persist.

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LAW BLOG ROUNDUP

Lawyers Behaving Badly

"When the Law Blog reads about a group of Kentucky lawyers and their handling of a settlement in fen-phen litigation there, all we can say is, 'What a shanda!' (Law Blog Yiddish Word of the Day: Shanda – a 'shame or an embarrassment.')" Writer Peter Lattman, blogging about recent actions taken against plaintiffs' lawyers who allegedly misappropriated client funds when American Home Products settled claims by several hundred Kentucky plaintiffs that its diet

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drug caused their heart damage. New evidence reportedly shows that Cincinnati lawyer Stanley Chesley, who contends he never communicated with class claimants, was one of the "chief architects" of the scheme to defraud the Kentucky plaintiffs.

blogs.wsj.com/law, March 26, 2007.

Anti-Regulatory Patterns?

"Arguments likely to be made early on in anti-reform campaigns are lower-level cards, progressing up to the face cards. 'No Problem' is the two of clubs, 'Stifles Innovation' is the six of hearts, 'Fake Consumer Groups' is the ten of clubs, and 'We'll Lose Money!' is the ace of clubs." Writers at the Center for Media and Democracy, quoting a California attorney who characterizes as a deck of cards the rhetorical devices of industry groups that oppose regulation and other oversight.

prwatch.org, March 23, 2007.

Bad News for Law Reviews; Good News for Law Blogs?

"'I haven't opened up a law review in years,' Second Circuit Chief Judge Dennis Jacobs told *The New York Times.* 'No one speaks of them. No one relies on them.'" Writer Peter Lattman, discussing publicity about a recent Cardozo Law School gathering and study showing that judges rarely cite law reviews in their opinions these days. Judges claim the articles are no longer relevant and are looking for timely commentary on actual cases and doctrines like that appearing in law blogs; at least one law professor characterizes the judges' dismissal of legal scholarship as "an anti-intellectual know-nothingism that is understandable but regrettable."

blogs.wsj.com/law, March 19, 2007.

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THE FINAL WORD

Food Litigators Highlighted in Article About Food-Borne Illnesses

Bill Marler, a Seattle-based lawyer who has built his practice representing plaintiffs in tainted food cases, and Portland-based David Ernst are showcased in a recent article about food contamination outbreaks. According to the article, "when something goes terribly wrong with peanut butter, lettuce or spinach," Marler adds telephone lines to his office to handle an onrush of incoming calls. Business has been brisk for Ernst and Marler because government regulators have only a limited role in addressing consumers' food-related injury claims, and tainted-food outbreaks are sickening thousands. Ernst, who generally handles plaintiffs' cases, was apparently retained by ConAgra to defend recent claims

involving a peanut butter *salmonella* outbreak, and found himself across the table from Marler, trying to determine how best to cover legitimate medical bills and quickly settle cases. Because food-poisoning cases involve product liability claims, plaintiffs do not have to prove fault; "they just have to show that unsafe food caused an injury." An epidemiologist is quoted as saying, "Once you've established that the person became sick from eating at a Safeway or McDonald's, the only question is how big the check is." Marler, who has a blog dedicated to food-related issues, advocates better government oversight, and he advises food companies on how to adopt best practices and avoid litigation. He reportedly wants the food industry to put him out of business. *See The Oregonian,* March 25, 2007.

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 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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