Shook, Hardy & Bacon L.L.P.

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PRODUCT LIABILITY LITIGATION REPORT

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ILLINOIS SUPREME COURT SAYS DEFENDANTS MAY PRESENT EVIDENCE OF OTHER ASBESTOS EXPOSURES

In asbestos-exposure litigation tried against a single defendant, the Illinois Supreme Court has determined that a trial court erred by excluding evidence of the decedent's other asbestos exposures. ***Nolan v. Weil-McLain*, No. 103137 (Ill., decided April 16, 2009)**. Thus, the court reversed a jury verdict against the defendant in excess of $2 million and remanded the case for a new trial.

The decedent in this wrongful death action worked for some 38 years in an industry that exposed him to different types of asbestos produced by many different companies. This litigation was originally filed against a number of defendants who either settled or were dismissed before trial, leaving one defendant, the manufacturer of boilers, asbestos rope and dry asbestos cement to which the decedent had minimal overall exposure.

The defendant sought to present evidence that the sole proximate cause of decedent's death was his exposure to asbestos-containing products of nonparty entities. The trial court barred the introduction of such evidence, relying on a line of cases that the state's high court ruled were either no longer good law or consistently misinterpreted by the lower courts.

According to the supreme court, prior case law established neither different rules of proof in asbestos cases nor a presumption of causation that makes evidence of exposure to other asbestos-containing products irrelevant. The lower courts' erroneous interpretation of previous cases "left Illinois standing alone in excluding evidence of other asbestos exposures, and conflicted with our well-settled rules of tort law that the plaintiff exclusively bears the burden of proof to establish the element of causation through competent evidence, and that a defendant has the right to rebut such evidence and to also establish that the conduct of another causative factor is the sole proximate cause of the injury."

Because the court also found that the trial court's evidentiary ruling was not harmless, it ruled that it was compelled to reverse and remand. The sole dissenting justice agreed that the evidentiary ruling was in error but would have concluded that it was harmless "because the evidence admitted at trial was sufficient to apprise the jury of Clarence's repeated exposure to other sources of workplace asbestos and to provide sufficient grounds for Weil-McLain's sole proximate cause defense."

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Shook, Hardy & Bacon Public Policy lawyers **Victor Schwartz**, **Mark Behrens** and **Christopher Appel**, and Pharmaceutical and Medical Device Litigation Associate **Wendy Williams** represented a number of organizations, such as the American Tort Reform Association and American Chemistry Council, that filed an *amici curiae* brief in support of the defendant.

SIXTH CIRCUIT ADOPTS RELIABILITY TEST FOR EXPERTS CONDUCTING DIFFERENTIAL DIAGNOSES IN CHEMICAL EXPOSURE SUIT

The Sixth Circuit Court of Appeals has determined that a district court erred in finding a treating physician's medical-causation testimony unreliable and inadmissible in litigation involving exposure to swimming pool chemicals that allegedly caused the complete loss of the plaintiff's sense of smell. ***Best v. Lowe's Home Ctrs., Inc.*, No. 08-5924 (6th Cir., decided April 16, 2009)**. Reversing the trial court's grant of defendant's motion for summary judgment, the appeals court adopted a test to guide the courts in the circuit in determining when medical-causation opinions relying on differential diagnoses are reliable under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and Federal Rule of Civil Procedure 702.

When the plaintiff was splashed with the chemicals at one of defendant's stores, he allegedly experienced immediate irritation and burning of his skin, irritation of his nose and mouth, dizziness, and shortness of breath. He sought treatment with an otolaryngologist who also held a degree in chemical engineering. The plaintiff continued to see the specialist, Francisco Moreno, with lingering problems, including the complete loss of his sense of smell. On the basis of a differential diagnosis, Moreno concluded that chemical inhalation caused the plaintiff's condition. Finding Moreno's proposed testimony too speculative, the trial court excluded it.

Noting that it had not provided detailed guidance on "separating reliable differential diagnoses from unreliable ones," the Sixth Circuit quoted the Federal Judicial Center's *Reference Manual on Scientific Evidence* to define differential diagnosis as "'[t]he method by which a physician determines what disease process caused a patient's symptoms. The physician considers all relevant potential causes of the symptoms and then eliminates alternative causes based on a physical examination, clinical tests, and a thorough case history.'"

The court then adapted the Third Circuit's test for the reliability of such diagnoses, stating that they are reliable and admissible "where the doctor (1) objectively ascertains, to the extent possible, the nature of the patient's injury, (2) 'rules in' one or more causes of the injury using a valid methodology, and (3) engages in 'standard diagnostic techniques by which doctors normally rule out alternative causes' to reach a conclusion as to which cause is most likely." As to the ruling-out prong of the test, the court noted that physicians need not rule out every conceivable cause for their opinions to be admissible. According to the court, "Our approach is similar to those employed in other circuits that recognize differential diagnosis as a valid basis for medical-causation opinions."

Employing its test, the court found the testimony relevant and admissible. The court also noted that even without the testimony, summary judgment might be inappropriate, citing its decision in *Gass v. Marriott Hotel Services*, 558 F.3d 419 (6th Cir. 2009), which held that expert testimony is not required to prove the causation element of a negligence case where the exposure and development of symptoms coincided. Additional information about *Gass* appears in the March 26, 2009, issue of this Report.

FEDERAL COURT ALLOWS PLAINTIFFS TO PURSUE PUNITIVE DAMAGES AGAINST AIRCRAFT MANUFACTURER

A federal court in Kansas, while confirming a previous order dismissing a fraud claim filed against the maker of an airplane that crashed and killed the plaintiffs' decedents, has ruled that plaintiffs' product liability allegations are sufficient for them to seek punitive damages. *In re: Cessna 208 Series Aircraft Prods. Liab. Litig.*, MDL No. 1721 (U.S. Dist. Ct., D. Kan., decided April 9, 2009). According to the court, the plaintiffs did not assert that the court erred in dismissing their fraud claim, but argued instead that the fraud claim also stated a claim for punitive damages. Because Kansas does not recognize a separate claim for punitive damages and the plaintiffs did not state an actionable fraud claim, the court found it did not err in dismissing the count.

Yet, the court decided to construe the plaintiffs' complaint "as requesting punitive damages from Cessna in their prayer for relief in conjunction with their First Claim (Products Liability)." According to the court, the plaintiffs allege (i) under authority delegated by the Federal Aviation Administration, "Cessna certified the 208B aircraft when it knew that testing equipment to determine whether the aircraft satisfied federal requirements was not functional"; (ii) following and in response to several accidents, "Cessna offered pilots a program on operating the 208B aircraft in icing conditions, but the program included a chart" that was based on false and fabricated data; (iii) "Cessna re-published the chart in NTSB and other accident investigation publications where pilots and operators relied upon the data"; and (iv) about two years before the accident, "Cessna discovered an error in the calibration specification for the stall warning system of the aircraft, but did not disclose that error to owners and pilots of affected aircraft."

The court concluded that, viewed in a light most favorable to plaintiffs, the standard for assessing claims challenged in a motion to dismiss, "a reasonable jury could find willful, wanton or malicious conduct" on the basis of these allegations.

PAINT MAKER AND LAW FIRM ENTER AGREEMENT OVER CONFIDENTIAL INFORMATION

Sherwin-Williams Co. and a plaintiffs' law firm have agreed to the entry of an order that requires the law firm not to use or reproduce a document referred to as a "Board Presentation." The paint manufacturer has sued the firm, alleging that it illegally

obtained the document, a 34-page PowerPoint® presentation, that included information about "the costs of defending the [Rhode Island] lead paint and pigment litigation," associate general counsel's "analysis of potentially available insurance coverage for that litigation—an issue that Sherwin-Williams was actively litigating with its insurers in a separate action," and other "highly confidential, proprietary business information." *The Sherwin-Williams Co. v. Motley Rice LLC*, No. 09-689237 (C.P. Ct., Cuyahoga County, Ohio, agreed order entered April 9, 2009).

The law firm also agreed not to "Transfer, convey, disclose, or communicate in any manner the Board Presentation (or any copies of the Board Presentation), or the contents of the Board Presentation to any person who is not a lawyer working on this litigation or the Rhode Island litigation."

Sherwin-Williams filed the lawsuit in Ohio, where the law firm represents plaintiffs that brought lead-based paint litigation against the company. While the paint-maker's complaint seeks to uncover how the firm obtained the document, a news source indicates that (i) one of the company's former employees secretly met with a law firm partner when the firm was soliciting Ohio cities to bring nuisance lawsuits against Sherwin-Williams and other paint manufacturers, and (ii) the source of the document appears to be a fax sent in September 2006 from a FedExKinko's in Akron, Ohio. The same document has generated a similar order in Rhode Island.

Sherwin-Williams filed the lawsuit in Ohio, where the law firm represents plaintiffs that brought lead-based paint litigation against the company.

The suit, which seeks more than $25,000 in punitive damages, costs and fees, as well as the return of the document and an order barring the document's use in court, will apparently proceed to discovery. The law firm has characterized the suit as "completely frivolous and ridiculous." *See Product Liability Law 360*, April 13, 2009.

"NO-INJURY" CLAIMS AGAINST MAKER AND RETAILER OF BABY CHAIR DISMISSED

A federal court in California has dismissed without prejudice claims that the maker and retailer of a baby seat violated state consumer protection laws, breached express and implied warranties and were unjustly enriched. *Whitson v. Bumbo*, No. 07-05597 (U.S. Dist. Ct., N.D. Cal., decided April 15, 2009).

The putative class-action complaint alleged that the product was marketed with images of babies in the seat placed on top of tables, chairs and stools. Warning labels apparently indicated that it was for use at floor level only. Still, after the plaintiff purchased a baby seat, lawsuits were filed by others in a number of jurisdictions alleging severe physical injury to infants who fell out of the seats. The U.S. Consumer Product Safety Commission recalled the seats and advised consumers not to use them on an elevated surface or leave a child placed in one unattended.

The plaintiff filed her lawsuit after the recall and made "no allegation that any child ever used the Bumbo seat she purchased, that any child fell from her baby seat or that Whitson actually saw or relied upon any images showing babies sitting on elevated surfaces in Bumbo seats." The defendants sought to dismiss the complaint, arguing that she lacked standing to sue and had not pleaded her fraud allegations with sufficient specificity.

The court agreed that the plaintiff lacked standing to sue because her causes of action required her to plead some injury. Instead, her "complaint itself is, in large part, a cut and paste job, asserting many causes of action (throwing everything against the wall and seeing what sticks) but alleging very few facts. In particular, Whitson does not allege that she or any child on whose behalf she has standing to sue actually used or was harmed by any defect in the Bumbo seat."

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The defendants apparently argued that "the instant action is best viewed as a 'no-injury' product liability class action," and the court agreed with their characterization. The court dismissed the complaint without prejudice so that the plaintiff, who requested leave to amend, could do so, although it was of the opinion that "serious questions as to whether Whitson will be able to state a claim" remain.

ALL THINGS LEGISLATIVE AND REGULATORY

Senator Calls for Resignation over Tainted Chinese Drywall; Drywall Legislation Introduced

Senator Bill Nelson (D-Fla.) has apparently called for the resignation of Nancy Nord, acting chair of the U.S. Consumer Product Safety Commission, (CPSC) for failing to address reports of tainted Chinese drywall installed in dozens of homes. While the CPSC evidently launched a formal compliance investigation in February 2009 to determine if any risk is associated with sulfur-based gases that are being emitted in the homes from the imported drywall, the agency has not acted to recall the product. Meanwhile, fearing that their drywall is making them sick, some homeowners are reportedly moving out of their houses, filing lawsuits and demanding help from lawmakers. Details about one drywall lawsuit appear in the February 12, 2009, issue of this Report.

On March 30, Nelson introduced the Drywall Safety Act of 2009 (S. 739), which would impose a recall and temporary ban on imports until federal drywall safety standards are implemented to protect consumers. The CPSC apparently has no safety standards for drywall. Nelson and other lawmakers said they support the bill because it requires manufacturers to be responsible for homeowners' repair and replacement costs. The legislation also calls for CPSC to perform a study with federal testing labs and the U.S. Environmental Protection Agency (EPA) to determine the level of risk posed by substances in the drywall.

Between 60,000 and 100,000 homes across the nation, including about 36,000 in Florida, contain tainted drywall, Nelson claimed. Tons of Chinese drywall, a common manufactured building material used for the construction of interior walls and ceilings, were reportedly used after Hurricane Katrina. During the housing boom from 2004 to 2007, the United States imported roughly 309 million square feet of drywall from China—a fraction actually used in the United States but enough to build about 35,000 houses. The number of houses containing the Chinese product could be higher, because some builders use a mix of domestic and imported drywall.

Sources say the actual health effects of the imported Chinese drywall are still unknown but some homeowners attribute bloody noses, sinus problems and headaches to the product. Some homeowners also claim the imported drywall in their newly built houses has turned their jewelry, pennies and electrical wiring black. Researchers say the sulfur-based gases from the drywall may be corroding the metal.

The Florida health department, which has analyzed some of the drywall, has said there is no evidence that gases emitted from drywall pose a serious health risk. A Chinese government agency is also reportedly investigating. According to a press report, investigations are hampered by the lack of clear manufacturer identification on Chinese drywall. *See Product Liability Law 360*, April 15, 2009, and *The Wall Street Journal*, April 17, 2009.

Children's ATV Lead-Rule Enforcement Delayed Until May 2011

The U.S. Consumer Product Safety Commission (CPSC) has apparently voted to delay enforcement of its new lead requirements for children's all-terrain vehicles (ATVs) until May 2011, because the commission says that enforcing the rule immediately would endanger children by encouraging them to ride adult-sized ATVs. Commissioner Thomas Moore and acting Chair Nancy Nord reportedly voted to reject a petition by ATV makers to exclude ATVs from the lead rules altogether. Instead, they supported a stay of the rule's enforcement as it pertains to ATVs.

"It is ironic that I am defending vehicles that I consider to be dangerous for children under 12 to ride and which contain accessible parts with excess levels of lead," Moore was quoted as saying. "However, the alternatives appear to be more dangerous. American parents seem willing to accept the risk for their children riding these vehicles, so it is the agency's task, at this stage, to ensure that the vehicles are as safe as possible. One safety rule the agency has stressed is keeping children off adult-sized ATVs."

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Moore and Nord have told their staff to draft a stay of enforcement for publication in the *Federal Register*. *See Product Liability Law 360*, April 17, 2009.

Magnetic Building Set Manufacturer Agrees to Pay $1.1 Million Civil Penalty

The U.S. Consumer Product Safety Commission (CPSC) has announced that Mega Brands America Inc. has agreed to pay a $1.1 million civil penalty to settle claims that the company "failed to provide the government with timely information about dangers to children with Magnetix magnetic building sets, as required under federal law."

Apparently, the building sets contain magnets that can fall out of the building pieces and are known to have killed at least one toddler who ate them. The company reported the death to the CPSC in December 2005, attributing it to "unusually abusive play by the toddler's older siblings." According to CPSC, the report lacked additional incident and product information. In March 2006, the company voluntarily recalled nearly 4 million of the sets for users under age 6. And in April 2007, the company expanded the recall to sets for users of any age, "after more than 25 children suffered intestinal injuries that required surgery to remove the magnets."

The CPSC later discovered documents that led staff to believe the company had compiled incident information before December 2005 and then learned via subpoena that the company had, in fact, received more than 1,100 consumer complaints about magnets falling out of the plastic pieces, but failed to share that information with the CPSC in its report. The company also "had received at least one report of an injury due to magnet ingestion, prior to the toddler's death."

Under federal law, companies are required to report to CPSC immediately—within 24 hours—after "obtaining information reasonably supporting the conclusion that a product contains a defect which could create a substantial product hazard, creates an unreasonable risk of serious injury or death, or violates any consumer product safety rule, or any other rule, regulation, standard, or ban enforced by CPSC." *See News from CPSC*, April 14, 2009.

LEGAL LITERATURE REVIEW

Edward Cheng, "A Practical Solution to the Reference Class Problem," *Columbia Law Review* (forthcoming)

From calculating classwide damages to estimating a plaintiff's background risk of contracting a disease, statistical evidence has become increasingly important in U.S. courtrooms. Brooklyn Law School Associate Professor Edward Cheng observes that the selection of a comparison group, or "reference class," for purposes of establishing inferences with statistics is problematic because numerous characteristics and factors can be and are used to create the group. According to Cheng, "Statistical inferences depend critically on how people, events, or things are classified." He proposes turning to model selection criteria as a way to decide which litigant's reference class is more accurate in a given case. These criteria provide numerical measurements of "how well the model fits the observed data" as well as "its complexity, [thus] reflecting the fit-complexity tradeoff." He claims that these criteria give courts "a powerful method for assessing and deciding" disputes over the appropriateness of various reference classes.

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Samuel Issacharoff & Ian Samuel, "The Institutional Dimension of Consumer Protection," NYU School of Law, *Public Law & Legal Theory Research Paper Series,* April 2009

New York University School of Law Professor Samuel Issacharoff has co-authored this paper about the institutional demands that different forms of consumer protection can take. He starts by assuming that the need to police markets and protect consumers is necessary and discusses public *ex ante* regulation, that is, the prior governmental approval of products before they may enter the marketplace, and private *ex post* enforcement, that is, a tort suit by an injured consumer. Noting that each option "must have its own supporting institutions and its own societal infrastructure to make it work," the paper explores European and American practices for providing consumer protection and concludes that "each regulatory strategy must ensure that the proper institutional actors are in place for its effective implementation."

Ruggero Aldisert, "Judicial Declaration of Public Policy," *Journal of Appellate Practice & Process,* Spring 2010

Senior U.S. Circuit Judge Ruggero Aldisert, known for his opinion-writing expertise, discusses the criticisms raised against jurists who rest their decisions on considerations of public policy. Observing that "[t]he courts are continually called upon to weigh considerations of public policy when adding to the content of the common law, when filling in statutory gaps left by an inattentive, divided or politically sensitive legislature and when applying constitutional precepts to changing and novel circumstances," Aldisert notes the pitfalls for those judges who purport to find society's values in their own and fundamentally mistake the public consensus. Exploring the considerations judges take into account when declaring what public policy is and how they must rigorously screen out personal bias, passion and prejudice, he advises that any public policy adopted "must be a concept universally held and uniformly respected" and suggests that the decisional process involved "bears a remarkable resemblance to classic natural law."

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LAW BLOG ROUNDUP

The Next Big Thing?

"Is this the new tobacco? Is this the new asbestos? … Could it be Chinese drywall?" *WSJ* Legal Correspondent Ashby Jones, blogging about the complaints proliferating against the companies that made and installed Chinese-made drywall in thousands of U.S. homes. Homeowners claim that emissions from the product are making them sick and damaging electrical equipment in their homes by corroding the metal parts.

WSJ Law Blog, April 17, 2009.

Bike Sellers Air Concerns About Lead Limits in CPSIA

"CPSIA won't let us build a legal bicycle. But we shouldn't let the bike dealers get panicked or anything." Manhattan Institute Senior Fellow Walter Olson, linking to a bike-retailer news item about the lead limits in the Consumer Product Safety Improvement Act of 2008. The bicycle industry will not apparently be able to produce certain bicycle parts without metals that exceed the lead limit, and industry representatives have reportedly testified to that effect before Congress.

Overlawyered.com, April 20, 2009.

Men and Women Judging Uniquely?

"It's almost an article of faith among Supreme Court watchers that President Obama will fill the bench's next vacancy—and perhaps the one after that, too—with a woman." *Slate.com* Legal Correspondent Dahlia Lithwick, discussing the long-standing debate and recent research about possible differences between the jurisprudence of male judges and that of female judges. Whether such differences actually exist, Lithwick concludes that when it is time for the president to appoint a new justice, "he'll have an embarrassment of female talent to choose from."

Slate. com Jurisprudence, April 11, 2009.

THE FINAL WORD

Reforming Court-Enforced Secrecy

The National Law Journal on April 20, 2009, published an article by Les Weisbrod, president of the American Association for Justice, a trial lawyers' organization, called "Shed Light on Safety Issues" in which he discusses the moral dilemma attorneys face when forced to decide between public safety and protecting the interests of their clients.

"When wrongdoers settle cases involving their irresponsible conduct, they often force injured consumers to agree not to reveal any of the details of the case—even if the product remains on the market and the information could warn the public of a potential health hazard," Weisbrod writes. "… Federal and state judges who have busy dockets are compelled not to stand in the way of a secret settlement agreed to by both parties. As a result judges grant secrecy agreements— which throw the weight and enforcement power of the court behind the sealed case. Injured consumers and their attorneys know that violation of the secrecy agreements can mean contempt of court, including steep fines."

Weisbrod claims that courthouses nationwide hide information about thousands of injuries and deaths associated with common products such as car tires, collapsing baby cribs and prescription drugs. "Limiting secrecy in our civil justice will help

prevent more people from being injured or killed by known defective products," he writes, adding that state and federal court systems in 41 states have taken steps to limit court secrecy. Legislation introduced in March 2009 in Congress called the Sunshine Litigation Act "is an important step in helping reform the broken system of court enforced secrecy. Federal judges would have the tools needed to evaluate whether secrecy agreements cross the line when public safety information is involved," Weisbrod concludes.

UPCOMING CONFERENCES AND SEMINARS

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. 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).