

Developments and Trends in the Defense of Mass Toxic Tort Cases

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Nationwide Teleconference Presentation
Call-In Number: 888.283.8550
November 14, 2000
3:00 - 4:00 p.m. (Eastern)

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Morgan, Lewis & Bockius LLP National Teleseminar Overview

- 1. Environmental Tort Litigation: An Update on the Application of the Daubert Trilogy as a Defensive Tool to Challenge Expert Testimony (Stuart)**
- 2. The Alarming Rise in the Use of Civil Conspiracy Theories in Mass Tort Litigation (Pagliaro)**
- 3. Medical Monitoring Claims in Mass Tort Litigation (Peterson)**
- 4. Questions and Answers**

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Environmental Tort Litigation:
An Update on the Application of the *Daubert* Trilogy
as a Defensive Tool to Challenge Expert Testimony

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Federal Rule of Evidence 702

“ If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill or experience may testify thereto in the form of an opinion or otherwise.”

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Amendments to FRE 702

- * April 2000 - U.S. Supreme Court approved amendments to FRE 702
- * Codifies the *Daubert* trilogy holdings
 - affirms gatekeeper role
 - *Daubert* applies to all expert evidence
 - experts can be qualified on basis of experience

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Amendments to FRE 702

(effective December 1, 2000 absent contrary Congressional action)

“If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if

- (1) the testimony is based upon sufficient facts or data,
- (2) the testimony is the result of reliable principles or methods, and
- (3) the witness has applied the principles and methods reliably to the facts of the case.”

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The Trilogy: *Daubert* and its Progeny

The seminal United States Supreme Court Decision

- *Daubert v. Merrell Dow Pharmaceuticals, Inc* (1993)
 1. Trial Court as the Gatekeeper
 2. The 4 factor non-exclusive test for relevancy and reliability
 - whether the theory or methodology has been
 - tested
 - subject of peer-reviewed analysis or publication
 - has an established rate of error
 - is generally accepted in the relevant community

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Progeny

- *General Elec. Co. v. Joiner* (1997)
Standard of review for reviewing court is abuse of discretion
- *Kumho Tire Co. v. Carmichael* (1999)
Expert testimony includes nonscientific evidence

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U.S. Supreme Court

Weisgram v. Marley Co. (2000)

An appellate court may direct a trial jury to enter judgment as a matter of law when it finds that critical expert testimony was improperly admitted at trial and remaining properly admitted evidence is insufficient to justify a plaintiff's verdict.

Daubert Trilogy Applied at all Stages of Litigation Calendar

- Pretrial discovery
- Pretrial *Daubert* hearing
- *Daubert* at Trial
- Post-Trial Motions

Federal Judicial Center Study Survey Method & Design

- Released on October 18, 2000
- Conducted from November 1998 - May 1999
- Surveys sent to all active U.S. district court judges (approx. 600) and 458 attorneys
- Similar study conducted in 1991 -- pre-*Daubert*
- Final report expected in June 2001

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Federal Judicial Center Study

Preliminary findings include:

- Experts testified most frequently in tort cases
- Medical and mental health experts were the most common broad category of testifying experts, although economists were the single most frequent specific type of expert.

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Judges' Responses about Admissibility of Expert Testimony

- Judges are more likely to scrutinize expert testimony before trial in 1998 than in 1991
- 2 most common problems cited by judges were:
 - experts who were not objective
 - excessive expense of expert testimony

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Judges' Responses about Admissibility of Expert Testimony

- In 1998, 59% of judges said they had allowed all of the proffered testimony without limitation
- Contrasts with 75% of judges in 1991
- Most frequent reasons for exclusion:
 - not relevant
 - not qualified

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Attorney Survey

- * Attorneys report a change in their practice
 - filing motions in limine challenging the admissibility of expert testimony more frequently after *Daubert* than before
 - perceive judges as more likely to hold pretrial hearing on admissibility of expert testimony
 - perceive judges as less likely to admit expert testimony

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Defense Counsel's Strategies

- Consider *Daubert* at every stage of a judicial proceeding
- Press the *Daubert* challenge both pretrial and during the course of the trial
- Consider post jury verdict motions for judgment as a matter of law under Rule 50(a)(2) of the Federal Rules of Civil Procedure

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The Alarming Rise in the Use of Civil Conspiracy Theories in Mass Tort Litigation

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CIVIL CONSPIRACY – Definition

- An agreement together with an overt act to do an unlawful act or a lawful act in an unlawful manner
- Liability spreading device used in mass tort cases to eliminate proof of product identification or the use of or exposure to a defendant's product
- Used in antitrust, civil rights, securities and other types of litigation
- Used in mass tort cases, e.g., asbestos, breast implants, tobacco, automotive tires, etc.

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QUESTIONS FACING DEFENDANTS

- 1 What has led to this recent expansion?
- 2 What can be done to stem its advance?
- 3 What can be done to defend against such claims?

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ELEMENTS OF A CIVIL CONSPIRACY

- 1 Agreement between 2 or more persons to commit an unlawful act or a tortious act (or a lawful act in an unlawful manner);
- 2 An overt tortious act committed in furtherance of the agreement; **and**
- 3 An injury caused by the unlawful or tortious act performed by one of the conspirators. (See 16 Am Jur. 2d Conspiracy § 50 (1998)).

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ADVANTAGES OF CIVIL CONSPIRACY TO PLAINTIFFS

- Attractive to jurors;
- Existence of Trade Associations;
- Evidentiary advantage - declaration admissible against co-conspirator regardless of whether the declarant is a party. (FRE 803(2)(E));
- Potential to extract damages from a defendant based on activity that predates the defendant's involvement;
- Liability for actions of codefendants which are defunct/bankrupt.

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PRACTICAL TIPS ON DEFENSE OF CIVIL CONSPIRACY CLAIMS

- Use discovery to smoke out the specific acts claimed to establish the conspiracy;
- Put plaintiffs to proof of all elements of conspiracy and underlying tort;
- Aggressive use of motions in limine and motions for summary judgment - emphasize plaintiffs' heightened standard of proof.

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**STRATEGIES FOR
DEFEATING CONSPIRACY CLAIMS**

- Hold plaintiffs to their burden - every element;
- Distinguish defendant from “the industry”;
- Civil conspiracy requires an underlying tort - where’s the causation?;
- Emphasize the issues of proof and procedural barriers to civil conspiracy, e.g., knowing participation and “clear and convincing” standard.

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Medical Monitoring Claims in
Mass Tort Litigation

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Claim for Medical Monitoring

- A medical monitoring claim seeks to recover the anticipated costs of long-term diagnostic testing necessary to detect latent diseases that could develop as a result of tortious exposure to toxic substances in the environment.
- Medical monitoring has long been part of recoverable damages when there is present physical injury.
- Today medical monitoring claims are proliferating in situations where there is no present physical injury and the plaintiff is completely asymptomatic.

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Elements of Medical Monitoring Claim

- Exposure to a proven hazardous or toxic substance
- Proximately caused by defendant's negligence
- Resulting in a greater risk of contracting a serious latent disease or illness as compared to the general population
- Existence of effective monitoring procedures and reasonable scientific necessity for monitoring
- Proof that the monitoring is different from regularly expected care
- Demonstrated clinical value of early detection and diagnosis of disease

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Medical Monitoring in Absence of Physical Injury or Illness

- New focus of plaintiffs in mass tort litigation.
- Overturns traditional and 200 year old common law tort requirement that plaintiff cannot recover damages in the absence of physical injury.
- Potential for almost unlimited exposure as noted by United States Supreme Court in Metro-North Commuter R.R. v. Buckley, 117 S. Ct. 2113 (1999).
- For example, billions of pounds of hazardous chemicals are emitted into the air each year and nearly 20% of the U.S. population (approx. 40 million people) live within four miles of a hazardous waste site that EPA has placed on the National Priority List.

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Significant Recent State Developments

- Foust v. Southeastern Pennsylvania Transp. Authority, 756 A.2d 112 (Pa. 2000).
- Bower v. Westinghouse Electric Corporation, 522 S.E.2d 424 (W. Va. 1999).
- Lockheed Martin Corp. v. Superior Court, 79 Cal. App. 4th 1019 (Cal. Ct. App. 2000).
- Louisiana's legislative response to Bourgeois v. A.P. Green Indus., Inc., 716 So. 2d 355 (La. 1998).

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Significant Recent State Developments (Cont.)

- “Fen-Phen” diet drug litigation.
- Predictably, in the wake of these decisions, medical monitoring cases are proliferating.
- In Nevada, 45,000 casino dealers seek medical monitoring for secondhand smoke exposure.
- In the Southern District of New York in May, a nationwide class action for medical monitoring was filed against Pfizer, Inc.

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Strategies for Defeating Medical Monitoring Claims

- Convince the court, at least colorably, of the inappropriateness and unfairness of granting medical monitoring awards absent “present injury.”
- Challenge class certification and reiterate that individual claims and issues predominate.

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Strategies for Defeating Medical Monitoring Claims (Cont'd)

- Require plaintiff to meet its burden of proof on each and every element of his case:
 - Significance and toxicity of exposure;
 - Plaintiff must establish, through scientific proof, a significantly increased risk of contracting an illness compared to the general population;
 - The plaintiff must prove that the defendant is at fault for exposing the plaintiff to the hazardous substance.
 - The plaintiff must show the need for diagnostic testing.