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Panel Dumps Last of Lockheed Toxic-Tort Case

By Dan Evans

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A state appellate panel tossed one of the final claims remaining from a two-decade-old toxic-tort case that once resulted in an \$800 million verdict against oil and chemical companies who supplied chemicals and solvents to the Lockheed Skunk Works in Burbank.

The published unanimous ruling by the 2nd District Court of Appeal on Monday affirmed the trial judge's right to exclude expert testimony he believed was implausible. *Lockheed Litigation Cases*, 2005 DJDAR 1293 (Cal. App. 2nd Dist. Jan. 31, 2005).

Horvitz & Levy attorney MC Sungaila, who represented defendant ExxonMobil Corp., said the ruling clarifies what kind of expert testimony is allowable under Evidence Code 801(b).

"The clouds have parted, and now we can better see what the standards are," she said. Scott Hengesbach, a partner at Murchison & Cumming, specializes in toxic-tort litigation. Hengesbach said that, because the courts recently narrowed defense attorney's abilities to exclude experts through *Kelly* hearings, Evidence Code 801(b) is going to grow in importance. *Kelly* hearings are now used only for "new or novel" scientific techniques or analysis, whereas before they had a much broader application, Hengesbach said.

"This decision is really going to spotlight the use of 801(b), especially for defense counsel who have not used it

much in the past," he said.

Nearly 700 Lockheed workers filed suit against the company, which became Lockheed Martin in 1995, in the mid-1980s, claiming they were injured by exposure to toxins at the Burbank plant. The facility, which included the secret "Skunk Works" area where the F117 Stealth fighter was built, closed in 1990. More than 25 chemical and oil companies also were named as plaintiffs.

The workers said they suffered brain damage and kidney problems, among other ailments, from exposure to the various solvents and chemical used in the building of aircraft at the facility.

Lockheed settled out of the case in 1992 for \$33 million, and many of the chemical and oil companies later settled for an undisclosed sums. However, a few remained, including ExxonMobil and the Union Oil Co.

In August 1998, 29 plaintiffs won \$785 million in damages against the two oil giants and other defendants for exposure to health hazards at the Lockheed Skunk Works. That figure was cut in half a few months later.

The Los Angeles-based appellate court dismissed the remaining punitive damages in June 2000 sending the \$25 million award for actual damages from the oil and chemical companies back to the trial court.

On retrial, Los Angeles Superior Court Judge John A. Torribio refused to allow the plaintiffs' expert, Dr. Daniel Teitelbaum, to testify, finding he had "no reasonable basis that any one of the solvents here can cause

disease," according to court documents.

Torribio said Teitelbaum inferred from a study of chemical exposure rates in animals that the plaintiffs were injured on the job. Torribio said the study wasn't sufficient to meet the legal standard of showing that the substance more likely than not caused the plaintiffs' health problems.

"Based on these legal conclusions, the court determined that the epidemiological studies on which Dr. Teitelbaum relied did not support his opinion of causation," the opinion stated.

Justice Patti Kitching, writing for the court, dismissed the plaintiffs' contention that Torribio "usurped the jury's role as trier of fact."

Kitching also denied that the trial judge overstepped the bounds of his knowledge by determining the study was not credible.

In fact, she states, Evidence Code 801(b) states that the judge is required to make such a determination.

There are limits, however.

"A court conducting this analysis must not weigh the probative value of the opinion, substitute its own opinion for the expert's opinion, or presume to be an expert," Kitching wrote. "Rather, the analysis is limited to determining whether the matter relied on can provide a reasonable basis for the opinion."

That, she wrote, is exactly what Torribio did.

Thomas V. Girardi, who represents the plaintiffs, did not return calls seeking comment.