Shook, Hardy & Bacon L.L.P.

Product Liability Litigation Report

A PUBLICATION OF SHOOK, HARDY & BACON L.L.P. DECEMBER 14, 2006

APPEALS COURT CANNOT HEAR DENIAL OF MOTION TO REMAND WHEN DIVERSITY CLASS ACTION HAS BEEN REMOVED TO FEDERAL COURT

The Eighth Circuit Court of Appeals has determined that federal appellate authority to consider whether a district court has erred in denying a motion to remand in a putative class action removed to federal court on the basis of traditional diversity jurisdiction was not expanded by the Class Action Fairness Act of 2005 (CAFA). ***Saab v. Home Depot U.S.A., Inc.*, No. 06-8014 (8th Cir. decided Nov. 22, 2006)**. According to the court, the more liberal review provisions of 28 U.S.C. § 1453(c) apply only to those class actions brought under CAFA, 28 U.S.C. § 1332(d). Because the defendant removed the case to federal court under section 1332(a) (traditional diversity jurisdiction), the court dismissed the plaintiff's petition for permission to appeal, finding that the lower court's order was interlocutory and not generally subject to review.

< Back to Top

COURT ISSUES RULING IN DISPUTE OVER MASS TORT ATTORNEY'S FEES

The Eleventh Circuit Court of Appeals has determined that federal courts lack subject matter jurisdiction to adjudicate a dispute between law firms over fees from a mass tort litigation settlement. ***Burr & Forman v. Blair*, Nos. 04-15585 & 05-14955 (11th Cir. decided Nov. 27, 2006)**. The issue arose in the context of a fee contract between two law firms representing plaintiffs involved in litigation against the Monsanto Co. to recover for personal injuries and property damage allegedly caused by the company's release of contaminants into Alabama waterways. The district court dismissed the fee dispute for a lack of subject matter jurisdiction but later entered an order preliminarily enjoining the defendants from litigating the matter in state court, apparently believing that its continuing supervisory jurisdiction over the settlement gave it supplemental jurisdiction over the fee dispute. The appeals court found that the injunction was not permissible under the Anti-Injunction Act because it was not necessary in aid of the court's jurisdiction or to protect or effectuate the court's judgment. While the

Contents

fees were to be paid from the settlement, the contract dispute did not challenge the settlement or seek a lien on the money held in the settlement fund. Accordingly, the court reversed the order granting the injunction and a merits order denying the breach of contract claim.

< Back to Top

FEDERAL COURTS ADDRESS FOOD LITIGATION

U.S. district courts in Illinois and Virginia have recently considered class claims for consumer fraud filed against food companies, and for the most part, rejected the claims as either preempted by federal law or not colorable under state law. The Illinois decision, *Reyes v. McDonald's Corp.,* Nos. 06-C-1604 & 06-C-2813 (U.S. Dist. Ct., N.D. Ill., decided Nov. 8, 2006), was filed immediately after McDonald's issued a public statement correcting the fat and calorie content of its french fries. The case involved deceptive advertising claims raised under Illlinois and New York law; the New York consumer fraud claims were dismissed at the outset for plaintiff's failure to plead actual injury under state law. Express and implied warranty claims were dismissed for plaintiffs' failure to satisfy the notice requirements of the Uniform Commercial Code. The court analyzed the remaining claim for consumer fraud under Illinois law to determine whether it was preempted by the Nutrition Labeling in Education Act (NLEA). Noting that the NLEA exempts restaurants from its requirements, the court found that because McDonald's had chosen to make nutrition claims, it subjected itself to the Act's requirements. The court applied the preemption test set forth in *Bates v. Dow Agrosciences LLC,* 544 U.S. 431 (2005), and determined that plaintiffs could proceed on any state law claims only to the extent that they are identical to NLEA requirements.

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The Virginia suit, *Physicians Committee for Responsible Medicine v. General Mills, Inc.,* No. 1:05cv958 (U.S. Dist. Ct., E.D. Va., decided Nov. 30, 2006), involved consumer fraud claims brought against dairy producers and marketing groups that promoted the consumption of dairy products as a healthy way to lose weight. Originally filed in state court, the case was removed to federal court under the Class Action Fairness Act of 2005. The court dismissed claims for injunctive relief brought under state law, because the statutes at issue do not make such relief available to private individuals. The court further found persuasive the defendants' primary jurisdiction argument, i.e., that the matter was already pending before federal agencies (the Food and Drug Administration and the Federal Trade Commission) and, as such, the court should dismiss the actions to avoid inconsistent judgments and defer to the agencies' expertise. Without the claims for injunctive relief, the court was constrained to dismiss the remainder of the claims because they did not meet the jurisdictional requirements for diversity jurisdiction.

< Back to Top

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COMMENTATOR CONTENDS PLAINTIFFS' BAR IS ON THE WANE

In an *American Lawyer* cover article, senior writer Alison Frankel opines that mass torts are waning because tort reformers have been so successful at packing courts "with judges amenable to their agenda" and getting state legislatures to adopt tort reform packages which those judges are reluctant to overturn. The article cites Shook, Hardy & Bacon partner **Mark Behrens** who wrote in 2005 that tort reforms in Mississippi provide "a shining example of how a state can join the legal mainstream and foster economic growth through legal reform." Frankel reports that some mass tort strategists are convinced that tort reforms can always be undone, but the vilification of trial lawyers has apparently made it difficult for them to get a receptive public audience. *See The American Lawyer,* December 1, 2006.

< Back to Top

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AKRON REVIEWS WITHDRAWN LAWSUIT AGAINST LEAD-PAINT MANUFACTURERS

Akron, Ohio, has reportedly withdrawn a suit seeking lead-paint removal, unspecified damages and money for preventive screenings from eight manufacturers of lead-based paint. Among those named in the suit, Sherwin-Williams reacted by dropping Akron from a federal counter-suit, which states that the company "believes that these well-intentioned cities and public officials have been misled by lawyers who are acting in concert pursuant to a common strategy to stir up litigation for their own gain across the state in blatant disregard of Sherwin-Williams' constitutional rights." Banned in 1978 after it was linked to developmental problems in children, lead-based paint has given rise to similar lawsuits in California, Missouri, New Jersey, New York, Texas, and Wisconsin, as well as three additional cities in Ohio. In 2006, a Rhode Island jury apparently advised that Sherwin-Williams undertake a $3.5 billion cleanup with two other companies. Akron has reserved the right to reopen the suit pending further review. *See Beacon Journal,* November 17, 2006.

< Back to Top

9/11 RESPIRATORY INJURY CLAIMS EXPECTED TO OVERWHELM SOUTHERN DISTRICT OF NEW YORK

Expecting a 60 percent case increase as a result of the September 11, 2001, terrorist attack, a federal district court in New York is apparently meeting the challenge with organizational aplomb. *The Third Branch* reports that technological innovations have streamlined docket filing procedures for the court, so that the clerk's office can automatically classify cases with common defendants and open them in the Case Management/Electronic Case Files system. Presiding District Judge Alvin Hellerstein also posts information relevant to September 11 litigation online, where he announces status conferences on consolidated cases. In the interest of "keeping on track and moving the cases along," he has appointed a mediator to handle the wrongful death airline lawsuits already in discovery.

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Hellerstein will also recommend a "special master" to oversee the respiratory injury cases, which are expected to reach some 7,500 in number. "The number and complexity of these cases, and the public interest in their speedy resolution, requires a greater urgency in progression, and a closer supervision of proceedings, than heretofore has been possible," said Hellerstein, who sees the special master as developing "a matrix of key facts" with both parties that will ultimately result in groups of settlements. *See The Third Branch,* November 2006.

< Back to Top

CONSULTANT CLAIMS REGULATIONS AND LITIGATION THREATEN DRUG COMPANIES

"Pharmaceuticals are not tobacco. There is no reason to rejoice in putting pharma on the ropes if its business reversals hurt the very consumers they are trying to serve," writes Richard Epstein, a University of Chicago law professor and Pfizer consultant, in a *Boston Globe* commentary. Contending that pharmaceutical advances are mainly profit-driven, Epstein argues against the "ill-designed regulation" likely to be favored by Congress in 2007, as resulting in "slower innovation and more limited drug use." According to Epstein, drug company profits are already caught in a "two-way vise" of increased FDA over-sight, which is often flawed, and dwindling patent exclusivity. Of particular concern are the many promising drugs kept off the market for fear of unforeseen adverse events. Rarely calculated in terms of "real costs," these missed opportunities should affect new regulations in addition to "visible injuries," claims Epstein.

Also at fault is the current litigious climate, in which pharmaceuticals face consumer fraud class actions brought by plaintiffs who suffered no injury. "The resulting loss in revenue leaves drug companies with even fewer resources to cover the thousands of suits for compensatory and punitive damages for drug-related injuries," Epstein concludes, suggesting that a healthy bottom line concerns patients as much as shareholders. *See The Boston Globe,* December 3, 2006.

< Back to Top

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LAW PROFESSOR CALLS FOR LEGISLATION TO PUNISH DOCTORS WHO MANUFACTURE EVIDENCE FOR MONEY

In a *Wall Street Journal* commentary, Cardozo School of Law Professor Lester Brickman discusses the silicosis litigation in which a U.S. district judge in 2005 allowed the defendants to question the doctors who diagnosed the alleged injuries and exposed widespread, fraudulent medical diagnoses. He claims that "[s]ubstantially the same fraudulent practices have been used in other mass tort litigations." To counter the problem, Brickman suggests that "judges approach mass tort litigation with a healthy skepticism when mass claims have been generated by the type of litigation screenings used in asbestos, silica, fen-phen, and breast implant litigations," and that state and federal lawmakers adopt legislation "to empower prosecutors to pierce doctors' and scientific experts' effective immunity from criminal prosecution."

< Back to Top

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LEGAL LITERATURE REVIEW

Symeon C. Symeonides, "The Quest for the Optimum in Resolving Product-Liability Conflicts," to be published in *Essays in Honor of J.P. Kozyris* (Anastasia Gammatikaki-Alexiou (ed.)), Sakkoulas/Kluwer Press., Thessaloniki, Greece (2006)

Willamette University College of Law Professor Symeon Symeonides has surveyed products liability cases decided by American courts between 1990 and 2004 to examine how the courts apply choice-of-law principles. He found that, regardless of methodology, courts most often base their selection of governing law on factors such as the number and relevance of factual contacts with a jurisdiction. He proposes a choice-of-law rule that all courts could follow and shows how it would save time and cost for litigants. The rule would give the injured party the choice of law for assessing liability if two of four contacts with a given jurisdiction exist, unless the defendant could show that "neither the products that caused the injury nor the defendant's products of the same type were available in the chosen state through ordinary commercial channels."

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Mark Geistfeld, "The Doctrinal Unity of Alternative Liability and Market-Share Liability," 155 *U. Pa. L. Rev.* (2006)

According to New York University Law School Professor Mark Geistfeld, while market-share liability theories were rejected by most courts faced with considering which of a group of defendants could be held liable for a plaintiff's injury, alternative liability, which neither re-defines tort nor causation principles, can provide a basis for holding defendants liable when a plaintiff has proven that someone in the group caused a compensable injury. He contends that the future of market-share liability "may critically depend upon whether it can be 'fit into old categories.' The courts apparently believe that alternative liability has such a justification, and so it provides the most promising doctrinal basis for market-share liability."

Rhonda Wasserman, "Tolling: The American Pipe Tolling Rule ad Successive Class Actions," 58 *Fla. L. Rev.* 803 (2006)

This article addresses statute-of-limitations issues in the context of successive class actions. University of Pittsburgh School of Law Professor Rhonda Wasserman analyzes the policies underlying statutes of limitations, Rule 23 and the preclusion doctrine to call into question federal appeals court rulings that justify denying tolling by applying a different tolling rule to successive class actions than they do to individual claims filed by absent class members. "Given the volume of class action litigation," Wasserman writes, "the lack of control that absent class members have over the timing of the certification decision, and the devastating effect the statute of limitations may have on their claims, it behooves us to understand why the courts have resolved the tolling for successive class actions differently and whether such differential treatment is justified." She argues that the courts should deny tolling only where the problem lies with the class itself and the successive class action fails to address that problem.

< Back to Top

LAW BLOG ROUNDUP

If the Shoe Fits …

"Sometimes an issue doesn't hit home until one's home is hit." Laurie Gindin Beacham & Joanne Doroshow, Center for Justice & Democracy, commenting on Senator Trent Lott's (R-Miss.) apparent "litigation" conversion after his beachfront home was destroyed by Hurricane Katrina and he joined a host of others who have sued their insurance companies. Lott was once quoted as saying, "I'm among the many Mississippi citizens who believe tort reform is needed," and "The Democrats seem to think that the answer is a lawsuit. Sue everybody." "It's sue, sue, sue … That's not the answer."

tortdeform.com, December 4, 2006.

"Sometimes an issue doesn't hit home until one's home is hit."

The *E-Coli* Race to the Courthouse

"[W]e're surprised that Bill Marler, of Seattle's Marler & Clark didn't win the race to the courthouse. This is a man who has devoted much of his life to the sometimes-fatal bacteria. After all, the license plate on his wife's Volkswagen reads 'ECOLI.'" The *Wall Street Journal's* Peter Lattman, blogging about how quickly plaintiffs found their way into court after allegedly getting sick from eating at a Long Island Taco Bell and noting the absence of Marler from the proceedings.

wsj.com, December 8, 2006.

"This is a man who has devoted much of his life to the sometimes-fatal bacteria. After all, the license plate on his wife's Volkswagen reads 'ECOLI.'"

SCOTUS Passes on Chance to Remake General Jurisdiction Doctrine

"The Court's denial seems like good news for consumer plaintiffs." Director Brian Wolfman of the Public Citizen Litigation Group, reporting the U.S. Supreme Court's decision to reject R.J. Reynolds' request to review general jurisdiction and adopt a new due process view under which a defendant's "sales-related" contacts with a forum state, regardless of their extensive nature, could never support general jurisdiction.

pubcit.typepad.com/clpblog, December 4, 2006.

< Back to Top

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THE FINAL WORD

No Rest for the Weary

Shook, Hardy & Bacon lawyer **Kevin Underhill** will be spending at least part of his end-of-the year holiday guest-blogging for Walter Olson at overlawyered.com. Since 1999, the Web site has been tracking the lawsuits that give rise to our reputation as a litigious society. Underhill has his own blog, loweringthebar.net, which chronicles some of the more unusual disputes finding their way into American courtrooms and the laws and regulations that leave us shaking our heads in disbelief. Look for Underhill's entries from December 26 to January 1 at **www.overlawyered.com**, and if you are not too drowsy from puddings and spirits and sports and other signs of the season, consider leaving a comment.

< Back to Top

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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