Shook, Hardy & Bacon L.L.P.

Product Liability Litigation Report

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OREGON SUPREME COURT REJECTS MEDICAL MONITORING CLAIMS ABSENT PHYSICAL INJURY

The Oregon Supreme Court has upheld the dismissal of a putative class action against cigarette manufacturers alleging that the named plaintiff suffered a "significantly increased risk of developing lung cancer" and thus, that it was "reasonable and necessary" for her to undergo "[p]eriodic medical screening." ***Lowe v. Philip Morris USA Inc.*, No. 054378 (Ore., decided May 1, 2008)**. The court based its refusal to recognize a medical monitoring cause of action in the absence of physical injury on its holdings in prior cases, stating, "Our precedents establish that the threat of future harm that plaintiff has alleged is not sufficient to give rise to a negligence claim." The court further rejected her attempt to link liability to the costs of medical monitoring, again because "[o]ne ordinarily is not liable for negligently causing a stranger's purely economic loss without injuring his person or property."

A concurring justice sought to establish that "the majority does not reject medical monitoring as a remedy in a negligence action" and that plaintiffs alleging some physical impact without the present, immediate appearance of symptoms or disease may well be able to recover the costs of medical monitoring in the future. This justice concluded, "When science and medicine are able to identify harm before it becomes manifest, and to do so with sufficient certainty, our precedents do not foreclose an action in negligence or the remedy of medical monitoring."

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GEORGIA TRIAL COURT FINDS NON-ECONOMIC DAMAGES CAP UNCONSTITUTIONAL

In the context of a medical malpractice action, a Georgia trial court has declared unconstitutional a statute that caps non-economic damages in such cases to $350,000 as to individual medical providers and a total of $700,000 as to multiple defendants. *Park v. Wellstar Health Sys., Inc.*, No. 2007CV135208 (Fulton County, Ga., decided April 20, 2008). The plaintiff was rendered quadriplegic following treatment for injuries sustained in a fall from a ladder.

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Defendants pleaded the state's statutory cap on non-economic damages in their answer to his complaint, giving rise to plaintiff's motion for declaratory judgment. Ruling that plaintiff had standing to challenge the statutory cap and that his challenge was ripe because the caps "have an immediate and present impact on these proceedings," the court found that limiting economic damages as to "one specific group of professional defendants" violated his equal protection rights.

First, the court observed, "Persons suffering the exact same personal injuries at the hands of other tortfeasors – including other professionals – are not subject to such caps." Further, explaining how "the legislative classifications made here lack the 'substantial relationship' to the 'objectives of the legislation,'" defined as allowing the medical profession to function effectively, the court stated, "the statute effectively puts substantial limitations on the rights of the poor and middle class to recovery while leaving the right to virtually unlimited recoveries unimpeded for the wealthy." According to the court, those with incomes in the tens of millions of dollars could recover "in excess of $100 million of lost earnings if they were injured by the kind of wrongful acts that [plaintiff] alleges to be the cause of his injuries," while those with little earnings, "the poor, the unemployed, the elderly, the homemaker who does not work outside the home," would bear the brunt of the limitation on non-economic damages. Thus, concluded the court, "the loss of a remedy and the burden of reform must fall less discriminatorily between the rich and the poor."

The court certified its order as appealable to allow immediate review if defendants decided to take an appeal.

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HEARING BOARD AFFIRMS PENALTY AGAINST X-RAY OPERATOR LOOKING FOR ASBESTOS PLAINTIFFS

A Pennsylvania hearing board has upheld an $80,500 civil penalty assessed by the Pennsylvania Department of Environmental Protection (DEP) against the operator of a mobile X-ray unit that was used to screen union employees for asbestosis under a contract with a plaintiffs' law firm from Texas. *Most Health Servs., Inc. v. Pa. Dept. of Envtl. Protection*, No. 2007-069 (Pa. Envtl. Hearing Bd., decided May 6, 2008). The screenings were conducted over three days in Pennsylvania motels and involved 161 individuals. No prescriptions had been written for the X-rays, and the operator failed to obtain DEP's approval to expose those screened to radiation. The penalty reflected a "Level II' violation of the Radiation Protection Act, i.e., "one that creates a potential for injury," and was reduced for a lack of culpability and actual damage.

A concurring hearing board member wrote separately to note that a higher penalty would have been justified, contending that (i) "for a company that is in the business of giving X-rays to assert that it is not familiar with the law regarding the giving of X-rays is unbelievable and unacceptable"; and (ii) "X-rays are to be given for healing purposes, not to search out potential plaintiffs for tort litigation." A dissenting hearing board member would have reduced the assessed penalty, finding no evidence that "a physician would not have given the required prescriptions" and that the operator had performed similar X-ray

programs at DEP's request without a physician's prescription, which "may have lulled appellant into believing that a screening of others might be done without a prescription."

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ILLINOIS JUDGE PRELIMINARILY APPROVES SETTLEMENT OVER RECALLED LEAD-TAINTED TOYS

A Cook County, Illinois, court has reportedly given preliminary approval to a $30 million settlement over claims related to the recall of imported toys contaminated with lead. If finally approved during an August 6, 2008, hearing, the settlement would apparently resolve some 20 state and federal lawsuits involving hundreds of thousands of potential class claimants. The toys at issue, Thomas & Friends Wooden Railway® products, were found to contain lead in the surface paint which was applied in Chinese factories. RC2 Corp. recalled more than 1.5 million toys; under the settlement, it will reimburse consumers or offer replacement toys plus a bonus toy. Some consumers will also qualify for blood tests, according to a news source. The company will also agree to adopt measures to ensure its toys are safe, including a multi-check safety system. A plaintiffs' lawyer was quoted as saying that the settlement "could serve as a model" given the number of lawsuits generated by numerous recent recalls of products made in China. *See Product Liability Law 360*, May 8, 2008.

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TRIAL BEGINS IN AUTISM TEST CASES; THIMEROSAL VACCINES ALLEGED TO BE CAUSE

According to news sources, test cases involving two 10-year-old boys from Portland, Oregon, have gone to trial before a special federal court master, who will decide whether thimerosal, the mercury-based preservative in vaccines, caused their autism. Nearly 5,000 families have apparently filed similar claims with the U.S. Court of Claims under a program created in 1987 that allows compensation for vaccine-related injury. Lawyers for the families have apparently presented three different theories as to how the vaccines cause autism. The cases that got underway on May 12, 2008, involve the second theory, that is, that thimerosal-containing vaccines alone cause autism by depositing a form of mercury in the brain that, in some children, triggers a chronic neuroinflammatory pattern which can lead to regressive autism. In 2004, an Institute of Medicine committee concluded that evidence does not support a link between thimerosal and autism. *See Associated Press* and www.pharmalot.com, May 12, 2008.

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FEDERAL COURT DENIES REQUEST TO DELAY HEARING CRIMINAL CHARGES AGAINST FEN-PHEN LAWYERS

A federal court in Kentucky has reportedly refused to delay the trial of three plaintiffs' lawyers who have been charged with wire fraud conspiracy for actions they allegedly took that netted them millions of dollars from a class

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action settlement involving the diet pill fen-phen. Apparently, the plaintiffs received only $45.5 million from a $200 million settlement, with the remainder going to their lawyers and consultants. In civil court proceedings that concluded in August 2007, the lawyers were ordered to pay back $42 million and an additional $20.1 million in interest after the court found that they breached their duty to their clients and took an unfair share of the settlement. The lawyers, Shirley Cunningham, William Gallion and Melbourne Mills, have apparently been jailed pending their trial, which was scheduled to begin May 12, 2008. If found guilty, they could face up to 20 years in prison. *See Product Liability Law 360*, May 2, 2008.

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ASBESTOS-LITIGATION INDUSTRY REPORT CALLS FOR PREVENTION OF FURTHER ABUSES

The Manhattan Institute Center for Legal Policy's third **report** on the asbestos-litigation industry highlights changes in this long-running mass tort since the first *Trial Lawyers, Inc.* report was released in 2003. According to the report, plaintiffs' lawyers are moving their asbestos cases into forums without tort reform legislation while continuing to conduct mass screenings and solicitations of potential plaintiffs and searching for non-bankrupt defendants with tenuous ties to the asbestos products that purportedly caused injury. Thus, "much of modern asbestos litigation has involved the filing of lawsuits by individuals who aren't sick against companies that never made the product alleged to have caused their sickness." The report claims that asbestos litigation has cost industry $70 billion and bankrupted 80 companies, with $40 billion of the cost going to lawyers.

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The center recommends that judges ensure that claims are legitimate and scrutinize settlements to ensure they are fair. The report also calls for prosecutors to punish and deter wrongful conduct, as well as for state legislatures to adopt reforms such as (i) imposing real medical standards of evidence, (ii) barring lawyers from forum shopping, (iii) revising joint-and-several liability laws to protect less culpable defendants, and (iv) "adopting transparency rules to ensure that asbestos claimants are not double-dipping into the bankruptcy trusts and multiple jurisdictions." The report closes with a list of resources that includes Shook, Hardy & Bacon Public Policy Partners **Victor Schwartz**, general counsel of the American Tort Reform Association, and **Mark Behrens**, cited for his asbestos expertise.

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ALL THINGS LEGISLATIVE AND REGULATORY

House Committee Schedules Hearing on FDA Drug and Medical Device Preemption

The House Committee on Oversight and Government Reform, chaired by Representative Henry Waxman (D-Calif.) has scheduled a May 14, 2008, hearing to consider whether Food and Drug Administration (FDA) drug and

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medical device regulations should bar state liability claims. While details about the hearing were not readily available when this Report was prepared, witnesses who were expected to appear included actor Dennis Quaid and his wife, whose newborn twins received a heparin overdose; David Kessler, former FDA commissioner and now professor of pediatrics, epidemiology and biostatistics, University of California School of Medicine; Georgetown University Law Center Professor David Vladeck; and Gregory Curfman, editor of the *New England Journal of Medicine*. *See Torts Prof Blog*, May 12, 2008.

California Considers Changes to VOC Emissions from Consumer Products

The California Air Resources Board has **announced** that it will conduct a public hearing June 26, 2008, to consider proposed changes to its regulation of the volatile organic compound (VOC) emissions from consumer products. Written submissions not submitted at the hearing must be received no later than noon on June 25.

Previously unregulated products with new proposed VOC limits include astringent/toner, fabric softener, motor vehicle wash, tire or wheel cleaner, and windshield water repellent. Products with proposed lower VOC limits include carpet/upholstery cleaner, floor polish or wax, glass cleaner, personal fragrance products, sealants, and spot removers. The proposal, if approved, will also address greenhouse gas emissions, and thus, the "Regulation to Reduce Volatile Organic Compounds from Consumer Products" would be renamed "Regulation to Reduce Emissions from Consumer Products." The new or modified VOC limits would not become effective until some time between December 31, 2010, and December 31, 2015.

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THINKING GLOBALLY

Rhode Island Court Adopts *Forum Non Conveniens*, Dismisses Asbestos Claims Filed by Canadian Residents

The Rhode Island Supreme Court has joined the overwhelming majority of other states that have adopted the *forum non conveniens* doctrine and dismissed the asbestos-related claims of 39 Canadians who filed in Rhode Island to take advantage of more favorable discovery and damages rules. *Kedy v. A.W. Chesterton Co.*, No. 2005-332 (R.I., decided May 9, 2008). As a threshold matter, the court determined that the state's courts, as a matter of common law, have the inherent authority to dismiss cases on *forum non conveniens* grounds. The court then outlined the two-prong test that would be applied under the doctrine, i.e., (i) whether there is an adequate alternative forum available to resolve the dispute, and (ii) whether the private and public interest factors compel resolution in another forum. While the court conditioned its dismissal on defendants' waiver of any statute of limitations defenses, it was persuaded that they could be sued in Canada where the courts could adequately resolve the dispute.

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The court further found that none of the parties were state residents or domiciliaries, much of the evidence was located in Canada or other states, the injuries and treatment occurred in Canada, none of the alleged tortious acts occurred in Rhode Island, and all the witnesses and parties would have to travel to the state from elsewhere for trial or other proceedings. Thus, the court ruled that the private interest factors weighed in favor of dismissing the claims. As for the public interest factors, the court determined that it made no sense for a Rhode Island jury "to sit through a complicated trial that literally has no connection to Rhode Island besides a generalized interest that is constant throughout the entire United States and beyond, *viz*., the interest in preventing asbestos-related diseases."

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In a footnote, the court acknowledged the "helpful" *amicus curiae* briefs filed in the case and thanked those who submitted them. Shook, Hardy & Bacon Public Policy lawyers **Victor Schwartz**, **Mark Behrens** and **Cary Silverman** filed an *amicus* brief in support of an asbestos defendant on behalf of the Chamber of Commerce of the United States of America, American Tort Reform Association, Pharmaceutical Research and Manufacturers of America, Coalition for Litigation of Justice, National Association of Manufacturers, and American Insurance Association.

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LEGAL LITERATURE REVIEW

Sheila Scheuerman, "Two Worlds Collide: How the Supreme Court's Recent Punitive Damages Decisions Affect Class Action," *Baylor Law Review* (forthcoming 2008)

Charleston School of Law Associate Professor Sheila Scheuerman explores recent punitive damages decisions in which the U.S. Supreme Court has made it clear that the Constitution's Due Process Clause forbids the states from using such awards to punish defendants for injury inflicted on non-parties "or those whom they directly represent, i.e., injury that [they inflict on] those who are, essentially, strangers to the litigation." *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1063 (2007). Scheuerman argues that such due process limitations mean that "where injuries are not uniform among class members, punitive damages cannot be calculated in the aggregate, but rather must be assessed on an individual basis in relation to each class member's compensatory claims." After considering how trial plans in class actions that allow for the trial of punitive damages entitlement issues before individual liability and compensatory matters are decided can result in both over- and under-deterrence as to liable defendants, she concludes that punitive damages cannot be pursued as a classwide remedy, stating "The jury must know the total harm caused by the defendant's conduct before it can assess a class-wide punitive damages remedy."

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Elizabeth Thornburg, "Judicial Hellholes, Lawsuit Climates, and Bad Social Science: Lessons from West Virginia," *West Virginia Law Review* (2008)

This article takes on the "Judicial Hellholes"® reports issued by the American Tort Reform Association (ATRA) and the legal rankings conducted by the U.S. Chamber of Commerce's Institute for Legal Reform (ILR), in the context

of West Virginia's litigation environment. The author concludes that "[a]s public relations ventures, the ATRA and ILR campaigns have been an astounding success. As well-founded, honest commentaries on judicial systems, however, they are a major failure." According to law professor Elizabeth Thornburg, empirical research by neutral scholars consistently demonstrates that the claims of tort reformers are false or exaggerated. Thornburg uses West Virginia as a case study to recommend that more data need to be gathered before legislators respond to "misleading and manipulative media campaigns." She concludes, "Real state legislators deserve real information rather than name-calling and threats as they try to find reasonable and targeted solutions to the problems of making the injured whole, deterring meritless claims, and encouraging businesses to provide safe workplaces and safe products for the benefit of us all."

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LAW BLOG ROUNDUP

Horses, Bovine Excrement, Plaintiffs' Lawyers, and Fen-Phen

"And speaking of horse racing, the two lawyers who used allegedly misappropriated settlement funds to purchase last year's Preakness winner, Curlin, are set to head to trial today in federal court in Covington, Kentucky." Journalist and former litigator Dan Slater, discussing criminal charges against the lawyers who allegedly used money that should have gone to their Fen-Phen clients to buy expensive cars, courtside seats in a sports arena and Curlin, the 2007 Horse of the Year. Among their defenses is that the settlement agreement and their share of it were approved by a judge, who, writes Slater, "later resigned after being accused of misconduct in the case." According to Slater, one of the government's witnesses will characterize as "bovine excrement" the claim by one of the indicted lawyers that clients were "thrilled" to give away excess funds to a charity.

WSJ Law Blog, May 12, 2008.

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THE FINAL WORD

Texas Tort Reformers Vindicated by Business Activity Report

According to a Texans for Lawsuit Reform-commissioned **study**, tort reforms adopted in the state since 1995 "have resulted in nearly $113 billion in additional annual spending, almost 500,000 new jobs and $2.6 billion a year in increased state budget resources." Titled "A Texas Turnaround: The Impact of Lawsuit Reform on Business Activity in the Lone Star State," the study was conducted by The Perryman Group, a Waco-based firm that does economic and policy analysis for corporate and government clients. Some have apparently criticized the report's methodology, and *The Wall Street Journal* recognized the group's founder for his marketing and self-promotion genius in a May 1995 article, cited in the Thornburg article summarized elsewhere in this Report. *See The Monitor*, May 3, 2008.

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UPCOMING CONFERENCES AND SEMINARS

Lorman Education Services, Kansas City, Missouri – June 18, 2008 – "Electronic Discovery and Document Storage," Shook, Hardy & Bacon Pharmaceutical & Medical Device Litigation Partner **Madeleine McDonough** will discuss issues related to corporate e-discovery. Her sessions are titled "Practical Considerations in Defending Corporate E-Discovery Programs" and "Practical Considerations to Reduce the Risk that E-Discovery May Improperly Be Used as Leverage."

Brooklyn Law School, Brooklyn, New York – November 13-14, 2008 – "The Products Liability *Restatement*: Was It a Success?," Shook, Hardy & Bacon Public Policy Partner **Victor Schwartz** will present along with a number of other distinguished speakers including *Restatement* reporters James Henderson and Aaron Twerski. Seminar brochure not yet available.

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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 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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