Shook, Hardy & Bacon L.L.P.

MAY 7, 2009

PRODUCT LIABILITY LITIGATION REPORT

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ARKANSAS SUPREME COURT FINDS TORT REFORM PROVISIONS UNCONSTITUTIONAL IN DEFECTIVE MACHINERY SUIT

The Arkansas Supreme Court has determined that two provisions which the legislature enacted in 2003 as part of a tort reform initiative unconstitutionally invade the court's authority to establish rules of pleading, practice and procedure. ***Johnson v. Rockwell Automation, Inc.*, No. 08-1009 (Ark., decided April 30, 2009)**. The court issued its ruling in response to two questions certified to it by a federal district court in a case involving injuries sustained from the use of equipment, an Allen-Bradley "starter bucket," purportedly designed, manufactured and supplied in a defective condition by the defendants.

The first provision, a nonparty-fault provision, established procedures for assessing a percentage of fault to nonparties "who contributed to the alleged injury or death or damage … regardless of whether the person or entity was or could have been named as a party to the suit." The defendants answered the complaint by pleading the fault of another party under this provision, and the plaintiffs responded by arguing that it was unconstitutional because, among other matters, it invaded the Arkansas Supreme Court's constitutional grant of authority to establish procedural rules. The court agreed, finding that the legislature impermissibly "established its own procedure by which the fault of a nonparty shall be litigated" and thus, the provision "offends the principle of separation of powers and the powers specifically prescribed to this court by Amendment 80."

The second provision, the medical-costs provision, required that any evidence of damages for medical care, treatment and services "shall include only those costs actually paid by or on behalf of the plaintiff" and "for which the plaintiff or any third party shall be legally responsible." The defendants sought to limit the medical-costs evidence under this provision to those costs not covered by the injured plaintiff's employee medical plan.

The plaintiffs argued that this limitation on damages also offended the separation-of-powers doctrine, and the court agreed, stating, "the instant statute promulgates a rule of evidence. Here, the provision clearly limits the evidence that may be introduced relating to the value of medical expenses … thereby dictating what evidence is admissible." Because the constitution gives the court the exclusive authority to prescribe evidentiary rules, the court held that the medical-costs provision also violates the separation of powers and is unconstitutional.

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SHB offers expert, efficient and innovative representation to clients targeted by class action and complex litigation. We know that the successful resolution of products liability claims requires a comprehensive strategy developed in partnership with our clients.

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SIXTH CIRCUIT DISMISSES AUTO ACCIDENT CASE FILED IN WRONG DISTRICT COURT

The Sixth Circuit Court of Appeals has affirmed a lower court's dismissal of claims arising from an automobile accident, because the plaintiff filed suit in a district court that lacked personal jurisdiction over the defendants. ***Stanifer v. Brannan,* Mo. 07-6019 (6th Cir., decided April 27, 2009)**. The plaintiff, a Kentucky resident, filed his negligence claims for an accident that occurred in Alabama in a federal court in Kentucky. The defendants, who were Alabama residents, filed a motion to dismiss for lack of personal jurisdiction. Rather than respond to that motion, the plaintiff filed a motion to transfer the case to a federal court in Alabama. The Kentucky court held that it lacked personal jurisdiction to try the case, denied the motion to transfer and dismissed the claims.

According to the appeals court, the district court did not abuse its discretion in deciding to dismiss rather than transfer the case, even though the statute of limitations has apparently run on the claims, leaving the plaintiff without a remedy. While the court acknowledged statutory provisions and case law allowing the transfer of cases filed in the wrong jurisdiction "in the interest of justice," the court found no reason, such as mistake or uncertainties over proper venue, that would justify invoking a presumption in favor of transfer.

The court concluded that the district court "was within its discretion to hold that the plaintiff, having engaged in the misuse of the court's processes, should not be permitted by means of a transfer to 'resurrect a claim which might be lost due to a complete lack of diligence in determining the proper forum in the first place.'"

FEDERAL COURT PREDICTS PENNSYLVANIA WOULD ADOPT BYSTANDER LIABILITY IN DEFECTIVE RIDING MOWER CASE

The Third Circuit Court of Appeals has allowed a product liability lawsuit against the manufacturer of a riding mower to proceed, after concluding that Pennsylvania, where the accident occurred, would adopt the bystander liability set forth in the *Restatement (Third) of Torts*. ***Berrier v. Simplicity Mfg.,* Inc., No. 05-3621 (3d Cir., decided April 21, 2009)**.

The case involves a child who lost her left foot when her grandfather, operating a riding mower he had purchased, inadvertently backed the mower over her. The child's parents brought the lawsuit against the mower's manufacturer arguing that it was defective because it lacked back-over protections, such as a "no mow in reverse" device or roller barriers. The trial court granted the manufacturer's motion for summary judgment and dismissed the strict liability claims, ruling that Pennsylvania law "does not permit recovery for injuries to anyone other than the intended user."

So ruling, the trial court relied on a 2003 Pennsylvania Supreme Court opinion in a case involving a fire set by a child playing with a cigarette lighter that lacked a child-safety device. The Third Circuit found this reliance misplaced, because bystander liability was not at issue in the case, which turned instead on distinctions between intended and unintended users.

According to the Third Circuit, no Pennsylvania court has yet addressed bystander liability, so it examined how the Pennsylvania courts have applied various negligence and strict product liability principles over the preceding 30 to 40 years. The Third Circuit concluded that Pennsylvania would, like other states, adopt sections 1 and 2 of the Third Restatement which do not limit a strict liability cause of action to the "user or consumer," and broadly permit any person harmed by a defective product to recover in strict liability, thus allowing a bystander to recover for injuries caused by a defective product.

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APPEALS COURT EXAMINES HOME-STATE EXCEPTION TO FEDERAL JURISDICTION UNDER CAFA

The First Circuit Court of Appeals has determined that putative class claims, which are limited to a class defined so as to consist entirely of citizens of a single state, fit within the home-state exception to federal jurisdiction under the Class Action Fairness Act of 2005 (CAFA) and that the district court properly remanded the claims to state court. ***In re: Hannaford Bros. Co. Customer Data Security Breach Litig., No. 09-1393 (1st Cir., decided May 1, 2009)***. The issue arose in a case brought by Florida residents against the operator of a chain of grocery stores in Florida for an alleged failure to adopt adequate security measures to protect customer credit card information, which was stolen by a computer hacker.

The lawsuit, filed in state court, was removed to federal court in Florida, then transferred to a multidistrict litigation court in Maine with 24 other similar suits against entities related to the defendant in the Florida litigation. Thereafter, the Florida district court granted the plaintiff's motion to remand to state court, finding CAFA's home-state exception requirements satisfied. This exception provides in part as follows: "A district court shall decline to exercise jurisdiction [where] … two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed."

The defendant argued that the exception's use of the term "aggregate" requires the court to look outside the four corners of the complaint to all previously filed class actions "which arise from a core nucleus of operative facts such as to meet an 'Article III case or controversy' requirement." According to the defendant, the previously filed national class actions consolidated by the Judicial Panel on Multidistrict Litigation "are the appropriate reference point to measure 'the members of all proposed plaintiff classes in the aggregate.'"

The First Circuit declined to adopt the defendant's home-state exception interpretation. While the court agreed that the four corners of a plaintiff's complaint do not "necessarily control the question of whether CAFA's home state exception applies," the court determined that the exception's application does not "depend on a broader assessment of the claims brought by others who do not fall within the complaint's class definition or of the claims available to the class against other possible defendants." The court also found that the plaintiff had not attempted to evade congressional intent by limiting the class to Florida residents and that his proposed class fit squarely within the statutory exception's plain language.

ALL THINGS LEGISLATIVE AND REGULATORY

Fundamental Changes Urged for White House Regulatory Oversight Office

The Obama administration should redefine the role of "regulatory Czar" to help protect citizens and not weaken regulation, the president of the Center for Progressive Reform (CPR) told members of a congressional subcommittee during an April 30, 2009, hearing on the role of science in regulatory reform.

Rena Steinzor, a University of Maryland law professor and CPR president, was among five scholars and consumer advocates who testified before the House Subcommittee on Investigations and Oversight that overhaul was needed for the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA). Reform, Steinzor said, was timely because a new OIRA chief, typically known as the "regulatory Czar," was about to come onboard. Harvard Law School Professor Cass Sunstein, President Barack Obama's choice for OIRA chief, was nominated April 20. A Senate confirmation hearing on Sunstein's nomination has not yet been set.

During the hearing, scheduled to consider the president's call for updating the federal regulatory review process, Steinzor recommended that (i) the administration and Congress should define a new mission for the OIRA chief; (ii) OIRA should stop reviewing individual regulatory proposals; and (iii) OIRA must stay out of science policy.

Steinzor said that cost-benefit analysis tools OIRA uses in public health decision-making, "weaken protection of health, safety and environment, not strengthen it." She called the current OIRA a "regulatory killing ground" that "is staffed by approximately 40-50 economists who cannot possibly review every regulatory proposal thoroughly.

In her **written testimony**, Steinzor said that cost-benefit analysis tools OIRA uses in public health decision-making, "weaken protection of health, safety and environment, not strengthen it." She called the current OIRA a "regulatory killing ground" that "is staffed by approximately 40-50 economists who cannot possibly review every regulatory proposal thoroughly. Nevertheless, the threat of OIRA review is deeply disruptive of rulemaking. Because agencies do not know which cost-benefit analysis economists may find objectionable, they must gird up for battle over each regulation they are developing. These elaborate preparations, and the subsequent fights that do break out between OIRA and agency staff, slow rulemaking substantially."

Steinzor suggested that a redefined role for the OIRA chief should focus on improving public health protections by assisting agencies such as the Food and Drug Administration and the Consumer Product Safety Commission by giving them adequate resources to fulfill their statutory mandates, helping them to develop strong proactive agendas and ensuring that they receive enhanced legal authority to take decisive action. She specifically cited safety problems with toys imported from China, the *salmonella*-contaminated peanut butter that "sickened 20,000 and caused nine deaths, provoking a recall the cost billions of dollars," and the failure of federal regulators to "deal effectively with the safety problems posed by Sports Utility Vehicles," in her plea for "revamping the regulatory system."

Other testimony was provided by Caroline Smith DeWaal, director of the Food Safety Program for the Center for Science in the Public Interest; Rick Melberth, director of Federal Regulatory Policy for OMB Watch; Wesley Warren, director of programs for the Natural Resources Defense Council; and Cary Coglianese, associate dean and professor of law and political science at the University of Pennsylvania Law School.

CPSC Unveils New Guidelines for Testing Lead in Paint

The Consumer Product Safety Commission (CPSC) has unveiled new testing **guidelines** that its laboratory has adopted to analyze the amount of lead in paint and other surface coatings on toys and children's products.

New lead limits for toys and children's products under the Consumer Product Safety Improvement Act (CPSIA) took effect in February 2009, but the CPSC postponed the testing requirement imposed on those who make and sell the products until February 2010.

The toy industry apparently pressured CPSC for the testing protocols so that manufacturers and importers could have enough time to test their products and demonstrate compliance with the law. Other laboratories testing lead content are not required to follow CPSC's testing method, although CPSC is urging them to do so to ensure consistent results under the new ban on paint and painted products containing lead.

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A spokesperson for the Toy Industry Association, a trade group for toy producers and importers, reportedly said that the association was pleased CPSC had accepted its recommendation that composite testing is an acceptable protocol in the evaluation of lead-testing requirements. "We were able to convene an extremely knowledgeable and respected group of laboratory experts to develop input that is based on the most current scientific protocols," the spokesperson was quoted as saying. "This was a truly collaborative effort, and we are pleased with its outcome."

Lead-based paint, which is a main source of lead poisoning in children, can purportedly cause brain damage and lead to impaired mental and physical development. *See Product Liability Law 360,* April 29, 2009.

LEGAL LITERATURE REVIEW

Theodore Eisenberg, Michael Heise & Martin Wells, "Variability in Punitive Damages: An Empirical Assessment of the U.S. Supreme Court's Decision in *Exxon Shipping Co. v. Baker*," (prepared for the 27th Seminar on New Institutional Economics, June 2009, Kloster Eberbach, Germany)

Cornell University and Cornell School of Law professors have collaborated to explain how the U.S. Supreme Court's reduction of the punitive damages award in the Exxon Valdez oil spill case to implement a 1-to-1 punitive to compensatory ratio "is not statistically supportable across the broad range of compensatory awards, and could contribute to an inability to tailor punitive awards to the facts and circumstances of particular cases." The authors note that the U.S. Supreme Court relied, in part, on an article they wrote, but contend that their empirical findings do not support the Court's unpredictability concerns or wide application of the limiting ratio. According to this article, punitive damages "are one of the flashpoints of U.S. tort law and a source of tension in international civil justice relations," but "it is now generally accepted that the mass of punitive damages awards have been reasonably sober, modest in size, and without significant increases over time."

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Mark Geistfeld, "Efficiency, Fairness, and the Economic Analysis of Tort Law," *Theoretical Foundations of Law and Economics*, 2009

New York University School of Law Professor Mark Geistfeld addresses the debate between those who claim "that tort law should be nothing more than an exercise in cost minimization" and those who "maintain that tort liability is best justified by the principle of corrective justice," that is, a principle "based on an individual right that imposes an obligation or duty on another individual." The author suggests that this ongoing debate about the appropriate purpose of tort law ignores a "symbiotic relationship," where economic analysis is guided by normative principles "in the initial specification of legal entitlements and the ultimate specification of the social welfare function," and the normative principle depends on economic analysis at the stage of implementation. He concludes, "In addition to satisfying the distributional criteria of welfare economic[s], a rights-based tort system will importantly depend on economic analysis. The two modes of analysis are complements and not substitutes."

Andrew Jurs, "Judicial Analysis of Complex & Cutting-Edge Science in the *Daubert* Era: Epidemiologic Risk Assessment as a Test Case for Reform Strategies," *Connecticut Law Review*, 2009

Wake Forest University School of Law Professor Andrew Jurs starts by examining how courts grappling with complex epidemiological evidence often reach inconsistent conclusions when ruling on its admissibility under the relevance and reliability

standards of Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Given "weak judicial training in scientific principles and statistical information, oversimplification of bright line tests, outlier enhancement of experts outside the mainstream of their field, and the incompatibility of the judicial procedure with science," Jurs suggests that the use of scientific consultants or the creation of a science panel under a modified arbitration panel format for the most complex cases could address these weaknesses and "plug holes in the *Daubert* system exposed by the epidemiologic risk controversy."

LAW BLOG ROUNDUP

Lights, Camera, Action! U.S. Chamber Releases Lawsuit Abuse Film Clips

"We don't like movie trailers. Never have. We don't like that they hold you captive before the movie starts, often give away far too much of a movie's plot, and we really don't like that these days they can delay the start of the movie by 15 or 20 minutes. Well, now comes a movie trailer the likes of which we might actually get to the theater early for." *Wall Street Journal* law correspondent Ashby Jones, blogging about the short clips the U.S. Chamber of Commerce began airing in May in Washington, D.C.-area movie houses to highlight lawsuit abuse and make the case for tort reform.

WSJ Law Blog, April 27, 2009.

Three Cheers for the Rule of Law

"From 20,000 lawsuits in 2003 to one claim so far this year—this CEO saved his company and helped save American law." George Mason School of Law Professor Michael Krauss, discussing a *Wall Street Journal* editorial portrait of the man who stopped "bogus claims" against the silica industry by uncovering "a massive fraudulent scheme (a criminal enterprise, perhaps?) by a small number of despicable plaintiff's lawyers in search of the 'new asbestos.'" We have noted in previous issues of this report the mass screenings of potential silica plaintiffs with questionable injury claims that were thwarted when a U.S. district court helped preserve the "Rule of Law" by exposing the scheme.

"From 20,000 lawsuits in 2003 to one claim so far this year—this CEO saved his company and helped save American law."

Point of Law.com, May 2, 2009.

SCOTUS Grants Cert. in Case That Balances Judicial Authority Between Federal & State Courts

"At stake are the uniformity of federal rules in diversity cases, as well as the right of states to regulate (or limit regulation) of business through statutory penalties. It provides the Court with an opportunity to revisit the intersection between the *Erie* doctrine and the federal rules." University of Connecticut School of Law Associate

Professor Alexandra Lahav, discussing the U.S. Supreme Court's decision to review *Shady Grove Orthopedic Association, P.A. v. Allstate Insurance Co.*, No. 08-1008 (U.S., *cert. granted* May 4, 2009), that pits state procedural rules against federal rules and assesses whether a rule is substantive or procedural. The lower federal courts dismissed the claims on the basis of New York law which prohibits certification of a class action unless a statute specifically permits the device to be used. The plaintiffs will argue that the state legislature cannot dictate the procedural rules used in federal courts, in this case, the money damages class action.

Mass Tort Litigation Blog, May 4, 2009.

THE FINAL WORD

House and Senate Approve Bill Extending Court Deadlines

The U.S. Senate unanimously approved a bill (H.R. 1626; S. 630) that would lengthen a number of federal court deadlines to bring them into accord with recent amendments to the federal rules of practice and procedure. The measure, previously approved by the House, was sent to the president for his signature on April 30, 2009. The federal rules amendments are scheduled to take effect December 1, and Congress rushed the bill to "create a more consistent and standard method for lawyers and judges to calculate court deadlines," according to Senator Patrick Leahy (D-Vt.) who introduced the Senate bill. The new rules will institute a "days are days" time-calculation policy that counts all holidays and weekend days when determining deadlines for specific court proceedings. Under current rules, weekends and court holidays are not included when determining deadlines shorter than 30 days, but these days are included if the deadlines exceed 30 days. *See Product Liability Law 360*, April 28, 2009.

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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American Conference Institute, New York, New York – June 24-25, 2009 – "3rd Annual Drug and Medical Device on Trial." Shook, Hardy & Bacon Pharmaceutical and Medical Device Litigation Partner Harvey Kaplan will conduct a "Cross-Examination of the Plaintiff's Cardiologist." Designed around a detailed fact pattern, this interactive seminar gives a distinguished faculty of judges, in-house counsel and practitioners the opportunity to demonstrate and critique a variety of trial skills. A seminar brochure is available on request from the sponsor. ■

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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).