Shook, Hardy & Bacon L.L.P.

Product Liability Litigation Report

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U.S. SUPREME COURT ESTABLISHES 1:1 RATIO FOR PUNITIVE DAMAGES IN MARITIME LITIGATION

Slashing a $2.5 billion punitive damages award in the Exxon Valdez oil spill case to $507.5 million, the U.S. Supreme Court has determined that, under federal common law, punitive damages should not exceed the compensatory damages award, particularly in cases lacking exceptional blameworthiness and involving economic injury only. ***Exxon Shipping Co. v. Baker*, No. 07-219 (U.S., decided June 25, 2008)**. Writing for a 5-3 majority, Justice David Souter explored the history of punitive damages, international law standards and research about the ratios of punitive to compensatory awards to conclude that the award was excessive.

Exxon Mobil Corp. had already paid $2.1 billion to clean up the fishing waters of Alaska's Prince William Sound after the company's oil tanker ran aground on a reef and spilled 11 million gallons of oil in 1989. Five years later, a jury awarded 32,000 fishermen and Alaska natives $507.5 million in compensatory damages and $5 billion in punitive damages, which the Ninth Circuit cut in half on appeal in 2006. Reducing the award even further, Justice Souter was concerned that "a penalty should be reasonably predictable in its severity" and opined that a 1:1 ratio was "a fair upper limit in … maritime cases."

The decision generated significant media attention, and legal commentators have debated its precedential value because it was not decided on constitutional due process principles. Among the more interesting observations about the case was Justice Souter's citation and rejection, in a footnote, of a body of legal literature documenting the unpredictability of punitive damages, "[b]ecause this research was funded in part by Exxon." Some commentators have characterized the footnote as "troubling" and "unfortunate," noting that litigants sometimes find it necessary to pay for empirical studies; others were less concerned, finding it unlikely that a litigant, for example, would ever buy out an entire law journal. *See The Wall Street Journal Law Blog*, July 7, 2008.

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RHODE ISLAND SAYS LEAD PAINT PRODUCERS ARE NOT LIABLE UNDER PUBLIC NUISANCE THEORY

The Rhode Island Supreme Court has overturned a $2.4 billion jury award that was to be used to clean up buildings contaminated with lead paint, ruling that "public nuisance law simply does not provide a remedy for this harm." ***State v. Lead Indus. Ass'n, Inc.*, No. 04-63 (R.I., decided July 1, 2008)**. The state's attorney general sued lead pigment manufacturers alleging that they knew or should have known since the early 1900s that their product was hazardous to human health yet sold it without warning state residents of its hazards. The state sought an order requiring defendants to abate lead pigment in all Rhode Island buildings accessible to children, who are particularly susceptible to lead poisoning from the lead-based paint in older housing, house dust and paint-contaminated soil.

Examining the elements of a public nuisance cause of action, the court determined, among other matters, that the public right to be protected "is reserved more appropriately for those indivisible resources shared by the public at large, such as air, water, or public rights of way," and that "a defendant must have control over the instrumentality causing the alleged nuisance at the time the damage occurs." Because the state could not demonstrate "that defendants had control over the product causing the alleged nuisance at the time children were injured," the court ruled that the trial court erred in denying defendants' motion to dismiss.

On the issue of control, the court quoted a 2006 law review article on public nuisance authored by Shook, Hardy & Bacon Public Policy lawyers **Victor Schwartz** and **Phil Goldberg**, stating, "[F]urnishing a product or instrumentality—whether it be chemicals, asbestos, guns, lead paint, or other products—is not the same as having control over that instrumentality." The court also addressed whether the attorney general could use contingency fees in hiring outside counsel and concluded that this would be appropriate as long as the attorney general maintained control of all decisions in the litigation.

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TEXAS HIGH COURT APPLIES APPORTIONMENT TO IMPLIED WARRANTY CLAIM IN WRONGFUL DEATH CASE

Ruling that a party seeking damages for death or personal injury under a breach of implied warranty claim seeks damages in tort and that such claims are subject to the state's liability apportionment scheme, the Texas Supreme Court has reversed a judgment awarding damages to a decedent's mother because the jury found the decedent more than 50 percent responsible for his own death. ***JCW Elecs., Inc. v. Garza*, No. 05-1042 (Tex., decided June 27, 2008)**.

The issue arose in a case involving a man who had been arrested for public intoxication and was found dead in his jail cell, hanging from a telephone cord. His mother sued the city and JCW Electronics, Inc., the company that provided the telephone to the police department for inmate use. Attributing 60

percent liability to the decedent, 25 percent to the city and 15 percent to JCW, the jury found in plaintiff's favor on her claims of negligence, misrepresentation and breach of implied warranty of fitness. The court of appeals affirmed the judgment on the jury's finding of breach of implied warranty of fitness for a particular purpose and rejected JCW's contention that the state's "proportionate responsibility scheme" barred recovery.

The state legislature replaced comparative responsibility with proportionate responsibility in 1995 and deleted mention of specific theories of liability, "providing instead that the chapter should apply '*to any cause of action based on tort* in which a defendant, settling person, or responsible third party is found responsible for a percentage of the harm for which relief is sought.'"

Plaintiff argued that a breach of implied warranty claim is not a "cause of action based on tort," and the Texas Supreme Court disagreed, noting that the nature of the claim "is ordinarily identified by examining the damages alleged: when the damages are purely economic, the claim sounds in contract … but a breach of implied warranty claim alleging damages for death or personal injury sounds in tort." The court also examined the statute as a whole and found confirmation "that the Legislature did not intend to exclude breach of implied warranty claims from its apportionment scheme."

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NEW MEXICO ALLOWS CLASS ACTION TO PROCEED DESPITE CONTRACTUAL PROVISIONS TO THE CONTRARY

In a putative class action against a computer manufacturer alleging misrepresentation as to memory size, the New Mexico Supreme Court has determined that the state's interest in resolving consumer claims regardless of the damages alleged is so fundamental that it overrides contractual provisions prohibiting class relief and requiring individual arbitration of claims. ***Fiser v. Dell Computer Corp.*, No. 30,424 (N. Mex., decided June 27, 2008)**.

The court first addressed a choice-of-law issue and rejected the application of Texas law because it would have resulted in enforcement of the contractual class-action ban and thus "would run afoul of fundamental New Mexico public policy." According to the court, the availability of the class-action device is fundamental in New Mexico, since it affords a meaningful redress of injury when claims are small. Because the damages were no greater than $10 to $20 for each claimant, and "only a lunatic or a fanatic sues for [ten to twenty dollars]," the court agreed with plaintiff that the class-action ban was unconscionable and as such could not be enforced. The court also found that the Federal Arbitration Act did not preempt the claims.

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TRIAL COURT ORDERS PLAINTIFFS TO PRODUCE EVIDENCE FROM ONE DRUG MDL IN SECOND DRUG MDL

A federal multidistrict litigation court in Florida has ordered plaintiffs, who claim that the anti-psychotic medication Seroquel® caused their hyperglycemia and diabetes, to produce documents pertaining to their ingestion of a similar drug, Zyprexa®, which is at issue in multidistrict litigation pending in a federal court in New York. *In re: Seroquel Prods. Liab. Litig.*, MDL No. 1769 (U.S. Dist. Ct., M.D. Fla., Orlando Div., order entered June 23, 2008). Both drugs are used by people with schizophrenia and bipolar disorder.

According to Seroquel® maker AstraZeneca LP, 15 plaintiffs who sued Zyprexa® maker Eli Lilly and Company in New York have made the same allegations of injury in that litigation. Rejecting plaintiffs claims that the documents were either unavailable or did not exist, the court stated, "Plaintiffs' allegations of diabetes and hyperglycemia allegedly caused by other drugs, including Zyprexa, and Plaintiffs' use of other antipsychotic medications are issues **directly relevant** to Plaintiff's claims against AstraZeneca in this case. Plaintiffs have an obligation to obtain their *own* documents from their *own* counsel (whether in this case or another) that relate to their personal injury claims including against Lilly."

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UNHAPPY CLIENT SEEKS DAMAGES FROM LAW FIRM FOR FAILURE TO PRODUCE DOCUMENTS

A chemical company that was sanctioned for failing to produce documents in multidistrict litigation charging the company with price-fixing has filed a complaint against the lawyers who represented it, alleging they were negligent and committed professional malpractice for "their utter and inexcusable failure to produce to the plaintiffs in the antitrust cases hundreds of thousands of documents that Celanese had provided to Kaye Scholer (many of which were in Kaye Scholer's offices)." *CNA Holdings, Inc. v. Kaye Scholer LLP*, No. 3-08-CV-1032 B (U.S. Dist. Ct., N.D. Tex, Dallas Div., first amended complaint filed June 26, 2008).

The discovery misconduct, characterized by the court as "egregious," cost Celanese monetary sanctions and allegedly forced it to settle the price-fixing lawsuit for an inflated sum because the court in that case was considering whether to further sanction the company by allowing adverse inferences on key issues during trial. Celanese was also allegedly "forced to retain new counsel, … perform enormous amounts of work and expend millions of dollars in obtaining, organizing, reviewing and producing documents – in an extremely tight time frame." Law firm Kaye Scholer purportedly responded to the complaint, which was filed in Texas, by suing Celanese in a federal court in New York, seeking to recover attorney's fees for work it had done in the price-fixing lawsuit. Celanese is asking for compensatory damages, disgorgement of attorney's fees, fees paid to other law firms to cure Kaye Scholer's alleged misconduct, and exemplary damages.

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ALL THINGS LEGISLATIVE AND REGULATORY

Legislation Introduced to Reverse Medical Device Preemption Ruling

U.S. Representatives Frank Pallone, Jr. (D-N.J.) and Henry Waxman (D-Cal.) have introduced legislation (H.R. 6381) that would effectively reverse *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999 (2008), in which the U.S. Supreme Court held that state-law claims against manufacturers of medical devices subject to pre-market approval by the Food and Drug Administration are foreclosed by the express preemption clause of the Medical Device Amendments to the Federal Food, Drug, and Cosmetic Act.

The Medical Device Safety Act of 2008, which was drafted and released as a "trial balloon" in March but not formally introduced in the House of Representatives until June 26, 2008, seeks to amend section 521 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. § 360k) by adding the following:

> (c) NO EFFECT ON LIABILITY UNDER STATE LAW. Nothing in this section shall be construed to modify or otherwise affect any action for damages or the liability of any person under the law of any State.

The bill would apply to any civil action pending or filed on or after the date of enactment.

In a press release issued by Rep. Pallone's office, the sponsoring congressmen opined that *Riegel* was wrongly decided and should be overturned. "This bill reverses an unfortunate Supreme Court decision that denied victims any legal recourse and gave medical device makers blanket immunity for the life of a product," said Rep. Pallone. "Congress should pass this legislation so that we can protect patients from dangerous and defective medical devices." Rep. Waxman echoed those comments, stating that *Riegel* "protects the financial interests of medical device companies at the expense of patients harmed by FDA approved devices…. If manufacturers face no liability, all the financial incentives will point them in the wrong direction: away from ensuring the safety of their medical devices. We must act quickly to address this dangerous situation."

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Following its introduction, the bill, which has more than 60 co-sponsors, was referred to the House Committee on Energy and Commerce. A companion bill is expected to be introduced by Senators Edward Kennedy (D-Mass.) and Patrick Leahy (D-Vt.).

Senate Bill Would Prevent Federal Investigators from Demanding Privilege Waiver

A Senate bill (S. 3217) with bipartisan support would protect attorney-client privileged communications and attorney work product from coerced disclosure as an element of cooperation in a federal investigation. Introduced on June 26, 2008, by Senator Arlen Specter (R-Pa.), the measure would preclude a U.S.

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agent or attorney from demanding waiver of the privilege or attorney work product, offering to reward or actually rewarding such waiver or threatening adverse treatment or penalties for a refusal to waive the privilege or work product protections. Voluntary waivers would continue to be allowed, and the proposed legislation would "not affect any other Federal statute that authorizes, in the course of an examination or inspection, an agent or attorney of the United States to require or compel the production of attorney-client privileged material or attorney work product." The bill was referred to the Committee on the Judiciary.

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LEGAL LITERATURE REVIEW

Thomas Colby, "Clearing the Smoke from *Philip Morris v. Williams*: The Past, Present, and Future of Punitive Damages," *Yale Law Journal* (forthcoming 2009)

George Washington University Law School Associate Professor Thomas Colby suggests that the U.S. Supreme Court reached the correct conclusion about punitive damages in *Philip Morris v. Williams*, 127 S. Ct. 1057 (2007), when it held that the Constitution does not allow punitive damages to punish a defendant for harm to third parties, but argues that the Court's analysis "does not stand up to scrutiny." According to Colby, when punitive damages are used to punish a defendant for public wrongs on behalf of society, their imposition must be preceded by the full panoply of criminal procedural protections because they have been substituted for criminal law. When courts allowed punishment for public wrongs by means of punitive damages in civil litigation before *Williams*, Colby contends they were doing an end run around the Bill of Rights. He predicts that *Williams* will have a significant effect on punitive damages awards in the future, assuming that juries are correctly charged and plaintiffs' lawyers do not refer to thousands of injured and dead in their closings. He also observes that the case does not forbid the states or courts from crafting an extracompensatory sanction that would be "designed to achieve optimal deterrence by ensuring that the defendant fully internalizes the costs of its behavior."

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Tom Baker, et al., "Jackpot Justice and the American Tort System: Thinking Beyond Junk Science," *William Mitchell College of Law Legal Studies Research Paper Series* (July 2008)

The law professors who authored this article contend that the Pacific Research Institute's 2007 report, *Jackpot Justice: The True Cost of America's Tort System*, overestimates the cost of tort litigation in the United States and relies on questionable and incomplete data to support its claims. Among the purported flaws they cite is that the researchers "began with an assumption that there would be excess costs, rather than taking a scientifically neutral position." The authors present what they argue are more reliable data that could be used to place a value on tort injuries and deaths, believing that such research is needed. They discuss the report's approach to products liability and claim that "reliable data show that product liability trials are much less frequent than

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claimed by advocates of tort reform and implied in *Jackpot Justice*. Also, the size of awards is much more modest than would be expected by the rhetoric against the tort system." As for punitive damages, the article concludes, "It is the height of hypocrisy to claim that punitive damages are ruining the country when an injured person sues for punitive damages while ignoring the fact that large corporations regularly sue one another and regularly ask for punitive damages."

Jason Krause, "Rockin' Out the E-Law, *ABA Journal*, July 2008

This article identifies the federal court judges who have been in the forefront as lawyers and their clients learn to apply the new procedural rules on the discovery of electronically stored information (ESI). Among them are U.S. District Judge Shira Scheindlin, who wrote a series of decisions so influential in one case that "it was partially absorbed into the recent civil procedure amendments." The issues she considered included what electronic evidence is discoverable, how the costs should be shared among parties and whether sanctions should be imposed when parties fail to produce ESI. Because many cases can be decided on the basis of pre-trial discovery motions, which are seldom challenged, and because nearly all cases settle before trial, judges play a significant role in e-discovery. Their rulings go essentially unreviewed; thus, according to the article, the judges who understand the subject have become regular speakers at legal and high-tech conferences and seminars. Also named among the "star" judges is Magistrate Judge David Waxse of the U.S. District Court in Kansas. A former partner at Shook, Hardy & Bacon, Waxse wrote an opinion that was one of the first to address meta-data, that is, "the invisible data from a document that includes who created it, what computers were used and when it was worked on."

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LAW BLOG ROUNDUP

Grading Law Students Via Median Ratio

"Can you imagine what my students would say if I told them that I am not reading their exams and grading them individually, but instead giving them a B, because we have a B median requirement at the law school where I teach?" University of Connecticut School of Law Associate Professor Alexandra Lahav, blogging about *Exxon v. Baker*, in which the U.S. Supreme Court decided that the appropriate measure of punitive damages is the same as the median ratio of punitive to compensatory verdicts rendered by juries and judges across the country.

Tort Litigation Blog, June 26, 2008.

Tell Us What You Really Think …

"So even though the companies knew as early as the 1920s that lead paint caused neurological damage to children and, knowing this, the companies lobbied Congress for years to keep lead paint on the market in America even

while other countries banned it for public health reasons. And even though the companies marketed lead paint specifically to parents and children, with claims of happy play spaces made brighter by their paint, all the while making sure to protect FARM ANIMALS from the harmful effects of lead in paint. Given all this, they should have no clean-up responsibility?" Center for Justice & Democracy Senior Field Organizer John Guyette, discussing the Rhode Island Supreme Court upset of a $2.4 billion jury verdict against paint manufacturers in a public nuisance lawsuit brought by the state's attorney general.

The Pop Tort, July 2, 2008.

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THE FINAL WORD

One Fen-Phen Lawyer Acquitted; Jury Hangs on Charges That Two Others Defrauded Clients

The jury considering whether three plaintiffs' lawyers defrauded their clients of settlement money in class-action litigation involving the diet drug fen-phen, has acquitted one, whose defense was that he was too drunk to participate in the alleged conspiracy. The jury also deadlocked after 52 hours of deliberation on charges against the remaining two defendants. The jury foreman, who apparently indicated that the jury was hung at 10-2 in favor of acquittal, was quoted as saying, "We felt the prosecution just didn't have a strong enough case." The prosecutors reportedly indicated their intent to retry the two defendants, and the judge sent them back to jail on the same bonds, apparently believing they had too much incentive to flee. *See ABA Journal*, July 1, 2008; *Courier-Journal*, July 4, 2008.

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UPCOMING CONFERENCES AND SEMINARS

American Conference Institute, Philadelphia, Pennsylvania – July 14-15, 2008 – "Drug & Device Preemption," Shook, Hardy & Bacon Pharmaceutical & Medical Device Litigation Partner **Deborah Moeller** will serve on a panel that will discuss "Evaluating Whether or Not to Pursue a Preemption Defense."

American Conference Institute, Boston, Massachusetts – September 23-24, 2008 – "Managing Legal Risks in Structuring & Conducting Clinical Trials," Shook, Hardy & Bacon Pharmaceutical & Medical Device Litigation Partner **Madeleine McDonough** will join a former FDA enforcement lawyer to discuss issues arising from compliance with state and federal laws requiring the registration of clinical trials and disclosure of results.

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Lorman Education Services, Kansas City, Missouri – September 25, 2008 – "Document Retention and Destruction in Missouri," Shook, Hardy & Bacon eDiscovery, Data & Document Management Partner **Christopher Cotton** will present an "E-Discovery Update," focusing on evolving law, litigation issues and coordination within a company.

American Conference Institute, Chicago, Illinois – October 29-30, 2008 – "Defending and Managing Automotive Product Liability Litigation," Shook, Hardy & Bacon Tort Partner **H. Grant Law** will serve on a panel discussing "Preemption: Examining the Current Viability of the Defense in Auto Product Liability Cases."

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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