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Product Liability Litigation Report

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NINTH CIRCUIT RULES PLUTONIUM FACILITY WAS ABNORMALLY DANGEROUS ACTIVITY

The Ninth Circuit Court of Appeals has determined that the World War II operation of the Hanford Nuclear Weapons Reservation in Washington constituted an abnormally dangerous activity which would create strict liability under state law and that the operators did not qualify for a public duty exception to such liability. ***In re: Hanford Nuclear Reservation Litig.*, No. 05-35866 (9th Cir., decided August 14, 2007)**.

The issue stemmed from lawsuits filed by more than 2,000 residents who lived near the facility and were exposed to emissions of radioiodine (I-131), a plutonium-production byproduct. They claimed that the exposure caused various cancers and other life-threatening diseases. A jury found in favor of two plaintiffs during a bellwether trial that tested the claims of six individuals. The defendants argued, among other matters, that plaintiffs could not proceed under a strict liability theory because the I-131 emissions were within federally authorized levels, the plutonium-production process was not an abnormally dangerous activity, and, even if it were, the defendants qualified for the narrow "public duty" exception to strict liability.

According to the court, while nuclear operators cannot be held liable unless they breach federally imposed dose limits and while the U.S. Army had established site-specific tolerance doses, such guidance "did not carry the force of law and thus cannot provide the basis for a safe harbor from liability." The court also found that no agency existed before the 1950s to establish a federal standard on which defendants could reasonably have relied. "The need for such standards was not recognized until many years later." The court also reviewed the factors Washington courts consider when they decide whether an activity is abnormally dangerous and determined that (i) the high degree of risk to people and property associated with the Hanford facility, (ii) the gravity of potential harm, (iii) the likelihood that some I-131 would be released despite defendants' efforts to exercise reasonable care, and (iv) the uncommon nature of the activity, all supported the district court's finding that defendants' activities were abnormally dangerous.

CONTENTS

The court predicted that Washington courts would adopt the "public duty" exception to strict liability, but found the defendants did not satisfy its purpose because they were not public officers or employees or common carriers nor were they legally obligated to operate the facility. According to the court, "[t]he case law therefore illustrates that the duty involved is the legal obligation to perform the abnormally dangerous activity in accordance with government orders…. There was no government mandate here." The court further noted, "We should not confuse the legal concept of a public duty with popular notions of patriotic duty taken at personal sacrifice. Defendants may well have been acting at the government's urging during wartime, … [but] they had no legal duty to operate Hanford, and they are, therefore, not entitled to the public duty exception."

< Back to Top

NEVADA ALLOWS UNNAMED CLASS MEMBERS TO APPEAL FINAL JUDGMENT IN DEFECTIVE PLUMBING CASE

Deciding an issue of first impression, the Nevada Supreme Court has determined that unnamed class members have standing to appeal a final judgment in a class action. ***Marcuse v. Del Webb Communities, Inc.*, Nos. 44508 & 44753 (Nev., decided August 2, 2007)**. Irwin and Edith Marcuse, unnamed plaintiffs in a class-action lawsuit involving underslab domestic water copper plumbing lines, did not experience any problems with the plumbing until after the date by which class members were required to opt out. While the defendant reimbursed them to repair the defective plumbing, it did not pay for the full damages that resulted from the flooding. Later, after the Marcuses unsuccessfully attempted to consolidate their individual "resultant damages" claim with the class-action claims, a court preliminarily approved a class settlement on behalf of those class plaintiffs whose homes had not yet been repaired. The Marcuses opposed the settlement and challenged its effect on their resultant damages claim. Approving the settlement and dismissing the class action with prejudice, the trial court denied their motion for relief from any class-action judgment.

The Nevada Supreme Court noted that other jurisdictions had split on the standing issue; many allow class members who have registered some objection with the trial court to pursue an appeal from a final judgment in a class action. Some courts, like the Fifth Circuit Court of Appeals, have determined that class members lack standing to appeal the final judgment in a class action because they have "adequate collateral avenues of relief under the federal rules, such as moving to intervene." Nevada's high court rejected this approach stating, "the objection filed in connection with the class action settlement was sufficient to give notice of the Marcuses' intent to preserve the collateral relief they sought. To require an application for intervention to raise the objection would unduly burden class proceedings." While the court found that plaintiffs had standing, it affirmed the district court's final approval of the settlement, finding that their objection "focused on their right to recover resultant damages rather than the merits and actual subject matter of the class settlement as a whole."

< Back to Top

OHIO COURT OVERTURNS GOVERNOR'S VETO OF BILL PLACING LIMITS ON LEAD-PAINT LAWSUITS

The Ohio Supreme Court has determined that Governor Ted Strickland (D) lacked the authority to veto a bill that would have made public-nuisance lawsuits subject to the state's products-liability laws. ***State ex rel. Ohio Gen. Assembly v. Brunner*, No. 2007-0209 (Ohio, decided August 1, 2007)**. By ordering the secretary of state to treat the bill as a duly enacted law, the court has effectively ensured that no new public-nuisance lawsuits will be filed against lead-paint manufacturers in the state. A number of such suits were filed at the end of 2006 by municipalities seeking the costs of lead-paint removal and a public education program, in addition to reimbursement for funds already spent addressing lead-related hazards. The state's attorney general also filed a similar lawsuit in April 2007, seeking to consolidate it with the previously filed actions. Plaintiffs have turned to the public-nuisance device in recent years to avoid some of the proof-related requirements imposed by products-liability statutes.

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Ohio's Republican-controlled legislature passed the reform measure late in its session and delayed presenting it to outgoing Governor Bob Taft (R) until after it adjourned, giving him less than 10 days to decide whether to sign it into law or veto it. Under the state's constitution, the last date on which the bill could be vetoed was January 6, 2007, or 10 days after adjournment. Taft decided to let the measure take effect without his signature and forwarded it to the secretary of state on January 5. Governor Strickland was sworn into office January 8 and vetoed the bill that day, claiming the 10-day veto window had not expired. The Ohio Supreme Court disagreed in a split decision. The majority did not believe that the constitution requires the General Assembly to give a governor 10 days to consider the merits of the bills it passes, prompting one of the dissenters to complain that "[t]he majority today allows the General Assembly, through the manipulation of its adjournment, to effectively render a governor's veto power a nullity."

< Back to Top

SIXTH CIRCUIT REFUSES TO EXTEND APPEAL TIME IN HIP-IMPLANT CASE; GIVES COUNSEL DUTY TO MONITOR DOCKET

The Sixth Circuit Court of Appeals has determined that counsel's failure to monitor an electronic court docket is fatal to his attempt to reopen the time to appeal the ruling he missed. ***Kuhn v. Sulzer Orthopedics, Inc.*, No. 06-3576 (6th Cir., decided August 10, 2007)**. The issue arose in a legal malpractice case filed in a Texas state court where plaintiffs contended that they were unable to recover under an extraordinary injury fund established to settle claims in a hip implant class action, because their lawyer failed to timely file their claim. As unnamed class members, they had received some compensation from the settlement fund, but sought additional sums for extraordinary injuries. They sought discovery about the settlement from non-party Sulzer Orthopedics, Inc., which filed an emergency motion to enjoin the discovery before the federal multi-district litigation (MDL) court overseeing the settlement. The MDL court ruled from the bench that the plaintiffs could pursue their malpractice claim against

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their former attorney, but, to the extent their other claims represented a collateral attack on the MDL court's judgment in the *Sulzer* class-action settlement, the court enjoined the prosecution of those claims.

The MDL court indicated that it would issue a written, appealable order, and several months later, the plaintiffs filed a motion requesting that the court do so. The court entered its injunction order less than two weeks later. Because plaintiffs' attorney had not provided the court with his e-mail address and failed to monitor the docket, the plaintiffs did not learn about the injunction order until about three months later, after the deadline for appeal had passed, when a paralegal in the lawyer's office discovered it while reviewing the court's electronic docket. The plaintiffs promptly filed a motion to reopen the time to file an appeal under a procedural rule that allows the courts to extend the time where three conditions are met. While they met each condition, the district court denied the motion, and this appeal followed.

The appeals court determined that the district court's local practice and procedure order does not compel counsel, as a *pro hac vice* admittee, to register with the court's electronic filing system. The court did, however, impose a docket-monitoring standard on counsel. "It might be one thing not to penalize a party who did not learn about the issuance of an appealable order in the bygone days of hiring '"runners" to physically go to the courthouse to check the docket,' but here all [counsel] had to do was register his email address with the district court's CM/ECF system to receive the court's orders. Failing that, [counsel] simply had to scan periodically the electronic docket for recent activity. Indeed, the unreasonableness of [counsel's] conduct here is evident in that ultimately, he learned about the district court's Injunction Order in precisely this way: His paralegal checked the online docket and discovered the order." The court found counsel's conduct particularly ill-advised because he had taken the "unusual step" of asking the court to promptly issue a written order and then failed to monitor the online docket.

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Plaintiffs cited Second and Ninth Circuit court decisions that refused to import the "excusable neglect" standard from Rule 4(a)(5) into Rule 4(a)(6), requiring the district courts to overlook a party's "failure to learn independently of the entry of judgment" when ruling on a Rule 4(a)(6) motion. The Sixth Circuit expressly rejected this authority stating, "Both cases were decided long before electronic dockets became widely available [and] do not even require an attorney 'to leave the seat in front of his computer' to keep apprised of what is happening in his cases." Refusing to "reach the precise contours of a district court's discretion to deny a Rule 4(a)(6) motion when the requirements of the Rule have been satisfied," the court nevertheless found no abuse of discretion in the lower court's denial of plaintiffs' motion. On the brief for appellee Sulzer Orthopedics were Shook, Hardy & Bacon Partners **David Brooks** and **Manuel Lopez**.

< Back to Top

TWOMBLY CREATES CONFUSION IN LOWER COURT; JUST WHEN IS HEIGHTENED PLEADING REQUIRED?

Columbia University Law Professor Michael Dorf criticizes the current U.S. Supreme Court's lack of trial experience in this analysis of *Bell Atlantic Corp. v. Twombly,* a decision that "concerns the standard to be used by federal district judges in deciding whether to dismiss a lawsuit before allowing the plaintiff to

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conduct civil discovery." In *Twombly,* the Court ruled that the complaint, which alleged an antitrust conspiracy, did not include "enough factual matter (taken as true) to suggest that an agreement was made" among conspirators and should be dismissed to avoid expensive antitrust discovery. Explaining that district judges must take "care to require allegations that reach the level suggesting conspiracy" before permitting a case to go forward, the Court nevertheless "vociferously denied" that it was imposing a heightened pleading requirement as called for in cases involving especially high risks and/or costs. Previous Court rulings stipulated that, under Federal Rule 9(b), a federal judge cannot impose a heightened pleading standard unless a plaintiff's claim for relief (or a defendant's defense) depends on an allegation of fraud or mistake.

Dorf argues that *Twombly* fosters ambiguity in the lower courts because the majority opinion neither imposes a heightened pleading requirement for conspiracy or antitrust conspiracy cases, nor does it "raise the bar, requiring more factual detail, for *all* categories of cases." As a result, the lower courts have reportedly cited *Twombly* 457 times since May 2007 as they attempt to decide whether, for instance, *Twombly* can be confined to the antitrust context or whether all complaints in all cases must satisfy a plausibility standard. Dorf specifically attributes this outcome to the Justices' dearth of experience as trial lawyers or trial court judges. Moreover, he adds that the majority ignored the advice of dissenting Justices Ruth Bader Ginsburg and John Paul Stevens, both of whom possess significant knowledge of procedural and antitrust law. "Without a base of their own experience on which to draw or a willingness to listen carefully to their more knowledgeable colleagues, most of the current Supreme Court Justices will likely continue to stumble in matters of trial court procedures," Dorf concludes. *See Findlaw.com*, August 13, 2007. Dorf has since corrected his article, after a reader noted that Justice David Souter sat on a trial court bench in New Hampshire. *See Dorf on Law*, August 13, 2007.

< Back to Top

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RECALL OF CHINESE-MADE TOYS PROMPTS LEGAL ACTION AGAINST AMERICAN COMPANIES

Mattel, Inc. this month recalled approximately 1 million toys after testing revealed high levels of lead in the Chinese-manufactured products. The Mattel announcement, which covered popular toys such as Elmo and Dora the Explorer, followed a similar decision by RC2 Corp. to recall 1.5 million Thomas & Friends toy trains over lead-paint concerns. In both cases, the contaminated toys reached the market through regulatory loopholes allegedly exploited by Chinese companies in the interest of saving time and money. Some consumer watchdogs have used the recent spate of unsafe products to call for third-party testing and expanding the Consumer Product Safety Commission's authority to cope with the global marketplace. "From the size of the recall, we're not talking about accidental use of paints," toxicologist Paul Mushak told the press. "We're talking about something that's been a conventional practice."

In response to these allegations, the Chinese government has revoked the licenses of Ler Der Industrial Co. and Hansheng Wood Products Co. for their respective roles in the Mattel and RC2 recalls. Ler Der's owner, Zhang Shuhong, apparently committed suicide after Chinese officials last week announced that

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Lee Der's paint supplier had sold the company fake, "lead-free" paint pigment. The Minister of Commerce, however, has stressed that the majority of Chinese exports meet international safety standards. *See The Wall Street Journal,* August 3, 2007.

Meanwhile, an Alabama mother has reportedly filed a lawsuit against Mattel, Inc. and Target Corp., alleging negligence and seeking medical monitoring funds for children who "suffered an increased risk for serious health problems." Although plaintiffs' attorney Mitchell Breit has argued that lead exposure justifies funds for testing, "other lawyers say courts aren't always quick to approve of the creation of a medical-monitoring fund, especially if probable injury caused by the exposure is in question," according to *The Wall Street Journal's Law Blog.* Having a contaminated toy in the house "does not constitute an acute medical risk to the child, even if the child was to have ingested one small paint chip," an environmental medicine specialist at the Mayo Clinic was quoted as saying. *See The Wall Street Journal,* August 9, 2007.

< Back to Top

INDUSTRY INTERESTS FUEL SCIENTIFIC DEBATE

"Since the late 1980s, this well-coordinated, well-funded campaign by contrarian scientists, free-market think tanks and industry has created a paralyzing fog of doubt around climate change," writes Sharon Begley in a *Newsweek* article documenting the scientific debate surrounding global warming. Begley contends that climate change "doubters" backed by special interest groups have stymied national and international efforts to reduce greenhouse gas emissions, despite warnings issued by the Intergovernmental Panel on Climate Change and vetted by "thousands" of mainstream scientists. She specifically argues that the appearance of discord within the scientific community has made Congress reluctant to consider policy decisions based on global warming evidence. In addition, "the denial machine" has allegedly rendered climate change a "bitterly partisan issue" by suggesting that "the science was fraudulent, even a Democratic fantasy," according to former Republican staffer David Goldston. As a result, Begley opines, the Bush Administration in 2001 reversed its call for carbon dioxide caps and withdrew from the Kyoto treaty. "They patterned what they did after the tobacco industry," former U.S. Senator Tom Wirth was quoted as saying. "Both figured, sow enough doubt, call the science uncertain and in dispute. That's had a huge impact on both the public and Congress." *See Newsweek,* August 13, 2007.

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< Back to Top

ALL THINGS LEGISLATIVE AND REGULATORY

Massachusetts Lawmakers Consider Increasing Corporate Manslaughter Fines

Two bills currently circulating among Massachusetts legislators would significantly increase the fines imposed on companies found guilty of involuntary manslaughter. Prompted by news that the company recently indicted for

wrongdoing related to the fatal collapse of ceiling panels in Boston's Big Dig tunnel would face a $1,000 penalty, lawmakers quickly proposed increasing the maximum fine to either $100,000 or $50 million. Both proposals would also bar convicted companies from doing business with the state. The supplier of the epoxy that has been blamed for the 2006 collapse which killed a motorist on her way to the airport is facing criminal prosecution, and while the penalties may not be severe under current law, the state attorney general contends that a conviction could help recover damages in civil litigation. A company spokesperson was quoted as saying, "The only reason that our company has been indicted is that unlike others implicated in this tragedy, we don't have enough money to buy our way out." Other companies involved in the $15 billion construction project are apparently negotiating with the state over costs associated with the collapse. *See The New York Times*, August 9, 2007; *Associated Press*, August 13, 2007.

< Back to Top

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LEGAL LITERATURE REVIEW

Spencer Weber Waller & Jillian Grady, "Consumer Protection in the United States: An Overview," *Strengthening the Consumer Protection Regime*, 2007

Loyola University of Chicago Law Professor Spencer Weber Waller and J.D. candidate Jillian Brady have authored an overview of U.S. consumer protection law for a forthcoming international anthology. The chapter addresses the decentralized nature of consumer protection law in this country and describes federal, state and private law mechanisms to punish deceptive and unfair conduct that results in consumer injury. The overview spans topics ranging from the federal agencies tasked with protecting consumers to state attorneys general, tort law and consumer associations that advocate on consumers' behalf. The authors contend that the U.S. system provides a depth and variety of protection not available in other jurisdictions with more centralized schemes.

< Back to Top

LAW BLOG ROUNDUP

Fen-Phen Lawyers Going to Jail

"For our money, there's little in this world more dramatic than when a judge gets tough with litigants – which might explain our inability to change the channel when we land on one of the myriad 'Judge Judy'-esque shows. But getting tough with lawyer-litigants really ups the ante." Reporter Ashby Jones, blogging about the Kentucky judge who revoked the bail of three plaintiff's lawyers accused of taking $64 million from the settlements they negotiated for their fen-phen clients.

blogs.wsj.com/law, August 13, 2007.

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When Judges Are Elected

"'What we are seeing now is the beginning of a very serious arms race.'" Staff at a Harvard-based blog, quoting the president of a business group involved in a recent report about the increasing influence of money in judicial elections. The median spent on candidates for judicial office in 2006 was nearly $250,000; the price tag for the race for Alabama chief justice topped out at $8.2 million. While business groups contributed twice as much to supreme court candidates as lawyers and unions combined, a Zogby poll of business leaders showed that 70 percent of those polled favor alternatives to judicial elections.

thesituationist.wordpress.com, August 13, 2007.

"Not a Bad System"

"I had a difficult year." Tony Mauro, *Legal Times* Supreme Court correspondent, quoting U.S. Supreme Court Justice Stephen Breyer, who referred to his many dissents during the Court's last term while speaking at the American Bar Association's annual meeting. Justice Breyer referred to his dissenting posture to emphasize the strength of the American legal system which keeps fundamental disagreements off the streets and in the courts.

Legaltimes.typepad.com/blt, August 12, 2007.

< Back to Top

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THE FINAL WORD

ABA Annual Meeting Participants Discuss Nanotech Health and Safety Issues

The *ABA Journal* reports that participants in an American Bar Association program dedicated to legal issues arising from nanotechnology found themselves discussing instead related health and safety matters and whether government regulators or industry researchers are or should be protecting consumers. Apparently, those attending the panel discussion during the ABA's annual meeting in San Francisco considered it a given that the use of nanotechnology in consumer products will ultimately raise "big legal problems." They learned about a petition filed in 2006 with the Food and Drug Administration calling on the agency to address the potential health and environmental risks of new products like sunscreen that contain nanotech ingredients. Filed by a Washington, D.C.-based nonprofit dedicated to analyzing the impact of technology on society, the petition has been described as the "first-ever legal challenge about the hazards of nanotechnology." Spokespersons for the agency and the nonprofit reportedly debated the issues during the panel discussion. An FDA task force has called for nanotechnology guidance for manufacturers and researchers; critics contend that its report "lacks urgency and fails to address oversight flaws and gaps." *See ABA Journal Law News Now*, August 12, 2007.

< Back to Top

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UPCOMING CONFERENCES AND SEMINARS

Charleston School of Law, Charleston, South Carolina – September 7, 2007 – "Punitive Damages, Due Process, and Deterrence: The Debate After Williams." Speakers include Shook, Hardy & Bacon Public Policy Partner **Victor Schwartz** who will address the topic "Looking Forward: Punitive Damages in the Next Two Decades – Guideposts From Precedent, History & Sound Public Policy."

Center for Business Intelligence, Washington, D.C. – September 24-25, 2007, "Global Data Security and Privacy Summit." Shook, Hardy & Bacon Pharmaceutical & Medical Device Litigation Partner **Madeleine McDonough** will discuss "Critical Privacy Issues in Electronic Document Discovery."

American Conference Institute, New York City, New York – December 12-14, 2007 – "12th Annual Drug and Medical Device Litigation" conference. Shook, Hardy & Bacon Pharmaceutical & Medical Device Litigation Partner **Harvey Kaplan** will serve on a panel that will discuss "Jury Communication: Changing Perceptions of the Industry/FDA and Putting Adverse Events and the Approval Process in Context."

< 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, 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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GLOBAL PRODUCT LIABILITY LAW FIRM OF THE YEAR 2005|2006|2007 WHO'S WHO LEGAL

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