Shook, Hardy & Bacon L.L.P.

Product Liability Litigation Report

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MDL PANEL TRANSFERS PHARMACEUTICAL CASES

The Judicial Panel on Multidistrict Litigation has transferred products liability cases pending in a number of federal district courts for consolidated pretrial proceedings. The cases involve **Fosamax**®, a prescription medication used in osteoporosis treatment.

Nineteen Fosamax® actions, involving common questions of fact, are pending in four different federal courts. On August 16, 2006, the panel concluded that transfer under 28 U.S.C. § 1407 would ensure that "common parties and witnesses are not subjected to discovery demands that duplicate activity that will occur or has already occurred in other actions." Merck & Co., Inc., which is one of the defending parties, had argued that centralization was unnecessary because the pending actions were filed in a limited number of districts and voluntary coordinating efforts would be preferable to transfer. The cases were transferred to the Southern District of New York where 15 of the 19 actions are pending. Multidistrict cases that are consolidated are generally sent back to their originating courts when pretrial proceedings have concluded.

NINTH CIRCUIT ALLOWS TRIAL OF CLAIMS ARISING FROM ACTS OCCURRING OUTSIDE THE UNITED STATES

The Ninth Circuit Court of Appeals has reinstated some claims filed under the Alien Tort Claims Act by residents of Papua New Guinea who alleged that they and their families were victimized by the mining operations and consequent civil conflict arising from international law violations committed in Papua New Guinea by Rio Tinto PLC, an international mining corporation. ***Sarei v. Rio Tinto, PLC*, No. 02-56390 (Ninth Circuit Court of Appeals, decided August 7, 2006)**.

The district court dismissed the claims in 2002, ruling that they presented "nonjusticiable political questions." And the U.S. Supreme Court issued a decision, *Sosa v. Alvarex-Machain,* 542 U.S. 692 (2004), that supported the district court's analysis while explaining the standards that would be applied in Alien Tort Claims Act cases. Nevertheless, in a split decision, a three-judge panel of the Ninth Circuit concluded that most of the plaintiffs' claims could be tried in the United States, rejecting the district court's nonjusticiable political questions and act-of-state doctrine holdings.

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SEVENTH CIRCUIT WEIGHS-IN ON CLASS ACTION FAIRNESS ACT INTERPRETATION

The Seventh Circuit Court of Appeals, joining two other federal circuits that have considered the matter, has ruled that plaintiffs seeking a remand of their removed actions to state court have the burden of establishing jurisdiction when the home-state and local controversy exceptions of the Class Action Fairness Act (CAFA) are implicated. The court grounded its holding on a plain reading of the statute. ***Hart v. FedEx Ground Package Sys., Inc.*, No. 06-2903 (Seventh Circuit Court of Appeals, decided August 9, 2006)**.

…plaintiffs seeking a remand of their removed actions to state court have the burden of establishing jurisdiction when the home-state and local controversy exceptions of the Class Action Fairness Act (CAFA) are implicated.

The court notes that CAFA clearly states that the district court "shall decline to exercise jurisdiction" in two circumstances, i.e., 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" and where the controversy is local in nature. Citing applicable U.S. Supreme Court precedent, the court determined that whenever the subject matter of an action qualifies it for removal to federal court, the burden is on the plaintiff to find an express exception to the general rule.

In so ruling, the court affirmed the district court's denial of the plaintiff's motion to remand on the basis of evidence showing that a number of the plaintiffs were not residents of the state in which the action was originally filed.

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MICHIGAN SUPREME COURT ISSUES ORDER TO STOP "BUNDLING" OF ASBESTOS-RELATED CASES

[T]he Michigan Supreme Court has issued an administrative order which provides that "no asbestos-related disease personal injury actions shall be joined with any other such case for settlement or other purposes, with the exception of discovery."

Finding objectionable "the practice of settling cases in which asbestos plaintiffs with symptoms and plaintiffs without symptoms are settled together," the Michigan Supreme Court has issued an **administrative order** which provides that "no asbestos-related disease personal injury actions shall be joined with any other such case for settlement or other purposes, with the exception of discovery."

Even though the order was effective August 9, 2006, the court is inviting public comments until December 1. Three justices filed written dissents; a concurring opinion, supported by four justices, cites an article co-authored by Shook, Hardy & Bacon Public Policy Partner **Mark Behrens** and Business Litigation Partner **Manuel Lopez** as support for the claim that unbundling such claims will "advance the interest of the most seriously ill asbestos plaintiffs whose interests have not always been well served by the present system, where available funds for compensation have been diminished or exhausted by payments of claims made by less seriously ill claimants." The article is titled "Unimpaired Asbestos Dockets: They Are Constitutional," 24 *Rev. Litig.* 253 (2005).

The dissenting justices were concerned that the order's effects were unknown and that it could place a significant financial burden on asbestos litigants.

The dissenting justices were concerned that the order's effects were unknown and that it could place a significant financial burden on asbestos litigants. One justice contended that the order "virtually ensures that justice will be so delayed for many diseased plaintiffs that they will never live to see their case resolved."

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NATIONAL ACADEMIES PRESS ISSUES REPORT ON *DAUBERT* STANDARDS

The National Academies convened an *ad hoc* committee of experts in the sciences and law to explore the impact of the U.S. Supreme Court's ruling in *Daubert v. Merrell Dow Pharm, Inc.,* 509 U.S. 579 (1993), which addresses the standards courts should apply in determining the admissibility of expert evidence. The committee has issued a **report**, titled "Discussion of the Committee on *Daubert* Standards: Summary of Meetings," *National Academies Press* (2006), in which it makes no recommendations but outlines areas that need further study.

Serving on the committee were such luminaries as Brooklyn Law School Professor Margaret Berger, Yale Law School Professor Judith Resnik and Doug Weed, M.D., of the National Cancer Institute. They noted the difficulties of proving causation in toxic tort cases, acknowledging that courts must decide such cases before the science is fully developed. "In the field of law," the report states, "it is sometimes difficult to square the legal standards of proof with the scientific standards of proof." Committee members, who met in January and March 2005, suggest further study regarding the role and responsibilities of scientists in the courtroom and curricula that should be developed in law, graduate and professional schools to encourage understanding of multidisciplinary issues.

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The National Academies, which include the National Academy of Sciences, the National Academy of Engineering, the Institute of Medicine, and the National Research Council, operate under a charter granted by the U.S. Congress.

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ALL THINGS LEGISLATIVE AND REGULATORY

Federal Agencies Propose $1.3 Billion Budget for Nanotechnology Research and Development

The National Nanotechnology Initiative, a collaborative program among 25 federal agencies, has submitted its fiscal year **2007 budget** to Congress. Among other projects for which the initiative is seeking funding is support for the development of nanotechnology standards through the American National Standards Institute and the International Organization for Standardization. The initiative's goals include (i) maintaining a world-class research and development program, (ii) facilitating technology transfer, (iii) developing a skilled workforce and supporting research infrastructure and tools, and (iv) supporting the responsible development of nanotechnology.

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The budget includes an executive summary, which notes that the Food and Drug Administration (FDA) has already approved several new nanotechnology-based biomedical device applications, including nanocomposites for orthopedic and dental applications. The Environmental Protection Agency will apparently continue to focus its nanotechnology research efforts on "the potential health and environmental implications of nanomaterials" as well as "increased efforts in the area of risk assessment and risk management needs for nanomaterials."

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In a related development, the FDA has formed a nanotechnology task force charged with determining regulatory approaches that will encourage the continued development of safe and effective FDA-regulated products using nanotechnology materials. The task force will be hosting a **public meeting** October 10, 2006, at which it hopes to learn about the kinds of new nanotechnology material products under development in the areas of foods, food and color additives, animal feeds, cosmetics, drugs and biologics, and medical devices. The FDA is also interested in learning about new or emerging scientific issues concerning the use of nanotechnology materials in FDA-regulated products. Written comments can be submitted until November 10. *See Federal Register,* August 11, 2006.

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LEGAL LITERATURE REVIEW

David Woods, "Company Witnesses: Fact or Expert Witness? – Or Both?," *For the Defense,* July 2006

Shook, Hardy & Bacon Products Liability Partner **David Woods** has published an article that explores corporate obligations under a Rule 30(b)(6) subpoena, whereby an opposing party seeks to depose a witness designated by the corporation as knowledgeable about a particular matter. Because employees no longer remain with a single company during their careers, it becomes more difficult to find someone who knows about the period at issue in the litigation. The courts, nevertheless, have imposed an obligation on corporations to prepare a knowledgeable witness even if one is not available, so Woods discusses the pros and cons of designating the company witness as either a fact witness or an expert.

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Laurel Harbour and Natalya Johnson, "Can a Corporation Commit Manslaughter? Recent Developments in the United Kingdom and the United States," *Defense Counsel Journal,* July 2006

In this article Shook, Hardy & Bacon Complex Litigation Partner **Laurel Harbour** and Products Liability Associate **Natalya Johnson** discuss the concept of holding corporations criminally liable for their conduct. Until the 1980s, U.S. courts considering the issue found no liability, either because the criminal offense had an element of intent or because the offense required the killing of one human being by another human being. Courts in Texas and Kentucky, however, have ruled that a corporation can be held criminally liable for manslaughter or criminally negligent homicide, and this trend continued into the 1990s.

According to the authors, corporate manslaughter legislation is pending in both the United Kingdom and the United States; they suggest that passage of such legislation, while unnecessary in light of extensive workplace regulatory schemes, will "complicate the already challenging task of corporate lawyers advising corporations on how to conduct themselves in relation to their managers, lower-level employees, and consumers of their products and services."

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Trio of Papers on CAFA Posted on Social Science Research Network

Three papers written by law school professors that have recently been made available online address issues raised by the Class Action Fairness Act. Writing in the *Tulane Law Review,* Law School Dean Edward Sherman provides an overview of the legislation and concludes that it is "the most significant change in class action practice since the 1966 amendment of Rule 23 and is likely to have considerable impact on how attorneys structure and conduct class actions." "**Class Actions After CAFA 2005," 80 *Tul. L. Rev.* 1593 (2006)**.

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In a paper to be published in an upcoming edition of the *Columbia Law Review,* Vanderbilt Law Professor Richard Nagareda discusses issues raised by aggregate litigation, including class action settlement pressures and the validity of provisions that either subject consumer disputes to mandatory arbitration or forbid class-wide arbitration proceedings. "**Aggregation and its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA," 106 *Colum. L. Rev.* (2006)**. He relates the debate over these topics to the emerging debate presented by choice-of-law principles that will apply to nationwide class actions by the Class Action Fairness Act.

University of Cincinnati College of Law Assistant Professor Adam Steinman has posted an article that discusses the conundrum created by Congress when it enacted the Class Action Fairness Act and provided that appeals from jurisdictional decisions must be made "not less than 7 days after entry of the order." "'**Less' is 'More'? Textualism, Intentionalism, and a Better Solution to the Class Action Fairness Act's Appellate Deadline Riddle," *U. Cinn. Research Paper Series*, No. 06-13**. The article notes the conflicting decisions that courts are reaching as they attempt to interpret this provision, but concludes that the Federal Rules of Appellate Procedure provide a reasonable "way out of this rabbit hole." The author contends that these rules require litigants to act within 30 days of the district court's order and should be applied to appeals under CAFA.

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LAW BLOG ROUNDUP

"It is now familiar, if still a scandal, that business decisions which would have been near-universally regarded as perfectly lawful at the time can retroactively be defined not only as giving rise to liability, but even as 'racketeering.'" Walter Olson, writer and senior fellow at the Manhattan Institute, responding to Judge Kessler's 1,653-page ruling in the federal government's racketeering case against cigarette manufacturers. Overlawyered.com, August 18, 2006.

"All law students and practicing lawyers would benefit from formal instruction in legislation and statutory interpretation."

"All law students and practicing lawyers would benefit from formal instruction in legislation and statutory interpretation." University of Minnesota Associate Professor of Law Jim Chen, commenting on "the worst pedagogical oversight in American legal education." Jurisdynamics.com, August 7, 2006.

"[I]n the case of non-economic 'compensatory' damages, which are often indistinguishable from punitive damages, consider the case of Carol Ernst, where [plaintiff's counsel] Mark Lanier was allowed to argue that the Ernsts were 'soulmates' who would be together 'forever,' but Merck could not point out that

Carol was the sixth Mrs. Ernst." Ted Frank, attorney and director, American Enterprise Institute Liability Project, noting that juries are often precluded from hearing facts favorable to defendants as he comments on a purported "disingenuous statement" made by one of the lawyers debating punitive damages in *The Wall Street Journal Online.* PointofLaw.com, August 15, 2006.

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THE FINAL WORD

ABA Delegates Adopt Resolutions on Privilege and Expert Discovery

During its annual meeting in Honolulu, the American Bar Association (ABA) adopted a number of resolutions of interest. Approved by a 207-137 vote, one vigorously debated resolution calls for the U.S. Supreme Court to adopt a rule that would provide a privilege for the draft reports of experts and communications between attorneys and their experts. The courts have apparently been inconsistent in ruling on this issue, and some litigators are seeking national uniformity. A less controversial resolution unanimously adopted by the House of Delegates calls for preservation of the attorney-client privilege and work product doctrine in connection with the audits of company financial statements.

Other measures approved in Honolulu call for procedural rules to allow parties to reassert privilege for inadvertently disclosed material, oppose bills pending in Congress that would create an inspector general for the federal judiciary, and encourage law firms to adopt alternatives to mandatory minimum billing requirements and consider compensation systems based on factors other than billable hours. *See U.S. Law Week* and *New Jersey Law Journal,* August 15, 2006; blog702.com, August 17, 2006.

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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, and food industries.

With 93 percent of its nearly 500 lawyers focused on litigation, Shook has the highest concentration of litigation attorneys among those firms listed on the AmLaw 100, *The American Lawyer's* list of the largest firms in the United States (by revenue).

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