Shook, Hardy & Bacon L.L.P.

Product Liability Litigation Report

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FEDERAL APPEALS COURT APPLIES BROAD DEFERENCE STANDARD TO CASE MANAGEMENT DECISIONS

The Ninth Circuit Court of Appeals has issued a ruling that accords district courts broad discretion in managing their multidistrict litigation dockets. *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 2006 WL 2474495 (Ninth Circuit Court of Appeals, decided August 29, 2006). The case involves an ingredient that was used in many decongestants and weight-control products until the Food and Drug Administration issued a public health advisory in 2000, warning that the ingredient increased the risk of hemorrhagic stroke.

The district court overseeing pretrial matters in the consolidated actions issued a number of case management orders designed to streamline discovery. Apparently, a number of plaintiffs either failed to provide or significantly delayed providing the information required by the orders, and the district court dismissed their claims as a sanction for the violations.

The Ninth Circuit affirmed in part and reversed in part, first outlining at length the standards that apply to a trial court's exercise of discretion when considering motions to dismiss for failure to comply with its orders. While the appeals court analyzed the issues pursuant to those standards, it gave greater deference to the district court, noting, "In sum, multidistrict litigation is a special breed of complex litigation where the whole is bigger than the sum of its parts. The district court needs to have broad discretion to administer the proceeding as a whole, which necessarily includes keeping the parts in line."

Regarding those claims the Ninth Circuit chose not to dismiss, the court determined that the "plaintiffs' delay in providing information that they had already given did not cause prejudice sufficient to warrant dismissal (as opposed to a different kind of sanction), especially in view of the public policy favoring resolution on the merits." These plaintiffs had filed complaints that they believed were in compliance with the case management orders, and when they realized they were mistaken, they "rectified their deficiencies within five weeks" of the order's due date. The court determined that their failure to comply was not prejudicial, because the information was already in the record, and thus, it was not necessary for them to file additional pleadings. A separate dissenting judge

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would have affirmed the dismissal of these complaints, stating "failure to make discovery required by a court order is not excused by the fact that the same information may be available elsewhere."

The majority reiterated its view about the expanded scope of discretion by concluding that the district court's decision "is necessarily informed, and broadened by the number of actions, their complexity, and its charge in the multidistrict context to promote the just and efficient conduct of actions that are coordinated or consolidated for pretrial purposes."

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THIRD CIRCUIT REJECTS FIFRA PREEMPTION ARGUMENT

The Third Circuit Court of Appeals has determined that products liability claims brought by blueberry farmers in New Jersey against a pesticide manufacturer are not preempted by a federal law that regulates pesticide labeling requirements. ***Mortellite v. Novartis Crop Protect., Inc.*, No. 03-3847 (Third Circuit Court of Appeals, decided August 21, 2006)**.

In so ruling, the court applied the principals set forth in *Bates v. Dow Agrosciences LLP*, 544 U.S. 431 (2005), where the U.S. Supreme Court considered similar claims brought under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). According to *Bates*, which involved peanut farmers who alleged crop damage from pesticides, while a jury verdict adverse to a product manufacturer might "induce" that manufacturer to change its label, it "should not be viewed as imposing a new labeling requirement in conflict with FIFRA." "Such an event," states the Third Circuit, "'merely motivates an optional decision' to change a label and therefore 'does not qualify as a requirement' to change a label," that would otherwise be preempted by federal law.

The court concluded that FIFRA does not preempt claims based on strict liability, negligent testing and breach of express warranty theories.

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DISTRICT COURT SENDS FRENCH AND ITALIAN PLAINTIFFS BACK TO HOME COURTS IN VIOXX LITIGATION

A federal district court in Louisiana, where products liability cases involving the anti-inflammatory drug Vioxx® have been consolidated for pretrial proceedings, has dismissed putative class claims filed by French and Italian litigants. ***In re Vioxx Prods. Liab. Litig.*, MDL No. 1657 (U.S. District Court, Eastern District, Louisiana, decided August 30, 2006)**.

The court rejected the plaintiffs' argument that their countries provided an inadequate forum for such litigation in that "these countries lack class action devices, employ fee-shifting, and prohibit lawyers from working on a contingency-fee basis." As the court noted, an alternative forum is inadequate only where it deprives the plaintiff of all remedies. Because the plaintiffs could readily bring individual actions, said the court, the foreign courts are not inadequate. The court also found that difficult access to foreign documents and witnesses would result in practical problems for American courts dealing with these claims. Also compelling to the court was that "trying Plaintiffs' claims in the United States

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risks disrupting the judgments of Italian and French regulatory bodies by imposing an American jury's view of the appropriate standards of safety and labeling on companies marketing and selling drugs in Italy and France."

Another public interest factor cited by the court was "the enormous volume" of Vioxx® cases pending in the federal courts. "[R]etaining jurisdiction over the purported classes of Italian and French residents would exacerbate any administrative difficulties that this Court may already be experiencing." The court conditioned its dismissal on the defendant submitting to service of process and jurisdiction in Italian and French forums and agreeing to satisfy any foreign judgment.

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ABA'S COMMITTEE ON PRODUCT LIABILITY LITIGATION COVERS NANOTECHNOLOGY IN SUMMER 2006 NEWSLETTER

Nanotechnology is the focus of the Summer 2006 *Products Liability* newsletter published by the American Bar Association's Committee on Products Liability Litigation. The authors define the nanometer as 1 billionth of a meter, so that "Manipulating materials in the size range of single digit nanometers to hundreds of nanometers, and utilizing the properties for new technologies and applications is the basis of the field of nanotechnology." According to the newsletter, end product applications of nanotechnology include consumer electronics, medical products, sports equipment, alternative energy, and food and beverages. The Committee on Products Liability Litigation also explores the potential legal implications arising from the manufacturing and application of nanotechnology, from human health and environmental concerns to regulatory and product liability issues. *See* Allyson Hartzell, et al., "Nanotechnology," *Products Liability* (Volume 17, Issue 3), Summer 2006.

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THREE FEN-PHEN PLAINTIFFS' LAWYERS SUSPENDED FOR TAKING EXCESSIVE FEES IN $200 MILLION LAWSUITS

The *Lexington-Herald Leader* has reported that the Kentucky Supreme Court temporarily suspended the law licenses of Lexington lawyers Melbourne Mills, Shirley Cunningham Jr. and William Gallion who are accused of misappropriating others' money for their own use or improperly dealing with that money. According to Linda Gosnell, chief bar counsel for the bar association, "They took $105 million and gave their clients $74 million." The suspensions are effective until further order of the court. *See Lexington-Herald Leader*, August 25, 2006.

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COURTS AND LEGISLATORS QUESTION LARGE-SCALE LITIGATION AGAINST SINGLE PRODUCTS

The Wall Street Journal Online has reported that mass torts and class action litigation against asbestos and silica manufacturers have been on the decline since judges and legislators began questioning the validity of numerous individual cases and the tactics plaintiffs' lawyers use to attract new clients. Several judicial and legislative factors appear to be responsible for dissuading new cases, including a federal judge's finding that tens of thousands of claims against silica companies were "manufactured for money" and a new tort-over-haul bill that facilitates moving class actions from state to federal courts, "where judges are more likely to dismiss dubious claims." *The Wall Street Journal* suggests that critics of mass-litigation say the system encourages law firms to "aggressively recruit plaintiffs with dubious claims, cutting into funds left for people who were truly harmed," while plaintiffs' attorneys argue that corporate negligence is a larger problem than isolated incidences of unscrupulousness. According to Geoffrey Miller, a New York University School of Law professor quoted in the piece, "The future of mass torts and class actions is very much in question." *See The Wall Street Journal Online*, August 26, 2006.

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ALL THINGS LEGISLATIVE AND REGULATORY

Memorandum of Understanding Assigns Nanotechnology Roles

The Food and Drug Administration recently **announced** that it had entered into a memorandum of understanding with the National Cancer Institute and the National Institute of Standards and Technology relating to emerging products based on nanotechnology. The parties have agreed to their respective roles, responsibilities and financial commitments "toward the goal of facilitating the development of nanotechnologies that constitute novel research tools and safer, more effective cancer therapies by establishing a framework for effective risk identification, assessment and evaluation of emerging products based on nanotechnologies."

Petitioners Seek FDA Black Box Warning on Antibiotics

A Washington, D.C.-based nonprofit representing consumer interests has filed a **petition** with the Food and Drug Administration (FDA), seeking warnings on antibiotics like Cipro® that contain fluoroquinolone. According to Public Citizen, the FDA's adverse event database contains numerous instances of tendon ruptures, tendonitis and other tendon disorders over a period of eight years purportedly associated with the use of such antibiotics.

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While the FDA already requires drug manufacturers to include a warning about tendonitis and tendon rupture risks on products containing fluoroquinolones, such warnings are simply listed in plain type along with other potential side effects. Public Citizen and the Illinois attorney general are requesting a black box warning to better alert physicians and patients of the alleged risk. The Illinois attorney general apparently submitted a similar petition to the FDA in 2005; its new letter, which accompanies Public Citizen's petition, seeks the status of FDA's review and whether any decision has been reached on its petition.

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LEGAL LITERATURE REVIEW

Gregory Keating, "Strict Liability and the Mitigation of Moral Luck," *USC Center in Law, Economics and Organization Research Paper*, August 2006

In this **article**, USC Law Professor Gregory Keating explores the concept of "moral luck," i.e., that responsibility is affected by factors beyond the control of the person held responsible. He contends that tort law is not entirely fair because two individuals can be equally negligent, but only the one who is unlucky enough to cause harm is held to account in a court of law. Keating suggests that strict liability is more fair than negligence liability by diminishing the role of moral luck "because it attributes accidents more collectively, and because it charges accidents to activities not to individuals." He concludes by stating, "In the 'world of activities,' strict enterprise liability protects our freedom of action, whereas fault liability heightens our exposure to unavoidable financial ruin. By substituting certain but manageable insurance premiums for unpredictable but potentially catastrophic losses strict liability enhances both liberty and security."

Keating suggests that strict liability is more fair than negligence liability by diminishing the role of moral luck "because it attributes accidents more collectively, and because it charges accidents to activities not to individuals."

Lonny Sheinkopf Hoffman, "The Lawsuit Abuse Reduction Act: The Legislative Bid to Regulate Lawyer Conduct," 25 *The Review of Litigation* 719, 2006

Based on a symposium presentation, this **article** discusses Rule 11 of the Federal Rules of Civil Procedure, which allows courts to impose sanctions for frivolous pleadings, and related reform legislation that is currently stalled in the U.S. Congress. According to University of Houston Law Center Professor Lonny Sheinkopf Hoffman, the Lawsuit Abuse Reduction Act (H.B. 420) would return Rule 11 to its 1983 status by mandating the imposition of sanctions whenever a violation occurs and eliminating current safe harbor provisions. The legislation would also apply to any state litigation involving interstate commerce. Professor Sheinkopf Hoffman contends that this bill represents an example of Congress "attempting to legislate procedure both in the federal and state courts" and constitutes an unusual departure because Congress does not generally involve itself in the regulation of lawyer conduct. Believing that current Rule 11 adequately addresses the issues, she suggests, "there are reasons to be dubious about these proposed changes to Rule 11."

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LAW BLOG ROUNDUP

Small Town Justice

"The problems now unfolding in Rio Grande City [characterized as a dusty Texas border town of 12,000] illustrate the unpredictable turns that litigation can take when the fates of large companies are decided in small-town courts." *Wall Street Journal* writer Ashby Jones, discussing Merck's challenge to a recent jury verdict in a Vioxx® case on the ground that one of the jurors not only knew the plaintiff, but had borrowed more than $5,000 from her.
wsj.com, August 31, 2006.

Pretrial Processes Win or Lose Cases

"Color me silly, but I love and respect written discovery during the pretrial process in American courts. Complex and hard-fought civil cases turn about 90 percent on the quality of the discovery questions and requests – both written questions and requests, and deposition questions – and the responses to them." Lawyer Dan Hull, responding to a judge's reference to interrogatories as "slick lawyer answers to lazy lawyer questions."
whataboutclients.com, August 25, 2006.

"Color me silly, but I love and respect written discovery during the pretrial process in American courts."

Daubert Goes Postal

"We are proud to be the first blog on the block to offer our own postage stamp. . . . True, at 90 cents a stamp, you're paying something of a premium. But you're also doing your part to promote sound standards for expert evidence." Philadelphia lawyer Peter Nordberg, announcing the launch of the "Blog 702" postage stamp.
daubertontheweb.com/blog702, August 25, 2006.

The Law as Sacred

"Americans expect a great deal from their courts. If we have some nasty and apparently insoluble social problem, we take it to the men in black robes and expect them to give us wonderful oracular solutions to our problems. . . . And of course, we surround our courts with this oracular mystique. The judges wear priestly robes. They emerge from within an inner sanctum in which they commune with the ineffable wisdom of the law." College of William and Mary Law School Assistant Professor Nate Oman, reflecting on Americans' reverence for the law.
concurringopinions.com, August 24, 2006.

"Americans expect a great deal from their courts. If we have some nasty and apparently insoluble social problem, we take it to the men in black robes and expect them to give us wonderful oracular solutions to our problems. . . . "

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Future Lawyers of America

"The U.S. has always been studying global warming to confirm its existence" and "They grew up with virtual pets to feed, water, and play games with, lest they die." University of Illinois College of Law Professor Lawrence Solum, listing facts about "undergraduates this year; law students in Fall 2010." legaltheoryblog.com, August 29, 2006.

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THE FINAL WORD

Consumer Product Companies Turning to "Netizens" to Solve Problems

According to a recent article, product manufacturers have begun to seek solutions to product development, packaging and marketing problems through the Internet. By means of Web site suggestion boxes and e-mail solicitations, companies are inviting recommendations about everything from packaging design to materials. In one instance, a hobbyist with particle physics expertise reportedly solved a packaging issue for Colgate-Palmolive Co. The article contends that "Every company of any size can profitably tap into the talent pool available in cyberspace" and "Prepare to seize upon 'netizens' expertise by clearly defining problems before you ask for solutions." What effect reliance on such recommendations may or may not have on liability issues is unaddressed. *See Trend Letter*, August 28, 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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