Shook, Hardy & Bacon L.L.P.

OCTOBER 22, 2009

PRODUCT LIABILITY LITIGATION REPORT

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THREE JUSTICES SIGNAL INTEREST IN CLASS NOTIFICATION ISSUE

According to two U.S. Supreme Court justices and the Chief Justice of the United States, where state law allows a trial court to impose class notification costs on a defendant simply because of its relative wealth and without considering the underlying merits of the case, "a serious due process question is raised." *DTD Enters., Inc. v. Wells*, No. 08-1407 (U.S., cert. denied October 13, 2009). Justice Anthony Kennedy authored the rare statement accompanying the certiorari denial; he was joined by Chief Justice John Roberts and the Court's newest member Justice Sonia Sotomayor.

The suit involved a contract action brought by a dating-referral service alleging that Janice Wells refused to make payments due. Wells responded by bringing a class action against the service. The class was certified, and the trial court ordered the service "to bear all the costs of class notification, on the sole ground (or so it appears) that petitioner could afford to pay and respondent could not." While the issue was interlocutory, and the three justices agreed that it was premature for the court to consider it, they deemed it "advisable, however to note that the petition for certiorari does implicate issues of constitutional significance."

According to the statement, "Where a court has concluded that a plaintiff lacks the means to pay for class certification, the defendant has little hope of recovering its expenditures later if the suit proves meritless; therefore, the court's order requiring the defendant to pay for the notification 'finally destroy[s] a property interest.'" Thus, the justices appear inclined to consider a challenge, in an appropriate case, to a court order requiring a party to pay the costs of class notification where the court has failed to consider the underlying merits of the class-action suit.

FIFTH CIRCUIT SPLITS OVER ADMISSIBILITY OF EXPERT TESTIMONY IN MED MAL LITIGATION

In a split decision that produced a vehement and sharply worded dissent, the Fifth Circuit Court of Appeals has denied a petition for rehearing and for rehearing en banc filed by plaintiffs whose favorable medical malpractice verdict was reversed by a Fifth Circuit panel, which determined that the trial court erred in excluding the testimony of an expert for the defendant. ***Huss v. Gayden*, No. 04-60962 (5th Cir., decided October 14, 2009)**. The testimony would have addressed whether a drug

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administered to the pregnant plaintiff caused her cardiomyopathy. The case has been remanded for a new trial, and the trial court judge has also apparently been instructed to consider whether the testimony of the plaintiffs' experts should be admitted, despite any objection to that testimony at trial.

Eight judges dissented from the rehearing denial and issued two separate dissenting opinions. Judge Patrick Higginbotham accused the eight members who voted to deny rehearing of abandoning their judicial roles and allowing "their private view on jury trials and the divisive issues of health care to guide their judicial hand." He called their stance "a stunningly aggressive view of the judicial role," "a seriously flawed view of the role of an en banc court" and "a rank preference of defendants in malpractice cases—a heavy thumb on the scale in the critical area of expert testimony." Higginbotham would have deferred to the trial court absent the commission of manifest error, which he did not find in the record.

The second dissenting opinion notes that the circuit now has three different admissibility standards, that is, (i) the trial judge *may* exclude the testimony of an unqualified expert; (ii) the trial judge *must* exclude the testimony; and (iii) the judge *must not* exclude the testimony. Judge Jennifer Walker Elrod would have reheard the case to resolve the apparent conflict.

APPEALS COURT RULES INTERNATIONAL AVIATION LAW DOES NOT PREEMPT APPLICATION OF INCONVENIENT FORUM RULES

The Eleventh Circuit Court of Appeals has upheld a district court's dismissal of claims arising from an airplane crash in Venezuela, finding that the 1999 Montreal Convention does not preempt the application of *forum non conveniens* by the federal courts. ***Bapte v. Newvac Corp.*, No. 07-15830 (11th Cir., decided October 8, 2009)**. The case involved plaintiffs who were not residents of the United States and defendants from Florida and Colombia. The court found that the case had been properly filed under the convention in a federal court in Florida and that the convention did not preclude application of *forum non conveniens* because it specifically provides that "[q]uestions of procedure shall be governed by the law of the court seised of the case." The appeals court agreed that *forum non conveniens* "is part of United States civil procedure," dismissing plaintiffs' argument that "because the convention does not specifically affirm the availability of forum non conveniens, it should not be permitted in cases arising under it."

Finding no preemption, the Eleventh Circuit also determined that the trial court did not err in ruling that relevant public and private interests weighed in favor of dismissal. The only issue at trial "is the amount of damages to which each Plaintiff is entitled," and with evidence and witnesses on this issue located in Martinique, the court determined that the courts there would provide a more convenient forum.

In a related development, the Ninth Circuit Court of Appeals has reportedly determined that a district court properly dismissed claims arising from the death of a U.S. citizen in a scuba diving incident off the coast of Mexico, ruling that *forum non conveniens* can be applied under the Death on the High Seas Act. *Loya v. Starwood Hotels & Resorts Worldwide, Inc.*, No. 07-35571 (9th Cir., decided October 2, 2009). According to the court, the law "neither explicitly, nor implicitly, rejects application of the doctrine of *forum non conveniens*." *See U.S. Law Week*, October 20, 2009.

MATTEL AGREES TO SETTLE CLAIMS INVOLVING HIGH LEVELS OF LEAD IN TOYS

Mattel, Inc. has reportedly agreed to provide refunds and the costs incurred for testing to families that bought toys made in China with dangerously high levels of lead. The tainted toys, withdrawn from the market in 2006 and 2007, include certain Sesame Street®, Dora the Explorer® and Diego® toys made by Fisher-Price, Inc., and certain Mattel toys such as Batman®, Polly Pocket®, Barbie® accessories, and Sarge® cars.

The cases, consolidated in late 2007 by the Judicial Panel on Multidistrict Litigation, were pending before Judge Dale Fischer of the Central District of California. If approved by the court, the class settlement would require Mattel and Fisher-Price to provide refunds totaling up to $10 million to consumers who purchased or acquired the toys, and reimburse families who had their children tested for lead up to a total of $600,000. Mattel would also reportedly implement a quality assurance program and donate $275,000 to a nonprofit association of 150 children's hospitals, medical center pediatric units and related health systems. *See Mealey's Personal Injury Litigation Report,* October 14, 2009.

HURRICANE VICTIMS SEEK SUMMARY JURY TRIALS FOR FEMA TRAILER SUITS

Lawyers for plaintiffs seeking damages from alleged exposure to harmful fumes in government-issued trailers after Hurricanes Katrina and Rita have reportedly asked a federal judge to order a pair of nonbinding "summary jury trials," or mock trials, as a possible prelude to settling hundreds of other similar claims. U.S. District Judge Kurt Engelhardt has yet to act on the request, which has apparently been given a cool reception from some defense lawyers who do not believe the cases are ripe for settlement or that the summary trials would save time and money.

A federal jury on September 24, 2009, ruled against a New Orleans family in the first of several "bellwether" trials that accuse trailer-makers of using inferior materials and methods to fill the Federal Emergency Management Agency (FEMA) demand for emergency housing and exposing people who lived in them to potentially dangerous chemicals. A handful of these claims were chosen from among hundreds to go to trial to help the New Orleans court test the merits and possibly settle other claims over formaldehyde exposure in FEMA trailers.

Summary jury trials offer another alternative to resolve cases; they typically last less than a day, cost much less than full trials on the merits and are governed by less-stringent procedural rules. Jurors are unaware that the parties are not bound by their verdict and, unlike regular trials, the proceedings and verdict can be kept confidential.

Plaintiffs' lawyers reportedly said in court papers that summary jury trials could be an efficient way of promoting a mass settlement and would avoid "spending multiple times more on a merits trial than the amount of recoverable damages." But some defendants' lawyers rejected the notion that a summary jury trial would save time and money. "If the plaintiffs and their counsel are concerned about the small value of their claims, this begs the obvious question—why did they bring the claims in the first place?," they asked in court papers. *See (Biloxi) Sun Herald,* October 12, 2009.

ALL THINGS LEGISLATIVE AND REGULATORY

Plan Calls for Open Internet Access to All Law Documents

Plans are reportedly under way that call for every primary legal document in the United States to be collected in an open-source government data repository on the Internet called Law.Gov. The Web site would be modeled after the federal government's Data.Gov, according to the plan's creator, Public.Resource.Org., a nonprofit group that will collaborate with legal and technology experts throughout the nation to create the site.

Judicial briefs and opinions; legislative reports, hearing documents and laws; and information about primary documents related to executive branch regulations, audits, grants, and other actions would be part of Law.Gov, the blueprint of which is apparently still under development and open for debate. "There is no one answer as to how the materials of our democracy should be provided on the Internet, but we're hopeful we're going to be able to bring together a group from both the legal and open-source worlds to help crack this nut," said Carl Malamud, head of Public.Resource.Org., which is focused on making public-domain documents widely accessible.

Public.Resource.Org plans to co-host workshops with academic and legal leaders in early 2010 that will be followed by a Law.Gov report submitted to lawmakers on the U.S. Senate Committee for Homeland Security and Governmental Affairs and other relevant bodies. Comments, reports and materials are welcome from all stakeholders to supplement the group's findings. *See Product Liability Law 360*, October 16, 2009.

LEGAL LITERATURE REVIEW

William Buzbee, "Preemption Hard Look Review, Regulatory Interaction, and the Quest for Stewardship and Intergenerational Equity," *George Washington Law Review*, 2009

Emory University School of Law Professor William Buzbee calls on the courts to impose a "hard look" standard when assessing whether agency pronouncements about the preemptive effect of their regulatory actions are valid. According to Buzbee, beginning in 2005, federal agencies were making such pronouncements "with little or no advance consultation, process, or opportunity for public input." Under these circumstances, the article contends, it is appropriate to subject the factual and policy judgments underlying agency preemptive power claims to stringent review to determine if the outcome is consistent with the public interest. The article explores in some depth whether a single regulator is always preferable to multiple regulatory actors at federal, state and local levels, sharing regulatory jurisdiction in addressing risks to human health and the environment. Buzbee concludes by suggesting, "In law, politics and markets, incentives to act for short-term, selfish benefits are always great. Those tendencies can be alleviated, although never eliminated, by requiring political actors, especially agencies, to act in open, transparent and deliberative ways."

Martin Redish, Peter Julian & Samantha Zyontz, "Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis," *Florida Law Review* (forthcoming)

This article discusses the origins of cy pres in the Roman law of trusts, considers how its use as a way to distribute unclaimed funds in class-action litigation presents "serious structural and constitutional problems," presents available empirical data about its use in federal courts, and concludes that it must be rejected in the context of the modern class action. The authors are most concerned that the use of cy pres "improperly transforms a bilateral dispute into a trilateral proceedings by introducing into the adjudicatory mix an uninjured third party [a charity with some relation to the subject matter of the dispute] who has no legitimate interest in the disposition of the suit." They also contend that the device can undermine "the due process interests of absent class members by disincentivizing the class attorneys in their efforts to assure the class wide compensation of victims of the defendant's unlawful behavior" and "fosters the pathological aspects of modern class action jurisprudence, including unconstitutional settlement classes and highly dubious 'faux' class actions."

Steven Shavell & A. Mitchell Polinsky, "The Uneasy Case for Product Liability," *Harvard Law School Discussion Paper* No. 647, September 2009

Professors of law and economics at Harvard Law School and Stanford Law School suggest in this article that the limited benefits and high costs of product liability may make it "socially undesirable." According to the authors, "The essence of our argument is that the three beneficial effects of product liability—inducing firms

to improve product safety, causing prices of products to reflect their risks, and providing compensation to injured consumers—are likely to be outweighed by the expenses of resolving product liability cases." The article explains that market forces and product safety regulations provide sufficient inducements for manufacturers to make safe goods and that consumers are usually adequately compensated by insurance for their injuries. The professors contend that the costs of litigating product cases exceed what plaintiffs can recover and so increase the cost of making some products, such as vaccines, that fewer consumers can afford to buy them. They call for the elimination of product liability "at least for widely sold products."

LAW BLOG ROUNDUP

Lacking Intermediate Appellate Courts, West Virginia Is Only State to Deny Right to Appeal

"Trial judges' decisions in West Virginia are highly unlikely to be subject to appellate court review. There is no intermediate court of appeals. The state's highest court, the Supreme Court of Appeals, requires that three of its five Justices agree for the Court to take a case. In most cases, the Court declines to do so." Shook, Hardy & Bacon Public Policy Partner Victor Schwartz, guest blogging about a hearing recently conducted before West Virginia's new Independent Commission on Judicial Reform to consider views on establishing an intermediate appellate court in the state. While some witnesses apparently expressed concern about potential costs of creating the court, others stressed the need for appellate review in civil and criminal cases. Favoring this judicial reform, Schwartz noted, "We all can benefit from having someone review our work."

TortsProf Blog, October 20, 2009.

Changes Wrought by Consumer Product Safety Law Amendments Still Rankle

"More background reading on the Draconian consumer product safety law." Senior Manhattan Institute Fellow Walter Olson, introducing a list of articles and blogs critical of the Consumer Product Safety Improvement Act of 2008. Commentators remain concerned about its potential effects on secondhand toy sellers, small businesses and overseas companies that supply quality toys in the United States.

Overlawyered.com, October 19, 2009.

Consumer Advocates Remain Cautious About New OIRA Director

"It was a good meeting, and we pledged to keep in touch as he undertakes what I hope will be a re-education that will covert his staff from the Bush mode—serving as a sort of waiting room for disgruntled industries—to what we hope will be the Obama mode—serving as a group of visionary economists that identifies the toughest problems holding back desperately needed protections for workers, the

public, and the environment, and then moving to make sure the regulatory structure does something about them." University of Maryland School of Law Professor Rena Steinzor, discussing a meeting with Cass Sunstein, the new director of the Office of Information and Regulatory Affairs (OIRA), which reviews the regulatory activities and initiatives of federal agencies. Steinzor, who also serves as president of the Center for Progressive Reform, referred to a center report "that was critical of [Sunstein's] views on cost-benefit analysis. So I give him credit for opening the door to us, and so soon after his confirmation at that."

The Pump Handle, October 20, 2009.

THE FINAL WORD

Federal Judicial Center Releases Results of Survey on Discovery Issues

At the request of the Judicial Conference's Advisory Committee on Civil Rules, the Federal Judicial Center has prepared and released a preliminary report on the results of its survey of attorneys involved in recently concluded civil cases as to discovery activities and costs, procedural reform attitudes and case management issues.

Titled "Federal Judicial Center National, Case-Based Civil Rules Survey," the report found (i) the courts adopted a discovery plan in more than 70 percent of the respondents' cases; (ii) electronically stored information (ESI) was at issue during more than 30 percent of discovery planning conferences, and ESI production problems arose in about one-fourth of the cases in which ESI was requested; (iii) the most common disputes that required referral to the courts involved the burdens of ESI production; (iv) while costs of discovery ranged from $1,600 to $280,000 for plaintiffs and $5,000 to $300,000 for defendants, median costs were nearly four times higher for plaintiffs in cases involving ESI discovery and nearly three times higher for defendants where ESI discovery occurred; and (v) lawyers representing defendants tend to favor raising pleading standards, and lawyers representing plaintiffs tend to disfavor this type of reform.

The survey was sent to more than 5,600 attorneys who were involved in a random sampling of about 3,500 cases terminated in the last quarter of 2008, and about half responded. The results are preliminary and will be further refined for the advisory committee to consider during a May 2010 conference on civil litigation at Duke University Law School.

UPCOMING CONFERENCES AND SEMINARS

American Conference Institute, Chicago, Illinois – October 26-27, 2009 – "Food-Borne Illness Litigation, Advance Strategies for Assessing, Managing & Defending Food Contamination Claims." Shook, Hardy & Bacon Pharmaceutical & Medical Device Litigation Partner Madeleine McDonough, originally scheduled to participate

in a discussion on "Global Food Safety: Factoring in New Threats Associated with Foreign Food Product Imports," will be replaced by Shook, Hardy & Bacon Pharmaceutical & Medical Device Litigation Partner **Paul La Scala**.

The Kansas Law Review is offering a **symposium** titled "Aggregate Justice: Perspectives Ten Years After *Amchem*" on October 30, 2009, at the University of Kansas School of Law, Lawrence, Kansas. Featured speakers well-known in the field of aggregate litigation include Tom Willlging, senior researcher at the Federal Justice Center, and Linda Mullenix, who holds the Rita and Morris Atlas Chair in Advocacy at the University of Texas School of Law.

The symposium will use *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), as a springboard to explore present and future aggregate litigation. No reservations are required to attend the free symposium.

Shook, Hardy & Bacon, Webcast — November 4, 2009 – **"California's Electronic Discovery Act: What the New Rules Are and How to Navigate Them Effectively."** Presented by Shook, Hardy & Bacon, this conference will provide details about California's eDiscovery law as well as tips on applying its new requirements. Speakers for this complimentary CLE program are Shook, Hardy & Bacon Tort Partner **Amor Esteban** and Tort Associate **Amir Nassihi**.

American Conference Institute, New York, New York – December 8-10, 2009 – "14th Annual Drug and Medical Device Litigation Conference." Co-sponsored by Shook, Hardy & Bacon, this conference features a distinguished faculty from the bench, bar and industry offering practical insights and strategies for successfully meeting the litigation challenges facing the drug and medical device industry. Shook, Hardy & Bacon Pharmaceutical and Medical Device Litigation Partner **Michelle Mangrum** will serve on a panel discussing "Successfully Asserting a Preemption Defense and Managing Industry/FDA Relationships in a Post-*Levine* and Post-*Riegel* World." Shook, Hardy & Bacon Pharmaceutical and Medical Device Litigation Partner **Eric Anielak** joins a panel addressing "Procedural Strategies for Winning Cases." ■

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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.

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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).