Shook, Hardy & Bacon L.L.P.

Product Liability Litigation Report

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FEDERAL COURT DISMISSES GOVERNMENT CLAIMS AGAINST MAKERS OF COLD REMEDIES

A federal court in Arkansas has dismissed claims filed by several counties against the makers of cold remedies containing ephedrine and pseudoephedrine, chemicals used to produce the illegal drug methamphetamine. *Independence County v. Pfizer, Inc.*, No. 1:07CV00033 (U.S. Dist. Ct., E.D. Ark., N. Div., decided February 11, 2008).

Suing under theories of deceptive trade practices, public nuisance, unjust enrichment, and violation of a state drug law, the counties sought to recover for the costs of dealing with the problems caused by the illegal manufacture and use of methamphetamine. The counties incur such costs to treat addicted users, investigate crimes committed by users, investigate and eradicate the manufacture and use of methamphetamine, treat children exposed to the drug and neglected by addicted care givers, and clean up the toxic and potentially explosive labs where the drug is manufactured. According to plaintiffs, the defendants knew "at least since 1986 that ephedrine and pseudoephedrine from their products are used to make methamphetamine, and that Defendants could have taken steps on their own to impede or eliminate the use of their products in the manufacture of methamphetamine." Plaintiffs further alleged that defendants knew how to make effective cold remedies without ephedrine or pseudoephedrine and that "but-for Defendants' products, the methamphetamine problem would not be of the scale that it is today."

The court analyzed the elements of each cause of action alleged and found that plaintiffs could not succeed on any of them. As to purported violations of the Arkansas Deceptive Trade Practices Act, the court determined that defendants could not be held liable because the law applies to trade practices and nothing in the record showed that defendants' trade practices, which conformed to federal regulations for the manufacture and distribution of products containing ephedrine and pseudoephedrine, were unconscionable. The court further found a lack of causation and remoteness of the injury given the intervening criminal acts of third parties.

The court determined that plaintiffs could not prevail on a public nuisance theory because Arkansas law recognizes ownership of land as an element of this cause of action and the defendants "do not own the land on which the alleged nuisance occurred." Addressing the defendants' alleged violation of a

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state law making it "unlawful for a person to sell, transfer, distribute, or dispense any product containing ephedrine … if the person sells, transfers, distributes, or dispenses the product with reckless disregard as to how the product will be used," the court ruled that this law did not apply to defendants because it was intended to apply "to distribution to persons having the intent to manufacture methamphetamine." The defendants distributed their products only to licensed or registered entities, and "nothing in the record indicates an intent to manufacture methamphetamine on the part of those entities."

Stating that "Defendants exercised their legal right in choosing to sell their products," and thus "did not violate public policy or the law," the court found that "the 'unjust' element of unjust enrichment is not satisfied," and plaintiffs could not prevail on this claim. The court granted defendants' motion for judgment on the pleadings and dismissed the case with prejudice. Shook, Hardy & Bacon Pharmaceutical & Medical Device Litigation Partner **Andy See** and Associate **Bill Northrip** represented the defendants in this matter.

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FEDERAL COURT ASKS STATE COURT IF BYSTANDER CAN RECOVER UNDER STRICT LIABILITY

The Third Circuit Court of Appeals has certified a question to the Pennsylvania Supreme Court to clarify whether that state recognizes a cause of action in strict liability brought by someone who was not a consumer or intended user of the product. ***Berrier v. Simplicity Mfrg., Inc.*, No. 05-3621 (3d Cir., question certified January 17, 2008)**. The question arises in a case involving injury to a 4-year-old whose grandfather accidentally backed over her foot while using his riding lawnmower. Her parents filed a lawsuit in Pennsylvania raising strict products liability and negligence claims. The defendant removed the case to federal court on the basis of diversity and moved for summary judgment on both claims. The district court granted its motion and dismissed the case, and plaintiffs appealed.

According to the appeals court, the district court held that the child could not recover under Pennsylvania law because she was not an "intended" user of the lawnmower. Exploring the cases on which the district court relied, the appeals court "was persuaded that the proper scope of strict liability remains unresolved where a bystander, who is neither a 'user' nor a 'consumer' of an allegedly defective product, is injured when that product is being used as intended." While the Pennsylvania courts have noted that negligence principles, such as foreseeability, have no place in products liability law, recent decisions have expressed a concern about "substantial deficiencies in present strict liability doctrine" needing overhaul by the state's supreme court.

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TENNESSEE COURT RULES CLASS ACTIONS NOT AVAILABLE UNDER CONSUMER PROTECTION LAW

The Tennessee Supreme Court has determined that a class action may not be certified under the Tennessee Consumer Protection Act. ***Walker v. Sunrise Pontiac-GMC Truck, Inc.*, No. 2006-01162 (Tenn., decided February 13, 2008)**.

The issue arose in a case involving alleged misrepresentations in the negotiation and sale of motor vehicles. According to the court, the consumer protection law allows any person to "bring an action *individually* to recover actual damages." Although the state legislature amended the law in 1991 to remove the phrase "but not in a representative capacity," the court did not construe that change as a modification of the plain meaning of the term "individually." The court noted that the consumer protection laws of several other states specifically allow class actions; they include California, Connecticut, Missouri, and Texas.

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WELDING FUME LITIGANTS DISMISS MEDICAL MONITORING CLAIMS

Sixteen welders without injury who sought medical monitoring in the multidistrict welding fumes product liability litigation have filed a motion for voluntary dismissal without prejudice. *In re: Welding Fume Prod. Liab. Litig.,* MDL No. 1535 (U.S. Dist. Ct., N.D. Ohio, motion filed February 6, 2008). In September 2007, the court refused their request to certify class claims for medical monitoring, finding that the large size of the purported class, "the differences in defendants' conduct, and the variable working environments in which all of the welder plaintiffs performed," made class certification "inappropriate." The court asked the welders how they wished to proceed, and this filing indicates that, while they are withdrawing their individual and class claims for medical monitoring, because 11 of the 16 "have manifested injuries," some will be participating in a "tolling agreement" with the defendants. They made their dismissal request "without prejudice to Plaintiffs' right to be included in any medical monitoring class or subclass certified by this Court or any other court for which they satisfy the class definition." Injured plaintiffs in this MDL litigation allege that the manganese in welding fumes to which they were exposed has caused various neurological impairments including Parkinson's disease.

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THINKING GLOBALLY

United States Files *Amicus* Brief in Alien Tort Claims Act Litigation

The U.S. government has asked the U.S. Supreme Court to grant *certiorari* in a case filed against a number of multinational corporations alleging they aided and abetted the system of apartheid imposed by the former South African government. ***Am. Isuzu Motors, Inc. v. Ntsebeza*, No. 07-919 (U.S., *amicus* brief filed February 11, 2008)**. Alleging injury under the Alien Tort Statute, plaintiffs claim that the defendant corporations provided "resources, such as technology, money and oil, to the South African government," which resources were used to oppress and persecute the African majority. The plaintiffs allege "violations of international law norms as to apartheid, forced labor, genocide, torture, sexual assault, unlawful detention, extrajudicial killings, war crimes, and racial discrimination," contending that the defendants "aided and abetted the apartheid regime in the commission of these violations."

A federal district court dismissed the lawsuit, ruling that aiding and abetting claims cannot be brought under the statute, which allows aliens to file claims

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in U.S. courts "for a tort only, committed in violation of the law of nations or a treaty of the United States." The court of appeals reversed, and the U.S. government contends, in its brief in support of defendants' request for review by the U.S. Supreme Court, "The court of appeals' decision allows an unprecedented and sprawling lawsuit to move forward and represents a dramatic expansion of U.S. law that is inconsistent with well-established presumptions that Congress does not intend to authorize civil aiding and abetting liability or extend U.S. law extraterritorially." The government brief further argues that the litigation touches on "an area fraught with foreign relations perils," and would "invite lawsuits challenging the conduct of foreign governments toward their own citizens in their own countries – conduct as to which the foreign states are themselves immune from suit – through the simple expedient of naming as defendants those private corporations that lawfully did business with the governments."

Attached to the brief is correspondence from the governments of Great Britain, Germany and Switzerland, objecting to the court of appeals' decision and expressing concerns about interference with other nations' sovereignty and possible commercial repercussions. According to the Swiss government, those perpetrating human rights violations should be held criminally accountable, but "[i]nternational law does not recognize the principle of universal civil jurisdiction over the foreign conduct of foreign defendants not affecting the forum State, unless the States involved have expressly consented to it."

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Thomas Rowe, Jr., "State and Foreign Class-Action Rules and Statutes: Differences From – and Lessons For? – Federal Rule 23," *Western State University Law Review* (forthcoming 2008)

Duke University School of Law Professor Thomas Rowe, Jr., who once served on the federal Advisory Committee on Civil Rules, has authored this comparison of federal, state and foreign class action rules to illustrate their variations and suggest that any changes to the federal rules should be made only after discovering how class action litigation is proceeding in jurisdictions with different provisions. Rowe has apparently found three significant variations, i.e., (i) some states do not have a "typicality" requirement; (ii) several states and foreign jurisdictions "do not apply the requirement of Federal Rule 23(b)(3) that common issues predominate over individual ones"; and (iii) a number of states have loosened the notice requirements in common-question class actions. The article concludes, "Deeper research, particularly empirical investigation of experience under major alternatives, would be well advised before opening what could be called Pandora's boxes when it comes to significant changes in familiar language."

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ALL THINGS LEGISLATIVE AND REGULATORY

Congress Poised to Give Consumer Product Safety Commission More Authority

Democratic and Republican Senators have reportedly reached an agreement on consumer product safety legislation that would expand the authority of the Consumer Product Safety Commission (CSPC) and provide it with more funding. Apparent impediments to agreement were provisions on state

attorneys general enforcement powers, recoveries for whistleblowers, penalty caps, and public information disclosures. The bill that will be brought to the Senate floor after the Presidents' Day recess will differ in some respects from the measure approved by the House in late 2007; the Senate proposal will allow the states to seek injunctive relief only, provide some whistleblower protections and increase penalties on product manufacturers that fail to comply with product safety requirements. The Senate compromise will also reportedly require the CPSC to create a database listing death, injury and illness reports and will allow the agency to disclose industry-provided information where public health and safety are in jeopardy. *See Congress Daily PM*, February 15, 2008.

In a related development, a watchdog organization called OMB Watch has issued a **report** detailing how cuts in budgets and personnel have hamstrung the CPSC in the decades since it was created to protect the public from product risks and reduce the injuries and fatalities allegedly caused by dangerous consumer products. Titled, "Product Safety Regulator Hobbled by Decades of Negligence," the report shows how the agency's budget has been cut by nearly 40 percent since 1974, when adjusted for inflation, and how staffing levels have fallen below 400 from a high of 469 employees. The report also tallies injuries and fatalities from toys, noting that the rate has reached 600 per day. OMB Watch concludes, "In his FY [fiscal year] 2009 budget request released Feb. 4, [President] Bush proposed level funding for the agency, a budget cut when adjusted for inflation. It will now be up to Congress to decide its commitment to increasing CPSC resources during what will likely be a contentious appropriations battle this fall."

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LEGAL LITERATURE REVIEW

Mark Geistfeld, "Punitive Damages, Retribution, and Due Process," *Southern California Law Review* (2008)

Observing that the U.S. Supreme Court has yet to assess the constitutionality of a punitive damages award in the context of cases involving serious bodily injury or death, Law Professor Mark Geistfeld suggests that using government data and methodology to establish the value of fatal risks can justify a punitive damages award in cases like *Philip Morris USA v. Williams* where the punitive damages were 97 times greater than the compensatory damages. Without reaching the constitutional due process issues, the U.S. Supreme Court reversed the award and remanded the case, finding error in the jury instruction on punitive damages, and Oregon's supreme court has since upheld the award. Geistfeld analyzes the retributive function of punitive damages at length and argues that such awards can vastly exceed the inadequate compensatory damages awarded in a given case without offending substantive or procedural due process.

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Chris Guthrie, et al., "Blinking on the Bench: How Judges Decide Cases," *Cornell Law Review* (forthcoming 2008)

The authors of this article, two law professors and a federal court magistrate, consider the decisions rendered by trial court judges and find that they tend to decide cases intuitively, a process that can lead to erroneous decisions. They

suggest that giving judges more time to make certain decisions, requiring more written opinions, providing more training opportunities and feedback, and allowing judges to use more scripts, checklists and multifactor tests could "increase the likelihood that judges will make more deliberative decisions." The authors acknowledge that such reforms would tend "to make decision making more costly or time consuming," but contend that "gains in accuracy" could justify such costs.

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LAW BLOG ROUNDUP

The $54 Million Claim: A Surefire Way to Get Attention?

"It's official. The infamous drycleaning flap – dubbed here The Great American Pants Suit – has become the benchmark for audacious litigation in this, our litigation nation. Have you been wronged? Need to get the attention of your antagonist (or the media)? Don't fret, just sue – for *exactly* $54 million." Former litigator and *Wall Street Journal* law blogger Dan Slater, discussing a new lawsuit, seeking damages for a lost laptop computer, that mimics a lawsuit which generated many headlines by claiming $54 million in damages for a lost pair of pants at a drycleaning establishment. The laptop plaintiff apparently sought the startling damages for her lost files to attract media attention.

WSJ Blog, February 14, 2008.

"Have you been wronged? Need to get the attention of your antagonist (or the media)? Don't fret, just sue – for exactly $54 million."

Oregon Court Criticized for Upholding Punitive Damages Award

"While Sebok finds it unlikely that the U.S. Supreme Court will grant *cert*. in this case for the third time, he expresses his hope that the USSC will GVR [grant, vacate and remand] the case because '[t]hat would be a fitting response to a state court that seems to think that winning is the only thing that matters.'" Law Professor Sheila Scheuerman, blogging about a *Findlaw.com* article critical of the Oregon Supreme Court's decision to uphold the punitive damages awarded in a smoking and health case. According to *Findlaw* columnist Anthony Sebok, the grounds on which the state high court affirmed the award "had never been previously identified" in its two earlier decisions, both of which were reversed by the U.S. Supreme Court.

TortsProf Blog, February 19, 2008.

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THE FINAL WORD

Acting CPSC Chair Calls on Toymakers to Remove Lead from Their Products

Demanding that "this problem must be fixed," Nancy Nord, acting chair of the Consumer Product Safety Commission, reportedly insisted that toy makers and retailers take additional steps to ensure that lead is eliminated from toys. According to a news source, Nord claimed during an appearance before

the annual American International Toy Fair, that the agency "will be relentless with recalls." She apparently called on manufacturers to audit their factories and said that retailers must also do more to prevent the sale of tainted toys to the public. The agency has been working with the Toy Industry Association to adopt more stringent safety regulations, and the association's board of directors has reportedly approved a proposal for testing and safety verification, including design-hazard analysis procedures, manufacturing process control auditing and third-party safety testing. *See CNNMoney.com*, February 18, 2008.

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UPCOMING CONFERENCES AND SEMINARS

Food & Drug Law Institute (FDLI) & FDA, Washington, D.C. – March 26-27, 2008 – "FDLI's 51st Annual Conference," Shook, Hardy & Bacon Pharmaceutical & Medical Device Litigation Partner **Madeleine McDonough** will serve on a panel discussing "Clinical Trials: Developments in Human Subject Protection." Other confirmed speakers include U.S. Supreme Court Justice Antonin Scalia, and Food & Drug Administration Commissioner Andrew von Eschenbach.

American Bar Association, Phoenix, Arizona – April 9-11, 2008 – "2008 Emerging Issues in Motor Vehicle Product Liability Litigation," Shook, Hardy & Bacon Tort Partner **H. Grant Law** will make opening remarks and moderate a panel discussion about issues that manufacturers must address when they evaluate the claims filed against them. Shook, Hardy & Bacon Class Actions and Complex Litigation Partner **Tammy Webb** will discuss "Recent Trends in Automotive Class Actions."

DRI, New Orleans, Louisiana – May 1-2, 2008 – "Drug and Medical Device Seminar," Shook, Hardy & Bacon Pharmaceutical & Medical Device Litigation Partner **Scott Sayler** will chair the program, and Pharmaceutical & Medical Device Litigation Partner **Marie Woodbury** will present a session titled "Crossing Borders and Seas – International Regulatory Events and Their Impact on United States-Based Litigations and Trials."

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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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