Shook, Hardy & Bacon L.L.P.

Product Liability Litigation Report

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U.S. SUPREME COURT DECIDES *FORUM NON CONVENIENS* ISSUE

The U.S. Supreme Court has determined that federal courts may dismiss a case on *forum non conveniens* grounds before considering whether they have jurisdiction, if a foreign tribunal is a more suitable forum for resolving a dispute's merits. ***Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, No. 06-102 (U.S. Supreme Court, decided March 5, 2007)**.

Malaysia International sued Sinochem in a U.S. district court while related court proceedings were pending in a Chinese court. The district court determined that it had subject-matter jurisdiction over the dispute and conjectured that limited discovery might show that it had personal jurisdiction over the defendant. Regardless, the court dismissed the case on *forum non conveniens* grounds, finding that the matter could be adjudicated adequately and more conveniently in the Chinese courts. A divided Third Circuit Court of Appeals reversed, reasoning that the trial court must first rule on its jurisdiction. The U.S. Supreme Court decided to take the appeal to resolve a conflict among the circuits over the issue.

Writing for the unanimous court, Justice Ruth Bader Ginsburg described *forum non conveniens* as "a threshold, nonmerits issue" that "does not entail any assumption by the court of substantive 'law-declaring power.'" Because a court need only establish jurisdiction if it proposes to issue a judgment on the merits, the court held that "[a] district court … may dispose of an action by a *forum non conveniens* dismissal, bypassing questions of subject-matter and personal jurisdiction, when considerations of convenience, fairness, and judicial economy so warrant." She characterized *Sinochem* as a "textbook case for immediate *forum non conveniens* dismissal" and stated that "where subject-matter or personal jurisdiction is difficult to determine, and *forum non conveniens* considerations weigh heavily in favor of dismissal, the court properly takes the less burdensome course." The Court reversed the Third Circuit's judgment.

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CAFA APPLICATION AT ISSUE IN TWO NINTH CIRCUIT OPINIONS

The Ninth Circuit Court of Appeals has considered questions arising under the Class Action Fairness Act of 2005 (CAFA) in two recent decisions. ***Progressive West Ins. Co. v. Preciado*, No. 06-17367 (9th Cir., decided March 6, 2007)**, and ***Lowdermilk v. U.S. Bank Nat'l Ass'n*, No. 06-36085 (9th Cir., decided March 2, 2007)**.

In *Progressive West,* the court determined that a complaint and cross-complaint filed in state court before CAFA went into effect on February 18, 2005, cannot be removed to federal court under CAFA. So ruling, the court discussed the state's "relation back" doctrine which can, in limited circumstances, deem an amended action commenced as of the date of the original filing. Here, the defendant/cross-complainant amended his complaint after CAFA's effective date, and the plaintiff argued that the amendment commenced a new action that substantially changed the nature of the action from an individual action to a representative action which should not "relate back" to the earlier filing. The court disagreed and also ruled that even if CAFA were applicable, the district court correctly remanded the action to state court because Progressive West, as a plaintiff/cross-defendant, is not authorized to remove an action under CAFA.

In *Lowdermilk*, a split circuit panel ruled that when a plaintiff has pleaded damages less than the jurisdictional amount, the party seeking removal must prove with "legal certainty" that the amount in controversy is satisfied to successfully remove the case to federal court under CAFA. The case involved employment law issues and alleged that "the aggregate total of the claims pled herein do not exceed five millions dollars." Specifically, the plaintiff claimed, on behalf of a class of employees, that the defendant rounded down actual hours worked, which practice resulted in employees not being compensated for one to five minutes of the time they worked each day.

By adopting the "legal certainty" standard, rather than the preponderance standard that defendant championed, the court joins the Third Circuit and "guard[s] the presumption against federal jurisdiction and preserve[s] the plaintiff's prerogative, subject to the good faith requirement, to forego a potentially larger recovery to remain in state court." The court further determined that because state law provided for the payment of attorney's fees in employment litigation, it would include the fees in determining the amount in controversy. Because the defendant "left [the court] to speculate as to the size of the class, the amount of unpaid wages owed due to the rounding policy, and whether or not members of the class qualify for penalty wages," the court held that it had failed to prove with legal certainty that the amount in controversy meets CAFA's jurisdictional requirements. The dissenting judge contended that new law was not required to decide the case, claiming that the complaint did not plead a specific amount in controversy, and thus, required the court to apply the preponderance standard.

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AUTO DEFECT CASE GOES TO JURY WITH *WILLIAMS* INSTRUCTIONS ON PUNITIVES; $50 MILLION AWARDED

A Los Angeles jury was reportedly given instructions that accounted for the U.S. Supreme Court's recent ruling in *Philip Morris USA v. Williams,* and returned a punitive damages verdict against DaimlerChrysler for $50 million. The case involved an unoccupied 1992 Dodge Dakota pickup truck that purportedly shifted into reverse due to a safety defect and ran over the plaintiff's decedent after he left the vehicle believing the transmission was in park; he suffered fatal head injuries. The jury rendered a compensatory award of $5.2 million for wrongful death. The defendant contends that a state statute does not allow a punitive award in such cases, and it intends to appeal. Nevertheless, plaintiffs' attorneys are reportedly pleased that a large punitives verdict can be obtained even when a court instructs a jury that it may not punish a liable defendant for injuries to persons who are "strangers to the litigation." Additional details about the Williams case appear in the March 1 issue of this Report. *See The Recorder,* March 12, 2007.

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POTENTIAL CONFLICTS WHEN DEFENSE FIRMS REPRESENT PLAINTIFFS

In this article on contingency-fee legal work, *The Wall Street Journal's* Nathan Koppel examines the potential conflicts facing firms that venture resources representing plaintiffs in cases with the potential for large punitive damages, but risk alienating senior counsel and corporate clients in the process. The trend, which can be lucrative, has challenged the legal philosophy, financial strategy and workplace dynamic of traditional corporate firms. As one lawyer is quoted as saying, contingent cases pit " 'agrarian plodders' who grind out steady hourly revenues" against " 'riverboat gamblers' within the firm who want to score oversize plaintiffs fees." The latter take a percentage of the award rather than bill an hourly rate, with the firm covering upfront costs and absorbing losses. Not only does the practice rankle corporations and partners who criticize excessive damages, but large firms must also decide how to distribute "one whopping sum" obtained through years of work.

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"If lawyers do really well [on a plaintiff's case] you can reward them in part, but they need to remember that the whole firm accepted the risk," a partner at a Dallas-based law firm said. "And if those lawyers strike out, you can't decimate them, either. You have to spread the risk out across the institution." Shook, Hardy & Bacon Intellectual Property Partner **B. Trent Webb** also noted that by handling its contingency-fee cases "extremely economically," a firm could offset financial losses. As Koppel concludes, however, the risks have become increasingly attractive as firms are driven to boost profits and clients continue to seek discounts on hourly rates. *The Wall Street Journal,* March 7, 2007.

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ALL THINGS LEGISLATIVE AND REGULATORY

New Flammability Standards Proposed for General Wearing Apparel

The Consumer Product Safety Commission has proposed amendments to the Standard for the Flammability of Clothing Textiles, 16 CFR part 1610, which was first issued in 1953. The standard provides a test to classify clothing and fabrics as normal (Class 1), intermediate (Class 2) or dangerously (Class 3) flammable according to burn time, defined as "a function of ease of ignition and flame spread rate." In addition to clarifying several key terms, the amendments would (i) describe the "critical parameters" of modern testing apparatuses; (ii) provide an alternative dry-cleaning procedure that eliminates perchloroethylene, a suspected carcinogen; (iii) simplify fabric selection and preparation instructions for testing; (iv) clarify instructions for calculating burn times; and (v) provide codes for reporting purposes. Written comments on this proposal must be received by May 14, 2007, and requests to make an oral presentation must be received by April 13, 2007. *See Federal Register,* February 27, 2007.

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FDA Announces Seminars on Medical Device Regulations

The Food and Drug Administration's Center for Devices and Radiological Health and Office of Regulatory Affairs, and AdvaMed's Medical Technology Learning Institute have announced three medical-device-regulation seminars, the first of which was slated for March 15-16, 2007, in Irvine, California. In accordance with section 903 of the Federal Food, Drug, and Cosmetic Act and the FDA Plan for Statutory Compliance, the program aims to improve voluntary compliance among new entrepreneurs and fulfills statutory outreach requirements. Titled "The Essentials of FDA Medical Device Regulations: A Primer for Manufacturers and Suppliers," the seminars will provide information on (i) quality-system regulation; (ii) controls for design, documentation, purchasing, and production; (iii) acceptance activities; (iv) corrective and preventative actions; (v) complaints, medical-device reports, corrections, and recalls; (vi) compliance issues; (vii) management responsibility; and (viii) fraud and abuse. Seminars will also be offered May 22-23 in Lakewood, Colorado, and June 6-7 in Pittsburgh, Pennsylvania. Interested parties can find details and register on the AdvaMed **Web site**.

Indiana Legislature Assesses Merits of Biomonitoring Bill

Indiana's General Assembly is considering a **bill** (H.B. 1473) that would require the state to conduct a biomonitoring program to "identify and assess the concentration of toxic chemicals in the bodies of individuals." The measure, introduced by Representative Ryan Dvorak (D), would also require the state department of health to "develop a list of chemicals that have been scientifically demonstrated to cause or contribute to an increase in serious illness or death in humans." Those residents who volunteer for testing would also be given information about test results, health care referrals, educational materials about chemical exposure, and information about available state and local resources. The bill was referred to the House Committee on Technology, Research and

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Development, which reported it out with a proposed amendment that requires the chemicals on the department's list to "have been scientifically demonstrated to be carcinogens or toxicants based on peer reviewed data; or are demonstrably likely to be carcinogens or toxicants based on chemical structure or the toxicology of chemically related compounds." The proposed amendment would also make it a crime to intentionally disclose confidential information generated by the program.

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LEGAL LITERATURE REVIEW

Victor Schwartz and Cary Silverman, "The Draining of *Daubert* and the Recidivism of Junk Science in Federal and State Courts," 35 *Hofstra L. Rev.* 217 (2006)

In this recently published article, Shook, Hardy & Bacon Public Policy Group attorneys **Victor Schwartz** and **Cary Silverman** explore the ways courts have been applying the U.S. Supreme Court's standard for the admissibility of expert testimony, espoused in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993). Examining tort law cases decided since 2000, they suggest that five areas of inconsistency have emerged that need attention to avoid eviscerating the standard altogether and placing liability on defendants that have not caused the injuries alleged. Those areas "where the courts have in some cases drained *Daubert* of its meaning" involve (i) "failure to apply the closer fit test for relevance"; (ii) "misinterpretation of their flexibility in applying *Daubert* to the point of abdication" of their gatekeeper function; (iii) "admission of expert conclusions that do not flow from the methodology"; (iv) "disparate application of *Daubert* hearings," i.e., differing on whether to conduct pre-trial hearings with written findings of fact and conclusions of law or to simply make routine evidentiary rulings during trial; and (v) "application of varying standards of review."

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Henry Noyes, "Good Cause is Bad Medicine for the New E-Discovery Rules," *Working Paper Series* (Feb. 27, 2007)

Chapman University Law Professor Henry Noyes explores how courts are likely to interpret the good-cause aspect of the new federal discovery rules related to electronically stored information (ESI). Federal Rule of Civil Procedure 26(b)(2)(B) provides that ESI which is not reasonably accessible shall be discoverable only if the requesting party can establish good cause. According to Noyes, the new rule "provides no new protection against the cost and burden of discovery" because courts persistently rely on a "liberal rules of discovery" standard in the absence of express direction, and "the 'good cause' standard is so vague that it is meaningless and toothless." He suggests that the courts "require a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements, that failure to permit discovery will cause a clearly defined and serious injury."

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LAW BLOG ROUNDUP

Graphology's Latest Use – Jury Selection

"Oh well, at least it's not as intrusive as driving around their neighborhoods and interviewing their acquaintances." Walter Olson, writer and senior fellow at the Manhattan Institute, blogging about a personal injury lawyer in Hawaii who hires a handwriting expert to help him with jury selection; his last three juries apparently awarded a total of $31 million in damages to his clients.

overlawyered.com, March 7, 2007.

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FDA Issues Product Recall; Lawsuits Follow

"On February 14, 2007, the Food & Drug Administration issued a recall for certain brands of peanut butter manufactured by ConAgra. On March 1, 2007, the FDA announced it had identified the *salmonella* at the manufacturing plant. Enter the lawyers." Attorney David Nieporent, commenting on the rush of lawsuits filed on behalf of people allegedly sickened by contaminated peanut butter. He suggests that a four-day gap between the filing of the first individual suits and a class action can be explained by the three-day Presidents Day holiday which would have closed courthouses across the nation.

overlawyered.com, March 8, 2007.

How to Buy Yourself a U.S. Supreme Court Law Clerk

"A $200,000 bonus to Supreme Court law clerks for signing on with a law firm? No. Don't be silly! That was *last year's* rate." Wisconsin Law Professor and blogger, Ann Althouse, weighing in on the signing bonuses U.S. Supreme Court law clerks can expect when they head to the private sector. Dahlia Lithwick at *Slate* had this to say about the bonuses: "That will be $200,000 on top of a starting salary of $145,000 to $160,000. Which adds up to an awful lot of Pottery Barn sectional furniture for someone who is, on average, 26 years old and just two years out of school. As Chief Justice John Roberts pointed out recently, that $360,000 beats the heck out of the $212,000 he's taking home for, well, chief justice-ing the entire nation."

althouseblogspot.com, March 11, 2007.

"A $200,000 bonus to Supreme Court law clerks for signing on with a law firm? No. Don't be silly! That was last year's rate."

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THE FINAL WORD

Pennsylvania Imposes Fines on Silicosis Screening Company

A New Jersey medical screening company that X-rayed potential silicosis plaintiffs in motel parking lots has reportedly been fined $80,500 by the Pennsylvania Department of Environmental Protection for doing so without

prior written authorization and in the absence of a licensed medical practitioner. The fine is apparently being appealed; it resulted from allegations in silica litigation pending in a Pennsylvania state court that plaintiffs' counsel improperly developed its silica practice through mass screenings. The X-rays, for the most part, were taken during screenings for asbestosis and were then forwarded to silica lawyers. A Texas court has already questioned the mass screenings that have taken place and suggested that most of the claims transferred to her court were without merit. In Pennsylvania, some 65 percent of the silica plaintiffs have apparently made previous claims for asbestosis, said a news report.

In a related development, U.S. Representatives Joe Barton (R-Texas) and Ed Whitfield (R-Ky.) have reportedly sent letters to Mississippi health officials for follow-up information on how the state is addressing questionable silicosis diagnoses in personal injury lawsuits. Because they are no longer in the majority, hearings are unlikely to be scheduled in the House. In fact, House Energy and Commerce Oversight Subcommittee Chair Bart Stupack (D-Mich.) has previously indicated that other targets, such as *salmonella* in peanut butter, would have a greater positive impact on public health. *See The National Law Journal,* March 2, 2007; and *CongressDailyPM,* March 5, 2007.

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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).