Shook, Hardy & Bacon L.L.P.

Product Liability Litigation Report

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FEDERAL CIRCUIT COURTS REJECT CONSUMER-PURCHASE CLASS ACTIONS

The First and Second Circuits have rejected the certification of wide-ranging classes involving millions of consumers and will now require federal district courts to test the viability of classwide liability theories at the class certification stage. ***In re: New Motor Vehicles Canadian Export Antitrust Litig.*, Nos. 07-2257-59 (1st Cir., decided March 28, 2008)**; and ***McLaughlin v. Am. Tobacco Co.*, No. 06-4666 (2d Cir., decided April 3, 2008)**. The First Circuit case involved the certification of a 20-state, antitrust and consumer-protection class of automobile purchasers, while the Second Circuit had before it the federal racketeering claims of a nationwide class of purchasers of "Light" cigarettes. Both courts found invalid the plaintiffs' proffered theories of classwide causation and injury and both explained that the viability of the plaintiffs' proposed theories of common proof must be tested through a rigorous and searching inquiry at the class certification stage.

The automobile purchasers sought to rely on mathematical models as common proof of injury or damages, an effort the First Circuit rejected because such models did not sort out the effects of permissible and impermissible conduct, nor did they provide a means for determining that each member of the putative class sustained an injury. The cigarette purchasers sought to prove reliance on defendants' alleged misrepresentations regarding "Light" cigarettes, because the cigarette manufacturers had purportedly conducted a consistent, singular and uniform national marketing campaign. The Second Circuit found it inappropriate to assume that, "regardless of whether individual smokers were aware of defendants' misrepresentation, the market at large internalized the misrepresentation to such an extent that all plaintiffs can be said to have relied on it."

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CONSUMER-PROTECTION AND MEDICAL-MONITORING CLAIMS DENIED CLASS TREATMENT IN HEART VALVE LITIGATION

The Eighth Circuit Court of Appeals has decertified a class of heart valve recipients who alleged violations of two Minnesota consumer-protection statutes. ***In re: St. Jude Med., Inc., Silzone Heart Valve Prods. Liab. Litig.,***

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No. 06-3860 (8th Cir., decided April 9, 2008). The court determined that (i) fraud and misrepresentation claims are not appropriate for class treatment; (ii) statutory consumer-fraud claims, while having "relaxed" reliance requirements, are still plagued by individual issues of causation and reliance; (iii) medical monitoring is a highly individualized remedy not appropriate for class treatment; (iv) it may be appropriate to certify a class based on a published misrepresentation, if the classwide remedy is restitution/refund or creation of a trust fund for medical research; and (v) an "issues class," if appropriate at all, was not appropriate here because where individual issues predominate, issue certification would "do little to increase the efficiency of the litigation."

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THIRD CIRCUIT RULES FAILURE-TO-WARN CLAIMS IN DRUG CASES PREEMPTED BY FEDERAL LAW

The Third Circuit Court of Appeals has dismissed claims filed against prescription drug manufacturers by relatives of individuals who committed suicide after taking antidepressants, finding their state-law tort claims preempted by actions taken by the Food and Drug Administration (FDA) under federal law. ***Colacicco v. Apotex, Inc.*, Nos. 06-3107, 06-5148 (3d Cir., decided April 8, 2008)**. In a split ruling (3-1), the court analyzed the case under an implied conflict preemption theory and, because the FDA had rejected petitions to add suicide warnings to the labels for the drugs at issue for lack of scientific evidence, ruled that the states cannot impose such a requirement on the defendants.

In this regard, the majority stated, "Because the standard for adding a warning to drug labeling is the existence of 'reasonable evidence of an association of a serious hazard with a drug,' 21 C.F.R. § 201.57(e), and the [Food, Drug, and Cosmetic Act] authorizes the FDA to prohibit false or misleading labeling, a state-law obligation to include a warning asserting the existence of an association between [antidepressants] and suicidality directly conflicts with the FDA's oft-repeated conclusion that the evidence did not support such an association. Therefore, under the circumstances of this case, the plaintiffs' failure-to-warn claims are preempted by the FDA's actions taken in accordance with its statutory authority."

According to the dissenting judge, "the FDA has for over three-quarters of a century viewed state tort law as complementary to its warning regulations. Only for the last two years has it claimed otherwise…. With this background, I believe courts should fear to tread where Congress has not given us a clear [preemption] statement. Because I see sound legal and policy reasons to hold that the presumption against preemption has not been overcome, I would allow the plaintiffs' suits to go forward."

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"SOPHISTICATED USER" DOCTRINE ADOPTED IN CALIFORNIA

The California Supreme Court has decided to adopt the "sophisticated user" doctrine as a defense to negate a manufacturer's duty to warn of a product's potential danger when the plaintiff has, or should have, advance knowledge of

the product's inherent hazards. ***Johnson v. Am. Std., Inc.*, No. S139184 (Cal., decided April 3, 2008)**. The issue arose in a case involving a plaintiff who was a trained and certified heating, ventilation and air conditioning technician and, as such, knew or should have known about the potential health hazards of exposure to a refrigerant used in large air conditioning systems when the refrigerant is heated, as in this case. Alleging that exposure to the substance in the course of his employment caused him to develop pulmonary fibrosis, he sued a number of chemical manufacturers and suppliers and the manufacturers of air conditioning equipment, including American Standard. Plaintiff sought recovery for failure to warn of potential hazards, alleging negligence, strict liability failure to warn, strict liability design defect, and breach of implied warranties.

Defendant filed a motion for summary judgment, claiming that it had no duty to warn about the potential hazards of the refrigerant because it did not manufacture it and "because it could assume that the group of trained professionals to which plaintiff belonged, and plaintiff himself, were aware of those risks." The trial court granted the motion, and the intermediate court of appeal affirmed "on the sole ground that the sophisticated user defense applies in California." The supreme court granted review to consider whether this defense should apply in the state.

Exploring state law on the liability of manufacturers for failure to warn, the court turned to the *Restatement (Second) of Torts*, legal treatises and case law from other jurisdictions regarding the sophisticated user doctrine, noting that the court of appeal saw it as "a natural outgrowth of the rule that there is no duty to warn of known risks or obvious dangers." Finding no reason not to adopt the doctrine, the court then defined its contours and how it will be applied in California. A unanimous court affirmed the dismissal of plaintiff's claims, finding that he knew or should have known that heating exposed refrigerant would cause it to decompose into toxic by-products, which pose a risk to human health.

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GEORGIA HIGH COURT AFFIRMS SANCTIONS AGAINST AUTOMAKER FOR REFUSAL TO PRODUCE CRASH-TEST DOCUMENTS

The Georgia Supreme Court has upheld a $13 million judgment against Ford Motor Co. for the death of a woman in an automobile accident, ruling that the trial court did not err in ordering Ford to produce crash-test documents to the plaintiff or in sanctioning the company when it refused to do so. ***Ford Motor Co. v. Gibson*, No. S07A1365 (Ga., decided March 28, 2008)**. The plaintiff's wife died in 1999 after her car, a 1985 Mercury Marquis, was struck from behind at an intersection, the bolts attaching a trailer hitch to the rear of her car punctured the fuel tank, the car doors jammed shut, and a post-collision fire caused the fuel tank to explode. She died from exposure to the fire and smoke inhalation. Her husband sued several parties, including Ford, claiming that the car's fuel system was defectively designed due to its location behind the car's rear axle; the driver's seat, which collapsed, and the car doors were defectively designed; and Ford failed to warn of these defects.

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During discovery, plaintiff sought documents relating to rear-crash testing and seat-back performance; Ford refused to produce certain crash-test documents related to prior litigation on the ground that they were attorney work product. Because the trial court found that plaintiff had established a substantial need for the documents and that their substantial equivalent could not be otherwise obtained without undue hardship, Ford was ordered, after an in camera review, to produce them. Ford continued to refuse to produce the documents and invited the court to find it in contempt, so it could immediately appeal the ruling. The trial court did not find Ford in contempt. Rather, the court decided to sanction Ford by precluding it from contesting at trial that (i) the fuel system and seats in the subject vehicle were defective, (ii) the fuel system and seats were susceptible to failure in rear-impact collisions, (iii) Ford's acts and omissions amounted to a willful, reckless or wanton disregard for life or property, and (iv) Ford failed to adequately warn consumers of these dangers. The jury found Ford and the other parties jointly and severally liable and awarded plaintiff $13 million in compensatory damages.

Ford argued on appeal that the trial court erred in ordering it to produce work product material and that plaintiff had not shown a substantial need for the documents or undue hardship if he were required to obtain their substantial equivalent by other means. According to the court, substantial need was shown, i.e., "the requested evidence documented past car-to-car crash tests conducted by Ford on a line of vehicles that included the Mercury Marquis, and that had similar fuel tank locations and performance as the Mercury Marquis driven by Ms. Gibson at the time of the incident involving Burns' car. As evidence that could have shown Ford's prior direct knowledge of fuel system, car door, and seat back design problems in car-to-car collisions such as the one that resulted in Ms. Gibson's death, we cannot say that the trial court clearly abused its discretion in concluding that [plaintiff] had a substantial need for these documents." Because plaintiff, after the accident, "could not generate rear car-to-car crash tests that would have established Ford's *prior* knowledge of dangers presented by its 1985 Mercury Marquis in rear car-to-car crashes," the court found plaintiff established undue hardship.

"As evidence that could have shown Ford's prior direct knowledge of fuel system, car door, and seat back design problems in car-to-car collisions such as the one that resulted in Ms. Gibson's death, we cannot say that the trial court clearly abused its discretion in concluding that [plaintiff] had a substantial need for these documents."

Further, the court found no error in the sanctions imposed because, as required by statute, Ford was given the opportunity to explain its continued refusal to produce the documents. The court also found that "[b]y refusing to produce the crash tests after having been expressly ordered to do so, Ford ran the risk of having a default judgment entered against it." Thus, noted the supreme court, the trial court did not abuse its discretion by imposing the lesser sanction of issue preclusion.

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ALL THINGS LEGISLATIVE AND REGULATORY

Federal Judicial Center Issues Fourth Interim Report on Class Action Fairness Act Impact

The Federal Judicial Center, which serves as the research arm of the federal courts, has released its fourth interim **report** on the Class Action Fairness Act (CAFA), a law intended to expand the federal courts' diversity

of citizenship jurisdiction over class action litigation. Titled "The Impact of the Class Action Fairness Act of 2005 on the Federal Courts," the report found a 72 percent increase in class action activity in the 88 district courts studied, comparing the first six months of 2007 to the last six months of 2001. The study also found "a dramatic increase in the number of diversity class actions filed as original proceedings in the federal courts in the post-CAFA period" and, while diversity class action removals from state court increased immediately after the law became effective, diversity removals "have been trending downward since 2005." According to the report, "[t]he increase in diversity class actions is due largely to increases in the numbers of contracts, consumer protection/fraud, and torts-property damage class actions being filed in or removed to federal court in the post-CAFA period. Tort-personal injury cases have not increased in the post-CAFA period."

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THINKING GLOBALLY

Richard Nagareda, "Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism," *Vanderbilt Law Review* (forthcoming 2008)

Vanderbilt University Law School Professor Richard Nagareda places the concept of aggregate litigation within the context of efforts to resolve conflicts that arise in a global economy where the transnational recognition of judgments can be problematic. He compares U.S. class action litigation with aggregate litigation devices that are gradually being adopted across Europe and concludes that the regulatory mismatch between "the preclusive scope of such lawsuits and the governing authority of the rendering court" could be ameliorated by recourse to contractual terms that provide either for the arbitration of disputes between buyers and sellers or choose the law that will be applied. While the U.S. aggregate litigation regime remains something that Europe does not wish to emulate, Nagareda concludes, "what is likely to emerge is not the exceptionalism of the U.S. experience but instead, a striking lack of exceptionalism – McDonald's on the Champs-Elysees, albeit with its Quarter Pounder famously redubbed a Royale with cheese."

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LEGAL LITERATURE REVIEW

Victor Schwartz & Christopher Appel, "Putting the Cart Before the Horse: The Prejudicial Practice of a 'Reverse Bifurcation' Approach to Punitive Damages," *Charleston Law Review* (2008 symposium)

According to Shook, Hardy & Bacon Public Policy Partner **Victor Schwartz** and Staff Attorney **Christopher Appel**, courts that have adopted reverse bifurcation, in which punitive damages are considered before a defendant is found liable for compensatory damages, are circumventing "constitutional protections that guard against excessive and prejudicial punitive damages awards." They examine the development of bifurcated proceedings as a case

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management tool, the motives of the plaintiff's lawyers who champion its use and consider specific cases in which the procedure was implemented. Contending that "[a] reverse bifurcation procedure appears to make it very difficult, if not impossible, for defendants to receive a fair trial once the jury considers issues relevant to punitive damages," the authors conclude that there is "no practical basis or constitutionally permissible justification for a court to allow a jury to determine punitive damages before they have made a legitimate finding of liability and can award compensatory damages."

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Mark Behrens & Christopher Appel, "'Reverse Bifurcation' Approach to Punitive Damages Trials in West Virginia," *Federalist Society Class Action Watch*, March 2008

This article, authored by Shook, Hardy & Bacon Public Policy lawyers **Mark Behrens** and **Christopher Appel**, addresses the reverse bifurcation approach to litigation in West Virginia that could be considered by the U.S. Supreme Court if certiorari is granted in an appeal from a medical monitoring class action. In that case, *Chemtall, Inc. v. Stern*, the trial court adopted the plaintiffs' trial plan which "will have the jury determine the liability of defendants for punitive damages and set a punitive damages 'multiplier' prior to class certification, before a full determination of the defendants' liability for medical monitoring, and before any medical monitoring damages have been determined." Noting, "[c]ritics argue that the West Virginia approach appears intended to wield a heavy club to pressure defendants to settle mass tort claims," the authors suggest that "[t]he growing use of 'reverse bifurcation' is likely to reinforce the perception that West Virginia courts mete out justice in an unfair manner, particularly when the defendant is a large out-of-state corporation."

Lars Noah, "Comfortably Numb: Medicalizing (and Mitigating) Pain-and-Suffering Damages," *University of Michigan Journal of Law Reform* (forthcoming 2009)

University of Florida Law Professor Lars Noah contends that courts should consider re-characterizing some pain-and-suffering damages, long found synonymous with noneconomic damages, as definable, calculable medical expenses. He explains why emotional harms have long been distinguished from physical harm by the courts, but notes, "As [psychiatric] interventions have become safer and more effective, and as the social stigma associated with their use has largely dissipated, courts should revisit this issue. Applying the doctrine of avoidable consequences in cases of emotional injury should result in a recharacterization of some pain-and-suffering damages as medical expenses, whether or not the plaintiff chooses to make such use of an award in the future, and it might help to confine what remains under the banner of non-economic damages."

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LAW BLOG ROUNDUP

Fame May Have Its Price…

"For many bloggers, gaining influence within the blogosphere represents a dream come true. For others, like Kathleen Seidel, a frequent critic of autism vaccine litigation at her blog Neurodiversity, influence can prove nightmarish." Solo practitioner and blogger Carolyn Elefant, discussing a sweeping subpoena served on Seidel by a plaintiff's lawyer for documents related to her blog for use in a case alleging that the mercury in a vaccine caused the plaintiff's autism. The subpoena was apparently filed after Seidel posted an entry critical of his legal efforts and stating that lawyers earn a "comfortable living" off "even marginal vaccine-injury claims."

Legal Blog Watch, April 8, 2008.

E-Harmony® or Match.com® for Litigants and Lawyers?

"The new website [sic] aspires to match would-be litigants with the right class action and lawyer for them, but Michael Arrington likely is a great deal too flattering in terming it a 'Shangri-La for ambulance chasers' since it remains to be seen whether such a mechanism will be able to attract either litigants or lawyers of the highest caliber." Manhattan Institute Center for Legal Policy senior fellow Walter Olson, blogging about the new SueEasy.com Web site.

Manhattan Institute Center for Legal Policy senior fellow Walter Olson, blogging about the new SueEasy.com Web site.

Overlawyered, April 13, 2008.

***NYT* Disses Preemption Rulings; Tort Reformers Listen?**

"Ah, the sweet sweet sound of tort reformers grumbling as the public speaks out against corporate abuse." Drum Major Institute civil justice fellow Kia Franklin, linking to a *New York Times* editorial that condemned Bush administration actions and recent U.S. Supreme Court rulings on preemption in prescription drug cases that will deprive the public "of a vital tool for policing companies and unearthing documents that reveal their machinations."

TortDeform, April 14, 2008.

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THE FINAL WORD

Food Safety Plaintiff's Lawyer Brings Diverse Interests Together in Seattle

William Marler, who has made a name for himself suing fast-food restaurants and others in the food industry on behalf of plaintiffs allegedly injured by food contamination outbreaks, co-sponsored a conference in Seattle, Washington, April 11-12, 2008, that brought together food safety experts from around the world. Scientists, public health officials from all levels of government and international agencies, politicians, consumer advocates, educators, reporters, and lawyers addressed the conference topic "Who's Minding the Store? The

Current State of Food Safety and How It Can Be Improved." Among the issues debated throughout the program were the merits of a single federal food safety agency and mandatory recall authority; the relative roles of industry, state and federal governments and consumers in ensuring food safety; and the effectiveness of current food safety efforts such as product testing and company audits, consumer education, product labeling, and risk management practices known as hazard analysis critical control points (HACCP). Written materials included detailed information about U.S., EU, U.K., and Australian food safety regulation, and a representative of the China National Institute of Standardization, People's Republic of China, outlined measures the Chinese have undertaken since contamination issues involving its exports proliferated in recent years. Lawyers discussed legal theories relied on in food contamination cases, insurance coverage issues and mandatory hold harmless and indemnity agreements.

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UPCOMING CONFERENCES AND SEMINARS

The Sedona Conference, Sedona, Arizona – April 17-18, 2008 – "Tenth Annual Sedona Conference® on Complex Litigation: Health Law and Medical Products Litigation," Shook, Hardy & Bacon Tort Partner **Amor Esteban** will participate in a panel discussion on e-discovery and records management issues. Esteban will join a distinguished faculty that includes current and former members of the judiciary, in-house counsel for medical and health care companies, and the chief of the Litigation I Section of the Antitrust Division, U.S. Department of Justice.

Lorman Education Services, Kansas City, Missouri – June 18, 2008 – "Electronic Discovery and Document Storage," Shook, Hardy & Bacon Pharmaceutical & Medical Device Litigation Partner **Madeleine McDonough** will discuss issues related to corporate e-discovery. Her sessions are titled "Practical Considerations in Defending Corporate E-Discovery Programs" and "Practical Considerations to Reduce the Risk that E-Discovery May Improperly Be Used as Leverage."

Brooklyn Law School, Brooklyn, New York – November 13-14, 2008 – "The Products Liability *Restatement*: Was it a Success?," Shook, Hardy & Bacon Public Policy Partner **Victor Schwartz** will present along with a number of other distinguished speakers including *Restatement* reporters James Henderson and Aaron Twerski. Seminar brochure not yet available.

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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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