Shook, Hardy & Bacon L.L.P.

APRIL 9, 2009

PRODUCT LIABILITY LITIGATION REPORT

CONTENTS

FEDERAL APPEALS COURT DECIDES QUESTIONS OF FIRST IMPRESSION UNDER CLASS ACTION LAW

The Third Circuit Court of Appeals has decided, as a matter of first impression, how to interpret two mandatory exceptions from federal jurisdiction under the Class Action Fairness Act (CAFA). ***Kaufman v. Allstate N.J. Ins. Co.*, Nos. 08-4911, -4912, -4913 (3d Cir., decided March 26, 2009)**. The issue arose in the context of a dispute over automobile insurance filed in a New Jersey state court and removed to federal court under CAFA.

The district court granted the plaintiffs' motion to remand under CAFA's local controversy exception, and the defendants appealed. While the Third Circuit disagreed with the defendants' CAFA interpretation, it vacated the judgment in part and remanded for the district court to reconsider part of its analysis.

CAFA gives federal courts jurisdiction over class actions in which the amount in controversy exceeds $5 million in the aggregate, any class member and any defendant are citizens of different states, and the putative class has at least 100 members. The law also contains two mandatory exceptions from federal jurisdiction, both of which require a district court to decline jurisdiction when the controversy is uniquely local and does not reach multiple states.

The "local controversy" exception may apply when at least one significant defendant and more than two-thirds of the putative class members are local. The significant defendant is one, in part, "whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class." The "home-state" exception may apply when the primary defendant and at least two-thirds of the putative class members are local. Under this exception the "principal injuries resulting from the alleged conduct or any related conduct of each defendant must be incurred in the state in which the action was originally filed."

The issues on appeal were (i) whether CAFA's "significant basis" provision requires that every class member must assert a claim against the local defendant, and (ii) whether the "principal injuries" provision requires that principal injuries resulting from the alleged conduct *and* any related conduct of each defendant must be incurred in the state in which the action was originally filed.

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SHB offers expert, efficient and innovative representation to clients targeted by class action and complex litigation. We know that the successful resolution of products liability claims requires a comprehensive strategy developed in partnership with our clients.

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Among other matters, the court ruled (i) whether the controversy is local "requires consideration of the defendants presently in the action" and not those initially sued; (ii) the plaintiffs bear the burden of establishing that the local controversy exception applies; (iii) not every member of the putative plaintiff class must assert a claim against the local defendant to apply the "significant basis" provision; and (iv) the "principal injuries" provision is satisfied either "when the principal injuries resulting from the alleged conduct from each defendant were incurred in the state in which the action was originally filed," ***or*** "when principal injuries resulting from any related conduct of each defendant were incurred in that state."

STATE HIGH COURT ALLOWS DISCOVERY OF JUROR MISCONDUCT IN DEFECTIVE VEHICLE CASE SETTLEMENT

The Texas Supreme Court has determined that Ford Motor Co. should be allowed to conduct discovery into juror misconduct allegations that Ford raised as a defense to its breach of a settlement agreement with the plaintiff in litigation over a sports utility vehicle rollover accident. ***Ford Motor Co. v. Castillo,*** **No. 06-0875 (Tex., decided April 3, 2009)**.

During jury deliberations in the product liability lawsuit, the presiding juror sent a note to the court asking, "What is the maximum amount that can be awarded?" The parties immediately settled, and when the jury was released, some of the jurors spoke with Ford representatives. They indicated that when the note was sent (i) they had decided the roof-strength defect claim in Ford's favor; (ii) they were deliberating the vehicle-handling defect claim, with most favoring Ford; and (iii) some of the jurors were either unaware of the presiding juror's note or objected to her sending it.

Ford unsuccessfully tried a number of different ways to set aside the settlement and finally simply did not fund it. The plaintiff then sued for breach of contract, and Ford, alleging mutual mistake, that is, the parties were under the mistaken impression that the note came from the jury as a whole, sought to conduct discovery to learn whether the presiding juror had been subject to outside prompting and attempted to improperly influence the result in the case. Two lower courts refused the request in granting the plaintiff's motion for summary judgment, and the state high court reversed.

The court ruled that Ford properly preserved the issue for review, was entitled to conduct discovery and develop its defenses as to the breach of contract claim and was not precluded from seeking discovery as to jury deliberations because the rules forbidding such inquiry apply to questioning the validity of verdicts or indictments. Because the dispute was settled, "there was no verdict." Concluding that the trial court's decision to disallow discovery was harmful error and constituted an abuse of discretion, the court remanded the contract dispute for further proceedings.

Two concurring justices suggested that the state's jury instructions be amended "to specify that only the jury can send questions about the deliberations to the judge during deliberations. At a minimum, the entire jury should know that a question about deliberations is being sent to the judge. This will preclude an individual juror or a group of jurors from sending a question to the judge under circumstances that suggest, as in this case, that the question was from the jury. When improper outside influence is exerted on a juror, a juror tries to manipulate the outcome of a dispute, both parties are misled, and the integrity of the jury trial is subverted."

SPERM IS DEEMED A PRODUCT IN STRICT PRODUCTS LIABILITY LITIGATION

A federal court in Pennsylvania has allowed some of the tort and contract-based claims brought by an artificially inseminated woman and her daughter to proceed against the laboratory that supplied the sperm. *Donovan v. Idant Labs.*, No. 08-4075 (U.S. Dist. Ct., E.D. Pa., decided March 31, 2009). The daughter, who has permanent developmental problems, was found to be a Fragile X carrier. The sperm donor selected by her mother from the defendant sperm bank, which purportedly said its semen and donors were of exceptional quality, was also found to be a Fragile X carrier. Fragile X Syndrome is known to lead to the types of developmental problems the child experienced.

Because the mother did not bring her lawsuit for negligence, breach of contract, breach of warranties, negligent misrepresentation, strict products liability, and negligent infliction of emotional distress until after the statute of limitations had expired, the court dismissed her claims. The court allowed some of the child's claims to proceed, finding the statute of limitations tolled as to her claims, and allowed the plaintiff to amend her complaint to allege third-party beneficiary claims under the contract between her mother and the sperm bank. The court dismissed the child's claims for negligence and negligent misrepresentation, finding that they constituted claims of wrongful life, which are not allowed under New York law.

As to whether the child could maintain an action for strict products liability, the court found that while New York exempts human biological products such as blood and blood components from liability as a "service," the statute has not been extended to human tissues like sperm. Thus, the court ruled "the sale of sperm is considered a product and subject to strict liability."

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DEFENSE CONTRACTOR SETTLES QUI TAM SUIT FOR $325 MILLION

Northrup Grumman Corp. has reportedly agreed to settle claims by the U.S. Department of Justice that a company it acquired made defective parts for a spy satellite program in the1990s. The charges arose out of fraud allegations made by a whistleblower

who will receive $48.7 million from the settlement, which is the largest ever paid by a defense contractor in a qui tam case. Whistleblower Robert Ferro is an electrical engineer who reportedly worked for a company that was evaluating a satellite transistor for the Pentagon. He purportedly claimed that the company which sold transistor components to the government knew, on the basis of research conducted in 1995, they were likely to fail in government satellites but did not tell the government about that research even after problems occurred.

Ferro and his company were subject to a nondisclosure agreement, and the component supplier apparently suppressed his findings in 2002 when the U.S. Air Force sought explanations for the problems and whether the component supplier should have known about them. *See Product Liability Law 360*, April 3, 2009.

FEN-PHEN LAWYERS CONVICTED OF SWINDLING CLIENTS

A federal jury in Frankfurt, Kentucky, convicted disbarred lawyers William Gallion and Shirley Cunningham Jr. on April 3, 2009, of scamming nearly $95 million intended for plaintiffs in a class-action settlement over the diet drug fen-phen. The trial, which began in February 2009, was the second for the lawyers. A federal jury last July failed to reach a verdict for Gallion and Cunningham but acquitted a third defendant.

After reaching the latest verdict, jurors were reportedly instructed to determine whether Gallion and Cunningham should forfeit the $94.6 million that prosecutors claim they swindled from 440 clients in a $200 million product-liability settlement reached in 2001. Deliberations on the forfeiture were scheduled to begin April 7. A complicated twist involves the defendants' assets from a 20 percent share in a thoroughbred racehorse.

Gallion and Cunningham's clients reportedly opted out of a massive national financial settlement because their lawyers told them they could get more money if they pursued their claims on their own. Prosecutors contend, however, that the lawyers failed to tell their clients, at least at first, that they were part of a group that settled en masse for $200 million. Gallion and Cunningham could face up to 20 years in prison. *See Product Liability Law 360,* April 3, 2009; *Associated Press,* April 4, 2009 .

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STUDY INDICATES SOME NANOTUBES COULD INCREASE MESOTHELIOMA RISK

The National Institute for Occupational Safety and Health has issued preliminary research suggesting that workers exposed to engineered nanotubes could be at increased risk for a cancer commonly linked to asbestos exposure. Multiwalled carbon nanotubes are apparently being developed for use in energy-efficient batteries, next-generation electronics and new drugs.

Research published in 2008 found that mice injected with carbon nanotubes showed precursors to mesothelioma. To build on that study, researchers looked into whether the nanotubes could become airborne and inhaled, and if so, able to reach the sensitive outer lining of the lungs.

Researchers cautioned that the latest study has not yet been peer-reviewed or published and that limitations included the exposure method and species of mice used. But some have said that these preliminary findings could increase pressure on Congress to reauthorize the National Nanotechnology Initiative, a program focusing on environmental, health and safety research. *See E&E News PM,* March 30, 2009.

THINKING GLOBALLY

Lawsuits with Fewer than 100 Plaintiffs May Not Be Removed to Federal Court under CAFA

The Ninth Circuit Court of Appeals has determined that seven individual lawsuits filed in state court involving fewer than 100 plaintiffs each may not be treated as a "mass action" eligible for removal to federal court under the Class Action Fairness Act (CAFA). **Tanoh v. Dow Chem. Co., Nos. 09-55138, -55145, -55147, -55148, -55153, -55156, -55160 (9th Cir., decided March 27, 2009)**. The different groups of plaintiffs, none of which sought to represent a class of claimants, involved 664 West African nationals who alleged they were exposed to a pesticide on banana and pineapple plantations in the Ivory Coast and developed injuries including sterility and infertility.

The plaintiffs filed their claims of negligence, misbranding, defective design, fraudulent concealment, breath of implied warranties, and battery in state court. The defendant filed a notice of removal to federal court and argued that taken together, the seven actions qualified as a "mass action" under CAFA. The district court remanded the cases *sua sponte*, or on its own motion, finding that removal was not proper because each action involved fewer than the 100-plaintiff statutory minimum for a "mass action." The Ninth Circuit vacated that order in August 2008, ruling that the district court exceeded its authority by ordering a remand *sua sponte*.

The appeals court disagreed with the defendant that the plaintiffs had tried to "evade" CAFA by "artificially structuring" their lawsuits to avoid removal to federal court.

When the case was returned to the district court, the plaintiffs filed a motion to remand to state court, claiming, among other matters, that none of the state court actions were "mass actions" under CAFA. The district court again remanded the cases, and the defendant sought review before the Ninth Circuit. The appeals court disagreed with the defendant that the plaintiffs had tried to "evade" CAFA by "artificially structuring" their lawsuits to avoid removal to federal court.

According to the court, Congress anticipated that defendants might try to consolidate several smaller state court actions into one "mass action" and "specifically directed

that such a consolidated action was *not* a mass action eligible for removal under CAFA." While the defendant had not made a formal motion to consolidate the separate actions, "[t]he absence of a formal motion cannot blink away the fact that Dow, the defendant, is asking us to" do just that "for purposes of applying the 'mass action' provision."

Distinguishing other recent cases where plaintiffs had tried to "game" the system and stay out of federal court by splitting their claims into multiple suits, the court observed, "none of the seven groups of plaintiffs has divided its claims into separate suits to expand recovery. To the contrary, each of the seven state court actions was brought on behalf of a *different* set of plaintiffs, meaning that none of the plaintiff groups stands to recover in excess of CAFA's $5 million threshold between the seven suits." The court also noted that the other cases involved class actions and not CAFA's mass action provision.

European Plaintiffs Properly Dismissed from U.S. Lawsuit Against Aircraft Manufacturer

The Eleventh Circuit Court of Appeals has upheld the dismissal of European plaintiffs on *forum non conveniens* grounds from a lawsuit filed against a U.S. aircraft manufacturer for the wrongful death of passengers, crew and people on the ground in Italy where a plane crash occurred in 2001. ***King v. Brega,* No. 08-11033 (11th Cir., decided March 27, 2009)**. The court assessed the factors that are considered when defendants contend that a U.S. forum is not convenient for litigating product liability claims involving foreign plaintiffs and an accident that occurred abroad.

The appeals court agreed with the district court that Italy provides an adequate and available forum for these claims, lesser deference is due to the decision of European plaintiffs to litigate in the United States because "we presume a foreign plaintiff does not choose to litigate in the United States for convenience," and much of the evidence needed to prosecute the claims was located in Italy.

The court modified the dismissal order by requiring the defendant to submit to the Italian courts' jurisdiction and waive the statute of limitations. The court also modified the dismissal order "to provide that any case dismissed pursuant to the district court's order may be reinstated in the event that jurisdiction to entertain such a case is rejected by a final decision of a court in Italy."

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ALL THINGS LEGISLATIVE AND REGULATORY

Michigan House Votes to Rescind Immunity Law for Drug Makers

The Michigan House of Representatives has approved, in a 61-48 vote, a **bill** (H.B. 4316) that would repeal a law, in effect since 1995, that shields manufacturers from liability in personal injury suits involving prescription drugs approved by the Food

and Drug Administration (FDA). The only exception to the immunity is where a plaintiff alleges and can show that the company withheld or misrepresented information about the drug to obtain FDA approval. The proposal has been transmitted to the state Senate and was referred to the Committee on Government Operations and Reform.

According to a news source, Senate Republicans hold a majority of that chamber; they allowed similar legislation introduced in 2007 to die. Democrats are reportedly more determined now to enact the bill; lead sponsor Representative Lisa Brown (D) was quoted as saying, "The people of Michigan deserve the same consumer protections that every other state guarantees for its citizens. We must take action now to put an end to special protections for the big drug companies and make sure that people are put before profits." *See Product Liability Law 360*, March 27, 2009.

Texas Legislature Considers Proposals to Overturn Court's Asbestos Ruling

Shook, Hardy & Bacon Public Policy Partner **Mark Behrens** recently testified before the Texas House Committee on Judiciary and Civil Jurisprudence to express concerns about legislation (H.B. 1811, S.B. 1123) that would overturn a Texas Supreme Court decision that requires asbestos plaintiffs to prove both exposure to a defendant's product and that the dose was sufficient to be a substantial factor in causing their mesothelioma. *Borg-Warner Corp. v. Flores, No.* 05-0189 (Tex., June 8, 2007).

According to Behrens, the bills would "significantly lower the standard for providing causation in mesothelioma litigation."

According to Behrens, the bills would "significantly lower the standard for providing causation in mesothelioma litigation." He also reportedly suggested that the legislation would impose "near absolute liability on the most peripheral asbestos defendants," forcing them to pay "coercive settlements" to avoid prohibitive defense costs.

The Senate Committee on State Affairs passed a substitute bill (**C.S.S.B. 1123**) on April 6, 2009. While the substitute would require a plaintiff to show that the defendant's product or conduct was a substantial factor in causing the injury and that the exposure was "not merely de minimis," neither plaintiffs nor defendants would be required to prove "numerically the dose, approximate or otherwise, of asbestos fibers to which the claimant was exposed that are attributable to the defendant or another person." *See The Southeast Texas Record*, April 2, 2009.

LEGAL LITERATURE REVIEW

Mark Behrens, "What's New in Asbestos Litigation?," *The Review of Litigation*, Spring 2009

This article, by Shook, Hardy & Bacon Public Policy Partner **Mark Behrens**, comprehensively discusses the most recent developments in what has been referred to as the "longest-running tort" in U.S. history. According to Behrens, plaintiffs' lawyers

have scaled back their efforts to seek recovery on behalf of exposed plaintiffs without injury and are instead pursuing new theories against new defendants in new jurisdictions. Among the new theories finding their way into courts in jurisdictions lacking needed reforms are those alleging secondhand exposure and component supplier liability. Behrens credits the legislatures and courts in some states that were formerly magnets for asbestos litigation with reforms that have resulted in shrinking asbestos litigation dockets.

Markus Green, Victor Schwartz & Phil Goldberg, "CMS Should Stop Health Plans from Displacing Doctors' Judgment on Prescription Medicines," *Washington Legal Foundation Legal Opinion Letter*, March 27, 2009

Shook, Hardy & Bacon Public Policy Partner **Victor Schwartz** and Associate **Phil Goldberg** have co-authored this "Legal Opinion Letter" for the Washington Legal Foundation with Markus Green, Pfizer, Inc. Senior Corporate Counsel. They express concern about a potential loophole raised by an off-label drug policy about to be issued by the Center for Medicare and Medicaid Services for 2010. The policy would permit Medicare Part D insurers "to force ill patients to first use several off-label drugs unsuccessfully before reimbursing the patient for the medicine that the Food and Drug Administration (FDA) has specifically approved as safe and efficacious for that patient's ailment." According to the authors, insurers find such requirements attractive because off-label choices "can be less expensive," but such choices can present serious health risks and lead to "a loose and potentially unfair 'liability bowling ball,'" affecting physicians and drug makers.

Victor Schwartz, Phil Goldberg & Christopher Appel, "Can Governments Impose a New Tort Duty to Prevent External Risks? The 'No-Fault' Theories Behind Today's High-Stakes Government Recoupment Suits," *Wake Forest Symposium on the Third Restatement*, April 2009

Shook, Hardy & Bacon Public Policy Partner **Victor Schwartz** participated in the Wake Forest Symposium on the *Restatement of the Law (Third): Torts: Liability for Physical Harm* on April 2, 2009, and presented this paper on government recoupment lawsuits co-authored with Associate **Phil Goldberg** and Staff Attorney **Christopher Appel**. According to the authors, "A fundamental shift is occurring in state and local government tort actions against product manufacturers; manufacturers are being sued without any tie to wrongdoing, which has historically been the lynchpin for tort liability. Instead, the companies are targeted solely because their products have created external costs that others have borne. This may occur where the user of a product, for example a gun, harms another with that product. It also may arise where personal or environmental injury is caused by an inherent risk in a product, such as with prescription medicines, or a user's neglect, as with deteriorated paint."

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They argue that this "government externalization theory" is the driver behind public nuisance, parens patriae and consumer protection act suits and goes beyond the scope of the Restatement's concept of duty and tort law boundaries.

LAW BLOG ROUNDUP

Punitive Damages Ruling Short Circuits on Third Trip to U.S. Supreme Court

"[T]he dismissal, coming four months after oral arguments, may have been a sign that the justices could not coalesce around a single opinion." *BLT's* Jordan Weissman, discussing speculation about the U.S. Supreme Court's dismissal, as improvidently granted, of the appeal Philip Morris USA filed from the Oregon Supreme Court's third decision to uphold a $79 million punitive damages verdict in a smoking and health case.

The BLT: The Blog of the *Legal Times*, April 1, 2009.

Entertainment and a Lesson About Duty under Tort Law

"In an entertaining talk, Schwartz discussed what he called 'government externalization theory," the idea that a manufacturer or service provider whose product creates a risk to society should not be able to externalize that risk." Charleston School of Law Associate Professor Sheila Scheuerman, blogging about the Wake Forest Symposium on the *Restatement of the Law (Third) Torts*, at which Shook, Hardy & Bacon Public Policy Partner **Victor Schwartz** participated in a panel presentation about the concept of duty in tort law.

Torts Prof Blog, April 2, 2009.

Crowded Courtroom for Asbestos Argument

"It may not have been the most high-profile case of the term, but the arguments before the [U.S.] Supreme Court this morning in *Travelers Indemnity Co. v. Bailey* and the consolidated case *Common Law Settlement Counsel v. Bailey* packed the Supreme Court's lawyers' section with insurance and bankruptcy law practitioners among others." U.S. Supreme Court correspondent Tony Mauro, commenting about a recent argument before the Court that raises the question whether insurers that contributed to an asbestos injury trust fund established by a bankruptcy court are immune from future claims related to their policies with the companies that made asbestos. Lower courts have found that the bankruptcy court lacked the power to immunize the insurers from claims filed by plaintiffs not part of the settlements.

The BLT: The Blog of *Legal Times*, March 30, 2009.

THE FINAL WORD

Study Challenges ABA's Neutrality in Judicial Vetting Process

The American Bar Association (ABA) has been given the ability once again to offer early evaluations of potential nominees to the federal bench just as a new **study** finds that liberal nominees fare better than conservative ones who undergo ABA scrutiny. The Obama administration recently restored the ABA to its former special status; during the Bush administration, the ABA evaluated nominees only after their names were announced.

According to Georgia State University's Amy Steigerwalt, who wrote the study with two other political scientists, a nominee with a higher ABA rating is more likely to move through the process. "When problems arise, a higher ABA rating provides one piece of ammunition for the president and supporting senators about why a person should be confirmed to the bench," she was quoted as saying.

But James Lindgren, a Northwestern University law professor, reportedly said that the effect of higher ratings on the likelihood of confirmation seems fairly small. He claims that 85 percent of candidates for federal appeals court seats who received the bar association's highest rating from 1977 to 2000 were confirmed, while candidates with lower ratings were confirmed 71 to 80 percent of the time. "A president has the right to seek any counsel he wishes in choosing judicial candidates," Lindgren said. "The ABA, even if it might be somewhat biased, will do a more thoughtful and thorough job than most outside vetters."

"A president has the right to seek any counsel he wishes in choosing judicial candidates," Lindgren said. "The ABA, even if it might be somewhat biased, will do a more thoughtful and thorough job than most outside vetters."

The ABA says that it bases its ratings on professional competence, integrity and judicial temperament, not ideology. *See The New York Times,* March 31, 2009.

UPCOMING CONFERENCES AND SEMINARS

DRI, New York, New York – May 14-15, 2009 – "Drug and Medical Device Seminar." Shook, Hardy & Bacon Pharmaceutical and Medical Device Litigation Partner **Scott Sayler** chairs this 25th annual program, which provides individual presentations, panel debates and trial skills demonstrations addressing the key litigation issues facing the industry and its counsel. Among the distinguished speakers is Shook, Hardy & Bacon Pharmaceutical and Medical Device Litigation Partner **Gene Williams**, who will serve on a panel discussing "Preparing and Protecting the Foreign Employee Deponent in Drug and Device Cases."

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American Bar Association, Chicago, Illinois – May 22, 2009 – "Third Annual National Institute on E-Discovery." Shook, Hardy & Bacon Tort Partner John Barkett is chairing this event. Barkett frequently speaks and writes about electronic discovery issues and has authored two books on the subject: *The Ethics of E-Discovery* and *E-Discovery: Twenty Questions and Answers."*

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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 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).