Shook, Hardy & Bacon L.L.P.

Product Liability Litigation Report

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PUNITIVE DAMAGES IN FORD ROLLOVER CASE RETURNED TO STATE COURT

The U.S. Supreme Court has vacated the judgment in a products liability case involving a $55 million punitive damages award and remanded it to the California Court of Appeal "for further consideration in light of *Philip Morris USA v. Williams,* 549 U.S. ___ (2007)." ***Ford Motor Co. v. Buell-Wilson*, No. 06-1068 (U.S., decided May 14, 2007)**. As we noted in our July 27, 2006, Report, the jury's punitive damages award had already been reduced twice, once by the trial court and then by the court of appeal. The Supreme Court's ruling will not affect the $27.6 million in compensatory damages awarded to a 51-year-old woman who was paralyzed after her Ford Explorer rolled over in 2002. Because the *Williams* decision did not address whether the punitive damages in that case were unconstitutionally excessive, the California court will be limited to determining whether the jury might have inflated the award after hearing that many others, not before the court, had been injured or killed in similar rollover accidents, an issue the U.S. Supreme Court did address in *Williams*. Counsel for the defendant is apparently hoping that the state court remands the case for a new trial, while the plaintiff's lawyer was quoted as saying, "I'm pretty confident the court of appeals will conclude their prior decision was correct, even in light of *Philip Morris*." *See The Los Angeles Times,* May 15, 2007.

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SIXTH CIRCUIT PLACES CEILING ON PUNITIVES WHEN REMANDING TO TRIAL COURT FOR REMITTITUR

In a case involving breaches of the Fair Credit Reporting Act, the Sixth Circuit Court of Appeals has ruled that the defendant's conduct was not reprehensible enough to justify an award of punitive damages that was 5.57 times the compensatory damages awarded to the plaintiff. ***Bach v. First Union Nat'l Bank*, No. 06-3669 (6th Cir, decided May 15, 2007)**. The court had already remanded the case, finding that a 6.6-to-1 ratio was "alarming," but the district court apparently failed to factor that portion of the appeals court's decision into its analysis.

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According to the Sixth Circuit, "This is not an insignificant omission." Because courts may assume that any compensatory award has made a plaintiff sufficiently whole for her injuries, "punitive damages are appropriate only where 'the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.'" Here, the only factor arguing in favor of punitive damages was the plaintiff's vulnerability as an elderly widow. The court rejected plaintiff's attempt to justify the size of the punitives award on the basis of defendant's wealth and remanded "with instructions to enter an order of remittitur reducing the [$2.2 million] punitive damages award to no more than $400,000." The court looked to U.S. Supreme Court decisions for guidance and found support for its 1-to-1 ratio in *dicta* from *State Farm Mutual Automobile Insurance Co. v. Campbell,* 538 U.S. 408 (2003), stating "the facts before us simply do not justify a departure from the general principle that a plaintiff who receives a considerable compensatory damages award ought not also receive a sizeable punitive damages award absent special circumstances."

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NEW JERSEY COURT LETS INSURERS OFF THE HOOK IN ASBESTOS SETTLEMENT

Insurance carriers have prevailed in their challenge to a "prepackaged bankruptcy plan" that was designed to protect a flooring products manufacturer from liability in asbestos-related litigation, "while leaving the insurance companies to bear the costs." ***Congoleum Corp. v. Ace Am. Ins. Co.*, No. MID-L-8908-01 (Middlesex County Law Division, New Jersey, decided May 18, 2007)**. The court found that the "Claimant Agreement" the insured negotiated with asbestos plaintiffs' counsel was not made in good faith. According to *The Wall Street Journal's* law blog, the case has been closely watched "by combatants in the asbestos prepackaged arena. Some companies that have faced asbestos liability have tried to control their exposure by filing prepackaged bankruptcies, which are negotiated ahead of time, potentially allowing a company to reorganize in an expedited manner."

Critics apparently contend that such deals "let plaintiffs lawyers collect damages for dubious asbestos claims at the expense of insurers." Among other matters, the court noted that the agreement abandoned viable tort defenses, allowed time-barred claims and contained no meaningful exposure requirement or provisions to "ferret out fraudulent claims." "Even more disconcerting," said the court, "is that Congoleum entered the Claimant Agreement on advice of outside counsel, [Gilbert Heintz and Randolph], who had an actual conflict of interest because of its relationship with [plaintiffs' counsel], including their joint representation of claimants with claims against Congoleum." *See The Wall Street Journal,* May 18, 2007.

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N.C. JUDGE REFUSES TO HONOR ILLINOIS COURT'S DISPOSITION OF NATIONWIDE CLASS SETTLEMENT

Expressing his clear distaste for the way a nationwide consumer class action was resolved, a North Carolina judge has refused to dismiss an identical statewide class with prejudice. ***Moody v. Sears, Roebuck & Co.*, No. 02 CVS 4892 (Superior Court Division, New Hanover County, North Carolina, decided May 7, 2007)**. The putative statewide class action, seeking to recover costs associated with allegedly unnecessary automotive services, was filed several days before a nationwide class was filed in Illinois. After the parties agreed to settle the Illinois case, they sought dismissal with prejudice in North Carolina. According to the North Carolina court, no accounting was provided to the Illinois court, and the North Carolina court had to take its request for an accounting before an appeals court before it was able to discover how the nationwide class had been resolved.

Apparently, only 317 valid claims out of a potential 1.5 million were filed, reaping a total benefit to plaintiffs of $2,402. Plaintiffs' lawyers were paid more than $1 million and received $50,000 in unclaimed coupons. Only nine North Carolina residents filed valid claims for a recovery of $66, including four who received $4 coupons. Based on such results, the court found class counsel provided inadequate representation, which, among other matters, justified the court in refusing to extend full faith and credit to the Illinois court's settlement approval order.

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The court lambasted counsel for both plaintiffs and defendant, noting that class notice was ineffective, erroneous information about the number of filed claims had been provided to the Illinois court at the hearing on preliminary settlement approval, and the use of coupons of little cash value made the settlement suspect. The court compared the nationwide class with similar litigation prosecuted by New Jersey's attorney general on behalf of consumers in that state. There, individual notice was provided to each legitimate class member, based on the defendant's records, and each received a check for $10. The class benefit in New Jersey was at least $125,440, with the attorney general's office receiving $500,000. Here, notice was provided by publication in October 2004 in two national and 25 local newspapers, five of which were published in New Jersey, where "there could be no claimants as a result of the prior suit." Details were omitted, and objectors or opt-outs were required to take action within nine days. The court concluded, "It is hard to imagine a more inadequate notice plan and claims process. The results so demonstrate."

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Stating that "[f]or each class member who received a $10 check or a $4 coupon, plaintiffs' counsel received just shy of $3,000," the court declined to adopt as a fairness-of-the-fee standard that the actual benefit received by the class is irrelevant, and "that it is sufficient that class counsel has created the 'opportunity' for class members to file claims and receive settlement proceeds." The court concluded by stating "Class actions are not entrepreneurial activities." Responding to news about the case, Tom Wilging, senior researcher at the Federal Judicial Center, wrote that such litigation can be anticipated in the federal courts under the Class Action Fairness Act of 2005. He notes that the center provides guidance and suggestions for dealing with "hot button indicators" of unfair

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settlement, such as the use of coupons, restrictions on claims and the reversion of unclaimed funds to a defendant. The center also provides specific illustrations of "attention-grabbing notice to the class." *See CL&P Blog,* May 18, 2007.

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HOSPITAL PRESIDENT JOINS CALL TO RAISE TORT LIABILITY CAP

Oregon Health & Science University President Joseph Robertson has reportedly called for an increase in the state's tort liability cap, which currently limits jury awards against the hospital to $200,000 in damages. "I want to be unequivocal: I think the cap should be raised," he was quoted as saying. "We want it to meet the 'Is this reasonable?' test." OHSU is currently engaged in a lawsuit filed by the family of Jordaan Michael Clarke, who at age 3 months suffered prolonged oxygen deprivation while in the hospital's care. The lawsuit apparently seeks $17 million in damages from OHSU, which admitted negligence. In 2006, the Oregon Court of Appeals ruled that the suit could proceed and effectively overturned the tort liability cap.

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Robertson, despite the hospital's appeal to the state supreme court, has since agreed that the cap should be increased to accommodate such instances of negligence, but nevertheless maintains that a cap is necessary because it allows the hospital to take on difficult, high-liability cases. Critics of his approach, however, have contended that Robertson favors raising the cap only for economic damages, which make up one-half of the $200,000 limit, and leaving the non-economic cap at $100,000. "Any increase that doesn't increase the non-economic damages does nothing for the majority of people who are treated up there," opined one Portland attorney, in describing the elderly, the disabled and the children who cannot claim a loss of future earnings. Meanwhile, Robertson has admitted that he doesn't know "where the balance should be set," believing that a compromise is essential to preserving quality care for disadvantaged patients. *See The Oregonian,* May 17, 1007.

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ALL THINGS LEGISLATIVE AND REGULATORY

CSPC Nominee to Receive Severance Payment from Lobbyist Association

Michael Baroody, a senior lobbyist at the National Association of Manufacturers (NAM), will reportedly accept $150,000 in severance when he leaves the association to direct the Consumer Product Safety Commission (CPSC), assuming the U.S. Senate confirms his nomination. Combined with a commission salary of $154,600, the severance payment and $44,571 in unused leave would equal Baroody's former earnings as a NAM executive, excluding pension and retirement funds. In a letter to the commission's general counsel, Baroody apparently acknowledged that the deal constituted "extraordinary payment," which federal ethics rules define as a payment not part of an established compensation program that is made to an employee nominated for a government position. As a result, Baroody must remove himself from agency

matters involving NAM for two years, although he could still handle issues concerning individual NAM members and smaller trade groups allied with the association.

While a White House spokesperson confirmed that government lawyers approved Baroody's letter, other ethics experts, as well as several Democrats and consumer groups, have pointed to potential conflicts of interest. "He's just not the person to have at the head of an organization responsible for the safety of products coming out," Senator Bill Nelson (D-Fla.) was quoted as saying. "He's represented a bunch of these companies that are making these products that will be very much in front of that body. That's like putting the fox in charge of the henhouse." The Senate Commerce Committee will consider Baroody's nomination on May 24, 2007, although some critics expect President George W. Bush (R), if thwarted in committee, to bypass the Senate by using a recess appointment. *See The New York Times* and *Consumer Law & Policy Blog,* May 16, 2007.

House Subcommittee Takes Testimony on CPSC

On May 15, 2007, CPSC's acting chair and representatives of a number of consumer and product-safety advocacy groups **testified** before a U.S. House subcommittee to discuss the agency's budget, authority and performance. Chaired by Bobby Rush (D-Ill.), the Subcommittee on Commerce, Trade and Consumer Protection of the House Energy and Commerce Committee learned about purported shortcomings in the country's consumer product review system. CPSC staffing levels have fallen significantly since the 1980s, funding has not kept pace with its statutory responsibilities, and Congress has acted to limit its authority in some respects. The specific focus of the hearing was on children's products, and the witnesses addressed topics ranging from unstable furniture and ingestible magnets to all-terrain vehicles and lead in jewelry, all of which have been blamed for a number of deaths and injuries. Some witnesses called for new legislation to address the hazards posed by new products and products imported from nations without strict manufacturing and safety standards. They also opined that CPSC would be a better watchdog if it had fewer obstacles to issuing product recalls.

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According to a 2002 paper submitted for the record by a Harvard University researcher, accidental deaths attributable to consumer products have decreased from 30,000 to 22,000 annually since the agency was formed, but injuries have risen 45 percent, from 20 million to 29 million. Some contend that CPSC's reliance on voluntary safety standards hinders the effective regulation of product safety, but the president of ASTM International, a private standard-setting organization, believes that laws requiring the agency to defer to private sector standards adequately protect the public from harm and save the government and consumers money. Representative Rush has pledged to review CPSC's authorizing statutes and issue a comprehensive reform package.

NRDC Calls for Precautionary Approach to Nanotechnology Regulation

The Natural Resources Defense Council, a nonprofit environmental action organization, has issued a report proposing an immediate, three-part framework for regulating nanomaterials based on established precautionary

principles used in managing toxic chemicals. The report, ***Nanotechnology's Invisible Threat: Small Science, Big Consequences***, insists that regulatory agencies facilitate public access to information by requiring labeling on consumer products that contain nanomaterials, workplace disclosure rules for all products and processes that involve nanomaterials and the establishment of a national public tracking system for all engineered nanomaterials.

Under the precautionary approach, the NRDC calls for a prohibition on human exposure or environmental releases of unsafe or untested nanomaterials; full lifecycle environmental, health and safety impact assessments before commercialization of products made with nanomaterials; and meaningful public and worker participation in nanotechnology development and control with attention to the social and ethical impacts of nanotechnologies. The report notes that nanomaterials are currently used in car paints, water-filtration systems, sunscreens, clothing, computers, and home pregnancy test kits. NRDC scientists contend that nanoparticles are readily absorbed by people and animals and have been known to induce inflammation and tissue damage; they argue that preliminary data "provide strong support for removing [nanoscale] materials from consumer products where significant human exposures are likely, and preventing further uses of nanoscale materials where those uses may result in widespread environmental releases over the product lifetime."

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Class Action Reform Bill Stalls in California Assembly

A **bill** (A.B. 1505) that would have made sweeping changes to the way that class action lawsuits are certified and administered in California courts has stalled in committee on first hearing and is unlikely to be considered by the full Assembly. The proposed legislation would add criteria to the class-certification analysis, require class proponents to pay for class notification and allow defendants to communicate potential settlement offers directly to class members without the approval of class members or their lawyers. It would also grant defendants an automatic right of appeal from an order granting class certification. Numerous business interests support the measure; public interest groups, unions and an array of advocacy organizations oppose it.

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LEGAL LITERATURE REVIEW

Anthony Sebok, "Dispatches from the Tort Wars: A Review Essay," *Texas Law Review* (2007)

In this article, Brooklyn Law School Associate Dean and Law Professor Anthony Sebok examines three books that seek to justify various aspects of the U.S. tort law system and counter the "myths" that tort reformers have successfully used to convince the media, the public and lawmakers that the system is out of control and must be curtailed. Sebok suggests that "the tort reformers have pulled ahead. The best evidence is the large number of tort reforms that have been passed at both the state and federal level; the number of judicial elections they have influenced; and the way in which tort reform was, until the 2006 election, part of the Republican Party's arsenal of issues raised in contested elections."

Acknowledging that the U.S. legal system has been polarized in a way not seen in most other countries, Sebok attempts to get at the roots of the debate and discusses the fundamental principles of individual fault and enterprise liability that appear to inform it. According to the article, defenders of the tort system were successful in the 1960s and 1970s challenging the principle that tort liability ought to be based on individual fault. Thus, "tort reformers' real fear is not that tort law after the 1950s was corrupted by dishonest men (and women) but that it was transformed by honest, well-intentioned scholars, judges, and lawyers whose views would have (in the tort reformers' view) disastrous consequences for the law as well as the economy." Sebok believes that "defenders of the status quo" will not be able to regain the upper hand until they can, like tort reformers, tell a good and gripping story framed by the American trope of rugged individualism and promote a positive agenda, methods that resonate and are used to great effect by tort reformers.

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LAW BLOG ROUNDUP

Curlin Wins the Preakness/Fen-Phen Plaintiffs Rejoice

"Curlin, the horse owned by fen-phen fraudsters Gallion and Cunningham, won the Preakness by a head." Ted Frank, attorney and director, American Enterprise Institute Liability Project, linking to a Kentucky newspaper article about the second race in the Triple Crown of horse racing in which Curlin co-owner Bill Gallion contends that the lawsuit against him and Cunningham by their former fen-phen clients will not affect ownership of the horse. Before the Kentucky Derby, fen-phen plaintiffs were pulling for Curlin to win so there would be more assets available if they prevail in their litigation against his owners.

overlawyered.com, May 20, 2007.

"Curlin, the horse owned by fen-phen fraudsters Gallion and Cunningham, won the Preakness by a head."

Bush Says No Contingency Fees for Private Lawyers Hired by Federal Government

"Such arrangements rarely occur on the federal level, but the action quickly sparked debate about the practice on a state level, which has long been a lightning-rod issue on the tort-reform scene." Reporter Peter Lattman, referring to the executive order issued by President George W. Bush (R) that will prohibit lawyers hired by the federal government from receiving compensation on a contingency-fee basis. State attorneys general made such arrangements in the 1990s when litigating against cigarette manufacturers; significant portions of the settlements that resulted went to private-practice attorneys.

wsj.com, May 17, 2007.

Hiring Outside Counsel Redux

"McGraw has given out the settlement proceeds to pretty much everybody except the underfunded [West Virginia Department of Health and Human Resources], including private law firms that he hired to work on the case." Practicing attorney David Nieporent, blogging about West Virginia's attorney general distributing the proceeds from a suit alleging that the maker of OxyContin® increased Medicaid costs due to residents' addiction to the drug. According to *The National Law Journal,* legislatures in a number of states, including West Virginia, are introducing measures that would require more transparency in the hiring of outside counsel. A reform proponent was quoted as saying that the three law firms used in the OxyContin® litigation reportedly "bankrolled" the attorney general's political campaign.

overlawyered.com, May 18, 2007.

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THE FINAL WORD

Daniel Fisher, "Plaintiff's Paradise: No injury? No problem. Creative lawyers will find a way to sue anyway," *Forbes.com*, May 21, 2007

This article examines "what defense lawyers dub the 'harm-less' tort," litigation that seeks damages for uninjured plaintiffs under consumer fraud laws. "Plaintiff lawyers argue they are doing a public service by enforcing laws against false advertising and other unfair trade practices," writes *Forbes* columnist Daniel Fisher, in describing several cases brought under consumer protection laws, which do not require proof of injury. "But there's a crucial difference between government attorneys and their private counterparts: discretion. Lawyers in search of a fee can find a case virtually anywhere," he argues. Fisher recounts recent actions against Merck, Apple and two soft-drink manufacturers, tracing the trend to a "lodestar" lawsuit filed against Toshiba that claimed a flaw in the company's laptops could have caused computing errors. Although the plaintiffs' lawyer could not identify any victims, Toshiba settled in 1999 for $2.1 billion and $147 million in fees, according to American Enterprise Institute fellow Michael Greve, who called the case a "template" for similar instances of lawyer-driven litigation. "You've just seen the ad, you've bought the product, nothing else has to be proved," he was quoted as saying.

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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GLOBAL PRODUCT LIABILITY LAW FIRM OF THE YEAR 2005|2006|2007 WHO'S WHO LEGAL

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