Shook, Hardy & Bacon L.L.P.

Product Liability Litigation Report

A PUBLICATION OF SHOOK, HARDY & BACON L.L.P. JUNE 21, 2007

WATSON DECISION IN "LIGHT" CIGARETTE CASE COULD HAVE BROAD RAMIFICATIONS

The U.S. Supreme Court has determined that the federal officer removal statute, which allows "any person acting under" a federal officer to remove a case from state to federal court, did not apply to a cigarette manufacturer defending unfair and deceptive business practices claims. ***Watson v. Philip Morris Cos., Inc.*, No. 15-1284 (U.S., decided June 11, 2007)**. Writing for a unanimous Court, Justice Stephen Breyer explored the statute's language, history, context, and purpose to rule that "the help or assistance necessary to bring a private person within the scope of the statute does not include simply *complying* with the law." Because there was no evidence that the defendant had done anything more in testing its cigarettes for tar and nicotine content than comply with Federal Trade Commission advertising rules and testing specifications, the Court said nothing warranted "treating the FTC/Philip Morris relationship as distinct from the usual regulator/regulated relationship," which does not come within the statute's terms.

According to the Court, "A contrary determination would expand the scope of the statute considerably, potentially bringing within its scope state-court actions filed against private firms in many highly regulated industries." While defendants have not often used this legal theory when seeking removal, companies that manufactured, refined, marketed, or distributed gasoline containing methyl tertiary butyl ether did rely on it when seeking to remove water-contamination claims to federal court. Further details about that case appear in the June 7, 2007, issue of this Report. Product manufacturers attempting to rely on the theory in the future will have to show that when they acted, they were (i) lawfully assisting a federal official in the performance of official duties, (ii) facing "local prejudice" under unpopular federal laws or officials, and (iii) helping a federal official enforce federal law and authorized to do so on his or her behalf.

Plaintiffs' lawyers in Illinois reportedly believe that the decision gives them further ammunition in their efforts to reopen a case involving claims that light-cigarette advertising violated state consumer-fraud laws. In 2005, the Illinois Supreme Court reversed a $10.1 billion jury verdict against Philip Morris USA, which had argued that the FTC's regulations authorized cigarette manufacturers to use the marketing slogans at issue in the case, "lights" or "low tar," and thus

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insulated the companies from liability. Because Justice Breyer noted in *Watson* that there was no evidence the FTC delegated legal authority to "the tobacco industry association" that tested cigarettes for the commission, plaintiffs' lawyers believe they can overcome company preemption arguments in light-cigarette cases. *See St. Louis Post-Dispatch,* June 12, 2007.

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NEW JERSEY SUPREME COURT REJECTS PUBLIC NUISANCE CLAIMS IN LEAD-PAINT LITIGATION

In a split decision based on issues of statutory interpretation, the New Jersey Supreme Court has dismissed public nuisance claims filed by 26 municipalities and counties against lead paint manufacturers, seeking to recover the costs of detecting and removing lead paint from homes and buildings, providing medical care to residents allegedly affected by lead poisoning, and developing educational programs. ***In re Lead Paint Litig.*, No. A-73-05 (N.J., decided June 15, 2007)**.

The court examined the historic underpinnings of the public nuisance cause of action, observing that it was traditionally raised in cases involving "conduct on one's own land or property as it affects the rights of the general public." Citing a law review article authored by Shook, Hardy & Bacon Partner **Victor Schwartz** and Associate **Phil Goldberg**, the court also discussed the influence brought to bear on the *Restatement (Second) of Torts* sections on public nuisance by those looking to redress environmental pollution. Turning to the state's laws on lead paint in buildings, which focus on the conduct and liability of premises owners as opposed to product sellers, the court determined that even if the laws applied to the defendants, the plaintiffs were acting as private individuals in bringing their suit, because they were seeking damages, which "fall outside the scope of remedies available to a public entity plaintiff." And because they "have not, and cannot, identify any special injury," which is required of private plaintiffs, the court found that their "damages are inadequate to support a claim sounding in public nuisance."

The court further analyzed the complaint from the perspective of the state's products liability statute and found the claims "squarely within" the law's theories. The court also ruled that an environmental tort action exception to the law did not apply because the legislature did not intend to include the sale of lead-based paint within the exclusion. The majority concluded, "We cannot help but agree with the observation that, were we to find a cause of action here, 'nuisance law would become a monster that would devour in one gulp the entire law of tort.'" While numerous cases of this type are pending in courts across the nation, it is unclear whether the court's opinion will prevail in other jurisdictions given its grounding in statutory law and the deep division among the justices who decided the case (3-2, with one abstention). Nevertheless, the opinion provides a thorough analysis of the issues and will likely be cited by product manufacturers defending similar claims.

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JUDGE ORDERS VIOXX® PLAINTIFF TO ACCEPT REDUCED DAMAGES OR FACE A NEW TRIAL

A U.S. district court in Louisiana, troubled by a damages award of $51 million to a man who claimed that the painkiller Vioxx® caused his heart attack and other injuries, has ordered a new trial in the case unless the plaintiff agrees to a remittitur of $1.6 million, consisting of $600,000 in compensatory damages and $1 million in punitive damages. ***In re Vioxx Prods. Liab. Litig.*, MDL No. 1657 (U.S. Dist. Ct., E.D. La., order entered June 5, 2007)**. The case is one of thousands pending against drug maker Merck & Co. and was tried before a jury as a bellwether case. When the court entered the judgment in 2006, it immediately ordered a new trial on the issue of damages on its own initiative. The parties thereafter filed the motions giving rise to the latest order. Merck sought judgment as a matter of law and a motion for new trial on all issues. Plaintiff and the Plaintiffs' Steering Committee in this multidistrict litigation sought the opportunity for a remittitur in lieu of a new trial on damages.

While the court determined that the jury's findings for the plaintiff on his negligent failure-to-warn and deceit-by-concealment claims were reasonable, it deemed the compensatory damages excessive because they were based mostly on pain and suffering. According to the court, the plaintiff "has been able to undergo preventative medical treatment as a result of this experience and has even returned to certain of his beloved recreations, including golf and Carolina shag dancing, apparently with the same gusto and commitment that he previously displayed." Should plaintiff refuse the remittitur, the court indicated it would consider Merck's argument that new trials limited to the issue of damages violate the Seventh Amendment.

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TEXAS SUPREME COURT REVERSES ASBESTOS JUDGMENT; EXPOSURE EVIDENCE FOUND INSUFFICIENT

Reiterating that an asbestos plaintiff must prove that the defendant's product is a "substantial factor" in bringing about the plaintiff's injuries, the Texas Supreme Court has reversed a judgment entered against a company that manufactured the automobile brake pads whose dust plaintiff was exposed to as a brake repair mechanic. ***Borg-Warner Corp. v. Flores*, No. 05-0189 (Texas, decided June 8, 2007)**. The court reviewed the testimony of plaintiff's experts at some length and concluded that nothing in the record revealed "about how much asbestos Flores might have inhaled. He performed about fifteen to twenty brake jobs a week for over thirty years, and was therefore exposed to 'some asbestos' on a fairly regular basis for an extended period of time. Nevertheless, absent any evidence of dose, the jury could not evaluate the quantity of respirable asbestos to which Flores might have been exposed or whether those amounts were sufficient to cause asbestosis." Nor did the jury have any basis on which to determine what portion of the plaintiff's exposure was attributable to the defendant's products. The court also found significant the fact that there were "no epidemiological studies showing that brake mechanics face at least a doubled risk of asbestosis." This is the level of risk that courts often use as a benchmark for causation in products cases.

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The court acknowledged how difficult asbestos claims are to prove, noting that the long latency period and an inability to "trace precisely which fibers caused disease" make the process inexact. While the court recognized that proof of causation may differ depending on the product at issue, it noted that this case, involving asbestos embedded in brake pads, did not present a situation requiring a lowered burden of proof. Conceding that the plaintiff was exposed to dust and that brake mechanics can be exposed to "some" respirable fibers when grinding pads or blowing out housings, the court nevertheless concluded that the evidence of causation was legally insufficient because the jury did not know the contents of that dust, including the approximate quantum of fibers to which plaintiff was exposed. "In a case like this, proof of mere frequency, regularity, and proximity is necessary but not sufficient, as it provides none of the quantitative information necessary to support causation under Texas law."

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FIRST COMPLAINT FILED AFTER LATEST CONTACT LENS SOLUTION RECALL

Soon after the Food and Drug Administration's announcement of a recall of Complete MoisturePlus® contact lens solution made by Advanced Medical Optics, Inc., a California resident filed suit against the company and retailers Wal-Mart Stores, Inc. and Costco Wholesale Corp. *Connolly v. Advanced Med. Optics, Inc.* (California Superior Court, Orange County). The complaint, believed to be the first against this manufacturer, was filed in a California state court 10 days after the May 25, 2007, announcement. According to the complaint, plaintiff Michael Connolly is a professional working in the engineering field and long-time contact lens user. He contends that despite his diligence in maintaining "good ocular health," he appeared to develop an infection after using the product, was initially treated for herpetic keratitis and was ultimately diagnosed with a "far more serious *Acanthamoeba* infection." He alleges that this condition remains unresolved and chronic and that surgery remains a possibility. Connolly and his wife are seeking compensatory, general, punitive, and exemplary damages, as well as prejudgment interest and the costs of suit. The legal theories on which they rely include (i) strict liability failure to warn, (ii) strict liability design defect, (iii) strict liability manufacturing defect, (iv) negligence, (v) breach of warranties, (vi) deceit, (vii) negligent and intentional misrepresentation, and (viii) loss of consortium. *See Mealey's Product Liability & Risk,* June 12, 2007.

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NEW JERSEY JURY AWARDS $2.62 MILLION IN DAMAGES IN ACCUTANE® CASE

A New Jersey jury has reportedly entered $2.62 million in damages against Hoffmann-La Roche Inc. in the first of 400 cases alleging that the acne medication Accutane® can cause extreme inflammatory bowel disease (IBD). After a four-week trial in the New Jersey Superior Court, the jury found Accutane's IBD warning insufficient and awarded Andrew McCarrell, an IBD sufferer whose colon had been removed, $2.5 million in damages and an additional $119,000 for medical expenses. The jury declined, however, to assess punitive damages

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under the state's Consumer Fraud Act because there was no evidence that Roche intentionally failed to warn that the drug could cause IBD. "Notwithstanding the verdict … there is no reliable scientific evidence that Accutane causes inflammatory bowel disease," a Roche spokesperson was quoted as saying. "We are pleased that the jury also found no liability for Roche under the Consumer Fraud Act and that after hearing all the evidence, the court concluded that there was insufficient evidence to allow the jury to consider any punitive damages award or any award for future medical/economic loss." Accutane has carried an IBD warning for the last 20 years, according to one Roche attorney. *See New Jersey Law Journal,* June 7, 2007.

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FEDERAL VACCINE COURT HEARS FIRST CASE ALLEGING AUTISM-VACCINATION LINK

The U.S. Court of Federal Claims this month began hearing the first of nearly 5,000 cases alleging that common childhood vaccinations can cause autism. The special court, which Congress set up 20 years ago to handle vaccine litigation, has heard opening arguments in the case of Michelle Cedillo, whose parents have contended that a measles, mumps and rubella vaccine caused their daughter's severe autism, inflammatory bowel disease, glaucoma, and epilepsy. Theresa and Michael Cedillo specifically alleged that Michelle contracted measles from the vaccination and that a mercury-based vaccine preservative, thimerosal, prevented her immune system from fighting the infection.

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The theory is apparently just one of three that will be tested in court, with other plaintiffs claiming that thimerosal directly damaged children's brains or that the measles virus used in the vaccine triggered the autism. Although several major studies have not identified a link between routine shots and autism, the court requires plaintiffs to prove only that the association is more likely than not. To this end, parents' lawyers reportedly delayed the hearings for five years while searching for more supportive evidence. "I think we can win with what we've got," the chair of a parents' lawyers' committee said about the data, which government attorney Vincent Matanoski has dismissed as "junk science." *See The New York Times,* June 12, 2007; *Associated Press,* June 11, 2007.

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Meanwhile, an assistant professor at Washington University's School of Social Work and an epidemiologist at the University of Wisconsin's School of Medicine have published a *New York Times* op-ed piece expressing concern "that the publicity surrounding the case will only drag out debate about whether past trends indicate we face an autism 'epidemic.'" Paul Shattuck and Maureen Durkin argue that it is difficult to confirm an epidemic because changes to the definition of autism spectrum disorders have skewed prevalence data.

They also claim that government initiatives to identify autistic children have resulted in more diagnoses. For example, federal data showing a 3,500 percent increase in autism cases between 1991 and 2006 might be statistically invalid because the 1991 baseline count was "clearly an underestimate," according to Shattuck and Durkin. Their analysis postulates that when schools began tracking autism rates in 1991, many children were probably tallied in other diagnostic categories or not counted at all, thus leading to an inflated

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percentage rate over time. "First, we should be wary of 'epidemic' claims and percentage increases based on administrative data. Second, we should not be surprised if school counts of children with autism continue increasing as they play catch-up to the number who truly have autism," the authors conclude. *See The New York Times,* June 11, 2007.

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FEN-PHEN PLAINTIFFS' LAWYERS INDICTED ON FRAUD CHARGES

A federal grand jury this week indicted three Kentucky plaintiffs' lawyers on charges that they defrauded fen-phen clients of $65 million in settlement funds. Shirley Cunningham, Melbourne Mills, Jr., and William Gallion face charges that they (i) conspired to commit wire fraud, (ii) forced clients to settle without revealing the total settlement amount, (iii) counseled clients against their best interests, (iv) falsely told clients that revealing settlement amounts would result in imprisonment, and (v) falsely told the presiding judge that clients had opted to place $20 million in "the Fund for Healthy Living" trust, which was managed by the three lawyers for $149,800 in fees.

Nearly 400 defrauded clients last year won a lawsuit against Cunningham, Mills and Gallion, who were ordered to repay the $64.4 million, minus legitimate expenses. There is also an ongoing dispute over the ownership of Preakness Stakes-winner Curlin, a colt purchased by Mills and Gallion in 2005 with their clients' "blood money" and now worth more than $30 million as a stallion prospect. If the lawyers are found guilty, a jury could require them to serve up to 20 years in prison, pay a $250,000 fine and disgorge millions of dollars in misappropriated fees.

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FEDERAL JUDGE ADVISES PROSECUTION OF PLAINTIFFS' LAWYER FOR CRIMINAL CONTEMPT

A federal judge has asked an Alabama U.S. attorney to prosecute plaintiffs' lawyer Richard Scruggs for criminal contempt. Scruggs made a name and fortune for himself first litigating asbestos claims and then joining the waves of litigation against cigarette manufacturers that occurred in the 1990s. U.S. District Judge William Acker has asserted that at the time Scruggs' law firm was suing State Farm Insurance Co. over Hurricane Katrina claims, the lawyer obtained 15,000 pages of documents stolen from E.A. Renfoe & Co., a contractor State Farm hired to process claims in Alabama. Renfoe then sued former employees Cori Rigsby Moran and Kerri Rigsby for stealing the claims information, at which point Acker issued an injunction ordering the return of all "purloined documents." Scruggs, however, ignored the injunction and sent the documents to Mississippi Attorney General Jim Hood, who was leading a criminal investigation into State Farm's flood insurance policies. "The documents were intended to help Mr. Hood make his case, and Mr. Hood in turn encouraged State Farm to settle with Mr. Scruggs – a sort of tag-team mugging," according to one writer for *The Wall Street Journal.*

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Acker maintained in a strongly worded memorandum opinion that Scruggs, in "brazen disregard of the court's preliminary injunction," was "arrogating to himself the right to substitute his judgment for the court's judgment. That spells 'defiance.'" Acker similarly dismissed Scruggs' arguments that the injunction did not apply to him, that Renfoe consented to the delivery of documents, and that withholding the documents could have endangered a criminal investigation. "Unless, as Renfoe has hinted at, Scruggs and Hood had teamed up to bully State Farm into civil and criminal settlements by telling State Farm that they had 15,000 inculpatory documents but not allowing State Farm to see them, the court does not understand why it was worth it to Scruggs to risk contempt," Acker wrote. He concluded that if the government declines to prosecute Scruggs, "the court will appoint another attorney to prosecute the contempt." *See The Wall Street Journal,* June 14, 15 and 19, 2007.

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LEGAL LITERATURE REVIEW

Edward Sherman, "Decline & Fall," *ABA Journal,* June 2007

Tulane University School of Law Professor Edward Sherman discusses "the rise and fall of consumer class actions" in this lengthy essay and wonders whether they have any future in the United States since Congress passed the Class Action Fairness Act of 2005 (CAFA). According to Sherman, "While the philosophical debate over the merits and drawbacks of consumer class actions goes on, the business community clearly appears to be winning the battle in the legal trenches." Since 1995, he contends, courts have been placing restrictions on class actions through their interpretations of Federal Rule of Civil Procedure 23, which addresses the requirements for class certification, and legislatures have been adopting tort reforms with a similar effect. The article discusses forum shopping and choice-of-law issues in the wake of CAFA and suggests that the consumer class action has a doubtful future in this country.

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William Rubenstein, "Finality in Class Action Litigation: Lessons from Habeas," *NYU Law Review,* June 2007

This article considers whether class members who do not actively litigate their claims should be allowed to re-litigate representational adequacy in a collateral forum at a later date to evade the binding effect of a class-action judgment. Some contend that full re-litigation is required under the Constitution while others insist that a judgment is issue preclusive. Law Professor William Rubenstein explores the approach to re-litigation of ineffective assistance of counsel in criminal habeas corpus proceedings and suggests that it provides a model that could be used in the class action context. He writes, "Applying habeas's approach to the field of class action law would entail designing a set of procedures that neither bluntly foreclose nor wantonly permit relitigation of the adequacy question. The content of that rule system should consider the substantive meaning of adequacy for constitutional purposes, the procedural meaning of default, the nature of the review that should take place, with whom the burden of proof should lie and what it should entail, and in what circumstances

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successive attacks should occur." While he recognizes that the opportunity for re-litigation satisfies few in the criminal context and is likely to raise similar concerns if applied to class actions, Rubenstein believes that with sufficient controls an "all" or "nothing" approach can be avoided.

Judith Fischer, "Why George Orwell's Ideas About Language Still Matter for Lawyers," *Montana Law Review*, 2007

Louis D. Brandeis School of Law Professor Judith Fischer discusses the language usage principles espoused by writer George Orwell and notes that, in the main, today's legal writing style comports with his advice about using clear, plain English. Nevertheless, she observes that lawyers are masters of "evasion" and contends that "the phrase 'tort reform' has been called Orwellian because it refers not to even-handed reform but to curtailment of tort liability. Thus it masks the existence of the views of other reformers who argue not for curtailment but for expansion of tort liability." Fischer calls for lawyers to heed Orwell's warnings about misleading language and "eliminate meaningless words, euphemisms, and evasions from our own speech and writing [to achieve] clearer, more honest discourse."

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LAW BLOG ROUNDUP

Bum Rap for New Lawyer Rating Site?

"A lawyer representing two lawyers filed a lawsuit against a lawyer-rating Web site founded by a lawyer. Got that?" Reporter Peter Lattman, blogging about challenges made to Avvo, a new Web site that rates and profiles lawyers, allowing clients and fellow lawyers to submit ratings and commentary, while including information from disciplinary dockets. The putative class action claims that the Web site is deceptive and unfair and violates state consumer protection laws.

blogs.wsj.com/law, June 15, 2007.

Ads Soliciting Clients Affect Drug Prescriptions and Use

"'Even when patients were responding well to their prescribed antipsychotic treatment, many requested a medication change because these drugs are featured in law firm advertisements.'" Ted Frank, attorney and director, American Enterprise Institute Liability Project, quoting a study that showed how some patients and psychiatrists are responding to law firm advertisements that seek new clients by highlighting the purported risks of drug side effects.

overlawyered.com, June 14, 2007.

Lacking in Persuasiveness

"The judge also admonished 12 legal scholars – a group that included Robert Bork and Alan Dershowitz – for a brief filed last week challenging his decision upholding the constitutionality of the appointment of Patrick Fitzgerald as a special prosecutor in the case." Peter Lattman, referring to the judge who ordered Scooter Libby to begin serving his sentence for perjury and called the scholarly *amicus* brief "not something I would expect from a first-year law student." Ouch.

blogs.wsj.com/law, June 15, 2007.

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THE FINAL WORD

Charleston to Host Conference on Punitive Damages After *Philip Morris v. Williams*

The Charleston School of Law will hold a **conference** on September 7, 2007, to consider how punitive damages, due process and deterrence have been affected by the U.S. Supreme Court's decision in *Philip Morris v. Williams.* Panelists will discuss why punitive damages are awarded, what the courts can be expected to do about punitive damages in the future, what impact Williams will have on trial strategy, and how punitive damages and class actions are related. Among the speakers is Shook, Hardy & Bacon Public Policy Partner **Victor Schwartz**, who will address the topic "Looking Forward: Punitive Damages in the Next Two Decades – Guideposts From Precedent, History & Sound Public Policy."

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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OFFICE LOCATIONS

Geneva, Switzerland
+41-22-787-2000

Houston, Texas
+1-713-227-8008

Irvine, California
+1-949-475-1500

Kansas City, Missouri
+1-816-474-6550

London, England
+44-207-332-4500

Miami, Florida
+1-305-358-5171

San Francisco, California
+1-415-544-1900

Tampa, Florida
+1-813-202-7100

Washington, D.C.
+1-202-783-8400