Shook, Hardy & Bacon L.L.P.

Product Liability Litigation Report

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OHIO SUPREME COURT UPHOLDS STATE FILING REQUIREMENTS FOR ASBESTOS CLAIMS

The Ohio Supreme Court has determined that a state law requiring plaintiffs to show physical injury caused by asbestos exposure in order to maintain a tort action alleging an asbestos claim is not preempted by federal law. ***Norfolk S. Ry. Co. v. Bogle*, No. 86339 (Ohio, decided October 10, 2007)**. The court agreed with the defendant that the medical criteria and administrative dismissal process were procedural and did not affect or place undue burdens on substantive federal rights under the Federal Employees' Liability Act or the Locomotive Boiler Inspection Act. Because the Ohio law allows potential plaintiffs to refile their claims when proof of injury becomes available, the court was able to distinguish cases finding preemption in other jurisdictions that require dismissal with prejudice where the plaintiff is unable to meet a threshold standard of proof. The two dissenting justices agreed with the intermediate appellate court, reversed by the majority, that the state requirement "would 'gnaw' at the FELA/LBIA claimants' substantive rights to assert a cause of action under federal law in state court."

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U.S. SUPREME COURT FACES PUNITIVE DAMAGES ISSUES IN TWO *CERT.* PETITIONS

The U.S. Supreme Court will consider whether to hear appeals in two cases involving claims that the punitive damages awarded are excessive. On the Court's October 26, 2007, conference **docket** are *Exxon v. Baker*, No. 07-219 ("Whether a $2.5 billion punitive damages award for economic harm to fishermen and private parties resulting from the Exxon Valdez oil spill is permitted under federal maritime law or the Due Process Clause"), and *Continental Carbon Co. v. Action Marine*, No. 07-257 ("Whether a $17.5 million punitive damages award for property damage on top of $1.9 million in compensatory damages violates the Due Process Clause.")

In other Supreme Court news, medical-device trade groups have reportedly filed an *amicus* brief in a case the Court will hear in December 2007, involving the federal preemption of state-law claims for personal injury allegedly caused by medical devices approved by the Food and Drug Administration. *Riegel v. Medtronic, Inc.*, No. 06-179 (U.S., *cert.* granted June 25, 2007). *Amici* argue that the federal agency should have exclusive jurisdiction over medical devices in this country. According to a spokesperson for the Advanced Medical

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Technology Associations, which joined the *amicus* brief, "Encouraging states to insert state court liability suits into the process would undermine the science-based approach to approvals currently in place and would likely result in inconsistencies in standards and delayed access to products." *See Product Liability Law 360*, October 22, 2007).

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FEDERAL COURT IMPOSES SANCTIONS ON LAWYERS REPRESENTING PLAINTIFFS WITH BASELESS CLAIMS

A federal court in California has imposed sanctions on public-interest lawyers who filed suit against Texaco Inc. on behalf of plaintiffs in Ecuador who allegedly contracted cancer from exposure to water sources purportedly polluted by the company's drilling operations in that country. *Gonzales v. Texaco Inc.*, No. 06-02820 (U.S. Dist. Ct., N.D. Calif., decided October 16, 2007). According to the court, three of the nine named plaintiffs did not have cancer, and their counsel either knew or should have known before the lawsuit was filed that they did not have the disease. Defendants filed a motion to dismiss the plaintiffs' claims after they were deposed in Ecuador and testified that they did not have cancer and did not know that lawyers in the United States planned to sue Texaco on their behalf.

Finding that sanctions were justified under Rule 11 of the Federal Rules of Civil Procedure, the court chastised the plaintiffs' attorneys for failing to (i) "follow up on pre-suit warning flags that spelled trouble," (ii) personally interview or counsel any of the three plaintiffs before filing the lawsuit, or (iii) gather the evidence they knew they needed to pursue the claims. "Counsel were obligated to investigate *first* and sue *second*, not the other way around," the court stated. While defense counsel incurred $80,000 in costs, primarily to depose the three plaintiffs in Ecuador, the court decided to impose $45,000 in sanctions, "[t]aking into account the public interest nature of the lawyers involved and their limited pocketbooks."

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JURY RECONSIDERS VERDICT IN MENOPAUSE DRUG CASE AND AWARDS $99 MILLION TO PUNISH DEFENDANT

A Nevada state jury that awarded three plaintiffs $134.5 million in compensatory damages after finding that the hormone drugs they had taken were defective and caused their breast cancer was instructed to reconsider the verdict after the judge learned that jurors were confused and thought their verdict included a sum intended to punish the defendant. The jury subsequently lowered the compensatory award to $35 million and then imposed $99 million in punitive damages against Wyeth Pharmaceuticals, Inc. According to news sources, the company plans to appeal the verdict, claiming that "substantial irregularities" in the jury deliberations constituted strong grounds for reversal. At issue is the menopause drug Prempro®, which has been implicated in thousands of personal-injury lawsuits pending in courts across the nation. Results to date have been mixed, and Wyeth has refused to settle any of the claims, saying that it has provided label warnings about the risk of breast cancer since it placed the product on the market in 1995. *See ABA Journal*, October 15, 2007; *The Wall Street Journal*, October 16, 2007.

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LAWSUITS FILED AFTER MEDTRONIC STOPS SALE OF DEFIBRILLATOR LEAD

A putative class action lawsuit filed in the U.S. District Court for the District of Minnesota alleges that medical device manufacturer Medtronic Inc. and its Puerto Rican subsidiary were negligent in failing to disclose the fracture risk of an electronic lead used in implantable defibrillators. Medtronic earlier this month discontinued its Sprint Fidelis line of electronic leads after receiving reports that the leads could facture, causing the defibrillator to malfunction. The company has maintained that of the 280,000 Sprint Fidelis leads implanted worldwide, 2.7 percent were not viable after 30 months and less than 1 percent had fractured. "This difference is not statistically significant; however, if the current lead fracture rates remain constant, it will become so over time," stated the company, which has identified five patients who may have died because of a fractured lead.

The lawsuit reportedly contends that "At all times relevant, Medtronic misrepresented the safety of the Sprint Fidelis leads and negligently manufactured, marketed, advertised, promoted, sold, and distributed the leads as safe devices." The suit also alleges that the Food and Drug Administration database shows fracture and inappropriate shocks as the most frequent complaints about the devices and classifies as defective 77 of 125 leads returned to Medtronic before July 2006. If certified, the class would include every U.S. citizen who received a Sprint Fidelis lead since the device gained FDA approval in 2004. *See Product Liability Law 360,* October 16, 2007.

A similar lawsuit has been filed in a federal court in Missouri. *Carlile v. Medtronic Inc.*, No. 07-06110 (U.S. Dist. Ct., W.D. Mo., filed October 19, 2007).

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LITIGATION TRENDS SURVEY SHOWS FEWER FILINGS AGAINST U.S. COMPANIES BUT PLENTY OF PENDING ACTION

An annual litigation survey of U.S. businesses reportedly shows that the number of new lawsuits and regulatory actions filed against them has dropped, yet one-third of corporate law departments count more than 25 pending suits at any one time and 18 percent are handling at least 100 in U.S. courtrooms. The survey also apparently shows that nearly one-fifth spend more than $5 million annually in litigation. Among the types of lawsuits that remain of most concern to the companies are personal injury and toxic tort. According to a news source, the survey also revealed that retailers in the last year faced more product liability lawsuits than manufacturers. The survey, performed during May and June 2007, involved 253 U.S. companies and 50 from the United Kingdom. *See Business Wire*, October 15, 2007.

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ALL THINGS LEGISLATIVE AND REGULATORY

Supporters of California Phthalate Ban Begin Push for Nationwide Legislation

California Governor Arnold Schwarzenegger (R) this month signed a state law, effective January 1, 2009, that will ban phthalate-containing toys intended for children under 3 years old. Supporters have contended that phthalates, which are used as plastic softeners in toys and teething devices, can cause hormonal damage in young children and may lead to serious illnesses, such as breast cancer, later in life. Prohibited in 14 countries and the European Union, the chemicals have also become the focus of legislation in Texas, Illinois, Florida, Massachusetts, Maryland, Washington, Maine, Connecticut, and New York, according to the public health groups that sponsored the California measure. In addition, U.S. Senator Dianne Feinstein (D-Calif.) has announced plans for a national bill, although industry groups have faulted the action as based on politics, not science. "This law is the product of the politics of fear," said Jack Gerard, the president and CEO of the American Chemistry Council. "It is not good science and it is not good government. Thorough scientific review in this country and Europe have found these toys safe for children to use. *See the San Francisco Chronicle,* October 16, 2007.

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Meanwhile, a California public interest group has apparently threatened to sue Apple Inc. for allegedly using phthalate ether and other toxic chemicals in its iPhone. The Center for Environmental Health (CEH) reportedly sent a letter to the company stating its intent to sue under California's Proposition 65, which requires products containing "reproductive toxins" to carry a warning label. CEH has based its allegations on a recent Greenpeace report that found phthalates, bromine, antimony, and chlorine in iPhone's components, in particular the headphone cables, after the device was dismantled for testing. If it proceeds with the lawsuit, CEH also plans to use the California phthalate ban to argue that the chemical poses a significant risk to consumers. "This is not a class action lawsuit," CEH Communications Director Charles Margulis was quoted as saying. "We want Apple to remove the threat to consumers and reformulate the product so it's safe for the community." *See Product Liability Law 360,* October 16, 2007.

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NAS Recommends Integrating Toxicogenomics into Rulemaking

The National Academy of Sciences (NAS) has released a **report**, "Applications of Toxicogenomic Technologies to Predictive Toxicology and Risk Assessment," that recognizes the importance of this new scientific field, which involves studying the effects of drugs and chemicals on the molecular level, to predict the human health effects of environmental toxicants. Commissioned by an arm of the National Institutes of Health, the report recommends integrating toxicogenomics into risk assessment and regulatory decisionmaking. Noting that toxicogenomic data are not yet ready to replace existing testing regimens, the report suggest that toxicogenomic technologies be further developed to be applied in such areas as (i) exposure assessment, (ii) hazard screening, (iii) variability in susceptibility, (iv) cross-species extrapolation, and (v) dose-response relationships.

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Working Group Seeks Comments on Responsible Nanotechnologies Code

A multi-stakeholder working group funded by Great Britain's Royal Society and part of the Woodrow Wilson International Center for Scholars is seeking comments on a consultation draft titled "**Responsible Nanotechnologies Code**." The working group, consisting of representatives from international companies, academia, labor unions, and consumer groups, is attempting to develop consensus on what constitutes good practice, and in the absence of current comprehensive legislation, to provide internal guidance on how organizations and business can demonstrate responsible management of nanotechnologies. The voluntary code would be "appropriate for adoption by organizations of all sizes involved in the research, development, manufacturing, and retailing of products using nanotechnologies," according to the working group. Code principles include identifying and minimizing sources of risk for workers handling products using nanotechnologies, minimizing any potential public health, safety and environmental risks relating to products with nanomaterials and adopting responsible sales and marketing practices. Comments on the draft code must be submitted to the working group by November 12, 2007.

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LEGAL LITERATURE REVIEW

Keith Hylton, "Due Process and Punitive Damages: An Economic Approach," *Boston Univ. School of Law Working Paper*, October 2007

This article, authored by Boston University Law Professor Keith Hylton, criticizes the U.S. Supreme Court's recent punitive damages decision, *Philip Morris v. Williams,* 127 S. Ct. 1057 (2007), for its failure to provide appropriate guidance to lower courts. According to Hylton, "Some courts may choose to focus solely on the reprehensibility approach and continue to award the same punitive judgments they had been awarding all along, though now armed with the understanding that justifications for the judgments should be couched in terms of reprehensibility. Other courts may avoid handing down any punitive award that looks like it could be a penalty for victims other than the plaintiff." Hylton proposes a Due Process Clause economic theory and contends that, through this lens, "if the punitive award both effects a substantial wealth transfer and is inconsistent with reasonable regulation, then it is potentially a taking. However, the mere fact that the punitive award is large, or a multiple-digit ratio of a compensatory award, or could be interpreted as internalizing harms suffered by non-plaintiffs, is of no importance, in a takings analysis, in the absence of some consideration of the incentive effects created by the award."

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Mark Shapiro, *Exposed: The Toxic Chemistry of Everyday Products and What's at Stake for American Power,* 2007

Investigative journalist Mark Shapiro has published a book about the ubiquitous presence of phthalates in our environment and the steps taken by nations around the world to ban these purported endocrine disruptors from toys and materials that come into contact with foods. The book, excerpted in the November 5, 2007, issue of *The Nation*, discusses the scientific research on phthalates, which are found not only in toys, but in products as diverse as shower curtains, shampoo bottles, raincoats, perfumes, medical tubing, and the plastic dashboards in cars. Shapiro describes how authority in the United

States to regulate phthalates is scattered among a number of different agencies which "are confronted with a powerful industry lobby that has largely succeeded in shaping a regulatory culture that imposes an obstacle course of cost-benefit analysis before action." The book describes a Consumer Product Safety Commission study showing that babies spend 70 minutes a day sucking on plastic, not enough time, according to the agency, to deliver a "designated health risk."

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LAW BLOG ROUNDUP

Experienced Advocates Bring More Successful Business-Related Cases to High Court

"Last term, 44% of the nongovernment petitions that were granted review by the [U.S. Supreme] Court were filed by … veteran advocates. … Who cares? You should, if you have an interest in the Supreme Court's docket." *Wall Street Journal* writer Peter Lattman, blogging about a new study that shows how "superstar Supreme Court advocates" are successfully filing *certiorari* petitions and *amicus* briefs that appear to be playing a pivotal role in the Court's new pro-business tilt.

WSJ Law Blog, October 22, 2007.

The Internet and Potential Jurors

"[T]here is no longer any question of the need for lawyers to ask potential jurors if they are writing online." Legal journalist Robert Ambrogi, writing about jury consultants who advise trial lawyers to ask whether potential jurors write blogs or otherwise have a presence on the Internet. Some venire panelists have apparently been blogging while sitting in the courthouse during jury selection, and most younger than 30 are likely active Internet participants. No conclusions have been drawn yet as to whether such participation should be a disqualifier.

Legal Blog Watch, October 12, 2007.

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THE FINAL WORD

Google Ads Reveal Competitive Market for Plaintiffs' Lawyers

"You can do cool things with Google, like take the pulse of the legal profession," writes Adam Liptak, national legal correspondent for *The New York Times,* in a recent "Sidebar" column that examines search engine advertisements sponsored by lawyers. Google, which auctions off advertisements on a pay-per-click basis, has reportedly sold search terms like "Oakland personal injury lawyer," "asbestos attorney" and "mesothelioma attorney Texas" for as much as $58.03, $51.68 and $65.21 per click, respectively. Liptak questions

why sponsored links that reference lawyers, lung cancer and specifically mesothelioma have dominated the list of the top 10 most expensive search terms, according to the Web site CyberWyre, when "relatively few of those clicks would bring in actual business." Ted Frank, the director of the Legal Center for the Public Interest at the American Enterprise Institute, explains that this "economic anomaly" might result from attorneys who "compete on Google" rather than on price, because cut-rate prices can stigmatize a law firm. "These lawyers don't really litigate cases – they settle," Frank is quoted as saying. "And they need a big inventory of cases. The only job of the attorney is to come up with clients."

Liptak also notes several drawbacks to lawyer-sponsored links, including the risk of misleading readers who are searching for accurate medical information. "In areas like cerebral palsy," lawyers' Web sites "will steer you into highly tendentious information," says one senior fellow with the Manhattan Institute. In addition, Liptak estimates he cost law firms at least $1,000 in clicks while researching an advertising medium that, by one law professor's reckoning, might have already entered "middle age." "Lawyers are usually the slowest to adopt any form of new technology," argues Susan Crawford of the University of Michigan, in expressing some reservations about the longevity of the trend. *See The New York Times,* October 15, 2007.

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UPCOMING CONFERENCES AND SEMINARS

American Conference Institute, New York City, New York – December 12-14, 2007 – "12th Annual Drug and Medical Device Litigation" conference. Shook, Hardy & Bacon Pharmaceutical & Medical Device Litigation Partner Harvey Kaplan will serve on a panel that will discuss "Jury Communication: Changing Perceptions of the Industry/FDA and Putting Adverse Events and the Approval Process in Context."

GMA, The Association of Food, Beverage and Consumer Products Companies, New Orleans, Louisiana – February 19-21, 2008 – "2008 Food Claims & Litigation Conference: Emerging Issues in Food-Related Litigation." Shook, Hardy & Bacon Product Liability Litigation Partner Laura Clark Fey and Pharmaceutical & Medical Device Litigation Partner Paul La Scala will discuss "Product Liability When There Is No Injury: The Deceptive Trade Practices Class Action. Shook, Hardy & Bacon is co-sponsoring this event.

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

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