Shook, Hardy & Bacon L.L.P.

Product Liability Litigation Report

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FEDERAL APPEALS COURT TAKES JURISDICTION OF CONDITIONAL JUDGMENT IN DEFECTIVE PLATFORM LIFT CASE

The Seventh Circuit Court of Appeals has ruled that a judgment based on a settlement agreement that leaves an issue to be decided on appeal is a final appealable judgment. ***Sims v. EGA Prods., Inc.*, Nos. 06-1057 & 06-1268 (7th Cir., decided January 24. 2007)**. Plaintiff Daniel Sims brought this tort suit against the manufacturer of a lift platform that allegedly failed and caused serious injuries. The manufacturer timely notified the superintendent of its insurance coverage about the litigation, but the superintendent failed to investigate or defend the suit. Sims was awarded a default judgment of $31.2 million, and the manufacturer filed a motion to vacate the default five months after its answer to the complaint was due.

The trial court agreed to reopen the case, finding good cause to do so because the award appeared to be disproportionate to the wrong. The parties then agreed to settle the case; Sims would receive the amount remaining on the insurance policy ($761,000) and would retain the right to appeal the question whether the default judgment should have been set aside. The agreement further provided that (i) if the appeals court reversed the decision to reopen the case, the manufacturer would try to recoup any award in excess of $761,000 from its insurance superintendent; and (ii) if the appeals court declined to rule on the case, the parties would be in the same position they were in before the settlement, i.e., awaiting trial in the district court.

Deciding that the judgment based on the settlement agreement was final and appealable, the court determined that the latter proviso did not alter the judgment's finality, comparing it to a conditional plea under the Federal Rules of Criminal Procedure which provide that a plea must be set aside if resolving a reserved issue on appeal is impossible. The court states, "it is essential to look at the whole picture, including claims that have been put on the back burner," when deciding whether a judgment is final. According to the court, "Only if we *refuse* to decide does the case go to trial on the merits. That's just what should happen, because the only way we can refuse to act is if the judgment isn't final, and then the case must still be ongoing." Ruling that reopening the judgment would not prejudice the plaintiffs, the court found that the trial judge did not abuse his discretion "in concluding that entry of default would be overkill."

< Back to Top

Contents

D.C. CIRCUIT COURT FINDS INTERNET SURVEY UNRELIABLE UNDER *DAUBERT* AND *KUMHO TIRE*

A federal court in the District of Columbia has granted summary judgment to the U.S. Department of Agriculture in a case involving a First Amendment challenge to a law that requires food producers to pay a federal assessment that funds government-sponsored promotional campaigns. *Avocados Plus, Inc. v. Johanns,* No. 02-1798, 2007 WL 172305 (D.D.C. Jan. 23, 2007). To establish their case, plaintiffs were required to show "that the individual advertisements funded by the government were actually being attributed to the specific [producer] that objected to being associated with the [promotional] message." They attempted to do so on the basis of expert testimony involving an Internet survey which purportedly demonstrated that a significant portion of the general populace attributed the messages to the plaintiffs. Citing U.S. Supreme Court decisions on the reliability of scientific evidence, *Kumho Tire Co. v. Carmichael,* 526 U.S. 137 (1999), and *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993), the court determined that the evidence was neither reliable nor trustworthy. The court characterized the survey as "fatally flawed" because plaintiffs' own expert admitted that "the ad shown to the survey respondents was not attributed to anyone specifically" and "it was unlikely that any of the respondents would have identified, unaided by the design of the survey, any of the plaintiffs as sponsors of the ad." Plaintiffs had also declined to provide any of the survey's underlying documentation, despite the district court's "grave doubts" about its reliability.

< Back to Top

CALIFORNIA SUPREME COURT ISSUES RULING ON INTERPLAY OF PRE-CLASS CERTIFICATION DISCOVERY AND PRIVACY INTERESTS

The California Supreme Court has determined that allowing a potential class member to passively fail to object to the disclosure of identifying information during civil discovery proceedings in a consumers' rights class action against a product seller sufficiently protects the member's privacy rights. ***Pioneer Elecs. (USA), Inc. v. Superior Court*, No. S133794 (Calif. Supreme Ct., decided Jan. 25, 2007)**. A lower appellate court had required that trial courts "assure not only that all prospective or potential class members receive actual notice of their right to grant or withhold consent to the release of their personal identifying information, but also that such consent must be exhibited by each potential class member's own positive act of agreeing to disclosure." The issue arose in the context of class litigation over allegedly defective DVD players. Purchasers had evidently communicated with the manufacturer expressing their discontent with the product, and plaintiffs sought their identifying information during pre-certification discovery to facilitate communication with potential class members.

The trial court's initial order would have required an affirmative response from the manufacturer's customers before personal identifying information could be disclosed to plaintiff's counsel. According to the state high court, the lower court's approach was too strict because it failed to consider the nature of the privacy invasion and apply a balancing test to weigh the competing interests involved. The court found it unlikely that the complaining consumers, "having

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already voluntarily disclosed their identifying information to that company in the hope of obtaining some form of relief, would have a reasonable expectation that such information would be kept private and withheld from a class action plaintiff who possibly seeks similar relief for other Pioneer customers.… If anything, these complainants might reasonably expect, and even hope, that their names and addresses would be given to any such class action plaintiff."

< Back to Top

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LEGAL SCHOLAR FINDS PUNITIVE DAMAGES JURISPRUDENCE POTENTIALLY UNPRINCIPLED

University of Richmond Law School Professor Carl Tobias, analyzing the Ninth Circuit's recent decision to reduce the punitive damages award in the Exxon Valdez oil spill case, contends that the court's application of the U.S. Supreme Court's punitive damages principles "shows how arbitrary punitive damages jurisprudence can appear." According to Tobias, the Ninth Circuit undercut its findings about the company's reckless behavior, i.e., allowing a known alcoholic to continue serving as an oil-tanker captain, by fashioning "out of whole cloth the mitigation notion." Justifying its reduction of the award, the court accounted for the steps Exxon took to repair the harm and voluntarily compensate the plaintiffs. As Tobias notes, "Mitigation is simply irrelevant because deterrence is punitive damages' major purpose, not measures taken after the fact." He further takes the Ninth Circuit to task for concluding that a 5-to-1 ratio satisfies due process "as enunciated by the Supreme Court, although the Justices have strenuously resisted assigning very specific ratios, which have no basis in the due process clause." Tobias concludes by quoting Justice Antonin Scalia who has stated that the Court's new punitive damages jurisprudence is "insusceptible of principled application." *See Findlaw.com,* January 22, 2007.

< Back to Top

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WEEKLY STANDARD ARTICLE DECRIES JUDICIAL ACTIVISM

In an article titled "Conservative Judicial Activism? Inventing a Constitutional Right to 'Medical Self-Defense,'" University of Colorado Law Professor Robert Nagel outlines how an individual can attempt to implement a "bright idea," such as medical self-defense, as national policy. According to Nagel, all that individuals need to do is go to law school, clerk for a U.S. Supreme Court Justice, become a law school professor, write academic articles and books, gain visibility through op-eds and a blog, and then publish the bright idea in an influential law review, get an important think tank to convene a symposium to discuss the article, and finally, wait for litigators to bring the idea to the Supreme Court for imposition as a requirement of constitutional law. Nagel has UCLA's Eugene Volokh in his sights for believing that he can get a conservative Supreme Court to adopt the principle that the use of experimental medical treatments is a constitutionally protected right with which the government cannot interfere except by means of the narrowest restrictions. Nagel contends that asking the courts to take such action requires that "judges make quintessentially legislative judgments."

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The article concludes, "Creating a constitutional right to medical self-defense would be a definitive sign that the conservatives who sit on the Supreme Court are not serious about establishing a saner, less imperial role for the judiciary – indeed, that just about nobody in the legal profession is. This would be further evidence, if more is needed, that if non-lawyers want to retake control over public decision-making, they should not expect much help from members of the profession whose inordinate power is based on the modern conventions of constitutional argument." *See The Weekly Standard,* February 5, 2007.

< Back to Top

ALL THINGS LEGISLATIVE AND REGULATORY

CPSC Seeks Public Comment on Settlement Agreement Involving Gas Grills

The Consumer Product Safety Commission (CPSC) has **announced** a provisionally accepted settlement agreement with a gas-grill manufacturer that allegedly failed to inform the agency of a product defect which caused a number of fires and minor burn injuries.

The agreement will require the manufacturer to pay a $300,000 civil penalty, but it "does not constitute an admission by Nexgrill or a determination by the Commission that Nexgrill violated the [Consumer Product Safety Act's] reporting requirements." Comments on the agreement will be accepted until February 5, 2007. *See* 72 Fed. Reg. 2496 (Jan. 19, 2007).

Advocates Claim Tort Reform Is Dead in Democratic Congress

Speaking at a Washington Legal Foundation forum, SHB Public Policy Partner **Victor Schwartz** recently claimed that because trial lawyers were a "driving force" behind the Democratic congressional victories in 2006, their efforts can prevent any tort-reform legislation from being enacted. In fact, Schwartz predicted that trial lawyers will probably try to expand the right to sue by offering "trial lawyers' earmarks" into various bills. Among the measures Schwartz identified as comatose in the 110th Congress are the Bush administration's proposal to cap non-economic damages in medical malpractice cases at $250,000, a so-called cheeseburger bill that would shield the fast-food industry from obesity lawsuits and a proposal to limit plaintiffs from forum shopping, i.e., bringing their cases in states with courts sympathetic to their issues. *See CongressDailyPM,* January 25, 2007.

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And Speaking of Cheeseburger Bills …

The latest tally of states that have adopted legislation protecting manufacturers, distributors, sellers, or retailers of food or nonalcoholic beverages from civil liability for weight gain, obesity or obesity-related health conditions from long-term consumption can be found on the National Restaurant Association's **Web site**.

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According to the organization, such laws, typically called "Common Sense Consumption Acts," have been enacted in 23 states, are dead in the current sessions of 21 states and the District of Columbia, and are pending in six states. Those states where the legislation is pending are Mississippi, Nebraska, New Jersey, New Mexico, Oklahoma, and South Carolina.

The movement to convince state legislatures and the U.S. Congress that such bills were needed was sparked by litigation against McDonald's Corp. filed in 2002 with claims that the company's fast food caused an array of obesity-related health problems. *Pelman v. McDonald's Corp.,* No. 1:02cv7821 (U.S. Dist. Ct., Southern Dist., NY). The first state to pass protective legislation was Louisiana, which acted in 2003.

< Back to Top

LEGAL LITERATURE REVIEW

Victor Schwartz, Cary Silverman and Phil Goldberg, "Toward Neutral Principles of Stare Decisis in Tort Law," 58 *S.C. L. Rev.* 317 (2006)

Shook, Hardy & Bacon Public Policy lawyers **Victor Schwartz**, **Cary Silverman** and **Phil Goldberg** suggest in this article that courts adopt 10 neutral principles as guides to ensure incremental rather than sudden changes in tort law. They acknowledge that pressures to change tort law come from both plaintiffs and defendants, but caution courts to be "extremely wary of departing from precedent" except in a "limited set of circumstances." While most of the neutral principles proposed would promote change in the law, three are principles of stability. They would require a court's close consideration of (i) reliance interests, (ii) prudential concerns favoring legislative action, and (iii) the need for incremental changes that respect fundamental tort law principles.

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Robert Gaglione, "The Modern Role of State Attorneys General: A Renewed Activism," *The Federalist Society* (2007)

California attorney Robert Gaglione traces the historical function of state attorneys general and describes how it has changed in recent years as such executive branch officials are increasingly turning to consumer protection and antitrust litigation "to achieve public policy ends they deem desirable." The industries targeted in recent years by state attorneys general include the airline industry, automakers, fast food companies, gun manufacturers, insurers, lead paint manufacturers, and oil and gas companies.

Gaglione discusses the debate that has accompanied such activity, noting that it encroaches on legislative functions and has the potential to "empower one state to set policy for a particular region or even the entire nation." Critics also apparently denounce the trend for attorneys general to hire outside counsel to pursue such litigation, which practice has brought enormous legal fees, in the case of attorneys general litigation filed against cigarette manufacturers in the 1990s, to lawyers who may have contributed to an attorney general's election campaign. Gaglione suggests that the federal courts and Congress exercise

careful oversight "to ensure that state attorneys general do not improperly exceed the boundaries of their authority or usurp power reserved to the federal government" and urges states to place restrictions on attorneys general use of outside counsel "to prosecute large-scale tort actions."

Richard Henry Seamon, "An Erie Obstacle to State Tort Reform," 43 *Idaho L. Rev.* 37 (March 2007)

University of Idaho College of Law Professor Richard Seamon makes the case for federal courts to ignore state laws that restrict the pleading of punitive damages when they exercise diversity jurisdiction. The Supreme Court's decision in *Erie Railroad v. Tompkins,* 304 U.S. 64 (1938), long studied by U.S. law students, generally provides that federal courts sitting in diversity and adjudicating state law claims must apply federal procedural law and state substantive law. Because there are many state laws in what Seamon calls the "substance-procedure borderland," the federal courts have split over whether to apply them to their diversity cases. Seamon argues that the U.S. Supreme Court may ultimately have to resolve the disagreement "because it concerns whether a state's tort reform efforts can reach into the federal courts in that state." He contends that they should not, because laws restricting the pleading of punitive damages (i) conflict with the Federal Rules of Civil Procedure and are thus preempted, or (ii) interfere with "federal courts' inherent power to make procedural rules for their own proceedings," which power "is justified by the strong federal interest in preserving the integrity of the simplified system of pleading and the liberal standard for amendment of pleadings."

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< Back to Top

LAW BLOG ROUNDUP

Vioxx® Lawsuit Voluntarily Dismissed

"I really wonder whether the Plaintiffs' Steering Committee (or individual trial lawyers with large inventories of Vioxx cases) are buying off plaintiffs with weak cases so that Merck doesn't have a pile of victories in the early going, something that has effectively shut down other pharmaceutical mass tort litigation that settled for nuisance sums." Ted Frank, attorney and director, American Enterprise Institute Liability Project, commenting on a plaintiff voluntarily dismissing her claims that Vioxx® caused her husband's heart attack in "plaintiff-friendly Philadelphia state court."

pointoflaw.com, January 23, 2007.

Legal Fees in Hurricane Katrina Settlement Delayed

"Turns out that plaintiffs' lawyer Richard Scruggs won't be able to take his settlement cut to the bank just yet." Reporter Ashby Jones, correcting an earlier blog entry that said the "famed Mississippi plaintiffs' lawyer whose firm was paid

more than $1 billion for helping negotiate a tobacco settlement in the mid-1990s" was due to collect up to $46 million from a settlement of Katrina-related claims against an insurance company. The court refused to endorse the deal.

wsj.com, January 26, 2007.

And Now the Wiki Truth …

"Beginning in 2004, more than 100 opinions have cited Wikipedia [an online encyclopedia that can be edited by anyone] including 13 from federal appeals courts." Reporter Peter Lattman, referring to a *New York Times* story about judges citing the notoriously unstable Wikipedia as a source of information. Legal scholars and judges are split on whether it should be used as a reference.

wsj.com, January 29, 2007.

< Back to Top

THE FINAL WORD

Plaintiff's Lawyer Claims No Legal Duty Owed to Fen-Phen Claimants; Sanctions Imposed on Defense Counsel for Appeal to Matters Beyond Law and Facts in Closing

According to a news source, a lawyer known as the "master of disaster" and the "prince of torts" for his work representing plaintiffs injured by airplane crashes, hotel fires, defective products, and toxic spills, may be facing questions over legal fees awarded as part of a fen-phen diet-pill settlement in Kentucky. Stanley Chesley, who lives in a 27,000 square-foot French chateau near Cincinnati, apparently earned $20.5 million to negotiate a settlement for 440 fen-phen plaintiffs. A judge has found that the Lexington lawyers who hired Chesley to broker the settlement breached their fiduciary duties in part by taking fees that exceeded their contracts, and press reports indicate that they destroyed notes showing how much they paid themselves and their clients who received only a third of the settlement. Chesley has been quoted as saying, "I was not a lawyer for those people," and he has claimed in court documents that he had no communications with the clients and did not sign the settlement. A lawyer representing the former clients contends that Chesley was "up to his eyeballs" in the alleged scheme and that his contract lists him as "co-counsel." *See The Courier-Journal,* January 21, 2007.

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And in a development catching the eye of lawyers practicing in Nevada, that state's supreme court has apparently imposed sanctions in four personal injury cases defended by attorney Phillip Emerson and referred him to the state bar for disciplinary proceedings. According to a press report, Emerson appealed to matters outside the law and facts of the case to gain wins for his clients. Among the objectionable statements he made in closing were: (i) "People must take responsibility for their lives and not blame others for challenges and setbacks. People must stop wasting taxpayers' money and jurors' valuable time on cases

like this." (ii) "I have a real passion for cases like this because it's cases like this that make people skeptical and distrustful of lawyers and their clients who bring personal injury lawsuits. And it's a big factor as to why our profession is not as honorable a profession as it once was in the eyes of the public." (iii) "There is a conventional school of thought prevalent now that Americans have become a society of blamers."

According to the Nevada Supreme Court, such arguments suggest to the jury that, "regardless of the evidence, if the jury found in the defendants' favors, the jury could remedy the social ills of frivolous lawsuits.… His arguments were directed at causing the jurors to harbor disdain for the civil jury process – a defining, foundational characteristic of our legal system – and at perpetuating a misconception that most personal injury cases are unfounded and brought in bad faith by unscrupulous lawyers." Nevada's professional conduct rules reportedly forbid lawyers from stating to a jury a personal opinion about the justness of a cause, the credibility of a witness or the culpability of a civil litigant. *See Las Vegas Review-Journal,* January 29, 2007.

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, and food 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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