Shook, Hardy & Bacon L.L.P.

Product Liability Litigation Report

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NINTH CIRCUIT ADDRESSES PUNITIVE DAMAGES ISSUE OF FIRST IMPRESSION

The Ninth Circuit Court of Appeals has determined that an Oregon statute which requires plaintiffs to share their punitive damage awards with the state violates neither the Takings Clause of the Fifth Amendment nor the Excessive Fines Clause of the Eighth Amendment to the U.S. Constitution. ***Engquist v. Or. Dep't of Agric.*, No. 05-35263 (9th Cir., decided Feb. 8, 2007)**. The plaintiff had successfully sued her former employer for constitutional deprivations and interference with contract and was awarded $175,000 in compensatory damages and $250,000 in punitive damages of which $75,000 was allocated to Oregon's Criminal Injuries Compensation Account (State Account). When the employer appealed, the plaintiff filed a cross-appeal, challenging the judgment entered in favor of the State Account. The court found that her constitutional claims were invalid as a matter of law and remanded for an adjustment to the damage awards related to those claims. Because the trial court made the State Account allocation on the basis of the punitive damages plaintiff was awarded for her state law claims, the court addressed her cross-appeal.

According to the court, the federal courts have not considered whether punitive damages awards qualify as property for purposes of the Takings Clause. Because such awards are "contingent and uncertain," i.e., they can only be awarded if the jury finds the defendant's behavior to be malicious or reckless and decides to invoke its discretionary moral judgment against the defendant's conduct, the court determined that "a plaintiff's interest in a prospective punitive damages award does not qualify as 'property' under the Takings Clause." As for the plaintiff's claim that being forced to split her award with the state violates the Excessive Fines Clause, the court noted that the clause applies only to government acts intended to punish and that "the split-remedy scheme is not intended to punish" plaintiffs. Such statutes, said the court, are "unrelated" to a plaintiff's culpability.

A number of states have adopted laws requiring plaintiffs to share their punitive damage awards with the state. Such initiatives were part of the litigation abuse reforms that have been pursued by the defense bar and business interests in recent years.

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ALABAMA SUPREME COURT CONSIDERS LARGEST VERDICT IN STATE'S HISTORY

The state of Alabama and Exxon Mobil Corp. recently appeared before the state's high court to argue the merits of a $3.5 billion punitive damages award against the company. Alabama's conservation department sued the oil company in 1999, claiming that it underpaid royalties to the state from gas wells drilled in state-owned coastal waters. A jury returned a verdict of $102.8 million in compensatory damages and $11.8 billion in punitive damages. The trial judge reduced the punitive damages award to $3.5 billion, which, in 2003, was the largest in U.S. history. On appeal, Exxon Mobil argued that punitive damages are not warranted because the case merely involves a dispute over the meaning of the royalty contract. According to the state's attorney, the company intentionally shortchanged the state, knowing that it was inexperienced in the natural gas business. Because of the company's size, i.e., it reported a record $39.5 billion in net income for 2006, the state argued that the $3.6 billion verdict was "enough to get Exxon's attention." *See Ledger Enquirer,* February 6, 2007.

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NINTH CIRCUIT WITHDRAWS OPINION ON TRIBAL JURISDICTION IN PRODUCT DEFECT CASE

The Ninth Circuit Court of Appeals has determined that it prematurely decided a case involving a question of tribal jurisdiction over a products liability claim against an automobile manufacturer. ***Ford Motor Co. v. Todecheene,* No. 02-17165 (9th Cir., decided Feb. 1, 2007)**.

So ruling, the court withdrew an opinion issued in 2005, when it determined that the tribe lacked jurisdiction to adjudicate the matter. The issue arose from an accident involving an on-duty Navajo police officer who was killed when her Ford Expedition patrol vehicle rolled over on a reservation road. Her parents sued Ford in tribal court, and Ford sought to remove the case to federal court. Because federal statutes do not allow removal from tribal courts, the district court remanded the case. Thereafter, the tribal court determined that it had jurisdiction because the vehicle was part of a lease-purchase transaction that provided for tribal authority over disputes arising under the contract.

Ford chose not to appeal this decision, seeking instead to halt the tribal proceeding in federal court. The district court agreed that the tribal court lacked jurisdiction, and the Ninth Circuit affirmed. *Ford Motor Co. v. Todecheene,* 394 F. 3d 1170 (9th Cir. 2005). In its 2005 ruling, the court determined that the case did not fit within either the consensual relations or the tribal self-government exceptions to the rule that generally prohibits tribal courts from exercising jurisdiction over nonmembers. In its 2007 decision, the Ninth Circuit noted that it did not resolve the precise jurisdictional issue presented in the case when it decided another matter in 2006. And thus, because it could not say "that the tribal courts in this case plainly lack jurisdiction over the dispute among Ford Motor Company, the Todecheenes and the Navajo Nation," the case must be remanded for the district court to stay proceedings in the federal system, until proceedings in the tribal courts about jurisdiction are exhausted.

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RICHARD ZITRIN, "SECRECY'S DANGEROUS SIDE EFFECTS," *THE LOS ANGELES TIMES,* FEBRUARY 8, 2007

"It is simply unacceptable as a matter of public policy to permit secret deals that conceal evidence of dangers to the public," writes lawyer Richard Zitrin, founder of the Center for Applied Legal Ethics, in his *Los Angeles Times* article about a drug company's decision to settle lawsuits involving a drug used to treat schizophrenia and bipolar disorder. Zitrin charges that the company settled the first 8,000 cases in exchange for claimants' secrecy, although he attributes this "public disservice," in part, to plaintiffs' lawyers who agreed to return sensitive documents to the defendant to expedite the federal case for their clients. Only after "negotiated secrecy" became impossible, according to Zitrin, did the company settle the remaining 18,000 claims. "Neither lawyers nor judges should ever be party to such agreements," opines Zitrin, who concludes by invoking several high-profile cases in which plaintiffs refused to "play the secrecy game."

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"It is simply unacceptable as a matter of public policy to permit secret deals that conceal evidence of dangers to the public."

ABA PANEL'S REVISION TO CODE OF JUDICIAL CONDUCT DRAWS CRITICISM

An American Bar Association (ABA) commission was recently criticized for attempting to recast a longstanding injunction against the "appearance of impropriety" as nonbinding advice under the group's Model Code of Judicial Conduct. According to the proposal, the contested language would have appeared in the Code's first canon as "important guidance," but would not have been enforceable as a black letter rule. Instead, the committee argued that judges, while expected to adhere to the overarching principles in the canon, should be disciplined only for the specific acts of impropriety codified in the rules.

The proposal elicited negative responses from judges, legal experts and lawmakers when it was brought to the media's attention by Robert Tembeckjian, who resigned from the ABA commission in protest and called the change a "monumental mistake." Many apparently believed that the "appearance of impropriety" standard, in addition to being widely used by state ethics codes, is made clear by the ABA Code, which also states that "the test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired."

The ABA House of Delegates will vote on the Code during the week of February 12, 2007, at which time the drafters will reportedly accept a "friendly amendment" reinstating the "appearance of impropriety" as an actionable offense. *See The New York Times,* February 6 and 9, 2007; *Law.com,* February 7, 2007; *The Los Angeles Times,* February 10, 2007; *Associated Press,* February 11, 2007.

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ALL THINGS LEGISLATIVE AND REGULATORY

Michigan Legislators Consider Bill to Reverse Drug Makers' Immunity

According to a news source, Democrats who now control Michigan's House of Representatives are poised to adopt measures (H.B. 4044-46) that would reverse a law that shields drug manufacturers from product liability suits. The state is apparently alone in the nation with such an immunity law; plaintiffs can sue a drug company only there if they can prove the company withheld or misrepresented information about a drug before the Food and Drug Administration. Hearings on the bill have reportedly been scheduled for the week of February 12, 2007; should it be reported out of the House, it will apparently face an uphill battle in the Republican-controlled Senate. *See Michigan Live,* February 11, 2007.

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LEGAL LITERATURE REVIEW

SHB Partner Analyzes State Court Decisions Rejecting Medical Monitoring

In a Federalist Society publication, Shook, Hardy & Bacon Public Policy Partner **Mark Behrens** discusses the five state supreme court decisions rejecting a cause of action for medical monitoring. Mississippi is the most recent state to do so; we summarized its supreme court's decision in *Paz v. Brush Engineered Materials, Inc.* in the January 18, 2007, issue of this Report. Other states that have also concluded that plaintiffs must have an identifiable injury to obtain a recovery are Alabama, Kentucky, Michigan, and Nevada. Behrens contends that "[m]edical monitoring claims brought by asymptomatic plaintiffs conflict with the traditional rule" and the adoption of such causes of action would likely foster litigation. He concludes, "Almost everyone comes into contact with a potentially limitless number of materials that could be argued to warrant medical monitoring relief. Courts would be forced to decide claims that are premature (because there is not yet any physical injury) or actually meritless (because there never will be)." *See* 8 *Engage* 131 (2007).

"Almost everyone comes into contact with a potentially limitless number of materials that could be argued to warrant medical monitoring relief."

Anthony Sebok, "Punitive Damages: From Myth to Theory," 92 *Iowa L. Rev.* (2007)

Brooklyn Law Professor Anthony Sebok contends in this article that (i) punitive damages were never "out of control" as tort reformers contended beginning in the 1980s, and (ii) most current efforts to explain the function of punitive damages, i.e., as a means of deterrence, fail to justify their imposition. He concludes by suggesting, "if we recognize that they fit within a scheme of civil recourse and provide a unique form of redress where citizens have suffered the indignity of a willful violation of their private rights, then we will have a theory of punitive damages that reflects the reality of the tort system we actually have." Sebok's intent is to answer the question, "how much should *this* plaintiff receive

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at the conclusion of *her* properly framed private lawsuit for retribution?" And he believes that applying the ratio between compensatory damages and a punitive award makes little sense if punitive damages are viewed as private retribution.

Griffin Bell, "Judicial Leadership Emerging in Asbestos and Silica Mass Torts," *Washington Legal Foundation Legal Opinion Letter,* (Feb. 9, 2007)

The Honorable Griffin Bell, a former federal appeals court judge and U.S. attorney general, has written an article to discuss steps that defense counsel and judges are taking to investigate and police fraud in mass tort litigation. Bell follows the course of proceedings in Texas, West Virginia, Washington, and Ohio where fraudulent medical reports and diagnoses, jury eavesdropping and lawyer misconduct in the courtroom have been uncovered in silica- and asbestos-related litigation. According to Bell, such evidence "suggests that fraud may be widespread in mass torts. The evidence that has emerged may be just the tip of the iceberg." He praises the judges who are taking fraud allegations seriously and suggests that others follow their example.

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LAW BLOG ROUNDUP

Wigs and Tort Reformers?

"I've never quite understood this, but many of the tort reform movement's leading lights have, in my humble opinion, an unhealthy obsession with Mother England – and not in a 'Lady Di' fan-club kind of way." *Washington Monthly* editor Stephanie Mencimer commenting on calls for reforms, like loser pays rules, that would replace "our messy, raucous, occasionally unpredictable but enormously democratic civil juries with guys in powdered wigs."

thetortellini.com, February 9, 2007.

Aggregate Litigation Principles on ALI Agenda

"If you like class actions, mass torts, and other aggregated litigation, then the current draft Principles [of the Law of Aggregate Litigation] are for you." Lawyers James Beck and Mark Herrmann discussing the American Law Institute's latest draft of its aggregate litigation principles, which purportedly encourage and expand the availability of class actions and other forms of aggregate litigation.

druganddevicelaw.blogspot.com, February 8, 2007.

"If you like class actions, mass torts, and other aggregated litigation, then the current draft Principles [of the Law of Aggregate Litigation] are for you."

But Do ALI's Principles Only Help Plaintiffs?

"Some of the most significant and controversial proposals in the ALI draft are those that reflect what many defendants have sought when looking for an exit strategy in mass litigation.… On these issues [settlement class actions

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and non-class aggregate settlements], the interests of defendants, plaintiffs' counsel, and the courts align; it's individual claimants themselves who are at risk of getting screwed." Seton Hall Law Professor Howard Erichson blogging about his view of the draft aggregate litigation principles.

lawprofessors.typepad.com/mass_tort_litigation, February 9, 2007.

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THE FINAL WORD

ABA Journal Focuses on Changes to Trial Lawyers Association

According to senior writer Terry Carter, the name change that the Association of Trial Lawyers of America adopted in late 2006 was just window dressing for what the plaintiffs' bar is likely to do to counter the recent successes of tort reformers, who have adroitly turned public opinion against "greedy trial lawyers." ATLA, which is now the American Association for Justice, has a new executive director, who brings a strong background in politics and public relations, as well as a new politically savvy staffer in the organization's media position. The AAJ has reportedly developed a new comprehensive communications plan that will "identify our opponents, highlight their true motives and blunt their attacks" and will be looking at other ways to counter the efforts of organizations such as the U.S. Chamber of Commerce to influence state and federal decision-makers and elections. Shook, Hardy & Bacon's Public Policy Partner Victor Schwartz is quoted as saying "these are very smart and sophisticated people. If the tort reform side sticks to its old playbook, these people could have some success. They're not just changing their name, they're changing the definition of the debate." *See ABA Journal,* February 2007.

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ABOUT SHB

Shook, Hardy & Bacon is widely recognized as a premier litigation firm in the United States and abroad. For more than a century, the firm has defended clients in some of the most substantial national and international product liability and mass tort litigations.

Shook attorneys have unparalleled experience in organizing defense strategies, developing defense themes and trying high-profile cases. The firm is enormously proud of its track record for achieving favorable results for clients under the most contentious circumstances in both federal and state courts.

The firm's clients include many large multinational companies in the tobacco, pharmaceutical, medical device, automotive, chemical, 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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