Shook, Hardy & Bacon L.L.P.

Product Liability Litigation Report

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U.S. SUPREME COURT CONSIDERS IF REGULATED BUSINESS IS ACTING UNDER A FEDERAL OFFICER

In late April 2007, the U.S. Supreme Court heard arguments in a case that will require it to decide if a company subject to specific and detailed federal regulation is entitled to remove a case raising state law questions to federal court under the federal officer removal statute. ***Watson v. Philip Morris Cos., Inc.*, No. 05-1284 (U.S., argued April 25, 2007)**. The case raises claims that the defendant's marketing of "light" cigarettes was deceptive because the defendant allegedly designed cigarettes that would "cheat" the federally prescribed test and marketed the cigarettes as "light" when they were not. The Eighth Circuit found the statute applicable and allowed Philip Morris to remove the case, essentially ruling that defendant was assisting the federal government when it created tar and nicotine ratings under its supervision and transmitted them to the public. If the removal was proper, the state law claims could be preempted, and the principles could be applied in lawsuits involving a host of other consumer products.

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FEDERAL DISTRICT COURT CONDEMNS ATTORNEY SOLICITATION OF PUTATIVE CONSUMER CLASS

A U.S. District Court in California has refused to certify a class in a case alleging unfair business practices and false advertising regarding the marketing and sales of air purifiers. ***Bodner v. Oreck Direct, LLC*, No. C06-4756 (U.S. Dist. Ct., N.D. Cal., decided April 25, 2007)**.

The named plaintiff bought defendant's air purifier hoping it would alleviate the allergic symptoms he purportedly experienced every February and March. While he claimed the product did not help, he also admitted that his apartment window is frequently open, he is exposed to allergens elsewhere during the day, he does not know what he may be allergic to, and his unit was never tested to determine whether it works. He also admitted he became a plaintiff by responding to an advertisement by plaintiff's counsel, whom he did not meet until the day before his deposition. The plaintiff did not read the complaint before it was filed.

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According to the court, "It is clear from the record that plaintiff's counsel, and not plaintiff, is the driving force behind this action …. That plaintiff's counsel constructed this lawsuit before it had a plaintiff cannot be denied. This fact is borne out not only by plaintiff's own admissions, but by plaintiff's counsel's previous abortive attempt to bring a seemingly identical lawsuit in another district. Indeed, counsel himself admitted at the hearing that he or his firm had the research performed on the product at issue and had a theory about the product's deficiencies. *Then,* armed with that information they went in search of a plaintiff, never mind the lack of a fitting plaintiff or the lack of ethical scruples." Finding that the plaintiff did not meet the threshold typicality or adequacy requirements of Rule 23(a), the court denied the motion for class certification, saying, "In short, the conduct in this action does not look good, does not sound good, and does not smell good. In fact, it reeks."

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TEXAS COURT EXPLORES INTERPLAY OF PRIVILEGE AND DISCLOSURE RULES IN DEATH CASE

Addressing a matter of first impression, the Texas Supreme Court has determined that a party may seek the return of inadvertently disclosed privileged documents from its designated expert witness, and thus preserve their privileged status, only if the designated expert does not testify at trial. ***In re Christus Spohn Hosp. Kleberg*, No. 04-0914 (Tex. Supreme Ct., decided April 27, 2007**. The issue arose in a medical malpractice case involving a patient's death. The hospital investigated the matter, generating work-product materials that were later forwarded to the hospital's designated expert witness by a paralegal, who was unfamiliar with Texas rules relating to the discovery of documents provided to experts. Texas has a "snap-back" rule that allows a party to recover privileged documents inadvertently produced. The state also has a rule, broader than its federal counterpart, that makes all documents provided to a testifying expert discoverable, regardless whether the expert relied on them.

The court analyzed the purpose for each rule and concluded that the policy considerations underlying the discovery of material reviewed by a testifying expert outweigh the interests protected by the "snap-back" rule. Accordingly, the court determined that the trial court did not abuse its discretion in denying the hospital's motion to quash the deposition of the woman who created the privileged documents. The court denied the hospital's petition for writ of mandamus "without prejudice to any right the hospital might have to designate another testifying expert and recover the privileged documents."

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SIXTH CIRCUIT GIVES WEIGHT TO PREPARED-FOR-LITIGATION FACTOR IN *DAUBERT* ANALYSIS

The Sixth Circuit Court of Appeals has dismissed claims in a personal-injury case involving an allegedly defective boom truck crane, finding that standards for the admissibility of expert testimony should be applied "with greater rigor" when the expert is a "quintessential expert for hire."

***Johnson v. Manitowoc Boom Trucks, Inc.*, No. 06-5145 (6th Cir., decided April 30, 2007)**. The expert at issue was a registered professional engineer who had been employed exclusively as an engineering "consultant" since 1980 and had testified in a wide range of design-defect cases. He had, in fact, rendered opinions on "almost any machine," including a "wheelchair, a deep fat fryer, a passenger elevator, an antique replica shotgun, a hay baler, a meat tenderizer, a forklift, a manure spreader, a lawn mower, a seat belt assembly, a log skidder, a concrete saw, a trampoline, and a tree stand." A magistrate judge had analyzed the expert's testimony under the standards set forth in *Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. 579 (1993), and found it lacking because the expert failed to test the equipment at issue in the case and because his "opinions were conceived, executed, and invented solely in the context of this litigation."

While the U.S. Supreme Court did not include a "prepared-solely-for-litigation" factor in its *Daubert* analysis, a number of courts, most notably the Ninth Circuit, have established it as a corollary to the "flowing-naturally-from-independent-research" factor, which, where shown, can lead to a more lenient application of the other *Daubert* factors. As the Sixth Circuit noted, this "would be in line with the notion that an expert who testifies based on research he has conducted independent of the litigation 'provides important, objective proof that the research comports with the dictates of good science.'" Conversely, "if a proposed expert is a 'quintessential expert for hire,' then it seems well within a trial judge's discretion to apply the *Daubert* factors with greater rigor, as the magistrate judge seems to have done in this case." Because the plaintiff essentially conceded he could not survive summary judgment without his expert's testimony, the court affirmed the grant of summary judgment in defendant's favor.

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LAWSUIT CHALLENGES OHIO CAP ON NON-ECONOMIC AND PUNITIVE DAMAGES

Plaintiffs in a lawsuit against Ortho Evra® manufacturer Johnson & Johnson Pharmaceuticals Co. have asked the court to declare unconstitutional Ohio's statutory cap on non-economic and punitive damages. Since April 2005, Ohio law (S.B. 80) has limited non-economic damages in personal injury suits to the greater of $250,000 or three times the amount of "economic" damages up to a maximum of $350,000; punitive damages are capped at double the amount of compensatory damages awarded to a plaintiff by the same defendant. The Ohio Supreme Court has agreed to consider three certified questions submitted by the U.S. District Court for the Northern District of Ohio, which has asked the justices to decide whether parts of S.B. 80 trespass on plaintiff's rights to trial by jury, to remedies at law, and to due process and equal protection of the law.

Filed in federal court in Cincinnati, Ohio, the 2005 lawsuit alleges that Melisa Arbino experienced multiple blood clots in her brain and lungs after using Johnson & Johnson's Ortho Evra® birth-control patch, which delivers 60 percent more estrogen than the traditional pill-form contraceptive. Arbino filed a motion for summary judgment, citing previous Ohio Supreme Court decisions that struck down caps on personal-injury awards and arguing that S.B. 80 violates her right to trial by jury because it does not allow jurors to determine how much she would be entitled to recover. She also contends that statutory caps fail to provide citizens with equal protection under the law because plaintiffs with minor injuries can recover all the damages they suffered, while severely injured plaintiffs can

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recoup only a small percentage of their losses. The Ohio Academy of Trial Lawyers, as well as various consumer groups, have filed *amicus curiae* briefs supporting this position. A number of related cases involving dozens of other plaintiffs have been consolidated with Arbino's and could be affected by the high court's determination.

Backed by *amicus* briefs submitted by the state of Ohio and the Ohio Association of Civil Trial Attorneys, defense lawyers have argued that S.B. 80 was designed to address concerns raised in earlier supreme court decisions striking down statutory caps. They assert, for example, that the law exempts plaintiffs who have suffered loss of limb or organ system or permanent disability from the non-economic damages cap. Attorneys for Johnson & Johnson further note that parties wishing to challenge legislative acts must bear the burden of proof and that the cap allows for reasonable recovery, protects the financial health of the state and provides fair treatment for severely injured plaintiffs in accordance with the state constitution. *See Supreme Court of Ohio Oral Argument Previews* and *The Enquirer,* May 2, 2007.

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EVIDENCE RULES ADVISORY COMMITTEE LIMITS ATTORNEY-CLIENT PRIVILEGE AND WORK-PRODUCT PROTECTION WAIVERS

The Advisory Committee on Evidence Rules recently approved, with modifications, proposed new Federal Rule of Evidence 502, which addresses limitations on the waiver of the attorney-client privilege and work-product protection. The rule aims to "resolve some longstanding disputes in the courts about the effect of certain disclosures of communications or information protected by the attorney-client privilege or the work-product doctrine – specifically those disputes involving inadvertent disclosure and subject matter waiver," according to the committee. In reviewing the proposed rule and public comments, the committee also considered the prohibitive costs of protecting against an attorney-client privilege or work-product waiver, which may currently be viewed as a subject-matter waiver of all protected communication.

In the context of disclosures made in federal proceedings, 502(a) would limit the scope of a waiver, so that "a waiver extends to an undisclosed communication or information in any federal or state proceeding only if:" (i) "the waiver is intentional"; (ii) "the disclosed and undisclosed communication or information concern the same subject matter"; and (iii) "they ought in fairness to be considered together." As for inadvertent disclosures, 502 (b) states that disclosure of privileged or protected information would not operate as a waiver in a federal or state proceeding if (i) "the disclosure is inadvertent"; (ii) "the holder of the privilege or work-product protection took reasonable steps to prevent disclosure"; and (iii) "the holder took reasonable and prompt steps to rectify the error, including (if applicable) following Fed. R. Civ. P. 26(b)(5)(B)."

Addressing the issue of confidentiality orders, especially as applied to electronic discovery, Rule 502(c) would further establish that "a federal court may order that the privilege or work-product protection is not waived by disclosure connected with the litigation pending before the court." Because it would apply to "all persons and entities in all federal or state proceedings, whether or not they were parties to the litigation," the rule means that a party that takes advantage

of a "quick peek" or "clawback" agreement under the Federal Rules of Civil Procedure and has a non-waiver order entered by the district court, can, in other proceedings, protect from a claim of waiver the privileged documents disclosed by use of the clawback procedure. Clawback agreements protect privileged information from waiver due to inadvertent or pre-review disclosure.

Additional subdivisions of Rule 502 cover party agreements of non-waiver, which cannot extend to other parties unless the agreement is incorporated into a court order, and the rule's applicability to disclosures made in state proceedings. The committee also explains that because a privilege rule cannot bind state courts, Congress will need to directly enact Rule 502 into law through its Commerce Clause authority before it can take effect. Meanwhile, the proposal must be approved by the Committee on Rules of Practice and Procedure and then transmitted to the U.S. Judicial Conference for its consideration.

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ALL THINGS LEGISLATIVE AND REGULATORY

New Policy Imposes Systematic Prior Restraint on Media Statements of U.S. Government Scientists

"While there is a flawless rhetorical mandate for scientific openness, the policy then creates a system of blanket prior restraint that will create just the opposite," states a recent Government Accountability Project (GAP) and Union of Concerned Scientists (UCS) letter to the Department of Commerce, which last month issued a new public communications policy to replace the one developed by the National Oceanic and Atmospheric Administration (NOAA). The new policy will reportedly require all agency employees to submit for prior review and approval any public communications, including personal views, "that relate to Department programs, policies or operations."

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Alleging that these speech restrictions reverse a 2006 NOAA statement encouraging scientists to report their findings, GAP and UCS are requesting that employee training on the new policy be suspended pending a Government Accountability Office review. GAP and UCS also call for the DOC to (i) implement a "clear and transparent media policy" that eliminates "mandatory pre-approval for media contacts, selective routing of media requests, drafting of anticipated questions and answers by scientists prior to interviews, and monitoring of media communications"; (ii) "educate federal employees about their first amendment right to speak on any unclassified subject so long as they make clear that they are expressing their personal views"; and (iii) ensure the policy complies with the Anti-Gag Statute, the Whistleblower Protection Act and the Lloyd-Lafollette Act for communications with Congress.

The two groups note that the policy, at least "in principle, provides a strong rhetorical mandate that 'Department employees may speak to the media and the public about their official work and freely and openly discuss scientific and technical idea, approaches, findings, and conclusions based on their official work.'" Nevertheless, they contend that it "permits arbitrary secrecy by not requiring the agency to explain why communications are restricted after prior review" and "constructs confusing communication categories, inconsistent procedures for restraint, undefined time deadlines, and unknown enforcement authority." *See GAP and UCS Letter to DOC,* April 23, 2007.

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Consumer Advocates Challenge Proposed Product Safety Commission Chair

A number of groups advocating on behalf of consumer interests have challenged President George W. Bush's nominee to head the Consumer Product Safety Commission (CPSC). The leadership position has been vacant since July 2006, and in March 2007, the president nominated Michael Baroody, a top executive with the National Association of Manufacturers, to the post. The CPSC is the nation's leading government product safety agency with responsibility for some 15,000 consumer products, including children's toys and clothing. The consumer advocates claim that Baroody, whom they refer to as an "industry shill," (i) "has not demonstrated a commitment to protecting the public from risks to safety," (ii) "oversaw efforts to weaken the CPSC and to undermine safety proposals pending before the Commission," and (iii) consistently favors "reducing business costs at the expense of consumer protection." They call on Congress to reject the nomination. Should the Senate refuse to confirm the nomination or should it be withdrawn, the president may use his recess-appointment authority to fill the position during a congressional hiatus, a practice he has followed with other controversial nominees.

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Oklahoma's Governor Rejects Lawsuit Reform Bill

Oklahoma Governor Brad Henry (D) has vetoed a litigation reform bill (S.B. 507) that would have, among other matters, capped non-economic damages and appeal bonds, required an independent attorney to be appointed to represent a class with respect to awards of attorney's fees, required potential class members to consciously include themselves in the class, established new rules for lay witness and expert testimony, and restricted the assessment of prejudgment interest. The law would also have eliminated joint and several liability. The state House and Senate passed the bill by margins that will not allow a veto override. The governor is apparently committed to working with the legislature to enact compromise legislation before it adjourns in May 2007; he was concerned that several provisions were unconstitutional, unduly restricted access to the courts and failed to adequately curb frivolous litigation. Senator Glenn Coffee (R – Oklahoma City) was quoted as saying, "The governor missed a grand opportunity to send a message to the nation that Oklahoma is pro-jobs, pro-doctor, and pro-business. Instead, he sent a message that millionaire trial lawyers are still running the show." *See Tulsa World,* April 28, 2007.

The law would also have eliminated joint and several liability.

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LEGAL LITERATURE REVIEW

Cass Sunstein, "Illusory Losses," *University of Chicago Law & Economics, Olin Working Paper* (May 2007)

University of Chicago Law School Professor Cass Sunstein focuses on hedonic damages, or those damages awarded for the loss of enjoyment of life, in this article. He contends that people generally overestimate their hedonic losses, stemming in part "from a failure to appreciate people's powers of adaptation" and from the fact that people tend not to direct their attention, most of the time, to their losses. Because such losses often turn out to be illusory, Sunstein insists that those involved in awarding damages must "clearly distinguish between those harms that involve persistent losses and those harms that do not."

David Friedman, "Reinventing Consumer Protection," *DePaul Law Review* (Fall 2007)

This article explores ways to reduce consumer fraud through non-traditional instruments of deterrence. Willamette Visiting Law Professor David Friedman posits that "Fraud continues to evolve. Perpetrators hone in on those who are too weak and unlikely to report. Resources devoted to the problem are quite limited, and they are usually targeted at specific schemes *post hoc*." He suggests selecting a specific, random group for protection and contends that the commission of fraud would then become riskier for the perpetrator who would face enhanced sanctions if any in this concealed, special group were victimized. The members of the group would be educated to recognize the fraud and have access to the means for readily reporting it. In this way, society could concentrate limited resources, and perpetrators would never know whether a potential victim carries specially protected status.

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David Hoffman, et al., "Docketology, District Courts, and Doctrine," *Working Paper Series* (posted April 2007)

While this article is a work in progress, it analyzes published opinions to determine in what circumstances judges are more likely to write opinions. The authors conclude, on the basis of 1,000 cases from four different jurisdictions that "judges do not write opinions to curry favor with the public or with powerful audiences, nor do they write more when they are younger, seeking to advance their careers. Instead, judges write more opinions at procedural moments (like summary judgment) when appeal is likely and less opinions at procedural moments (like discovery) when it is not." If, as the authors suggest, opinions are intended to make a plea against reversal and are the result of risk aversion, then scholars should be cautious about relying on such material to try to define the law as it is. Rather, they should listen to practitioners, say the authors, who "might be better at forecasting judicial outcomes than scholars."

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LAW BLOG ROUNDUP

Curlin Places Third in Derby; Plaintiffs Lament

"A win by Curlin would boost the value of the horse and provide additional funds for the attorneys to repay the plaintiffs." Blogger Paul Davies, noting that fen-phen plaintiffs, whose lawyers purportedly defrauded them of $64.4 million in a settlement of their claims, could be urging on 7-2 favorite Curlin in the Kentucky Derby because their lawyers have a stake in the horse and a win would boost its value. Alas, Curlin placed third.

blogs.wsj.com/law, May 3, 2007.

Sleeping Justice?

"While judicial pay and judicial elections have made headlines as threats to an independent judiciary, a new study identifies yet another cause

for concern: judicial sleepiness." Journalist and former litigator Peter Lattman, blogging about an Australian study of judges around the world falling asleep on the bench. The study's author suggests that such incidences threaten the integrity of the judicial system, but adds that other courtroom players, like jurors, "may also be vulnerable to sleepiness."

blogs.wsj.com/law, May 2, 2007.

The Cost of Lawsuit Abuse? Where Do Those Numbers Come From Anyway?

"$3,250 a year? We raised our eyebrows over the number too." Reporter Ashby Jones, questioning the accuracy of a number touted by a pro-business group as the annual cost to every American family of tort lawsuit abuse. According to a mathematics expert working at *The Wall Street Journal* as "the numbers guy," the figure is a misrepresentation because it includes every lawsuit in the tort system regardless of merits.

blogs.wsj.com/law, April 27, 2007.

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THE FINAL WORD

Web Site Allows Practitioners to Rate Federal District Court and Magistrate Judges

Practitioners and litigants have the opportunity to anonymously rate and post comments about federal trial judges and magistrates. Called "The Robing Room," the Web **site** tells the visitor who the top-ranked and bottom-ranked jurists are and provides the written comments that have been submitted about them. As might be expected, comments range from the laudatory ("well-prepared," "fair-minded," and "a pleasure to appear before") to the downright insulting ("has seen better days mentally," "brutally mean," "should have quit 20 years ago"). Those wishing to communicate with the individuals who post comments are provided links to do so. It is, of course, unknown if the judges are rating each other.

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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