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Product Liability Litigation Report

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FEDERAL APPEALS COURT CONSIDERS WHETHER DOCUMENTS PRODUCED IN AGENCY INVESTIGATION MAY BE PROTECTED BY ATTORNEY-CLIENT PRIVILEGE

The Tenth Circuit Court of Appeals recently ruled, in a case of first impression, that documents produced under subpoena to a federal agency and subject to written confidentiality agreements were not protected by attorney-client privilege from disclosure in civil litigation involving third parties. ***Qwest Communications Int'l Inc. Securities Litigation*, No. 06-1070, U.S. Court of Appeals, Tenth Circuit, (decided June 19, 2006)**. In so ruling, the court joined six other circuit courts in rejecting what has been referred to as the "selective waiver" doctrine. According to the Tenth Circuit court, only the Eighth Circuit allows such selective waiver and did so to encourage corporations to hire independent outside counsel to conduct self-audits/investigations that would protect the interests of stockholders and customers.

Of particular significance to the Tenth Circuit was the fact that the confidentiality agreements applied to the documents at issue allowed the Securities and Exchange Commission (SEC) to share the documents virtually without limitation, i.e., as otherwise required by law or in furtherance of its duties and responsibilities. As well, the third-party civil actions in which the documents were sought had been filed before the agency subpoenas arrived at the corporation's doorstep, and Qwest had decided to cooperate with the agency subpoenas "in the face of the known [discovery] threat from Plaintiffs, the absence of Tenth Circuit precedent, and a dearth of favorable circuit authority." Nevertheless, said the court, Qwest chose to release hundreds of thousands of pages of privileged documents to the SEC, perceiving "an obvious benefit from its disclosures … while weighing the risk of waiver." Thus, the court did not find Qwest's plea for fairness persuasive nor did it agree "that companies will cease cooperating with law enforcement absent protection under the selective waiver doctrine."

Also discussed as some length in the opinion is whether there is selective waiver for opinion work product, with the court conducting a circuit-wide review of the issue. Because the matter was not at issue in the case, however, the decision

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is not directed to work-product waiver. The court makes note of corporate and commentator support for selective waiver; *amicus* briefs filed in the case apparently claimed that there is a current "culture of waiver" faced by companies undergoing federal investigation. The companies, argued *amici*, feel compelled to waive privilege in the face of government demands for documents "as a pre-requisite for fair treatment by prosecutors." The court rejects such reasoning, which it claims is based on anecdotal evidence, stating that it "cannot rely on such a sparse record to recognize a new doctrine of selective waiver or to create a new privilege for government investigations."

In a related development, a U.S. Judicial Conference advisory committee has recommended amending Rule 502 of the Federal Rules of Evidence to allow corporations and others to disclose privileged documents to federal public offices or agencies without waiving the privilege as to "non-governmental persons or entities." The committee's **recommendation and report** were forwarded in May 2006 to the Judicial Conference's Standing Committee on Rules of Practice and Procedure, which is expected to consider the proposal some time in July. According to the advisory committee, because the proposal involves a rule affecting privileges, it must eventually be enacted by Congress.

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FEDERAL JUDICIAL CENTER ASSESSING IMPACT OF CLASS ACTION FAIRNESS ACT OF 2005

A research arm of the Federal Judicial Center is compiling and analyzing data from the federal district courts to determine whether there have been changes to class-action filings in light of legislation adopted in 2005 that was intended to remove class-action cases from state to federal courts. A preliminary report, released in May 2006, examines data from three district courts and covers filings from 2001 to 2005, before the Class Action Fairness Act was enacted. Thus, the interim report does not reflect post-enactment statistics. It does show some interesting trends, however, including "dramatic increases" in class-action activity since the center initially studied class actions in the early 1990s. Few of the cases analyzed had been removed from state courts, i.e., they had been originally filed in federal court based on federal question jurisdiction, and tort class actions (personal injury and property damage) were a "negligible proportion of the class actions filed during the study period." None of the three federal districts had more than four personal injury or property-damage class-action cases in any of the six-month periods covered by the study. An updated report, due in September 2006, will cover more than 80 district courts . To access the May report, go to **http://www.fjc.gov/library/fjc_catalog.nsf** and click on Recent Materials.

Meanwhile, Florida's governor has approved **legislation** that requires all class-action claimants to be state residents, unless the out-of-state claimants are injured by conduct occurring in Florida and they cannot obtain personal jurisdiction

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over the defendant in their own state. The law also requires class claimants to allege and prove actual damages, unless they are seeking injunctive or other nonmonetary relief. This provision is presumably intended to preclude class-action litigants from seeking medical monitoring in cases without existing injury.

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LEGAL LITERATURE REVIEW: TORT-REFORM SUCCESSES, THE FEDERALIZATION OF PRODUCTS-LIABILITY, AND COMPARISONS OF STATE AND FEDERAL COURT DATA ON PRODUCTS LIABILITY LITIGATION

Shook, Hardy & Bacon Public Policy attorneys **Mark Behrens** and **Cary Silverman** have published an article about one state's experience with tort reform. "Now Open for Business: The Transformation of Mississippi's Legal Climate," 24 *Mississippi Coll. L.R.* 393 (2005). Specifically, the article describes how one state's progress from being a forum that could be characterized as a "judicial hellhole" inimical to defendant interests to one that is more balanced can serve as a model for other states.

The authors vividly describe the abusive legal environment facing corporate defendants summoned to Mississippi's courts in recent years until a convergence of forces began changing the tide in the new millennium. Among the abuses cited were courts friendly to plaintiff interests, extraordinary jury verdicts and excessive appeal-bond requirements. Reform occurred, however, as grassroots organizations worked to inform the public about how litigation was impairing the state's economy, key state leaders committed to enacting tort-reform statutes, and the courts began insisting that justice be administered in a fair and unbiased manner. According to the authors, tort-reform efforts can have a positive impact on a state's economy and must be ongoing "with each branch of the state government taking an active role in transforming the state's image."

Meanwhile, in a **paper** due out in 2007 in the *DePaul Law Review,* Columbia Law School professor Catherine Sharkey discusses how federal agencies are incorporating preambles into their regulations that purport to preempt conflicting or contrary state law, a form of backdoor federalization of products liability. Using regulations recently adopted by the Food and Drug Administration, the Consumer Product Safety Commission and the National Highway Traffic Safety Administration, the author examines the tension between agencies that are attempting to restrict state common-law regulation of companies and products within their bailiwick and the continuing existence of private rights of action.

A statistician with the Bureau of Justice Statistics has released a **paper** that compares data on products-liability and other litigation in state and federal courts from 1992-2001. The state data were generated from jury-trial dockets in the country's 75 most populous counties, while the federal data included civil jury trials that reached a verdict in all federal district courts. Overall, the author

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found that there are two times more civil jury trials in state courts and most of them involve tort issues. Products-liability cases account for less than 5 percent of tort trials in state courts, while 22 percent of federal tort jury trials involved products-liability issues. Plaintiff win rates are nearly the same in state and federal court systems. Products-liability plaintiffs prevailed about 40 percent of the time in state courts and about one-third of the time in federal courts. Damage awards tend to be higher in federal courts, but this is likely a function of the dollar requirements placed on those bringing suits based on diversity jurisdiction. The numbers of products-liability cases brought to trial declined 41 percent in state courts and nearly 67 percent in federal courts over the time-period surveyed.

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LAW BLOG ROUNDUP: SCIENCE AND THE LAW, SUPREME COURT PRECEDENT AND PRODUCTS-LIABILITY STATISTICS

"Investing in some basic scientific literacy for state judges would be money well-spent. Judges can also consider directing parties to litigation to put together an agreed-upon primer on the subject matter." William G. Childs, Products Liability Law Professor, Western New England School of Law. PointofLaw.com., June 27, 2006.

"If each [U.S. Supreme Court] Justice is his or her own sovereign entity, then we don't have a single jurisprudence, but instead nine 'jurisprudentia.'" Whittier Law School professor Russell Covey on how Supreme Court justices do not seem to be bound by Supreme Court precedent. prawfsblawg.blogs.com, July 10, 2006.

"Pharmaceuticals: 35.8%; Industrial manufacturing: 9.0%; Chemicals: 7.4%; Construction: 7.4%; Financial services: 6.6%; Services: 6.6%." From a *Los Angeles Times* study, listing the percentage by industry of products-liability lawsuits filed in federal courts in 2005. Blogs.wsj.com, June 27, 2006.

"CASE-BY-CASE TORT REFORM, FIRMS PUSH TO CHALLENGE COMMON LAW BEFORE NEW, BUSINESS-FRIENDLY JUDGES," *ABA JOURNAL,* JUNE 2006

Referring to the work that lawyers like Shook, Hardy & Bacon's Public Policy Partner **Victor Schwartz** are doing on behalf of corporate clients to change the landscape of tort law in the United States, this article highlights efforts that are taking place in state courtrooms to change fundamental tort-law principles. For example, lawyers are arguing at the trial-court level that juries should be allowed to hear that (i) the plaintiff received compensation from sources other than the defendant; (ii) joint and several liability can result in a defendant with minimal liability shouldering the bulk of a damages award; and (iii) the plaintiff was under the influence of drugs or alcohol or engaging in other

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conduct that might constitute comparative fault. By raising such issues early and preserving them for review, lawyers representing defendants in products-liability litigation are getting them before appellate courts that are becoming more business friendly. Some believe that this is one of the quickest ways to effect change, and it is being championed by corporations such as DaimlerChrysler AG.

There are critics of the approach, however, who consider such strategies to be a method of jury nullification, i.e., giving jurors information that nullifies the common law. Nevertheless, the article notes that tort reform is gaining momentum in courtrooms, legislatures and even before regulatory agencies, which are attempting to limit state lawsuits involving products that meet federal standards. Further information about this regulatory initiative can be found in the Sharkey article noted above. Some legal scholars have argued that, as a matter of fairness, fully informed juries should also be told about caps on noneconomic damages and defendants' insurance coverage. Cornell law professor James Henderson, Jr., a co-reporter on the products liability section of the *Restatement (Third) of Torts,* was quoted as saying "I think this is a 'sauce for the goose, sauce for the gander' sort of thing." He is apparently interested in seeing how the courts react. As more state courts adopt the reforms, tort-law principles developed through court opinions since the 19th century could lose traction, say some experts.

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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).