Shook, Hardy & Bacon L.L.P.

Product Liability Litigation Report

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U.S. SUPREME COURT TO HEAR *FORUM NON CONVENIENS* DISPUTE IN FRAUDULENT MISREPRESENTATION CASE

Among the cases the U.S. Supreme Court agreed to hear this term is one that comes from the Third Circuit and involves a dispute between parties to a shipping transaction that went awry when a shipment of steel coils arrived in a Chinese port. *Malaysia Int'l Shipping Corp. v. Sinochem Int'l Co.,* No. 06-102 (*cert. granted* Sept. 26, 2006). Among other matters, the Third Circuit Court of Appeals **decided** that it would adopt a rule requiring trial courts to first establish personal and substantive jurisdiction before ruling on a motion to dismiss on *forum non conveniens* grounds. Because the district court had dismissed the case without providing an adequate analysis as to the personal jurisdiction issues in the case, the case was remanded to further develop that aspect of the record. Defendant Sinochem is a Chinese company.

The appeals court acknowledged a split among the circuit courts in ruling on this issue, and one panel member dissented, complaining that the majority had tendered only a legal dictionary definition for its rationale. The issue the U.S. Supreme Court will address is whether a district court must first conclusively establish jurisdiction before dismissing a suit on the ground of *forum non conveniens.* Whether the district court properly found that it had subject matter jurisdiction under admiralty law principles is not before the Supreme Court.

The Second and D.C. Circuits have determined that courts may pass over jurisdictional questions and decide the *forum non conveniens* issue when raised; the Fifth, Seventh and Ninth Circuits have ruled to the contrary. A key to the U.S. Supreme Court's ruling will be whether the matter of an inconvenient forum is entangled with the merits of the case. According to the Third Circuit court, it is a non-jurisdictional, non-merits procedural issue that must be decided after jurisdiction has been established because *forum non conveniens* involves a deliberate abstention from the exercise of jurisdiction. If the court lacks jurisdiction, said the Third Circuit, it has no jurisdiction from which to abstain, nor can it decide which of two or more forums is more appropriate to address the litigation.

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APPEALS COURT PUNISHES PARTY FOR ASKING COURT TO EDIT OPPONENT'S BRIEF

The Seventh Circuit Court of Appeals has sanctioned a party for filing a motion to strike parts of an appeals brief filed by an opposing party. ***Custom Vehicles, Inc. v. Forest River, Inc.*, No. 06-2009 (Seventh Circuit Court of Appeals, decided Sept. 25, 2006)**. The court noted that while motions to strike are not covered by any of its procedural rules, they may be proper where briefs "so substantially violate the Rules of Appellate Procedure that it would not be worth the judicial time to work through them." "But *editing* a brief," the court continued, "That's a different kettle of fish. The sort of motion that Custom Vehicles has filed does nothing but squander time." Chief Judge Easterbrook, deciding to sanction the moving party by reducing the length of its reply brief, also observed "I see about one such motion during each week that I act as motions judge. I have never granted such a motion (and never will); I don't believe that any of my colleagues grants such motions; yet the flow continues." Now you know; forewarned is forearmed.

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DISTRICT JUDGE CERTIFIES NATIONWIDE CLASS OF "LIGHT" CIGARETTE SMOKERS

In an opinion that exceeds 500 pages, a district court in New York has determined that named plaintiffs may represent a class of smokers who purchased "light" cigarettes beginning in the early 1970s, claiming they were misled into thinking that those cigarettes labeled "light" or "low tar" were safer than other cigarettes. The lawsuit, which was filed against cigarette manufacturers in 2004 under a federal racketeering law that has the potential to treble any damages award, could involve tens of millions of people, none of whom is asserting personal injury. Federal district judge Jack Weinstein, who issued the certification ruling, is known for decisions favoring class actions and proposing novel settlement solutions. Some commentators are reportedly predicting that the certification decision will be reversed on appeal, given that the burden of proving fraud requires showing that the defendants lied and that their customers relied on those lies. *See The New York Times,* September 26, 2006.

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FEDERAL JUDGE REFUSES TO CERTIFY CLASS OF DIGITAL CAMERA OWNERS

A U.S. district court in New York has denied plaintiffs' motion to certify a class of people who purchased digital cameras that were allegedly defective. *In re Canon Cameras Litig.,* No. 05 Civ. 7233 (U.S. District Court, Southern District, New York, decided Sept. 1, 2006). According to the court, plaintiffs failed to show that "more than a tiny fraction [fewer than two-tenths of one percent] of the cameras in issue malfunctioned for any reason." The court rejected plaintiffs' contention that even if the cameras did not malfunction, they contained defective parts which could have resulted in malfunctions. The court concluded that this argument was inconsistent with the essential elements of the legal theories supporting plaintiffs' claims, which theories require proof of malfunction. Because it was undisputed that the malfunctions alleged could have been caused by many factors, including customer misuse for which the defendant could not be held liable, the court found that the case involved "highly individualized fact-finding," not suited for treatment as a class action.

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CLASS ACTION CLAIMS FILED IN TAINTED SPINACH EPISODE

With the ink barely dry on recalls involving bagged fresh spinach from California allegedly tainted with *E. coli* bacteria, personal injury lawsuits are being filed in federal courts across the United States. One lawsuit, brought as a purported class action, was filed in state court by a restaurateur on behalf of all who allegedly lost money when they were forced to discard their spinach. *G&C Restaurant Corp. v. Natural Selection Foods LLC,* No. 06-CH-19494 (Cook County, Illinois, filed Sept. 18, 2006). Plaintiffs are seeking recovery of sums paid for spinach they could not use.

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ALL THINGS LEGISLATIVE AND REGULATORY

Pre-Registration for FDA Nanotechnology Meeting Closes

The Food and Drug Administration announced that it would close pre-registration to its October 10, 2006, public meeting on nanotechnology at the end of September. Those wishing to inform FDA about the use of nanotechnology in FDA-regulated products may nevertheless register on site, on a first-come first-serve basis. 71 *Fed. Reg.* 56,158 (Sept. 26, 2006).

In other news, the National Science Foundation has reportedly renewed funding for Rice University's Center for Biological and Environmental Nanotechnology to continue its research assessing any environmental and health risks posed by nanotechnology-based products. *See Houston Chronicle,* September 19, 2006.

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LEGAL LITERATURE REVIEW

Shook, Hardy & Bacon Partner **James Muehlberger**, who co-chairs the firm's Class Actions and Complex Litigation Group, and Public Policy Group Senior Associate **Cary Silverman** have co-authored an article that discusses a new litigation trend. Titled "Lawsuits Without Injury: The Rise of Consumer Protection Claims," the article states, "attorneys use consumer protection laws to bring massive lawsuits where no one was actually injured in the hopes of receiving 'statutory damages,' minimum awards set by statute in absence of proof of injury, treble (triple) damages and awards of attorneys' fees." The authors contend that no one wins when lawyers and public interest groups generate lawsuits for profit and political reasons.

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In **"Harry Potter, Ruby Slippers and Merlin: Telling the Client's Story Using the Characters and Paradigm of the Archetypal Hero's Journey," 29 *Seattle L. Rev.* 767 (Fall 2006)**, Rutgers School of Law Associate Professor Ruth Anne Robbins suggests that lawyers can improve their storytelling skills by relating their clients and case issues to the heroes and themes found in folklore and mythology. According to Robbins, "This strategy is not merely a device to make the story more interesting but provides a scaffold to influence the judge at the unconscious level by providing a metaphor for universal themes of struggle and growth."

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New York University School of Law Professor Samuel Issacharoff has authored an **article** that will be published in a forthcoming issue of the *Columbia Law Review* that addresses choice-of-law issues arising under the Class Action Fairness Act (CAFA). Titled "Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act," the article explores how choice-of-law doctrine, "which assumes fidelity to the forum state choice of law rules as its basic premise, corresponds poorly to the national scope of economic activity in cases brought into federal court under CAFA." The author recommends that such issues be addressed by means of a simple underlying principle, i.e., "any actor who engages in nationwide economic activity must be accountable to one single rule of readily discernible substantive law when challenged on the basis of its nationwide activity." He recognizes the weaknesses of this approach, but lobbies for its adoption nonetheless, contending that the interstate scope of economic activity calls for rules that transcend state-level regulation.

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LAW BLOG ROUNDUP

To Blog or Not to Blog

"There is as much really silly blogging as there are really silly law review articles – and that's saying quite a lot." University of Illinois College of Law Professor Lawrence Solum, commenting on an article titled "Why Blogs Are Bad for Legal Scholarship," appearing in *Yale's Pocket Part.*

Legaltheoryblog.com, September 22, 2006.

FDA Preemption

"Emboldened by the FDA's new view that federal regulation of drug labels preempts a broad range of personal injury claims, drug companies have been making motions to dismiss or for summary judgment in cases throughout the country." Public Citizen Litigation Group staff attorney Deepak Gupta, reporting on public interest organization efforts to counter drug company preemption arguments in the Third Circuit.

CL&PBlog.com, September 28, 2006.

Spinach Lawsuits

"Marler Clark's lawsuits are more about ambulance-chasing after the injury and problem has been noted than about bringing attention to and correcting dangerous conditions." Blogger Ted Frank, proclaiming that the lawyers who filed the first lawsuits alleging injury from *E. coli* contamination of bagged fresh spinach were not acting unethically in their self-aggrandizement and rush to the courthouse.

Pointoflaw.com, September 27, 2006.

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THE FINAL WORD

Scientists and engineers have apparently formed an organization to elect politicians "who respect evidence and understand the importance of using scientific and engineering advice in making public policy." On its **Web site**, Scientists and Engineers for America states, "Over the last several years, scientists have come under political assault and the integrity of science has been compromised. The attacks have ranged from White House rewriting an Environmental Protection Agency report on global warming, to veto of the Stem Cell Research Enhancement Act of 2005, to the promotion of intelligent design to disseminating inaccurate scientific information on federal websites." The group will present lectures on the importance of independent scientific advice and propose a bill of rights to prevent the politicization of science. Members are already planning where to campaign during the next election cycle. *See The New York Times,* September 28, 2006.

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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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