Shook, Hardy & Bacon L.L.P.

Product Liability Litigation Report

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U.S. SUPREME COURT HEARS *FORUM NON CONVENIENS* ARGUMENT IN SHIPPING DISAGREEMENT

The U.S. Supreme Court has heard argument about whether a federal court must first determine whether it can exercise jurisdiction over a matter before it can entertain a motion to dismiss for *forum non convieniens* (i.e., whether the forum court is not convenient to the parties and the dispute). ***Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, No. 06-102 (U.S. Supreme Court, argued Jan. 9, 2007)**. Malaysia International sued Sinochem in a U.S. district court while related court proceedings were pending in a Chinese court. The underlying dispute involves a shipping contract, and there are allegations of fraud on the foreign court. The district court dismissed the case on *forum non conveniens* grounds, and a divided Third Circuit Court of Appeals reversed, reasoning that the trial court must first rule on its jurisdiction, thus adding to the existing split among the circuit courts on this issue.

The oral argument transcript shows that some of the justices are concerned about an arbitration agreement that is referred to in the record. The attorneys were unable to recall exactly why the agreement may not have any application, but pointed out that the issue was neither decided by the Third Circuit nor briefed. Some justices were also concerned that the appellant really had no effective remedy because the lower court made its *forum non conveniens* determination while explicitly assuming that it had personal jurisdiction. Accordingly, if on remand the court determines that it lacks personal or subject matter jurisdiction, or if, finding jurisdiction, the court reiterates that the forum is inconvenient, the outcome will be the same: Sinochem will be out of court in the United States, and Malaysia International will have to litigate the dispute in China. A decision in the case is not expected until later in the court's term which ends in June.

Meanwhile, the Court has reportedly agreed to hear a case, transferred from state to federal court, with deceptive advertising claims about "light" cigarettes. The *certiorari* **petition** asks "Whether a private actor doing no more than complying with federal regulation is a 'person acting under a federal officer' for the purpose of 28 U.S.C. § 1442(a)(1), entitling the actor to remove to federal court a civil action brought in state court under state law." *Watson v. Philip Morris Cos., Inc.,* No. 05-1284 (U.S. Supreme Court, *cert*. granted Jan. 12, 2007). The defendant relied on this 19th Century statute to transfer the litigation, claiming that it was acting under the Federal Trade Commission's regulation of advertising.

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FEDERAL COURT RULES CLAIM FOR INJUNCTIVE RELIEF ALONE RENDERS ACTION INAPPROPRIATE FOR CLASS TREATMENT

A federal court in Louisiana has denied a putative class claimant's motion to certify a class of "all persons or entities who purchased roofing materials manufactured by" the defendant. *Hilton v. Atlas Roofing Corp.,* No. 95-4204, 2006 WL 3524295 (E.D. La., decided Dec. 5, 2006). The court agreed with the defendant that the named plaintiff will not adequately represent class interests because she may have created a conflict between her interests and those of putative class members by pursuing only injunctive relief and not monetary damages. The court also determined the case could not be certified as a Rule 23(b)(2) injunctive relief class because the "[p]laintiff's requests, while framed in terms of injunctive relief, appear more concerned with recouping the damages that might flow from the injuries suffered by the putative class than with enjoining defendant's actions and preventing future harm."

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STATE SUPREME COURT REJECTS MEDICAL MONITORING CAUSE OF ACTION

On a question certified to it by the Fifth Circuit Court of Appeals, the Mississippi Supreme Court has unequivocally stated that "Mississippi common law continues to decline to recognize a medical monitoring cause of action." ***Paz v. Brush Engineered Materials, Inc.*, No. 2000-FC-00771-SCT (Miss. Sup. Ct., decided Jan. 4, 2007)**. The case involved class claims for medical monitoring costs to detect disease development from beryllium exposure purportedly caused by defendant's negligence. The court rejected the argument that it lacked authority to create and discontinue common law torts. The question certified to the court was "whether the laws of Mississippi allow for a medical monitoring cause of action, whereby a plaintiff can recover medical monitoring costs for exposure to a harmful substance without proving current physical injuries from that exposure?" Mississippi law requires injury to prove a tort.

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FLORIDA HIGH COURT APPROVES PUNITIVE DAMAGES RULING AND DECERTIFIES CLASS OF SMOKERS

The Florida Supreme Court has issued a deeply divided opinion in a class action lawsuit that was tried and resulted in a compensatory damages verdict in favor of three named plaintiffs and punitive damages of $145 billion for the entire class. ***Engle v. Liggett Group, Inc.*, 2006 WL 3742610 (Fla. Sup. Ct., decided December 21, 2006)**. The court reversed one compensatory damages award because the statute of limitations had run on that claimant's cause of action. And the court further remanded for decertification, finding that individual issues predominated over those of the class.

Individual litigants will have one year to file their claims. Findings made during phase I of the class litigation regarding general causation, addiction to cigarettes, strict liability, fraud by concealment, civil-conspiracy

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concealment, breach of implied warranty, and negligence will have *res judicata* effect in the individual cases. Nonspecific findings in favor of the plaintiffs as to fraud and misrepresentation, intentional infliction of emotional distress and civil-conspiracy misrepresentation were overturned and will have to be proved on a case-by-case basis.

The court affirmed the intermediate appellate court's reversal of the punitive damages award but for reasons of excessiveness and because the trial court had allowed entitlement to punitive damages to be decided before the jury found that the plaintiffs had established causation and reliance. So ruling, the court rejected the lower court's conclusion that the punitive damages were barred by a settlement agreement between Florida and many of the defendants entered as part of a deal brokered with most states in the attorneys general actions filed against the industry during the 1990s.

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WEB SITE PROVIDES MASS TORT RESOURCES

The National Center for State Courts has compiled information about how mass torts are handled by the courts of each of the 50 states. State court administrators were surveyed about specific categories of information, and the Web site arranges the material according to those categories, which include (i) tracking and/or reporting of mass torts, (ii) procedural rules, (iii) statutes, (iv) case law, (v) case management, and (vi) technology.

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TURNAROUND FOR U.S. TRIAL LAWYERS ANALYZED

Reporting and analyzing trends in tort law, a recent article notes that tort reforms at the state level have had their intended effect. The plaintiff's bar apparently has a lot less work to do as statutes of repose and limitations, damages caps and limitations on liability are being adopted state-by-state – a result of vigorous and savvy campaigning by business interests. Millions are being spent on judicial elections and legislative lobbying, and the article highlights the effects of such spending on Texas, which is a poster child for tort reform. "[A]s is the case with oil in Texas, the easy money in injury lawsuits is gone," the article concludes. *See Business Week Online,* January 8, 2007.

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CIRCUIT COURT SPLITS CHART PUBLISHED

U.S. Law Week has resumed publishing its circuit splits chart, which identifies the cases and issues reported each quarter that represent a split among the federal circuit courts of appeal on an array of issues. Among them is a case involving whether the Food, Drug and Cosmetic Act preempts state product liability claims against drug manufacturers that allegedly defrauded the Food and Drug Administration. The Second Circuit has said "no," while the Sixth Circuit has determined that such claims are preempted. Cases involving issues over which the circuit courts disagree are among those that the U.S. Supreme Court will take for review on a *certiorari* petition. *See BNA U.S. Law Week,* January 2, 2007.

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LEGAL LITERATURE REVIEW

E-Discovery and Judicial Involvement Discussed in ABA Paper

Shook, Hardy & Bacon Partner **John Barkett** has written an article titled "The Battle for the Bytes: New Rule 26 and the Return of the Judges," published in *Litigation*, a product of the American Bar Association's Section on Litigation. Barkett posits that the keys to coping with the new federal procedural rules on the discovery of electronically stored information lie with counsel's meet-and-confer obligations and judicial oversight. The rule changes are outlined and discussed, and then Barkett explains how companies can best prepare, before a lawsuit is even filed, for the electronic discovery that will take place during litigation. The article discusses the new duties of counsel created by the rules; Barkett contends that they "impose what should be a one-time obligation to design a digital document discovery strategy to be followed by a vigilant coordination and maintenance program marked by effective communication with, and education of, litigation counsel." He believes that "involved judges" will make new Rule 26 work.

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Sheila Jasanoff, "Transparency in Public Science: Purposes, Reasons, Limits," 69 *Law & Contemporary Problems* 21 (2006)

Written by a professor who teaches science and technology studies at the John F. Kennedy School of Government, Harvard University, this article explores the tensions between openness in the realm of scientific research and the secrecy imposed by government or the demands of litigation that can hamper beneficial interactions within the scientific community. Author Sheila Jasanoff focuses on issues of scientific quality and reliability as science becomes fully integrated into "[t]he growth of national economies, the comparative military advantages of states, the market shares of companies, the health and safety of populations and the environment, and, increasingly, the vitality of universities and the personal fortunes of scientists." She also observes, in the litigation context, "The law's focus on individual cases and its commitment to closure create substantial disincentives to the free flow of knowledge, and it will take thoughtful institutional innovations to lower those barriers without compromising the interests of justice. Settlement practices, in particular, need to be reexamined to make sure that expediency in the particular case does not override society's need for accumulating knowledge."

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George Conk, "Will the Post 9/11 World Be a Post-Tort World," Fordham Legal Studies Research Paper (Dec. 2006)

Fordham Law School Professor George Conk answers his own question by saying "no," but he pauses to take note of the myriad bills passed in the wake of 9/11 that abolish liability, expand defenses and provide sweeping immunity. Conk calls for a revitalization of tort as civil recourse. He writes, "Switching the focus of the tort debate from cost reduction and corporate governance to principles of personal responsibility clarifies the principles and remedies for which we stand. Tort law and the right of action by an injured person against a wrongdoer strengthen the bonds of civility among citizens and between government and citizens."

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LAW BLOG ROUNDUP

Wacky Warnings

"Since its inception, M-LAW's wacky label project has been quoted on the floor of Congress, in speeches by CEOs of *Fortune* 100 companies, and by the authors of numerous books as proof that common sense legal reform is greatly needed." Author Bob Dorigo Jones, president of Michigan Lawsuit Abuse Watch, posting to overlawyered.com about the imminent release of his *Remove Child Before Folding, the 101 Stupidest, Silliest and Wackiest Warning Labels Ever.*

overlawyered.com, January 4, 2007.

The Evils of Cooked Chicken

"[T]hat's the beauty of laws like Prop. 65 – evidence tends to be optional." Shook, Hardy & Bacon's **Kevin Underhill**, guestblogging about lawsuits filed in California against fast-food restaurants for "failure to warn customers that they cook meat," despite the lack of any evidence about what levels of a carcinogenic substance produced during cooking will increase cancer risk.

overlawyered.com, December 26, 2006.

THE FINAL WORD

A news source recently reported that Maryland's State Bar Association Committee on Ethics issued an opinion in the latter part of 2006, addressing respective obligations when confidential information is embedded in electronic materials disclosed in litigation. When litigating in state court, Maryland attorneys may ethically review or make use of such information without ascertaining whether the sender intended to include it. On the other hand, the lawyer who sends electronic discovery "has an ethical obligation to take reasonable measures to avoid the disclosure of confidential or work product materials imbedded [sic] in the electronic discovery." This opinion does not extend to legal obligations or privilege, and the committee discusses differences between applicable state rules and the new federal e-discovery rules which apply to federal actions. *See BNA U.S. Law Week,* January 2, 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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