Shook, Hardy & Bacon L.L.P.

Product Liability Litigation Report

A PUBLICATION OF SHOOK, HARDY & BACON L.L.P. MARCH 1, 2007

U.S. SUPREME COURT NARROWLY FOCUSES PUNITIVE DAMAGES DECISION

In a 5-4 decision that was the product of an atypical court alignment, the U.S. Supreme Court has reversed a $79.5 million punitive damages award in a smoking and health case involving Philip Morris USA and the widow of a man who allegedly died from smoking-related disease. ***Philip Morris USA v. Williams*, No. 05-1256 (U.S. Supreme Court, decided Feb. 20, 2007)**. The majority determined that an award based in part on a jury's desire to punish the defendant for harming persons not before the court amounts to a taking of property without due process. Because it appeared that the Oregon Supreme Court had applied the wrong constitutional standard when considering the cigarette manufacturer's appeal, the case was remanded for it to apply the correct standard. The Court did not reach the question whether a 100-to-1 ratio between punitive and compensatory awards is constitutionally "grossly excessive."

The issue was preserved at trial when Philip Morris asked for a jury charge that would have informed the jury it could consider the extent of harm suffered by others in determining what the reasonable relation is between any punitive award and the harm caused to the plaintiff by the defendant's misconduct, "but you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other parties can resolve their claims." The trial court rejected this proposal and instructed the jury that "punitive damages are awarded against a defendant to punish misconduct and to deter misconduct," and "are not intended to compensate the plaintiff or anyone else for damages caused by the defendant's conduct." According to the U.S. Supreme Court, the Due Process Clause forbids a state from using a punitive damages award to punish a defendant for injury it inflicts on nonparties, saying there is no opportunity for a defendant to defend against the charge; the jury will be left to speculate how many other victims there are, how seriously they were injured and under what circumstances the injury occurred; and no authority supports the use of punitive damages awards for the purpose of punishing a defendant for harming others.

Justices Ruth Bader Ginsburg, Antonin Scalia, John Paul Stevens, and Clarence Thomas, who do not generally form alliances on the bench, dissented in three separate opinions. According to Justice Thomas, the U.S. Constitution

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places no constraints on the size of a punitive damages award. Justice Ginsburg did not believe that the issue had been properly preserved, and Justice Stevens contended, as she had, that the Oregon courts correctly applied Supreme Court jurisprudence on punitive damages. He suggested that the Court has imposed a "novel limit" on the state's power to impose punishment in civil litigation.

Shook, Hardy & Bacon Partner **Walt Cofer** was on the trial team that defended the case in Oregon and preserved the issue the Court considered.

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NINTH CIRCUIT JOINS SISTER CIRCUITS IN PLACING BURDENS UNDER CAFA

In a case involving employment-related claims, the Ninth Circuit Court of Appeals has determined that the party seeking to remand a putative class action to state court under the Class Action Fairness Act (CAFA) bears the burden of establishing any exceptions to federal court removal jurisdiction. ***Serrano v. 180 Connect, Inc.*, No. 06-17366 (9th Cir., decided Feb. 22, 2007)**. The district court required the removing party, i.e., the defendant, to show the inapplicability of the exceptions to jurisdiction, an approach the Ninth Circuit expressly rejected. The court discussed the statutory exceptions, known as "local controversy" and "home-state controversy," and compared them to the structure of the general removal statute and cases interpreting that legislation. The court notes that its interpretation is consistent with decisions from the Fifth, Seventh and Eleventh Circuits.

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FEDERAL JUDGE REBUKES LAWYER, EXPERT AND REPORTER FOR SCHEMING TO EVADE PROTECTIVE ORDER IN PHARMACEUTICAL LITIGATION

In a 78-page opinion, Judge Jack Weinstein, a senior district court judge in Brooklyn, New York, has ordered individuals who allegedly schemed to obtain litigation documents covered by a protective order in personal injury lawsuits to cease further disseminating the documents and return them to a special master. ***In re Zyprexa Litig.*, No. 07-CV-0504, related to MDL No. 1596 (U.S. Dist. Ct., E.D. N.Y., decided Feb. 13, 2007)**. The issue arose when the court sealed internal documents produced by the defendant in multidistrict litigation involving some 30,000 individual litigants. The court issued a protective order "so that discovery could be expedited and the individual cases promptly settled or otherwise disposed of on their merits."

Most of the cases were settled; thereafter, a *New York Times* reporter discussed with a plaintiffs' expert how to evade the order, which allowed the protected documents to be subpoenaed by courts or executive agencies. They recruited an Alaska lawyer to subpoena the protected documents; he did so by intervening in unrelated litigation in Alaska, and then he distributed the documents to various organizations and individuals, including *The New York Times,* which published excerpts and summaries. The court preliminarily enjoined a

number of organizations from further disseminating the documents and ordered their return. This opinion finalizes the injunction "against two of the conspirators … and others who have not returned the documents they obtained."

Noting that this case was not about a newspaper obtaining information with clean hands from whistleblowers or protestors, the court stated, "Even if one believes, as apparently did the conspirators, that their ends justified their means, courts may not ignore such illegal conduct without dangerously attenuating their power to conduct necessary litigation effectively on behalf of all the people. Such unprincipled revelation of sealed documents seriously compromises the ability of litigants to speak and reveal information candidly to each other; these illegalities impede private and peaceful resolution of disputes." The court did not enjoin any Web sites from disseminating or posting the material; the defendant had asked for five sites to be so enjoined, and the court found that prohibiting "five of the internet's millions of websites from posting the documents will not substantially lower the risk of harm posed to Lilly. A more effective use of the court's equitable discretion is to impose restraints on the individuals who pose the greatest risk of harm to Lilly – those who have not returned the documents despite knowledge that they were illegally procured."

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BRIAN WINGFIELD, "CLASS ACTION LAW GUMS UP COURTS," *FORBES*, FEBRUARY 15, 2007

In his article on the Class Action Fairness Act of 2005, *Forbes* reporter Brian Wingfield considers claims that the legislation, while reducing class actions in state courts, "also seems to have placed unforeseen strains on the federal court system." Designed to discourage "forum shopping" for jurisdictions likely to certify class actions, CAFA has apparently increased the number of lawsuits filed at the federal level, where critics say cases might become stalled at the expense of legal fees and overworked judges. "Congress is not doing a careful job of drafting these statutes," one law professor was quoted as saying.

Wingfield also notes that legal experts are revisiting CAFA in light of a recent Ninth Circuit Court of Appeals ruling that affirmed class certification in a lawsuit challenging Wal-Mart's employment practices. While some lawyers claim that CAFA favors "big businesses," others argue against evaluating the law by case numbers alone. "It's hard to know whether the level of class actions has gone up or down, because you're seeing different kinds of class actions now," said Ted Frank, a resident fellow at the American Enterprise Institute. "I think you're seeing fewer attempts to get a nationwide class."

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CONSUMER GROUP LINKS CARCINOGEN TO CHILDREN'S BATH PRODUCTS

The Campaign for Safe Cosmetics, a coalition of heath and environment advocates, recently released test results allegedly linking a probable human carcinogen – the petrochemical known as 1,4-Dioxane – to children's bath

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products. The group claims that of the 24 products tested, four exceeded the 10 parts per million limit set by the Food and Drug Administration for 1,4-Dioxane, and most contained trace amounts of the chemical. “Because the FDA does not require cosmetics products to be approved as safe before they are sold, companies can put unlimited amounts of toxic chemicals in cosmetics,” a campaign spokesperson said. *See Campaign for Safe Cosmetics Press Release,* February 8, 2007.

Industry groups, however, have disputed the findings. “The levels are what you would expect and are reasonable,” said a spokesperson for the Cosmetics, Toiletries, and Fragrance Association, which also noted that the 10 ppm 1,4-Dioxane limit is recommended for food additives, not cosmetics. “With food additives, you have a direct exposure that equates to a risk of 28 in one billion,” the association reiterated. “In cosmetics it will be far less than that. This is not a risk.” *See BNA Product Safety & Liability Reporter,* February 12, 2007.

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HARVARD LAW SCHOOL LAUNCHES PROGRESSIVE POLICY JOURNAL

Harvard Law students this month published the inaugural issue of *Harvard Law & Policy Review,* described by co-founder Michael Negron as a “home base for progressives to debate.” The biannual journal, which is supported by the American Constitution Society, will primarily print “liberal authors” and aims to attract practicing lawyers and policy makers by being “a little less footnote heavy,” according to co-founder James Weingarten and managing editor Elizabeth Dodson.

The first winter issue features an article by Senator Charles Schumer (D-N.Y.), who charges that Congress has lost legislative and administrative oversight as recent executive and judicial decisions seem to encroach on its traditional functions. In *Under Attack: Congressional Power in the Twenty-First Century,* Schumer argues that the Bush Administration, in adopting “the theory of a unitary executive,” has cloaked its unilateral approach in secrecy and a “tenuous” legal precedent that undermines congressional interests in domestic and foreign policy. Schumer further contends that a New Federalist judiciary “has also been usurping the authority of the legislative branch,” which has seen “an unprecedented number of federal laws” struck down in recent decades. “Perhaps most disturbingly,” Schumer writes, “the Court made these changes with the rationale that it was better suited than Congress to make determinations about the extent of Congress’s policymaking ability under the Constitution.”

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Schumer ultimately recommends that members of Congress should “join together, get tough, and fulfill their institutional responsibilities,” suggesting that insofar as inter-branch competition preserves a healthy balance of power, fidelity to the legislative body should override party affiliations. In his plan for regaining oversight, Schumer specifically calls on Congress to hold the administration accountable for its decisions despite the desire for a strong commander-in-chief in times of war. Schumer also concludes that Congress must take a more vigorous approach to evaluating judicial nominees, asking “more tough questions about when they believe courts can strike down federal laws.” A D.C. Circuit Court of

Appeals judge and a law professor respond to Schumer's thesis by suggesting that Congress is also responsible for the imbalances he described, stating "Congress itself has been largely supine in fighting back."

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LEGAL LITERATURE REVIEW

SHB Partners Address International Safety Standards in Inaugural Issue of *Bloomberg European Business Law Journal*

Shook, Hardy & Bacon Partners **Greg Fowler** and **Simon Castley** have published an article titled "Product Manufacturers Take Heed: International Markets Bring International Regulatory Oversight, Safety Standards and Liability Concerns." Appearing in the Winter 2007 inaugural issue of the *Bloomberg European Business Law Journal,* the article discusses the impact that cross-border regulatory agreements on product safety may have on products liability issues. The authors provide an overview of product regulation in the United States and the European Union and explain how the global marketplace is trending toward uniform product safety standards. They suggest that manufacturers take advantage of the opportunities to participate in standards writing. "The payoff," they contend, "is the potential for the development of one uniform international standard and, thereby, one uniform product for the global marketplace that furthers a manufacturer's desire for a level playing field in the marketplace and in the courtroom, both locally and globally."

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Chaim Saiman, "The Reemergence of Restitution: Theory and Practice in the *Restatement (Third) of Restitution,*" 52 *Villanova L. Rev.* (March 2007)

Villanova Law School Professor Chaim Saiman discusses the American Law Institute's effort to not only restate the law of restitution but to persuade "the American legal public that restitution is a doctrinal category like contract and tort which itself can be a source of legal rights and liabilities." The *Restatement (Third) of Restitution* project, launched with a discussion draft published in 2000, reflects developments in Britain and Europe and creates the field of restitution by showing it to be "a body of positive law that accounts for recoveries not captured by traditional contract and tort doctrine," defining it "in terms of unjust enrichment, which provides the conceptual underpinning for a large number of existing doctrines," restructuring constituent sub-doctrines "to accord with unjust enrichment principles," and expelling nonconforming doctrines from restitution's orbit.

David Bernstein, "Expert Witnesses, Adversarial Bias, and the (Partial) Failure of the Daubert Revolution," *George Mason Law & Economics Research Paper* (February 2007)

This article explains how the reliability test for the admissibility of expert evidence adopted by the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993), fails to address the bias issues that arise when adversarial expert testimony is the means by which claims are

proved or disproved in court. George Mason University Law Professor David Bernstein contends that the test does succeed in barring "junk science" from toxic tort cases, but "likely goes too far in insisting on a reliability test that makes the courtroom stricter about causation evidence than is the scientific community itself." According to Bernstein, "[a] far better alternative would be for courts to appoint nonpartisan experts to advise them on the reliability of proffered testimony, or perhaps even exclude adversarial experts and replace them with court-appointed experts."

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LAW BLOG ROUNDUP

Williams Commentary

"Expect *Williams* to be cited extensively by class action defendants, particularly in class actions seeking punitive damages." Cato Institute's Senior Constitutional Studies Fellow Mark Moller, commenting on potential ramifications of the U.S. Supreme Court's punitive damages ruling. Moller focuses on the majority's statement that the Due Process Clause prohibits a state from punishing an individual "without first providing that individual with 'an opportunity to present every available defense.'"

cato-at-liberty.org, February 21, 2007.

More *Williams* Commentary

"I think that any corporation that took comfort in the *Philip Morris* decision would be making a grave mistake. And while Philip Morris may have won this battle, if the Oregon Supreme Court again upholds the verdict, it appears that they will lose the war of numbers if [the case] comes back to the U.S. Supreme Court." New York lawyer Eric Turkewitz, suggesting that Justice Stevens' dissent, which would have affirmed the Oregon Supreme Court's $79.5 million punitive damages award indicates by implication that a 100-to-1 ratio of punitive to compensatory damages was within the bounds of acceptability to him and in accordance with his view of the Court's last significant ruling on punitive damages.

newyorkpersonalinjuryattorneyblog.com, February 23, 2007.

"I think that any corporation that took comfort in the Philip Morris *decision would be making a grave mistake."*

And Even More on *Williams*

"This is where the Court's decision is confusing. As Justice Stevens, Justice Thomas, and Justice Ginsburg point out in their dissents, it is hard to understand how juries will be able to weigh the evidence of harm to others in determining how reprehensible the defendant's conduct was without punishing the defendant for that conduct." Rutgers University Law Professor Jay Feinman, blogging about the *Williams* case and cautioning business interests about prematurely celebrating the decision.

acsblog.org, February 20, 2007.

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THE FINAL WORD

Revisions to Federal Evidence Rules Unlikely to Include Selective Privilege Waivers

According to a news source, a Fordham University law professor and drafter of a proposed new rule of federal evidence has indicated that the rule will not likely include provisions allowing for selective waiver of attorney-client privilege or work-product protection when it is submitted to Congress. Proposed Rule 502(c), as currently drafted, would provide that disclosures of privileged or protected communications or information to a federal public office or agency in the exercise of its authority, would not operate as a waiver of privilege or protection as to nongovernmental persons or entities. Thus, a person or business could cooperate with government investigators without being forced to waive the privilege in subsequent civil litigation. Professor Daniel Capra, however, does not believe it will survive because defense attorneys believe it will eliminate a common excuse for not cooperating with government investigations. The plaintiffs' bar is also apparently opposing the provision because it will block civil litigators from obtaining evidence. *See BNA U.S. Law Week,* February 13, 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, food and beverage, oil and gas, telecommunications, agricultural, and retail 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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