Shook, Hardy & Bacon L.L.P.

Product Liability Litigation Report

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TORT REFORM LIMITATIONS ON EXPERT TESTIMONY UPHELD IN GEORGIA FLOOR-COVERING CASE

The Georgia Supreme Court has upheld the validity of a tort-reform statute that places more stringent limitations on the admissibility of expert testimony in civil actions than apply to criminal proceedings in the state. ***Mason v. Home Depot U.S.A., Inc.* No. S07A1486 (Ga., decided March 10, 2008)**. The plaintiffs alleged injuries from the use of a floor-covering product in 1996. Shortly before trial, the Georgia General Assembly passed the Tort Reform Act of 2005, "which governs the qualification of expert witnesses and the admissibility of expert testimony." Defendants moved to exclude the testimony of two expert witnesses for the plaintiffs, and the trial court denied the motion finding that retroactive application of the law would violate the state's constitution. Following a mistrial, defendants renewed their motion to exclude the experts' testimony, and plaintiffs responded by mounting a constitutional challenge to the statute. The trial court, for the most part, upheld the statute's validity and excluded the testimony of the two experts.

On appeal, the court's majority agreed with most of the trial court's rulings, overturning only that part of the lower court's decision which voided a section of the statute expressing the legislature's intent that Georgia courts "not be viewed as open to expert evidence that would not be admissible in other states" and suggesting that the court rely on specific federal court decisions addressing the issue. According to the court, this section did not impermissibly invade the province of the judiciary. Because the trial court had severed this section from the remainder of the statute in reaching its decision to otherwise uphold the law's constitutionality, the high court found its error harmless.

The court found that the statute did not violate equal protection by treating civil litigants differently from criminal defendants and further found that the law did not violate due process rights or the constitutional prohibition against retroactive laws. The court also found that the trial court did not abuse its discretion in excluding the expert testimony. A concurring justice would have upheld the validity of a section invalidated and severed by the trial court and the majority, finding that its inconsistency with the rest of the statute could be harmonized. The invalidated section would have allowed expert witnesses to rely on inadmissible facts or data; it was severed from a provision allowing experts to testify if their testimony "is based upon sufficient facts or data which are or will be admitted into evidence at the hearing or trial."

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Two dissenting justices would have invalidated the law on equal protection grounds, contending that because different standards now apply to expert testimony in civil and criminal cases, one expert could be qualified in criminal court proceedings but disqualified from testifying in civil litigation. According to the dissent, the legislature had no rational basis on which to make a distinction between civil and criminal litigants. The dissenters also objected to the majority's decision to uphold the section in which the legislature "codified the specific judicial opinions it wants the courts to consider in construing the legislation it has enacted." They further suggested that courts applying the legislature's "intent" that they admit only evidence admissible in other state courts would lead "to the absurd result that 'other states' would govern the admissibility of expert opinion testimony in Georgia."

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CALIFORNIA APPEALS COURT AFFIRMS PUNITIVE DAMAGES AWARD IN SUV ROLLOVER CASE

On remand from the U.S. Supreme Court for reconsideration in light of its punitive damages holding in *Philip Morris USA v. Williams*, 549 U.S. ___ (2007), the California Court of Appeal has confirmed a $55 million punitive damages award in a case involving the rollover of a Ford Explorer. *Buell-Wilson v. Ford Motor Co.*, Nos. D045154 & D045579 (Cal. Ct. App., decided March 10, 2008). The jury's punitive damages award had already been reduced twice to $55 million, once by the trial court and then by the court of appeal, before the case was taken to the U.S. Supreme Court. The plaintiff is a 51-year-old woman who was paralyzed after her sports utility vehicle rolled over in 2002.

The court of appeal was asked to consider whether the jury might have inflated the award after hearing that others, not before the court, had been injured or killed in similar rollover accidents, an issue the U.S. Supreme Court addressed in *Williams*. The court concluded that *Williams* did not "compel a reversal or a further reduction of the punitive damages awarded in this case." According to the court, "Ford has forfeited the right to assert there is a significant risk the punitive damages verdict in this case was based on improper evidence and arguments concerning third party harm because Ford (1) submitted incorrect and misleading jury instructions on third party harm; (2) did not timely object to plaintiffs' closing argument at the punitive damages phase of the trial; (3) did not request a limiting instruction during the liability phase of the trial; and (4) did not raise instructional error as an issue on its original appeal."

Counsel for Ford has reportedly indicated that the company plans to appeal to the California Supreme Court and the U.S. Supreme Court, if necessary. *See The San Diego Union-Tribune*, March 11, 2008.

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CONSERVATIVE THINK TANK ISSUES 2008 TORT LIABILITY INDEX

The Pacific Research Institute, a conservative San Francisco-based think tank, has published a **report** assessing the tort systems of the 50 U.S. states, referring to it as "a tool for governors and state legislators to assess their tort systems and to enact laws that will improve the business climates of their states. The study helps predict the winners and losers in the race for jobs and business investment. It is also useful for business leaders who are deciding where to start a new business, build a new plant, expand operations, introduce a new product, or hire more employees. States that rank worse in the study are less likely to lead in these areas."

According to the institute, "[a] poor tort system [measured in terms of monetary tort losses and litigation risks for business] imposes excessive costs on society, not the least of which is foregone production of goods and services." According to the institute's rankings, the states with the best climates for businesses to operate are North Dakota, Alaska, North Carolina, Iowa, and Virginia, while the worst include Montana, Illinois, New York, New Jersey, and Florida. Among the variables measured in the report were (i) caps on damages; (ii) attorney's fee limitations; (iii) preemption defenses; (iv) statutes of limitations; (v) whether the state has a "harmful attorney general," and (vi) how its judges are selected.

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The report concludes by noting, "Meaningful tort reform will improve a state's ranking in future editions of the *U.S. Tort Liability Index*. But more important, a reform state will be a more favorable place to invest human, physical, and financial capital – the ingredients for new businesses, new products, new jobs, and an improved standard of living for everyone. States that maintain an onerous legal environment, on the other hand, might as well hang a sign at the state line saying 'Businesses Not Welcomed.'"

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THINKING GLOBALLY

French Appeals Court Dismisses Air Crash Claims Against U.S. Companies

A French appeals court has reportedly ruled that the claims filed by families of the victims of a 2004 airplane crash against U.S. defendants must be heard in a U.S. court. An organization representing many of the crash victims apparently filed a suit on their behalf in a U.S. court in 2005, but the federal district court judge ruled that the matter should be removed to France. According to a news source, the U.S. court noted that if jurisdiction failed in France, it would consider the claims. While the civil claims will now be heard in the United States, two criminal proceedings against the airline and its insurer will apparently remain in French courts. The dispute with Boeing, Honeywell International Inc.

and others arises from the crash of a Boeing 737 shortly after taking off from an Egyptian resort. There were no survivors among the passengers, who included 134 French nationals. *See Product Liability Law 360*, March 6, 2008.

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Trial Court Reduces Plaintiffs' Award in Dole Pesticide Litigation

A California trial court judge has issued a number of rulings on post-trial motions filed in litigation involving Nicaraguan workers claiming reproductive injuries from exposure to pesticides used on banana plantations. *Telez v. Dole Food Co.*, No. BC 312 852 (California Superior Court, Los Angeles County, decided March 7, 2008). While the court upheld the fraudulent concealment judgment in plaintiffs' favor and dismissed several motions for new trial in individual cases, the punitive damages award of $2.5 million was overturned, and defendants' motion for judgment notwithstanding the verdict on plaintiffs' strict liability cause of action was granted.

Regarding the punitive damages award, the court found no legal support for "endorsing an award of punitive damages 30 years after the defendant's misconduct" or "against a domestic corporation for injuries that occurred only in a foreign country." The court declined to hold Dole liable under a strict product liability theory because the company "was not in the business of purveying [the pesticide] and did not profit from it. Instead, the company 'organized and arranged' its delivery to the plantation in order to facilitate the business [it was] interested in, growing bananas."

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LEGAL LITERATURE REVIEW

Geoffrey Rapp, "The Wreckage of Recklessness," Washington University Law Review (forthcoming 2008)

This article discusses the way the courts have used the concept of recklessness in their tort law jurisprudence, noting, for example, how it relates to punitive damages awards and assumption of the risk. According to author Geoffrey Rapp, who teaches at the University of Toledo College of Law, its definition has remained elusive and may, in fact, ignore important lessons from modern behavioral psychology. Apparently, the disciplines of neuroscience and neuroeconomics reveal "a picture of human decisionmaking in risky and uncertain situations that is wholly inconsistent with the black-letter law's articulation of recklessness." Rapp suggests that any restatement of the law in this area might provide clarification by adding categories and subcategories and filling treatises

"with precise terminology meant to better reflect the way that human actors behave in the face of uncertain risks. Moreover, recklessness could be explicitly defined differently for different purposes, as it already is in practice."

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Goutam Jois, "The Cy Pres Problem and the Role of Damages in Tort Law" (unpublished 2008)

Authored by a law clerk for the chief judge of a federal district court in Massachusetts, this article recommends that where class action recoveries are not fully distributed, remaining funds "should escheat to the state" for ultimate distribution to the citizenry. According to Goutam Jois, "all citizens are equally likely to find themselves exposed to the risk that led to the class recovery in the first place. Escheat to, and distribution through, the state thus disburses money on average equally to all of those who are potential victims." The author believes that "optimal deterrence and increased welfare" are social objectives that would be met by his cy pres proposal, which would also "dramatically reconceptualize the role of damages in tort law. Instead of viewing tort damages as an ex post entitlement linked to a specific harm, my theory conceives of damages as an ex ante tool to compensate individuals on average for the entire menu of risks they face." The author recognizes that tort law currently tailors damage awards directly to victims' losses, but contends that reshaping the approach "with a view to the average risk borne" would impose few costs, deliver significant benefits, and yield "optimal deterrence."

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LAW BLOG ROUNDUP

The Holidays Will Arrive for Mass Tort Professors in May

"…those of us who teach with the Mullenix text (myself included) will no doubt be opening the arriving casebook box with a kind of Christmas-morning glee." Southwestern Law School Professor Byron Stier, discussing the pending release of Professor Linda Mullenix's *Mass Tort Litigation: Cases and Materials* (2d ed.), which Stier refers to as a "seminal" work on the subject. First published in 1996, and supplemented in 2000, the new edition, to be released in May 2008, has been updated with material on breast implant, tobacco and medical device and pharmaceutical litigation, as well as cases relating to Agent Orange, the Dalkon Shield, DES, and asbestos.

Mass Tort Litigation Blog, March 4, 2008.

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Are Tort Data Myth or Reality?

"80 plus pages of fuzzy math, tall tales, and public relations gimmicks is the best way to describe the latest Pacific Research Institute's U.S. Tort Liability Index 2008 Report." Center for Justice & Democracy senior field organizer John Guyette, questioning the "wild claims" in this report. According to Guyette, tort filings have decreased since 1990, only 2 percent of injured Americans file lawsuits, and nearly one fourth of the "tort costs" calculated by the institute are actually insurance industry overhead expenses.

ThePopTort, March 13, 2008.

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THE FINAL WORD

Mississippi "Tort King" Enters Guilty Plea to Judicial Bribery Charge

Richard "Dickie" Scruggs, a Mississippi plaintiffs' lawyer who made his reputation in the 1980s and 1990s suing asbestos, tobacco, construction, and pharmaceutical companies in mass tort actions, pleaded guilty to a charge of conspiring to bribe a judge in a fee dispute with other lawyers arising from a mass settlement of Hurricane Katrina lawsuits. Prosecutors are reportedly recommending a five-year prison sentence. *The Wall Street Journal*, which published a front-page profile about Scruggs and his latest legal troubles, asked "What could lead a lawyer who once earned nearly $1 billion on a single case, the tobacco litigation, to bribe a judge over a matter of a few million dollars?" Scruggs's attorney reportedly said that the simple answer was "he didn't," and accused prosecutors of concocting a "manufactured crime." But that was before Scruggs entered his plea, characterized as "a stunning end to a controversial and lucrative legal career." *See The Wall Street Journal*, March 14, 2008.

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UPCOMING CONFERENCES AND SEMINARS

Food & Drug Law Institute (FDLI) & FDA, Washington, D.C. – March 26-27, 2008 – "FDLI's 51st Annual Conference," Shook, Hardy & Bacon Pharmaceutical & Medical Device Litigation Partner **Madeleine McDonough** will serve on a panel discussing "Clinical Trials: Developments in Human Subject Protection." Other confirmed speakers include U.S. Supreme Court Justice Antonin Scalia, and Food & Drug Administration Commissioner Andrew von Eschenbach.

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Cardozo Law School, New York, New York – March 28, 2008 – "Justice and the Role of Class Actions," Shook, Hardy & Bacon Public Policy Partner **Victor Schwartz** will serve on a panel that will address "Moving Forward: Class Actions in the Future and Around the Globe." Keynote speaker at this CLE program is Ken Feinberg who served as special master of the 9/11 Victim Compensation Fund.

American Bar Association, Phoenix, Arizona – April 9-11, 2008 – "2008 Emerging Issues in Motor Vehicle Product Liability Litigation," Shook, Hardy & Bacon Tort Partner **H. Grant Law** will make opening remarks and moderate a panel discussion about issues that manufacturers must address when they evaluate the claims filed against them. Shook, Hardy & Bacon Class Actions and Complex Litigation Partner **Tammy Webb** will discuss "Recent Trends in Automotive Class Actions."

The Sedona Conference, Sedona, Arizona – April 17-18, 2008 – "Tenth Annual Sedona Conference® on Complex Litigation: Health Law and Medical Products Litigation," Shook, Hardy & Bacon Tort Partner **Amor Esteban** will participate in a panel discussion on e-discovery and records management issues. Esteban will join a distinguished faculty that includes current and former members of the judiciary, in-house counsel for medical and health care companies, and the chief of the Litigation I Section of the Antitrust Division, U.S. Department of Justice.

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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).

Shook, Hardy & Bacon L.L.P.

OFFICE LOCATIONS

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