Shook, Hardy & Bacon L.L.P.

Product Liability Litigation Report

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CALIFORNIA SUPREME COURT ADDRESSES INTERPLAY OF MERITS-BASED AND CLASS-CERTIFICATION RULINGS

In a case involving the repossession of a motor vehicle, California's Supreme Court has clarified under what narrow circumstances a trial court may reach the merits of a class-action proceeding before the class has been certified. ***Fireside Bank v. Superior Court*, No. S139171 (Cal., decided April 16, 2007)**. The woman whose van had been repossessed was sued by Fireside Bank for the contract balance remaining after the bank sold the van. She filed a cross-complaint alleging that the bank failed to comply with statutory notice requirements and claiming that it lost its right to pursue a deficiency judgment. She filed a motion for judgment on the pleadings and thereafter amended her complaint to add a class claim. The trial court initially indicated that it would not rule on the motion until the certification issues were resolved, but then issued formal orders granting both the class-certification motion and the motion for judgment on the pleadings.

An intermediate appellate court affirmed both rulings, finding that courts have broad discretion over whether to address the merits of a putative class-action complaint before the class is certified or the class is notified. Fireside Bank appealed to the supreme court, arguing that trial courts may never make a merits-based ruling in advance of certification, because that would expose the litigants to "one-way intervention." The state high court discusses one-way intervention at some length, noting that courts are generally limited in making merits-based rulings in advance of certification to prevent a situation where potential class members could elect whether to join in the action depending on the outcome of a decision on the merits. According to the supreme court, while trial courts may certify or decertify a class after a decision on the merits, that authority is confined to situations involving a clear showing of changed circumstances. The exception is a narrow one requiring "compelling justifications" that "avoid inequitable outcomes in a given case."

The court states, "the relevant question is whether a given ruling affects the merits of the class claims in a way that would create a risk of one-way intervention.… The greater the concern, the more compelling a contrary justification will be needed to support immediate resolution; the lesser the concern, the more slender a contrary justification will suffice." The court determined that the grant

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of defendant/cross-claimant's motion for judgment on the pleadings in this case did pose the risk of one-way intervention, but also concluded that reversing both of the trial court's rulings, including its ruling on class certification, would unduly punish the defendant/cross-claimant. Because a vacated ruling on the merits raised only a small risk that potential class members would elect to remain in the class, the court decided to allow the action to proceed as a class, while nevertheless vacating the trial court's premature merits ruling.

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TEXAS TRIAL JUDGE RULES VIOXX® CLAIMS PREEMPTED BY FEDERAL LAW

A Texas District Court judge, before whom nearly 1,000 Vioxx® lawsuits are pending, has dismissed the inadequate warning claims, finding them preempted by federal law. ***Ledbetter v. Merck & Co., Inc.* No. 2005-59499 (Harris County Dist. Ct., Tex., decided April 19, 2007)**.

In 1999, the Food and Drug Administration (FDA) approved Vioxx,® an anti-inflammatory painkiller, for sale in the United States. A study later indicated that the drug increased the risk of cardiovascular thrombotic events, like myocardial infarctions, and Merck withdrew the product from the market. Thousands of lawsuits ensued across the country, and most of them allege that Merck failed to provide an adequate warning.

In Texas, as in a number of other states, there is a rebuttable presumption that a defendant is not liable for failure to provide adequate warnings, if the warnings provided were those approved by the FDA. This presumption may be rebutted if a claimant can establish that the defendant "withheld from or misrepresented to the [FDA] required information that was material and relevant to the performance of the product and was causally related to the claimant's injury." Construing this language, adopted in 2003 as part of a tort-reform initiative in the state, the court determined that "plaintiffs must prove by a preponderance of the evidence that required information was withheld from or misrepresented to the FDA, such that the allegedly withheld or misrepresented information, if disclosed or not misrepresented, would have led to a different regulatory outcome such as refusal to approve Vioxx for marketing or requiring a label change." The court further determined, "The allegedly withheld or misrepresented information must relate to the same injury complained of by plaintiff."

The court, following a line of decisions in the federal courts, ruled that a plaintiff can only invoke the "fraud on the FDA" exception if the FDA itself determines that it was defrauded. Otherwise, said the court, "permitting a Texas jury or judge to make the same inquiry would impinge on a uniquely federal issue." Because the FDA "has not made a determination that material and relevant information was either withheld or misrepresented concerning Vioxx," the court granted Merck's motion for partial summary judgment and found the Texas exception to the rebuttable presumption "preempted to the extent that someone other than the FDA is being asked to make the determination." According to news sources, the judge plans to hold all of the state's Vioxx® cases in abeyance until the appellate courts consider the issue. A final ruling from the Texas Supreme Court could take several years. *See Houston Chronicle,* April 16, 2007.

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NINTH CIRCUIT REJECTS *DAUBERT* ANALYSIS IN MEDICAL DEVICE CASE BUT UPHOLDS SUMMARY DISMISSAL

The Ninth Circuit Court of Appeals has upheld the dismissal of a lawsuit filed against a medical device manufacturer, despite finding that the lower court erred in excluding the testimony of plaintiff's expert. ***Stilwell v. Smith & Nephew, Inc.*, No. 05-15000 (9th Cir., decided April 11, 2007)**. The expert was a metallurgist who was asked to determine reasons for the failure of nails placed in plaintiff's leg to help heal a fracture. He concluded that the nails "fractured due to fatigue," and could have lasted longer if they had been further ground and polished. He refused to render an opinion as to whether fatigue failure would occur before bone healing.

The trial court excluded the testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993), essentially finding that it would not be helpful, because the witness lacked expertise about the intended fatigue life of such nails. According to the Ninth Circuit, the court "concentrate[ed] its analysis on the eventual merit of Stilwell's claim, seemingly requir[ing the] testimony to establish not only the presence of an alleged defect but also causation." Because plaintiff conceded that without the expert testimony her remaining evidence was insufficient to survive summary judgment, the trial court granted the defendant's motion.

According to the appellate court, the trial court mingled its *Daubert* analysis with the analysis required by the summary-judgment rule. "The chain necessary to prevail on a claim may be weakened by the absence of other evidence or testimony, but that does not undermine the admissibility of … evidence." "Thus a district court may not exclude expert testimony simply because the court can, at the time of summary judgment, determine that the testimony does not result in a triable issue of fact." The court reversed the evidentiary ruling and then took the "rare" step of deciding whether the summary-judgment ruling could be sustained despite that error. Because the parties had analyzed and argued the summary-judgment issue, the court determined it would be proper "to exercise our discretion to consider a legal issue for the first time on appeal." The court found that plaintiff would be unable to establish that the nails caused any actionable harm because she lacked evidence regarding the product's intended duration of use, despite conceding it was not indefinite.

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ALIEN TORT CLAIMS ACT CASE REHEARD; NEW OPINION FILED

The Ninth Circuit Court of Appeals has withdrawn its opinion in *Sarei v. Rio Tinto,* PLC, 456 F.3d 1069 (9th Cir. 2006), and issued a superseding opinion and dissent on rehearing that mirror the original opinion in most respects and reach the same conclusion. ***Sarei v. Rio Tinto, PLC*, No. 02-56256 (9th Cir., decided April 12, 2007)**. We discussed the withdrawn opinion in the August 24, 2006, issue of this Report. Essentially, the court reinstated some claims filed under the Alien Tort Claims Act by residents of Papua New Guinea who alleged that they and their families were victimized by the mining operations and consequent civil conflict arising from international law violations committed in Papua New Guinea by Rio Tinto PLC, an international mining corporation.

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The district court dismissed the claims in 2002, ruling that they presented "nonjusticiable political questions." The Ninth Circuit again concluded in its new opinion that most of the plaintiffs' claims could be tried in the United States.

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FEN-PHEN SETTLEMENT PRECLUDES REVIEW OF TEXAS STATUTORY CAP ON PUNITIVE DAMAGES

Attorneys appealing a $1 billion verdict against pharmaceutical company Wyeth have reportedly reached a settlement in *Jeffrey Coffey, et al. v. Wyeth, et al.,* a fen-phen suit in which the plaintiff alleged that his wife developed a fatal lung disease after taking Wyeth-manufactured Pondimin® for weight loss. In April 2004, Judge Donald Floyd of the 172nd District Court signed a judgment awarding the Coffey family $113.9 million in actual damages, $900 million in punitive damages, $4.2 million in prejudgment interest, and $188,737 in guardian ad litem fees, according to *The Texas Lawyer.* Plaintiffs' lawyers had argued that the Texas statutory cap on punitive damages did not apply in this case because the jury found that Wyeth had tampered with public documents in violation of § 32.21 of the Texas Penal Code. The *Coffey* appeal, which was scheduled to be heard this month, would have sought a ruling on the Texas statute limiting punitive damages to double the compensatory amounts plus a maximum of $750,000. A plaintiffs' appellate attorney reportedly said that such a ruling would have been "huge" and "precedent-setting," but both parties have since filed a joint motion with the appeals court to postpone the oral arguments while settlements in *Coffey* and other cases are finalized. *See Law.com,* April 16, 2007.

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MIAMI PLAINTIFFS' ATTORNEY TO PLEAD GUILTY IN ASBESTOS SETTLEMENT FRAUD

"In an era where lawyers are already smeared or have a bad rap, this doesn't help," criminal defense attorney Richard Sharpstein said in a recent *Daily Business Review* article about Miami plaintiffs' lawyer Louis Robles, who is expected to plead guilty to charges that he stole millions from his asbestos clients. Robles represented plaintiffs in more than 12,000 class actions, but was disbarred in 2003 after a federal investigation revealed that he misappropriated settlement funds, charged contingency fees exceeding 50 percent and billed clients for undisclosed expenses. The plea deal would exact from Robles a 10-year prison sentence and $13.5 million in restitution, although U.S. District Judge Alan Gold has reportedly delayed the plea hearing until May 21, 2007, citing dissatisfaction with the agreement. Gold argued that the 4,400 defrauded clients would receive only $1.3 million because Robles apparently spent the difference on personal property and has since filed for bankruptcy. "I think he should have gotten 20 years," one survivor of a Robles asbestos client was quoted as saying. "That man is subhuman. Who knows how many people were counting on those settlements to live out their last years, for prescription medicine? He destroyed lives." *See Law.com,* April 19, 2007; *Miami Herald,* April 21, 2007.

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FEDERAL JUDICIAL CENTER ISSUES THIRD INTERIM REPORT ON CAFA

Federal Judicial Center researchers have issued a third interim **report**, titled *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts,* that claims "class action activity" increased by 46 percent in 88 study districts from January to June 2006, compared with case data compiled from July to December 2001. "Much of that increase was in federal question cases, especially labor class actions, and thus not attributable to the effects of CAFA," the researchers concluded, but added that since CAFA took effect in February 2005, there has been "a substantial increase in class action activity based on diversity of citizenship jurisdiction." Most diversity cases before CAFA were removed to federal court, while now they are more often filed as original actions, according to lead author Thomas Willging on Public Citizen's **Consumer Law & Policy Blog**. The FJC report also notes that tort class actions in federal courts, including personal injury class actions based on diversity jurisdiction, did not significantly increase after CAFA. "The additional cases so far have primarily been contract and common-law fraud cases, plus a small number of property damage class actions," concluded the researchers, who also announced plans to study the potential impact on judicial resources.

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ALL THINGS LEGISLATIVE AND REGULATORY

House Subcommittee Hears Testimony About Food Supply Safety

The House Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce scheduled a hearing April 24, 2007, to discuss whether the Food and Drug Administration is able to ensure the safety and security of the U.S. food supply. Clients of plaintiffs' attorney William Marler were expected to testify about their experiences with tainted spinach and peanut butter. According to Marler's written **testimony**, "My clients who will testify before this committee are but a small slice of your constituents who will suffer and die needlessly each year and every year unless action is taken…. When American business poisons its customers and when our regulatory agencies do not have the manpower or the ability to help business perform, people die and market share is lost, nationally and internationally." Marler calls for produce "best practices," regulatory responsibilities consolidated in one federal-level agency, increased funding, and more stringent regulations on food imports, among other matters.

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LEGAL LITERATURE REVIEW

Daniel Blinka, "Expert Testimony and the Relevancy Rule in the Age of *Daubert*," *Marquette Law Review* (Winter 2006)

In this article, Marquette University Law School Professor Daniel Blinka examines the relevancy-based rule that governs the admissibility of expert testimony in Wisconsin. He describes it as a "'third way' that falls well outside the mainstream of prevailing evidence doctrine," being neither the federal reliability

standard commonly referred to as the *Daubert* rule, nor the general acceptance test, known as the *Frye* standard. Under the Wisconsin rule, judges perform limited gatekeeping functions, and "the strengths and weaknesses of an expert's testimony are, one assumes, sufficiently exposed through cross-examination and impeachment before a trier of fact capable of sorting through the issues, especially as judges may be no better equipped for the task than the lay jury. Thus, the relevancy test strives to assure fair adversary trials, not arbitrate scientific disputes." Blink contends that the relevancy test better assures consistent decisionmaking while avoiding the flaws of the federal reliability test, which "has become a formidable 'case-dispositive' tool, or perhaps weapon, at the summary judgment stage."

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Mark Moller, "Class Action Lawmaking: An Administrative Law Model," *Texas Review of Law and Politics* (2007)

Cato Institute Senior Fellow Mark Moller contends that courts too often adapt elements of statutory claims to fit the requirements for class litigation and in so doing assume that the statutes they are modifying delegate them special interpretive authority in the class context. He argues that courts would better serve congressional intent if they ceased taking liberties not permitted to administrative agencies. Moller calls for judicial restraint in this context and expects that such a change "would reduce the number of class actions certified, while inviting more democratic oversight of class action litigation." The Cato Institute is a Washington, D.C.-based nonprofit public policy research foundation guided by principles of limited government, individual liberty, free markets, and peace.

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LAW BLOG ROUNDUP

"More Likely Than Not" Standard?

"'More likely than not' seems to us to be farther away from the actual comfort level that professionals need before making a decision than the existing 'reasonable professional certainty' standard." Lawyers James Beck and Mark Herrmann, discussing a proposed draft of the American Law Institute's *Restatement (Third) of Torts, Liability for Physical and Emotional Harm* which would eliminate the requirement that an expert witness testify to a "reasonable degree of medical/professional certainty."

drugandevicelaw.blogspot.com, April 12, 2007.

Inauspicious Launch of Texas Newspaper?

"Depositions are scheduled for Thursday …" Blogger Stephanie Mencimer, noting that the editor and a reporter for a Chamber of Commerce publication just launched in Texas have been subpoenaed after a plaintiff's lawyer found them in a courtroom supplying potential jurors with the inaugural edition which had stories purportedly bashing trial lawyers and alleging fraud in mass tort cases. The plaintiff's lawyer was there to pick a jury in an asbestos case he was trying; it settled before reaching the jury.

thetortellini.com, April 17, 2007.

Pet Food Lawsuits Look Like Two-Legged Personal Injury Complaints

"It sounds like the litigation is shaping up much like other mass tort litigation, with claims for medical expenses, medical monitoring, and emotional distress (which would require a significant shift in the law's treatment of animals)." Seton Hall Law School Professor Howard Erichson, blogging about an article in the *Philadelphia Inquirer* that discusses the class actions filed against a New Jersey pet food maker for contaminated products that allegedly killed or sickened cats and dogs around the country.

lawprofessors.typepad.com/mass_tort_litigation, April 23, 2007.

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THE FINAL WORD

Ohio Supreme Court to Consider Tort Reform Cases

Two cases that could affect consumer-protection litigation in Ohio will be argued before Ohio's Supreme Court on May 1, 2007. A woman who claims use of a birth-control patch resulted in four blood clots before age 24 seeks an advisory ruling on the constitutionality of a tort-reform bill that capped non-economic damages. Liability has not yet been determined in her case, but her attorneys want to test the amount of damages she can recover. Her complaint reportedly contends that the cap infringes on her jury trial rights, "unconstitutionally empowers a court to reexamine a jury's award, interferes with the constitutional right to a remedy, and violates due process." Some 24 *amicus* briefs have been filed in this case. The other case will test whether the governor properly vetoed a bill that prevents cities from suing over certain matters, including lead paint. Further details about lead-paint litigation pending in Ohio appear in the April 12, 2007, issue of this Report. *See LegalNewsline.com,* April 9, 2007.