Shook, Hardy & Bacon L.L.P.

Product Liability Litigation Report

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U.S. SUPREME COURT DECLINES APPEALS ON PUNITIVE DAMAGES AND REOPENING SETTLEMENTS

The U.S. Supreme Court has decided not to hear appeals in cases involving punitive damages awarded for radioactive contamination of property and the unsuccessful effort to reopen settlements for alleged crop damage from a fungicide. *ExxonMobil Corp. v. Grefer*, No. 07-1055 (U.S., *cert. denied* April 21, 2008); *Taka v. E.I. du Pont de Nemours & Co.,* No. 07-1060 (U.S., *cert. denied* April 21, 2008). While the Court's decisions in these cases set no precedent, they do allow the lower court rulings to stand.

ExxonMobil sought review of a punitive damages award that was upheld after remand from the U.S. Supreme Court, which had directed a Louisiana appeals court to reconsider it; the award was made to property owners who alleged contamination from naturally occurring radioactive material in drill pipes which ExxonMobil sent to a cleaning company that leased the property. A week before the remand order was issued, the Court ruled in *Philip Morris USA Inc. v. Williams*, 127 S.Ct. 1057 (2007), that punitive damages many not be awarded for harm done to non-parties. Louisiana's appeals court refused to reduce a $112 million punitive damages award any further in light of the *Williams* decision, citing Exxon's reprehensible delay in warning its contractors that the radiation in its drill pipes posed a human safety hazard, which delay increased the plaintiffs' economic damages by allowing the accumulation of radioactive scale on their property. *See The Wall Street Journal*, April 21, 2008; *Mealey's Emerging Toxic Torts*, April 22, 2008.

The fungicide case involved claims by Hawaiian nurseries that their plants were killed or damaged by the fungicide Benlate®. DuPont agreed to settle the claims in 1994 and 1995, and the nurseries later sought to reopen the settlements, claiming that the company withheld scientific evidence about the product to induce them "into settling for pennies on the dollar of damages," conduct they allegedly discovered only after agreeing to settle their claims. Hawaiian courts have consistently dismissed the nurseries' claims, ruling that they could not meet their burden of proving damages. According to Hawaii's supreme court, "plaintiffs' attorney experts merely presented conclusory opinions that would do little to assist a jury. It is not sufficient for an expert to simply

CONTENTS

state that he or she believed that, had the concealed evidence been known, the settlement value would have been greater because the existence of the concealed evidence strengthened the liability aspect of the litigation." *See Product Liability Law 360*, April 21, 2008.

< Back to Top

STATE SUPREME COURT FINDS DEFECTIVE LIGHTER CLAIMS PREEMPTED UNDER FEDERAL LAW

The Texas Supreme Court has determined that a design defect claim involving burns sustained by a 6-year-old girl whose dress was set on fire by a lighter her 5-year-old brother wielded is preempted under the Consumer Product Safety Act (CPSA). ***BIC Pen Corp. v. Carter*, No. 05-0835 (Tex., decided April 18, 2008**. The court reversed the appeals court's judgment as to this issue but remanded the case for the lower court to consider whether sufficient evidence supported the manufacturing defect claims that were not preempted and whether clear and convincing evidence of malice supported the $2 million in exemplary damages awarded by the jury.

The CPSA contains both preemption and savings clauses. The preemption clause forbids states from establishing "any provision of a safety standard or regulation which prescribes any requirements as to the performance, composition, contents, design, finish, construction, packaging, or labeling of such product which are designed to deal with the same risk of injury associated with such consumer product, unless such requirements are identical to the requirements of the Federal Standard." The savings clause provides, "[c]ompliance with consumer product safety rules or other rules or orders under this chapter shall not relieve any person from liability at common law or under State statutory law to any other person." The court found that savings clauses do "not bar the ordinary working of conflict pre-emption principles," and "if the state-law claim conflicts with federal regulations, it is still preempted."

According to the court, "the issue for preemption purposes is whether Carter's claim of a higher standard of child resistance at common law is compatible with federal regulation under the CPSA." Noting that two other courts had considered the issue and split over the result, the court decided that consumer safety would best be served by preempting state law claims that could impose safety requirements more stringent than those considered and rejected by the Consumer Product Safety Commission. In this regard, the court stated, "The Commission specifically rejected more stringent standards, noting the problems that such standards would create by reducing the utility and convenience of the product and increasing costs disproportionate to benefits. Because the Commission weighed these competing concerns when drafting its standard, we conclude that imposing a common law rule that would impose liability above the federal standard is contrary to the Commission's plan and conflicts with federal law."

The Texas court found additional support for its position in the U.S. Supreme Court's policy analysis in *Riegel v. Medtronic, Inc.*, 128 S.Ct. 999 (2008) (observing that juries see "only the cost of a more dangerous design," and are not concerned with its benefits, in contrast to federal agency experts

who apply a cost-benefit analysis to their standard setting). While finding that the plaintiffs' design defect claim was preempted, the court refused to rule the manufacturing defect claim preempted, noting that it raises a separate question. Because the lower court had not addressed whether the evidence of manufacturing defect was legally and factually insufficient, the state high court refused to consider it for lack of jurisdiction. The issue was remanded for further review.

< Back to Top

NINTH CIRCUIT ALLOWS DECEPTIVE MARKETING CLAIMS TO PROCEED AGAINST GERBER

The Ninth Circuit Court of Appeals has reversed an order dismissing putative class claims filed under California law alleging that Gerber Products Co. misled consumers in the packaging for its Fruit Juice Snacks®. ***Williams v. Gerber Prods. Co.*, No. 06-55921 (9th Cir., decided April 21, 2008)**. Plaintiffs claimed that Gerber deceived consumers by (i) using the words "Fruit Juice" on its packaging alongside images of oranges, peaches, strawberries, and cherries, when the product contains only white grape juice from concentrate; (ii) including a package side panel statement describing the product as made "with real fruit juice and other all natural ingredients," despite the fact that the two most prominent ingredients in the product are corn syrup and sugar; and (iii) labeling the product as a "snack" instead of a "candy," "sweet" or "treat." After the complaint was filed, Gerber made some changes to its packaging, including renaming the product "Fruit Juice Treats" and removing the word "nutritious" from the label.

The trial court dismissed the claims, finding that the statements on the original packaging were not likely to deceive a reasonable consumer given the ingredient list on the side of the box and that the "nutritious" claim was non-actionable puffery. The appeals court decided to consider the merits of the appeal despite briefing deficiencies because *amicus* briefs from the Center for Science in the Public Interest and the California attorney general provided additional support for an otherwise meritorious appeal.

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The district court found that "no reasonable consumer upon review of the package as a whole would conclude that Snacks contains juice from the actual and fruit-like substances displayed on the packaging particularly where the ingredients are specifically identified." The appeals court disagreed, finding that reasonable consumers should not "be expected to look beyond the misleading representations on the front of the box to discover the truth from the ingredient list in small print on the side of the box. The ingredient list on the side of the box appears to comply with FDA regulations and certainly serves some purpose. We do not think, however, that a busy parent walking through the aisles of a grocery store should be expected to verify that the representations on the front of the box are confirmed in the ingredient list."

The court further noted, "We do not think that the FDA requires an ingredient list so that manufacturers can mislead consumers and then rely on the ingredient list to correct those misinterpretations and provide a shield for liability for the deception." Finding that plaintiffs had stated a claim and, "given the opportunity," might be able to prove that a reasonable consumer would be

deceived by the product packaging, the court determined that the district court "erred in concluding, without considering any evidence beyond the packaging itself, that [plaintiffs'] complaint failed to state a viable claim." The court declined to consider Gerber's argument that some of the claims were preempted under the Federal Food, Drug, and Cosmetic Act because the issue was raised for the first time in Gerber's answering brief.

< Back to Top

INSURANCE COMPANIES SEEK SHARE OF VIOXX® SETTLEMENT

Nearly four dozen health insurance providers have sued the parties administering the $4.85 billion settlement fund that Merck established to settle the claims of tens of thousands of individuals who alleged that the prescription drug Vioxx® caused their heart attacks or strokes. *AvMed, Inc. v. BrownGreer PLC*, No. 08-1633 (U.S. Dist. Ct., E.D. La., filed April 14, 2008). According to the insurers, the system established to distribute the funds "renders it impossible to identify their members who are participating in the agreement and to assert their reimbursement rights as to those members." While some 50,000 claimants have reportedly enrolled in the settlement program, the lawsuit contends that only a handful have notified the insurance company plaintiffs about the litigation or the settlement as required by their health plan contracts. According to the complaint, efforts to obtain the names of Vioxx® claimants from Merck and the claimants' counsel have been rebuffed. The insurers seek, among other matters, the imposition of a constructive trust in their favor on the settlement funds, an order declaring the insurers the rightful owners of the settlement funds "to the extent necessary to satisfy [their] rights of reimbursement," and a restraining order to prevent the distribution of settlement funds until the claimants have been identified to the insurers. *See Product Liability Law 360*, April 18, 2008.

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< Back to Top

FORD EXPLORER® CLASS SETTLEMENT APPROVED

According to press reports, a California trial court judge has approved a class action settlement between Ford Motor Co. and some 800,000 owners of its Explorer® sports utility vehicles that allegedly lost value due to a perceived rollover danger from defective tires, which were subject to a massive recall in 2000. While the company did not admit any wrongdoing, it agreed to issue discount certificates valid for one year that are worth $500 toward the purchase or lease of a new Explorer® or $300 toward the purchase or lease of other Ford, Mercury or Lincoln vehicles. Plaintiffs' counsel will receive up to $25 million from Ford under the settlement agreement. Some plaintiffs and consumer advocates are reportedly critical of the plan, which resolves class actions in California, Connecticut, Illinois, and Texas, claiming that it serves only to entice buyers of fuel-inefficient vehicles during an economic slump exacerbated by spiking gasoline prices. The settlement does not include any of the personal injury and wrongful death lawsuits pending against the company. *See Reuters* and *NBC5.com*, April 16, 2008; *The Los Angeles Times*, April 17, 2008.

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< Back to Top

Shook, Hardy & Bacon L.L.P.

CALIFORNIA WOMAN FILES FIRST BISPHENOL A LAWSUIT

A putative consumer class action has been filed in federal court in California against the maker of a plastic sports bottle alleging the company downplayed the risks that bisphenol A, which is used to make the plastic, could leach into the liquids stored in the bottles and sicken consumers. *Felix-Lozano v. Nalge Nunc Int'l Corp.*, No. n/a (U.S. Dist. Ct., E.D. Calif., Sacramento Div., filed April 22, 2008). The named plaintiff reportedly alleges that she has purchased the reusable beverage containers for several years for herself and her two minor daughters. According to her attorney, while the company discusses bisphenol A on its Web site, it ignores studies linking the substance to hormone disruptions, infertility, early puberty, and cancer. The lawsuit, which does not allege any physical harm to the plaintiffs, apparently seeks unspecified damages.

The litigation comes in the wake of a recent National Toxicology Program study, finding low-dose bisphenol A exposures in immature lab animals can cause behavioral and reproductive effects. In addition, Canada has announced its intent to ban baby bottles containing the chemical, and a number of major retailers are pulling baby products made with bisphenol A from their shelves. *See Product Liability Law 360,* April 21, 2008; *Reuters UK*, April 24, 2008.

< Back to Top

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ALL THINGS LEGISLATIVE AND REGULATORY

FDA Safety Inspection Plans in the Eye of a Storm

As contaminated products continue to enter the United States, lawmakers are exploring ways to give the Food and Drug Administration (FDA) the resources and authority needed to increase inspections and accredit laboratories. European Union health and food safety officials have criticized draft legislation that would impose import inspection fees on consumer products without regard to the size of the manufacturers or importers and that would require the FDA to accredit laboratories that test goods before they reach U.S. shores. They complain that these labs are already meeting international standards and should be exempt.

Meanwhile, Food and Water Watch, a food safety advocacy group, has reportedly sued the agency to force it to produce documents under the Freedom of Information Act relating to the deployment of its inspection force. The FDA has been calling for more resources to inspect and track foreign and domestic food, drug, medical device, and cosmetic manufacturers. But the agency has apparently refused to provide data about its inspections or the resources it needs to get the job done. In fact, during an April 22, 2008, House oversight subcommittee hearing, FDA Commissioner Andrew von Eschenbach reportedly acknowledged agency shortcomings in inspecting foreign plants, but would not say how much money the FDA needs to prevent products like tainted heparin, linked to 103 deaths, from crossing the U.S. border in the future. *See CongressDaily,* April 21 & 28, 2008; and *Product Liability Law 360*, April 22, 2008.

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California Lawmakers Turn Attention to Nanotechnology Regulation

According to a news source, California legislators are preparing to introduce a bill in 2009 that would establish a state nanotechnology regulatory program that is likely to give the state's environmental protection agency a major role. Assemblyman Mike Feuer (D-Los Angeles) moderated a legislative summit on the issue on April 25, 2008, at the University of California-Los Angeles; this event was intended to bring together stakeholders to discuss responsible ways to regulate nanotechnology. Among other topics addressed during the summit were the integration of predictive toxicology with regulatory policy, the role of the private sector and the effectiveness of various policy alternatives such as direct regulation of nanotechnology processes and materials and market-based initiatives. *See Inside Cal/EPA*, April 25, 2008.

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Government Watchdog Group Criticizes Electronic Record Management

Citizens for Responsibility and Ethics in Washington has issued a **report**, *Record Chaos: The Deplorable State of Electronic Record Keeping in the Federal Government*, that discusses the ways government agencies are losing essential information and exposing themselves to potential legal liability by mismanaging their electronic records.

The report, which outlines the legal frameworks that guide federal agencies in managing their records, surveyed specific agency policies and practices to see if government was complying with its legal obligations. Claiming that the public is being deprived of access to government records from widespread mismanagement of electronic records, the report notes that some agency administrators insisted their computers be reformatted before a new administration took office, and the hard drives of departing employees are regularly erased. According to the report, such policies "may constitute spoliation (or destruction) of evidence and lead to civil litigation damages … when the information [erased] was material to a potential civil action." The watchdog group recommends annual audits and centralized oversight to improve agency performance.

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Advocate Calls for FDA to Retract Approval of Drugs Based on Ghostwritten Papers

Contending that widespread fraud on the part of the pharmaceutical industry has led the Food and Drug Administration (FDA) to wrongly approve prescription drugs as safe and effective, a consumer advocate is calling for (i) medical journals to retract ghostwritten articles, (ii) the FDA to retract its approval of all drugs that were approved on the basis of ghostwritten papers, and (iii) the prosecution of pharmaceutical companies for ghostwriting papers about the safety and effectiveness of their products. According to Mike Adams, writing for *NaturalNews.com*, "The discovery that drug companies have been ghostwriting scientific studies using in-house writers, then paying doctors and high-level academics to pretend they were the author of the article is making shockwaves across conventional medicine." Adams contends the practice constitutes an "elaborate scam" that infuses "the whole system" and adds, "now we have Big Pharma, the FDA and top medical journals all engaged in

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a massive conspiracy to deceive the public." He concludes by calling for putting the companies out of business "and thereby saving countless American children, adults and senior citizens from death by dangerous pharmaceuticals."

< Back to Top

LEGAL LITERATURE REVIEW

Scott Moss, "Litigation Discovery Cannot Be Optimal But Could Be Better: The Economics of Improving Discovery Timing in a Digital Age," *Duke Law Journal* (forthcoming 2009)

University of Colorado Law School Associate Professor Scott Moss examines the cost issues presented by discovery through game and economic theory lenses and concludes that courts should defer making decisions about allowing high-cost discovery until after a case has survived the summary judgment hurdle. According to Moss, courts are simply unable to measure the value of particular evidence or the merits of a case before parties marshal all the evidence, the time at which discovery disputes arise. Noting that "much of the scholarly debate on discovery misses the mark by focusing on *how much* costly discovery is warranted, such as with numerical and proportionality limits," Moss contends that scholars should focus instead "on *when* in litigation to allow such discovery…. [S]urviving summary judgment means a case likely is the sort of close call warranting more fact-gathering, so courts should allow truly costly discovery, such as heavy e-discovery that they commonly disallow now, only once a case survives summary judgment." Moss suggests that current procedural rules would allow courts to defer these decisions, but recommends a new rule "to minimize the risk of courts misusing the proposal to deny discovery excessively."

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Anthony Sebock, "What Do We Talk About When We Talk About Mass Torts?," *Michigan Law Review*, April 2008

In this article, Anthony Sebok reviews and analyzes Richard Nagareda's book, *Mass Torts in a World of Settlement*. Sebok, a Benjamin N. Cardozo School of Law Professor, suggests that Nagareda's proposed solution to the "volatile world" of mass torts, i.e., establishing an administrative mechanism to compensate mass tort plaintiffs, does little to resolve all of the problems identified in the book. According to Sebok, Nagareda's "Leveraging Proposal" (i) "does not confront the centrality of the right to redress in contemporary tort law; it does not compromise that right at all. All it does is harness the lawyer for the right-holder as an agent to help the right-holder sell that right back to the defendant before trial. But the system allows that already;" and the "Leveraging Proposal" (ii) "focuses entirely on solving a problem that exists only in the world of mature mass torts." Sebok concludes by noting that a broader solution may not be possible "within the broad constraints of the current rules of tort and civil procedure. But that does not mean that the Leveraging Proposal's 'success' – as far as it goes – should lead us to believe that the problems which motivated Nagareda to write *Mass Torts* have been solved, or can be solved."

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James Sample, David Pozen & Michael Young, "Fair Courts: Setting Recusal Standards," *Brennan Center for Justice*, 2008

This paper describes "the increasing threats to the impartiality of America's state courts" and discusses "the trends undermining public confidence in the courts." The authors recommend that states strengthen their judicial recusal systems to restore public confidence. They offer ten specific proposals, including peremptory disqualification of judges by litigants, enhanced disclosure of information bearing on impartiality, *per se* rules for recusal in cases involving parties who made large campaign contributions, independent adjudication of disqualification motions, transparent and reasoned decision-making on disqualification motions, de novo review on interlocutory appeal of disqualification decisions, mechanisms for replacing disqualified judges, expanded commentary in the judicial canons, judicial education, and recusal advisory boards. The foreword, authored by a former Texas supreme court justice, opines that viable recusal systems make more sense now than in earlier years when replacing a judge was difficult and expensive and are needed more than ever in light of "record-breaking [judicial] campaign contributions, frequently unreported special interest expenditures, and misleading advertising campaigns." While he recognizes that no state will likely adopt all of the report's proposals, he recommends that "every state should adopt some of them" to achieve meaningful reform.

The authors recommend that states strengthen their judicial recusal systems to restore public confidence.

< Back to Top

LAW BLOG ROUNDUP

The Latest Health Scare = The Newest Mass Tort?

"Another mass tort in the offing? A justification for adopting the precautionary principle perhaps?" Connecticut Associate Professor of Law Alexandra Lahav, commenting on mounting concerns about bisphenol A, a chemical in hard plastics used as reusable water bottles, baby bottles, food containers, and canned food and beverage liners.

"Another mass tort in the offing? A justification for adopting the precautionary principle perhaps?"

Mass Tort Litigation Blog, April 22, 2008.

Bloggers: 1; Plaintiff's Lawyers: 0

"The subpoena has not only been quashed, but attorney Clifford Shoemaker, who issued the subpoena, must show cause why he shouldn't be sanctioned." Attorney Eric Turkewitz, blogging about what happened to the subpoena issued by a plaintiff's lawyer seeking documents and financial information from blogger Kathleen Seidel, an autism litigation critic not involved in Shoemaker's lawsuit. Among the documents Shoemaker sought were those regarding Seidel's religious affiliations, "Muslim and otherwise."

New York Personal Injury Law Blog, April 22, 2008.

< Back to Top

THE FINAL WORD

U.S. Chamber Institute for Legal Reform Ranks State Court Liability Systems

In a report released April 23, 2008, the U.S. Chamber Institute for Legal Reform says that Delaware continues to have the best legal climate in the United States, while West Virginia has the worst. Results are based on an annual assessment of state liability systems conducted by Harris Interactive Inc. in a survey of in-house general counsel or other senior corporate litigators from $100 million corporations exploring "how reasonable and balanced the tort liability system is perceived to be by U.S. business." Among the issues that factor into the rankings are punitive damages reforms, high litigation costs, timeliness of court decisions, limitations on class action suits, appointment versus election of judges, caps on jury awards, and quality of judges.

< Back to Top

UPCOMING CONFERENCES AND SEMINARS

Lorman Education Services, Kansas City, Missouri – June 18, 2008 – "Electronic Discovery and Document Storage," Shook, Hardy & Bacon Pharmaceutical & Medical Device Litigation Partner Madeleine McDonough will discuss issues related to corporate e-discovery. Her sessions are titled "Practical Considerations in Defending Corporate E-Discovery Programs" and "Practical Considerations to Reduce the Risk that E-Discovery May Improperly Be Used as Leverage."

Brooklyn Law School, Brooklyn, New York – November 13-14, 2008 – "The Products Liability *Restatement*: Was It a Success?," Shook, Hardy & Bacon Public Policy Partner Victor Schwartz will present along with a number of other distinguished speakers including *Restatement* reporters James Henderson and Aaron Twerski. Seminar brochure not yet available.

< Back to Top

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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