Shook, Hardy & Bacon L.L.P.

Product Liability Litigation Report

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U.S. SUPREME COURT SEEKS FEDERAL VIEWS ON ASBESTOS CLAIM PREEMPTION ISSUES

The U.S. Supreme Court has requested that the U.S. solicitor general provide the federal government's view of an Ohio Supreme Court ruling upholding the constitutionality of a state law that requires claimants to prove illness from asbestos exposure before filing claims under the Federal Employees Liability Act. ***Weldon v. Norfolk S. Ry. Co.*, No. 07-1152 (U.S., petition for certiorari filed March 11, 2008)**. An intermediate Ohio appeals court had determined that the state law, which became effective September 2, 2004, was preempted under the Supremacy Clause of the U.S. Constitution. The trial court also found the law preempted and, in addition, rejected an effort to apply the restrictions retroactively to a claim filed before the law went into effect. Disagreeing with the lower courts, the Ohio Supreme Court ruled that the state law provisions do not unduly burden employees' federal rights and give the courts a valid means of distinguishing the claims of plaintiffs who fail to produce medical evidence of existing impairment from those who are injured. The U.S. Supreme Court will decide whether to hear the appeal after considering the U.S. solicitor general's brief. *See Product Liability Law 360*, June 16, 2008.

NINTH CIRCUIT DECLINES TO IMPORT CROSS-JURISDICTIONAL TOLLING IN AUTO CLASS ACTION SUIT

The Ninth Circuit Court of Appeals has affirmed the dismissal of claims arising out of the failure of a Dodge Neon's head gasket, declining to toll the statute of limitations as requested by the named plaintiff who was a member of a putative nationwide class filed in another jurisdiction. ***Clemens v. DaimlerChrysler Corp.*, No. 06-56410 (9th Cir., decided June 19, 2008)**. According to the court, the named plaintiff learned more than three years before filing his suit that the head gasket problems he experienced were allegedly "common" among other Dodge Neon owners. He apparently sought repair discounts after the warranty period expired and then fixed the problem himself, videotaping his efforts "(apparently in preparation for litigation)," again more than three years before he filed suit under California law.

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The plaintiff's claims were dismissed as time-barred, and he sought to toll the statute of limitations by arguing reliance on a nationwide class action, filed in Illinois, involving the Dodge Neon head gaskets to vindicate his rights. As the court noted, plaintiffs can, under certain circumstances, "rely on the filing of a prior class action to vindicate the right in question and toll the statute in the event that the class is not ultimately certified." Because the California courts had not adopted "cross-jurisdictional tolling" and because few other states have done so, however, the court declined to import the doctrine into California law. Accordingly, the court concluded that the plaintiff's civil code fraud claim was barred by the three-year statute of limitations.

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ARKANSAS COURT AFFIRMS CERTIFICATION OF NATIONWIDE CLASS IN DEFECTIVE BRAKE LAWSUIT

The Arkansas Supreme Court has allowed a nationwide class to proceed in a case involving defective parking-brake claims, ruling that potential differences in state laws applicable to the claims do not defeat predominance. ***General Motors Corp. v. Bryant*, No. 07-437 (Ark., decided June 19, 2008)**. Finding that the trial court did not abuse its discretion in certifying the class, the supreme court agreed with the lower court that (i) state law does not require a "rigorous analysis" of class-certification factors; (ii) Arkansas trial courts have wide discretion to manage class actions, and "the potential application of many states' laws is not germane to class certification"; (iii) choice-of-law issues are merits intensive and thus, should not be made before certification; and (iv) if application of multiple states' laws is eventually required and proves too cumbersome or problematic, the class can be de-certified.

According to the court, the predominance requirement goes to "whether there is a predominating question that can be answered before determining any individual issues." In this case, the court held that a predominating question was presented, that is, "Whether or not the class vehicles contain a defectively designed parking-brake system and whether or not General Motors concealed that defect." The court discussed prior case law in which it had "suggested that multistate class actions are not per se problematic for Arkansas courts." Then the court determined, as a matter of first impression, whether state trial courts "must first conduct a choice-of-law analysis before certifying a multistate class action." Ruling that they do not, the court also rejected General Motor's suggestion that a petition to the National Highway Traffic Safety Administration (NHTSA) would be superior to a class action. Earlier petitions of this nature have been summarily dismissed, leading to the court to observe, "Clearly, resolution by that agency cannot be superior to a class action when the agency has made such a rejection." The court also noted, "it has been recognized that the Motor Vehicle Safety Act and NHTSA do not in any way preempt a plaintiff's right to bring common-law claims against the manufacturer of an allegedly defective part."

Two concurring justices filed a separate opinion to disagree that choice-of-law issues could never defeat class certification. "Such a declaration extends far past the holdings of our prior case law addressing class certification and forecloses analysis that could conceivably be required," they stated.

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STATE ATTORNEY GENERAL FILES PROP. 65 CLAIMS AGAINST MAKERS OF "NATURAL" PERSONAL CARE PRODUCTS

California's attorney general has filed a lawsuit against companies that make and sell body care or household cleaning products without warning that they contain a possible cancer-causing chemical. *People ex rel. Brown v. Avalon Natural Prods., Inc.*, No. RG08389960 (Alameda County Superior Court, filed May 29, 2008). The complaint, which involves **1,4-dioxane**, was filed under the state's Safe Drinking Water and Toxic Enforcement Act of 1986 (Prop. 65), a law adopted by the state's voters as a ballot initiative that requires warnings on products containing substances known to the state to cause cancer. According to the complaint, the defendants knew "since at least May 29, 2004, that the body washes and gels and liquid dish soaps contain 1,4-dioxane and that persons using these products are exposed to 1,4-dioxane," yet "failed to provide consumers … with a clear and reasonable warning that they are exposed to chemicals known to the State of California to cause cancer." Civil penalties of up to $2,500 per day for each violation can be assessed; the attorney general is also seeking injunctive relief, i.e., product warnings, and the costs of suit.

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According to a news source, the products at issue are marketed as "organic" and "natural." The Organic Consumers Association apparently **investigated** a number of such products and found that nearly 50 of them contained 1,4-dioxane. The products of the four companies that the attorney general sued reportedly had levels of the chemical close to or exceeding 20 parts per million. A company fighting for more stringent application of "organic" labeling filed its own lawsuit in April 2008 against some of the companies investigated, contending that it must sell its natural and organic products, which are backed by certification, on shelves filled with products claiming to be equally organic but which contain petrochemicals or nonorganic substances. *See Greenwire*, June 11, 2008.

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"TORT WARS" MAKE HEADLINES; NEW GUIDE ASSESSES STATE LITIGATION CLIMATE

The New York Times recently discussed developments in the "tort wars," defined as the "decades-old conflict over the rules governing civil lawsuits," and suggested that while corporate interests have won a number of victories in recent years, "trial lawyers continue to try to undo legislation restricting litigation and are pursuing new strategies of their own." The article, titled "To the Trenches: The Tort War Is Raging On," quotes lawyers from both sides of the "trenches" and reports how business interests convened in the late 1990s to adopt a more aggressive approach to tort reform that included advertising campaigns in judicial elections, continued lobbying of lawmakers and annual rankings of states viewed as most and least friendly to businesses. According to reporter Jonathan Glater, the strategy also saw businesses pouring contributions into state supreme court judicial campaigns. The article concludes by observing that plaintiffs' lawyers have begun taking their litigation overseas: "So, despite some very high-profile casualties, the tort wars aren't over. They may just be going global."

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Meanwhile, the June/July 2008 issue of *Directorship* provides a feature titled "Dire States" that reviews the legal climates in all 50 states, based on an annual ranking project undertaken by the American Justice Partnership Foundation. According to the chair and CEO of Directorship.com, "it is clear from reading the state profiles in this article that the business community needs to do more to support the AJP coalition and other liability reform advocates if we are going to stop the plaintiffs' bar from destroying America's ability to compete in the global marketplace." The state-by-state rankings took into account a number of variables, such as insurance loss ratios and state laws affecting liability climates, as well as more subjective inputs like legislative composition and attorney general activism. According to the article, the states with the best liability climate for business are Tennessee, Utah, Indiana, Ohio, and North Dakota, while the worst are California, Pennsylvania, Rhode Island, West Virginia, and Illinois. Directorship.com provides a number of publishing platforms intended to influence corporate leaders, public officials, government regulators, and shareholders.

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ALL THINGS LEGISLATIVE AND REGULATORY

Former DOJ Prosecutors Urge Congress to Pass Law Protecting Corporations' Attorney-Client Privilege

More than 30 former Department of Justice (DOJ) prosecutors have signed a letter to Senator Patrick Leahy (D-Vt.) urging him, as chair of the Judiciary Committee, to support a bill (S. 186) that would limit the ability of DOJ officials to demand that businesses waive attorney-client privilege in exchange for more lenient treatment when they are under investigation. According to the June 20, 2008, letter, "The widespread practice of requiring waiver has led to the erosion not only of the privilege itself, but also to the constitutional rights of employees who are caught up, often tangentially, in business investigations." Apparently, when companies waive the privilege, "individual employees' statements are turned directly over to the government. These employees never have the opportunity to assert their Fifth Amendment rights to the government. Yet, as in several recent cases, they can be prosecuted for making false statements *to the government,* even though the statements were made to company counsel," often without their own lawyers, without reflection and without the ability to refresh their memories by reviewing relevant documents. Such statements, according to the letter, are memorialized in company lawyers' notes which are given to the government when privilege is waived. The former prosecutors also allege that despite a document referred to as the 2006 McNulty Memorandum, which was intended to rein in privilege waiver requests, "prosecutors in the field are still requesting or demanding privilege waivers without the supervision" required by the memorandum.

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Louisiana Senate Concurs with House Amendments to Reform Expert Testimony Rules

A bill (S.B. 308) that would establish procedures governing the admissibility of expert testimony has been approved by the Louisiana Senate after amendment in the House and is now awaiting the governor's signature. The legislation would

require state courts to hold a hearing on motion of any party seeking a determination as to the qualification of an expert witness or "whether the methodologies employed by such witness are reliable." The courts would be required to set forth, either orally or in writing, the reasons for judgment, including the elements required to be satisfied under the state's evidentiary code, the evidence presented to satisfy the requirements and the courts' detailed reasons for allowing or disallowing the testimony. Should the legislation be signed into law, a court's decision under the proposed legislation "shall be subject to appellate review."

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THINKING GLOBALLY

Eighth Circuit Finds Japanese Company Lacked Sufficient Contacts To Be Sued for Wrongful Death

The Eighth Circuit Court of Appeals has affirmed the dismissal of wrongful death claims against a Japanese electrode manufacturer, ruling that the company's contacts with the state to which the electrodes were ultimately to be delivered were limited and, thus, did not "afford an Arkansas court personal jurisdiction over" the company. ***Miller v. Nippon Carbon Co., Ltd.*, No. 07-2332 (8th Cir., decided June 18, 2008)**. The plaintiff's decedent was killed in Tennessee while unloading a shipment of electrodes, and plaintiff filed suit in a federal court in Arkansas against four Japanese companies in the distribution chain–the manufacturer, packer, shipper, and the company that made the transportation arrangements. Nippon, which manufactured the electrodes, filed a motion to dismiss for lack of personal jurisdiction. The district court granted the motion finding that the company was not registered to do business in Arkansas; did not maintain a registered agent, bank account, office, or manufacturing plant in the state; and did not advertise there. While Nippon apparently sent two representatives to the Arkansas buyer once or twice a year since 2003, the court concluded that the death did not arise from these visits.

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The appeals court agreed. Outlining the Due Process Clause requirement that "minimum contacts" exist between a non-resident defendant and the forum state before a court can exercise jurisdiction over the defendant, the appeals court discussed the distinction between general jurisdiction and specific jurisdiction and decided the case under the latter. According to the court "[s]pecific jurisdiction refers to jurisdiction over causes of action arising from or related to a defendant's actions within the forum state." Because nothing in the record showed that Nippon had the duty to ensure the safe packing of the electrodes and because all the witnesses and documents about the packaging, shipping and unloading of the electrodes were primarily in Japan or outside Arkansas, the court was convinced that "traditional notions of fair play and substantial justice do not afford an Arkansas court personal jurisdiction over non-resident Nippon."

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Special Prosecutor Appointed to Determine Sanctions Against Lawyers for Toxic Tort Claims Arising in Nicaragua

According to a news source, the Ninth Circuit Court of Appeals has appointed a special prosecutor to decide appropriate sanctions to impose on plaintiffs' lawyers who allegedly made false statements about toxic tort litigation involving pesticides used on plantations in Nicaragua. A special master has apparently already recommended that Thomas Girardi and Walter Lack pay $375,000 for the false statements and for filing a frivolous appeal. The issue giving rise to the purported misconduct was whether the plaintiffs sued the correct parties. A Nicaraguan judge reportedly awarded the plaintiffs nearly $500 million in their suit against five defendants, including two named in the complaint as Dole Food Corp. and Shell Oil Co. When the plaintiffs sought to enforce the judgment in the United States against Dole Food Co. and Shell Chemical Co., they allegedly misstated repeatedly in legal documents that the parties' names had been corrected in the Nicaraguan writ of execution. *See Law.com*, June 10, 2008.

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LEGAL LITERATURE REVIEW

Howard Erichson, "CAFA's Impact on Class Action Lawyers," *University of Pennsylvania Law Review* (forthcoming 2008)

Seton Hall Law School Professor Howard Erichson examines the animus toward plaintiffs' lawyers that motivated passage of the Class Action Fairness Act of 2005 (CAFA) and, studying the data on post-CAFA shifts in class action practice, observes that the law has actually strengthened the position of certain class action litigators. Erichson notes that CAFA not only shifted class action cases to federal courts by removal from plaintiff-selected state courts, it also "fundamentally" changed forum selection. According to the article, early data suggest that federal courts in Los Angeles, San Francisco, New Jersey, Philadelphia, and New York have replaced former litigation "magnet jurisdictions," like Madison County, Illinois, and Beaumont, Texas. Erichson notes that CAFA has caused a "shift away from personal injury class actions and a growth in contract, fraud, wage-and-hour, and consumer protection cases," and observes, "If CAFA's proponents expected it to squelch class actions, the statute appears unlikely to achieve that goal. Similarly, if CAFA's proponents expected the statute to disempower the class action bar or its most powerful members, they are in for a disappointment." The article concludes, "Given the adaptations of class action lawyers, however, the statute appears unlikely to obliterate class actions or to diminish the power of the elite class action bar. In other words, CAFA may be achieving its stated objective while failing to achieve an unstated agenda."

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Theodore Eisenberg & Charlotte Lanvers, "Summary Judgment Rates over Time, Across Case Categories, and Across Districts: An Empirical Study of Three Large Federal Districts," *Cornell Legal Studies Research Paper Series* (May 2008)

Cornell Law School Professor Theodore Eisenberg and Disability Rights Education & Defense Fund, Inc. Skadden Fellow Charlotte Lanvers studied summary judgment rates in three large federal districts for periods preceding and following a trilogy of U.S. Supreme Court opinions in 1986 that purportedly expanded the availability of the summary judgment device in civil cases. They found statistically insignificant differences. And while they found consistently higher summary judgment rates in civil rights cases, rates for contract and tort cases across all districts and time periods were consistently less than 10 percent. Their research will be of interest to those who have suggested that summary judgment has contributed to declining trial rates in the United States since the 1960s.

Ross Davies, "The Judiciary Fund: A Modest Proposal that the Bar Give to Judges What Congress Will Not Let Them Earn," *Green Bag 2d* (Spring 2008)

In this article, George Mason University Law Professor Ross Davies writes that if the bar is serious about increasing judicial salaries, there is precedent for establishing a fund that would provide the $44 million that would be needed to bring the salaries of Article III (federal) judges to levels that Congress has been asked to consider. Apparently, former colleagues of Chief Justice Roger Taney raised funds after his death in 1864 to provide support for two of his children because they had not been provided for by Taney's "tiny estate." The author observes that the American Bar Association has called for increasing judicial pay to avert a "crisis that threatens to undermine the strength and adequacy of the federal judiciary," and suggests that simply raising its 400,000 members' dues by $110 would raise the necessary funds.

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LAW BLOG ROUNDUP

Questions Without Answers?

"So, what's up with that? Are the liberals caving or poised for triumph? Is the generational split on the importance of precedent between the younger and older conservatives becoming a real rift? Has John Roberts finally steered the court to a bipartisan new Age of Constitutional Aquarius?" *Slate's* U.S. Supreme Court Correspondent Dahlia Lithwick, kicking off the magazine's annual online discussion of the Court's latest term by asking if there is a way to explain the relatively few 5-4 decisions from this year's docket.

Slate.com, June 22, 2008.

Counsel Not to Hire for Your Next Class Action …

"Accused of defrauding their clients of $200 million, plaintiffs' lawyers defense is that they 'may not have been able to grasp the complexities of the class action,' and that one should be excused because of 'severe alcoholism' 'that made him unable to think rationally.'" George Mason University Law Professor Michael Krauss, blogging about the charges against plaintiffs' lawyers who allegedly bilked their clients in a settlement for claims of injury from the diet drug Fen-Phen.

PointofLaw.com, June 24, 2008.

No End to the Tort Wars

"Yesterday the *Times* ran a lengthy article … citing without comment brazenly biased and bogus corporate surveys and insurance industry consultant 'reports' that have been widely trashed … and making it seem like the only people affected by laws that take away rights of injured consumers are the attorneys who represent them." Center for Justice & Democracy Senior Field Organizer John Guyette, commenting on the "tort war" article appearing recently in *The New York Times* and discussed elsewhere in this Report.

ThePopTort.com, June 23, 2008.

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THE FINAL WORD

Clarification

The item appearing in this section of our previous report may have given the impression that a petition was filed recently with the Food and Drug Administration (FDA) regarding the regulation of products, especially sunscreen, made with nanoparticles. The petition, which was undated, was actually filed in 2006 by the International Center for Technology Assessment (ICTA). The FDA opened a public docket for comment in response to the petition and an agency task force issued a **report** in 2007, discussing many of the issues raised by the petition.

More recently, senior FDA staffers reportedly indicated that they "feel comfortable" regulating products incorporating nanoparticles within the agency's "present regulatory framework." Their position may not, however, be the last word on the issue as the ICTA is reportedly planning to take legal and regulatory action over carbon nanotubes now that a new study suggests that these materials produce "asbestos-like, length-dependent, pathogenic behavior" in exposed mice. The advocacy organization filed a petition with the Environmental Protection Agency in May 2008 demanding that the agency use its authority to regulate pesticides to stop the sale of consumer products containing nano-silver, which is apparently used to enhance "germ killing" properties. *See ICTA Press Release*, May 1, 2008; *Product Liability Law 360*, May 21, 2008; *CQ HealthBeat News*, June 17, 2008.

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UPCOMING CONFERENCES AND SEMINARS

American Conference Institute, Philadelphia, Pennsylvania – July 14-15, 2008 – "Drug & Device Preemption," Shook, Hardy & Bacon Pharmaceutical & Medical Device Litigation Partner **Deborah Moeller** will serve on a panel that will discuss "Evaluating Whether or Not to Pursue a Preemption Defense."

American Conference Institute, Boston, Massachusetts – September 23-24, 2008 – "Managing Legal Risks in Structuring & Conducting Clinical Trials," Shook, Hardy & Bacon Pharmaceutical & Medical Device Litigation Partner **Madeleine McDonough** will join a former FDA enforcement lawyer to discuss issues arising from compliance with state and federal laws requiring the registration of clinical trials and disclosure of results.

American Conference Institute, Chicago, Illinois – October 29-30, 2008 – "Defending and Managing Automotive Product Liability Litigation," Shook, Hardy & Bacon Tort Partner **H. Grant Law** will serve on a panel discussing "Preemption: Examining the Current Viability of the Defense in Auto Product Liability Cases."

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.

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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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