Shook, Hardy & Bacon L.L.P.

JUNE 4, 2009

PRODUCT LIABILITY LITIGATION REPORT

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U.S. SUPREME COURT RETURNS ASBESTOS CASE TO TRIAL COURT FOR ERRONEOUS JURY-INSTRUCTION RULING ON FEAR OF CANCER

Without oral argument or complete briefing, the U.S. Supreme Court has issued a per curiam decision allowing an appeal of and reversing a $5 million verdict in an asbestos exposure case filed under the Federal Employers' Liability Act (FELA). ***CSX Transp., Inc. v. Hensley*, No. 08-1034 (U.S., decided June 1, 2009)**. The plaintiff sought damages for the economic injuries caused by his toxic encephalopathy and asbestosis, diseases purportedly linked to his lengthy workplace exposure to a solvent and asbestos, respectively. He also sought damages for his fear of developing cancer in the future.

The Court's majority found that the trial court erred by refusing to instruct the jury, as requested by the railroad employer, that the plaintiff could recover for fear of cancer only if he could demonstrate that the "fear is genuine and serious." Citing a footnote from a previous decision, *Norfolk & Western R. Co. v. Ayers*, 538 U.S. 135 (2003), the Court found that refusal to give the instruction, as a "verdict control device," was clear error. According to the Court, the volume of pending asbestos claims and the danger that a jury, without proper instructions, "could award emotional-distress damages based on slight evidence of a plaintiff's fear of contracting cancer," necessitate a properly instructed jury to protect "against unbounded liability on asbestos defendants."

Justice John Paul Stevens, dissenting, noted that without a special verdict, "we do not know what portion (if any) of the award was meant to compensate Hensley for his fear of developing cancer," and that the Court's decision to nullify the jury's damages award rests on a footnote that was dicta (i.e., not necessary to the disposition of the case) and indicated only that such an instruction was "available to the trial court," not that it was per se reversible error not to give it.

Stevens also suggested that the Court's ruling will invite further questions, such as (i) "if it is *per se* error for the trial court to deny a request for a genuine-and-serious instruction, is it also *per se* error to fail to employ particularized verdict forms? After all, that too is a verdict control device listed in footnote 19"; (ii) "How much discretion, if any, is accorded the trial court to decide which devices are necessary?"; and (iii) "Is the list of verdict-control devices identified in *Ayers* exhaustive?"

Justice Ruth Bader Ginsburg also dissented, claiming that the defense-oriented instructions requested were more elaborate than *Ayers* would require and that "the trial court rightly refused to give them."

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SHB offers expert, efficient and innovative representation to clients targeted by class action and complex litigation. We know that the successful resolution of products liability claims requires a comprehensive strategy developed in partnership with our clients.

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SOME STATE CLAIMS IN FEMA TRAILER MDL PREEMPTED BY FEDERAL LAW

A federal multidistrict litigation (MDL) court has granted, in part, the motion to dismiss filed by manufactured-housing defendants in litigation over purportedly excessive levels of formaldehyde in "emergency housing units," or trailers, supplied by the U.S. government to individuals displaced from their homes by Hurricanes Katrina and Rita. *In re: FEMA Trailer Formaldehyde Prods. Liab. Litig.*, MDL No. 07-1873 (U.S. Dist. Ct., E.D. La., order entered May 29, 2009). The suits were filed in a number of federal courts under state product liability laws and were later consolidated before the MDL court, which will handle all of the pre-trial proceedings before returning the cases to the courts of origination for trial.

The court sets forth the federal regulations pertaining to manufactured housing, including those that specify formaldehyde emission limits. Noting that the regulations expressly "preempt State and local formaldehyde standards," the court also states that they contain a "savings clause," providing that "compliance with any Federal manufactured home construction or safety standard … does not exempt any person from liability under common law." The rules also provide that they "shall not prevent any State agency or court from asserting jurisdiction under State law over any manufactured home construction or safety issue with respect to which no Federal manufactured home construction and safety standard has been established."

Discussing the types of preemption—express, implied, field, and conflict—that determine whether federal law will preempt liability under state law, the court ruled that the savings clause "makes it clear that the congressional intent behind the Act was not to explicitly preclude common law suits." Still, the court found that allowing state-law suits involving emission standards already established by the federal government would directly conflict with the federal law and thus granted the motion to dismiss "only to the extent that any of Plaintiffs' state law claims which advance a standard of care that is different from (i.e., not identical to) the formaldehyde regulation in the HUD [Housing and Urban Development] Code and the formaldehyde warning standard specifically set forth in 24 C.F.R. § 3280.309(a)." The court added, "To be clear, Plaintiffs' other state law claims, particularly those that may involve violations of the HUD Code, remain viable and are not hereby dismissed."

FEDERAL COURT STAYS DISCOVERY IN DEFECTIVE BABY-BOTTLE SUIT PENDING RESOLUTION OF MOTION TO DISMISS

While a number of legal commentators have considered whether recent U.S. Supreme Court rulings about the sufficiency of factual allegations in pleadings apply to products liability litigation, a federal magistrate judge in Illinois has, in

fact, applied those cases to a putative class action against the maker of allegedly defective baby bottles. *Coss v. Playtex Prods., LLC*, No. 08-50222 (U.S. Dist. Ct., N.D. Ill., W. Div., order entered May 21, 2009).

According to the judge, where a complex case is susceptible to the "burdensome and costly discovery contemplated by *Bell Atlantic* and *Iqbal*, the district court should limit discovery once a motion to dismiss for failure to state a claim has been filed." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), involved antitrust claims, and *Ashcroft v. Iqbal*, No. 07-1015 (U.S., decided March 18, 2009), raised issues of race, religion and national origin discrimination against government officials. In both cases, the U.S. Supreme Court stated that all civil complaints "must contain sufficient factual matter, accepted as true, to state a claim of relief that is plausible on its face." Without reinstating the "hyper-technical, code-pleading regime of a prior era," the Court determined that Federal Rule of Civil Procedure 8 "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions."

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The baby-bottle litigation plaintiff filed claims for unjust enrichment, violations of state consumer-fraud acts and breach of implied warranty of merchantability, alleging a product defect that caused the baby bottles to leak. She sought to represent a class with members in 13 states and raised claims involving alleged violations dating back to October 2003 under 15 statutes. Her complaint apparently also raised allegations involving patent applications and sought damages in excess of $5 million. The court concluded, "[t]here is no doubt that this case is complex and will entail burdensome and costly discovery."

The defendant filed a motion to dismiss for failure to state a claim and then sought to stay discovery pending the court's decision on its motion. Among the plaintiff's discovery requests was a request to produce "Any internal memorandum, studies, analyses, reports, white papers, summaries, projections, board minutes or board presentations prepared by you or on your behalf, or provided to you, reflecting or referring to performance problems of the bottles at issue arising from circular diaphragm vent caps."

The court found that this request sought "an immense volume of documentation without specifying a relevant time period. Locating and producing responsive documents would force Defendant to endure undue burden and cost. This request to produce is typical of the discovery that the court will not allow in a complex case pending decision on the motion to dismiss." Because the court, however, disfavored putting a halt to all discovery, it ordered limited discovery to proceed "in the interest of moving the case forward." The defendant was ordered to answer two interrogatories about the number of bottles sold in the class states during the class period and whether they were sold with the vent cap at issue.

U.S. SUPREME COURT DECLINES REVIEW OF PUNITIVE DAMAGES AWARD IN AUTO-DEFECT CASE

The U.S. Supreme Court has denied a petition for certiorari asking it to review a Tennessee Supreme Court decision upholding a $13.3 million punitive damages award to the parents of an infant who died in a 2001 car accident. *DaimlerChrysler v. Flax* No. 08-1010 (U.S., cert. denied May 26, 2009). The company unsuccessfully argued in its petition that (i) Tennessee law deprives defendants of "fair notice" under the Due Process Clause by permitting the imposition of liability for punitive damages without regard to objective indicators of reasonable conduct, such as compliance with government safety standards, industry custom and a genuine debate over what the law requires; (ii) a punitive damages award substantially exceeding the compensatory damages (at a ratio of 5.35 to 1) violates due process; and (iii) the Tennessee Supreme Court erred by refusing to consider its argument, not raised before an intermediate appellate court, that the jury should not have been allowed to consider harm to non-parties in assessing punitive damages.

DAMAGES IN ESCALATOR MISHAPS WOULD NOT REACH JURISDICTIONAL THRESHOLD, SAYS FEDERAL APPEALS COURT

The Seventh Circuit Court of Appeals, which was asked to consider whether a district court abused its discretion in excluding evidence of other escalator accidents, determined instead that the district court lacked jurisdiction to consider claims of injury from escalator malfunctions because the amount in controversy did not meet the threshold for diversity jurisdiction. **McMillian v. Sheraton Chicago Hotel & Towers, No. 07-3370 (7th Cir., decided May 29, 2009)**.

The four plaintiffs were allegedly injured when hotel escalators malfunctioned in September 2003. They sued the hotel and the escalator manufacturer, and during discovery, sought information about other escalator malfunctions. The hotel provided reports about two other incidents. The escalator company filed a motion in limine to exclude from trial the introduction of any evidence of accidents occurring on an escalator other than those involved in the lawsuit, which motion was granted. Without that evidence, the plaintiffs apparently did not believe they could survive a motion for judgment as a matter of law. They consented to entry of judgment against them and then appealed the district court's ruling on the motion in limine.

The appeals court first determined that it could, in fact, consider an appeal from a party that had consented to judgment against it because the record showed that the plaintiffs reserved their rights to appeal the contested ruling. Most federal circuit courts have determined that an express reservation of the right to appeal avoids a waiver of contested issues resolved under a consent judgment. According to the court, the Fifth Circuit Court of Appeals is the only one that "gives no effect to an express reservation of appellate rights."

Still, the court determined that the district court lacked jurisdiction to consider the matter because the plaintiffs were unable to prove by a preponderance of the evidence that their injuries gave rise to an amount in controversy that exceeded

$75,000, the diversity jurisdiction threshold. The total medical expenses claimed amounted to about $26,000, and the plaintiffs failed to provide "competent proof" that future medical expenses and pain and suffering would make up the difference. Thus, the appeals court vacated the district court judgment and remanded the case with instructions to dismiss the claims for lack of jurisdiction.

NANOTECHNOLOGY BOOM SEEN AS POTENTIAL FOR INCREASED PRODUCT LIABILITY CLAIMS

Although no major nanotechnology product liability cases are apparently pending in the United States, legal experts say that the potential for this type of litigation exists. According to an operating list maintained by the Project on Emerging Nanotechnologies, some 800 products are currently formulated or constructed through the use of nanotechnology, ranging from germ-resistant bandages to faster microprocessors to stronger bicycle frames. Nano-watchers reportedly believe that the list is far from comprehensive.

While some makers openly brand their products "nano," others using the technology are more circumspect about their usage partially because of liability fears, experts claim. Global insurer Swiss Re, known for its ability to accurately identify future risks, said in a recent finding that although nanotech "has become a major engine for economic growth," examination of the technology's environmental and health consequences is just beginning.

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Fearing future potential litigation, one insurer in fall 2008 issued and then quickly rescinded a nanotech-related policy exclusion in its commercial general liability and excess liability policies. Continental Western Group's exclusion reads in part that certain of its policies would not apply to injuries "related to the actual, alleged or threatened presence of or exposure to 'nanotubes' or 'nanotechnology.'" The company's general counsel John Thelen confirmed recently that the policy exclusion was issued and rescinded, but declined further comment. *See Product Liability Law*, May 29, 2009.

ALL THINGS LEGISLATIVE AND REGULATORY

Consumer Advocate Calls for Motor Vehicle Safety Improvements as Part of Bailout

Joan Claybrook, who formerly headed the consumer advocacy organization Public Citizen, recently testified before the House Committee on the Judiciary to urge the U.S. Congress to link motor vehicle standards to the ongoing auto-company bankruptcies and bailouts. In her May 21, 2009, statement, Claybrook noted that automakers swiftly agreed to President Barack Obama's (D) fuel economy program

"[u]nder the threats of bankruptcy and the need for bailout money," but that "no initiative or agreements have been made to improve motor vehicle safety."

According to Claybrook, motor vehicle crashes kill more than 40,000 Americans every year, injure more than 2.5 million and cost the country $230.6 billion annually, or about "$800 for every man, woman and child." She contended that vehicle safety improvements would save lives, reduce injuries and help bring national health care costs under control. Claybrook recommended new safety standards for auto roofs, side windows, seats and seat backs, and air bags, as well as pedestrian protection from sharp exterior objects and event data recorders in all vehicles.

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Nancy Nord Steps Down as CPSC Acting Chief

Nancy Nord, acting chair of the Consumer Product Safety Commission (CPSC), has reportedly stepped down from her post but will remain at the agency as a commissioner until the end of her term, which expires in 2012.

According to *The Associated Press*, CPSC's other current commissioner, Thomas Moore, will replace Nord as acting head of the agency until Inez Moore Tenenbaum, President Barack Obama's (D) pick for new chair, can be confirmed by the Senate. Obama also tapped Robert Adler to fill one of two new seats the administration has proposed adding to the product safety agency.

In April, Senator Bill Nelson (D-Fla.) called for Nord's resignation because of what he claimed was the agency's lack of action over reports of Chinese-made tainted drywall installed in U.S. homes.

Former President George W. Bush (R) appointed Nord to the position in 2005. In an April 2009 letter to Obama, amid increasing uproar over newly enacted product safety standards, Nord implored him to appoint a new chair, who would face "a number of daunting challenges," according to Nord, especially implementation of the Consumer Product Safety Improvement Act of 2008. The law, which went into effect in February, has been a source of contention among manufacturers and consumer advocates. In particular, Nord wrote, the law's lead and phthalate bans will be "especially challenging" to the new chair. *See Product Liability Law 360,* May 29, 2009.

Vermont Legislators Approve Ban on Some Gifts to Health Care Providers by Drug and Medical Device Makers

Vermont's governor is apparently expected to sign legislation (S. 48) approved by the state House and Senate in May 2009 that would prohibit the manufacturers of prescription drugs and medical devices from giving certain kinds of gifts to physicians and other health care providers. The law would also impose new registration and

disclosure requirements which can be complied with through the office of the attorney general. According to the findings appearing in the legislation, "acceptance of meals and gifts and other relationships are common between physicians and pharmaceutical, medical device, and biotechnology companies," and "these relationships may influence physicians to prescribe a company's medicines even when evidence indicates another drug would be more beneficial to the patient."

New Hampshire and Pennsylvania Take Different View on Ethics of Searching for Metadata in Electronic Materials from Opposing Counsel

U.S. Law Week recently reported that the bar associations of two states have taken contrary positions on whether attorneys are prohibited from searching for or using information hidden in the metadata of the electronic documents they receive from opposing counsel. The New Hampshire Bar Association's ethics panel has reportedly determined that disciplinary rules prohibit this practice, while the Pennsylvania bar's ethics committee, revisiting the issue, has advised lawyers in that state that they are usually allowed to examine hidden metadata and use it to benefit their clients. The Pennsylvania opinion, 2009-100, apparently aligns the state with the American Bar Association's (ABA's) view about lawyer ethics when transmitting and receiving electronic documents containing metadata. This new opinion reportedly imposes a duty of reasonable care on lawyers to remove unwanted metadata before sending electronic documents to a third party.

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New Hampshire's ethics panel expressly rejected the ABA's position in its opinion, 2008-2009/4, noting that its rule on inadvertent disclosure differs from the ABA's model rule. According to this opinion, hidden metadata could reveal client secrets, litigation and negotiation strategy, legal theories, attorney work product, and other privileged and confidential information. Several other states have also apparently rejected the ABA approach, including Alabama, Florida, Maine, and New York. New Hampshire's ethics committee reportedly determined that metadata must always be deemed "inadvertently sent" within the meaning of Rule 4.4, unless counsel have mutually agreed otherwise. The committee compared the search for metadata to peeking at opposing counsel's notes or purposely eavesdropping. *See U.S. Law Week*, May 27, 2009.

LEGAL LITERATURE REVIEW

Victor Schwartz & Christopher Appel, "Federal Government Bailout for Trial Lawyers," *Washington Legal Foundation Legal Opinion Letter,* May 22, 2009

According to Shook, Hardy & Bacon Public Policy Attorneys Victor Schwartz and Christopher Appel, legislation introduced by Senator Arlen Specter (D-Pa.) would

allow personal injury lawyers to deduct the "loans" they make to clients when the loans are made and not "as is the case under current law, in the future if and when, at the end of the litigation, the loans are not repaid." Plaintiffs' lawyers are not allowed to advance expenses for their clients, but can make loans that are recovered under a contingency fee arrangement if they win the case for their clients. Major cases against pharmaceutical or automobile manufacturing companies can require hundreds of thousands in costs upfront. The authors contend that if this change to the nation's tax laws is adopted, it would force the federal government to bear 40 percent of the initial costs of litigation and allow plaintiffs' lawyers to "take more cases with higher risks."

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Jennifer Robbennolt, Robert MacCoun & John Darley, "Multiple Constraint Satisfaction in Judging," *Illinois & Berkeley Public Law Research Paper,* May 2008

This article, which is part of a larger work, discusses the various goals and factors that can influence how judges make their decisions. The authors have gathered a broad array of references to outline current models of judicial decision making, including attitudinal, strategic and managerial models, each with its own objectives, such as following precedent, wishing not to be overturned, gaining public respect, moving a busy docket, or even spending time writing an interesting opinion. They suggest that "each model accurately captures some of what every judge does some of the time, and that no single model is likely to describe any judge all of the time. A sophisticated understanding of judicial decision making should explicitly incorporate the notion that judges simultaneously attempt to further numerous, disparate, and often conflicting objectives."

Mark Behrens, Gregory Fowler & Silvia Kim, "Global Litigation Trends," *Michigan State Journal of International Law,* 2008-09

Shook, Hardy & Bacon Attorneys **Mark Behrens** (Public Policy), **Gregory Fowler** (International Litigation & Dispute Resolution) and **Silvia Kim** (International Litigation & Dispute Resolution) discuss how nations around the world are, in some instances, considering adopting some aspects of the U.S. legal system, like aggregate litigation, litigation funding and punitive damages. They caution global business interests to "pay attention to the rapidly emerging global trends and become engaged in the dialogue that is occurring." They cite specific reforms under consideration or recently enacted abroad and note that while a growing list of countries outside the United States recognize some form of multi-claimant litigation, the trend "has been to reject wholesale adoption of U.S.-style class actions." Still, they caution that as "collective actions become more prevalent, and the foreign plaintiffs' bar better funded and coordinated as a result, it would not be surprising to hear calls for broader and speedier reform."

LAW BLOG ROUNDUP

Keeping a Scorecard on U.S. Supreme Court Nominee Sonia Sotomayor

"The Sonia Sotomayor speculation games have definitely begun! Ever since her nomination to the U.S. Supreme Court on Tuesday, policy nerds, pundits, and blearly-eyed bloggers have been in a 'wonkadelic' frenzy over who [U.S. Federal Appeals Court] Judge Sotomayor is and how she's likely to rule on various issues." Consumer advocates at the Center for Justice and Democracy, pulling together electronic material from the media discussing the nominee's positions on business issues, preemption and punitive damages.

The Pop Tort, May 29, 2009.

"Four leading Senators did the talk-show rounds on Sunday morning, largely to address the confirmation process on Judge Sotomayor. From where we sit, the main takeaway was provided by the ranking Republican on the Senate Judiciary Committee, Jeff Sessions (R-Ala.). Sessions said it was unlikely his party would use procedural delays to try to block a vote on Sotomayor by the full 100-member Senate." *WSJ* legal correspondent Ashby Jones, compiling the most recent commentary on the nomination.

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***WSJ* Law Blog, June 1, 2009**.

"She will not be as liberal as many of the Republicans are saying—but no one could be that liberal, even if they tried." Manhattan Institute Senior Fellow Walter Olson, quoted in the *The New York Times* about his views on the nominee and linking to other electronic sources of information about her record and views.

Overlawyered.com, May 28, 2009.

THE FINAL WORD

Rise in Worldwide Products Market Creates Opportunity for Global Forum Shopping

Product liability issues are apparently changing with the rise of the global product market and instant access to data worldwide. As more products are sold in multiple markets around the globe, thereby exposing manufacturers and distributors to liability risks from numerous countries, many attorneys reportedly believe that foreign plaintiffs will participate in global forum shopping with the United States remaining a most attractive venue.

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"If you create a product in a country and ship it worldwide, you are subject to product liability in each of those countries," Gregory Fowler, partner and co-chair of Shook, Hardy & Bacon's International Litigation and Dispute Resolution Practice, was quoted as saying. "Any time you put a product in the stream of commerce, you are exposing yourself to be regulated by laws of other countries."

Many countries, but not the United States, operate on a "loser pays" model in which the loser of a lawsuit pays the attorney's fees incurred by both sides, apparently discouraging plaintiffs from bringing actions in their home country and tempting them to try their claims in U.S. courts. *See Product Liability Law 360*, May 27, 2009.

UPCOMING CONFERENCES AND SEMINARS

American Conference Institute, New York, New York – June 24-25, 2009 – "3rd Annual Drug and Medical Device on Trial." Shook, Hardy & Bacon Pharmaceutical and Medical Device Litigation Partner Harvey Kaplan will conduct a "Cross-Examination of the Plaintiff's Cardiologist." Designed around a detailed fact pattern, this interactive seminar gives a distinguished faculty of judges, in-house counsel and practitioners the opportunity to demonstrate and critique a variety of trial skills. A seminar brochure is available on request from the sponsor.

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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 our more than 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).