Shook, Hardy & Bacon L.L.P.

Product Liability Litigation Report

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FEDERAL OFFICER REMOVAL STATUTE AT ISSUE IN MTBE PRODUCTS CASE

While the U.S. Supreme Court continues to deliberate whether a cigarette manufacturer may remove a deceptive advertising case from state to federal court under a removal statute, the Second Circuit Court of Appeals has issued a ruling under that statute in litigation involving the alleged contamination of public water sources by methyl tertiary butyl ether (MTBE), a gasoline additive. ***In re MTBE Prods. Liab. Litig.*, Nos. 04-5974 & 04-6056 (2d Cir., decided May 24, 2007)**. The court ordered the trial court to return to their respective state courts cases filed by California and New Hampshire against corporations that manufactured, refined, marketed, or distributed gasoline containing MTBE.

The corporations had sought removal under a statute that permits the removal of cases commenced in state court against "any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office.…" The defendants contended that they added MTBE to their gasoline at the direction of the Environmental Protection Agency and, thus, were acting under the direction of a federal agency. Because the Clean Air Act and EPA regulations promulgated thereunder did not specify that MTBE be used in gasoline, but only mandated the use of oxygenates, the court found that the defendants failed to meet their burden of proving "they were acting under federal officers when they added MTBE, and not some approved alternative, to their reformulated gasoline."

The court distinguished the Eighth Circuit's ruling in *Watson v. Philip Morris Cos.,* 420 F.3d 852 (8th Cir. 2005), *cert. granted,* 127 S. Ct. 1055 (2007) (No. 05-1284), which was recently argued before the U.S. Supreme Court. Further details about that case and a link to the argument transcript can be found in the May 10, 2007, issue of this Report. Questioning whether *Watson* was correctly decided, the court nevertheless found that the level of agency control over cigarette testing in *Watson* "was stronger than that of the EPA over the gasoline industry." The court further noted that the federal officer removal statute was not "intended to be construed so broadly that it would federalize a broad spectrum of state-law tort claims against entities regulated by – though not acting under – officers or agencies of the United States."

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DEFECTIVE AIRCRAFT CLAIMS TRANSFERRED UNDER FIRST-TO-FILE RULE

A U.S. district court in Texas has transferred to another district court a case brought by aircraft passengers against Raytheon Aircraft Co. for injuries allegedly caused by exposure to jet-oil fumes. *Rosas v. Raytheon Aircraft Co.,* No. 5:06-CV-184 (U.S. Dist. Ct., Southern Dist., Texas, decided May 23, 2007). Plaintiffs claim that an aircraft made by Raytheon is defective because it disperses the fumes into the aircraft's pressurized cabin and pilot areas. One of the plaintiffs is the president and principal stockholder of the helicopter company, Rio Bravo, which owns the aircraft in question and had an earlier dispute with Raytheon after a baggage door on the aircraft shifted during flight. Raytheon took Rio Bravo to court in Kansas before the Texas suit was filed, seeking a declaratory judgment that its manufacture or design of the baggage door was not faulty and that it was not responsible for damages arising out of other functional problems with the aircraft.

While the Kansas suit was pending, Rio Bravo filed suit in federal court in Texas "centering on the same facts and issues at the heart of the Kansas suit." The Kansas court issued an order requiring Rio Bravo to stay its Texas litigation under the "first-to-file" rule. Thereafter, individual plaintiffs filed the instant suit in a Texas state court, and Raytheon removed it to federal court, immediately seeking transfer to the Kansas court, "arguing that under the first-to-file rule, this court should not entertain this case because the issues presented therein 'substantially overlap' with those presented in the still-pending Kansas suit." The issue before the court was whether the issues raised in the suits substantially overlap. According to Raytheon, because the central dispute in both cases is whether the aircraft was designed and manufactured properly, they do overlap. Plaintiffs argued that they are not parties to the Kansas litigation and the suits involve different theories of recovery; the Texas litigation involves personal injury claims and negligence, while the Kansas suit is a declaratory action involving breach-of-warranty issues.

The court discussed the purpose of the first-to-file rule, i.e., "the prevention of conflict between judgments of two coequal district courts," and noted that the rule essentially involves the "well-settled doctrine" of collateral estoppel, which precludes the re-litigation of issues between the same parties. The court observed that while the Kansas litigation is ostensibly about a baggage door, Raytheon is really seeking a declaration that the aircraft "is sound in *all* respects per its sales contract with Rio Bravo." "More importantly," added the court, "Rio Bravo has counterclaimed in Kansas, arguing that Raytheon's '*negligence* in the repair and maintenance of the RB-87 resulted in the introduction of fumes within [sic] the aircraft.'" The court concluded that the issues in both cases are the same, and because Rio Bravo's president/principal shareholder is suing in Texas in his individual capacity, there is privity between the parties, "thereby establishing identity of the parties for collateral estoppel purposes." Thus, to facilitate the efficient adjudication of the disputes and prevent inconsistent rulings, the court granted Raytheon's motion to transfer.

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CALIFORNIA COURT ALLOWS INFERENCE OF COMMON RELIANCE STANDARD FOR CLASS CERTIFICATION

A California appeals court has determined that an "inference of common reliance," as opposed to a showing of "actual reliance," may satisfy class certification requirements under the state's Consumers Legal Remedies Act and Unfair Competition Law. ***McAdams v. Monier, Inc.*, No. C051841 (Cal. Ct. of App., decided May 30, 2007)**. The named plaintiff in this putative class action alleged that the defendant knowingly failed to disclose that its roof tiles are inherently defective because the exterior surface erodes away long before the end of the tiles' warranted 50-year life, leaving plain (noncolored) concrete. He alleged violations of the CLRA and the UCL. The trial court denied plaintiff's motion to certify the class, finding that class members would have to prove individually the existence of liability, reliance and damages and that they received different representations regarding the roof tiles in four different types of purchase transactions (direct from the manufacturer, from an independent distributor, from a home builder, or from a prior homeowner).

According to the appeals court, "the alleged material misrepresentation in this case, properly viewed, does not encompass an array of varying transactions and misrepresentations, but a single failure to disclose a particular known fact." Plaintiff tendered evidence that the defendant knew but failed to inform class members about the specific product defect and that "this failure to disclose would have been material to any reasonable person who purchased tiles in light of the 50-year/lifetime representation, or the permanent color representation, or the maintenance-free representation." The court stated that if plaintiff is successful in proving these facts, "the purchases common to each class member … would be sufficient to permit an inference of common reliance among the class on the material misrepresentation comprising the alleged failure to disclose."

The court determined that, as to the elements of liability and reliance, "plaintiff's CLRA cause of action, based on the alleged failure to disclose just noted, is suitable for class treatment." The court also determined that, while the UCL was amended by Proposition 64 to close a loophole that had allowed an action for fraud even if no one was actually deceived, relied on the fraudulent practice or sustained any damage, the same inference of common reliance made the plaintiff's UCL claim suitable for class treatment. Proposition 64 requires that private plaintiffs suffer an injury in fact and lose money or property as a result of the alleged unfair competition. According to the court, "We do not construe this amendment to section 17204 as requiring a showing in a UCL class action that each class member '*actually* relied' on the misrepresentation and, as a result, was injured thereby." The court reasoned that the "CLRA and UCL are both consumer protection statutes with traditionally less rigorous proof burdens than common law fraud," and "if the principle of inferred reliance is sufficient to satisfy the element of reliance/causation as to a CLRA fraud-based class action, in which damages can be awarded, it certainly is sufficient to satisfy that element for a similar UCL class action where the remedies are essentially limited to injunctive and restitutionary relief." The court reversed the order denying class certification.

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CASES IN BRIEF

U.S. Supreme Court Seeks Government's View of Drug Labeling Preemption

The U.S. Supreme Court has asked the U.S. solicitor general's office to prepare a brief in a case involving a $6.8-million state-court judgment against drug maker Wyeth, which is hoping to argue to the high court that the Food and Drug Administration's drug-regulation authority bars litigation alleging problems with product labeling. *Wyeth v. Levine,* No. 06-1249 (U.S., petition for writ of cert. filed March 12, 2007). The issue arises in a case involving loss of part of an arm to gangrene after anti-nausea drug Phenergan® was injected into plaintiff's artery. While the drug's label warned about risks of gangrene if used this way, the plaintiff claimed the warning was inadequate. According to Wyeth, "This conflict is currently at issue in tens of thousands of cases in our nation's courts, in which plaintiffs claim that manufacturers should have modified FDA-approved prescription drug labeling." *See The Wall Street Journal,* May 21, 2007.

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Ninth Circuit Refuses Request to Rehear Punitive Damages Appeal in Alaskan Oil Spill Case

With three judges dissenting, the Ninth Circuit Court of Appeals has upheld an earlier ruling that reduced to $2.5 billion a jury award to the fishermen and residents affected by the 1989 oil spill in Prince William Sound. ***In re The Exxon Valdez*, No. 04-35182 (9th Cir., decided May 23, 2007)**. While the previous ruling cut the jury's award in half and represents a 5-to-1 ratio of punitive to compensatory damages, the award, with accrued interest, is currently estimated to be $4.5 billion. A lawyer representing the plaintiffs reportedly expects defendant Mobil Corp. to file a petition for certiorari to the U.S. Supreme Court and will challenge the court's order reducing the award if it does so. Otherwise, plaintiffs do not plan to file their own appeal. *See The Legal Intelligencer,* June 4, 2007.

Federal Court Agrees to Be Bound by State Court's Ruling on Foreign Sovereign Immunity

The Ninth Circuit Court of Appeals has ruled that a California court's dismissal of claims against Thai Airways for lack of subject-matter jurisdiction is binding on the federal courts and precludes consideration of issues previously raised in state court. ***Gupta v. Thai Airways Int'l, Ltd.*, No. 04-56389 (9th Cir., decided May 30, 2007)**. The state court had dismissed claims that plaintiff's business interests were harmed when the airline refused to allow him to board a plane for Los Angeles, ruling that it lacked jurisdiction to hear the claims after finding that the airline was a "foreign state" under the Foreign Sovereign Immunities Act because it is 79-percent owned by Thailand's Ministry of Finance. Plaintiff did not appeal this ruling, rather he brought an identical action in federal court. Citing California law and a statute requiring federal courts to give full faith and credit to state-court proceedings, the court gave the state-court's ruling *res judicata* effect, stating that the plaintiff "had a full and fair opportunity to establish the jurisdiction of the United States courts over Thai Airways. He failed to do so. He does not now get a do-over."

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SUPREME COURT PROPOSES NEW DISCLOSURE REQUIREMENTS FOR *AMICUS CURIAE* BRIEFS

The U.S. Supreme Court has proposed a **rule** that would expand the disclosure requirements for *amicus curiae* briefs. Under the current rule, amicus filers must disclose whether an attorney for one party authored or helped author the brief, in addition to identifying outside funding sources. The proposed rule would require filers to also divulge "whether such counsel or a party is a member of the *amicus curiae,* or made a monetary contribution to the preparation or submission of the brief." As the clerk's comment notes, "The change would require the disclosure that a party made a monetary contribution to the preparation or submission of an *amicus curiae* brief in the capacity of a member of the entity filing as *amicus curiae.*" The Court also proposed rules that would affect filing deadlines and would require the electronic transmission of amicus briefs in cases scheduled for oral argument. *See OMB Watch: Advocacy Blog,* May 28, 2007.

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DEFENSE COUNSEL DISCUSSES SILICOSIS SCREENINGS

"The predatory screening practices decried in federal Judge Janis Graham Jack's now famous opinion, *In re Silica Products Liability Litigation,* have resulted from conspiracies among lawyers, physicians, and mobile screening companies," claims Nathan Schachtman in an opinion letter describing the use of mobile screening units to test for silicosis in Pennsylvania workers. Schachtman, who represents companies "victimized by the unlawful screenings," writes that MOST Health Services, Inc. used X-ray radiation "without prescriptions, physicians' orders, or regulatory approval" on workers invited by their unions to participate in the screening. The invitation letters, however, apparently originated with a Texas-based law firm and required workers to sign a retainer agreement before proceeding with the tests, according to Schachtman. An off-site physician "well compensated in dust-disease litigation" then diagnosed most workers with asbestosis and silicosis without an examination.

In addition to arguing that "no state permits attorneys to provide medical tests," Schachtman notes that the Pennsylvania Department of Environmental Protection (DEP) did not authorize the mobile screening units and that no physician was present. Although DEP consequently fined New Jersey-based MOST for conducting the screenings, the state did not penalize the sponsoring law firm, and defendants in the silica case did not win a motion to dismiss. "These conspiracies have thrived in part because of the entrepreneurial enthusiasm of the conspirators, and the failure of courts, bar associations, adversary counsel, state and federal regulators, and medical societies to condemn the screening practices," Schachtman concludes, adding that the "'red flags of fraud,' go beyond the manufacturing of diagnoses for money." *See Legal Opinion Letter (Washington Legal Foundation),* May 25, 2007.

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RUSH TO PUBLISH ABOUT AVANDIA; JOURNALISTIC MALPRACTICE?

Wall Street Journal writer Scott Gottlieb argues in this commentary that *The New England Journal of Medicine* (*NEJM*) "seemed bent on beating FDA to the punch" when its editors published an unfavorable study of the diabetes drug Avandia® prior to the agency's more comprehensive review. *NEJM's* goal was to

paint the FDA as "impotent, in order to argue for legislation winding through Congress that would increase regulatory hurdles for drug approvals," Gottlieb says, in describing the study's prepublication release to U.S. Representative Henry Waxman (D-Calif.) and the House Energy and Commerce Committee. Gottlieb also alleges that the study's lead author, Steve Nissen, M.D., was in contact with Congress while preparing the report and that *NEJM* editors overlooked flaws in Nissen's research, which comprised a meta-analysis of 42 previous studies. "Among other things, the authors of the *NEJM* study based their conclusions that Avandia® caused a higher heart attack risk on just a handful of cardiac events, none of which they could go back and verify, because, unlike FDA, the authors didn't have access to confidential patient records," Gottlieb opines, criticizing *NEJM* for using "shortcuts and shoddy analysis to fabricate criticism and doubt of drug regulation." In likening these tactics to a "deceptive" 2005 editorial on Vioxx®, Gottlieb concludes that the journal is using "bottom-line medical information" to influence political decisions and to "upstage" the FDA through "well-timed but much less complete publications."

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ALL THINGS LEGISLATIVE AND REGULATORY

House Bill Would Increase Civil Penalties Under Consumer Product Safety Act

Representative Bobby Rush (D-Ill.) has introduced a **bill** (H.R. 2474) that would increase maximum civil penalties for violations of the Consumer Product Safety Act from $1.25 million to $20 million. Introduced on May 24, 2007, the proposal has been referred to the Committee on Energy and Commerce. Representative Rush conducted a hearing in May 2007 to consider whether the Consumer Product Safety Commission has sufficient resources and statutory authority to carry out its mission of ensuring the safety of thousands of consumer products. Additional information about the hearing appears in the May 24, 2007, issue of this Report.

Consumer Blog to Begin Posting Product Recall Information

The Consumer Law & Policy Blog has **announced** that it will begin posting monthly product recall information from the Consumer Product Safety Commission and the National Highway Traffic Safety Administration. Each recall list contains links to the specific notices issued for each product.

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LEGAL LITERATURE REVIEW

Mark Behrens & Phil Goldberg, "The Asbestos Litigation Crisis: The Tide Appears to be Turning," *Connecticut Insurance Law Journal*, 2005-2006

Shook, Hardy & Bacon Public Policy attorneys **Mark Behrens** and **Phil Goldberg** contend in this article that reforms adopted by courts and legislatures in key states may have stemmed the asbestos-litigation crisis. They discuss the

abuses spawned by mass filings involving claimants without disease, improper consolidations, bankrupt defendants, and forum shopping. Where courts have prioritized the claims of sick claimants, dismissed cases lacking medical evidence of injury, questioned the validity of mass medical screenings, and ended joinder abuse, the pace of filings has decreased. Other reforms, such as modifications to joint liability and limitations on punitive damages, have also helped "restore fairness and promote sound public policy in litigation," according to the authors.

Theodore Eisenberg & Michael Heise, "Plaintiphobia in State Court? An Empirical Study of State Court Trials on Appeal," *Cornell Legal Studies Research Paper*, May 2007

Cornell Law School Professors Theodore Eisenberg and Michael Heise, analyzing comprehensive state-court data that followed litigation from trial to final appeal, found that (i) "of 8,038 completed state court trials, only 12% stimulated an appeal"; (ii) "[o]f the 965 cases that initiated appeals, only 24 cases reached a state's appellate court of last resort"; (iii) "appellate courts were more likely to upset jury trials than bench trials"; and (iv) "defendants were far more successful than plaintiffs in securing a reversal of a trial court outcome." According to the authors, "A plaintiff victory in front of a jury was the most likely scenario to generate an appellate court reversal." They suggest that such results "likely evidence appellate and trial courts' differing perceptions regarding the accuracy of jury trial outcomes," i.e., appellate courts tend to believe that jurors are biased in favor of plaintiffs.

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LAW BLOG ROUNDUP

Cash Cows, Quackery and Shills — Tell Us What You Really Think, Ted

"Trial lawyers looking for a cash cow have seized upon the quackery, and, with the help of unethical shills like Robert F. Kennedy, Jr., have dissuaded parents from vaccinations across the country, leading to new disease hot spots." Ted Frank, attorney and director, American Enterprise Institute Liability Project, blogging about the thimerosal trials beginning in June 2007 before the Federal Claims Court. The "quackery" to which he refers involves the claim that thimerosal in vaccines has caused an increase in the incidence of autism among children.

overlawyered.com, May 28, 2007.

Selective Waiver Given New Life

"The 'selective waiver' rule, which had been bracketed in the prior draft [of proposed Federal Rule of Evidence 502], is no more. Instead, the 'selective waiver' rule now is a separate rule that the Advisory Committee forwarded to Congress without taking a position on its merits." Attorneys James Beck and Mark Herrmann, discussing a proposed rule that would permit the production of privileged or protected documents or communications to regulatory agencies without thereby waiving otherwise applicable claims of privilege in litigation.

druganddevicelaw.blogspot.com, May 30, 2007.

"You're a Few French Fries Short of a Happy Meal"

"Likely to result in a supersized apology, probably." Shook, Hardy & Bacon Product Liability Litigation Of Counsel **Kevin Underhill**, commenting on the above insult lobbed by an attorney at the presiding judge during federal bankruptcy proceedings. While the insult was delivered "with respect" by the frustrated lawyer, the judge issued a show cause order later that day, initiating proceedings to suspend his privilege to practice in her court.

loweringthebar.net, May 24, 2007.

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THE FINAL WORD

Our Biweekly Update on a Colt Named Curlin

Defrauded fen-phen plaintiffs are reportedly seeking their lawyers' share in Preakness Stakes winner Curlin, a colt already valued at $30 million as a stallion prospect and scheduled to run this week at the Belmont Stakes. Curlin is partly owned by two plaintiffs' lawyers, William Gallion and Shirley Cunningham, Jr., who recently lost a civil suit claiming that they defrauded 400 plaintiffs out of $64.4 million in settlement money intended to cover injuries allegedly caused by the diet drug fen-phen. The lawyers apparently bought Curlin for $57,000 in 2005 and have since sold 80 percent of the colt for $3.5 million to three other parties. But the plaintiffs in the civil suit are asserting that the lawyers purchased the colt with the stolen money. "We own part of that horse – there's about 400 of us. We may not have our names on the papers, but it's our horse. He was bought with our blood money," one plaintiff was quoted as saying. His attorney has argued that if a court agrees with these claims, "then the entire horse belongs to my clients and clear title could not have been conveyed." Curlin's other three owners, however, have reportedly maintained that their interest in the colt is legally protected under contract. "I don't think it says a whole lot of good about the industry, to be honest with you," said partial owner Satish Sanan, adding that these types of legal troubles reflect poorly on thoroughbred racing. *See The New York Times,* June 4, 2007.

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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GLOBAL PRODUCT LIABILITY LAW FIRM OF THE YEAR 2005|2006|2007 WHO'S WHO LEGAL

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