Shook, Hardy & Bacon L.L.P.

Product Liability Litigation Report

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HIGH COURT TO ADDRESS PUNITIVE DAMAGES WHEN SUMMER RECESS ENDS

Looking ahead to the U.S. Supreme Court's fall docket, legal commentators and business interests are taking note of the punitive damages issues presented by *Philip Morris USA Inc. v. Williams,* No. 05-1256 (cert. granted May 30, 2006). In that case, the Oregon Supreme Court affirmed a $79.5 million punitive damages award made to a three-pack-a-day smoker with lung cancer after the case had been remanded to an intermediate appellate court for reconsideration in light of the U.S. Supreme Court's ruling in *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408 (2003).

The punitive award, which was 97 times the award for actual damages, was found to be justified in light of the defendant's purported reprehensible conduct. On appeal, the Supreme Court will consider (i) whether a high degree of reprehensibility is enough to override the Court's previous rulings that punitive damages must bear a reasonable relationship to the plaintiff's actual injury; and (ii) whether due process rights are violated by allowing jurors to punish defendants for the effect of their conduct on people who are not involved in the litigation. *See Andrews Product Liability Litigation Reporter,* July 13, 2006; *CNNMoney.com,* July 11, 2006; *DRI, The Voice,* July 12, 2006.

Meanwhile, a California appeals court has reduced the second-highest damage award in the United States in an automobile products liability lawsuit from $368.6 million to $82.6 million. ***Buell-Wilson v. Ford Motor Co.*, Nos. D045154 & D045579 (California Court of Appeal, Fourth Appellate District, Division One, decided July 19, 2006)**.

The damage award had already been reduced by the trial judge to $150 million, but the appeals court still found the non-economic damages excessive under California law and the punitive damages in violation of federal due process limitations. In so ruling, the court denied Ford's motion for a new trial. *See Los Angeles Times.com,* July 20, 2006.

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FEDERAL COURT DISMISSES THIMEROSAL LAWSUIT; EXPERT TESTIMONY EXCLUDED UNDER *DAUBERT*

Finding that the testimony of plaintiffs' expert witness must be excluded under *Daubert v. Merrell Dow Pharm.,* 509 U.S. 579 (1993), a federal district court in North Carolina has dismissed claims that thimerosal in defendant's biologic product RhoGAM, which was administered during Jane Doe's pregnancy, caused her child's autism. ***Doe 2 v. Ortho-Clinical Diagnostics, Inc.*, No. 1:03CV00669 (U.S. District Court, Middle District, North Carolina, decided July 6, 2006)**.

The ruling represents a clear victory for those who have argued that "litigation driven" research is unreliable.

The court noted its concern "as to a potential bias in Dr. Geier's methodology and ultimate conclusion given the recency of Dr. Geier's research into the cause of autism, which he admittedly began in only the last two and a half years, a time period that also represents the pendency of this lawsuit." The ruling represents a clear victory for those who have argued that "litigation-driven" research is unreliable and should not be admitted as expert testimony under Federal Rule of Evidence 702.

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CALIFORNIA APPEALS COURT FINDS CLASS DEFINITION OVERBROAD

A California appeals court has determined that a law enacted via ballot initiative (Proposition 64) requires, in lawsuits filed under the state's Unfair Competition Law (UCL), that each class member "must have suffered injury in fact and lost money or property as a result" of unfair competition or false advertising. ***Pfizer Inc. v. Super. Ct. of Los Angeles County*, No. B188106 (California Court of Appeal, Second Appellate District, Division Three, decided July 11, 2006)**. Accordingly, the court ruled that a class defined as "all persons who purchased Listerine, in California, from June 2004 through January 7, 2005" is overbroad and that its certification must be set aside.

Under Prop. 64 "each class member must have suffered injury in fact."

The court further ruled that (i) the mere likelihood of harm to purported class members is no longer sufficient for standing to sue in UCL cases brought by the attorney general or local public prosecutors; and (ii) inherent in Propositions 64's requirement that a plaintiff suffer "injury in fact … *as a result of* the fraudulent business practice or false advertising," "is that a plaintiff actually *relied* on the false or misleading misrepresentation or advertisement in entering into the transaction at issue."

Filing an *amicus* brief for the Product Liability Advisory Council, Inc. on behalf of Pfizer Inc. were Shook, Hardy & Bacon Pharmaceutical and Medical Device Partner **Paul La Scala**, Public Policy Partner **Victor Schwartz** and Public Policy Associate **Cary Silverman**.

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PLAINTIFF-FRIENDLY STATE COURT PERMITS RECOVERY OF HEDONIC DAMAGES

The Louisiana Supreme Court has determined, in a split decision, that plaintiffs may recover for the loss of enjoyment of life (hedonic damages) as a separate item of general damages that may be submitted as a separate item on a jury-verdict form. ***McGee v. A. C. and S., Inc.*, 2006 WL 1883368 (Louisiana Supreme Court, decided July 10, 2006)**. The issue arose in a case involving injuries allegedly caused by asbestos exposure.

According to the majority,

> loss of enjoyment of life is conceptually distinct from other components of general damages, including pain and suffering. Pain and suffering, both physical and mental, refers to the pain, discomfort, inconvenience, anguish, and emotional trauma that accompanies an injury. Loss of enjoyment of life, in comparison, refers to detrimental alterations of the person's life or lifestyle or the person's inability to participate in the activities or pleasures of life that were formerly enjoyed prior to the injury. In contrast to pain and suffering, whether or not a plaintiff experiences a detrimental lifestyle change depends on both the nature and severity of the injury and the lifestyle of the plaintiff prior to the injury.

One of the two dissenting justices refers to the majority of state courts that do not permit a separate hedonic damages recovery, finding that such damages simply duplicate what is already provided for in a general damages award. Tracing the history of hedonic damages, this dissenting justice cites a law review article written by Shook, Hardy & Bacon's Public Policy attorneys Victor Schwartz and Cary Silverman. They and Shook Public Policy Partner **Mark Behrens** filed an *amicus* brief in the case on behalf of a number of business-related interests.

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ALL THINGS LEGISLATIVE AND REGULATORY

The Buzz About a Bill to Establish a Judicial Watchdog

According to National Public Radio's Nina Totenberg, U.S. Supreme Court Justice Stephen Breyer will soon issue a report on how well the federal courts handle judicial misconduct. In spring 2006, U.S. Representative James Sensenbrenner (R-Wis.) introduced a bill (H.R. 5219) that would require the chief justice to appoint an inspector general who would investigate matters within the judicial branch pertaining to conflicts of interest, fraud and waste. Concerns have apparently been expressed about privately funded judicial education junkets that judges do not always report. Hearings on the bill, which has been criticized by legal commentators and sitting justices, were held in late June before a subcommittee of the House Committee on the Judiciary. *See Slate.com,* July 10, 2006; *npr.org,* July 24, 2006.

ABA Tort Section Opposes Federal Agency Preemption by Rule

The American Bar Association's Tort Trial and Insurance Practice Section is **recommending** to the House of Delegates that the ABA establish a policy of opposing "the promulgation by federal agencies of rules or regulations that pre-empt state tort and consumer protection laws in instances where the state laws hold parties to a higher or stricter standard than that being promulgated by a federal agency."

Electronic Calendars Must Be Disclosed Under Freedom of Information Act

The D.C. Circuit Court of Appeals has determined that the personal electronic calendars that Department of Agriculture officials maintain on an agency computer system are "agency records" that must be disclosed under the Freedom of Information Act. ***Consumer Fed'n of Am. v. Dep't of Agric.*, No. 05-5360 (U.S. Court of Appeals, D.C. Circuit, decided June 30, 2006)**. The Consumer Federation of America sought the information to find out if agency officials had met with industry representatives while a food-safety rulemaking was pending.

CPSC Issues New Rules

The Consumer Product Safety Commission has published a new final rule and is seeking public comment on a new interpretative rule. The final rule involves the commission's participation in voluntary standard-setting activities. 71 *Fed. Reg.* 38754 (July 10, 2006). The proposed rule would identify and explain the factors that the commission may consider in evaluating the appropriateness and amount of a civil penalty. 71 *Fed. Reg.* 39248 (July 12, 2006). The comment period for this proposal ends August 11, 2006.

Meanwhile, debate is apparently brewing over the successor to CPSC Chair Hal Stratton, who retired as of July 15, 2006. A business-oriented candidate would likely continue to rely less on rulemaking and more on voluntary recalls, say some, while those touting consumer interests would reportedly like to see tougher product safety rules adopted. *See The Kansas City Star,* July 23, 2006.

CPSC Chair Hal Stratton retires.

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LEGAL LITERATURE REVIEW

Citizen Participation in Rulemaking: A Non-Starter

A public policy professor at the John F. Kennedy School of Government has concluded that the ability of ordinary citizens to easily participate online in regulatory rulemakings is not likely to lead to greater citizen participation. In his article **"Citizen Participation in Rulemaking: Past, Present, and Future," *Duke L.J.* (2006)**, Cary Coglianese suggests that "the deep motivational, cognitive, and knowledge-based chasms" standing in the way of such participation mean that "the future will be little different from the past and present."

Perils of Unpublished Federal Appellate Opinions

Rutgers University Law Professor Sarah Ricks, tracking a single legal issue over six years in the Third Circuit Court of Appeals, has determined that "doctrinal divergence between the Third Circuit's binding and non-precedential opinions has undermined the predictive value of precedential … decisions, creating an obstacle to settlement at both the trial and appellate levels." She suggests, in "The Perils of Unpublished Non-precedential Federal Appellate Opinions: A Case Study of the Substantive Due Process State-Created Danger Doctrine in One Circuit," **81 *Wash. L. Rev.* 217 (2006)**, that the courts adopt specific internal rules for determining when a decision should be published.

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LAW BLOG ROUNDUP

ATLA Renamed

"An astounding admission of the unpopularity of trial lawyers in America." The U.S. Chamber Institute for Legal Reform commenting on the Association of Trial Lawyers of America, which is populated by members of the plaintiff's bar, changing its name to the American Association for Justice. Blogs.wsj.com, July 20, 2006.

"An astounding admission of the unpopularity of trial lawyers."

Gen X and Gen Y in the Jury Box

"Generation X jurors tend to harken back to many traditional values that we typically correlate with older jurors, in particular with a focus on 'personal responsibility' and 'self-reliance.'" "Generation Y jurors tend to feel less suspicious than other generations do toward the government, indicating an opportunity to impress them with a party's ability or inability to meet governmental or industry standards." Law firm marketer Mark Beese taking note of a *Law Practice Management* article on the differences between Generation X and Y jurors. Leadershipforlawyers.typepad.com, July 9, 2006.

The Allure of Colorful Language

"Often … colorful language is so appealing to the writer that the writer uses it *even when it's not quite apt* – even when it suggests an analogy that isn't quite right, or when it implicitly undermines the writer's argument. UCLA School of Law Professor Eugene Volokh commenting on the phrase "Is less more?" that opens the dissent to a Ninth Circuit Court of Appeals opinion addressing what Congress meant by allowing certain appeals to be filed "not less than 7 days after entry of the order." Volokh.com, July 13, 2006.

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PHAI TO HOST CONFERENCE ON LEGAL APPROACHES TO THE OBESITY EPIDEMIC

The Public Health Advocacy Institute (PHAI) will host its **fourth annual conference** on legal approaches to the obesity epidemic on November 3-5, 2006, at the Northeastern University School of Law in Boston.

Preliminary information about the event indicates that its overall theme will focus on the food industry's alleged targeting of children, with specific sessions on the American Beverage Association/Clinton Foundation school beverage policy, potential litigation, legislative efforts, and "building a national movement for effective public health policy around obesity."

PHAI was established in 2003 with a core grant from the Washington, D.C.-based Bauman Foundation, which has also provided significant grants to the Institute for Agriculture and Trade Policy, Center for Science in the Public Interest and the National Resources Defense Council. PHAI's board of directors includes long-time antitobacco attorney Richard Daynard, who created and chaired the Tobacco Products Liability Project.

THE FINAL WORD

The chief judge of Madison County's civil division, known to many as one of the nation's "judicial hellholes," where litigants have faced plaintiff-friendly judges, has reportedly been replaced. Illinois Supreme Court's chief justice, apparently concerned about the county's reputation for fairness, has appointed Circuit Judge Dan Stack to the position, in which he will handle case assignments and supervise other civil judges. Stack, who has been dealing with asbestos litigation since 2004, has reportedly been praised by tort-reform advocates for the way he has handled his docket. *See St. Louis Post-Dispatch,* July 19, 2006.

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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, and food 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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2005 & 2006 Global Product Liability Law Firm of the Year WHO'S WHO LEGAL

OFFICE LOCATIONS

Geneva, Switzerland
+41-22-787-2000

Houston, Texas
+1-713-227-8008

Irvine, California
+1-949-475-1500

Kansas City, Missouri
+1-816-474-6550

London, United Kingdom
+1-44-207-332-4500

Miami, Florida
+1-305-358-5171

Overland Park, Kansas
+1-913-451-6060

San Francisco, California
+1-415-544-1900

Tampa, Florida
+1-813-202-7100

Washington, D.C.
+1-202-783-8400