Shook, Hardy & Bacon L.L.P.

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PRODUCT LIABILITY LITIGATION REPORT

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FEDERAL APPEALS COURT FINDS JURISDICTION PROPER IN AUTO FATALITY CASE

The Eleventh Circuit Court of Appeals has determined that, even if a plaintiff alleges unspecified damages, a defendant can establish jurisdiction in federal court where removability "is apparent from the face of the complaint." ***Roe v. Michelin N. Am., Inc., No. 09-15141 (11th Cir., decided August 5, 2010)***. The issue arose in litigation over a fatal automobile accident allegedly caused by a tire separation. The decedent's representative filed suit against the tire maker in an Alabama state court, seeking damages under that state's wrongful death law, which allows recovery for punitive but not compensatory damages.

The defendant removed the lawsuit to federal court, stating that the parties were diverse and that, while the plaintiff did "not state a specific amount of damages sought," it was apparent from the face of the complaint that the claims met the $75,000 amount-in-controversy requirement. The plaintiff then sought to remand the case to federal court, arguing that the defendant failed to prove by a preponderance of the evidence that more than $75,000 was at stake. The trial court denied the motion to remand, and the plaintiff appealed.

Noting that district courts are permitted to "make 'reasonable deductions, reasonable inferences, or other reasonable extrapolations' from the pleadings to determine whether it is facially apparent that a case is removable," the Eleventh Circuit ruled that "courts may use their judicial experience and common sense in determining whether the case stated in a complaint meets federal jurisdictional requirements." The court observed that its precedent was "relatively sparse in this area" and turned to rulings from other federal circuits to support its determination that the lack of a specific damage request is not fatal to removal. Because the factors used to calculate a punitive damages award under Alabama's Wrongful Death Act would more than likely lead a factfinder to value the plaintiff's claims in excess of $75,000, the court affirmed the district court's conclusion that the case was properly removed.

SEVENTH CIRCUIT DECIDES CHOICE-OF-LAW ISSUE IN OTC DRUG CASE

The Seventh Circuit Court of Appeals has determined that the law of the state where a plaintiff allegedly consumed and suffered her first reaction to an over-the-counter

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(OTC) drug governs product liability claims filed against its manufacturer. ***Robinson v. McNeil Consumer Healthcare,* No. 09-4011 (7th Cir., decided August 11, 2010)**. The plaintiff, an adult woman, allegedly developed a rash that led to the loss of most of her skin and damage to her mouth, eyes, throat, and esophagus as the result of taking Children's Motrin®, which she had purchased for her child. She sued the company that makes the drug in an Illinois state court, and the case was removed to federal court, which determined that Virginia law governed the substantive issues because she lived there when the injury allegedly occurred.

Under Virginia law, strict liability is rejected as a basis for a products liability suit, and even if a plaintiff proves negligence, her contributory negligence is a complete defense. A jury found the defendant negligent and determined that damages amounted to $3.5 million. Because the jury also found the plaintiff contributorily negligent, the judge entered judgment for the defendant.

On appeal, the plaintiff argued that Illinois was the site of the injury and that its law should have been applied. According to the Seventh Circuit, the plaintiff purchased the drug in Georgia, but was living in Virginia when she took it and first exhibited an adverse reaction to the product. Her initial medical treatment also occurred in Virginia, but then she spent a month in the burn unit of a Baltimore, Maryland, hospital. Later, she moved to Illinois where her condition lingered and worsened. Thus, noted the court, "because the injury is a continuing one, it is being experienced in Illinois."

Observing that many injuries linger or worsen in personal injury cases, the court states, "to make the continuation or exacerbation of an injury a basis for applying Illinois tort law to your case would open vistas of forum shopping. Severely injured persons would move to the state whose law was most favorable to their tort claim and argue that that state had the 'most significant relationship' to the injury because the plaintiff's aggregate suffering and perhaps expense of medical treatment would be greatest there. To avoid this incentive to forum shop, the initial place of the injury is properly deemed the place in which the injury occurred." Applying Virginia law, the court agreed that the evidence was sufficient to show that the plaintiff was contributorily negligent and affirmed the lower court's judgment.

SOUTH CAROLINA COURT FINDS FEDERAL SAFETY STANDARD PREEMPTS CLAIM BASED ON AUTO MAKER'S CHOICE OF WINDOW GLASS

The South Carolina Supreme Court has determined that a federal auto safety standard that gives manufacturers options as to the type of glass to use in the side windows of their automobiles preempts a state law products liability claim premised solely on the use of tempered glass in a side window. ***Priester v. Cromer,* No. 26846 (S.C., decided August 2, 2010)**. The issue, which has apparently split courts in other

U.S. jurisdictions, arose from a rollover accident involving a pickup truck. The plaintiff's son was killed after he was ejected from the vehicle. The complaint alleged that the auto maker breached its warranty "by using inappropriate glazing materials."

The defendant filed a motion for summary judgment, arguing that federal Motor Vehicle Safety Standard 205 preempted the claim. According to the defendant the regulation "provided car manufacturers with options of types of glass they were permitted to use, and since Ford used one of the glass options," the plaintiff's claim was preempted. The trial court granted the defendant's motion and dismissed the lawsuit.

On appeal, South Carolina's high court discussed a 2000 U.S. Supreme Court ruling about the preemptive effect of federal passive restraint device rules, which also gave manufacturers a range of choices among different systems "to be gradually introduced." Courts faced with applying this precedent to cases specifically involving the type of glass used in automobile windows have split on the preemptive effect of Standard 205. The court agreed with those finding preemption, stating, "To allow this suit to go forward would sanction a jury verdict finding the Ford F-150 pickup truck to be defectively designed solely because it selected the federally authorized choice of tempered glass." Because the state tort action "presents a conflict between federal law and state law," the court affirmed the trial court's order.

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NEW JERSEY SUPREME COURT CONSIDERS HOW TO SANCTION SPOLIATION IN COMMERCIAL CONSTRUCTION DEFECT LITIGATION

The New Jersey Supreme Court has dismissed claims against several defendants as a sanction for spoliation in a case alleging a defective window system in a commercial establishment, because they were not given the opportunity before or during remediation to evaluate the system, its installation or the cause of the alleged window leaks. ***Robertet Flavors, Inc. v. Tri-Form Constr., Inc.*, No. A-70/71-08 (N.J., decided August 3, 2010)**.

Concluding that the plaintiff, a food, beverage and pharmaceutical flavorings company that owned the building, had engaged in spoliation of the evidence, the trial court granted the defendants' motions to exclude evidence relating to the window system installation. The court's action was based on findings that the plaintiff (i) failed to notify defendants about the proposed remediation before starting the work, (ii) failed to respond to defendants' initial requests to conduct an inspection, (iii) first notified the defendants about the remediation work when there was insufficient time for them to perform an independent evaluation, and (iv) completed repairs when there was no real emergency.

The trial court determined that monetary sanctions or an adverse-inference jury instruction would be insufficient and ineffective, and also determined that dismissing the complaint would be too extreme. Accordingly, the court barred plaintiff's experts from giving any opinion testimony against the defendants, concluding that this would create a level playing field for the parties. The court later granted defendants' motions for summary judgment because the plaintiff lacked expert proof as to both liability and damages. An intermediate appellate court reversed, finding the remedy of preclusion and dismissal too harsh. Instead, the appellate court decided to limit the plaintiff's expert proofs "to those based only on evidence obtained and observations made prior to the disassembly of the windows and the remediation. That limitation would permit defendants to engage an expert who could rely on that evidence and other evidence in their control to rebut plaintiff's expert."

The state supreme court took the appeal, limited to "the extent of the remedy available on the spoliation claim," and explained that it was setting a standard to guide similarly-placed litigants, noting how common it is in a large construction project, for the building owner to try to solve a problem and prevent it from getting worse "without waiting for a resolution by the contractor whose work the owner believes is the cause.… Even if the parties act with the purest motives, evidence of the extent or the cause of any claimed defect may be compromised or destroyed as testing and investigations are undertaken and as repair, retrofitting, or replacement of affected building systems or components is completed."

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Providing an overview of remedies available in the event of spoliation of evidence and exploring case law in New Jersey and other jurisdictions on the issue, the court adopted a three-part test from the Third Circuit Court of Appeals. Under that test, the court conducts "an inquiry into the spoliator's degree of fault, the prejudice caused to the other party, and the availability of lesser sanctions that will both avoid unfairness to the non-spoliator and deter future acts of spoliation." The court then added to the test a consideration of (i) the spoliator's identity (plaintiff, defendant or third party), (ii) why, how and when the spoliation occurred, and (iii) whether information about the matter can be found in the vast materials a commercial building project generates. The court must then balance these considerations "with an appreciation for the ways in which the construction industry itself provides them with tools with which to 'level the playing field' and achieve an appropriate remedy for spoliation."

In this case, the court agreed with the appellate court that the plaintiff could proceed against the defendant that actually installed the window system and undertook at various times to address the leaking problems, but limited the plaintiff's claims "to the conditions that were observable prior to remediation and its

experts to a review of only those conditions." As to the remaining defendants who were deprived of an opportunity to inspect the windows before remediation, the court dismissed the claims outright.

NEW MEXICO COURT CLARIFIES STANDARD ON EXTRANEOUS JUROR COMMUNICATIONS IN DEFECTIVE SEAT BELT CASE

The New Mexico Supreme Court has changed the "presumption of prejudice" that attaches to extraneous juror communications to a standard that requires a party moving for a new trial based on such communications to prove a reasonable probability of prejudice. ***Kilgore v. Fuji Heavy Indus. Ltd.*, No. 31,750 (N.M., decided August 3, 2010)**. The court also held that "an evidentiary hearing, rather than a new trial, typically is the appropriate remedy."

The court clarified its standard in a case involving an allegedly defective seat belt that purportedly failed in a Subaru rollover accident that resulted in the plaintiff's quadriplegia. A jury rendered a defense verdict, and later the plaintiff learned that one of the jurors had spoken to the owner of a Subaru auto repair shop. This individual apparently told the juror that "he had never heard of a Subaru seat belt buckle opening in an accident." The plaintiff submitted the repair shop owner's affidavit with a request for new trial, arguing that the affidavit established that the juror received extraneous information, and, under New Mexico law, "the Court must therefore presume prejudice" and grant her motion. The trial court denied the motion without conducting an evidentiary hearing. An intermediate appellate court affirmed, finding the affidavit insufficient to raise a presumption of prejudice.

The New Mexico Supreme Court explored the law relating to the impeachment of a jury verdict, expressly disavowed "any further reference to a 'presumption of prejudice' in our case law because, in practice, the burden does not shift to the opposing party to disprove prejudice," and indicated that the new standard would be referred to as the "probability of prejudice." The court established the factors a court should consider in determining whether that probability exists, and applying the factors, determined that the affidavit was sufficient to establish that "material extraneous to the trial actually reached the jury" and that it was relevant to the case being tried. The court remanded the case for an evidentiary hearing "in which Plaintiffs will have an opportunity to prove a reasonable probability of prejudice."

ALL THINGS LEGISLATIVE AND REGULATORY

CPSC Commissioners Split over Third-Party Safety Testing for Compliance with Certain Standards

The Consumer Product Safety Commission (CPSC) recently approved, by a split vote, laboratory accreditation requirements for testing compliance with several

children's product safety rules. The rules involve all-terrain vehicles, clothing textiles, mattresses and mattress pads, and mattress sets designed or intended primarily for children ages 12 or younger. The commissioners issued separate statements to explain their reasoning, with those supporting the requirements interpreting recent amendments to the Consumer Product Safety Act in a way that includes rules of general applicability, such as flammability regulations, under the rubric "children's product safety rules." The two commissioners opposing this interpretation contend that flammability standards cannot be children's product safety rules because they do not address specific dangers unique to children.

Supporting the requirements, CPSC Chair Inez Tenenbaum stated, "Congress created the mandate for third party testing at a time when consumers had experienced a crisis in confidence of the safety of children's products, and the need for further protections for our nation's children was abundantly clear. This week's votes provide the public with reassurance that a third party, other than a manufacturer, will test and verify that children's all-terrain vehicles, wearing apparel and youth mattress products comply with the rules and regulations applicable to them."

Complaining about what she sees as "excessive regulation," Commissioner Anne Northup stated, "imposing more regulation without a corresponding improvement in product safety, the Commission continues down a path of overregulation that our economy cannot sustain." She invited public comments by affected parties who could "convince my colleagues to change course before we add further to what are now six notices of accreditation that we never should have issued." *See Northup Statement,* August 9, 2010; *Tenenbaum Statement*, August 12, 2010; *BNA Product Safety & Liability Reporter*, August 13, 2010; *Federal Register*, August 18, 2010.

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Early Probe into Toyota Issues Finds No New Safety Defects

Government regulators reportedly told members of the House Energy and Commerce Committee recently that their preliminary investigation into sudden, unintended acceleration by certain Toyotas has not been linked to problems with the electronic throttle control systems, as some safety experts had suggested. According to a news source, no new safety defects have been found beyond floor mat entrapment and sticking accelerator pedals that led the automaker to recall about 9.5 million cars and trucks since October 2009.

The initial probe by the National Highway Traffic Safety Administration and the National Aeronautics and Space Administration, expected to be completed in fall 2010, reportedly revealed that brakes were not applied in 35 of 58 cases of sudden acceleration. Data also showed that in about half of the 35 cases, the accelerator was depressed just before a crash, indicating that the drivers stepped on the accelerator

rather than the brakes. Additionally, 14 cases showed partial braking, one case showed pedal entrapment, another showed both the brake and the accelerator pedal had been applied, and other cases were inconclusive.

In a statement released August 10, 2010, Toyota said that its own evaluations have confirmed that "the remedies it developed for sticking accelerator pedal and potential accelerator pedal entrapment by an unsecured or incompatible floor mat are effective. Having conducted more than 4,000 on-site vehicle inspections, in no case have we found electronic throttle controls to be the cause of unintended acceleration." *See Associated Press*, August 10, 2010.

FTC Asked to Order Rental Car Company to Fix Recalled Vehicles Before Renting Them

A **petition** filed with the Federal Trade Commission (FTC) calls on the agency to order Enterprise-Rent-A-Car to fix every vehicle subject to a safety recall before renting them. Petitioners are two auto safety consumer groups and the parents of two sisters who died in a recalled rented vehicle that caught fire and crashed. In May 2010, Enterprise admitted negligence in failing to fix a Chrysler PT Cruiser involved in the 2004 crash. A jury awarded the parents $15 million in June.

Clarence Ditlow, executive director for Center for Auto Safety, which was among those filing the August 9, 2010, petition, told a news source that under federal law auto dealers are not allowed to sell a new vehicle without carrying out a safety recall, but no such restrictions are imposed on rental-car companies. "We ought to apply the same logic to rental-car companies," he was quoted as saying.

An Enterprise spokesperson has reportedly said that the company relies on an auto-maker's expertise when deciding whether to "ground" a vehicle before renting it. But Carol Houck, the mother of the two women who died, said she wanted FTC "to order that any safety recall not be discretionary. If the hammer comes down on Enterprise, I would find it surprising if its competitors don't take notice of that and revise their practices accordingly," she said. *See The New York Times*, August 11, 2010.

LEGAL LITERATURE REVIEW

David Rosenberg & Luke McCloud, "A Solution to the Choice-of-Law Problem of Differing State Laws in Class Actions: Average Law," *Harvard Law & Economics Discussion Paper*, June 2010

A Harvard Law School professor and student propose in this paper that courts take an "average law approach" to determine liability and damages in multi-state federal diversity class actions.

A Harvard Law School professor and student propose in this paper that courts take an "average law approach" to determine liability and damages in multi-state federal diversity class actions. They note that widely varying state laws pose "a virtually insuperable obstacle to certification of multistate, diversity class actions. Interpreting and applying many

diverging, not infrequently conflicting state laws—often of all 50 states plus the District of Columbia and U.S. territories—obviously can increase the complexity and cost of resolving numerous claims by class-wide trial." They purport to show "that applying the average of the differing state laws can overcome this choice of law impediment to use of class actions, yet without compromising the functioning of the civil liability in any significant way." According to the authors, applying an average law is equivalent, in sum and substance, to the application of all actual state laws separately.

Herbert Kritzer & Robert Dreschel, "A Portrait of Local News Reporting of Civil Litigation," *Minnesota Legal Studies Research Paper*, July 2010

After studying empirical data that they collected on civil-litigation coverage by local newspapers and television, University of Minnesota journalism and law professors suggest that the public would be justified in concluding that (i) "Lots of lawsuits get filed, but most seem to fade away"; (ii) "It's not clear how much is involved in most cases, but it's probably a fairly large amount of money"; (iii) "Prominent people seem to get involved in a lot of lawsuits"; and (iv) "If there is a fire or explosion, lawsuits will follow." The authors contend that their preliminary findings could affect the civil justice reform debate.

In this regard, they state, "The fact that lots of suits get filed but few seem to reach resolution might reinforce the idea that [a] large number of suits are without merit (even though most of those that we hear about being filed but not about being resolved actually do lead to settlements or adjudicated resolutions). While dollar figures are usually not mentioned, those that are mentioned would lead viewers to have a belief that the typical case is considerably larger than it actually is. Given that a fair number of the suits that get reported deal with consumer issues or significant problems created by things purchased by consumers, one might expect citizens to have something of a contradictory view of litigation, both thinking that a lot seems unwarranted but also seeing lots of situations where it does seem clearly warranted."

LAW BLOG ROUNDUP

Sympathy for Supplement Makers

"You have to pity the poor supplement industry. It is taking a real beating these days." New York University Nutrition Professor Marion Nestle, blogging about recent government and press reports claiming that dietary supplement makers use "questionable and deceptive" marketing practices and provide advice posing potential health risks. She concludes, "Yes, I know half the U.S. adult population takes supplements and nearly everyone who takes them claims to feel better as a result. The science, however, consistently produces reasons for skepticism, if not caution."

Food Politics, August 9, 2010.

A Judicially Created "Average Law" May Not Be the Answer

"The paper doesn't explain the practical realities of how, for example, one averages differing states' conceptions of reliance in consumer fraud cases or different statutes of limitation or different unjust enrichment laws or different scienter requirements. These are frequently binary variables not conducive to analog averaging." Manhattan Institute Center for Legal Policy Adjunct Fellow Ted Frank, critiquing the Rosenberg and McCloud paper that proposes addressing nationwide federal diversity class actions where there are differences in state law by taking an "average law approach." The paper is summarized elsewhere in this *Report*.

PointofLaw.com, August 16, 2010.

THE FINAL WORD

Report Shows Spending on State Supreme Court Campaigns More Than Doubles in Last Decade

A new **report** has revealed that special-interest spending on state supreme court elections has more than doubled in the past 10 years to $207 million, prompting former U.S. Supreme Court Justice Sandra Day O'Connor to write in its introduction that "three out of every four Americans believe that campaign contributions affect courtroom decisions [and] this crisis of confidence in the impartiality of the judiciary is real and growing. Left unaddressed, the perception that justice is for sale will undermine the rule of law that the courts are supposed to uphold."

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Titled "The New Politics of Judicial Elections, 2000-2009: Decade of Change," the report was prepared by the nonpartisan policy groups Brennan Center for Justice, National Institute on Money in State Politics and Justice at Stake Campaign. Their research reveals that total spending in supreme court elections rose from $6 million in the early 1990s to more than $45 million during the 2008 elections. States ranked the highest in supreme-court fundraising include Alabama, Illinois, Ohio, Pennsylvania, and Texas.

According to the report, "a broad portrait of a grave and growing challenge to the impartiality of our nation's courts" include the following trends: (i) "the explosion in judicial campaign spending, much of it poured in by 'super spender' organizations seeking to sway the courts"; (ii) "the parallel surge of nasty and costly TV ads as a prerequisite to gaining a state Supreme Court seat"; (iii) "the emergence of secretive state and national campaigns to tilt Supreme Court elections"; (iv) "litigation about judicial campaigns, some of which could boost special-interest pressure on judges"; and (v) "growing public concern about the threat to fair and impartial justice—and support for meaningful reforms."

The Center for Competitive Politics has reportedly claimed that complaints about spending on judicial races have been exaggerated and that states which hold judicial elections should not limit the free speech of voters or candidates. "Part of our argument is that there isn't a different First Amendment standard for judicial campaigns," a center spokesperson was quoted as saying. *See The Washington Post*, August 16, 2010.

UPCOMING CONFERENCES AND SEMINARS

The Missouri Bar/Missouri Judicial Conference, Columbia, Missouri – September 29-October 1, 2010 – "2010 Annual Meeting." Shook, Hardy & Bacon eDiscovery, Data & Document Management Practice Co-chair Denise Talbert will co-present a session titled "E-Discovery Roadmap – 2010 and Beyond," a continuing legal education track program. Talbert will discuss emerging best practices, cost efficiencies, and competencies in managing and conducting e-discovery. ■

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