Shook, Hardy & Bacon L.L.P.

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PRODUCT LIABILITY LITIGATION REPORT

CONTENTS

CASE NOTES

Ninth Circuit Rules Jurisdiction Lacking over Foreign Plane-Crash Defendant

The Ninth Circuit Court of Appeals has dismissed for lack of personal jurisdiction design-defect claims filed against a French company that designed and manufactured an airplane which crashed in 2010 some 200 miles southeast of Havana, Cuba, killing everyone on board. ***Martinez v. Aero Caribbean*, No. 12-16043 (9th Cir., decided August 21, 2014)**. The plaintiff heirs argued that their service of the summons and complaint in California on Avions de Transport Régional's (ATR's) vice president of marketing, who was attending a conference on the company's behalf, created general personal jurisdiction over ATR under a "tag jurisdiction" theory. They also argued that ATR's contacts with the state were sufficiently extensive to create general personal jurisdiction.

According to the court, the case that recognized tag jurisdiction, *Burnham v. Superior Court*, 495 U.S. 604 (1990), was a split decision, with no controlling majority, and involved service in divorce proceedings on a New Jersey resident while he was visiting his children in California. Because corporations are artificial persons and an officer is not the corporation, the court determined that the presence of an officer is "not physical in the way contemplated by *Burnham*." Thus, the only way for the plaintiffs to establish personal jurisdiction over ATR would be to show that its contacts with California support either specific or general jurisdiction. Since no part of the lawsuit arose out of or related to ATR's contacts with the state and thus specific jurisdiction was lacking, the plaintiffs argued that the company's contacts were so extensive that they created general jurisdiction.

In this regard, the plaintiffs relied on five sets of contacts, including ATR sales contracts with a California corporation "worth between $225 and $450 million"; contracts with 11 California component suppliers; the presence in the state of company representatives "to attend industry conferences, promote ATR products, and meet with suppliers"; one company's use of ATR airplanes on its California route; and company advertising in trade publications distributed in California. Relying on *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), and citing its "demanding" standard, the court ruled that this activity was insufficient to establish general jurisdiction, which is appropriate when a corporation "engages in a substantial, continuous, and systematic course of business" in the state.

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Under *Daimler*, the court said, "the 'paradigm' fora for general jurisdiction are a corporation's place of incorporation and principle place of business." Noting that the company is organized and has its principal place of business in France, the court further observed that it is not licensed to do business in California and its "California contacts are minor compared to its other worldwide contacts." The court affirmed the lower court's dismissal of the claims against ATR and ruled that it did not abuse its discretion in denying the plaintiffs' request for additional jurisdictional discovery as to the company's North American subsidiary, which was headquartered in Virginia when the crash occurred and has since relocated to Florida.

Jury to Decide Whether Novartis Caused Patient's ONJ by Failing to Warn Physician

In a Tennessee case formerly part of multidistrict litigation targeting Novartis for failing to warn physicians that its Aredia and Zometa biophosphonate drugs could cause osteonecrosis of the jaw (ONJ), the Sixth Circuit Court of Appeals has reversed a district court's grant of summary judgment for Novartis and remanded the causation issue for a jury to decide. ***Payne v. Novartis Pharm. Corp.*, No. 13-6266 (6th Cir., decided August 18, 2014)**.

The plaintiffs, a cancer patient and her husband, alleged that if Novartis had notified her physician and he had then warned them of the ONJ risks purportedly associated with Aredia and Zometa, she would not have taken the drugs and would not have had part of her jaw removed as a result of ONJ. In dismissing the claims, the district court looked to Tennessee's "learned intermediary doctrine," under which the question was "whether a jury could find that [the physician] would have done something differently had he known about the risk of ONJ and, if so, whether that difference could have prevented [the plaintiff's] ONJ." It then dismissed as "entirely speculative" the plaintiff's statement that she would not have taken the biophosphonates if she had been warned about the ONJ risk.

The Sixth Circuit disagreed. It found that the district court erred in disregarding the testimony offered by the plaintiff's physician, who said that he now warns patients about the ONJ risk. Tennessee law only requires "evidence that a warning would have altered the doctor's actions and that the change in the doctor's actions would have averted the patient's injury," the court said, and the testimony from the plaintiff's physician should have been sufficient to forestall summary judgment. The plaintiffs argued that Tennessee "explicitly allows such testimony to show causation in informed consent cases," and the court found "no indication that the Tennessee Supreme Court would adopt a different standard of proof for essentially the same link in the causal chain" of this failure-to-warn case.

Seventh Circuit Establishes CAFA Jurisdiction Guidepost

In the context of a dispute over health insurance offered to Illinois residents, the Seventh Circuit Court of Appeals has indicated how plaintiffs seeking to remand a matter removed to federal court under the Class Action Fairness Act (CAFA) can show that the putative class meets the § 1332(d)(4) requirement that "at least two-thirds of the class's members are citizens of the state in which the suit began and at least one defendant from which 'significant relief' is sought is a citizen of the same state." ***Myrick v. Wellpoint, Inc.*, Nos. 12-3882, 13-2230 (7th Cir., decided August 19, 2014)**.

Here, the plaintiffs offered no evidence about the class members' citizenship, stating that it would be cost-prohibitive to do so and asking the court to infer from the insurance policies' restrictive language that most policyholders, even if some had relocated, were Illinois citizens. According to the court, a random sample of policyholders could have been used to satisfy the § 1332(d)(4) requirement: "If the sample yields a lopsided result (say, 90% Illinois citizens or only 50% Illinois citizens) then the outcome is clear without the need for more evidence. (The more lopsided the result, the smaller the sample needed to achieve statistical significance). If the result is close to the statutory two-thirds line, then do more sampling and hire a statistician to ensure that the larger sample produces a reliable result."

The court questioned the representative plaintiffs' and counsel's adequacy given their "insouciance toward the need for proof of the class members' citizenship" and other questionable litigation strategies. The court affirmed the district court's refusal to remand the matter to state court, its refusal to certify a class and its ruling in favor of the defendants on the merits.

THE INTERNATIONAL BEAT

CPSC Scrutiny of Dr. Reddy's Packaging Cited in SEC Filing as Contingency

In a U.S. Securities and Exchange Commission (SEC) filing, Hyderabad, India-based Dr. Reddy's Laboratories Ltd. has **referred** to a Consumer Product Safety Commission (CPSC) investigation into the company's alleged failure to comply with special child-resistant packaging regulations under the Poison Prevention Packaging Act. While the company disagrees with the allegations "and is engaged in discussions with the CPSC regarding its compliance," the agency's intent to seek civil penalties and a Department of Justice investigation of similar issues under the Federal False Claims Act have led the drug maker to state, "[T]he Company cannot conclude that the likelihood of an unfavorable outcome is either probable or remote. . . . An unfavorable outcome in these matters could result in significant liabilities, which could have a material adverse effect on the Company." *See Dr. Reddy's Laboratories Ltd. Form 6-K*, August 19, 2014.

ALL THINGS LEGISLATIVE AND REGULATORY

CPSC Commissioners Deny Fire Marshals' Petition for Candle Standards

The U.S. Consumer Product Safety Commission (CPSC) has denied a 2004 petition filed by the National Association of State Fire Marshals seeking mandatory safety standards for candles and has directed staff to continue monitoring and contributing to the efforts of ASTM, a voluntary standard-setting organization, as it works on "a performance standard for paint and other non-wax coatings on candles."

CPSC staff **recommended** the denial after apparently finding that manufacturers have been complying with the current voluntary ASTM standards—ASTM F2417-11, Standard Specification for Fire Safety for Candles, and ASTM F2601-13, Fire Safety for Candle Accessories—which adequately reduce the fire-hazard risks purportedly posed by candles and their accessories. In this regard staff stated, "[T]he reduction in candle-related deaths and incidents cannot be attributed to any single factor but is likely the result of a combination of factors, including reduced consumption and substantial compliance with the voluntary standards."

A trade organization representing the interests of some 90 percent of U.S. candle makers reportedly said that the National Candle Association "appreciates CPSC's careful consideration of the petition, and we support the position that broad adherence to the voluntary ASTM standards as well as ongoing consumer education efforts have contributed to significant reductions in fires, injuries and deaths. We welcome CPSC's continued participation in ongoing ASTM committee work." Consumer interest organizations and the fire marshals group supported the industry's commitment to voluntary standards compliance and to keeping the standards current. *See Bloomberg BNA Product Safety & Liability Reporter™*, August 19, 2014; *CPSC Record of Commission Action,* August 20, 2014.

New CPSC Chair to Require "Clear Safety Justifications" for Rule Changes

Recently confirmed as U.S. Consumer Product Safety Commission (CPSC) chair, Elliot Kaye emphasized during an August 13, 2014, press briefing that he would require "clear safety justifications" for any proposed rules or rules changes, including a pending proposal that generated significant criticism in calling for legally binding product recalls and the publication of product information without manufacturer consultation. According to Kaye, this draft rule is undergoing staff revisions, and he suggested that any new rule would have to show that it would achieve important safety objectives.

Kaye also indicated that the agency would prioritize rules for window coverings and to expand its import safety-monitoring program. Kaye reportedly favors a collaborative approach, saying, "A lot of times going right to the manufacturers, going on their turf, flying to their plants and facilities, bringing our technical experts, and just sitting down and just having an open discussion, to me, has led to far more fruitful discussions, and potentially actions in many instances, than just sitting here in Bethesda and just issuing some type of regulation." He further noted that he expects staff to submit a proposed all-terrain vehicle rule to the commissioners in 2015. *See Law360* and *Bloomberg BNA Product Safety & Liability Reporter*™, August 13, 2014.

NHTSA Website Allows Searches for Recalled Vehicles

The U.S. National Highway Traffic Safety Administration (NHTSA) has **launched** a new online search tool that will allow consumers to determine, on the basis of a vehicle identification number (VIN), whether a particular vehicle is affected by a recall and has been repaired. U.S. Transportation Secretary Anthony Foxx said, "Starting today car owners, shoppers, and renters can find out if a specific vehicle has a safety defect that needs to be fixed—using our free online tool." The agency also now requires that all major light vehicle and motorcycle manufacturers provide VIN search capability for ongoing recalls on their own Websites. *See NHTSA News Release*, August 20, 2014.

Safety Agency Proposes Vehicle-to-Vehicle Communications

The U.S. National Highway Traffic Safety Administration (NHTSA) has **issued** a report titled "Vehicle-to-Vehicle [V2V] Communications: Readiness of V2V Technology for Application" and **seeks** comments on its preliminary research as to the technology's costs and benefits, and "additional information, data, and analysis that will aid the agency in developing an effective proposal to require new light vehicles to be V2V-capable." NHTSA believes that this technology could prevent some 592,000 crashes and save 1,083 lives annually at an approximate cost of $341 to $350 per vehicle in 2020. Comments are requested by October 20, 2014.

NHTSA suggests that V2V capability will not develop without regulation, "because there would not be any immediate safety benefits for consumers who are early adopters of V2V. V2V begins to provide safety benefits only if a significant number of vehicles in the fleet are equipped with it and if there is a means to ensure secure and reliable communication between vehicles." Among the questions NHTSA would like commenters to address are how its legal authority would apply to various V2V system technologies, whether it should include technical standards in its V2V rule to ensure compatibility, whether these systems should last the life of the vehicle, if requiring V2V on new vehicles will spur the development and application of retrofits

for vehicles already on the road, and how to secure privacy interests and prevent cyber-attacks. The report also addresses legal liability issues that are similarly open for comment. *See Federal Register*, August 20, 2014.

LEGAL LITERATURE REVIEW

Guido Calabrese, "A Broader View of the Cathedral: The Significance of the Liability Rule, Correcting a Misapprehension," *Law and Contemporary Problems*, 2014

Second Circuit Court of Appeals Senior Judge Guido Calabresi discusses how viewing torts solely through a private-law lens—i.e., the right of an injured person to receive redress from the one who injured her—neglects the more significant economic role for "the liability rule," which establishes a price "designed to approach what a collective allocation of entitlements, through regulatory or criminal law, would have ordained." Doing so, he opines, makes "seemingly peculiar application," such as over-compensating or under-compensating tort claimants, explainable. Thus "the explanation for the price chosen lies in a collective decision with respect to what and when entitlement shifts are relatively desirable and when they are not." And when one realizes this is what is happening, "one is much better placed to analyze and discuss whether the collectively set price and the goals that the collectivity had in mind in setting that price are good, bad, or indifferent."

Rhonda Wasserman, "Future Claimants and the Quest for Global Peace," *Emory Law Journal* (forthcoming 2014)

University of Pittsburgh Law Professor Rhonda Wasserman identifies the problems encountered in resolving mass-tort claims with potential future claimants—those who were exposed to the defective product or toxic substance at issue but have not filed any claims stemming from the exposure—and proposes a resolution process to balance the parties' interests. She argues that class actions and non-class aggregate settlements are unsuitable for mass torts with future claimants because such devices may be inadequate to protect their rights.

Instead, she suggests a hybrid public-private claims resolution process in which defendants would secure judicial approval of a class-action settlement for current claims, then make offers of comparable terms to future claimants as they arise through an extrajudicial process. Such an agreement would protect the constitutional rights of future claimants, she argues, because the settlement of current claims would not bind them. In addition, "the future claimants would have an incentive to accept [the defendant's offers comparable to the settlement], rather than

sue in tort, because they would be assured fair compensation without incurring the costs of litigation," she suggests. "If structured and administered properly, such a process could yield something approximating a global peace while preserving the future claimants' constitutional rights and ensuring them fair compensation."

Civil Jury Symposium Papers Published

William and Mary School of Law Associate Professor Jason Solomon has **authored** an introduction to a symposium issue of the *William & Mary Law Review*, focusing on "The Civil Jury as a Political Institution." He has also **authored** an article titled "Juries, Social Norms, and Civil Justice," appearing in the most recent issue of the *Alabama Law Review*.

The introduction explores how the role of the civil jury has been debated for more than 200 years in the United States, mostly as to its competence as an adjudicative institution. This symposium was designed to address an underexplored aspect of the civil jury—its justification and role as a political institution. Among the symposium's participants was Law Professor Alexandra Lahav who opined that jury service exposes citizens to the workings of the court system, thus meeting an important educational goal, and places them in a position of power, with an impact on dignitary interests. Others saw the civil jury as "a valuable political institution guarding against 'judicial autocracy' as well as distributing power to the people." Still, some question whether jurors are sufficiently knowledgeable to adjudicate civil disputes, extrapolating from observations about the political ignorance of voters.

Solomon's article addresses the tensions between U.S. Supreme Court tort reforms that have stemmed from cases where juries have allegedly usurped the authority of other governing bodies, such as the Food and Drug Administration, and the *Restatement (Third) of Torts*, which has affirmed the jury's central role in tort law, i.e., its "fatalistic embrace of the jury's role." Solomon suggests that a middle ground exists "between unfettered jury discretion and cutting off redress entirely" and makes the case for juries or judges "deferring to indicia of social norms such as statutes and regulations, custom, and the market," in deciding whether a duty of care has been breached.

LAW BLOG ROUNDUP

Sampling and Extrapolation to Prove CAFA "Home State Exception"

"In a recent decision authored by Judge Easterbrook, the 7th Circuit suggested that plaintiffs looking to prove that their case falls under the 'home state exception' to CAFA [the Class Action Fairness Act] can use sampling and extrapolation to prove their allegations." University of Connecticut School of Law Professor Alexandra Lahav, blogging about a case, discussed elsewhere in this *Report,* proposing random

sampling to determine whether two-thirds of putative class members are citizens of the same state as at least one defendant, in support of a motion to remand a class action to state court.

Mass Tort Litigation Blog, August 22, 2014.

Vehicle Recall and Repair Status

"So, you want to buy a used or new car. How do you tell whether the vehicle has been recalled and whether the repair associated with the recall has been completed? Given the large number of high-volume recalls in the last few years, used cars in particular may be the subject of recalls, and you'll want to know before you buy whether the repair has been made." Harvard Law School Lecturer on Law Brian Wolfman, commenting on the National Highway Traffic Safety Administration's new online tool, discussed elsewhere in this *Report,* that allows consumers to locate information about a car's recall and repair status.

CL&P Blog, August 25, 2014.

Litigation Counsel's Duty to Understand Electronic Discovery

"California recently released an ethics opinion that addresses whether litigators have a duty to know how e-discovery works. Spoiler alert: They do." Solo practitioner Jeff Bennion, discussing a proposed advisory **opinion** from the State Bar Standing Committee on Professional Responsibility and Conduct that would hold every attorney who represents clients engaged in litigation to an ethical obligation requiring "a basic understanding of, and facility with, issues relating to e-discovery." According to the draft, "Such competency requirements may render an otherwise highly experienced attorney not competent to handle certain litigation matters involving ESI [electronically stored information]."

Above the Law, August 26, 2014.

THE FINAL WORD

Comment Period on Proposed Civil and Appellate Rules Changes Now Open

Public comments on the proposed changes to federal civil and appellate procedure rules may now be submitted; the comment period **closes** February 17, 2015. The advisory committees of the Judicial Conference of the United States have **proposed** amending Federal Rules of Civil Procedure 4, 6 and 45, and Federal Rules of Appellate Procedure 4, 5, 21, 25, 26, 27, 28.1, 29, 32, 35, and 40, as well as Forms 1, 5, 6,

and new Form 7. Public hearings on the civil rules proposals have been slated for Washington, D.C., on October 31, 2014, and in Phoenix, Arizona, on January 9, 2015; public hearings on the proposed appellate rules and forms amendments will take place in Phoenix on January 9, 2015, and in Washington, D.C., on February 12. *See Federal Register*, August 15, 2014.

UPCOMING CONFERENCES AND SEMINARS

Perrin Conferences, San Francisco, California – September 8-10, 2014 – "Asbestos Litigation Conference: A National Overview & Outlook." Shook, Hardy & Bacon Public Policy Partner Mark Behrens will take part in a panel discussion on "Asbestos Compensation: The Impact of Bankruptcy on the Tort System." The firm is a conference co-sponsor.

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