Shook, Hardy & Bacon L.L.P.

Product Liability Litigation Report

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SECOND CIRCUIT ADDRESSES CAFA JURISDICTIONAL BURDENS AND APPEAL DEADLINES

The Second Circuit Court of Appeals has determined that the party seeking to remove a putative class action from state court to federal court under the Class Action Fairness Act of 2005 (CAFA) has the burden of proving that the case is properly before the federal court. ***DiTolla v. Doral Dental IPA of New York, LLC*, No. 06-2324-cv (2d Cir., decided Nov. 17, 2006)**. In so ruling, the court joins the Seventh, Ninth and Eleventh circuits, which have held that CAFA did not change the traditional rule on this issue. The case involved a dentist who sought an accounting from companies that compensate dentists who treat Medicare and Medicaid patients. Because an accounting does not involve a damages award, the court found that the case did not meet the $5 million jurisdictional amount in controversy that must be satisfied for a federal court to assume jurisdiction over a class action under CAFA. The court also joined the Fifth, Seventh, Ninth, and Eleventh circuits to rule that the 60-day deadline for appellate court action on an appeal from a trial court's certification ruling does not begin to run until the appeals court grants permission to appeal.

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MDL JUDGE REFUSES TO CERTIFY NATIONWIDE PERSONAL INJURY AND WRONGFUL DEATH CLASS IN VIOXX PRODUCTS LIABILITY LITIGATION

A U.S. district court in New Orleans has refused to certify a nationwide class of Vioxx® users who alleged that the anti-inflammatory prescription drug caused personal injury and wrongful death. ***In re: Vioxx Products Liability Litigation*, MDL No. 1657 (U.S. District Court, Eastern District, Louisiana, decided Nov. 21, 2006)**. Consolidated before the court for pre-trial proceedings are thousands of individual claims and more than 160 class actions from nearly every state. While master complaints have been filed for medical monitoring and purchase claims classes, neither of these putative class actions were before the court when this decision was rendered.

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For purposes of certifying a nationwide class, a plaintiffs' steering committee (PSC) presented as class representatives two New Jersey residents who took Vioxx® and allegedly suffered either a pulmonary embolism or a heart attack. The PSC argued that New Jersey substantive law can and should be applied to all personal injury and wrongful death claims made by U.S. residents and further urged the court to find that common factual issues predominated over individual questions. Applying the choice-of-law rules from the forum state, in this case New Jersey, the court disagreed. According to the court, the interests of interstate comity, the interests underlying the field of tort law, the interests of the parties, and the competing interests of the states all weighed in favor of applying the law of each plaintiff's home jurisdiction to his or her respective claims. Because the court would have to apply the law of 51 jurisdictions to the class claims, it further determined that neither common questions of law nor common questions of fact predominate. In this regard, the court stated, "The number, uniqueness, singularity, and complexity of the factual scenarios surrounding each case swamp any predominating issues."

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While plaintiffs also asked the court to certify individual state class actions, the court declined to address the issue because "[t]his somewhat novel alternative has not been fully briefed."

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COURT EXAMINES WHEN ACTION COMMENCED TO DETERMINE IF CAFA APPLIES IN "MASS ACTION" TORT

A U.S. district court has remanded a "mass action" to state court and in so doing has addressed questions that had yet to be answered by courts considering application of the Class Action Fairness Act of 2005 (CAFA) to such claims. *Lowery v. Honeywell Int'l, Inc.,* No. 06-AR-1370-S (U.S. District Court, Northern District, Alabama, decided Oct. 24, 2006). The plaintiffs filed a complaint in January 2003 against "eleven named alleged polluters and multitudinous fictitious defendants" in state court seeking personal injury and property damages allegedly linked to the discharge of airborne pollutants. According to the court, "There is nothing in the original complaint to distinguish between a plaintiff who may be claiming severe lung disease from one who may be claiming grit in her grits." Nevertheless, the original complaint sought judgment against defendants of $1,250,000 and costs.

Subsequent amended complaints eliminated this "preposterous demand" and instead asked for "an amount of compensatory damages to be determined by a jury in excess of the jurisdictional minimum of this [state] Court, together with interest from the date of injury, and the costs of this proceeding." Plaintiffs filed a third amended complaint in June 2006, adding two new defendants, Alabama Power and Filler Products Co., Inc., but leaving the theories of liability, allegations of tortious conduct and claim for damages, characterized by the court as an "enigma," unchanged. Alabama Power removed the case to federal court, contending it was removable as a mass action under CAFA. The court was faced with determining when an action "commences" as that term is used in CAFA, which applies only to those actions commenced after its effective date (Feb. 18, 2005).

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The court ruled that (i) state law determines when an action is commenced for CAFA purposes; (ii) while the third amended complaint, which was filed after CAFA became effective, commenced the action as to Alabama Power and Filler Products under applicable state law, because it is unknown whether any of the plaintiffs can meet the $75,000 jurisdictional damages floor, the court lacks subject matter jurisdiction as to these defendants; (iii) the third amended complaint, which added no new theories or claims against the other defendants, does not "relate back" to those claims to make the whole case removable; and (iv) CAFA does not change the rule that the removing defendant has the burden of proving jurisdictional amount by a preponderance of the evidence, and because defendants were unable to show that the plaintiffs' "highly speculative" claims met the statutory minimum, they had not met their burden.

While discussing the issues and defendants' attempted reliance on legislative history, the court rejected the authority of the Committee Report, stating that even it if were relevant, "it was issued ten days **after** CAFA was enacted, and by a small subset of the voting body of the Senate. Such after-the-fact bolstering or 'shaping' is a technique of statutory construction this court rejects."

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FEDERAL APPELLATE RULE CHANGES TAKE EFFECT

"This new rule is guaranteed to arrive on the scene not with a bang but a whimper."

"This new rule is guaranteed to arrive on the scene not with a bang but a whimper," appellate litigator Howard Bashman writes about the first of two amendments to the Federal Rules of Appellate Procedure. Slated to take effect December 1, 2006, the first amendment (FRAP 32.1) allows citation to unpublished and non-precedential federal appellate court opinions issued on or after January 1, 2007. Calling it "the most controversial amendment … of all time," Bashman nevertheless argues that the consequences may be "imperceptible" at first, partly because "savvy advocates will only cite to unpublished or non-precedential rulings in the absence of any equally relevant published and precedential decisions."

The second amendment "authorizes federal appellate courts to require that pleadings, briefs, and other papers be filed electronically," but "also states that '[a] local rule may require filing by electronic means only if reasonable exceptions are allowed.'" In these instances, Bashman notes, the "hardship exception" will likely include *pro se* litigants as well as lawyers who lack electronic filing technology or software. He also adds that both amendments will have a significant "long-term impact" on appellate litigation, "especially given that electronic filing is the wave of the future for appellate cases." *Law.com*, November 27, 2006.

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U.S. JUSTICE DEPARTMENT TO REVISE CORPORATE FRAUD GUIDELINES

The U.S. Justice Department will reportedly revise the corporate fraud guidelines that have enabled prosecutors to coerce the cooperation of companies seeking to preclude indictment. Drafted by former Deputy Attorney General Larry

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Thompson in 2003, the policy "suggests that companies can benefit by waiving attorney-client privilege and by not paying the legal bills of 'culpable employees.'" Lawmakers and judges have apparently criticized the rules for infringing on company and employee rights.

Under the anticipated revisions, prosecutors asking for attorney-client privilege waivers would first need the approval of an attorney general or her top deputy, and companies that refused such waivers would not necessarily be penalized. Also under consideration is a proposal to remove the language referring to "culpable employees."

Meanwhile, critics continue to focus on the limited scope of these changes. "We've built a heck of a lot of momentum, and we don't want this problem to resurface," an Association of Corporate Counsel spokesperson told the press. *See Bloomberg News,* November 17, 2006.

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LAWYERS RESORT TO THERAPY TECHNIQUE TO WIN BIG WITH JURORS

"Until you learn to show your vulnerability, the jury is not going to understand you," attorney Eric Dubin told *Los Angeles Times* reporter Jessica Garrison in her article about a group therapy technique that is gaining popularity with lawyers. Known as psychodrama, the once outmoded practice allegedly helps attorneys "gain insight by acting out scenes from their own lives" or the lives of clients. Apparently resurrected by Gerry Spence and his protégé, Jude Basile, the two trial lawyers offer psychodrama courses across the country. Basile says that he uses the role playing learned in therapy to prepare for trial, adding that his clients' lives often become "imprinted on me like I'm a little baby duck."

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According to Garrison, many proponents credit psychodrama with helping them win large monetary awards for clients. But critics also point out the inappropriateness of some strategies used in psychodrama, such as "speaking to dead people as if they were in the courtroom." *See The Los Angeles Times,* November 25, 2006.

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ALL THINGS LEGISLATIVE AND REGULATORY

As Congressional Democrats Measure for New Drapes …

With the dust settling from mid-term elections that allowed Democrats to take control of Congress and many state capitals, political pundits have been assessing what the change will mean in terms of issues ranging from tort reform and drug safety to asbestos victims' trust funds and loser-pays proposals. According to a former *Washington Post* investigative reporter who also served

as a staff writer for the *Legal Times,* while conventional wisdom holds that tort reform efforts will come to a halt now with Democrats in charge of congressional committees, it does not account for "just how many lobbyists have come to depend on this issue living another day." Apparently, 475 lobbyists, working for 100 large corporations, were instrumental in securing passage of the Class Action Fairness Act, to which the U.S. Chamber of Commerce dedicated $60 million.

"With that kind of money at stake," writes Stephanie Mencimer, "the tort reform industrial complex is likely to ensure that while the battle over medical malpractice lawsuits might go dormant, the larger movement to restrict lawsuits – and bash the lawyers who bring them – will not go away." Mencimer also reports that big business has already hired some veteran and Democratic tort reform lobbyists "to push for legislation that would cap damages and force the loser to pay the other side's legal bills in patent infringement lawsuits." Mencimer opines that state legislatures have not seen the last of tort reformers either; she notes that the American Tort Reform Association (ATRA) only recently launched a campaign against "abusive state consumer protection laws" that allow plaintiffs to recover treble damages and attorney's fees in consumer protection lawsuits involving relatively small damages. *See TomPaine.com,* November 13, 2006.

Meanwhile, *The National Law Journal's* Marcia Coyle predicts that asbestos litigation remains a concern for Senator Patrick Leahy (D-Vt.), who has worked in the past with Senator Arlen Specter (R-Pa.) to address the burdens such litigation places on the federal judiciary. An ATRA spokesperson acknowledges that the Democratic takeover means "at least a cooling of tort reform fervor," but he believes some issues, like restricting lawsuits by consumers against the fast food industry for their obesity problems, have bipartisan support, along with legislation that would impose new sanctions on lawyers who file frivolous lawsuits and new restrictions on state court actions affecting interstate commerce. *See law.com,* November 14, 2006.

Liberals and conservatives have differing views of what caused recent Republican losses, but most agree that committed conservatives now have a larger majority among congressional Republicans due to the loss of a number of party moderates, while "Reagan" Democrats will be filling a number of Democratic seats. Because many blame fiscal irresponsibility for the election results, it can be expected that remaining Republicans will stand firm on a core issue like "runaway federal spending." William F. Buckley, Jr., who helped define the conservative movement has been quoted as saying, "It will perhaps take something like a depreciation of the dollar, something electric." If other countries "stop subsidizing our debt it will be a terrible shock to a lot of people, and then I think conservative reservoirs of thought would be consulted." *See The New York Times,* November 12, 2006.

Overall, it can be anticipated that tort reform legislation will have a more difficult time gaining traction in a Democratic Congress, but it is by no means clear that all reform efforts will come to a halt. Nor is it entirely clear what will happen to judicial nominations requiring Senate confirmation. President George W. Bush (R) has already resubmitted the names of controversial nominees to the federal bench, signaling an intent to continue his efforts to populate the nation's federal courts with conservative thinkers more allied to business interests.

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Any reforms that do pass will likely be modest in scope; to the extent that any legislative proposal can be framed in terms of reducing the size and cost of government, it will probably get at least a second look.

Meanwhile, pharmaceutical stocks reportedly slipped in the period after the election because of concerns about the incoming Democratic Congress, which is apparently expected to introduce legislation that would require stricter safety regulations for new drugs. What is bad for one industrial sector, however, is not necessarily bad for another. Should new drug safety legislation require additional clinical trials and post-approval studies, contract research organizations would, according to some industry analysts, be expected to thrive. *See UPI,* November 15, 2006.

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LEGAL LITERATURE REVIEW

SHB Lawyers Discuss the New California "Gold Rush"

Shook, Hardy & Bacon Public Policy Partner **Victor Schwartz** and Product Liability Group Attorney **Kevin Underhill** have published an article that addresses a troubling litigation trend in California as out-of-state plaintiffs are flooding the courts with personal injury lawsuits. According to the authors, "California's growing business of 'litigation tourism," unlike other forms of tourism, does not benefit the state. To the contrary, the demands of resolving claims that belong in other states impose unfair burdens on California's courts and citizens." They describe the factors that have led to this influx of cases and recommend that the state legislature or courts change current *forum non conveniens* rules and "stop deferring to the choices of nonresident plaintiffs." *See LexisNexis® Mealey's™ Litigation Report – Asbestos,* November 15, 2006.

"California's growing business of 'litigation tourism," unlike other forms of tourism, does not benefit the state. To the contrary, the demands of resolving claims that belong in other states impose unfair burdens on California's courts and citizens."

Bert W. Rein, et al., "Collisions of Expert Testimony: Why Rule 56 Should Be Amended," AEI-Brookings Joint Center for Regulatory Studies (October 2006)

This article posits that juries are not appropriately equipped to resolve a "battle of the experts" in court cases and suggests that a temporary solution to the problem is to amend Federal Rule of Civil Procedure 56(c), which relates to motions for summary judgment, by adding "For purposes of this Rule, a question whose resolution depends upon conflicting or opposing expert testimony may be resolved as a question of law." This would, the authors contend, give courts, which have greater familiarity with the issues in a case and more time to consider the relative merits of expert testimony, jurisdiction over such conflicts. Judges, unlike juries, can also be trained to analyze and evaluate technical evidence. The article concludes by countering arguments against the proposal including why it would not violate the Seventh Amendment's guarantee to a trial by jury.

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John Bronsteen, "Against Summary Judgment," *George Washington Law Review* (2007)

Loyola University Chicago School of Law Professor John Bronsteen writes in this article that summary judgment has become an increasingly popular alternative to dispute resolution at great cost to our system of justice. He claims that more cases would settle early in the litigation process if summary judgment were no longer available and the only other option were to try the case. According to Bronsteen, "summary judgment creates a systemic pro-defendant bias due to the pressure on judges to move their dockets along by terminating cases rather than letting them proceed to trial." The article concludes, "Powerful interests are aligned in favor of summary judgment. Large corporations, the typical defendants in important civil litigation, benefit from the procedure and would no doubt exert inexorable political pressure to retain it. … Perhaps those interests cannot be overcome, but if that is the case, then we should at least acknowledge that summary judgment owes its continued existence primarily to our system's capitulation to those who undeservedly benefit from it. In a better world, it would not exist."

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LAW BLOG ROUNDUP

Relish with That Hot Dog?

"I can't imagine that over twice as many hot dogs are eaten in New York as in Chicago. … I propose that the judge hold an evidentiary hearing to have a contest between New York and Chicago to see who eats more hot dogs." Illinois attorney David Fish, commenting on information contained in a class action complaint that alleges Vienna Beef hot dogs, advertised as all beef, contain pork intestine casings.

internetandclassactionlaw.blogspot.com, November 22, 2006.

The Unwitting Class Claimant

"A judge was about to make a final ruling on the case, and they [plaintiff's lawyers] wanted to let me know that I was in for a sweet cut of the ultimate reward. … I got the letter two weeks too late to opt out of the lawsuit, and I had no postmark to prove it was intentionally mailed out late to prevent me from refusing to participate. The old expiration date trick." Indiana physician Michael Hebert, blogging about the class action lawsuit filed on his behalf as a share-holder of Cisco Systems against Cisco Systems that could net him $.90 and will bring $24 million in fees and expenses to the lawyers who filed the litigation.

drhebert.squarespace.com, November 16, 2006.

"The old expiration date trick."

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RNC Picks "Ambulance Chaser" as Chair

"Despite his litigious roots, Martinez is not likely to take lawyer-bashing out of the GOP platform. Like all good trial lawyers who move into politics after making a lot of money, he has seen the light and embraced tort reform." Journalist and blogger Stephanie Mencimer, reporting that the Republican National Committee selected former plaintiff's attorney and Florida senator Mel Martinez as its next chair.

thetortellini.com, November 15, 2006.

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THE FINAL WORD

Scholars Call for Nanotechnology Risk Research

The Woodrow Wilson International Center for Scholars recently held a press conference to highlight the challenges for nanotechnology risk research identified in an **article** published in *Nature* by 14 top international nanotech scientists. According to the article, "Fears over the possible dangers of some nanotechnologies may be exaggerated, but they are not necessarily unfounded. Recent studies examining the toxicity of engineered nanomaterials in cell cultures and animals have shown that size, surface area, surface chemistry, solubility and possibly shape all play a role in determining the potential for engineered nanomaterials to cause harm." The challenges identified include developing instruments to assess exposure to engineered nanomaterials in air and water, developing and validating methods to evaluate the toxicity of engineered nanomaterials, developing models for predicting the potential impact of engineered nanomaterials on the environment and human health, developing robust systems for evaluating the health and environmental impact of engineered nanomaterials over their entire life, and developing strategic programs that enable relevant risk-focused research.