Shook, Hardy & Bacon L.L.P.

AUGUST 13, 2009

PRODUCT LIABILITY LITIGATION REPORT

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FEDERAL TRIAL COURT CONSIDERS PRUDENTIAL EXHAUSTION ISSUES IN ALIEN TORT CLAIMS ACT CASE

A federal court in California has determined that plaintiffs alleging crimes against humanity in litigation against foreign corporations for incidents occurring in Papua New Guinea were not required to exhaust local remedies as to some of their claims before filing in federal court under the Alien Tort Claims Act (ATCA). *Sarei v. Rio Tinto plc*, No. 00-11695 (U.S. Dist. Ct., C.D. Cal., decided July 31, 2009. The case, a putative class action that also raised strict liability and medical monitoring allegations, was on remand from the Ninth Circuit where it has generated four decisions since it was filed in 2000.

The plaintiffs allege that the defendants' mining operations on Bougainville destroyed the island's environment, harmed human health and incited a 10-year civil war that led to the death and injury of thousands of civilians. They allege war crimes, crimes against humanity, racial discrimination, and environmental harm in violation of international law.

The court first struggled to interpret the most recent remand order and determined that the Ninth Circuit plurality intended for it to decide "as an initial threshold inquiry, whether it was appropriate to impose a prudential exhaustion requirement in this case." Then, if this requirement were imposed as to any of plaintiffs' claims, the court determined that "it would conduct the traditional two-step exhaustion analysis before returning the matter to the circuit court so that the appellate court would have a full and complete record in deciding whether plaintiffs should be required to pursue local remedies as to any claim."

Guided by the principle "[w]here the 'nexus' to the United States is weak, courts should carefully consider the question of exhaustion, particularly—but not exclusively—with respect to claims that do not involve matters of 'universal concern,'" the court found that the nexus of plaintiffs' claims to the U.S. judicial forum was weak, because they involved litigants without ties to the United States and conduct occurring outside the country. To test the strength of the nexus, the court looked to a wide range of factors, including those set forth in the *Restatement (Third) Foreign Relations Law of the United States*, pertinent connections between the United States

SHB offers expert, efficient and innovative representation to clients targeted by class action and complex litigation. We know that the successful resolution of products liability claims requires a comprehensive strategy developed in partnership with our clients.

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and the parties and/or claims and ATCA's scope and purpose. The court gave no weight to evidence that Papua New Guinea, the Autonomous Bougainville Government and the United States did not oppose the prosecution of this litigation in the United States.

Despite a weak nexus, the court found that exhaustion was not required as to those claims that raised the U.S. courts' "historical commitment to upholding customary international law." These claims were (i) crimes against humanity, (ii) war crimes and (iii) racial discrimination. The claims to which the court found that exhaustion could be applied related to environmental tort and violations of rights to health, life and security of the person; and more general claims of cruel, inhuman and degrading treatment and consistent pattern of gross violations of human rights, to the extent that they involved multiple elements, such as environmental damage, that have not been universally condemned.

The court gave plaintiffs the option of amending their complaint to limit it to the claims to which exhaustion did not apply or pursuing all claims, including those to which exhaustion did apply. In the latter event, the court planned to require briefing as to whether local remedies are available and if plaintiffs should be excused from exhausting them because they "are ineffective, unobtainable, unduly prolonged, inadequate, or otherwise futile to pursue."

FEDERAL MDL COURT FINDS FORMALDEHYDE TEST RESULTS ADMISSIBLE IN FEMA TRAILER LITIGATION

A federal district court has denied a motion to exclude the results of formaldehyde testing conducted on an "emergency housing unit" that was among those the U.S. government supplied to individuals displaced from their homes by Hurricanes Katrina and Rita. *In re: FEMA Trailer Formaldehyde Prods. Liab. Litig.*, MDL No. 07-1873 (U.S. Dist. Ct., E.D. La., decided August 6, 2009). The manufacturer filing the motion argued that the tests were conducted "under conditions that do not replicate the actual living conditions of the [plaintiffs]." Specifically, the manufacturer noted that the unit had been tested "after it had been vacant, and sealed up, for 22 months," and without extending a slide-out, which increases the unit's air space, used by the owners to accommodate a wheel chair. The court concluded that the company's objections "go to the evidentiary weight of the test results, not to their admissibility."

TWOMBLY AND *IQBAL* PLEADING REQUIREMENTS CONTINUE TO SUPPORT FEDERAL COURT DISMISSALS

Federal courts have continued to dismiss claims for plaintiffs' failure to include sufficient facts in their complaints under the authority of *Bell Atlantic Corp. v. Twombly*,

550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). According to *The New York Times*, as of July 31, 2009, the federal courts had cited *Iqbal* some 500 times in the previous two months.

For example, the Eighth Circuit Court of Appeals recently dismissed claims brought against the manufacturer of a baby crib that was recalled for an alleged defect that had purportedly resulted in three infant deaths, seven injuries and 56 other reported incidents. ***O'Neil v. Simplicity, Inc.*, No. 08-2278 (8th Cir., decided July 22, 2009)**. The court cited *Twombly* and *Iqbal* to frame its analysis and concluded that by failing to allege that their crib had the defect or that they had suffered any injury other than a purported economic loss, the plaintiffs had no cause of action for violations of consumer protection laws or breach of warranty.

A federal court in Illinois also cited *Twombly* and *Iqbal* to dismiss putative class claims alleging that an insulated baby-bottle cooler used for storing and transporting milk contained dangerous levels of lead. *Suarez v. Playtex Prods., Inc.*, No. 08-2703, 08-3352 (U.S. Dist. Ct., N.D. Ill, E. Div., decided July 24, 2009). According to the court, plaintiffs failed to allege fraud with sufficient particularity, that is, they neglected to allege whether they saw or relied on the manufacturer's Web site assurances about product safety, and failed to allege, in relation to a request for the cost of lead testing in their children, that their children were exposed to lead or that "they even have children."

Meanwhile, Seventh Circuit Court of Appeals Judge Richard Posner used an appeal from the dismissal of fraud claims to criticize this trend in federal court decisionmaking. ***Smith v. Duffey*, No. 08-2804 (7th Cir., decided August 3, 2009)**. Affirming the dismissal, the court stated, "In our initial thinking about the case, however, we were reluctant to endorse the district court's citation of the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), fast becoming the citation *du jour* in Rule 12(b)(6) cases, as authority for the dismissal of this suit."

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Judge Posner distinguished *Twombly* by noting that it involved complex litigation which could have put the defendant to the cost of pretrial discovery so steep "as to coerce a settlement on terms favorable to the plaintiff even when his claim is very weak." He also distinguished *Iqbal,* which involved a defense of official immunity and the "cold comfort" of a minimally intrusive discovery promise to "high-level officials who must be neither deterred nor detracted from the vigorous performance of their duties." Neither issue was involved in *Smith v. Duffey*, according to the court, which concluded, "It is apparent from the complaint and the plaintiff's arguments, without reference to anything else, that his case has no merit. That is enough to justify, under any reasonable interpretation of Rule 12(b)(6), the dismissal of the suit"

CALIFORNIA APPEALS COURT REJECTS EMOTIONAL DAMAGES CLAIM IN PET DEATH LAWSUIT

A California appeals court has affirmed a trial court's decision dismissing a cause of action for intentional infliction of emotional distress in a veterinary malpractice lawsuit arising from the death of a pet dog. *McMahon v. Craig*, No. G040324 (Cal. Ct. App., decided July 31, 2009). The court also upheld the lower court's ruling to strike portions of the complaint seeking damages for emotional distress and loss of companionship. According to the court, "[r]egardless of how foreseeable a pet owner's emotional distress may be in losing a beloved animal, we discern no basis in policy or reason to impose a duty on a veterinarian to avoid causing emotional distress to the owner of the animal being treated, while not imposing such a duty on a doctor to the parents of a child receiving treatment."

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Shook, Hardy & Bacon Public Policy Partner **Victor Schwartz** and Associate **Phil Goldberg** teamed with SHB Pharmaceutical and Medical Device Litigation Partner **Paul La Scala** to file an *amicus* brief supporting this outcome on behalf of the California Veterinary Medical Association, Animal Health Institute, American Animal Hospital Association, American Kennel Club, Cat Fanciers' Association, American Pet Products Association, American Veterinary Medical Association, and Pet Industry Joint Advisory Council.

ATTORNEY-CLIENT PRIVILEGE ISSUES BRIEFED AND READY TO ARGUE BEFORE U.S. SUPREME COURT

Among the earliest cases new U.S. Supreme Court Justice Sonia Sotomayor is expected to hear when the Court opens its term in October is one involving the way federal appeals courts address attorney-client privilege questions. *Mohawk Indus., Inc. v. Carpenter,* 08-678 (U.S., cert. granted January 26, 2009). In an employment dispute, the employer is seeking the right of immediate appeal from a trial court ruling that it waived attorney-client privilege and must disclose privileged material in discovery. The Eleventh Circuit Court of Appeals dismissed Mohawk's interlocutory appeal finding that, under the collateral order doctrine, the ruling could be effectively reviewed on appeal after final judgment.

The appeals court decision added to a circuit court split on the issue, with three circuits favoring immediate review, and seven, including the Eleventh, opposing it. Mohawk argues that the disclosure of privileged material cannot be undone if an appellate court later reverses the order mandating production. The American Bar Association has reportedly backed the employer's view, arguing that trial courts often reach erroneous conclusions on privilege questions.

The Obama administration and a group of law professors and former federal judges have reportedly asked the U.S. Supreme Court to reject the company's position, contending that it would undermine district courts' ability to control the discovery process. The professors and former judges also cite heavy appellate court workloads as a reason for denying interlocutory review of privilege decisions. *See Fulton County Daily Report*, July 29, 2009.

ALL THINGS LEGISLATIVE AND REGULATORY

Senate Committee Hears Testimony on Bill to Overturn *Riegel*

The Senate Committee on Health, Education, Labor, and Pensions recently held a hearing to consider legislation that would reverse a U.S. Supreme Court ruling on medical device preemption. **Senate Bill 540** and its companion **H.R. 1346**, the Medical Device Safety Act of 2009, would reverse *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999 (2008), which immunized medical device manufacturers from certain state-based claims brought by patients who were allegedly injured by Class III medical devices approved by the Food and Drug Administration (FDA). The Court found the claims barred by an express preemption clause in the Medical Device Amendments of 1976.

Witnesses supporting the bill included a medical practitioner who believed that FDA oversight of medical devices is not sufficiently comprehensive or foolproof and a patient who complained about an allegedly faulty device he had used. University of Texas School of Law Professor Thomas McGarity testified about the legal consequences of preemption and opined that "Congress should be very reluctant to deprive victims of corrective justice and to deprive federal agencies of the common law's 'backstop' function behind the veil of express preemption clauses, and it should be very quick to correct the injustice that results when a court misinterprets an express preemption clause using the word 'requirement' to eliminate victims' rights to corrective justice." McGarity also cited limited agency resources as another reason for reversing *Riegel*.

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Witnesses opposing the bill included Peter Barton Hutt, former FDA chief counsel, and an amputee who testified that within the last five years the changes in spinal cord stimulator technology have made a "huge difference" in his life and that of his family. "But what if Congress had enacted the Medical Device Safety Act in 2001? For me, I'm sure it would have been game over," Roman was quoted as saying. *See Talk Radio News Service; Help.Senate.Gov*, August 4, 2009.

Senate Confirms Two Obama Picks to Join CPSC

Before the Senate went into recess, it confirmed two individuals President Barack Obama (D) nominated to join the Consumer Product Safety Commission (CPSC) as commissioners, bringing the number of seats at the federal agency from three to five. Confirmed were Robert Adler, who served as attorney-advisor to CPSC commissioners in the 1970s and 1980s and as deputy attorney general in Pennsylvania's Bureau of Consumer Protection, and former Republican Congresswoman Anne Northup.

Northup served the Third Congressional District of Kentucky between 1997 and 2006, and she was a member of the House Appropriations Committee. A proponent of education reform, she sat on a number of subcommittees dealing with labor and education, transportation and military quality of life issues. Commerce Committee Chair John Rockefeller (D-W.Va.) reportedly said of the new commissioners after the vote, "Mr. Adler brings extensive experience and knowledge about consumer product safety issues, and Ms. Northup has a long track record of working on behalf of children."

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The confirmations follow Obama's nomination of Inez Moore Tenenbaum to head the CPSC. Confirmed by the Senate in June, Tenenbaum has reportedly pledged to increase consumer protections for children's products and toys; she faces complex product safety issues ranging from lead in toys to Chinese drywall that is allegedly damaging people's homes. *See Product Liability Law 360*, July 31 and August 10, 2009.

CPSC Issues Tracking-Label Guidance for Manufacturers of Children's Products

The Consumer Product Safety Commission (CPSC) has issued a policy **statement** designed to ease the concerns of children's product sellers by assuring them it will not likely seek penalties for noncompliance, if they made good faith efforts to educate themselves about new tracking-label requirements and they inadvertently omitted the information.

Beginning August 14, 2009, under Section 103(a) of the Consumer Product Safety Improvement Act (CPSIA), manufacturers and importers must place "distinguishing marks" on all children's products and packaging so that if a recall occurs, the product can be traced to a manufacturer, private labeler, location, and date of production.

According to CPSC Commissioner Nancy Nord, "We have tried to minimize the burdens imposed on all children's product manufacturers through this policy statement while we stay focused on how to improve recall effectiveness. Unfortunately, the CPSIA does not give the agency the flexibility to phase in the requirements, for example, by first addressing high-value products with long useful lives and a history of recall issues." The tracking-label requirements will not apply to products made before August 14. *See Product Liability Law 360*, July 22, 2009.

Proposed Bill Aims to Help Consumers Hold Foreign Companies Accountable for Dangerous Products

Bipartisan legislation recently introduced in the Senate is aimed at reducing the legal hurdles facing Americans injured by products manufactured outside the United States. Senators Sheldon Whitehouse (D-R.I.), Jeff Sessions (R-Ala.) and Richard Durbin (D-Ill.) introduced the Foreign Manufacturers Legal Accountability Act of 2009 (S. 1606) to bring foreign manufacturers within the jurisdiction of U.S. courts. It would cover Consumer Product Safety Commission-regulated products such as children's toys, Food and Drug Administration-regulated products such as prescription drugs and medical devices, and Environmental Protection Agency-regulated products, including pesticides.

Whitehouse called the number of recent examples of American injured by foreign products shocking. "American businesses and consumers harmed by defective foreign products need justice, and they don't get it when foreign manufacturers use technical legal defenses to avoid compensating those they have injured," he was recently quoted as saying. During a subcommittee hearing in May, Whitehouse claimed that the delays and expenses associated with serving foreign manufacturers with a lawsuit and establishing jurisdiction put American manufacturers at a competitive disadvantage because they allow foreign companies to offer cheaper products that do not comply with U.S. safety requirements.

The proposed legislation would require foreign manufacturers to have an "agent" located in at least one state where the company does business to accept service of process for any civil and regulatory claims. It would also require companies to consent to state and federal jurisdiction. Whitehouse claims the approach is fair to foreign manufacturers because all U.S. manufacturers are subject to the jurisdiction of the courts of at least one state. "This bill therefore complies with the trade principle that we should not subject foreign manufacturers to burdens not already imposed on domestic manufacturers," he was quoted as saying. *See Product Liability Law 360,* August 7, 2009.

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LEGAL LITERATURE REVIEW

Victor Schwartz, Cary Silverman & Christopher Appel, "The Supreme Court's Common Law Approach to Excessive Punitive Damage Awards: A Guide for the Development of State Law," *South Carolina Law Review*, 2009

Shook, Hardy & Bacon Public Policy lawyers Victor Schwartz, Cary Silverman and Christopher Appel discuss U.S. Supreme Court punitive damages decisions and focus on the Court's common law-based ruling in *Exxon Shipping Co. v. Baker.* They suggest that state courts turn to the decision to guide their own punitive damages jurisprudence. The authors found that a number of state court judges are not

comfortable with constitution-based decision making in this arena, and as "common law judges" resent efforts to place substantive due process limits on punitive damages. According to the article, *Exxon*, by grappling with the "outlier" punitive damage award and carefully considering alternative approaches, "has the potential to persuade state courts to move away from traditional, subjective verbal thresholds, such as whether the award shocks the conscience or arouses 'passion and prejudice,' and move toward more precise empirical standards for evaluating whether punitive damage awards are excessive."

Matthew Miller, "Responding to Semi-Objectionable Discovery," *Product Liability Law 360*, August 3, 2009

Shook, Hardy & Bacon Tort Of Counsel **Matthew Miller** has authored an article on the standard practice of including language in a substantive discovery response that indicates the answer is subject to and does not waive any noted objections. He examines conflicting federal case law on this matter and offers "guidance to the attorney who seeks to offer both objections and substantive responses to discovery requests." Noting that some courts have found the practice unacceptable because it can obfuscate the extent of the response, Miller provides insight into preserving valid objections while making clear that a reasonable response has been made in compliance with the Federal Rules of Civil Procedure.

Robert Bone, "*Twombly*, Pleading Rules, and the Regulation of Court Access," *Iowa Law Review*, 2009

Boston University School of Law Professor Robert Bone analyzes the U.S. Supreme Court's ruling in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), and finds that its plausibility standard may not represent the broad departure from long-standing pleading requirements that many courts and commentators believe it is. Written before the Court decided *Ashcroft v. Iqbal*, Bone's paper takes on the broader subject of regulating court access through stricter pleading and other case-screening devices. Bone concludes by calling for formal rulemaking or a legislative process to make any significant changes from traditional notice pleading to fully define what makes an undesirable lawsuit, correctly identify the cause of the problem, and tailor solutions to probable causes. His goal is the development of an analytical framework to "assure a more just and efficient set of pleading and merits-based screening rules."

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LAW BLOG ROUNDUP

The Notice Pleading Kerfuffle Continues

"Here I'll put my money where my mouth is." Cornell Law Professor Michael Dorf setting forth an alternative to legislation proposed by Senator Arlen Specter (D-Pa.) to change the apparently new pleading direction spearheaded by the U.S. Supreme Court in its *Twombly* and *Iqbal* rulings. Specter's proposal, the "Notice Pleading Restoration Act of 2009," would change the standard for a complaint's dismissal back to its espousal in a 1957 U.S. Supreme Court decision, that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

Dorf on Law, July 29, 2009.

And More on the Federal Courts' Pleading Standard

"Congress is preparing to wade into the growing debate over the pleading standard for civil lawsuits, after two recent Supreme Court decisions effectively upended longstanding precedent." Capitol Hill reporter David Ingram, blogging about Senator Specter's proposal and calling it a likely "lightning rod for debate among plaintiffs' lawyers, consumer groups, and businesses." Noting that the courts applying the new standard are requiring more specific facts, which may not be available until discovery, Ingram quotes Specter as saying, "I think that is an especially unwelcome development at a time when, with the litigating resources of our executive-branch and administrative agencies stretched thin, the enforcement of federal antitrust, consumer protection, civil rights and other laws that benefit the public will fall increasingly to private litigants."

The BLT: The Blog of the Legal Times, July 23, 2009.

THE FINAL WORD

Courts Looking for More Effective E-Discovery Keyword Searches

Judges forced to construct e-discovery search terms have reportedly chastised the parties before them for suggesting keywords that are either too broad or narrow to be effective. Experts have suggested a number of ways to devise an effective plan, including consulting knowledgeable members of the organization whose data will be searched, making a good faith effort to collaborate with opposing counsel and testing the search terms by running trial searches before finalizing them. While collaboration may present difficulties due to the adversarial nature of litigation, it can provide significant cost savings and insurance against spoliation. *See Product Liability Law 360*, July 28, 2009.

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UPCOMING CONFERENCES AND SEMINARS

Legal iQ, Washington, D.C. – September 21-23, 2009 – "Foreign Corrupt Practices Act, Defining New Strategies in Global Anti-Corruption for 2009 and Beyond." Shook, Hardy & Bacon Corporate Law Partner Nate Muyskens will join a panel of distinguished speakers to address FCPA issues with a specific focus on "Defining New Strategies in Global Anti-Corruption for 2009 and Beyond." Co-sponsored by SHB, the conference brings together counsel from global corporations and federal enforcement agencies to share lessons learned, discuss the differences between permissible gifts and bribes, and report on coming changes in FCPA enforcement, among other matters.

American Conference Institute, Chicago, Illinois – October 26-27, 2009 – "Food-Borne Illness Litigation, Advance Strategies for Assessing, Managing & Defending Food Contamination Claims." Shook, Hardy & Bacon Pharmaceutical & Medical Device Litigation Partner Madeleine McDonough will participate in a discussion on "Global Food Safety: Factoring in New Threats Associated with Foreign Food Product Imports."

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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, food and beverage, oil and gas, telecommunications, agricultural, and retail industries.

With 93 percent of our more than 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).