Shook, Hardy & Bacon L.L.P.

Product Liability Litigation Report

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FEDERAL COURT CERTIFIES POST-SALE DUTY QUESTION TO STATE SUPREME COURT

The First Circuit Court of Appeals has asked the Maine Supreme Court to decide whether state law "would recognize a post-sale duty to warn claim where a manufacturer's product is not defective at the time of sale but a hazard later develops because of a change in the user environment." ***Brown v. Crown Equip. Corp.*, Nos. 06-2705 & 2706 (1st Cir., order entered September 4, 2007)**. The issue arose in a case tried before a federal jury that awarded $4.2 million to the wife of a man killed when operating a forklift the defendant manufactured. While the jury found that the forklift was not defective, it also found that the manufacturer failed to provide a warning to its owner, an indirect purchaser, about an available retrofit needed to operate the forklift safely in warehouses re-configured after it had been manufactured.

Both parties appealed the verdict, but neither requested that the question before the court be certified to the state court for resolution. Nevertheless, the First Circuit felt constrained to do so, finding the post-sale duty issue open in Maine. The court also noted that "other jurisdictions are quite divided – splintered might be a better description – as to whether and when to recognize a duty to warn arising after an un-defective product has been made and distributed." The court suggested that the state court would have to decide among competing policy interests such as safety concerns and economic consequences to industry and consumers.

The court also requested that Maine's high court decide how a jury's dollar adjustment for comparative negligence is applied where a portion of the original damages award is reduced by a statutory damage cap. The district court applied a statutory cap on consortium damages to the jury's verdict and then further reduced the award by part of the $200,000 sum the jury had determined was attributable to decedent's comparative negligence. Each party had a different idea how the court should account for the comparative negligence amount in reducing the award.

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UTAH COURT ISSUES RULING ON PRESUMPTION INSTRUCTION WHERE PRODUCT CONFORMS TO SAFETY STANDARDS

On a question certified to it by a federal district court, the Utah Supreme Court has determined that juries should be instructed in product liability cases that a product complying with applicable government safety standards is presumed to be free from any defect. ***Egbert v. Nissan N. Am., Inc.*, No. 20060433 (Utah, decided August 24, 2007)**. The issue arose in a case involving an automobile rollover accident in which the front passenger window was allegedly defective because it was made with tempered glass that shattered on impact. When it was manufactured, the vehicle complied with federal safety standards which allow either tempered or laminated glass to be used in passenger windows. Utah has a tort reform statute enacted in 2002 that creates a rebuttable presumption of nondefectiveness for those products in conformity with government standards.

While preparing for trial, the parties disputed whether the jury must be instructed about the statutory presumption and whether proof by a preponderance of the evidence is sufficient for rebuttal. Because the matter had not yet been decided under Utah law, the federal court sought a ruling from the state's high court, which summarily stated, "[i]t is common to instruct juries as to the law, and as to presumptions specifically," and there is no good reason "not to instruct the jury" that the statutory rebuttable presumption applies to the defendant in this case.

As to the standard of proof, the court rejected the defendant's argument that clear and convincing evidence should be required to rebut the presumption because the interests at stake were particularly important, i.e., "the government invested substantial amounts of time and money in studying the regulation at issue and … manufacturers should benefit by complying with such a carefully considered regulation." The court was "not persuaded that the interest at stake here rises to the level of requiring application of the clear and convincing standard." Nor was the court swayed by defendant's argument that a preponderance standard would render the statute a nullity and that "by creating the presumption of nondefectiveness in section 78-15-6(3), the Legislature meant to 'ratchet-up … the proof needed to overcome [the presumption] from what prevailed before it was passed.'" According to the court, the presumption "gives a kind of legal imprimatur to the significance of compliance with federal standards. In light of this benefit to the manufacturer, requiring rebuttal by a preponderance of the evidence does not render the statute a nullity."

Joining a majority of other jurisdictions, the court also expressly recognized the "enhanced injury" theory of liability by which the manufacturer of a defective product that did not cause an accident can be held liable for resulting injuries, where the defect caused injuries over and above those that would have been expected in the accident absent the defect. While both parties agreed that the court should recognize this theory, they disagreed as to which party has the burden of proof regarding the allocation of injuries resulting from the underlying automobile accident and those attributable to the product defect. Because this question had not been certified to it by the federal court, the state supreme court declined to address it.

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N.J. SUPREME COURT DECERTIFIES NATIONWIDE CLASS OF THIRD-PARTY PAYORS IN VIOXX® LITIGATION

The New Jersey Supreme Court has found that certification of a nationwide class of entities that cover the costs of prescription drugs for their members and beneficiaries was not proper because common questions of fact or law do not predominate and the class-action device is not superior to other mechanisms for redress. ***Int'l Union of Operating Eng'rs Local No. 68 Welfare Fund v. Merck & Co., Inc.*, No. A-22-2006 (N.J., decided September 6, 2007)**. The named plaintiff, a union welfare fund, claimed that as a third-party payor it incurred costs for Vioxx® and was induced by a fraudulent and aggressive marketing scheme to pay a higher price than that charged for similar medications. The fund also alleged that if manufacturer Merck had disclosed adverse product-safety information about which it was aware, the fund and others like it would have taken action to discourage consumers from purchasing the product.

While the plaintiff's expert contended that an agreed-upon set of principles and guidelines govern the practices of third-party payors in making decisions about which prescription drug products they will cover, defendant's expert asserted that this drug evaluation varies greatly among different managed care plans. Noting that the court's class-action analysis must be "rigorous," the court agreed with defendant, finding that the members of the proposed class are "a diverse group of entities" and that each "made individualized decisions concerning the benefits that would be available to its members for whom Vioxx was prescribed."

The court further refused to allow the plaintiffs to take advantage of the lesser evidentiary burdens applicable in securities litigation where fraud on the market is alleged, i.e., reliance is presumed where defendant engages in prohibited behavior and there is a change in price. "Therefore, to the extent that plaintiff seeks to prove only that the price charged for Vioxx was higher than it should have been as a result of defendant's fraudulent marketing campaign, and seeks thereby to be relieved of the usual requirements that plaintiff prove an ascertainable loss, the theory must fail." The court found significant plaintiff's intent to rely "on a single expert to establish a price effect in place of a demonstration of an ascertainable loss or in place of a causal nexus between defendant's acts and the claimed damages," calling it a failure of proof for a critical element. "Our rejection of the theoretical basis for that proof mechanism removes it as a potential common question entirely."

The court also agreed that it would be inappropriate to certify a class where each named plaintiff has "been damaged in large sums." Because the members of the class were "well-organized institutional entities with considerable resources," the court found "no disparity in bargaining power and no likelihood that the claims are individually so small that they will not be pursued."

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OHIO COURT EXTENDS DEADLINE FOR CHALLENGE TO TORT REFORM LAW

In a split decision, the Ohio Supreme Court has issued a ruling clarifying when the 90-day time limit began for citizens to seek a referendum on legislation that made public-nuisance lawsuits subject to the state's product-liability laws. ***State ex rel. Gen. Assembly v. Brunner*, No. 2007-4460 (Ohio, decided August 31, 2007)**. The court earlier determined that the law was valid despite the new governor's attempt to veto it. Further details about that decision appear in the August 16, 2007, issue of this Report. Should the law survive a citizen challenge, public-nuisance lawsuits filed against lead-paint manufacturers in the state could become a footnote in state legal annals.

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The court's prior ruling, issued on August 1, 2007, stated that the law took effect 90 days after it was originally filed by the former governor in the secretary of state's office. That filing occurred on April 5, 2007. The state's constitution gives citizens the power to adopt or reject General Assembly laws by a referendum vote, but they must file a referendum petition before it becomes effective, i.e., within the 90-day period after a bill is filed with the secretary of state. As the court noted, that deadline had long passed by the time the court issued its decision upholding the law and rejecting the new governor's attempt to veto it. Calling this an "unusual" case, but finding it "necessary to safeguard the rights reserved to the citizens," the court decided to extend the deadline, giving citizens 90 days from August 1 in which to file a referendum petition against the law.

Dissenting justices were concerned that the court had issued an advisory opinion because no one had actually attempted to file a referendum petition. One dissenter pointed out that citizens have other ways to alter or repeal laws to which they object and that it was entirely inappropriate for the majority to rewrite the constitution.

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EPOXY COMPANY PLEADS NOT GUILTY FOR BIG DIG FATALITY

Powers Fasteners, Inc. has reportedly entered a plea of not guilty to a manslaughter charge lodged against it in Boston. The company was indicted for the July 2006 death of a woman who was crushed when tons of concrete ceiling panels fell as she drove through Boston's Big Dig highway tunnel. Investigators have apparently concluded that the epoxy used to hold the panels in place was to blame for the failure; prosecutors allege that Powers Fasteners knew the type of epoxy it sold for the project was unsuitable but never told project managers. According to a news source, the company's president called the indictment "ridiculous" and "scandalous." He claimed that the Massachusetts attorney general was using his company as a pawn in an effort to persuade larger companies to agree to pay a multimillion-dollar civil settlement. If convicted, the company faces a maximum fine of $1,000. The decedent's family has filed a wrongful death lawsuit against the company, the Massachusetts Turnpike Authority and other companies. *See Associated Press*, September 5, 2007.

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PLAINTIFFS SEEK RESTORATION OF $5 BILLION PUNITIVE DAMAGES AWARD

Plaintiffs in a class-action lawsuit against Exxon Mobil Corp. have filed a petition with the U.S. Supreme Court seeking the restoration of a $5 billion punitive damages award resulting from the 1989 Exxon Valdez oil spill case. The petition, filed on behalf of 32,000 commercial fisherman, Alaska Natives, property owners, and others harmed by the spill, challenges Exxon Mobil's request that the Supreme Court overturn the $2.5 billion fine assessed by the Ninth Circuit Court of Appeals, which last May halved the original $5 billion award but denied the company's request for another hearing. While the plaintiffs' petition argues that Supreme Court review is unnecessary and would "prolong the case for many years to come," it also asks the Court to reinstate the full punitive fine because Exxon Mobil's "reprehensible" conduct led to the spill. Exxon Mobil has countered that it has already paid $3.5 billion in cleanup costs, compensation and settlements. "We acknowledge that the Exxon Valdez oil spill was a very emotional event for many in Alaska, and to some, those feelings remain strong even today," an Exxon Mobil spokesperson was quoted as saying. "As we have said many times, the Valdez oil spill was a tragic accident, one which the corporation deeply regrets, and one for which the corporation has paid significantly." *See Reuters,* August 31, 2007.

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ALL THINGS LEGISLATIVE AND REGULATORY

New York Times Article Criticizes Federal Safety Agency for Defective Products

In an article examining the limitations of the Consumer Product Safety Commission (CPSC), *New York Times* writer Eric Lipton argues that, "Under the Bush administration, which promised to ease what it viewed as costly rules that placed unnecessary burdens on businesses, industry-friendly officials have been installed at agencies that oversee the nation's workplaces, food suppliers, environment and consumer goods." Lipton contends that political appointments and funding cuts have hamstrung the safety agency, which reportedly suffers from a dearth of inspectors, out-dated equipment and waning legal authority. He specifically alleges that former Commissioner Harold Stratton, "a conservative Republican and a Bush campaign volunteer," vowed to break what he called "the barrier of fear" imposed by product recalls and appointed officials who appeared sympathetic to the demands of manufacturers and lobbyists. As a result, one former senior official told Lipton, "management positions at CPSC have lost their contact with the consuming public who they intended to serve."

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"At a time when imports from China and other Asian countries surged, creating an ever greater oversight challenge, the Bush-appointed commissioners voiced few objections as the already tiny agency – now just 420 workers – was pared almost to the bone," Lipton opines. He also cites agency insiders who called the reduced workforce, which resulted in a 45 percent decline in compliance investigations from 2003 to 2006, "a complete disaster."

Congress has apparently responded by approving modest funding increases in 2008 and forcing President Bush to withdraw his latest nomination, Michael Baroody, who served as a lobbyist for the National Association of Manufacturers. Acting Chair Nancy Nord, however, defended the agency's record and pointed to the inherent effectiveness of industry self-regulation. "The commission is currently doing more to protect consumers than it has at any prior time in its history," Nord was quoted as saying. "Even more could be done with greater resources, but the media's portrayal of a crippled and impotent agency, unable to deal with basic problems, is reckless and plain wrong." *See The New York Times,* September 2, 2007.

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In a related development, U.S. Representative Mike Ferguson (R-NJ) has introduced a **bill** (H.R. 3477) that would require independent third-party verification that the manufacturers of children's products have complied with consumer product safety standards before the goods are sold.

The legislation, which has been referred to the House Committee on Energy and Commerce, would apply to toys or other products "intended for use by a child under 60 months of age" and require manufacturers to issue certificates "which shall certify that such product conforms to such consumer product safety standard or is not a banned hazardous product under such rule."

Transportation Secretary Announces New Auto Safety Standard

The U.S. Department of Transportation's National Highway Traffic Safety Administration (NHTSA) has developed new side-impact safety **requirements** for all passenger vehicles. According to Transportation Secretary Mary Peters, "This new standard will spare hundreds of families from losing a loved one in a side-impact accident, and will forever raise the bar on safety for drivers and passengers across America." Among the new requirements is a change to the dummies used in performance testing. Previously, dummies representing an adult male of average height were used; now, manufacturers will have to perform additional side-impact tests with a dummy representing a small adult female. Enhanced side-impact protection systems meeting the federal standard will be phased in beginning with models produced in 2009. *See NHTSA Press Release*, September 5, 2007.

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LEGAL LITERATURE REVIEW

Nancy Moore, "The ALI Draft Proposal to Bypass the Aggregate Settlement Rule: Do Mass Tort Individual Clients Need (or Want) Group Decision-Making?," *DePaul Law Review* (2007)

Boston University School of Law Professor Nancy Moore takes on the American Law Institute (ALI) in this article, contending that some of the provisions in the current draft of its *Principles of the Law of Aggregate Litigation* conflict with the ABA Model Rules of Professional Conduct and have not been adequately justified by the reporters. The model rules, which have been adopted in some form in all U.S. jurisdictions, place limitations on lawyers settling the

claims of multiple clients in aggregate litigation. They require the informed consent of each client who must be advised as to "the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement." The ALI reporters have proposed exceptions to this aggregate settlement rule that would allow (i) individual clients to agree in advance to be bound to a proposed settlement under certain circumstances and (ii) lawyers receiving an offer for a lump sum settlement to seek approval of the fairness and adequacy of the settlement in court in the absence of direct approval from clients. Moore finds ALI's goals "laudable" and approves the draft proposal's definition of an "aggregate settlement," but she urges the reporters to consider addressing areas of ambiguity under current law and argues that the waiver provisions will not protect clients from overreaching attorneys.

Michael Gerhardt, "Non-Judicial Precedent," *Vanderbilt Law Review* (forthcoming)

Michael Gerhardt, who teaches constitutional law at the University of North Carolina at Chapel Hill School of Law, proposes that the precedent created by public authorities other than courts pertaining to constitutional matters "are supreme in making constitutional law." While he acknowledges that non-judicial precedents must be discoverable, he counts among them events such as presidents' State of the Union messages, official attorney general opinions, filibustered judicial nominations, congressional oversight, and presidential signing statements. According to Gerhardt, "[s]hifting perspective from the Supreme Court to non-judicial actors enables us to see constitutional law in new ways and particularly to appreciate the contributions of non-judicial precedents to constitutional law." He believes they can be "instrumental for resolving some of the most difficult questions in constitutional law" and that their "prevalence, pervasiveness and endurance … refute protestations that judicial supremacy is a fact of our constitutional life. It is not. Non-judicial precedents settle at least as many, if not more, constitutional conflicts than judicial precedents." While he views non-judicial precedents as the ultimate democratization of the constitution's implementation, he is not clear on who will have the last word when they conflict.

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LAW BLOG ROUNDUP

Sending Sealed Documents to the Press Can Be Expensive

"The bickering began almost as soon as Eli Lilly trumpeted a settlement and $100,000 payment by a plaintiffs' expert witness who released damaging documents about Zyprexa, the company's blockbuster medicine for schizophrenia." *Wall Street Journal* staffer Avery Johnson, blogging about the settlement between the man who violated a protective order and sent documents under seal to *The New York Times*, which then published articles about the drug's purported risks. The witness claimed that Lilly mischaracterized his signed statement as an admission that he had committed an illegal act and cherry-picked documents to send to the media. Eli Lilly stood by its reaction to the settlement.

blogs.wsj.com/health, September 7, 2007.

CPSC Under Fire?

"I was surprised by that story, but apparently gridlock and apathy are par for the course at the agency." Seton Hall Law School Associate Professor Frank Pasquale, commenting about the Consumer Product Safety Commission's failure to adopt product-safety rules that could prevent thousands of injuries each year. He was referring to a recent *New York Times* article that highlighted the agency's apparent shortcomings.

concurringopinions.com, September 2, 2007.

Singin' 'Bout Suin'

"The Law Blog received an e-mail from the American Tort Reform Association alerting us to a rap-metal song that they think should be 'adopted as a theme song by America's personal injury lawyers.'" *Wall Street Journal* reporter Peter Lattman, linking to "Weird Al" Yankovic's YouTube performance of "I'll Sue Ya." The lyrics, in part, go as follows: "I'll sue Taco Bell, cause I ate half-a-million chilupas and I got fat; I sued Panasonic, they never said I shouldn't use my microwave to dry off my cat …"

blogs.wsj.com/law, August 30, 2007.

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"I'll sue Taco Bell, cause I ate half-a-million chilupas and I got fat; I sued Panasonic, they never said I shouldn't use my microwave to dry off my cat …"

THE FINAL WORD

American Enterprise Institute Announces Merger with National Legal Center for the Public Interest

The American Enterprise Institute (AEI) for Public Policy Research recently announced a merger with the National Legal Center for the Public Interest (NLCPI), which will discontinue its separate operations and join AEI to "pursue an expanded program of research, publications and conferences drawing on the traditions, interests and people of both institutions." The new research division, named the AEI Legal Center for the Public Interest (AEILC), will continue the NCLPI's annual Gauer Distinguished Lecture in Law and Public Policy, in addition to featuring publications, event notices and conferences videos on its **Web site**. AEI Resident Fellow Ted Frank, who has a presence on several law blogs that support tort reform, will direct the new center, and several former NLCPI directors and legal advisors will participate in the AEILC Legal Advisory Council. AEI describes itself as a "private, nonpartisan, not-for-profit institution dedicated to research and education on issues of government, politics, economics, and social welfare." *See AEI Press Release,* September 4, 2007.

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UPCOMING CONFERENCES AND SEMINARS

Center for Business Intelligence, Washington, D.C. – September 24-25, 2007, "Global Data Security and Privacy Summit." Shook, Hardy & Bacon Pharmaceutical & Medical Device Litigation Partner **Madeleine McDonough** will discuss "Critical Privacy Issues in Electronic Document Discovery."

American Conference Institute, New York City, New York – December 12-14, 2007 – "12th Annual Drug and Medical Device Litigation" conference. Shook, Hardy & Bacon Pharmaceutical & Medical Device Litigation Partner **Harvey Kaplan** will serve on a panel that will discuss "Jury Communication: Changing Perceptions of the Industry/FDA and Putting Adverse Events and the Approval Process in Context."

GMA, The Association of Food, Beverage and Consumer Products Companies, New Orleans, Louisiana – February 19-21, 2008 – "2008 Food Claims & Litigation Conference: Emerging Issues in Food-Related Litigation." Shook, Hardy & Bacon Product Liability Litigation Partner **Laura Clark Fey** and Pharmaceutical & Medical Device Litigation Partner **Paul La Scala** will discuss "Product Liability When There Is No Injury: The Deceptive Trade Practices Class Action. Shook, Hardy & Bacon is co-sponsoring this event.

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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 its nearly 500 lawyers focused on litigation, Shook has the highest concentration of litigation attorneys among those firms listed on the AmLaw 100, *The American Lawyer's* list of the largest firms in the United States (by revenue).

Shook, Hardy & Bacon L.L.P.

GLOBAL PRODUCT LIABILITY LAW FIRM OF THE YEAR 2005|2006|2007 WHO'S WHO LEGAL

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