Shook, Hardy & Bacon L.L.P.

Product Liability Litigation Report

A PUBLICATION OF SHOOK, HARDY & BACON L.L.P. SEPTEMBER 21, 2006

FEDERAL COURTS ADDRESS THE ADMISSIBILITY OF EXPERT TESTIMONY UNDER *DAUBERT* STANDARD

The First Circuit Court of Appeals has affirmed a lower court order dismissing claims filed against a ladder manufacturer after finding that the court properly excluded plaintiffs' expert testimony. ***Beaudette v. Louisville Ladder, Inc.*, No. 05-2685 (First Circuit Court of Appeals, decided September 6, 2006)**. Among the issues raised by plaintiffs was that the ladder company was judicially estopped from arguing that their expert was unqualified because he could not define what constitutes "good commercial practice" under the applicable ladder safety standard approved by the American National Standards Institute (ANSI). According to plaintiffs, the ladder company participated in the standard's development and had taken a contradictory position in that venue. Noting that the judicial estoppel doctrine applies to prevent "a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase," the court rejected this contention because plaintiffs had not shown that the ladder company had taken contradictory positions in *this* proceeding nor was the final ANSI standard contradictory to its current position. ANSI approves standards developed by private standard-setting organizations. Product manufacturers are often active participants in such organizations and have the opportunity to suggest that their product designs be incorporated into standards to which the relevant industry will voluntarily conform to meet state-of-the-art legal obligations.

The Eighth Circuit Court of Appeals has affirmed a lower court order dismissing claims filed against an automobile manufacturer after finding that the court properly excluded plaintiffs' expert testimony. ***Smith v. Alamo Rent-A-Car, LLC*, No. 05-3902 (Eighth Circuit Court of Appeals, decided September 11, 2006)**. The expert was a mechanical engineer who was prepared to testify about the instability of a vehicle operated in four-wheel drive at highway speeds on dry pavement. Because he had not offered the results of any testing, accident data, the tests of others, or peer-reviewed articles to support his opinion, the court determined that the methodology he used to reach his conclusions was unreliable. Among the exhibits plaintiffs submitted to show support for their expert was an informational Web site, which the court found was the only exhibit that addressed safety issues. The court did not find this evidence sufficiently reliable,

Contents

however, because information about the author's qualifications or whether the Web site's conclusions were premised on any scientific method had not been included in the record.

Rejecting a *Daubert* challenge to the testimony of two of plaintiffs' expert witnesses, a U.S. district court in Illinois excoriated counsel in a lengthy opinion for not raising the issue earlier in the proceedings. *In re Sulfuric Acid Antitrust Litigation*, MDL No. 1536 (U.S. District Court, Northern District of Illinois, Eastern Division, decided August 29, 2006). One set of defendants apparently challenged the experts' testimony under Rule 703 of the Federal Rules of Evidence, claiming the experts' reliance on information provided by a third undisclosed expert violated the disclosure requirements of Rule 26 of the Federal Rules of Civil Procedure and was, in any event, unreliable. A second set of defendants sought reconsideration of the court's ruling on the Rule 703 challenge, claiming they had been surprised by the scope of the court's ruling and that its grounds "could not have been anticipated." They made these claims after (i) the motion had been argued and reliability issues arose during argument; (ii) the defendants had been asked to, but did not, brief reliability issues; (iii) the undisclosed expert had been deposed; and (iv) the court issued its decision rejecting the first admissibility challenge. The court characterized their failure to address the patent *Daubert* issues the first time around as "obvious waiver," "delay," "inaction," and "inimical to the proper functioning of the adversary system or to its efficient operation."

< Back to Top

CLASS ACTION CERTIFICATION IN AUTOMOBILE CASE AFFIRMED BY SIXTH CIRCUIT

In a case involving claims that a particular van model had a defective throttle body assembly that caused the accelerator to stick, the Sixth Circuit Court of Appeals has affirmed a lower court order certifying a statewide class. ***Daffin v. Ford Motor Co.*, No. 05-3545 (Sixth Circuit Court of Appeals, decided August 18, 2006)**. The court found that the district court properly determined that the elements of Rule 23 were met, rejecting the defendant's argument that the named plaintiffs' claims were not typical of the class because not every owner or lessee had experienced the problem. Among plaintiffs' claims was breach of an express warranty for supplying vehicles with defective parts, which claim the district court found was typical of both owners whose vans had manifested defects and those whose vans had not. According to defendant, it would not be possible for every class member to recover under breach of a "repair or replace" warranty for a defect that never manifested itself, and because the class as a whole could not recover, the district court abused its discretion by certifying a statewide express warranty class. The appeals court determined that this issue involved contract interpretation and went to the merits of the underlying action. Noting that courts may not conduct an inquiry into the merits of a case to determine whether it may be maintained as a class action, the court stated, "Whether the district court applying Ohio law could find that Ford's warranty permits an owner to recover damages for loss resulting from the alleged defect in the throttle body assembly is a merits issue."

< Back to Top

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SUMMARY JUDGMENT RULING REVERSED IN DRUG LABELING CASE

Although a prescription drug label specifically cautioned that the drug was for short-term use only and mentioned that its use could give rise to an involuntary movement disorder, the Fifth Circuit Court of Appeals recently determined that there was a genuine issue of material fact as to whether the label was misleading. ***McNeil v. Wyeth*, No. 05-10509 (Fifth Circuit Court of Appeals, decided August 22, 2006)**. In so ruling, the court overturned a lower court decision granting summary judgment in defendant's favor. The plaintiff had allegedly taken the drug at issue for more than a year and suffered an adverse drug reaction involving involuntary movements of the mouth, tongue, lips, and extremities; involuntary chewing; and a general sense of agitation. She claimed that defendant had failed to adequately warn physicians and consumers of an increased risk of this condition with long-term use of the drug. The court agreed with plaintiff that although the label mentioned the conditions of which she complained, it could be misleading as to the risk level for developing the condition. The court also found that defendant should have been aware that it was common practice for patients to use the drug for much longer than 12 weeks and that this widespread use "suggests that Wyeth's indication for use for no more than twelve weeks was widely disregarded." Because a jury could infer that the 12-week warning was ineffective and, therefore, inadequate, the court held that it could not say the warning was adequate as a matter of law.

The court agreed with plaintiff that although the label mentioned the conditions of which she complained, it could be misleading as to the risk level for developing the condition.

< Back to Top

E-DISCOVERY AND RECORDS MANAGEMENT FORUM HIGHLIGHTS CHANGES TO FEDERAL RULES

Speaking before a capacity crowd of some 300 lawyers, U.S. District Judge Lee Rosenthal recently provided an overview of the new Federal Rules of Civil Procedure on e-discovery that take effect, absent congressional intervention, December 1, 2006. During the September 12 "National Forum on E-Discovery and Electronic Records Management" hosted in Kansas City, Missouri, by Shook, Hardy & Bacon L.L.P. and the University of Kansas School of Law, Judge Rosenthal called e-discovery "an ongoing process" that will require judges to get into "the discovery pit" with counsel.

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She highlighted the differences between e-discovery and traditional document discovery to explain why the Federal Rules Advisory Committee, which she chairs, felt compelled to change the rules. In particular, Judge Rosenthal discussed the dynamic nature of electronically stored information and the unique issues relating to its preservation and production. Thus, the new rules will require attorneys to meet and confer early in the litigation process to decide what to do about the discovery of electronically stored information. The rules contemplate active judicial participation in e-discovery and provide a framework for addressing a number of recurring issues, including inaccessible data, the form of production, privilege and work product claims, and sanctions. During a panel discussion, Judge Rosenthal indicated that the Federal Judicial Center is preparing a pocket guide for judges and will be incorporating e-discovery training into continuing education courses.

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Addressing "coming attractions," Judge Rosenthal reported that the committee has revised every procedural rule as part of its "style project" to make the rules clearer, simpler and easier to read. The Judicial Conference is expected to adopt the proposed changes in late September, and they could become effective in December 2007. The committee is also in the midst of a "time counting project" that will make every federal rule consistent in terms of calculating filing and other deadlines. These proposed changes are expected to be published for comment in August 2007. Other revisions under consideration include expert-report disclosures, expert/attorney communications disclosures, improvements to the "notice" pleading framework to provide for more specificity, and modifications to the summary judgment rule.

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Additional presentations on e-discovery and records management were made by in-house counsel for Bayer HealthCare LLC, Lorillard Tobacco Co., Sprint Nextel Inc., the Cola-Cola Co., and Miller Brewing Co. Panels of scholars and lawyers who face e-discovery issues daily, including (i) University of Kansas Law Professor Laura Hines; the (ii) Honorable David Waxse, a federal magistrate judge and former Shook, Hardy & Bacon partner; and (iii) Shook, Hardy & Bacon lawyers **John Barkett**, **Dave Chaumette**, **Chris Cotton**, **Laura Fey**, **Bill Martucci**, **Madeleine McDonough**, **Denise Talbert**, and **Arlen Tanner**, discussed questions about the new rules, electronic records management, and what litigators and their clients must do once the rules are in place.

< Back to Top

"PERSONALIZED PRESCRIPTIONS" COULD CHANGE LEGAL LANDSCAPE

A recent ABA *Journal* article addresses the legal implications of pharmacogenomics, defined as "the application of genetic science and technology to pharmaceutical therapy." Considering whether the law will help or hinder pharmacogenomics, the author argues that although some fear litigation as a result of pioneering medical techniques, "the law may provide the necessary impetus for the medical industry to incorporate pharmacogenomics into its treatment arsenal." The author suggests that once genetic testing becomes widely available to medical care providers, they may "face sanctions if they don't employ pharmacogenomics" as the profession moves away from local standards of care toward a uniform national standard.

Quoting from *Brown v. Superior Court*, 751 P.2d 410 (Cal. 1988), the author also explains that liability is spread unevenly between pharmaceutical companies, which cannot be held strictly liable for design defects according to the court's opinion, and physicians. The latter, says one law professor summarized in the article, often fall victim to the "learned intermediary doctrine," wherein "the manufacturers' duty to warn runs primarily to physicians not the patient." Thus physicians, many of whom lack training in genetic research, seem more likely to resist pharmacogenomics because they are the ones held responsible in court, even as over-the-counter medications and direct-to-consumer marketing have resulted in some successful class actions against pharmaceutical companies. The author concludes that, in addition to litigation, federal regulation will be necessary to help pharmacogenomics survive both market demands and

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liability issues, especially since patient privacy laws vary from state to state. "Experts in the field," she writes, "say lawyers will need to stay on top of new developments if they are to help their clients navigate a changing health care landscape." *See ABA Journal*, September 2006.

< Back to Top

COURTS TURN TO BLOGS FOR "CAREFULLY ARTICULATED LOGIC"

According to *The National Law Journal*, "The blog 3L Epiphany reports that, as of early August [2006], there have been 32 citations of legal blogs in 27 different court opinions, and academic law journals have cited 75 different legal blogs a total of nearly 500 times." Web logs – or blogs – have apparently gained credence with the legal community in recent years, with Professor Douglas Berman's "Sentencing Law and Policy" reportedly the most-cited blog of all time: 24 citations in 19 opinions. Berman describes his work to *The National Law Journal* as a "constantly updating treatise," one which keeps pace with the "cyberspeed" of modern legal developments. While some distrust this malleability, others like Judge Diarmund O'Scannlain of the Ninth Circuit Court of Appeals have seemingly embraced the new technology. In an interview, O'Scannlain said he once cited "The Volokh Conspiracy" by Professor Eugene Volokh because judges must evaluate "carefully articulated logic in whatever form." As Ohio Supreme Court Justice Judith Lanzinger apparently posted on a 3L Epiphany Q&A forum, "Assuming that legal blogs are now in their infancy, and that they will grow to have a long and fruitful life, I think that lawyers who ignore them altogether will do so at their peril." *See The National Law Journal*, September 4 and 11, 2006.

< Back to Top

SHB LAWYER CONTRIBUTES TO TORT REFORM EFFORTS

Shook, Hardy & Bacon Public Policy Group Associate **Cary Silverman** was recently quoted by The National Law Journal in connection with efforts by the American Tort Reform (ATR) Foundation to amend consumer protection laws in certain states where frivolous and costly class actions are taking a toll on legal resources. Silverman helped author an ATR Foundation report directed to state courts and legislatures and urging action, such as the adoption of a model law that would mimic California's Proposition 64, a ballot initiative making it more difficult for plaintiffs in that state to bring claims without economic loss or injury. According to Silverman, "Obviously, California had a situation where there were extreme examples of abuse spurred by plaintiffs' lawyers who took it to the edge of what was possible. They may not be as broad as California's was in terms of letting anybody sue whether they're injured or not, but the requirements in a lot of the states are still very flexible as to what a person needs to show in order to sue."

States like Massachusetts, where statutory damages can be awarded in consumer suits, will apparently see the number of class actions rise as plaintiffs' lawyers seek out new venues amenable to their claims, said other defense attorneys quoted in the article. *The National Law Journal* reports that, in addition to the ATR Foundation, the U.S. Chamber of Commerce favors legislation that "would require consumers to have suffered economic losses or injuries from a

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company's alleged misstatements" and "would require consumers to have relied on a company's alleged misrepresentations when they bought its product or services." *See The National Law Journal*, August 28, 2006.

ALL THINGS LEGISLATIVE AND REGULATORY

< Back to Top

Congressional Hearing Examines Alleged Ethics Violations at NIH

On September 13, 2006, a House Energy and Commerce subcommittee convened a hearing to determine whether the National Institutes of Health (NIH) has taken appropriate measures to discipline scientists who allegedly violated conflicts-of-interest rules. A 2004 hearing revealed that some NIH employees were also the paid consultants of private biotech and pharmaceutical companies, a practice that required NIH approval at the time but was subsequently banned to alleviate concerns over potential conflicts. At least two Public Health Service Commissioned Corps officers at NIH have been referred to boards of inquiry for reportedly failing to seek approval for outside activities before 2005 and failing to disclose income from those sources. Also among the purported ethics violations was the improper distribution of human tissue samples to private firms.

NIH and Commissioned Corps witnesses maintained that they followed federal laws with regard to actions taken against individuals, although one board of inquiry is stalled pending a criminal investigation by the Department of Justice. Willing to comply with congressional advice, NIH voiced concern that the restrictions placed on paid consulting might dissuade field leaders, many of whom could earn more at private firms, from joining or staying with NIH agencies. NIH representatives characterized the agency's partnership with industry as a valuable one that nevertheless "keeps our scientists directly away from the source of those gifts and the company."

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Part of the U.S. Department of Health and Human Services, NIH conducts and supports medical research and discoveries to improve human health by funding researchers in every state and across the globe through its 27 institutes and centers. Among the agency's stated goals is to "exemplify and promote the highest level of scientific integrity, public accountability, and social responsibility in the conduct of science."

Senators Take on DOJ Policy That Trades Privilege Waiver for Dropped Criminal Charges

Senator Arlen Specter (R-Pa.) recently threatened to introduce legislation that would require Department of Justice (DOJ) prosecutors to relax current policy under which corporations are encouraged to waive attorney-client privilege to avoid criminal prosecution. Specter characterized the policy as "coercive" and possibly arising "to the level of being a bludgeon." U.S. Chamber of Commerce President Thomas Donohue, who opposes the policy, testified before the Senate Judiciary Committee and pointed to a collateral consequence, i.e., "once the privilege is waived, third-party private plaintiffs' lawyers can gain access to attorney-client conversations and use them to sue the company or

obtain massive settlements." *See BNA, The U.S. Law Week*, September 19, 2006.

Class Action Fairness Act Living Up to Its Promise

According to a new **study** released by the Federal Judicial Center, class action legislation enacted by Congress in 2005 is having its intended effect; federal class action filings or transfers from state to federal courts have substantially increased since the Class Action Fairness Act took effect in February 2005. The increases in class action activity in the federal courts post-CAFA "occurred primarily" in categories of cases likely to include state-law claims such as contract, tort (alleging property damage in far greater numbers than personal injury), and fraud. Judicial center researchers examined more than 10,000 class action filings in 85 federal district courts from July 2001 through June 2005 for this report.

LEGAL LITERATURE REVIEW

< Back to Top

Aaron Twerksi, "Chasing the Illusory Pot of Gold at the End of the Rainbow: Negligence and Strict Liability in Design Defect Litigation," *Marquette Law Review*, November 2006

Hofstra University Dean and Professor of Law Aaron Twerksi, who served as co-reporter of the *Restatement (Third) of Torts: Products Liability* (1998) with Cornell Law Professor James Henderson, writes that Illinois has "needlessly tortured classic negligence law" in attempting to differentiate strict liability from negligence. And he blames himself and his co-reporter for the error, because they decided when drafting the restatement that they would not directly acknowledge that common law negligence principles govern design defect litigation. They instead "championed a functional test for defect that made no mention of any particular doctrine."

"We prevailed," writes Professor Twerksi, "but our critics may yet have the last laugh," because courts are complicating the law "with distinctions that are spurious at best." In the Illinois case to which the professor refers, the court states that the difference between negligence and strict liability is grounded in fault. Thus, "[i]n a defective design case sounding in negligence, the focus is on the conduct of the defendant, but in a strict liability defective design case, the focus is on the product." According to Professor Twerski, if risk-utility tradeoffs are used to decide whether a design is defective, there is no difference between negligence and strict liability. Yet, the Illinois court split on whether risk-utility balancing should be used to determine defect when a products liability case is brought in negligence. Claiming "[i]t is high time that these irrational distinctions be wiped away," the professor states, "Courts ought not to insist that negligence and strict liability are similar in design defect cases with regard to the core definition of defect and then fumble to find a non-sensical distinction." What happens when they do is that plaintiffs are forced to bring design defect cases

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under both theories and risk inconsistent verdicts that are either remanded for retrial or give rise to "warped reasoning" by courts attempting to sustain them.

Elizabeth Lear, "Congress, the Federal Courts, and Forum Non Conveniens: Friction on the Frontier of the Inherent Power," 91 *Iowa Law Review* 1147 (2006)

According to Florida Law Professor Elizabeth Lear, federal courts err when they attempt to base *forum non conveniens* doctrine on inherent Article III powers. She contends that federal *forum non conveniens* is within Congress's bailiwick under the Rules Enabling Act and that "[w]hen federal law supplies the rule of decision in a federal case, there is no place for the *forum non conveniens* inquiry to operate." Professor Lear illustrates the problems that have arisen in the federal courts, including varying standards of proof for *forum non conveniens* dismissals and splits between the circuits, particularly where transnational disputes are concerned. She calls for the U.S. Supreme Court to "abandon the forum non conveniens doctrine as an unconstitutional usurpation of congressional power."

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Edward Sherman, "Segmenting Aggregate Litigation: Initiatives and Impediments for Reshaping the Trial Process," 25 *Review of Litigation* 691 (2006)

In this article, Tulane University School of Law Dean Edward Sherman explores seven devices used to segment complex litigation into manageable parts for decision or settlement. According to Dean Sherman, these devices have their roots in the growth of "public law litigation," which involves multiple parties, the discovery of large amounts of information, lengthy pre-trial proceedings, and complex forms of relief, and the "alternative dispute resolution" movement that experimented with various processes to achieve resolution without trial. Discussed in the article are non-binding trial runs, bellwether cases, sample trials and extrapolation, bifurcation, hybrid class actions, phased trials, and claims procedures. The author notes that most aggregate litigation involves private suits against corporate defendants and that these defendants, who generally oppose aggregation, have also been challenging the segmented models on due process and right to trial by jury grounds.

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LAW BLOG ROUNDUP

< Back to Top

Shopping for Judges

"Madison County Chief Judge Ann Callis has changed the rule [that allowed each plaintiff in a class action suit to obtain an automatic change of judge] so that it limits substitution of judge to only one time as a right, and the Korein Tillery law firm is now challenging that rule's constitutionality, which could delay its implementation for a couple of years if they get the right judges to hear the case." Ted Frank, attorney and director, American Enterprise Institute Liability Project, commenting on procedural changes in an Illinois jurisdiction

known for its generous plaintiffs' verdicts.
overlawyered.com, September 2, 2006.

Automated Jury Selection

"Some litigators are beginning to let a computer do it for them." Walter Olson, writer and senior fellow at the Manhattan Institute, linking to an article about lawyers who are using computers to pick their juries.
pointoflaw.com, September 14, 2006.

Over-the-Top Restrictions on Lawyer Advertising?

"In the name of protecting consumers from false and misleading lawyer advertising, New York is proposing draconian [sic] new restrictions on internet communications and other forms of attorney advertising that will directly impact attorneys who maintain blogs or websites [sic] in New York, or in many cases who simply send an email into the state."
consumerlawandpolicyblog.com, September 14, 2006.

THE FINAL WORD

< Back to Top

We are proud to report that *The National Law Journal* has selected Shook, Hardy & Bacon as one of the top defense firms from the past year. The publication was looking to highlight "firms that managed exemplary cutting-edge work on the defense side" from January 2005 through the first half of 2006. The August 21, 2006, edition of the journal features selected trial successes from each of the 14 firms honored. The editors were impressed with the diverse nature of Shook's defense work.

< Back to Top

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, and food 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).

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