Shook, Hardy & Bacon L.L.P.

JULY 18, 2013

PRODUCT LIABILITY LITIGATION REPORT

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LAW FIRM NEWS

Shelley Explores Ramifications of *Kiobel* for Global Product Manufacturers

Shook, Hardy & Bacon Global Product Liability Partner **Marc Shelley** has authored an **article** titled "The US Supreme Court reins in the Alien Tort Statute and brings relief to global product manufacturers" appearing in the July/August 2013 issue of *The In-House Lawyer*. Shelley sets the stage for the Supreme Court's ruling by explaining how the law's reach had been expanded in the lower courts which allowed it to be used in instances where private actors, i.e., corporations, allegedly committed violations of the law of nations "under color of law." Discussing why the Court concluded that the statute is "limited by a general presumption against the extra-territorial application of US law," Shelley closes by noting that plaintiffs will have a significant barrier to overcome that presumption and calls for a close watch on a pending Ninth Circuit ruling discussed elsewhere in this *Report*.

Behrens Featured in Published Transcript of Asbestos Symposium Presentation

Shook, Hardy & Bacon Public Policy Partner **Mark Behrens** joined a panel of distinguished speakers during the "7th Annual Judicial Symposium on Civil Justice Issues," a George Mason Judicial Education Program. *The Journal of Law, Economics & Policy* has published the transcript, available at 9 J.L. Econ. & Pol'y 489 (2013). The panel's topic was "The Asbestos Litigation Tsunami—Will It Ever End?"

According to Behrens, "We are now in our fourth decade of asbestos litigation; the longest running mass tort in United States history. What is more astounding is not that we are four decades into it but that the most recent actuarial studies project that asbestos claims will continue through 2050. That is forty years from now so when you think about it we are only half way through this litigation, which is really mind-boggling." Behrens outlined the issues currently facing courts trying to manage their dockets and discussed some of the most recent legal theories now in dispute, including assertions of secondary exposure liability and third-party duties to warn.

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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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CASE NOTES

Ninth Circuit Dismisses ATS Claims Against Rio Tinto

On remand from the U.S. Supreme Court and in light of *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), the Ninth Circuit Court of Appeals has affirmed the trial court's dismissal with prejudice of a lawsuit filed by plaintiffs seeking to hold a London-based company liable under the Alien Tort Statute (ATS) for the deaths of indigenous people on the island of Bougainville. ***Sarei v. Rio Tinto, PLC*, Nos. 02-56256, -56390, 09-56381 (9th Cir., decided June 28, 2013)**. Additional details about *Kiobel*, in which the U.S. Supreme Court significantly narrowed the statute's application, appear in the April 25, 2013, **issue** of this *Report*.

Federal Court Exercises Jurisdiction over South African Company in Baby-Seat Defect Case

A federal court in Texas has determined that it has general jurisdiction over a South Africa-based company sued for injury to an infant allegedly caused by its infant seat product and thus denied the company's motion to dismiss. *Hess v. Bumbo Int'l Trust F/K/A Jonibach Mgmt. Trust*, No. 12-0040 (U.S. Dist. Ct., S.D. Tex., Victoria Div., order entered June 20, 2013).

According to the court, nearly one-fourth of the 3.85 million baby seats the company sold in the United States were distributed by Texas-based Wartburg Enterprises, Inc. And for part of the companies' seven-year relationship, Wartburg was Bumbo International's exclusive U.S. importer and distributor. The court also noted that when the Consumer Product Safety Commission recalled the Bumbo Baby Seat® in 2007, Warburg's vice president coordinated the recall and served as Bumbo's U.S. representative. In this capacity, he served as a liaison between the agency and the company, made and distributed instruction leaflets for Bumbo customers and was involved in developing new product warnings and packaging. This activity, in terms of longevity, continuity and volume "establish the type of contacts that allow Bumbo to be considered 'at home' in Texas," the court said.

Eleventh Circuit Clarifies CAFA's Mass Action Requirements in Cruise Ship Suit

The Eleventh Circuit Court of Appeals has ruled that cases alleging damages from the grounding of the Costa Concordia cruise ship in 2012 off the coast of Italy belong in state court under the Class Action Fairness Act (CAFA) because they involve groups of individuals fewer than the statutory minimum of 100 for trial in federal court as a mass action. ***Scimone v. Carnival Corp.*, No. 13-12291 (11th Cir., decided July 1, 2013)**.

One case involved 48 plaintiffs, the other involved 56. Both were filed in state court, both include the same allegations against the ship's owner, "and there is no question that all 104 plaintiffs' claims concern common questions of fact and law." The defendant removed the actions to federal court under CAFA's mass-action

provision and based on the exclusive jurisdiction of federal courts over cases raising "substantial issues of federal common law relating to foreign relations." The defendant then filed motions to dismiss each case, "based on the forum selection clause of plaintiffs' contracts and forum non conveniens." Both groups of plaintiffs sought to remand the actions to state court, arguing that they had not proposed trying the cases jointly and that the cases did not implicate foreign relations. The district court agreed and remanded the cases to state court.

According to the Eleventh Circuit, absent a proposal from the plaintiffs to try the cases jointly under § 1332(d)(11)(B)(i) or perhaps a *sua sponte* court determination, "the federal courts lack subject-matter jurisdiction over the plaintiffs' claims." The court rejected a statutory interpretation that would allow the defendant to propose a joint trial and thus allow removal of the actions to federal court. The court also recognized that plaintiffs are "the master of the complaint" and "free to avoid federal jurisdiction." According to the court, its view is shared by the other courts of appeals that have addressed the issue, including the Third, Seventh and Ninth.

The court rejected a statutory interpretation that would allow the defendant to propose a joint trial and thus allow removal of the actions to federal court.

Ninth Circuit Orders Trial Court to Hear False Ad Claims for Protein Bars Under CAFA

Ruling that the Class Action Fairness Act (CAFA) permits an appeal from a district court's *sua sponte* remand order, a divided Ninth Circuit Court of Appeals panel has determined that declarations filed by the defendant as to the amount in controversy were sufficient to establish that CAFA's $5-million jurisdictional threshold had been met. ***Watkins v. Vital Pharm., Inc.*, No. 13-55755 (9th Cir., decided July 2, 2013)**.

On behalf of a putative nationwide class, the plaintiff alleged in state court that the defendant deceived consumers by claiming that its ZERO IMPACT® protein bars have "little to no impact on blood sugar." The complaint states that "the aggregate damages sustained by the Class are likely in the millions of dollars" and seeks damages, restitution, disgorgement, and attorney's fees and costs.

The defendant removed the action to federal court under CAFA and, according to the court majority, filed two declarations to support its assertion that CAFA's $5-million amount-in-controversy requirement is met. Trial counsel's declaration recited the complaint's allegation about aggregate damages and concluded, because the product had been sold to thousands of consumers, that the amount in controversy exceeded $5 million to "a legal certainty." Company accountant Richard Cimino declared that nationwide sales for the product in the preceding four years exceeded $5 million.

Without discussion, the Ninth Circuit agreed that the undisputed Cimino declaration was sufficient to meet CAFA's requirement. A concurring and dissenting jurist, finding that it was unclear whether the district court had seen the Cimino declaration and that the declaration was insufficient as a matter of law to establish that

the company had met its burden, would have remanded the matter for the district court "to determine in the first instance, in light of the Cimino declaration, whether Vital met its burden of proving that the amount in controversy exceeds $5 million." According to this judge, "I cannot endorse Vital's paltry showing as the new standard for meeting CAFA's heretofore more demanding requirement."

Spray-Foam Multistate Products Class Action Dismissed in Part

A federal court in Pennsylvania has dismissed several claims without prejudice in putative class litigation alleging that the installation of spray foam insulation (SPF) caused homeowners' property damage and physical injury. *Slemmer v. McGlaughlin Spray Foam Insulation, Inc.*, No. 12-6542 (U.S. Dist. Ct., E.D. Pa., order entered July 3, 2013). The court deferred ruling on whether the Restatement (Second) of Torts or Restatement (Third) of Torts applies to the strict liability claim, pending its resolution by the state supreme court in *Tincher v. Omega Flex, Inc.*

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The plaintiffs sued the manufacturer and installer of SPF in their home, alleging that the product is highly toxic and remains that way after installation. They alleged negligence, strict liability, breach of express and/or implied warranties, unjust enrichment, violation of consumer protection acts, equitable and injunctive relief, and medical monitoring. The plaintiffs proposed a nationwide class and Pennsylvania subclass of owners and residents of properties containing the product.

Among other matters, the court refused to dismiss the case under the local controversy exception of the Class Action Fairness Act, finding that the installer failed to carry its burden of showing that the exception should apply. The court also refused to dismiss the plaintiffs' negligence, implied warranty, violation of consumer protection law, and unjust enrichment claims, finding them adequately pleaded or properly pleaded in the alternative.

The court dismissed without prejudice the plaintiffs' (i) negligent supervision claim against the manufacturer, finding no law to support "the contention that [its] training and certification created a legal duty to supervise SPF installers"; (ii) breach of express warranty claim for insufficient pleading; (iii) medical monitoring claim for failure "to identify either a serious latent disease which requires monitoring or a medical monitoring procedure suitable in this case"; and (iv) injunctive relief, because such request does not by itself state a cause of action. The court ordered the plaintiffs to amend their complaint, if warranted, by July 17.

Maryland High Court Retains Contributory Negligence Doctrine in Soccer Injury Suit

Maryland's high court has rejected a request that it adopt the comparative negligence doctrine and thus allow plaintiffs found negligent in part for their injuries to recover to the extent of the defendants' culpability; accordingly, the court will continue to

apply contributory negligence in certain types of tort actions, barring plaintiffs from any relief however slight their contribution to their own injuries. ***Coleman v. Soccer Ass'n of Columbia*, No. 9, Sept. Term 2012 (Md., decided July 9, 2013)**. While the court determined that it had the authority to make such a change in the law, it invoked the legislature's failure to adopt the doctrine as evidence of a state policy that it was unwilling to abrogate.

The plaintiff was injured when he jumped and grabbed the crossbar of an unanchored soccer goal that subsequently landed on his face as he fell backward. His severe facial fractures required surgery and three titanium plates to repair. He requested that the trial court instruct the jury on comparative negligence, but the court refused, and the jury found both the plaintiff and defendant negligent. "Because of the contributory negligence finding, [the plaintiff] was barred from any recovery." The state high court agreed to hear the case limited to whether it should retain the standard of contributory negligence, and it did so. Two dissenting judges, including one who retired before the opinion was published, called for a future court majority to "relegate the fossilized doctrine of contributory negligence to a judicial tar pit at some point."

The state high court agreed to hear the case limited to whether it should retain the standard of contributory negligence, and it did so.

Shook, Hardy & Bacon's Public Policy attorneys filed an *amicus* brief on behalf of a number of groups, including the American Tort Reform Association, Chamber of Commerce of the United States of America, Property Casualty Insurers Association of America, and American Medical Association, to support the continued application of the contributory negligence doctrine in the state.

No Relief for Alleged Injury from Secondhand Asbestos Exposure in Maryland

Maryland's high court has held that a woman exposed as a child in the late 1960s to asbestos on her grandfather's clothing could not recover for the mesothelioma she allegedly contracted from the company whose products, used at his workplace, contained asbestos. ***Ga. Pac., LLC, f/k/a Ga.-Pac. Corp. v. Farrar*, No. 102, Sept. Term 2012 (Md., decided July 8, 2013)**. Two lower courts had determined that the manufacturer owed the granddaughter a duty to warn about the purported danger of contact with the asbestos dust in her grandfather's clothes during laundering and awarded her in excess of $5 million.

The Maryland Court of Appeals reversed, however, finding no duty to warn household members about secondhand exposure because (i) knowledge about potential risks to them was "somewhat skimpy" before 1972, when the Occupational Safety and Health Administration issued regulations addressing the problem of tracking asbestos dust on clothing into the home; (ii) companies would have been unable to directly warn household members about the purported risk "in an era before home computers and social media"; and (iii) without changing, washing and laundering facilities in the workplace, any warning provided by an asbestos manufacturer would have been ineffective to avoid the potential danger of in-home exposure from laundering work clothes.

ALL THINGS LEGISLATIVE AND REGULATORY

CPSC Finalizes Rule for Exclusion from Lead Limits in Children's Products

The Consumer Product Safety Commission (CPSC) has issued a final **rule** revising regulations "pertaining to procedures and requirements for exclusions from lead limits under section 101(b) of the Consumer Product Safety Improvement Act of 2008." According to CPSC, the revisions reflect changes mandated by Public Law 112–28 to provide for a "functional purpose exception from the lead content limits under certain circumstances and set[] forth the procedures for granting an exception in the statute." The rule took effect July 10, 2013. *See Federal Register,* July 10, 2013.

CPSC Commissioners Disagree About Cost-Benefit Analysis

According to a news source, at a recent Consumer Product Safety Commission (CPSC) hearing to discuss the agency's priorities and strategies for fiscal years 2014 and 2015, Democratic commissioners objected to the suggestion that the agency account for costs to industry when considering new rules, evidently claiming that they did not have to do so under the 2008 Consumer Product Safety Improvement Act (CPSIA).

"We're not required to do a cost-benefit analysis [under the CPSIA]. We're required to stick to the timelines that Congress mandated," Democratic Chair Inez Tenenbaum said. The lack of a cost-benefit analysis requirement has permitted CPSC to roll out more rules more quickly under CPSIA than it can otherwise, and according to Tenenbaum, the analyses have limited the agency to nine non-CPSIA rules in 32 years. Democratic Commissioner Robert Adler reportedly said that he "always thought we needed to have a cost-benefit analysis of cost-benefit analyses."

"We're not required to do a cost-benefit analysis [under the CPSIA]. We're required to stick to the timelines that Congress mandated," Democratic Chair Inez Tenenbaum said.

Evidently neither Tenenbaum nor Adler oppose the analyses, only that they should not be performed for CPSIA rules. Republican Commissioner Nancy Nord said the agency should consider including them for regulations under that law. "There's really nothing in the CPSIA that prohibits the CPSC from doing a cost-benefit analysis," Nord said. *See Law360,* July 10, 2013.

Senate Confirms New CPSC Commissioners

The U.S. Senate has, by unanimous consent, **confirmed** Ann Marie Buerkle (R-N.Y.) and Marietta Robinson (D-Mich.) as new Consumer Product Safety Commission (CPSC) commissioners. Buerkle and Robinson were approved for seven-year terms, replacing former Commissioners Thomas Moore and Anne Northup, respectively.

Buerkle, a former New York Congresswoman who served as New York assistant attorney general from 1997 to 2009 and previously worked in private practice, was nominated by President Barack Obama (D) for the post in May 2013 and reportedly

received "fast track approval" without a Senate confirmation hearing or opposition from Senate Democrats. Her term was back-dated to October 27, 2011. Robinson, a trial attorney, was first nominated by Obama in January 2012 and re-nominated in January 2013 after the Senate failed to act during the previous Congress, stated a news source. Her term was back-dated to October 27, 2010.

Buerkle and Robinson will join current Commissioners Inez Moore Tenenbaum, Robert Adler and Nancy Nord after a yet-to-be-scheduled swearing-in. *See Syracuse.com,* June 28, 2013; *Product Safety Letter,* July 1, 2013.

Collapsible Hampers Pose Potential Risk of Eye Injuries in Children

A recent **report** from the American Academy of Pediatrics (AAP) suggests that the number of penetrating eye injuries to children caused by collapsible cloth and wire-framed laundry hampers may be on the rise. Evidently, the embedded stiff wire spring contained in the hampers can become dangerous if the cloth frays and the wire is exposed. According to a news source, recent incidents involved an 11-year-old boy and 23-month-old girl who each had an eye punctured by such wires, requiring emergency surgery. These types of injuries can result in "poor visual outcomes and multiple vision-threatening complications," noted the study.

AAP suggested that parents receive a warning about the risks associated with the hampers. While the Consumer Product Safety Commission (CPSC), which has jurisdiction over this product, has not made an official statement, the agency is apparently "looking into incident reports of eye injuries related to the wire framing of laundry hampers," CPSC spokesperson Scott Wolfson said. *See Reuters Health,* July 1, 2013; *Bloomberg BNA Product Safety & Liability Reporter,* July 3, 2013.

Will Sequester's Budget Cuts Cause a Constitutional Crisis?

Contributing Editor Andrew Cohen writes in *The Atlantic* that federal judges are concerned about the effects of ongoing budget cuts to the judiciary and administration of justice in the United States. Known as the "sequester," the automatic, across-the-board cuts have been in effect for about one-third of a year, and a number of federal judges contend that if they continue into the next fiscal year, civil jury trials will come to an end, because there will be no funds to pay for them. Claiming that the federal judiciary's budget is already underfunded, judges appointed by both Democrats and Republicans claim that continuing congressional inaction on the budget "represents an assault by the legislative and executive branches upon core judicial functions" and will deprive Americans of their right to serve on and be served by juries. *See The Atlantic*, July 12, 2013.

New Wisconsin Law on Risk Contribution Applies Retroactively

Wisconsin Gov. Scott Walker (R) has signed into law an amendment that would clarify the legislature's intent that tort reforms, including limitations on the courts' ability to apply the "risk-contribution" theory, enacted in 2011 are applicable even to pending litigation. In 2005, the Wisconsin Supreme Court applied the theory, under which a claimant harmed by a substance may recover from a manufacturer of that substance even if unable to prove with certainty that the particular manufacturer made the substance that caused the claimant's injuries, to lead pigment manufacturers. The 2011 law, Wisconsin Act 2, was specifically crafted to correct the court's "improperly expansive application of the risk contribution theory of liability."

The 2013 amendment to Wisconsin Act 20, known as Motion #999, clarifies that the 2011 provision "applies to all actions in law or equity, whenever filed or accrued." According to a news source, a number of cases involving lead paint are pending in the courts, and it is expected that the law will be challenged. In a June 2013 memorandum, staff attorneys with the Wisconsin Legislative Council opined that the retroactive elements of Motion #999 "raise constitutional concerns." Among other things, the memorandum discusses cases finding retroactive legislation affecting vested rights unconstitutional. *See Wisconsin Legislative Council Informational Memorandum*, June 12, 2013; *Bloomberg BNA Product Safety & Liability Reporter*, July 8, 2013.

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ISO Product Safety Standard to Allow Component Part Tracing

A new standard adopted by the International Organisation for Standardization (ISO) will reportedly require that every item in a consumer product, including raw materials, components and subassemblies, be "traceable and carry a unique identifier that is labeled, marked or tagged at the source." The "Consumer Product Safety—Guidelines for Suppliers" standard (ISO 10377) is apparently intended to affect all suppliers in the supply chain and applies to all consumer products except foods, drugs and automobiles. The standard also addresses product safety by requiring record management and document control, calling for design improvements to reduce risks to tolerable levels and requiring hazard warnings and instructions to consumers. While ISO standards do not themselves carry the force of law, they are often adopted into national regulatory frameworks and can be considered state-of-the-art in a relevant industry. *See Manufacturing & Technology News*, July 11, 2013.

LEGAL LITERATURE REVIEW

Paul MacMahon, "Proceduralism, Civil Justice, and American Legal Thought," *University of Pennsylvania Journal of International Law* (forthcoming 2013)

Harvard Law School Climenko Fellow and Lecturer on Law Paul MacMahon considers why U.S. legal scholars focus largely on procedural issues and debates

while their British counterparts rarely consider such questions. Finding that part of the explanation lies in Americans' willingness to use private litigation to achieve regulatory ends and in the dispersion of civil justice authority among different actors, the author delves into the emergence of Legal Realism in the 1920s and 1930s as the source of "contemporary American proceduralism." According to MacMahon, "English legal scholars, in keeping with their more formal vision of law, continue to see procedure simply as the 'handmaid' of substantive law," while American lawyers learn early on "that procedure is just as worthy of intellectual attention as substantive law." This focus "reflects a distinctly American urge to transcend the conceptual structure of substantive legal doctrine, to understand the purposes and effects of law and legal institutions."

LAW BLOG ROUNDUP

Is Computer-Aided Content Analysis the Future of Legal Scholarship?

"By using content analysis methods, a researcher can more reliably and validly answer research questions potentially covering large numbers of legal documents." University of Kansas School of Law Associate Professor Corey Yung, blogging about an article applying computer-aided content analysis along with conventional human analysis to determine how briefs affect judicial opinion writing. The computer-coding techniques, including a comparison of similar words using the cosine similarity method and a count of brief citations used in the judicial opinions, apparently correlated strongly with the human coding, although the differences identified could help researchers refine their techniques, according to Yung.

Jotwell: Courts Law, July 16, 2013.

THE FINAL WORD

Law Professor Calls for Use of Checklists

After reading Atul Gwande's *The Checklist Manifesto*, which addresses how using "checklists can help eradicate simple errors in the increasingly complicated things that we do," University of Kentucky College of Law Assistant Professor Josh Douglas contends that nearly "every endeavor we undertake could benefit from a checklist. Law is no exception." Noting that they are regrettably underused, Douglas states, "Well-constructed checklists, when employed at pause points in a complex process, help to ensure that we do not allow our huge array of knowledge to cloud the routine but essential steps we must perform in a given procedure." This could include everything from deal making to brief writing. *See PrawfsBlawg*, July 9, 2013.

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UPCOMING CONFERENCES AND SEMINARS

DRI, Washington, D.C. – July 25-26, 2013 – "2013 DRI Class Actions Conference." Shook, Hardy & Bacon Class Actions & Complex Litigation Partners Tim Congrove and Jim Muehlberger will participate in this event. Congrove, who is also serving as program vice-chair, will moderate a panel of distinguished in-house counsel discussing "Inside and Out: A Wide-Ranging Discussion of Class Actions from the Client's Perspective." Muehlberger "will discuss the current state of issue classes, techniques for addressing them, and his experience in trying a case involving a Rule 23(c)(4) class" during a presentation titled "Making an Issue Out of It: The Trial of a 23(c)(4) Class." SHB is a conference co-sponsor. ■

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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 95 percent of our more than 440 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).