Shook, Hardy & Bacon L.L.P.

AUGUST 5, 2010

PRODUCT LIABILITY LITIGATION REPORT

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CALIFORNIA COURT RULES ON GOVERNMENT'S USE OF CONTINGENCY FEE LAWYERS IN PUBLIC NUISANCE LITIGATION

The California Supreme Court has determined, in the context of public-nuisance claims against the manufacturers of lead paint, that government prosecutors may hire private law firms on a contingency-fee basis to pursue the claims as long as the government lawyers retain the power to control and supervise the litigation. ***County of Santa Clara v. Atl. Richfield Co.*, No. S163681 (Cal., decided July 26, 2010)**.

Because the contingency-fee agreements at issue did not contain all of the provisions that the court will now require to ensure the requisite neutrality for attorneys prosecuting public-nuisance cases on the government's behalf, the court reversed an intermediate appellate court ruling and remanded for further proceedings. According to the court, "Assuming the public entities contemplate pursuing this litigation assisted by private counsel on a contingent-fee basis, we conclude they may do so after revising the respective retention agreements to conform with the requirements set forth in this opinion."

At a minimum, those requirements mandate (i) "that the public-entity attorneys will retain complete control over the course and conduct of the case"; (ii) "that government attorneys retain a veto power over any decisions made by outside counsel"; and (iii) "that a government attorney with supervisory authority must be personally involved in overseeing the litigation." The court also noted that the "unique circumstances of each prosecution may require a different set of guidelines for effective supervision and control of the case, and public entities may find it useful to specify other discretionary decisions that will remain vested in government attorneys."

The court examined a decision it rendered in 1985 that appeared to impose an absolute prohibition on contingency-fee agreements whenever a public entity was pursuing a public nuisance claim. In that case, which was filed against the owner of an adult bookstore, important First Amendment issues and the ability of a private citizen to pursue commercial activity were implicated. Potential criminal action was also apparently available in the matter. Because those concerns were not at issue in a case involving the past production and distribution of lead-based paint, illegal since 1978, and would not involve enjoining an ongoing business activity, the court concluded that a broad reading of its 1985 decision was not warranted.

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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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Shook, Hardy & Bacon Public Policy Attorneys **Victor Schwartz** and **Cary Silverman**, and Global Product Liability Partner **Kevin Underhill** served as co-counsel on an amicus brief filed on behalf of the Chamber of Commerce of the United States of America and the American Tort Reform Association.

ELEVENTH CIRCUIT CONSIDERS CAFA JURISDICTIONAL ISSUES IN CASE FILED FIRST IN FEDERAL COURT

The Eleventh Circuit Court of Appeals has determined that the federal courts lack jurisdiction to consider claims initiated in federal court under the Class Action Fairness Act (CAFA), if none of the plaintiffs allege an amount in controversy that satisfies the diversity jurisdiction requirement. ***Cappuccitti v. DirectTV, Inc.*, No. 09-00627 (11th Cir., decided July 19, 2010)**. The issue arose in a case alleging improper contract termination fees on behalf of a putative statewide class of plaintiffs. While the federal district court granted the defendant's motion to dismiss, it denied the defendant's motion to compel arbitration.

Noting that it had rendered a number of rulings on a variety of CAFA issues, the appeals court observed that most were raised in proceedings involving cases removed from state court. CAFA simplified "the removal of state court class actions to federal court by establishing only minimal requirements for removal." The issue before the court in this case involved "what jurisdictional requirements CAFA imposes on a putative class action originally filed in federal court."

As articulated by the court, those requirements include an aggregated amount in controversy exceeding $5 million, minimal diversity, claims filed under Federal Rule of Civil Procedure 23, and an allegation that more than 100 plaintiffs are within the proposed class. The court also found, "CAFA did not alter the general diversity statute's requirement that the district court have original jurisdiction 'of all civil actions where the matter in controversy exceeds the sum or value of $75,000' and is between citizens of different States."

Thus, the court ruled that "in a CAFA action originally filed in federal court, at least one of the plaintiffs must allege an amount in controversy that satisfies the current congressional requirement for diversity jurisdiction provided in 28 U.S.C. § 1332." To hold otherwise, said the court, would "essentially transform federal courts hearing originally filed CAFA cases into small claims courts, where plaintiffs could bring five-dollar claims by alleging gargantuan class sizes to meet the $5,000,000 aggregate amount requirement."

Because no single plaintiff in this action would be able to allege damages in excess of $480, the maximum termination fee imposed, the court ruled that the district court lacked subject matter jurisdiction over the case and also lacked the authority to consider the defendant's motion to compel arbitration. The court vacated the order denying that motion and remanded the matter "with the instruction that the district court dismiss it."

TENTH CIRCUIT DISMISSES TIRE FAILURE CLAIMS, FINDS PROFFERED EXPERT TESTIMONY UNRELIABLE

The Tenth Circuit Court of Appeals has affirmed a district court decision to exclude the plaintiffs' expert from testifying about the failure of a tire in a fatal vehicle accident and upheld the grant of defendant's motion for summary judgment. ***Cruz v. Bridgestone/Firestone N. Am. Tire, LLC*, No. 08-2242 (10th Cir., decided July 22, 2010)**. The expert opined that the tire was defective because the defendant failed to design it with a nylon cap ply, which the expert asserted would have stopped the tire's tread from separating.

The trial court found that the expert "had served several years as an international expert on tire failures and had extensively examined the tire," but (i) he had not performed any testing specifically related to his opinions and was not aware of "any testing on nylon caps vis-à-vis tire separation"; (ii) the expert had no scientific literature to support his opinion; and (iii) he conceded that no U.S. tire standard "suggested, much less required, the use of nylon cap plies in tires" when the tire at issue was manufactured. The court also referred to another court's refusal to allow this expert to testify about his nylon cap ply theory. The appeals court found nothing to show that the trial court had abused its discretion in excluding the testimony.

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FEDERAL COURT DISMISSES CLAIMS AGAINST PAINT MAKER FOR LACK OF CAUSATION EVIDENCE

A federal court in Florida has dismissed a lawsuit filed against a paint manufacturer, finding that plaintiffs would be unable to prove an essential element of their putative class claims of failure to warn, strict liability and violations of the state's deceptive and unfair trade practices law. *Gringauz v. The Sherwin-Williams Co.*, No. 09-60197 (U.S. Dist. Ct., S.D. Fla., decided July 23, 2010). The plaintiffs alleged that a homebuilder used exterior paint on the interior of their home and that chemicals in exterior paint "produce lingering odors and are known to cause bodily injury, medical infirmities, and property damage." Claiming that the defendant should have warned them of the dangers of using exterior paint indoors, the plaintiffs alleged economic losses from property damage and bodily injury.

The defendant moved for summary judgment, contending that the plaintiffs cannot meet their burden of proof on causation because they did not have an expert who could show that exposure to exterior paint caused their alleged injuries. The court agreed after discussing the plaintiffs' (i) unsupported assertions that material facts were disputed, (ii) non-responsive responses in opposition to defendant's motion and (iii) assertions that they had been precluded by the defendant from conducting discovery.

JURY RETURNS VERDICT FOR MANUFACTURER IN BELLWETHER ATV DESIGN DEFECT CASE

A jury in California has reportedly found that Yamaha Motor Corp. USA was not liable in one of more than 170 consolidated cases alleging that the company's Rhino® all-terrain vehicle (ATV) is dangerously unstable. The verdict apparently followed four months of testimony in the first bellwether case to go to trial in California. Dozens of similar suits are reportedly pending in other state and federal courts, and mixed verdicts have been rendered in those cases already tried. A Georgia jury apparently awarded more than $300,000 to an injured plaintiff, while a Texas jury cleared the company of any wrongdoing. According to a press report, Yamaha suspended sales of the ATV in April 2009 and agreed to provide free repairs to those who had purchased it. *See Product Liability Law 360*, July 27, 2010.

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ALL THINGS LEGISLATIVE AND REGULATORY

Federal Bill Aims to Reduce Exposure to Harmful Chemicals in Cosmetics

Representatives Jan Schakowsky (D-Ill.), Ed Markey (D-Mass.) and Tammy Baldwin (D-Wis.) have introduced the Safe Cosmetics Act of 2010 (H.R. 5786) to "close the major loopholes in federal law that allow companies to use virtually any ingredient in cosmetics and personal care products—even chemicals that are known to damage human health and the environment," according to a July 21, 2010, press release issued by Schakowsky.

"Harmful chemicals have no place in the products we put on our bodies or on our children's bodies," Schakowsky was quoted as saying. "Our cosmetics laws are woefully out of date—manufacturers aren't even required to disclose all their ingredients on labels, leaving Americans unknowingly exposed to harmful mystery ingredients." Baldwin elaborated by saying that "scientists are increasingly linking chemicals in personal care products to cancer, learning disabilities and other widespread health problems in our society."

"Our cosmetics laws are woefully out of date—manufacturers aren't even required to disclose all their ingredients on labels, leaving Americans unknowingly exposed to harmful mystery ingredients."

The legislation would require, among other matters, that (i) the Food and Drug Administration (FDA) establish a list of ingredients banned from use in cosmetics; (ii) package labels list each ingredient, including fragrance components; (iii) post-market random testing be conducted for pathogens or contaminants in cosmetics; (iv) market restrictions be imposed on products that fail to meet the proposed safety standards; (v) cosmetic makers register annually with FDA and provide ingredient statements to the agency for every product manufactured; (vi) cosmetic manufacturers, packagers and distributors report any serious adverse health effects to FDA; (vii) companies distributing cosmetics for salon use provide information on the products' health hazards as listed by authoritative bodies or in scientific studies; and (viii) states be allowed to set more stringent standards.

CPSC Requests Comments on Lead Limits in Certain Children's Products

The Consumer Product Safety Commission (CPSC) has **issued** a notice requesting comments and information on the "technological feasibility" of manufacturers meeting a 100 parts per million (ppm) lead content limit for certain children's products.

The Consumer Product Safety Improvement Act requires that as of August 14, 2011, children's products primarily intended for those ages 12 years old and younger not contain more than 100 ppm unless CPSC determines it is not technologically feasible for them to meet the requirement. The current allowable limit is 300 ppm.

For products and materials that currently meet the 100 ppm lead limit, CPSC requests (i) test data on products or materials such as metals, plastics, glass, or recycled materials; (ii) industrial strategies or devices that have enabled manufactures to comply with the limit; and (iii) the impact the content limit has had on the "functional or safety requirements specified for the product or product category."

For products and materials that currently to do not meet the 100 ppm lead limit but do meet the 300 ppm limit, information is requested on (i) whether the products or materials could become compliant through the use of different products or materials; (ii) strategies or devices, alternative or best practices, or other operational changes that could enable manufacturers to become compliant; (iii) the lowest lead content limit under 300 ppm that is technologically feasible; and (iv) the dates by which the products or materials could meet the 100 ppm lead limit. Written comments must be submitted by September 27, 2010. *See Federal Register,* July 27, 2010.

CPSC Reopens Comment Period on Proposed Rule Regarding Safety Standards for Bassinets, Cradles

The Consumer Product Safety Commission (CPSC) has **reopened** the comment period for its proposed rule that aims to reduce injury risks by requiring more stringent safety standards for bassinets and cradles. Comments must be received by September 10, 2010.

After publishing a notice of proposed rulemaking in the *Federal Register* on April 28, 2010, CPSC staff met with various parties regarding product safety testing methods for bassinets and cradles described in the proposal. CPSC extended the comment period to allow adequate time for summary review of the meetings placed into the administrative record. *See Federal Register,* July 20, 2010.

LEGAL LITERATURE REVIEW

Mark Behrens, "Asbestos Litigation Screening Challenges: An Update," *Thomas M. Cooley Law Review*, 2009

Published in the most recent issue of the *Thomas M. Cooley Law Review*, this article by Shook, Hardy & Bacon Public Policy Partner **Mark Behrens** details how defendants have finally begun to turn the asbestos-litigation tide. It has taken persistent efforts

to expose the unreliable diagnoses underlying the claims of thousands of nonmalignant injury claims currently clogging court dockets across the nation. Describing several specific "litigation physicians and screening companies" whose diagnoses have been discredited in state and federal courts, Behrens notes how judges and defense lawyers have "set a precedent that will help end the mass-screening abuses of the past."

Lester Brickman, "Anatomy of an Aggregate Settlement: The Triumph of Temptation over Ethics," *George Washington Law Review* (forthcoming 2011)

In this article, Benjamin N. Cardozo School of Law Professor Lester Brickman discusses an aggregate settlement reached in a case arising out of an oil refinery explosion in 1989 to prove his thesis that the massive fees which can be obtained in non-class aggregate settlements are behind violations of the ethical rule requiring lawyers to obtain each client's informed consent to his or her share of a fixed settlement. In this respect, Brickman disagrees with others trying to fix the problem by changing the use of the all-or-nothing settlement and allowing advance client waivers in non-class aggregative litigation. Brickman contends that when "money talks, ethics walks." He would rather see rules that significantly limit lawyers' fees and courts that enforce violations of professional ethics with meaningful monetary sanctions.

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David Schwartz & Lee Petherbridge, "The Use of Legal Scholarship by the Federal Courts of Appeals: An Empirical Study," Working Paper (July 2010)

Studying reported decisions from the U.S. circuit courts of appeals over the past 59 years, law professors David Schwartz and Lee Petherbridge have found that some judges' criticisms about the usefulness of law review articles notwithstanding, the federal courts have markedly increased their reliance on legal scholarship in recent years. While Chief Justice John Roberts has been quoted as saying the articles are not "particularly helpful for practitioners and judges," the findings reported in this article suggest "that easy conclusions about the meaning of legal scholarship to judges may be difficult to reach." The authors speculate that ease of access to law review articles with the advent of online databases may have contributed to their increasing use. They also apparently found that ideology may play a role, noting their data show that "the more liberal a circuit is, the more likely that its reported decisions cite to legal scholarship."

LAW BLOG ROUNDUP

Suppression of Pro-Corporate Findings?

"A new report in the *WSJ* quotes a retiring NHTSA [National Highway Traffic Safety Administration] official as saying higher-ups are refusing to release the results of the agency's staff investigation into charges of Toyota sudden acceleration, because those findings are not unfavorable enough toward the automaker." Cato Institute

Senior Fellow Walter Olson, discussing the possibility that sweeping federal auto safety laws could be adopted without a full public airing of all its provisions and despite evidence apparently favorable to the automaker.

Overlawyered.com, July 31, 2010.

Asbestos-Related Exposures Expected to Continue in United States and Abroad

"From the perspective of countries like China and India, asbestos is the next asbestos." George Washington University School of Public Health's Department of Environmental and Occupational Health Research Associate Liz Borkowski, blogging about a nine-month investigation into the global trade in asbestos that documents the continued use of asbestos around the globe. As Borkowski notes, people concerned about emerging public health threats often warn that they might be "the next asbestos," that is, something not widely recognized as dangerous until already in widespread use. "But that suggests that the asbestos threat has come and gone," she writes, "In the US, a lot of people probably think it's banned, but it's still used in brake pads and roofing materials. We're not done with asbestos, or asbestos-related diseases and deaths."

The Pump Handle, July 27, 2010.

The Law's "Big Problem"

"There is a huge, obvious problem with the law. The bar studiously ignores it. Even the legal academy generally pretends it's not there. It's so large as to be beyond overwhelming." University of North Dakota School of Law Professor Eric Johnson, referring to the complexity and time-consuming nature of the U.S. system of justice. He blames it on rules, procedures and substantive laws created in "an era of quill and parchment," and notes that "[t]he cost of a civil dispute scales directly with the dollar amount on the line." Johnson calls for his fellow law professors to take a hard look at the problem and do something about it.

PrawfsBlawg, July 28, 2010.

THE FINAL WORD

Knowledge Gaps Impede Assessment of Potential Chemical Health Risks

The recent recall of millions of boxes of Kellogg's cereals due to strange odors emanating from the packaging has reportedly highlighted significant gaps in industry and government data about the potential impact of certain chemicals on human health. According to a news source, federal regulators, including the Food and Drug Administration and the Environmental Protection Agency, simply have no data on the suspected chemical at issue in the recall, 2-methylnaphthalene, despite requests for information from the industry for more than 15 years. Some are calling

for an overhaul of the nation's oversight laws because no law requires companies to test chemicals for safety. Bills currently pending in Congress would require proof of safety before companies can use new chemicals, but some proposed restrictions are raising concerns that they will hamper innovation and competition.

A minimal scientific review on 2-methylnaphthalene is evidently in the files of the Agency for Toxic Substances and Disease Registry (ASTDR). It apparently conducted a literature review in 2005 and concluded that nothing is known about exposure to the chemical through food. "You are not likely to be exposed … eating foods or drinking beverages" and could be exposed only "if you live near a hazardous waste site," says ASTDR's Website. A packaging expert speculated that the chemical may have formed in the cereal boxes when too much heat was applied in attaching a foil lining to the paper bag or because the adhesive's composition was incorrect. While an FDA official said that contaminants rarely migrate from packaging into foods, in this case the cereal had an odor and a taste and purportedly caused nausea and diarrhea in some individuals who consumed it. *See The Washington Post*, August 2, 2010.

UPCOMING CONFERENCES AND SEMINARS

The Missouri Bar/Missouri Judicial Conference, Columbia, Missouri – September 29-October 1, 2010 – "2010 Annual Meeting." Shook, Hardy & Bacon eDiscovery, Data & Document Management Practice Co-chair Denise Talbert will co-present a session titled "E-Discovery Roadmap – 2010 and Beyond," a continuing legal education track program. Talbert will discuss emerging best practices, cost efficiencies, and competencies in managing and conducting e-discovery. ■

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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).