Shook, Hardy & Bacon L.L.P.

Product Liability Litigation Report

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TEXAS SUPREME COURT PROTECTS UPSTREAM SUPPLIER FROM INDEMNITY IN DISPOSABLE LIGHTER CASE

The Texas Supreme Court has ruled that the seller of a defective product is not entitled to indemnity from an upstream supplier other than the manufacturer under statutory law, but may be entitled to indemnity if the upstream supplier was responsible for the product defect. ***SSP Partners & Metro Novelties, Inc. v. Gladstrong Investments (USA) Corp.*, No. 05-0721 (Tex., decided November 14, 2008)**.

A child was killed in a fire allegedly started by a disposable butane lighter with a defective child-resistant mechanism. The parents settled their claims with the seller, SSP Partners, which sought indemnity from Gladstrong USA, as the manufacturer, under a statute allowing such indemnification. According to the court, Gladstrong USA imported, promoted and distributed the lighters in the United States for its parent, Gladstrong Hong Kong, which actually designed and patented the lighters' safety wheel and instructed another Chinese company in their manufacture.

The trial court granted Gladstrong USA's motion for summary judgment, and an intermediate appellate court affirmed finding that an "apparent manufacturer," one who puts out, as its own product, chattel manufactured by another," could not be liable for statutory indemnity. The state supreme court affirmed but for a different reason.

According to the court, "Gladstrong USA imports lighters; it has nothing to do with making them. We have no difficulty concluding that Gladstrong USA was not a manufacturer for purposes of statutory indemnity." The court rejected SSP Partners' argument that Gladstrong USA was liable for statutory indemnity because it and Gladstrong Hong Kong operated as a "single business enterprise." This, said the court, would require it to disregard the corporate structure and impose one corporation's obligations on another. The court also rejected SSP Partners' attempt to impose liability on an "apparent manufacturer," finding that the indemnity obligation created by statute is limited to manufacturers, "a defined term."

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Because the issue of Gladstrong USA's potential indemnity liability under common law had not been addressed by the lower courts, the court remanded the case to allow SSP Partners to show that Gladstrong USA was responsible for the defective condition of the lighters. The court noted that common law indemnity cannot be predicated merely on facilitating the entry of a defective product into this country, but that an "active *wrongdoer* may be made to indemnify one who has been subjected to, or is sought to be held liable for, damage through his *wrong*."

U.S. SUPREME COURT TO DETERMINE WHERE TO DRAW LINE ON JUDICIAL BIAS

The U.S. Supreme Court has agreed to hear an appeal from West Virginia asking whether a state supreme court justice's failure to recuse himself from participating in a financial supporter's case violated the Due Process Clause of the U.S. Constitution. *Caperton v. A.T. Massey Coal Co.*, No. 08-22 (U.S., certiorari granted November 14, 2008). The dispute arises out of a case involving a jury award of $50 million against a Massey Energy affiliate for fraud. While preparing to appeal the verdict, Massey Energy's chief executive officer Don Blankenship contributed more than $3 million to a 2004 judicial campaign that resulted in the election of West Virginia Supreme Court Justice Brent Benjamin, who twice provided the needed majority vote to overturn the jury's verdict despite being asked to excuse himself from hearing the case.

Former U.S. Solicitor General Theodore Olson, representing the plaintiffs, reportedly claimed in briefs filed with the U.S. Supreme Court, "The improper appearance created by money in judicial elections is one of the most important issues facing our judicial system today. A line needs to be drawn somewhere to prevent a judge from hearing cases involving a person who has made massive campaign contributions to benefit the judge." A *New York Times* editorial, printed before the U.S. Supreme Court agreed to hear the appeal, stated, "Situations like the Massey Energy case create an unmistakable impression that justice is for sale." Benjamin has apparently defended his decision by asserting, "Due process … requires recusal only in those rare cases wherein a judge or justice has a 'direct, personal, substantial (or) pecuniary interest' in the outcome of the case."

Thirty-nine states elect their judges. A decision in the case, not expected until after oral argument in 2009, could provide needed guidance in a debate about judicial integrity that has drawn increasing attention from the bench and bar, including former U.S. Supreme Court Justice Sandra Day O'Connor. *See The Charleston Gazette*, November 14, 2008; *Pittsburgh Post-Gazette*, November 15, 2008; *Huntington News*, November 18, 2008.

OKLAHOMA SUPREME COURT AGAIN INVALIDATES PORTION OF 2003 TORT-REFORM LAW

The Oklahoma Supreme Court has determined that part of a 2003 tort-reform statute, which deems dismissed any medical negligence lawsuit where the defendant has not been served with a summons within 180 days of

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the filing of the lawsuit, is unconstitutional as a special law. ***Woods v. Unity Health Ctr., Inc.*, No. 105737 (Okla., decided November 4, 2008)**. In a brief and unanimous opinion, the court found that the statute singled out medical negligence plaintiffs for different procedural treatment by denying them prior notice of dismissal proceedings, which notice is accorded "the ordinary plaintiff." Remanding the case to the trial court for further proceedings, the supreme court relied on a previous decision in which it invalidated a tort-reform provision that required a medical malpractice claimant to attach to her petition an affidavit of merit. In that case, the court concluded that the law improperly set "aside a subset of negligence plaintiffs for different procedural and evidentiary treatment based on the type of action" they pursued.

SUIT ALLEGES VICTORIA'S SECRET LINGERIE CAUSED RASHES, SKIN CONDITIONS

A class action lawsuit filed in the U.S. District Court for the Southern District of Florida has reportedly accused Victoria's Secret Stores, LLC and its parent company, Limited Brands, Inc., of negligently manufacturing and selling undergarments that allegedly caused skin rashes, hives and other symptoms in some wearers. Plaintiffs' lawyers have apparently hypothesized that their clients experienced allergic reactions to textiles containing formaldehyde, which some garment manufacturers use as an anti-wrinkling agent.

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Although Victoria's Secret has since stated that it does not use formaldehyde in any of its bras, the complaint charges the lingerie retailer with breach of express and implied warranties, negligence, strict liability, fraudulent concealment, fraudulent misrepresentation, and violations of Florida Deceptive and Unfair Trade Practices Act. The plaintiffs are apparently seeking damages in excess of $25,000, treble damages, disgorgement of profits from the sale of intimate apparel, and legal fees.

An earlier class action has made similar claims in filings before the U.S. District Court for the Northern District of Ohio. Initiated in August 2008, the lawsuit alleges that bras sent to labs for analysis tested positive for formaldehyde. "It may not be something [Victoria's Secret] is specifying to put into their bras, but somehow it's making its way into the manufacturing process," one attorney involved in the Ohio litigation was quoted as saying. *See ABA Journal* and *The New York Post,* November 12, 2008; *Product Liability Law 360,* November 18, 2008.

ALL THINGS LEGISLATIVE AND REGULATORY

Legal Commentator Predicts Obama Administration Will Not Roll Back Tort Reforms

Benjamin N. Cardozo School of Law Professor Anthony Sebok contends in a recent *FindLaw* article that the Obama administration and Democratic Congress will not substantially roll back tort reforms achieved during the Bush administration. While he predicts that "the tort reform movement will be stopped

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in its tracks at the federal level," Sebok notes that Obama has supported caps on damages in the past and co-authored an article with Hillary Clinton in the *New England Journal of Medicine* "recommending an alternative dispute resolution mechanism for medical malpractice claims—a solution that could not easily be characterized as favorable to either the plaintiffs' or the defense bar."

Sebok also believes that Obama will not stand in the way of Congress if Senate Democrats wish to roll back existing tort reforms, but given that the only real tort reform enacted in the past eight years was the Class Action Fairness Act, "there is not much for Congress to undo." He suggests that the Senate may want to "tip the playing field more in favor of plaintiffs" by adopting legislation that would repeal the U.S. Supreme Court's rulings on federal preemption in drug cases. The Senate may also, according to Sebok, take action on mandatory arbitration clauses, which the sellers of goods and services impose on consumers to preclude them from bringing class action lawsuits. Sebok concludes by suggesting that "when it comes to civil justice issues, interested parties should focus upon watching the Senate, not the White House." *See FindLaw*, November 18, 2008.

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Federal Judicial Center Issues Preliminary Phase II CAFA Report

As part of an ongoing project to assess the impact of the Class Action Fairness Act of 2005 (CAFA) on the federal courts, the Federal Judicial Center has issued a preliminary **Phase Two report** that examines diversity class actions filed in the two years preceding the law's effective date. Phase One examined diversity class actions filed in or removed to the federal courts after CAFA's effective date. "Future reports will compare [the Phase Two] findings—to the extent that meaningful comparisons are possible—with prior empirical research and discuss any apparent differences."

The report's principle findings, based on 231 diversity class actions brought to disposition in the federal district courts, include (i) "Plaintiffs filed motions to certify a class in fewer than one in four class actions"; (ii) "Plaintiffs filed motions to remand in 75% of the removed cases and judges granted remand motions almost 70% of the time, resulting in the remand of more than half of the removed cases"; (iii) "Voluntary dismissal was the most frequent disposition of cases not remanded, occurring 38% of the time"; (iv) "One in five cases was terminated by the court granting a dispositive motion"; and (v) "Judges approved all twenty-one proposed class settlements; in three cases approval came only after modification of the settlement."

Among the report's conclusions are that "There was relatively little motions activity in the typical case, and the majority of cases not remanded to state court were voluntarily dismissed. Most plaintiffs did not move to certify a class. But all class actions in which a class was certified, whether for litigation or settlement purposes, ended with class settlements."

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Consumer Product Safety Commission Publishes Final Rules on ATVs and Product Certifications

The Consumer Product Safety Commission (CPSC) has issued a **final rule** for four-wheel all-terrain vehicles (ATVs) that, among other matters, regulates their maximum speed and how the brakes are configured. The Consumer Product Safety Improvement Act of 2008 required the agency to adopt the voluntary American National Standard Institute (ANSI) standard for ATVs as a mandatory consumer product safety standard, and this notice fulfills that direction. The standard, added as part 1429 to Title 16 of the Code of Federal Regulations (CFR), takes effect April 13, 2009. Before that date, ATV manufacturers and distributors must file an action plan with the CPSC describing how they will implement the rules. Each ATV "shall bear a label certifying [compliance with the ANSI standard] and identifying the manufacturer, importer or private labeler and the ATV action plan to which it is subject."

The CSPC has also issued a **final rule** requiring manufacturers, importers and private consumer product labelers to "certify that the products comply with all applicable [Consumer Product Safety Act] consumer product safety rules and similar rules, bans, standards and regulations under any other laws administered by the Commission by issuing a certificate that accompanies the product and can be furnished to certain parties." The certification "must be based on a test of each product or upon a reasonable testing program. Certificates and certification for certain children's products must be based on testing by third party laboratories whose accreditation to do so has been accepted by the Commission." The rule, codified at part 1110 of CFR Title 16, applies to all consumer products under CSPC's jurisdiction manufactured on or after November 12, 2008. Electronically accessible certification will apparently satisfy the accompaniment requirement.

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FDA Scientists Accuse Managers of Corrupting Medical Device Reviews; Congress Investigates

The House Energy and Commerce Committee has initiated an investigation into reports that top managers at the U.S. Food and Drug Administration's Center for Devices and Radiological Health (CDRH) "corrupted and interfered with the scientific review of medical devices." In an October 24, 2008, letter to committee chair John Dingell (D-Mich.), FDA scientists warned of "serious misconduct" that reached "the highest levels of CDRH management including the Center Director and Director of the Office of Device Evaluation."

The employees alleged that managers at CDRH "ordered, intimidated and coerced FDA experts to make safety and effectiveness determinations that are not in accordance with scientific regulatory requirements, to use unsound evaluation methods, and accept clinical and technical data that is not scientifically valid nor obtained in accordance with legal requirements." In addition, these managers "ordered, intimated and coerced FDA experts to modify their scientific review, conclusions and recommendations in violation of the law," according to the letter, which documented purported "reprisals" taken against employees who reported "critical concerns."

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"The allegations are deeply concerning, and we intend to uncover whether any FDA activity has compromised the health and safety of America [sic] consumers," stated Dingell in a November 17, 2008, press release, noting that "Although the FDA has launched its own investigation into this matter, no corrective action has been taken." Citing "compelling evidence" offered by the letter writers, the House committee has launched its inquiry with the intention of learning what actions FDA "plans to take to ensure the integrity of the medical device approval process and prevent retaliation against the scientists who blew the whistle on these activities." *See Bloomberg.com,* November 17, 2008.

LEGAL LITERATURE REVIEW

Gideon Parchomovsky & Alex Stein, "Torts and Innovation," *Michigan Law Review*, 2008

This article, co-authored by professors of law from the University of Pennsylvania and Cardozo Law School, discusses how tort law principles can have a hidden cost in the form of suppressing innovation. They explain how standards of care and presumptions generally focus on custom as a benchmark against which a defendant's conduct is measured and claim that this approach "works against innovators and in favor of users and producers of conventional technologies." They suggest that two possible reforms could rectify this "distortionary effect."

"First, policymakers can make tort law more welcoming to innovation by eliminating the privileged status of custom and moving to a pure cost-benefit system." Because "the social value of innovation is virtually limitless," the authors believe this approach will effectively balance the costs in a given case in a way that adherence to custom cannot. Recognizing that "a wholesale abolition of the custom rules" may not be palatable, however, the authors also propose keeping the custom rules, but granting "certain innovations, approved by special boards of industry experts, the same privileged status as enjoyed by custom." The article concludes, "It is possible to benefit from the deterrent effect of tort liability on wrongdoers without paying a significant price in the form of forgone or distorted innovation."

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LAW BLOG ROUNDUP

Classic Case of How Not to Practice Law

"Two bigshot Louisiana trial lawyers will be permanently disbarred if the Louisiana Supreme Court accepts the 'blistering' recommendation of the Louisiana Attorney Disciplinary Board. The Board's full recommendation … gives us an inside look at how personal injury law firms often operate as business-like settlement mills, putting their own financial interest ahead of their clients'." Legal reform activist and blogger Dan Pero, discussing a business model adopted by a Baton Rouge law firm that had nonlawyers managing personal injury cases, from intake through settlement, on a commission basis.

American Courthouse Blog, November 13, 2008.

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No-Fault Approach to Vaccine Injury Compensation Questioned

"Vaccine Program: A Failure?" Western New England School of Law Associate Professor William Childs, blogging about the November 18, 2008, speech by the woman who co-founded the National Vaccine Information Center, which worked with Congress to establish the Vaccine Injury Compensation Program. Barbara Loe Fisher explained that the program was set up in recognition of the need for pharmaceutical companies to make childhood vaccines without product liability risks and for parents to have access to a no-fault compensation alternative to civil litigation.

Fisher claimed that the federal agencies responsible for administering the program have so restricted those eligible to receive compensation that (i) "almost no health condition qualifies as a reason not to vaccinate, placing many more vulnerable children at higher risk for suffering vaccine reactions"; and (ii) the program "has turned into a nightmare for thousands of families with vaccine injured children, who have been denied federal compensation." She called the program "a failed experiment in tort reform that should be repealed."

Tort Profs Blog, November 24, 2008.

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THE FINAL WORD

Study Links Hairspray Phthalates to Male Birth Defect

A British study has claimed that women with workplace exposure to hairspray were two- to three-times more likely to give birth to a son with the genital birth defect hypospadias. **Gillian Ormond, et al., "Endocrine Disruptors in the Workplace, Hair Spray, Folate Supplementation, and Risk of Hypospadias: Case-control Study," *Environmental Health Perspectives*, November 20, 2008**. Researchers interviewed the mothers of 471 children treated for hypospadias, asking them about their folate supplementation, vegetarianism and occupational exposure to chemicals during pregnancy. The study allegedly showed that mothers exposed to hairspray in the workplace during the first trimester had more than twice the risk of bearing a son with hypospadias.

The authors suggested that the phthalates in hairspray could "play a role in hypospadias" by acting as anti-androgenic endocrine disruptors. The study also found no support for previous claims linking vegetarianism to this birth defect, but noted that pregnant women who took folate supplements decreased the risk of hypospadias by 36 percent. "Further research is needed to understand better why women exposed to hairspray at work in the first 3 months of pregnancy may have increased risk of giving birth to a boy with hypospadias," said Professor Paul Elliot of the Department of Epidemiology and Public Health at Imperial College London. *See UPI.com* and *Imperial College London Press Release,* November 21, 2008.

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UPCOMING CONFERENCES AND SEMINARS

American Conference Institute, New York, New York – December 9-11, 2008 – "13th Annual Drug and Medical Device Litigation." Shook, Hardy & Bacon Pharmaceutical & Medical Device Litigation Partner **Marie Woodbury** will discuss "Successfully Asserting the Preemption Defense Post-*Riegel* and in Anticipation of *Levine*," and International Litigation and Dispute Resolution Partner **Simon Castley**, who is managing partner of SHB's London office, will serve on a panel to consider "Coordinating the Proliferation of Mass Tort Litigation Outside the U.S.: International Class Action and Product Liability Litigation Trends."

American Bar Association, Phoenix, Arizona – April 2-3, 2009 – "2009 Emerging Issues in Motor Vehicle Product Liability Litigation." Shook, Hardy & Bacon Tort Partner **Frank Kelly** joins a distinguished faculty to serve on a panel discussing "The Science Behind the Sentiment: Understanding Punitive Damages in an Era of Anti-Corporate Bias." CLE credit is available for this program, which is presented by the ABA's Tort Trial & Insurance Practice Section; Products, General Liability and Consumer Law Committee and Automobile Law Committee.

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).

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