Shook, Hardy & Bacon L.L.P.

FEBRUARY 18, 2010

PRODUCT LIABILITY LITIGATION REPORT

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NEW JERSEY SUPREME COURT ADOPTS STREAM-OF-COMMERCE JURISDICTION DOCTRINE; ALLOWS PRODUCTS CLAIM TO PROCEED AGAINST UK MACHINE MAKER

The New Jersey Supreme Court has, by a narrow 3-2 majority, determined that the state's courts have jurisdiction over a British manufacturer that had no presence or minimum contacts in the state but sold its goods in the United States through an Ohio distributor. ***Nicastro v. McIntyre Machinery Am., Ltd.*, No. A-29-08 (N.J., decided February 2, 2010)**. The case was remanded to the trial court for further proceedings.

To address legal claims within the context of a "contemporary international economy," where "trade knows few boundaries," the court articulated a "stream-of-commerce doctrine of jurisdiction": "A foreign manufacturer will be subject to this State's jurisdiction if it knows or reasonably should know that through its distribution scheme its products are being sold in New Jersey." The issue arose in a case involving an allegedly defective recycling machine, used to cut metal, that severed four of the plaintiff's fingers.

According to the majority, the defendant knew or should have known its machine would be purchased by a New Jersey consumer and cannot make a compelling case that defending a product-liability action in the state would be unfair. The court determined that its stream-of-commerce doctrine would be limited to product-liability actions, finding it unsuitable for other types of cases, such as contract, in which the "minimum contacts" doctrine is applied. Two dissenting justices criticized the majority's approach, claiming that it "stretches our notions about due process, and about what is fundamentally fair, beyond the breaking point."

DELAWARE COURT REFUSES TO APPLY LAWS OF MEXICO TO SUV ROLLOVER CASE

A Delaware superior court has denied defendants' motion to apply Mexican laws to a tire defect action arising out of a rollover accident that occurred in Mexico. *Cervantes v. Bridgestone/Firestone N. Am. Tire Co.. LLC*, No. 07C-06-249 (New Castle County Superior Court, Delaware, decided February 8, 2010). The accident allegedly involved a Ford Explorer equipped with a recalled Firestone tire. The plaintiff asserted claims of negligent design and manufacturing and failure to warn.

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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The court detailed the various U.S. jurisdictions involved in the litigation, including the defendants' places of business and manufacture and the location of tests conducted on the tire at issue, as well as the location of the original recall, which took place after an evaluation by a U.S. federal agency. The plaintiff was a Mexican resident and the accident happened there.

Applying the *Restatement (Second) Conflict of Laws* § 145 to determine which law should apply to the case, the court determined (i) the place of injury was fortuitous; (ii) none of the conduct allegedly causing injury occurred in Mexico; (iii) the defendants were incorporated in Delaware; and (iv) the parties' relationship was centered in Delaware, where the suit was filed. According to the court, all of these factors weighed in favor of applying U.S. law. In this regard, the court stated, "a foreign plaintiff has come to the U.S., specifically the defendants' parent state, in order to hold defendants accountable for alleged wrongful conduct which occurred solely in the U.S. It therefore does not offend fundamental fairness to allow for the suit to proceed under United States law."

NINTH CIRCUIT INVALIDATES CLASS ACTION WAIVER PROVISION IN COMPUTER DEFECT CASE

The Ninth Circuit Court of Appeals has determined that provisions in a computer sales agreement are invalid and ordered that product defect claims under the agreement be pursued in federal district court. ***Omstead v. Dell, Inc.*, No. 08-16479 (9th Cir., decided February 5, 2010)**. The agreement, which stated that it was governed by Texas law, contained a class action waiver clause and required that any claims be submitted to arbitration.

The plaintiffs brought a putative class action in a California federal court against the computer manufacturer, asserting various products-related claims under California law. A federal district court granted the defendant's motion to stay proceedings and compel arbitration, and, when plaintiffs refused to comply with the arbitration order contending that the arbitration forum mandated by the agreement was biased against consumers, the court dismissed the action for failure to prosecute.

According to the appeals court, the circumstances did not justify a finding that the plaintiffs failed to prosecute their action. They had apparently filed their claims while a similar action raising similar issues was pending before the Ninth Circuit and stated in a number of court filings that they were not refusing to prosecute their claims, but rather were "refusing to arbitrate them in a manner which … would be futile." They would have been unable to seek review of an adverse arbitration award and ran the risk of forfeiting potentially meritorious claims if they voluntarily dismissed their claims with prejudice and then sought appellate review of the arbitration order. The Ninth Circuit decided to construe the dismissal as a voluntary dismissal with prejudice and considered whether the case should have been ordered to arbitration.

The court concluded that it should not have been, finding the sales agreement a contract of adhesion with an unconscionable choice-of-law provision that would have run counter to California's view that class action waivers are invalid. The court also determined that because the class action waiver was central to the arbitration provision, the entire arbitration provision was unenforceable.

TOYOTA RECALL SPAWNS PRODUCTS LITIGATION AND SHAREHOLDER ACTIONS

Soon after Toyota Motor Corp. announced it was recalling millions of cars for unexplained acceleration and braking problems, the barrage of litigation against the company began in federal and state courts throughout the United States. Early claims involved traditional products-related theories. And now, shareholder litigation under the Securities Exchange Act has been filed in a California federal court. *Stackhouse v. Toyota Motor Corp.*, No. 2:10-cv-00922 (U.S. Dist. Ct., C.D. Cal., W. Div., filed February 8, 2010).

Seeking to represent a class of claimants, the named plaintiffs allege that the defendants "issued materially false and misleading statements regarding the Company's operations and its business and financial results and outlook." They allege that the false statements caused Toyota's securities to trade at artificially inflated prices and that they paid artificially inflated prices for the company's securities and would not have purchased them "at the prices they paid, if at all, if they had been aware that the market prices had been artificially and falsely inflated." *See The National Law Journal*, February 9, 2010.

COMMISSION CENSURES JUDGE FOR ORDERING ATTORNEY FEES PAID IN GIFT CARDS

The California Commission on Judicial Performance has reportedly censured a now-retired superior court judge for requiring a defendant to pay plaintiffs' attorney fees in $10 gift cards. While temporarily substituting for another judge, Los Angeles Superior Court Judge Brett Klein presided over a proposed mediated settlement that called for the defendant, a women's clothing store, to issue $10 store vouchers to plaintiff class members, as well as pay $2,500 in cash to the lead plaintiff and $125,000 in attorney fees and costs to class counsel. But Klein apparently altered the proposed settlement without notice during the January 16, 2009, hearing, stipulating that the lead plaintiff would receive 250 store coupons valued at $10 and that the attorneys would receive 12,500 such coupons paid out over 12 months. He then forwarded a copy of the settlement to the *Metropolitan News-Enterprise,* telling reporters that the unusual attorneys' fees mirrored the restitution offered to their clients. A brief summary of the judge's action appeared in the February 12, 2009, issue of this Report.

The commission has since censured Klein for engaging "in a pattern of sarcasm and improper remarks toward the attorneys," noting that he had been publicly admonished in the past for "displaying bias and embroilment." The disciplinary decision further criticized the judge for abusing his authority, abandoning his role as neutral arbitrator and grandstanding to the press. "His conduct also reflects a failure to be patient, dignified and courteous to those appearing before him," concluded the commission, which also barred him from presiding over future court cases. *See ABA Journal,* February 2, 2010.

LAW SCHOOL SCHOLARS TO PRESENT PROGRAM ON AGGREGATE LITIGATION

George Washington University Law School will be **hosting** a conference of leading academics who will consider issues raised by aggregate litigation. Titled "Aggregate Litigation: Critical Perspectives," the event will take place at the law school on March 12, 2010. Among those discussing issues such as class certification, class-action settlements, abandoned claims, non-class aggregation of claims, and attendant ethical issues are renowned scholars and law professors Richard Nagareda, Linda Mullenix, Samuel Issacharaoff, Judith Resnick, Robert Bone, and Lester Brickman.

According to promotional materials for this event, "aggregation poses problems." It can skew outcomes, concentrate power in the parties, lawyers and courts that handle aggregate claims, and raise "serious questions about the institutional competence of courts to resolve what are often intractable social or political controversies." Among the specific questions that will be considered are (i) "What is the optimal level of aggregation?"; (ii) "When is class action litigation appropriate?"; and (iii) "What did the American Law Institute's 'Aggregation Project' final report get right, and what did it get wrong?"

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LAW 360 COMPILES LARGEST PRODUCT LIABILITY JURY VERDICTS FROM 2009

According to a *Law 360* article, lawyers may disagree about whether juries are tending to side more with plaintiffs or the corporations they sue, but there is general agreement that "[j]uries are both increasingly willing and able to evaluate complicated claims, and more likely to hand out larger amounts of cash when wrongdoing is found." The article summarizes the 10 largest jury verdicts rendered in product liability litigation in 2009, including cases involving allegedly defective products ranging from a tree stand, auto parts, prescription drugs, and tobacco to an airplane, portable fans and asbestos exposure. *See Law 360*, February 12, 2010.

ALL THINGS LEGISLATIVE AND REGULATORY

Federal Judicial Center Releases Data on Motions to Dismiss Before and After *Twombly* and *Iqbal* Decisions

The Federal Judicial Center has **compiled** data collected from the 94 federal district courts indicating how many motions to dismiss were filed and granted or denied from January 2007 through October 2009 by type of lawsuit.

During this time frame, the U.S. Supreme Court issued two decisions, *Bell Atlantic Corp. v. Twombly* (May 2007) and *Ashcroft v. Iqbal* (May 2009), that many commentators believe have changed the standards for pleading and increased early dismissals of civil litigation. According to the information collected, it appears that the rate of motions to dismiss has remained relatively stable throughout the period, although the number of motions to dismiss granted as a percentage of number of cases filed has gradually trended upward. A spike in motions to dismiss filed appears to have occurred immediately after the Court issued *Iqbal*.

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OEHHA Seeks Comment on Whether to List Bisphenol A as Reproductive Toxicant

California EPA's Office of Environmental Health Hazard Assessment (OEHHA) has issued a request for public comment on its determination that bisphenol A (BPA) "appears to meet the criteria for listing as known to the State to cause reproductive toxicity under Proposition 65, based on findings of the National Toxicology Program's Center for the Evaluation of Risks to Human Reproduction (NTP-CERHR, 2008)."

The notice states that BPA is a "[c]omponent in polycarbonate plastic used in water and baby bottles, present in epoxy resins used to line food cans and in dental sealants."

Comments must be submitted by April 13, 2010. If requested by March 12, a public forum will be scheduled for the public to "discuss the scientific data and other relevant information on whether the chemical meets the criteria for listing in the regulations." If OEHHA determines, after reviewing the comments, that BPA should be listed, the agency will publish a Notice of Intent to List and provide an opportunity for additional public comment. Those who manufacture and sell products containing substances listed under Proposition 65 must provide warnings to the public that the substances are known to the state to cause cancer or reproductive harm. Failure to do so generally allows private citizens and the attorney general to bring actions for violations of the law.

Children's Product Makers Begin Pilot Program on Chemical Reporting in Washington State

Washington's Department of Ecology has announced that some children's product manufacturers will begin field testing a pilot rule to carry out the state's "groundbreaking Children's Safe Product Act." The law requires the department to develop

a list of toxic chemicals either found in children's products or documented to be present in human tissue. Once the list is finalized and the agency issues rules to implement the law, manufacturers will be required to notify the department if their products contain these chemicals.

As part of the pilot phase, expected to last three to four months, the state has released a draft reporting list of 66 chemicals, including formaldehyde, bisphenol A, toluene, mercury, arsenic, and antimony. Participating manufacturers will attempt to comply with the rule, which involves product testing and reporting, and provide information to the state about what parts of the program work, whether chemicals should be removed from or added to the list, analytical techniques, optimal reporting formats, protection of confidential business information, and costs of compliance, among other matters. *See Washington Department of Ecology Bulletin*, February 2010.

LEGAL LITERATURE REVIEW

Lee Epstein, William Landes & Richard Posner, "Why (and When) Judges Dissent: A Theoretical and Empirical Analysis," *University of Chicago, John M. Olin Law & Economics Working Paper No. 510*, January 2010

University of Chicago law and economics professors and a federal appeals court judge have created a model for studying when and why judges write dissenting opinions and applied it to statistics for certain courts during certain years to determine whether their theory adequately explains the empirical data. They note that writing a dissenting opinion imposes a cost, in terms of time and effort, on both dissenting and majority opinion writers, as well as in terms of collegiality. Dissenting opinions usually generate longer majority opinions. The authors find that most dissenting opinions are often not cited in other cases, so the exercise of influence may not necessarily motivate a judge to dissent in a given case. The article concludes that lower caseloads and greater ideological differences among judges on a particular court are correlated with more frequent dissents.

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Edward Hartnett, "Taming *Twombly*, Even After *Iqbal*, *University of Pennsylvania Law Review*, 2010

Seton Hall University School of Law Professor Edward Hartnett has proposed tools for guiding courts tasked with deciding whether to grant a motion to dismiss under the new standards for pleading enunciated by the U.S. Supreme Court in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*. Hartnett discusses the various criticisms that scholars have directed toward these new requirements and suggests that the rulings can be "tamed" by (i) understanding the plausibility standard "as equivalent to the traditional insistence that a factual inference be reasonable," (ii) treating the

new framework "as an invitation to present information and argument designed to dislodge a judge's baseline assumptions about what is natural," and (iii) allowing discovery to proceed while a motion to dismiss under *Twombly* and *Iqbal* is pending.

Shira Scheindlin, "The Future of Litigation," Inns of Court Dinner Remarks, January 2010

U.S. District Court Judge Shira Scheindlin, who has authored a number of authoritative decisions on e-discovery that have raised some concerns among lawyers, recently provided remarks about the future of litigation during a presentation at the Inns of Court in New York. She focused on questions of jurisdiction, pleading standards and case tracking, vanishing trials, alternative dispute resolution, and the effect of electronic communications on civil and criminal litigation. Among other matters, Scheindlin expressed concern about the U.S. Supreme Court's *Twombly* and *Iqbal* rulings, which addressed standards for pleading, saying "When courts are told to draw on experience and common sense that means that predictability will vanish because every judge has had different experiences and has a different definition of common sense. What we will see is that depending on a judge's views of various types of claims, one judge will dismiss a claim where another would have let it survive."

LAW BLOG ROUNDUP

"Three Kinds of Lies: Lies, Damned Lies and Statistics"?

"Asked for a response to the report, a spokesman for the American Association for Justice, which lobbies for the plaintiffs' bar, called it 'recycled lies and attacks.' 'Coming off an era when corporations—from Enron and AIG—were allowed to trump the interests of everyday Americans, this report is clearly tone-deaf for the times,' said the spokesman, Ray De Lorenzi, in a statement." Capitol Hill reporter David Ingram, blogging about the Manhattan Institute report that examines the lobbying activities of the plaintiffs' bar. The report concludes that plaintiffs' lawyers do not always act in the best interests of consumers.

The BLT: The Blog of Legal Times, February 9, 2010.

Right to Sue in Tort Less Than Sacrosanct?

"I will argue that the right to sue in tort is not universal, absolute or automatic, but is counterbalanced and limited by an equally critical right to be free from unsubstantiated litigation." Southwestern Law School Professor Alan Calnan, guest posting about tort and strict liability litigation. He argues that "this defensive right invalidates the use of a general duty in negligence cases. A plaintiff suing for negligence must earn the right to haul her adversary into court; and to do this, she must show probable cause for her action."

TortsProf Blog, February 15, 2010.

THE FINAL WORD

Manhattan Institute Issues Annual Report on Litigation Lobby

The Manhattan Institute's Center for Legal Policy has issued a 2010 report, titled **Trial Lawyers Inc.: K Street**, on the litigation lobby and its impact on state and federal tort reform efforts. Noting that "lawyers and law firms—excluding lobbyists—have injected $780 million into federal campaigns, on top of $725 million donated to state races," the report examines the latest political actions of the plaintiffs' bar, which has purportedly worked "to maintain the legal shifts that have enriched them, as well as to initiate changes that would enrich them still more."

According to the director's message, the plaintiffs' bar has used its political clout to block federal tort reform efforts and pursue favorable initiatives, including (i) "[l]engthening statutes of limitations in employment law to make it easier to file discrimination suits"; (ii) "[s]purring securities litigation by allowing suits to be filed against the vendors of corporations accused of fraud"; (iii) "[c]utting contingent-fee lawyers a tax break worth over a billion dollars"; (iv) "[g]utting arbitration contracts designed to encourage resolution of disputes that are too expensive to take to trial"; and (v) "[a]llowing state juries to override federal regulations." The report also claims that the plaintiffs' bar "strategically concentrates its giving, wielding disproportionate influence in contested state supreme court elections and over the leadership of both the U.S. Senate and key state legislatures."

The report ultimately urges states to push back against "the power of the lawyer lobby," pointing to federal reforms like the Class Action Fairness Act (CAFA) and recent Oklahoma legislation that sets stricter evidentiary standards, caps on noneconomic damages and limitations on forum shopping. It also anticipates a favorable response from President Barack Obama (D), whose "rhetoric and [record] suggest that, were congressional leadership to change, he might be open to the funding of state-level experiments in reform or supporting legislation that, like CAFA, tightens federal procedural rules." As the report concludes, "Over time, states that rein in lawsuit abuse have an advantage in attracting businesses and doctors."

UPCOMING CONFERENCES AND SEMINARS

Drug Information Association, Inc., Washington, D.C. – February 25, 2010 – "Liability Risks in Clinical Trials." Shook, Hardy & Bacon Pharmaceutical & Medical Device Litigation Partners **Mark Hegarty**, **Lori McGroder** and **Douglas Schreiner**, and Corporate Law Partner **Carol Poindexter** have organized and will present during this continuing education program, which will include sessions on "Who's Watching You: Government Enforcement in Clinical Trials," "Litigation Update: What Can Happen with Clinical Trials," "Avoiding Liability, 'Bad' Documents and Bad Press," and "Clinical Trials on Trial: Potential Legal Liability Arising from Clinical Trials (Mock Trial)."

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HB Litigation Conferences, Marina del Rey, California – March 3-5, 2010 –"3rd Annual Emerging Trends in Asbestos Litigation Conference." Shook, Hardy & Bacon Public Policy Partner **Mark Behrens** will participate in a panel to discuss "The Role of the Bankruptcy Trusts in Civil Asbestos."

GMA, Washington, D.C. – April 7-9, 2010 – "Consumer Complaints Conference." Shook, Hardy & Bacon Pharmaceutical & Medical Device Litigation Partner **Madeleine McDonough** will discuss "Pre-Litigation Risk Management Strategies," for an audience of food industry staff working in the areas of consumer affairs, call center management, consumer complaints, product liability claims, and quality assurance.

ABA, Phoenix, Arizona – April 8-9, 2010 – "2010 Emerging Issues in Motor Vehicle Product Liability Litigation." Shook, Hardy & Bacon Tort Partner **H. Grant Law** is serving as program co-chair and will moderate a panel session involving in-house counsel from six manufacturers who will discuss "How Not to Settle Your Case: Mistakes Plaintiffs' and Defense Lawyers Make Leading up to and at Mediation." Shook, Hardy & Bacon Public Policy Partner **Mark Behrens** will participate on a panel addressing "Products Liability in Transition: Is There a Sea Change or Steady as She Goes?" The American Bar Association's Tort Trial & Insurance Practice Section's Products, General Liability and Consumer Law Committee and the Automobile Law Committee are presenting the program.

DRI, San Francisco, California – May 20-21, 2010 – "26th Annual Drug and Medical Device Seminar." Shook, Hardy & Bacon Pharmaceutical & Medical Device Litigation Partner **Mark Hegarty** will serve on a panel discussing "Potential Civil and Criminal Liability Arising from Clinical Trials." The firm is a co-sponsor of this continuing education seminar. ■

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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).