Shook, Hardy & Bacon L.L.P.

MARCH 27, 2014

PRODUCT LIABILITY LITIGATION REPORT

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FIRM NEWS

Newstead Discusses Legal Issues for Drone and Robotics Industries

Shook, Hardy & Bacon Global Product Liability Partner **Alison Newstead** has **authored** an article titled "Drones and robots: liability for designers, manufacturers and insurers" appearing in the March 2014 issue of *The In-House Lawyer*. She considers the legal issues that might arise when, for example, drones mis-deliver or damage packages shipped to consumers or remote controlled household technology fails to function as designed and injury ensues. Among other matters, Newstead calls for legislators to avoid hindering innovation by "introducing measures which excessively load liability on manufacturers, when the users of the automated technology (or their insurers) may be better positioned to bear the risk." She also addresses how the EU risk assessment guidelines can be used even in the automated technology arena to aid manufacturers in determining whether a safety issue exists and whether a recall is required.

CASE NOTES

Court Allows Responsible Party Designation in Defective Infant Seat Suit

A federal court in Texas has granted the defendants' motion to designate the mother of a child allegedly injured in a spill from the company's infant seat as a responsible third party with respect to the minor child's claims. *Hernandez v. Bumbo (Pty.) Ltd.*, No. 12-1213 (U.S. Dist. Ct., N.D. Tex., order entered March 10, 2014). The defendants claim that her "use of the Bumbo Seat on a raised surface was an improper use of the product, and contrary to the warnings that accompanied the product." According to the defendant, by designating her as a responsible third party, the jury would be able to determine "whether, and to what extent, she shares in the responsibility for C.H.'s fall and injuries."

The court agreed with the defendants that their motion was not untimely under the state's rules of civil procedure, the third-party designation is not precluded by the doctrine of parental immunity due to liberalizing amendments made to the applicable

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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rule in 2003 and a party to a case may be designated as a responsible third party. As to the latter, the court observed, "[t]here is, however, little legal authority as to whether a claimant, particularly a guardian bringing a claim on behalf of a minor plaintiff, may nonetheless be designated a responsible third party." Finding that the purpose of the 2003 amendments to the requirements for designating responsible third parties "was to liberalize who may be so designated" and because a jury would otherwise be unable to consider the extent of the mother's liability "in the contributory negligence context" due to the parental immunity doctrine, the court found the designation "consistent with the aims of the 2003 amendments."

Putative Class Claims Overheating Motorcycles Have No Value

A Missouri resident has filed a putative nationwide class action against Kawasaki Motors Corp., alleging that its Vulcan 1700 series motorcycle "gives off excessive heat in such amounts as to render the motorcycle virtually unusable." *Napier v. Kawasaki Motors Corp.*, No. 14-0508 (U.S. Dist. Ct., E.D. Mo., Eastern Div., filed March 20, 2014). According to the complaint, the company "offered Heat Shield Kits, to be installed at their expense, in an attempt to alleviate the excessive heat problems" but the kits "do not adequately resolve the excessive heat issue" caused by the motorcycles' purported defective design. Alleging breach of implied warranty of merchantability, negligent design and failure to warn, the plaintiff seeks damages in excess of $5 million, costs and fees.

ALL THINGS LEGISLATIVE AND REGULATORY

NHTSA to Study User Acceptance of Seat Belt Technologies

The U.S. National Highway Traffic Safety Administration (NHTSA) has **requested** public comments on the estimated time and cost burdens of collecting information that "will be used to recruit participants for a field study on vehicle occupant protection technologies and to get information from study participants about their experience with such technologies. The study focuses on occupant protection technologies that restrict some vehicle functionality, permanently or temporarily, when they detect that a vehicle occupant is not wearing a seat belt." The estimated time burden for responding to the agency's eligibility, demographic and post-study questionnaires is 46 hours, at a cost of $972. Comments are requested by May 12, 2014. *See Federal Register*, March 13, 2014.

FTC to Study Consumer Perceptions of Environmental Marketing Claims

The U.S. Federal Trade Commission (FTC) has **requested** comments on the time burdens of collecting responses from a broad spectrum of the U.S. adult population in a survey about consumer perceptions of environmental marketing claims.

According to FTC, "using a treatment-effect methodology, the study will examine whether respondents viewing organic and recycled content claims believe that these products have particular environmental benefits or attributes depending on the context in which they are presented." FTC estimates that respondents will collectively take 2,700 hours to participate in the Internet-based survey. Comments are requested by May 27, 2014. *See Federal Register*, March 25, 2014.

California Identifies First Priority Products Under Safer Consumer Regulations

California's Department of Toxic Substances Control (DTSC) has **released** its initial draft priority products list under the Safer Consumer Products Regulations, which implement the state's green chemistry initiative. The product-chemical combinations proposed are (i) paint and varnish strippers, and surface cleaners with methylene chloride; (ii) spray polyurethane foam systems with unreacted diisocyanates; and (iii) children's foam-padded sleeping products with the fire retardant tris (1,3-dichloro-2-propyl) phosphate, also known as TDCPP.

According to DTSC Director Debbie Raphael, "We are not announcing a ban. We are starting a conversation with manufacturers to answer that critical question—are the chemicals necessary." The agency contends that "ample evidence" shows that these chemicals can be harmful. Under the safer consumer products program, individual rulemakings to officially list each priority product and chemical of concern must be undertaken and could require up to 18 months to complete. Workshops on this initial draft list will reportedly be held in May and June 2014 in Sacramento, Oakland and Southern California. *See Bloomberg BNA Product Safety & Liability Reporter™*, March 13, 2014.

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Wisconsin Set to Require Asbestos Plaintiff Disclosures

The Wisconsin Assembly and Senate have approved by comfortable margins legislation (**A.B. 19**) that would require an asbestos personal-injury plaintiff, within 45 days of filing his or her claim, to "provide to all parties a sworn statement identifying each personal injury claim he or she has filed or reasonably anticipates filing against an asbestos trust." All information relating to the trust claims would be admissible in evidence and "[t]rust claim materials that are sufficient to entitle a claim to consideration for payment under the applicable trust governance documents may be sufficient to support a jury finding that the plaintiff may have been exposed to products for which the trust was established to provide compensation and that such exposure may be a substantial factor in causing the plaintiff's injury that is at issue in the litigation." If a personal-injury defendant is found to be 51 percent or more responsible for the plaintiff's damages, "the plaintiff may not collect any amount of damages until after the plaintiff assigns to the defendant all pending, current, and future rights or claims he or she has or may have for a personal injury claim against an asbestos trust."

According to news sources, Gov. Scott Walker (R) is expected to sign the bill, which has been opposed by trial lawyers, consumer organizations and veterans groups. A spokesperson for the governor reportedly indicated that the legislation is intended to ensure "transparency in the lawsuit process to stop trial lawyers from double dipping." *See wrn.com*, March 17, 2014; *Bloomberg BNA Product Safety & Liability Reporter™*, March 21, 2014.

LEGAL LITERATURE REVIEW

Alli Orr Larsen, "The Trouble with Amicus Facts," *Virginia Law Review* (forthcoming 2014)

College of William and Mary School of Law Associate Professor Allison Orr Larsen describes how the U.S. Supreme Court has come to rely on the facts presented by *amici* to decide the cases before it and explains why this practice may be unsound. According to the article, the Court more often than not cites an *amicus* brief as authority for a fact used to support its reasoning without addressing whether the underlying source or sources are reliable. In some instances, the source was funded by the group filing the *amicus* brief or the data are unpublished and reside in *amicus* files. Given the 800 percent explosion in *amicus* brief filings between 1946 and 1995, and the increasing frequency with which the Court relies on *amicus* briefs to answer outcome determinative issues, the author questions the ability of the parties to adequately respond to *amici* assertions and suggests instead that the Court, in the manner of an administrative agency, flag the "legislative" facts considered significant when granting certiorari and invite those with expertise to address them. She also suggests that the Court explain why it rejected certain facts as unreliable when basing its rulings on conflicting or controverted facts.

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James Maxeiner, "The Federal Rules at 75: Dispute Resolution, Private Enforcement or Decision According to Law?," *Georgia State University Law Review* (2014)

Starting from the premise that the Federal Rules of Civil Procedure "do not work to resolve routine cases justly, quickly and inexpensively," University of Baltimore School of Law Associate Professor James Maxeiner calls on the legal profession to look abroad and learn from "foreign civil systems that work well." Most of his article explores the schism that has developed between those interests that want rules that control and conclude litigation—plausibility pleading, case management, limited discovery—and those defending rules that support the private enforcement of social goals by means of notice pleading, open and free discovery, as well as limited summary judgment. Comparing foreign outcomes with domestic—German state labor courts handle 400,000 employment disputes a year, for example, while U.S. federal courts

handle 20,000 employment discrimination claims in that timeframe—Maxeiner contends that civil law systems are better at applying law to fact to determine rights and resolve disputes according to law and justice and they do so more efficiently, requiring far fewer personnel.

LAW BLOG ROUNDUP

Distinguishing Meritless from Frivolous Claims

"Reinert deftly demonstrates how meritless cases should influence substantive and procedural reform. In a debate that is dominated by concerns about efficiency, he reminds us that the 'justice' side of the equation is often understated and under-developed. His work is a critical contribution. Indeed, his article is such a success because he so convincingly argues that there is a great value in failure." Seattle University School of Law Associate Professor Brooke Coleman, discussing a recent law review article that explains how meritless cases differ from frivolous claims and often lead to changes in the law that would not have been achieved without them. Those meritless cases with broad social consequences can generate debate and allow litigants to sense that they have been heard, despite their loss. The article's "ultimate point is that even when these meritless cases fail, they teach us something and that something improves the system."

Jotwell: Courts Law, March 19, 2014.

The Future of Legal Computation

"I took a deep dive last week into the world of legal computation, to see just how far it has come, where it is going, and how transformative it will be as a force in legal thought and practice." Vanderbilt University Law School Professor J.B. Ruhl, summarizing workshop presentations at the University of San Diego Law School's Center for Computation, Mathematics, and the Law. Among other matters, presenters demonstrated (i) a software search engine that could be created "to parse the U.S. Code text to extract instances of defined terms"; (ii) "a classification algorithm for predicting affirm/reverse outcomes of U.S. Supreme Court decisions … with the computer's accuracy outperforming the experts by 75% to 58%"; (iii) a program that can compare federal and state regulations on specific issues; and (iv) "the use of predictive coding in e-discovery," which, despite presenting some challenges, has "substantial promise."

Law 2050, March 24, 2014.

Data Mining to Innovate or Discriminate?

"If you are childless, shop for clothing online, spend a lot on cable TV, and drive a minivan, data brokers are probably going to assume you're heavier than average. We know that drug companies may use that data to recruit research subjects. Marketers could utilize the data to target ads for diet aids, or for types of food that research reveals to be particularly favored by people who are childless, shop for clothing online, spend a lot on cable TV, and drive a minivan. We may also reasonably assume that the data can be put to darker purposes: for example to offer credit on worse terms to the obese (stereotype-driven assessment of looks and abilities reigns from Silicon Valley to experimental labs). And perhaps someday it will be put to higher purposes: for example, identifying 'obesity clusters' that might be linked to overexposure to some contaminant." University of Maryland Law Professor Frank Pasquale, blogging about whether public policy should incentivize the use of big data for innovation rather than discrimination.

Concurring Opinions, March 24, 2014.

THE FINAL WORD

Court Orders Re-Briefing over Excessive Acronym Use

A D.C. Circuit Court of Appeals panel has, on its own motion, ordered the parties to "submit briefs that eliminate uncommon acronyms used in their previously filed final briefs." *Ill. Pub. Telecomm. Assoc. v. FCC*, No. 13-1059 (D.C. Cir., order entered March 25, 2014). The court cited its practice and internal procedures handbook, which states, "[i]n briefs the use of acronyms other than those that are widely used should be avoided." The new briefs were required within two days of the court's order.

UPCOMING CONFERENCES AND SEMINARS

ABA, Phoenix, Arizona – April 2-4, 2014 – "2014 Emerging Issues in Motor Vehicle Product Liability Litigation." Shook, Hardy & Bacon Tort Associate Amir Nassihi serves as event coordinator for this 24th annual continuing legal education program and will participate in a panel discussion with Global Product Liability Partner Holly Smith to present "Hot Topics in Class Action Litigation. Firm Tort Partner H. Grant Law, who co-chairs the American Bar Association's (ABA's) Tort Trial & Insurance Practice Section Products Liability Committee, will provide a welcome and introduction to the program. Shook, Hardy & Bacon Tort Partner Robert Adams will present "Effective Trial Communication: A Master Class," and Global Product Liability Partner Frank Kelly will join a panel to discuss "Effectively Packaging and Presenting Complex Accident Reconstruction Concepts." SHB Global Product Liability Partner

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Janet Hickson will participate in a panel discussion titled, "Managing the Corporate Counsel Relationship: The Inside View on Diversity, Retention and Client Expectations."

DRI, Phoenix, Arizona – April 9-11, 2014 – "Product Liability: Plan and Prepare." Shook, Hardy & Bacon Business Litigation Attorney April Byrd will join a distinguished faculty during this continuing legal education conference. Byrd will discuss "Post *Comcast*: Are Federal Courts Considering Individual Damages When Certifying Class Actions?" as part of a specialized litigation-group mass-torts and class-actions workshop.

ACI, Chicago, Illinois – June 4-5, 2014 – "7th Annual Summit on Defending & Managing Automotive Product Liability Litigation." Shook, Hardy & Bacon Tort Partner H. Grant Law will participate in a panel discussion during this continuing legal education summit, which features presentations by judges as well as corporate and agency in-house counsel. His topic is "The Current Battleground for Automotive Class Action Litigation: Class Certification and Managing Experts, Attacks on Pleadings in Class Claims, Choice of Law, Arbitration and More." ■

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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).