Shook, Hardy & Bacon L.L.P.

OCTOBER 13, 2011

PRODUCT LIABILITY LITIGATION REPORT

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NINTH CIRCUIT RULES AG *PARENS PATRIAE* ACTIONS DO NOT BELONG IN FEDERAL COURT UNDER CAFA

The Ninth Circuit Court of Appeals has determined that state attorney general (AG) actions brought on behalf of the state and as *parens patriae* for state citizens cannot be removed to federal court under the Class Action Fairness Act of 2005 (CAFA). *Washington v. Chimei Innolux Corp.*, No. 11-16862 (9th Cir., decided October 3, 2011).

The decision involved claims filed in state courts by the attorneys general of California and Washington alleging a conspiracy to fix the prices of thin-film transistor liquid crystal display panels resulting in state agencies and consumers paying inflated prices for products, such as TVs and cellphones, containing the panels. The defendants removed the actions to federal court on the ground that consumers were the real parties in interest and thus the *parens patriae* actions were disguised as class actions which are removable under CAFA. Both district courts granted the states' motions to remand, and the cases were consolidated on appeal.

According to the Ninth Circuit, CAFA allows the removal of actions filed under Federal Rule of Civil Procedure 23 or a state law or rule that authorizes an action to be brought as a class action. None of the state statutes authorizing the attorneys general to bring a *parens patriae* action requires that they demonstrate standing through a representative injury or that they obtain certification of a class to recover on behalf of individuals. The statutes also lack "the typical class action requirements of showing numerosity, commonality, typicality, or adequacy of representation." Finding that the district courts properly remanded the matters to state court, the Ninth Circuit joined the Fourth Circuit, "the only other circuit court to have squarely considered the question," in concluding that these actions are not covered by CAFA.

FIFTH CIRCUIT SAYS CASE-SPECIFIC REVIEW REQUIRED FOR *CY PRES* DISTRIBUTION OF SETTLEMENT FUNDS

The Fifth Circuit Court of Appeals has overturned a trial court's order distributing funds remaining from the settlement of medical monitoring claims to four charities under

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the *cy pres* doctrine. ***Klier v. Elf Atochem N. Am., Inc.*, No. 10-20305 (5th Cir., revised September 27, 2011)**. The issue arose in a case involving exposure to chemicals emitted by an agrochemical plant in Texas. Three subclasses were ultimately certified, and funds were distributed according to the terms of the settlement agreement.

According to the court, approximately $830,000 remained from the money allocated to one of the subclasses whose members were permitted to forego a small cash payment and "instead enroll in a program through which they would receive regular checkups and physician visits over a five-year period." The parties agreed that additional distribution to members of this subclass was not economically feasible, so, 18 years after the litigation was filed, the court ordered the funds to be distributed to three charities proposed by the defendant and to a local history and genealogy library proposed by the court. A member of a different subclass opposed the proposal, arguing that the funds should be distributed pro rata to his class. He also contended that the defendant's proposed charities, a scholarship program and two museums, were not proper recipients.

Overturning the district court's order as an abuse of discretion, the appeals court began its analysis with the premise that "settlement funds are the property of the class, [and] a *cy pres* distribution to a third party of unclaimed settlement funds is permissible 'only when it is not feasible to make further distributions to class members.'" Carefully examining the settlement agreement, the court noted that one of its provisions allowed the settlement administrator to "petition the District Court for reallocation of available funds among the [subclasses] on a showing of good cause if … he determines that considerations of equity and fairness require reallocation."

The administrator did so about a year after medical monitoring began, but the district court refused the request, stating that it would decide later what to do with the remainder of the medical-monitoring fund. According to the appeals court, "The Protocol did more than merely empower the district court to allocate medical-monitoring funds unused by members of Subclass B to members of other subclasses—it required the court to do so as long as further distributions were feasible and equitable." Agreeing with other courts that require a case-specific approach "to the role of the federal district judge in the distribution of monies left unclaimed after administration of a class settlement," the court ruled that the failure of one subclass to draw down all available funds "did not constitute an abandonment or relinquishment by the class of its property interest in the settlement."

A concurring judge questioned the continuing viability of the *cy pres* doctrine, contending that the preferable alternative is "to return any excess funds to the defendant," claiming that this "corrects the parties' mutual mistake as to the amount required to satisfy class members' claims."

TOY COMPANY AGREES TO PROVIDE CUSTOMER REFUNDS FOR RECALLED PRODUCTS WITH MAGNETS

A company that made recalled toys with magnets embedded in small flexible parts which can apparently be ingested or aspirated and purportedly injured and killed a number of toddlers, has reportedly announced that it will provide refunds to consumers. This action follows a federal court's preliminary approval of the settlement of a nationwide class action involving safety-related claims for the products. *Berry v. Mega Brands, Inc.*, No. 08-01750 (U.S. Dist. Ct., D.N.J., decided August 17, 2011). A December 15, 2011, hearing has been scheduled to determine if the agreement should be granted final approval.

While the company denies liability, it has agreed to provide class members with "cash reimbursements up to the purchase price of the toy, depending upon proof of purchase." The company has also agreed to (i) "contribute $100,000 in cash and product toward the establishment of a foundation that addresses children's health issues," (ii) pay up to $3.5 million in attorney's fees, and (iii) provide an incentive award of $1,000 for the named plaintiffs. The claims at issue are economic only and do not involve personal injury. *See Mega Brands Press Release*, September 27, 2011.

MISSISSIPPI SUPREME COURT REMOVES TRIAL JUDGE FROM ASBESTOS LITIGATION, IMPARTIALITY AT ISSUE

The Mississippi Supreme Court has disqualified the trial judge who presided over a $322-million jury verdict in asbestos exposure litigation, finding that his impartiality was in question due to the asbestos-related claims of his father and mother. *Union Carbide Corp. v. Brown*, No. 2011-M-00874 (Miss., decided October 6, 2011). The court observed, among other matters, that the judge was reluctant to provide information about his father's claim and that both of the judge's parents had settled asbestos claims with the defendant. According to the court, "we find that a reasonable person, knowing all of the circumstances, would harbor doubts about Judge Bowen's impartiality in this particular case." Further proceedings are on hold until another judge is assigned to the matter.

ALL THINGS LEGISLATIVE AND REGULATORY

GAO Analyzes CPSC Product Incident Reporting Database, Recommends Changes

The Government Accountability Office (GAO) has issued a **report** titled "Consumer Product Safety Commission: Action Needed to Strengthen Identification of Potentially Unsafe Products." According to the report, the commission (CPSC) does not require those reporting product-related risks and incidents for inclusion on the saferproducts.gov database to include model or serial numbers in their reports. A law adopted in August 2011, requires CPSC to try to obtain this information or a

product photograph from the submitter before forwarding the information to the product manufacturer for a response.

GAO found that the analytic methods CPSC uses to identify reports lacking product model or serial numbers is lacking in some respects and recommended that "CPSC enhance the analytic methods it uses to identify product information in a report of harm, such as by verifying whether the model field in its data contains a number (versus a text response, which would not meet the statutory requirement) or by searching for model numbers or serial numbers that may be listed in other fields."

FTC Enforcement Action Nets $25 Million for Unsupported Athletic Shoe Claims

To settle its allegations that Reebok lacks scientific proof that its "toning shoes" improve the physiques of those wearing them, the Federal Trade Commission (FTC) has ordered the shoe company to provide $25 million in refunds to consumers. *FTC v. Reebok Int'l Ltd.*, No. 11-2046 (U.S. Dist. Ct., N.D. Ohio, E. Div., filed September 29, 2011). The proposed settlement, filed with the complaint, requires court approval. Reebok denied liability, but reportedly agreed to settle "to avoid a protracted legal battle." According to the company, "We fully stand behind our EasyTone technology." FTC Bureau of Consumer Protection Director David Vladeck reportedly said, "The evidence was wholly insufficient to support the objective claims [Reebok] was making." Advertisements allegedly claim that the company's toning shoes strengthen and tone leg and buttock muscles more than regular shoes.

Under the terms of the agreement, the company will fund an escrow account that will provide refunds to consumers who apply for them. Any remaining funds "shall be deposited to the U.S. Treasury as disgorgement." The company must also stop making health-benefit claims unless they are "true and backed by scientific evidence." *See FTC News Release* and *The BLT: The Blog of LegalTimes*, September 28, 2011.

Lawmakers Introduce Bill Addressing Safety Risks of Nanotechnology Products

U.S. Senators Mark Pryor (D-Ark.) and Benjamin Cardin (D-Md.) have introduced a bill (S. 1662) that focuses on the potential risks of products containing nanomaterials. The Nanotechnology Regulatory Science Act of 2011 would establish a Food and Drug Administration (FDA) program to conduct the scientific research needed to evaluate the health and safety of common nanotech products and develop safety practices for companies using the technology. The measure would authorize $48 million for the program over three years starting in fiscal year 2013; the lawmakers said their home states have the FDA laboratories and research facilities suited to conduct the studies.

The senators claim that more than 800 commercial uses of nanotechnology are currently known and more than 1,300 consumer nanotechnology products, including cell phones, MP3 players and food packaging, are available on the market. The

National Science Foundation estimated in 2010 that new nanotechnology-based products would create 2 million jobs and add $1 trillion in revenue to the global economy by 2015.

"From new cancer treatments to stain-resistant pants, nanotechnology offers hundreds of promising applications and jobs," Pryor said. "As these products are developed and used, we should assess potential risks to human health, safety, or the environment." Introduced on October 6, 2011, the bill has been referred to the Senate Committee on Health, Education, Labor, and Pensions. *See Sens. Mark Pryor* and *Benjamin Cardin Press Releases,* October 6, 2011.

FDA Declares Preemption Language in Regulation Preambles Not Legally Supportable

The Food and Drug Administration (FDA) has **determined** that text included in the preambles to three regulations adopted over the past 10 years and purporting to preempt state law "are not legally justified."

The agency reviewed all of its regulations in response to President Barack Obama's (D) May 20, 2009, memorandum outlining the administration's preemption policy. The three affected regulations include: "Requirements on Content and Format of Labeling for Human Prescription Drug and Biological Products" (the physician labeling rule); "Exceptions or Alternatives to Labeling Requirements for Products Held by the Strategic National Stockpile"; and "Supplemental Applications Proposing Labeling Changes for Approved Drugs, Biologics, and Medical Devices."

FDA also clarified the preemption language in other regulations, including one on food labeling. According to the agency, the preamble, which discusses the rule's "pre-emptive effect, in that it would preclude states from issuing any … requirements … that are not identical to those required by the final rule," failed to "acknowledge the applicability limitation set forth in section 6 (c)(2) of the Nutrition Labeling and Education Act." According to FDA, that section, which provides that 403A of the Food, Drug, and Cosmetic Act "shall not be construed to apply to any requirement respecting a statement on the labeling of food that provides for a warning concerning the safety of the food or component of the food," should have been included in the preamble's preemption discussion. *See Federal Register*, October 5, 2011.

LEGAL LITERATURE REVIEW

Harvey Kaplan, "Global Overview," *Getting the Deal Through, Product Liability,* 2011

Shook, Hardy & Bacon Pharmaceutical & Medical Device Practice Chair **Harvey Kaplan** has authored an introduction to a book he co-edited with Partner Gregory Fowler who co-chairs the firm's International Litigation & Dispute Resolution Practice. Harvey Kaplan & Gregory Fowler, eds., *Getting the Deal Through, Product Liability in*

31 Jurisdictions Worldwide, 2011. To introduce the nation-by-nation product-liability law survey, Kaplan notes, "Every year it becomes increasingly apparent how closely connected jurisdictions throughout the world are to one another. Therefore, it is essential that we stay abreast of developments in our respective product liability laws." He explains how a number of jurisdictions are joining the United States in allowing use of the class action device to prosecute claims against product manufacturers and also observes how tort reform in the United States is leveling the playing field for defense interests. The book provides an overview of the court systems, theories of recovery, discovery procedures, and "other important means for assessing potential risks" in 31 countries.

Gregory Fowler & Marc Shelley, "United States," *Getting the Deal Through, Product Liability,* 2011

This chapter, authored by experienced Shook, Hardy & Bacon International Litigation & Dispute Resolution Attorneys **Gregory Fowler** and **Marc Shelley**, discusses the system under which U.S. product liability claims are litigated. The authors conclude, "The diversity of United States product liability law, the availability of punitive damages, the potential for class actions and the prevalence of contingency fees make the United States fertile ground for product liability litigation.… While tort reform has been achieved in many jurisdictions to discourage what some consider to be predatory, duplicative and meritless lawsuits, it is not yet apparent that litigation by consumers has slowed."

Simon Castley & Jon Hudson, "England & Wales," *Getting the Deal Through, Product Liability,* 2011

Shook, Hardy & Bacon International Litigation & Dispute Resolution Partner **Simon Castley** has co-authored the "England & Wales" chapter of *Getting the Deal Through, Product Liability*. He notes that while these jurisdictions have "a relatively high level of 'consumerism' [i.e., a "knowledge of, and propensity to use, product liability litigation to redress perceived wrongs"] in comparison with other EU states, the Middle East, Africa and Asia," they have "a relatively low level of claims for personal injury damage in comparison with the US." Castley suggests that the UK and EU-wide shift to "a greater access on consumer protection via access to justice" may "encourage greater use of product liability litigation" by injured consumers in the future.

LAW BLOG ROUNDUP

A Trio of Comments on All-or-Nothing Aggregate Settlements

"The blogosphere is talking about a recent decision by the [Second Circuit Court of Appeals allowing] clients to sue their own attorney—and even the defendant—for breach of fiduciary duty in entering a settlement agreement." Charleston School

of Law Associate Professor Sheila Scheuerman, blogging about an employment discrimination case that raised ethical questions about counsel's conduct.

TortsProf Blog, October 10, 2011.

"The Second Circuit last week … decided *Johnson v. Nextel Communications, Inc.*, ___ F.3d ___, 2011 WL 4436263 (2d Cir., Sept. 26, 2011).… That case involved an aggregate settlement with all kinds of shenanigans that our own Howard Erichson described in his article "The Trouble with All or Nothing Settlements." University of Connecticut School of Law Professor Alexandra Lahav, discussing how the court "allowed the clients to sue the lawyers on a broad breach of fiduciary duty theory. The clients may also sue the *defendants* on an 'aiding and abetting' theory."

Mass Tort Litigation Blog, October 2, 2011.

"Among other things, the agreement included tight time frames for claimants to participate and resolve their claims; the agreement even reduced plaintiff counsels' fee awards, on a sliding scale, when they failed to persuade clients to meet those deadlines or participate in the settlement. By entering into the deal, according to the Second Circuit, the plaintiffs' former lawyers 'violated [their fiduciary] duty to advise and represent each client individually, giving due consideration to differing claims, differing strengths of those claims, and differing interests in one or more proper tribunals in which to assert those claims.'" St. John's University Assistant Law Professor Adam Zimmerman, describing the settlement's salient features.

ADR Prof Blog, September 29, 2011.

THE FINAL WORD

Chemical Industry Seeks BPA Ban, FDA Inclined to Adopt One

According to a news source, the Food and Drug Administration (FDA) is poised to prohibit the use of bisphenol A (BPA) in baby bottles and sippy cups in response to a petition filed by the American Chemistry Council. A council spokesperson apparently stated during a press briefing that while scientific data and government assessments have declared the chemical safe and U.S. manufacturers ceased making these products with the plasticizer in response to market demand, the council took the action because of "quite a bit of legislative activity around a product that doesn't exist" and "[c]onfusion about these products has become an unnecessary distraction to consumers, legislators and state regulators."

An environmental advocate reportedly characterized the council's petition as a "stunning reversal," noting that the "industry spent millions this year fighting efforts in California and other states to ban BPA in baby bottles and sippy cups." The Environmental Working Group called on the industry to "drop any further objections to phasing out BPA in baby formula containers and other canned food." *See BNA Product Safety & Liability Reporter*, October 11, 2011.

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UPCOMING CONFERENCES AND SEMINARS

ABA, Section of Litigation, Nashville, Tennessee – October 27, 2011 – "12th Annual Women in Products Liability Workshop." Shook, Hardy & Bacon Pharmaceutical & Medical Device Practice Co-Chair Madeleine McDonough takes part in a panel discussion on "Increased Fraud-Based Claims Against Your Product Clients." This CLE session features "in-house and outside counsel in key industries [who] will share their insights on this emerging trend and discuss strategies for bolstering corporate compliance programs to minimize risk."

Georgetown Law CLE, Arlington, Virginia – November 17-18, 2011 – "Advanced eDiscovery Institute." Shook, Hardy & Bacon eDiscovery Partner Amor Esteban joins a distinguished faculty to serve on a panel addressing "Corporate Approaches to Electronic Information Management: How to Manage Data and Prepare for Litigation in an Increasingly Mobile World."

Practicing Law Institute, San Francisco, California – December 2, 2011 – "Electronic Discovery Guidance 2011: What Corporate and Outside Counsel Need to Know." Shook, Hardy & Bacon eDiscovery Partner Amor Esteban will participate in this CLE event as moderator and speaker on a panel discussing "Litigation Begins: Early Case Assessment and the Rule 26(f) Conference."

ACI, New York City – December 5-7, 2011 – "16th Annual Drug and Medical Device Litigation Conference." Co-sponsored by Shook, Hardy & Bacon, this event brings together leading litigators and in-house counsel to share their insights about current products liability defense strategies. A number of judges will provide the view from the bench. Shook, Hardy & Bacon Pharmaceutical & Medical Device Partner Michael Koon will join a distinguished panel to discuss "Personal Liability Concerns for Life Sciences Counsel and other Industry Professionals." Shook, Hardy & Bacon Partner Madeleine McDonough, who co-chairs the firm's Pharmaceutical & Medical Device Practice, will participate on a panel addressing the topic, "Creating Exit Strategies for Mass Torts and Selecting the Most Advantageous Settlement Model." ■

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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).