Shook, Hardy & Bacon L.L.P.

NOVEMBER 5, 2009

PRODUCT LIABILITY LITIGATION REPORT

CONTENTS

TRIAL COURT ERRED IN LABELING MOTOR VEHICLE A "PUBLIC HAZARD"

A Florida court of appeal has quashed a trial court order, issued under a "sunshine in litigation" statute, that found the Ford Explorer to be a public hazard, and forbid the trial court from entering any order concealing the "hazard" from the public or the manufacturer from concealing any documents about the vehicle including trade secrets and protected, confidential or privileged documents. *Ford Motor Co. v. Hall-Edwards*, No. 3D08-3220 (Fla. Dist. Ct. App., decided October 21, 2009). The issue arose in litigation involving a 1996 model vehicle that rolled over during a traffic accident and allegedly caused the death of the plaintiff's son.

According to the court, the statute can be invoked only where a defendant has made a request for confidentiality or the court has entered a confidentiality order, neither of which occurred in this case. The court also noted that the plaintiff is bound by a confidentiality order entered by a federal court that is considering product liability issues related to the vehicle in multidistrict litigation pending in Indiana. The court stated, "Florida's Sunshine in Litigation Act does not override the terms of the federal court order." The court also found that the plaintiff failed to provide Ford with adequate notice of the documents she wished to have examined *in camera* or the evidence she would rely on to demonstrate that its vehicle is a "public hazard."

Further error was found in the trial court's failure to conduct "a formal, trial-like evidentiary hearing at which each side was permitted to offer evidence, make objections, and create a traditional evidentiary record." Because "irreparable injury" would occur if the appeals court delayed reviewing the trial court's order until a plenary appeal, the court found Ford's appeal of the lower court's interlocutory order was reviewable.

The court concluded, "The label 'public hazard' is not to be affixed to an allegedly-dangerous product 'like you would buckle a collar on a bird dog or paste a tag on an express package that is being forwarded to a friend.' Attention to a proper evidentiary hearing and due process are plainly required. Such a label has significant and far-reaching consequences in a day when court orders can make it around the world before the sun sets on the day they are filed. The respondent's counsel, who include lawyers and firms involved in many other lawsuits against Ford, wasted no time in disseminating the order. The statute was intended to preclude the concealment of specific information about a 'public hazard,' not simply to provide a tactical pejorative for counsel to use in other cases."

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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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TENTH CIRCUIT AFFIRMS CIVIL PENALTY AGAINST MEDICAL DEVICE MAKER

The Tenth Circuit Court of Appeals has upheld the imposition of a $170,000 civil penalty against a medical device manufacturer and its president for failing to file medical device reports (MDRs) concerning a number of "events" that "involved either a device explant (the device was surgically removed) or antibiotic treatment" for an implanted device. ***TMJ Implants, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 08-9539 (10th Cir., decided October 27, 2009)**.

The manufacturer of the temporomandibular joint (TMJ) implant at issue argued that the physical conditions leading to the explants and medical treatment were not serious and thus did not require MDRs. The court disagreed, finding the agency's broader interpretation of the law reasonable. The court also rejected the defendants' claim that "they should not be required to submit MDRs for events reported on voluntary MedWatch forms because they could not conclusively determine whether their devices were involved in those events." According to the court, despite the redactions in the MedWatch forms, because the law does not "limit FDA's authority to require MDRs to events that are confirmed by the manufacturer," reports must be filed when the manufacturer "has information 'from any source[] that reasonably suggests' its device caused or contributed to a serious injury."

The court also found that a corporate officer could be fined in his or her individual capacity for failure to comply with the law and that the fines imposed were reasonable and supported by substantial evidence.

ARIZONA SUPREME COURT INCLUDES METADATA IN "PUBLIC RECORDS" DEFINITION

The Arizona Supreme Court has ruled that a litigant is entitled to the metadata in electronic documents maintained as public records by a government entity. ***Lake v. City of Phoenix*, No. CV-09-0036 (Ariz., decided October 29, 2009)**. The issue arose in a case filed by a police officer alleging employment discrimination against him by the City of Phoenix. The plaintiff apparently suspected that a document the city produced had been backdated when prepared on a computer and requested "meta data" relating to the file, "including 'the TRUE creation date, the access date, the access dates for each time it was accessed, including who accessed the file as well as print dates etc.'" The city denied the request, claiming that metadata is not a public record, and the lower courts agreed.

The court rephrased the issue as "whether a 'public record' maintained in an electronic format includes not only the information normally visible upon printing the document but also any embedded metadata." And the court then determined that electronic documents that are public records do include the metadata, saying "It would be illogical, and contrary to the policy of openness underlying the public

records laws, to conclude that public entities can withhold information embedded in an electronic document, such as the date of creation, while they would be required to produce the same information if it were written manually on a paper public record."

PLAINTIFFS SEEK NATIONWIDE CLASS FOR ALLEGED DEFECTIVE CHINESE DRYWALL

Plaintiffs in one of the nearly 250 Chinese drywall lawsuits consolidated in a multi-district litigation (MDL) court in Louisiana are seeking to amend their complaint to certify a nationwide class of plaintiffs with respect to one defendant. *In re: Chinese-Manufactured Drywall Prods. Liab. Litig.*, MDL No. 2047 (U.S. Dist. Ct., E.D. La., motion to amend filed October 30, 2009). According to their motion to amend, discovery has purportedly revealed that more than just Virginia homeowners were affected by allegedly defective drywall manufactured and distributed by Taishan Gypsum Co, Ltd., f/k/a Shandong Taihe Dongxin Co., Ltd. The MDL claims range from property damage, allegedly caused by sulfur emissions affecting the wiring in air conditioning systems and appliances, to personal injury, including respiratory and other health problems. *See Product Liability Law 360*, October 30, 2009.

U.S. SUPREME COURT HEARS ARGUMENT IN CASE PITTING STATE LEGISLATURES AGAINST FEDERAL CLASS ACTION RULES

The U.S. Supreme Court heard **oral argument** on November 2, 2009, in a case that questions whether state laws barring class actions for statutory damages can control whether federal courts may certify a class action based on state law claims. *Shady Grove Orthopedic Assocs., P.A., v. Allstate Ins. Co.*, No. 08-1008 (U.S., *cert*. granted May 4, 2009). The lower courts ruled that the prohibition on class actions under New York law "renders the class action device unavailable in federal court" for the plaintiffs' state law claims.

A woman injured in an auto accident assigned her right to recover insurance proceeds to the clinic that treated her. The clinic eventually recovered its medical expenses and then sued the insurance company in federal court under New York insurance law, claiming that the company had a practice of routinely failing to timely pay these claims. The clinic alleged that it was due about $500 in interest on the injured woman's claim, but it brought the lawsuit as a putative class action, seeking to recover more than $5 million on behalf of a group that it alleged was similarly affected by the insurance company's practice of delaying coverage payouts.

The insurance company successfully moved to dismiss the case, relying on a New York law that prohibits class actions, unless the statutory damages law specifically authorizes the recovery in a class action. New York insurance law does not authorize

recovery of interest on overdue payments in a class action. If the plaintiffs cannot bring their claims in federal court as a class, their individual damages do not meet the threshold for the federal courts to hear them.

The dispute presents questions about the relationship between federal and state law, that is, whether state legislatures can dictate the use or non-use of the class action device in any federal court, and whether the New York rule on class actions is substantive or procedural. Court watchers are reportedly interested in how the U.S. Supreme Court will handle the case given the majority of justices who appear to have a "business-friendly" approach to litigation. The Court may be inclined to cede authority to the states and, in so doing, recognize new and potentially significant limitations on class actions. *See ScotusWiki*, November 2, 2009.

LACK OF SUFFICIENT CLASS DEFINITION DOES NOT DIVEST FEDERAL COURT OF JURISDICTION UNDER CAFA

The First Circuit Court of Appeals has ruled that a district court prematurely determined that it lacked jurisdiction under the Class Action Fairness Act (CAFA) when it remanded a putative class action to the originating court after finding that the complaint did not sufficiently define the plaintiff class. ***College of Dental Surgeons of Puerto Rico v. Conn. Gen. Life Ins. Co.*, No. 09-2201 (1st Cir., decided October 22, 2009)**.

The complaint "consistently" alleged harm to dentists in Puerto Rico as a professional group. It described the plaintiff as representing a "dentistry class" and sought class-wide relief. And while the complaint invoked Puerto Rico's class action rules and alleged harm to "members of the class," it did not define the putative class. When the defendant filed a motion for remand, the district court found that the plaintiff did not define a class within federal pleading requirements and thus, CAFA jurisdiction was wanting.

According to the appeals court, "The district court's pronouncement that this was not a class action because the complaint lacked a sufficiently defined class is in tension" with a CAFA provision which recognizes the principle that any complaint with "class-type allegations historically has been assumed to assert a class action before formal class certification." CAFA expressly applies "to any class action before or after the entry of a class certification order by the court with respect to that action."

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According to the court, defining a class "is not the issue at the *inception* of a class action," and the district court erred in ruling on the inadequacy of the class definition when it was simply making a decision about jurisdiction under CAFA. The court remanded the case for further proceedings.

DISNEY OFFERS REFUNDS ON BABY EINSTEIN® VIDEOS

The Walt Disney Co. has reportedly agreed to offer refunds for Baby Einstein® videos purchased between June 5, 2004, and September 5, 2009, apparently in response to a threatened class-action lawsuit for alleged unfair and deceptive practices and continued pressure from a children's advocacy group that claims the popular videos, featuring music, puppets, bright colors, and few words, do not increase infant intellect as advertised.

Susan Linn, director of the Campaign for a Commercial-Free Childhood (CCFC), which led the anti-baby-video campaign, told a news source that the organization viewed the refunds as "an acknowledgment by the leading baby video company that baby videos are not educational." In 2006, CCFC filed a **complaint** with the Federal Trade Commission about Disney's educational claims and those of another company, Brainy Baby, citing the American Academy of Pediatrics' recommendation that "no screen time" be allowed for children younger than age 2. Thereafter, the companies stopped using the word "educational" in their product promotions, but CCFC continued to push the issue. "Disney was never held accountable, and parents were never given any compensation," Linn was quoted as saying. "So we shared our information and research with a team of public health lawyers."

The Baby Einstein Co., acquired by Disney in 2001, will apparently refund $15.99 each for up to four Baby Einstein® DVDs per household once the videos are returned. Susan McLain, vice president and general manager of the video maker, claims on its Web site that the refund program was merely good customer service. She told a news source that "fostering parent-child interaction always has and always will come first at The Baby Einstein Company, and we know that there is an ongoing discussion about how that interaction is best promoted. We remain committed to providing a wide range of options to help parents create the most engaging and enriching experience for themselves and their babies." *See The New York Times,* October 24, 2009; *Product Liability Law 360,* October 29, 2009.

ALL THINGS LEGISLATIVE AND REGULATORY

Computer Maker Agrees to Pay Fine for Anti-Microbial Claims

The Environmental Protection Agency (EPA) has announced that Samsung Electronics America, Inc. will pay a $205,000 civil penalty for promoting its computer keyboards as anti-microbial without first registering the products as pesticides. Under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), companies that make "pesticidal claims" in connection with the sale of their products must register the products with the agency so that it can (i) decide whether the pesticide is effective, (ii) assess potential harm to human health or the environment, and (iii) prescribe labeling requirements with warnings and directions for use.

Between October 2008 and March 2009, Samsung had apparently sold laptop, netbook and notebook computers that had keyboards coated with a silver nanotechnology-based substance, touted for its ability to inhibit bacterial growth and reduce odors. Specifically, the company claimed that its "N Series use incredibly small, nano-sized silver ion powder to coat the keyboard making it virtually impossible for bacteria to live and breed creating a more hygienic personal computing environment." According to the consent agreement, Samsung will pay the civil penalty and certify that it is no longer selling computers with pesticidal claims and that its computers "do not contain any nano-silver technology." *See EPA Press Release,* October 21, 2009.

Congress Holds Hearing on Pleading Requirements After *Iqbal*

A House subcommittee recently conducted a **hearing** captioned "Access to Justice Denied—*Ashcroft v. Iqbal*." Several Democratic congressmen are apparently considering introducing legislation, similar to a bill earlier introduced by Senator Arlen Specter, that would override the U.S. Supreme Court's new "plausibility standard" for pleadings in civil cases. Among those testifying during the hearing before the Judiciary Committee's Subcommittee on the Constitution, Civil Rights, and Civil Liberties were New York University School of Law Professor Arthur Miller and former Assistant Attorney General, Civil Division, U.S. Department of Justice, Gregory Katsas.

Miller criticized the new standard, calling the Court's rulings "the latest steps in a long-term judicial trend that has favored increasingly early case disposition in the name of efficiency, economy, and the avoidance of abusive and frivolous lawsuits." He contended that "insufficient attention has been paid during this period to the important policy objectives and societal benefits of federal civil litigation." Miller also questioned, "Have we abandoned our gold standard—adjudication on the merits, with a jury trial, if appropriate—and replaced it with threshold judicial judgments based on limited information, discarding all suits that the district court believes are not worth pursuing?"

Katsas argued that the Court's "decisions faithfully interpret and apply the pleading requirements of the Federal Rules of Civil Procedure, are consistent with the vast bulk of prior precedent, and strike an appropriate balance between the legitimate interests of plaintiffs and defendants." He also testified that "overruling these decisions would threaten to upset pleading rules that have been well-settled for decades, and thereby open the floodgates for what lawyers call 'fishing expeditions'—intrusive and expensive discovery into implausible and insubstantial claims." According to *The Wall Street Journal's* Law Blog, the Court's decisions make it "harder for plaintiffs to defeat defendant's motions to dismiss. For that reason, broadly speaking, defense lawyers love the *Iqbal* decision and plaintiffs' lawyers hate it." *See WSJ Law Blog*, October 28, 2009.

Two Public Nanotechnology Meetings Slated for November

The National Nanotechnology Coordination Office has **announced** two public meetings in November concerning nanotechnology and its implications. The first is a November 16, 2009, "primer" for a workshop to be held the following two days. The primer will provide general background and federal research material about nanotechnology, including environmental, health and safety concerns associated with it. The November 17-18 workshop will provide an open forum to "discuss the state-of-the art of the science related to environmental, health and safety aspects of nanomaterials in two areas: human health and instrumentation and metrology." Research in these areas is used as a guide to improve environmental, health and safety protection as to nanoscale-engineered materials and to monitor trends and progress. *See Federal Register,* October 31, 2009.

CPSC Study Declines to Blame Chinese Drywall for Homeowners' Ailments, Problems

In its **first** in a series of reports on drywall manufactured in China, the Consumer Product Safety Commission (CPSC) has initially declined to link the construction material with various ailments and problems allegedly experienced by homeowners where it was installed. While the October 29, 2009, report acknowledges that Chinese drywall shows elevated levels of certain elements, such as volatile sulfur gases and elemental strontium, compared with non-Chinese drywall, it did not tie those levels to health impacts or reported metal corrosion.

CPSC stressed that more study is needed. "This is a complicated problem, and we have several studies and other activities underway to help bring the best possible science to bear," the agency said in a statement. "The first sets of data released today start to explain differences between Chinese and non-Chinese drywall, but more remains to be learned." CPSC reportedly plans to issue information from a 50-home air-sampling project by late November 2009. *See Product Liability Law 360*, October 29, 2009.

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Federal Court Statistics Updated

The Administrative Office of the U.S. Courts recently released an update to its "**Judicial Facts and Figures**" report, a compilation of data on the federal judiciary's caseload since 1990. Among the tables included in the report are those that track the number of cases filed by type and district court; how long it takes the courts, on average, to resolve a dispute; and numbers of appeals filed. While product liability cases filed in 1990 (19,621) and 2008 (19,322) were nearly the same, asbestos litigation filings have recently surged with a new influx in the Eastern District of Pennsylvania. The median time to process a civil case changed from eight months in 1990 to 8.1 months in 2008. Appeals have increased about 21,000 from 40,893 in 1990, and about half were civil cases.

Wisconsin Supreme Court Rules That Campaign Donations Are Not Enough to Force Judges to Step Aside

The Wisconsin Supreme Court, by a 4-3 vote, has reportedly adopted a rule that says endorsements, campaign contributions and independently run ads alone are not enough to require a judge to recuse him or herself from hearing a case. The state's longstanding ethical code for judges and a recent U.S. Supreme Court decision required them to recuse themselves if their impartiality could reasonably be questioned.

Wisconsin Manufacturers & Commerce, which has reportedly contributed millions of dollars to elect two of the sitting justices, and the Wisconsin Realtors Association argued that the rule they drafted and the court adopted was essential to clarify policies at a time when justices increasingly face bias charges. Justice Patience Roggensack was quoted as saying that the new rule will "send a message that making lawful contributions is not a dishonorable thing to do and it's not a dishonorable thing to receive."

The court apparently rejected a competing proposal from the League of Women Voters of Wisconsin and former Justice Bill Bablitch; it would have required judges to step aside if a lawyer or party to a case gave them more than a certain amount in campaign contributions. The new rule will "add to the perceptions (of bias) that are apparently out there rather than put them to rest," argued Justice N. Patrick Crooks. *See Associated Press*, October 27, 2009; (Milwaukee) *Journal Sentinel,* October 28, 2009.

LEGAL LITERATURE REVIEW

Suja Thomas, "The New Summary Judgment Motion: The Motion to Dismiss Under *Iqbal* and *Twombly*," (unpublished, October 27, 2009)

University of Illinois College of Law Professor Suja Thomas contends that the U.S. Supreme Court's recent rulings in *Ashcroft v. Iqbal* and *Bell Atlantic Corp. v. Twombly* have blurred the differences between a motion to dismiss and a motion for summary judgment, which are not the same in terms of the availability of discovery. The article suggests that, "under the plausibility standard, motions to dismiss may be granted inappropriately in at least some cases where facts may be discovered that would make the claim plausible under a summary judgment motion." Noting that the new pleading standard will result in an increased role for judges in litigation and an increased dismissal of certain types of cases and questioning whether *Iqbal* and *Twombly* were decided correctly, the author concludes, "The motion to dismiss is now the new summary judgment motion, in standard and possibly effect."

LAW BLOG ROUNDUP

Is *The NYT* Turning a New Leaf?

"*The Times* has now gotten around to covering some of the harm done by [the Consumer Product Safety Improvement Act] ten months after the *Washington Post* and other media had begun reporting the basic outlines of the story." Overlawyered.com editor Walter Olson, writing about a weekend item in the business section of *The New York Times* discussing the burdens on small businesses of complying with the lead testing and certification requirements of the law. According to Olson, "Okay, so the *Times* was—well, not a day late and a dollar short, but more like 300 days late and many billions of dollars in overlooked costs short. Still let's be grateful: the paper's news side has now implicitly rebuked the editorial side's fantastic, ideologically blinkered dismissal of 'needless fears that the law could injure smaller enterprises.'"

Overlawyered.com, November 2, 2009.

Time Takes on Surreal Quality in U.S. Supreme Court

"There was an *Alice in Wonderland* quality to the Supreme Court this morning, where clocks throughout the building were off-kilter—apparently triggered by an unsuccessful effort to turn them back when Daylight Savings Time ended early Sunday morning." U.S. Supreme Court correspondent Tony Mauro, blogging about the Court's November 2, 2009, oral argument session. He noted that the Chief Justice "told spectators that lawyers are sometimes admonished not to look at the clock during oral arguments," and that the warning was "well-taken, because the clocks kept changing as the argument proceeded, at one point reading 10 a.m., and then a little after 11. Lawyers kept their own time, and never looked up."

BLT: The Blog of Legal Times, November 2, 2009.

State-Federal Law Tension Subject of Recent U.S. Supreme Court Argument

"The Supreme Court will come off Halloween weekend in *Erie* fashion with Monday's oral argument in *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.* (No. 08-1008), which considers whether New York's bar on class actions for certain statutory-damages claims precludes class certification in a federal court diversity action." University of Cincinnati College of Law Professor Adam Steinman, discussing how the Court may have to consider whether "the *Erie* doctrine requires federal courts to follow state-law class-certification standards."

Civil Procedure & Federal Courts Blog, October 28, 2009.

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THE FINAL WORD

Civil Case Against Famed Asbestos/Tobacco Lawyer Assigned to New Judge

After plaintiff's lawyer Richard "Dickie" Scruggs pleaded guilty to bribing a judge, a lawyer who worked with him on asbestos litigation reportedly sued him in federal court, claiming that Scruggs took fees he was owed from asbestos litigation settlements and used the money to finance lawsuits against cigarette manufacturers. According to a news source, a federal judge from Texas has been assigned to preside over the case filed by attorney William Wilson following the recusal of a Mississippi federal judge whose chief deputy once worked for a firm that represented Wilson in another case. Other Mississippi judges apparently declined to hear Wilson's suit because they have presided over criminal or civil cases in which Scruggs was involved. Scruggs, who purportedly earned as much as $848 million from anti-tobacco lawsuits in the 1990s, is currently serving a prison term of 7.5 years. Wilson is reportedly seeking actual, punitive and treble damages. *See Associated Press*, October 26, 2009; (Mississippi) *Clarion Ledger* and *Southeast Texas Record*, October 27, 2009.

UPCOMING CONFERENCES AND SEMINARS

American Conference Institute, New York, New York – December 8-10, 2009 – "14th Annual Drug and Medical Device Litigation Conference." Co-sponsored by Shook, Hardy & Bacon, this conference features a distinguished faculty from the bench, bar and industry offering practical insights and strategies for successfully meeting the litigation challenges facing the drug and medical device industry. Shook, Hardy & Bacon Pharmaceutical and Medical Device Litigation Partner Michelle Mangrum will serve on a panel discussing "Successfully Asserting a Preemption Defense and Managing Industry/FDA Relationships in a Post-*Levine* and Post-*Riegel* World." Shook, Hardy & Bacon Pharmaceutical and Medical Device Litigation Partner Eric Anielak joins a panel addressing "Procedural Strategies for Winning Cases." ■

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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).