Shook, Hardy & Bacon L.L.P.

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PRODUCT LIABILITY LITIGATION REPORT

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THINKING GLOBALLY

Fourth Circuit Dismisses Shipping Accident Claims Without an Alternative Forum

The Fourth Circuit Court of Appeals has affirmed the dismissal of claims on *forum non conveniens* grounds in a case arising from a shipping accident in Chinese waters involving foreign vessel owners, despite the expiration of the deadline for filing claims against a limitation fund in Chinese courts. ***In re: Compania Naviera Joanna SA v. Koninklijke Boskalis Westminster NV,* No. 08-1031 (4th Cir., decided June 26, 2009)**.

Proceedings had been filed in Chinese admiralty court, but the Boskalis defendants objected to its jurisdiction and decided not to pursue litigation there. Instead, the Boskalis defendants, hoping to recover damages in U.S. courts that far exceeded what was available in China, filed claims against plaintiff MSC Shipping in eight different U.S. courts and secured some 16 orders of attachment against its ships under an admiralty rule requiring the posting of bonds on each ship to obtain its release.

MSC Shipping filed the instant action to enjoin all of the other U.S. actions in favor of this one and then to dismiss it under the doctrine of *forum non conveniens.* According to the court, over the dissent of one appellate panel member, it is not an abuse of process to bring a lawsuit and then file a motion challenging all other related U.S. litigation under the *forum non conveniens* doctrine. In fact, the court found it an efficient use of judicial resources.

The court also decided that the case could be dismissed on this basis despite the apparent lack of an alternative forum, because Boskalis "deliberately forfeited the alternative forum," and some questions remained as to whether Boskalis's claims were irrevocably time-barred in China. According to legal research supplied by MSC Shipping, Chinese courts will not raise the statute of limitations sua sponte where it is not raised as a defense. The Fourth Circuit, in affirming the district court's dismissal, conditioned its order on MSC Shipping's not raising or asserting a defense based on the statute of limitations or any court-imposed deadlines in response to any claim Boskalis chose to pursue against it in China.

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 concluded by advising the district courts to "be ready to rely on their wide discretion and decline to exercise jurisdiction when doing so will avoid the danger of U.S. courts becoming a place for resolving a maritime dispute only because U.S. law might provide a more favorable outcome for one of the litigants."

U.S. LITIGATION DEVELOPMENTS

Puerto Rico's Solidarity Doctrine Tolls Statute of Limitations for Those in Motorcycle Supply Chain

The First Circuit Court of Appeals has reinstated product liability litigation filed against Suzuki Motor Corp. in a Puerto Rico district court nearly five years after the motorcycle accident giving rise to plaintiff's alleged injuries occurred. ***Rodríguez v. Suzuki Motor Corp.*, No. 07-2662 (1st Cir., decided June 22, 2009)**. The plaintiff initially filed his lawsuit against the motorcycle's seller and distributor in 2002, which was within the one-year statute of limitations. Several voluntary dismissals, dismissals without prejudice and re-filings followed; the case before the appeals court was filed against Suzuki in 2006.

The district court dismissed the claims as time-barred, and the First Circuit reversed, finding that, under Puerto Rico tolling law, which is based on Spanish civil law, (i) the statute of limitations clock resets when an action comes to an end through voluntary dismissal or dismissal without prejudice, unless the rule is abused or used in bad faith; (ii) this tolling rule is effective in products liability as to all joint tortfeasors in the supply chain under the solidarity doctrine; and (iii) as long as the litigation involves identical claims, it makes no difference "whether the later-sued tortfeasors are brought into the initial action that created the tolling effect or they are sued in a subsequent action."

The court determined that the plaintiff effectively tolled the statute of limitations as to his later-filed action against Suzuki by "timely bringing before the court an identical cause of action against parties solidarily liable with Suzuki."

Occasional Seller of Used Machinery Not Liable Under NY Law for Personal Injury

In 2008, the Second Circuit Court of Appeals certified a question to New York's high court in litigation involving personal injury sustained while the plaintiff was operating an industrial machine that defendant had purchased secondhand and owned for 15 years before selling it to the plaintiff's employer. More information about the certification decision appears in the August 20, 2008, issue of this Report.

According to the Second Circuit, the New York Court of Appeals has determined that the defendant was not a "regular seller" for strict liability purposes and thus cannot be held liable for plaintiff's injury. So ruling, the court affirmed the district court's dismissal of plaintiff's claims. ***Jaramillo v. Weyerhaeuser Co.*, No. 07-0507 (2d Cir., decided June 18, 2009)**.

The New York court apparently based its determination on the policy considerations underlying the law's distinction between "regular" product sellers and those "casual" or "occasional" sellers whose sale of a product is "wholly incidental to the seller's regular business." Regular sellers (i) have ongoing relationships with manufacturers that enable these sellers "to exert pressure for improved safety of products and [to] recover costs within their commercial dealings, or through contribution or indemnification in litigation"; and (ii) by marketing products as a regular part of their business, "may be said to have assumed a special responsibility to the public, which has come to expect them to stand behind their goods." The New York court found such policy considerations inapplicable to the occasional seller.

Weyerhaeuser had a closer relationship with the manufacturer in this case than the typical casual seller, because it owned patents related to the equipment's technology and from time to time had made suggestions about its safety features. Still, the New York Court of Appeals determined that this relationship was "general in nature" and "even more attenuated" with respect to the machine at issue, because "Weyerhaeuser had bought it used from a third party and sold it as surplus."

Federal Circuit Allows Recovery for Vaccine Act Claim

The Federal Circuit Court of Appeals has determined that a special master imposed too high an evidentiary burden under the Vaccine Act on the parents of a child who allegedly began experiencing seizures the day after he was vaccinated with the diphtheria, whole-cell pertussis and tetanus (DPT) vaccine. ***Andreu v. HHS,* No. 2008-5184 (Fed. Cir., decided June18, 2009)**. The court allowed the parents to recover compensation and costs under the National Childhood Vaccine Injury Act of 1986.

According to the court, the special master (i) "incorrectly determined that the testimony of [the child's] treating physicians was insufficient to establish 'a logical sequence of cause and effect' between the DPT vaccine [the child] received on October 31, 1995, and the seizure he experienced one day later"; (ii) "imposed upon the [claimants] an elevated evidentiary burden requiring them to submit conclusive proof in the medical literature linking afebrile seizures to components in the whole-cell pertussis vaccine"; and (iii) "erroneously determined that [the child's] 'clinical picture' precluded a finding that his seizure disorder was caused by an injury to the brain from the DPT inoculation."

The court explained how Congress established the statutory compensation scheme to ease the evidentiary burdens, transaction costs and delays for those individuals who experience vaccine-related injuries.

The court explained how Congress established the statutory compensation scheme to ease the evidentiary burdens, transaction costs and delays for those individuals who experience vaccine-related injuries. Reviewing the treating physicians' testimony, the court found the evidence adequate to support recovery. While the court ruled that the special master did not err in requiring the testimony, given ambiguity in certain of their statements, the court also noted, that in most cases, "it is both inadvisable and

unnecessary to subpoena the testimony of treating physicians. It would not be in the public interest for the specter of a subpoena to provide physicians with a disincentive to treat a vaccine-injured patient or to cause them to be less than forthright in creating medical records assessing the relationship between a vaccine and a patient's injury."

Jury Awards $7 Million in Lead-Paint Exposure Suit; Wisconsin Turns Aside Design-Defect Claims

A Mississippi jury has reportedly awarded $7 million to the family of a boy who allegedly developed brain damage as a result of exposure to lead-based paint. *Gaines v. The Sherwin-Williams Co.*, No. 2000-604 (Jefferson County Circuit Court, Miss., decided June 25, 2009). According to a news source, the plaintiffs alleged that they purchased lead-based paint for use in the home where the child was allegedly exposed after the company stopped making and selling the product. Sherwin Williams apparently plans to file an appeal. *See Product Liability Law 360*, June 29, 2009.

Meanwhile, the Wisconsin Supreme Court has dismissed defective-design claims in lead-paint litigation. ***Godoy ex rel. v. E.I. du Pont de Nemours & Co.*, No. 2006AP2670 (Wisc., decided July 14, 2009)**. The plaintiffs claimed that the minor child sustained lead poisoning and alleged that the source of the lead was white lead carbonate pigment from painted surfaces, and paint chips, flakes and dust containing paint in his apartment. The defendants include the companies that manufactured, marketed, distributed, or sold white lead carbonate products used as a pigment in paints and coatings for residential use. Plaintiffs alleged design-defect claims in strict liability and negligence, among other matters.

An intermediate appellate court dismissed the design-defect claims, finding that a product cannot be said to be defectively designed when that design is inherent in the nature of the product so that an alternative design would make the product something else. The supreme court agreed and further clarified, "Wisconsin strict products liability law does not require a plaintiff to prove the feasibility of an alternative design" and "the substantial change defense is not a basis of our decision here and was not an alternative basis of the decision of the court of appeals." Other claims in the case that remained pending before the trial court were not affected by the court's decision.

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Trio of State and Federal Rulings Further Refine Class Action Parameters

The Massachusetts Supreme Judicial Court has held that consumer contracts compelling the individual arbitration of claims, thus prohibiting class action proceedings against the manufacturer, violate the state's fundamental public policy and are therefore unenforceable. ***Feeney v. Dell, Inc.*, No. SJC 10259 (Mass., decided July 2, 2009)**. According to the court, the policy is so strong

that it overrides a contract clause specifying the application of another state's law. While the court found the contract unenforceable in its entirety, it dismissed the plaintiffs' claims without prejudice, finding they had failed to allege facts sufficient to state a claim under the state's consumer protection law.

Deciding an issue of first impression, the Fifth Circuit Court of Appeals has determined that, in litigation commenced in Louisiana years before the effective date of the Class Action Fairness Act of 2005 (CAFA), an amended complaint filed in 2008 cannot be removed to federal court under CAFA where the new plaintiffs or claims added by the amended complaint relate back to the original complaint. ***Admiral Ins. Co. v. Abshire*, No. 09-30121 (5th Cir., decided July 2, 2009)**. The court had previously determined that the addition of new defendants to litigation commenced pre-CAFA provided a new removal window.

The Ninth Circuit Court of Appeals has ruled that Federal Rule of Civil Procedure 23 does not preclude a defendant from bringing a "preemptive" motion to deny certification. ***Vinole v. Countrywide Home Loans, Inc.*, No. 08-55223 (9th Cir., decided July 7, 2009)**. In this case, the defendant filed its motion before the close of discovery, the pretrial motion deadline and the filing of plaintiffs' motion to certify a class. The court found no procedural bar to the practice and also determined that plaintiffs failed to show that the timing was prejudicial.

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Bankruptcy Court Turns Aside Challenge to GM Restructuring Plan by Asbestos Claimants

A federal bankruptcy court has denied motions brought by individual accident litigants and an ad hoc committee of asbestos personal injury plaintiffs who challenged its order approving the sale of General Motors Corporation's assets under a restructuring plan that, for the most part, created a new entity free of successor liability claims. *In re: General Motors Corp.*, Chapter 11 Case No. 09-50026 (Bankr. S.D.N.Y., decided July 7, 2009). While the new auto company will apparently assume responsibility for product liability claims involving vehicles made by the old company, it will not be liable for damages from accidents that happened before the bankruptcy filings. The bankruptcy court denied motions to certify its sale-approval order for appeal and to stay the proceedings pending appeal, finding that "huge contrary public interests" in the automaker's future counseled against the grant of such relief. *See The Los Angeles Times*, July 11, 2009.

Dismissal of Nicaraguan Banana Workers' Pesticide Cases Could Threaten Similar Litigation

When a Los Angeles judge dismissed a Nicaraguan banana workers' multimillion-dollar lawsuit against Dole Food Co. in April 2009, after finding the claims had been concocted and those investigating the wrongdoing had been subject to a campaign

of intimidation, the claims of hundreds of other workers throughout the United States were reportedly put in jeopardy as judges examine charges that plaintiffs' lawyers orchestrated international fraud.

The claims centered around the pesticide DBCP and allegations that workers in banana plantations in Central America and Africa were harmed by exposure to it. But, as the Los Angeles judge found, the lawyers who brought the cases recruited and coached as plaintiffs people who had never worked on the plantations. A November 2007 $5.7 million verdict, later reduced in post-trial motions, for the alleged sterility of six Nicaraguan men, is now on appeal and may be thrown out in the wake of the recent fraud findings.

"Once you see fire, you look closer to see if there's smoke in other cases like this one," Stephen Yeazell, a UCLA law professor who specializes in international civil litigation, was quoted as saying.

The farmworkers' claims were included in a documentary film that premiered at the Los Angeles Film Festival in June 2009. Dole has reportedly sued the Swedish filmmaker for slander and libel, arguing that the April fraud ruling proved it was inaccurate and defamatory. The company seeks damages and has requested an injunction to stop additional screenings. Titled "Bananas!," the film documents the activities of the California lawyer who sued Dole on behalf of thousands of Nicaraguan plantation workers. *See Los Angeles Times,* July 12, 2009; *Courthouse News Service*, July 13, 2009.

ALL THINGS LEGISLATIVE AND REGULATORY

Lead-Level Enforcement for Children's Bikes Delayed Until 2011

The Consumer Product Safety Commission (CPSC) has put a **two-year hold** on its enforcement of a new law requiring children's bicycle manufacturers to reduce the lead levels in certain bike parts by August 2009. The manufacturers will have until July 1, 2011, to drop lead levels from 600 parts per million to 300 ppm for specific parts used in bicycles, jogger strollers and bike trailers for children younger than age 12. The stay applies to any children's bike or related product made before February 2009 until June 30, 2011, and will remain in effect for the life of the product.

Manufacturers that wish to take advantage of the enforcement exemption must submit a report to CPSC by September, identifying the lead content and component makeup of products subject to the law and produced between May 2008 and May 2009. They will also have to submit detailed plans about how and when they will comply with the Consumer Product Safety Improvement Act standards.

An industry trade association submitted a petition in March 2009 requesting the delay, arguing that bicycle manufacturers had not yet been able to make safe and

effective versions of some bike components, such as tire valves, that could meet the August deadline. CPSC, in granting the delay, reasoned that forcing noncompliant bikes off the market in August would result in children riding adult bikes, which would pose an additional safety risk and could lead to more accidents than lead exposure. CPSC also observed that removing replacement parts from store shelves could force parents to use older or less-safe parts.

"In such circumstances, enforcement discretion is the only measure for the commission to protect children," according to the CPSC. *See Product Liability Law 360*, July 1, 2009.

California Implements New Electronic Discovery Act

California Governor Arnold Schwarzenegger (R) recently signed into **law** the new Electronic Discovery Act, which limits discovery in most litigation to reasonably accessible sources of electronic data and provides that litigants will not be sanctioned if they lose data through ordinary electronic system operations. Amending existing conventional discovery rules, the law establishes procedures for seeking electronic information and allows litigants to seek protection from e-discovery requests where the information sought is inaccessible. Courts will, however, have discretion to order limited discovery even in this event.

According to the law, "If it is established that the electronically stored information is from a source that is not reasonably accessible because of undue burden or expense, the court may nonetheless order discovery if the demanding party shows good cause, subject to specified restrictions in specified circumstances."

Courts will also have the discretion to limit electronic discovery from accessible sources if they determine that the information sought is otherwise available or duplicative or if the expense outweighs any likely benefit. The law allows courts to impose sanctions on parties for inadequate production but provides that they "shall not impose sanctions on a party or any attorney of a party for failure to provide electronically stored information that has been lost, damaged, altered or overwritten as the result of the routine, good faith operation of an electronic information system."

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In a related matter, experts reportedly claim that it is only a matter of time before e-discovery issues involving social networking data arise in major cases. Many companies use social networking sites, such as Facebook and Twitter, to promote their products, communicate with customers and share information in the workplace. That information, some lawyers say, could one day be an important part of a lawsuit. But tracking down the data from social networks can be challenging given some site designs, with information appearing on a single page actually stored on multiple servers. *See Product Liability Law 360*, June 20 and July 1, 2009.

New Laws in Massachusetts and Vermont Ban Gifts from Drug Companies to Doctors

To stop companies from unduly influencing choices physicians make about the drugs they prescribe, new laws went into effect recently in Massachusetts and Vermont that ban pharmaceutical companies and medical-device makers from giving physicians gifts, including resort trips. Vermont, which also prohibits free meals, and Massachusetts, which curtails them, reportedly have the most restrictive laws in the nation, while Minnesota has a longstanding partial-gift ban. Lawmakers in Colorado, Connecticut, Illinois, Maryland, Oregon, and Texas are apparently debating similar measures. Gift bans are also reportedly in place at Stanford University's medical school, Ohio State University and the University of Pennsylvania.

"There is a genuine recognition within the medical profession that the financial entanglements with industry have become problematic," Allan Coukell, director of the Pew Prescription Project, a nonprofit advocacy organization that supports tighter regulation, was quoted as saying.

According to a news source, the issue came to a head after several drug companies were accused of using these types of inducements to persuade doctors to prescribe their products. Criminal charges and multimillion dollar settlements have apparently caught policymakers' attention. Some physicians and companies oppose the new restrictions, concerned that they will hinder the flow of information to physicians. *See The Wall Street Journal*, July 1, 2009.

LEGAL LITERATURE REVIEW

Victor Schwartz & Christopher Appel, "The Plaintiffs' Bar's Covert Effort to Expand State Attorney General Federal Enforcement Power," Washington Legal Foundation Legal Backgrounder, July 10, 2009

Shook, Hardy & Bacon Public Policy Attorneys **Victor Schwartz** and **Christopher Appel** discuss a common thread linking recently adopted federal legislation involving issues ranging from consumer product safety and climate change to data accountability and economic stimulus. That thread is "a specific enforcement provision that allows a federal lawsuit to be initiated by a state's attorney general." They argue that such statutory provisions favor plaintiffs' lawyers who will be hired to handle the lawsuits that the state attorneys general decide to pursue.

This article provides a number of examples where contributors to state attorney general election campaigns were awarded contracts to prosecute mass tort litigation on the states' behalf. The authors conclude, "Congress should take care when meting out federal law enforcement authority, and view with great skepticism the efforts of plaintiffs' lawyer lobbying groups to buoy the office of the state attorney general for the advancement and profit of private attorneys."

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Mark Geistfeld, "The Value of Consumer Choice in Products Liability," *Brooklyn Law Review* (forthcoming 2010)

New York University School of Law Professor Mark Geistfeld considers how issues of autonomous consumer decisions about product safety are woven into the liability rules set forth in the *Restatement (Third) of Torts: Products Liability.* He notes that consumer choice may be difficult to discern because the *Restatement (Third)* de-emphasizes the importance of consumer expectations, but contends that, "[p]roperly understood, the value of consumer choice not only justifies the liability rules in the *Restatement (Third)*, it also provides the key to understanding the important limitations of strict products liability, including those based on assumed risks."

Robert Rabin, "Territorial Claims in the Domain of Accident Law: Conflicting Conceptions of Tort Preemption," *Brooklyn Law Review*, 2009

In this article, Stanford Law School Professor Robert Rabin explores the intersection of federal regulation and the tort system, reexamines landmark preemption rulings and discusses the circumstances under which implied preemption might be justified in the absence of an express statutory preemption provision. He concludes that "disparate views on the appropriate scope of preemption claims" will not likely disappear from the policy arena and contends regulation and tort can both offer distinct benefits in the prevention of injury.

LAW BLOG ROUNDUP

Some Products Litigants Protected in GM Bankruptcy

"Although no one has explained why potential product liability plaintiffs should be treated differently than other unsecured creditors injured by GM's bankruptcy, the company relented in the face of intense public pressure and effectively put these creditors at the head of the line of those with claims against the company." William Mitchell College of Law Professor J. David Prince, blogging about the decision by General Motors Corp. to assume responsibility for future product liability claims after emerging from bankruptcy.

Products Liability Prof Blog, July 2, 2009.

Advisory Jury to Be Empaneled in FEMA Trailer Litigation

"Bellwether trials are gaining popularity, particularly in Louisiana." Florida State University College of Law Assistant Professor Elizabeth Chamblee Burch, discussing a multidistrict litigation court's decision, in cases involving formaldehyde and other chemicals in the trailers that FEMA supplied to Hurricane Katrina survivors, to empanel a jury to hear the bellwether plaintiffs' claims against the non-governmental defendants and to use that jury in an advisory capacity to hear the claims against the government in the same trials. According to the court, the jury's

findings will not be binding but could lessen the chances of an excessive damages award against the non-governmental defendants "as might occur if the jury were precluded from considering the government's liability." The government opposed the use of an advisory jury, arguing that the Federal Tort Claims Acts requires bench trials for claims against the United States. It is likely that the jury pool will have strong feelings about how the government addressed pre- and post-Katrina events.

Mass Tort Litigation Blog, July 7, 2009.

THE FINAL WORD

Greg Fowler, who co-chairs Shook, Hardy & Bacon's International Litigation and Dispute Resolution Practice, will serve as secretary of the International Bar Association's Product Law and Advertising Committee in 2009-2010. Fowler has extensive experience in the management and litigation of individual product liability claims and mass tort litigation in state and federal courts throughout the United States and internationally in Asia, Australia and Western Europe. He has counseled U.S., Asian and European manufacturers on developments in products liability law and regulatory issues arising in those regions as well. Fowler has completed postings in the firm's London office and in Melbourne, Australia.

UPCOMING CONFERENCES AND SEMINARS

American Conference Institute, Chicago, Illinois – October 26-27, 2009 – "Food-Borne Illness Litigation, Advance Strategies for Assessing, Managing & Defending Food Contamination Claims." Shook, Hardy & Bacon Pharmaceutical & Medical Device Litigation Partner Madeleine McDonough will participate in a discussion on "Global Food Safety: Factoring in New Threats Associated with Foreign Food Product Imports."

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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).