Shook, Hardy & Bacon L.L.P.

AUGUST 27, 2009

PRODUCT LIABILITY LITIGATION REPORT

CONTENTS

CLAIMS AGAINST RUSSIAN AIRCRAFT MANUFACTURERS DISMISSED

Finding none of the Foreign Sovereign Immunities Act (FSIA) exceptions applicable in litigation seeking to enforce a default product liability judgment against companies controlled by or instrumentalities of Russia, the Eleventh Circuit Court of Appeals has dismissed the claims for lack of subject matter jurisdiction. ***Butler v. Sukhoi Co., No. 08-14523 (11th Cir., decided August 19, 2009)***. The plaintiffs obtained a $3.5 million damages award after a default judgment was entered against a Russian company that did not invoke immunity under the FSIA and failed to comply with a court order compelling discovery.

The plaintiffs sought to enforce the judgment against the company and several others that plaintiffs claimed were successors in interest to and/or alter egos of that company. These new defendants sought to dismiss the suit, asserting immunity from liability and execution under the FSIA. The district court denied their motion, finding it "premature" to dismiss the complaint because the plaintiffs were entitled to discovery on "jurisdictional issues."

Noting that it had jurisdiction over this interlocutory appeal from an order denying a claim of FSIA immunity, the appeals court reversed. According to the court, plaintiffs have the burden of proving that one of the FSIA's statutory immunity exceptions applies. Where the party asserting immunity does not contest the jurisdictional facts and simply challenges their legal adequacy, the court reviews the complaint's jurisdictional allegations de novo to determine if they are sufficient to eliminate presumptive immunity. Here, the complaint failed to specifically invoke any of the FSIA's statutory exceptions. The only "conduct" alleged was that the new defendants were alter egos of the defendant against whom the plaintiffs had won a default judgment.

The plaintiffs asserted that they were entitled to further discovery about the alter ego status, but because the new defendants conceded that they were alter egos of the original defendant, the court "was unable to see what specific facts additional discovery might reveal that would be crucial to the court's immunity determination." Because the plaintiffs failed to demonstrate a basis for jurisdiction, the court reversed the district court's order and remanded with instructions to dismiss the case.

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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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FIFTH CIRCUIT ORDERS TIRE DEFECT CLAIMS TO BE TRIED IN MEXICO

The Fifth Circuit Court of Appeals has issued a writ of mandamus ordering a trial court to grant a *forum non conveniens* motion and dismiss litigation filed by Mexican residents for injuries occurring in Mexico against U.S. tire manufacturers. ***In re: Ford Motor Co.*, No. 09-50109 (5th Cir., decided August 21, 2009)**.

The case had been filed in state court, removed to federal court in Texas and then transferred to a multidistrict litigation (MDL) court in Indiana, which, before returning the case to Texas, had denied a *forum non conveniens* motion because plaintiffs had produced *ex parte* orders from Mexican courts saying that foreign defendants cannot be sued in Mexico for torts.

The defendants sought reconsideration by the Texas court of the MDL court's *forum non conveniens* ruling, submitting evidence that the *ex parte* orders from Mexico had been obtained by fraud. The federal district court in Texas denied the motion, explaining that it could not reconsider a pretrial ruling rendered by an MDL court. The Fifth Circuit identified the issue presented, "whether we can grant mandamus on a district court's refusal to reconsider a pretrial MDL decision," as a matter of first impression in the circuit.

The appeals court decided to adopt a "law of the case" analysis under which MDL court rulings should rarely be reversed, but can be revisited "to correct serious errors." According to the Fifth Circuit, the MDL court's *forum non conveniens* decision "is so clearly erroneous that it would work manifest injustice in this case." The court referred to numerous decisions in which it had held that Mexico is an available forum for tort suits against a defendant willing to submit to jurisdiction there. "District courts do not have to start from scratch each time they consider a forum's availability," the court opined, "[u]nless plaintiffs can show evidence distinguishing this case from our precedent, an order from a Mexican court dismissing *this exact case* for lack of jurisdiction, or reliable evidence of some subsequent change in Mexican law that calls our earlier determinations into serious question, plaintiffs cannot prevail in their [inconvenient forum] defense."

Because fraudulently obtained *ex parte* orders from Mexican courts had been submitted in a similar case before the MDL court, "the MDL court should have asked for orders that were issued in courts in which both parties were present, to ensure there was no fraud," the appeals court noted. Thus, the court concluded that, "under the law of the case doctrine, the transferor court should have reconsidered the MDL court's [inconvenient forum] decision for manifest injustice." The court also ruled that mandamus was the appropriate remedy due to the transferor court's clear abuse of discretion in refusing "to alter a transferee court's decision that relied on an erroneous conclusion of law."

The court remanded the case to the district court to enter a judgment of dismissal without prejudice. If the plaintiffs, litigating in good faith in Mexico, can show that Mexican courts are unavailable, they will be allowed to re-file their suit in the Western District of Texas.

CALIFORNIA AG SETTLES PROP. 65 CLAIMS OVER LEAD IN ASTROTURF®

California Attorney General Edmund (Jerry) Brown (D) has entered an agreement with the companies that make and sell Astroturf®, an artificial turf used on playgrounds and playing fields, to resolve claims that they had violated Proposition 65 by failing to warn consumers that the product contains lead, a chemical known to the state to cause cancer and reproductive harm. *State v. Beaulieu Group, LLC*, No. RG 08407310 (Cal. Super. Ct., Alameda County, agreement reached August 13, 2009).

While the companies do not concede liability, they have agreed to (i) reformulate their products to meet lead reduction limits, (ii) provide warnings to those who have purchased and installed their products in California since 2004, (iii) establish a Web site with warnings and good maintenance practice information to minimize lead transfer, (iv) replace up to 20,000 square yards of turf installed at licensed day care facilities, schools, public playgrounds, or public playing fields, and (v) pay a $17,500 civil penalty, as well as payments to various entities for independent testing, research, attorney's fees, and costs.

The agreement, which must be approved by a court, does not apply to downstream sellers and undisclosed affiliates, or to the cushioning and infill products that are used in conjunction with artificial turf.

ARIZONA HIGH COURT CHANGES COURSE ON APPEALS COURT JURISDICTION OVER CLASS CERTIFICATION DENIALS

Overruling a 1972 decision, the Arizona Supreme Court has determined that the state's appellate courts lack jurisdiction to consider challenges to trial court orders denying class certification. ***Garza v. Swift Transp. Co., No. 08-0382 (Ariz., decided August 24, 2009)***. The issue arose in a putative class action brought by a truck driver who contracted with a trucking company and alleged that the company routinely underpaid its drivers.

Overruling a 1972 decision, the Arizona Supreme Court has determined that the state's appellate courts lack jurisdiction to consider challenges to trial court orders denying class certification.

The trial court denied class certification, and the court of appeals, finding that it had jurisdiction under an Arizona statute, vacated the denial after determining that the named plaintiff had a claim typical of other potential class members. The trucking company petitioned the supreme court for review without addressing appellate jurisdiction; the court granted review, but on its own motion ordered the parties to submit supplemental briefs on the jurisdictional issue.

The court discusses at some length the federal courts' struggle over whether a class certification denial is an appealable order. Those courts allowing the appeal relied on the "death knell" doctrine to find that such orders are "final," because the small size of an individual claim effectively shuts the courthouse doors to the named plaintiff. Still, the rule was not applied to allow an appeal as of right; rather, the courts engaged in consideration of "various case-specific factors unrelated to the merits of the underlying order denying class certification." In 1972, the Arizona Supreme Court allowed an appeal from a class certification denial and referred to the death knell doctrine with approval. *Reader v. Magma-Superior Copper Co.*, 494 P.2d 708 (Ariz. 1972).

According to the court, *Reader* should be overruled because (i) it "requires appellate courts to engage in a case-specific factual analysis before determining whether appellate jurisdiction exists for class certification denials"; (ii) "under existing Arizona law, class action defendants are denied the right to appeal orders granting certification"; and (iii) "there is no principled reason why the death knell doctrine should be limited to class actions, and expansion of the doctrine to other orders that make further individual litigation economically unattractive to a plaintiff would fundamentally undermine the final judgment rule."

SEVENTH CIRCUIT CLARIFIES DEADLINES FOR *AMICUS* BRIEFS

The Seventh Circuit's chief judge has issued an opinion supporting the court's refusal to reconsider its decision denying the filing of an *amicus curiae* brief in support of a request to rehear an appeal en banc. ***Fry v. Exelon Corp. Cash Balance Pension Plan, No. 08-1135 (7th Cir., decided August 12, 2009)***. The motion for leave to file the brief was filed eight days after the petition for rehearing en banc was filed.

The appellate rule on which *amici* relied, Federal Rules of Appellate Procedure 29(e), requires that *amicus* briefs be filed no later than seven days after "the principal brief of the party being supported is filed." Excluding weekends and holidays from the count as allowed under the current rule, *amici's* motion to file the brief would have been timely if "the principal" brief involved were the petition for rehearing en banc.

"Someone who wants to file as amicus curiae in support of a petition for rehearing, or rehearing en banc, must use the same schedule as the petitioner. A potential amicus who needs extra time should ask the litigant to seek an extension from the court and defer filing the petition."

According to the court, the principal brief is "the opening brief on the merits." Because that brief was filed in 2008, an *amicus* brief filed more than one year later was untimely. The court explained how appellate materials are distributed to the court and outlined the deadlines under which they operate, noting that late-arriving *amicus* briefs would place additional review burdens on the appeals court judges. The opinion concludes, "Someone who wants to file as *amicus curiae* in support of a petition for rehearing, or rehearing en banc, must use the same schedule as the petitioner. A potential *amicus* who needs extra time should ask the litigant to seek an extension from the court and defer filing the petition."

The court also observed that excluding weekends and holidays from the count potentially extends the seven days of Rule 29(e) to nine, but this will change as of December 1, 2009, when Rule 26 amendments take effect, and seven days will become real calendar days.

VIRGINIA COURT TO HEAR REQUEST FOR EMOTIONAL DISTRESS DAMAGES IN PET LOSS CASE

A man who claims that his former domestic partner deliberately beat one of their dogs to death is reportedly seeking damages well beyond the pet's replacement value. Trial was expected to begin August 24, 2009, and, if the plaintiff is awarded the $15,000 sought, the case will apparently redefine Virginia law. Plaintiff Jeffrey Nanni seeks damages for assault and battery, unlawful killing of a dog and intentional infliction of emotional distress. The pet was reportedly killed in Nanni's arms, after Nanni's partner struck him during a physical altercation between the men. According to a news source, the Animal Legal Defense Fund is involved in the litigation and is hoping to convince the Virginia courts to recognize such injury and increase the damages awarded in pet loss cases.

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The Virginia Supreme Court reportedly issued a ruling in 2006 limiting recovery in a pet injury case, but recognized in a footnote that some states permit recovery of emotional distress damages where animals are intentionally injured or killed. *See Washington Post*, August 16, 2009.

ALL THINGS LEGISLATIVE AND REGULATORY

EPA Withdraws Carbon Nanotube Rule in Response to Notice of Intent to File Adverse Comments

The Environmental Protection Agency (EPA) has published a **notice** that it is withdrawing a significant new use rule (SNUR) issued two months earlier that would have required carbon nanotube makers to notify EPA at least 90 days before starting manufacturing. Originally issued under the agency's "direct final rulemaking procedures," which are used when a rule is not expected to raise controversy, EPA is required to withdraw such rules and reissue them under standard notice-and-comment procedures when notified that someone plans to file "adverse comments."

That notice reportedly arrived in July over purported concerns that the rule is ambiguous and does not include a limit on when the restrictions would stop applying, that is, when the material reaches a certain level of processing such that identified hazards are no longer of concern.

Section 5(a)(2) of the Toxic Substances Control Act authorizes EPA to determine that use of a chemical substance is a "significant new use." Once that determination is made, section 5(a)(1)(B) requires persons to submit a significant new use notice

to EPA at least 90 days before they manufacture, import or process the chemical substance for that use. After receipt of the notice, EPA assesses the risks that may be presented by the intended uses and, if appropriate, regulates the proposed use by, for example, requiring that workers handling the material don protective safety gear, before the use occurs.

The SNUR listed both "[m]ulti-walled carbon nanotubes (generic)" and "[s]ingle-walled carbon nanotubes (generic)" as new substances subject to the rule and would have been effective August 24, 2009. *See Federal Register*, August 21, 2009.

CPSC Takes Action Under Product Safety Law Amendments

The Consumer Product Safety Commission (CPSC) recently published three notices, two of which are specific to children's products, in the *Federal Register* to implement or interpret Consumer Product Safety Improvements Act of 2008 (CPSIA) requirements. One is a proposed rule that simplifies third-party conformity assessments for consumer products, and two are notices about the availability of guidance documents regarding phthalates and product labeling.

The proposed conformity assessment **rule** will establish "requirements for the periodic audit of third party conformity assessment bodies as a condition for their continuing accreditation." The CPSIA requires manufacturers, importers and any private labelers of products manufactured on or after November 12, 2008, to issue a certificate that certifies "based on a test of each product or upon a reasonable testing program, that such product complies with all rules, bans, standards, or regulations applicable to the product under this Act or any other Act enforced by the Commission" and specifies each rule, ban, standard, or regulation applicable to the product. The proposed rule would apply to those bodies authorized to conduct the tests. Comments are requested by October 13, 2009. *See Federal Register,* August 13, 2009.

CPSC has **announced** the availability of its "Statement of Policy: Testing of Component Parts with Respect to Section 108 of the Consumer Product Safety Improvement Act." Section 108 prohibits the sale of children's products containing specified phthalates. The document establishes CPSC's position about "testing products to determine whether they contain phthalates in excess of statutory limits."

Under rules that became effective February 10, 2009, CPSIA permanently prohibits the sale of any "children's toy or child care article" containing more than 0.1 percent of three specified phthalates and prohibits on an interim basis "toys that can be placed in a child's mouth" or "child care articles" containing more than 0.1 percent of three additional phthalates. A test method published in March "generated some controversy in that it suggested testing the entire product or testing components and then mathematically combining the results." CPSC re-examined the issue of product testing and describes its position in the policy statement, indicating its belief that

CPSC re-examined the issue of product testing and describes its position in the policy statement, indicating its belief that the requirements apply to each component part of any article. The agency describes the test method that will be used by agency staff when enforcing the statute and discusses how manufacturers can identify component parts that may require testing.

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CPSC has also **announced** the availability of a document titled "Statement of Policy: Interpretation and Enforcement of Section 103(a) of the Consumer Product Safety Improvement Act." Section 103(a) requires "distinguishing marks" on all children's products that enable the manufacturer and the ultimate purchaser to "ascertain" certain source and product information. The document clarifies how the CPSC intends to enforce the requirement, including leaving the format of the marks to manufacturers' best judgment and identifying what constitutes a conforming tracking label. *See Federal Register,* August 19, 2009.

LEGAL LITERATURE REVIEW

David Engle & Michael McCann, "Introduction: Tort Law as Cultural Practice," excerpted from Fault Lines: *Tort Law as Cultural Practice,* 2009

This essay, authored by a University of Buffalo Law School professor and a University of Washington political science professor, introduces a book that compares the tort law of a number of nations and concludes that "tort law and culture are inseparable dimensions of social practice in which risk, injury, liability, compensation, deterrence, and normative pronouncements about acceptable behavior are crucial features." Contending that this approach to tort law is "terra incognita," the authors posit that "[c]ultural elements are everywhere apparent in the practices and products of tort law." They suggest that typical tort law practices rely on the assumption that judges and juries are able to "read" their own culture to decide what behavior is reasonable, outrageous or valuable, and that they should "rely on such readings to inject cultural norms, values and behaviors into the tort law system."

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Anita Bernstein, "Implied Reverse Preemption," *Brooklyn Law Review*, 2009

Brooklyn Law School Professor Anita Bernstein argues that courts refusing to hear personal injury claims because their adjudication would be inconsistent with a federal regulatory scheme, i.e., they are impliedly preempted, should also recognize and apply the complementary doctrine of "implied reverse preemption." Using the example of federal consumer product safety regulation, the author contends that congressional intent to occupy a field or establish comprehensive regulation can be abandoned over time, and thus, courts must "infer a retreat from implied preemption," where circumstances warrant. Bernstein explores the history of the Consumer

Product Safety Commission, from the days when it was given a strong hand to regulate product safety to years when its authority and budgets were weakened and a preemption inference "became no longer tenable." She concludes by calling for courts to be attuned to congressional oscillations and "find implied reverse preemption just as fundamental as preemption."

LAW BLOG ROUNDUP

Children's Furniture Industry Unhappy with Product Safety Law Amendments

"Makers call it 'impulsive,' 'ill-conceived,' and 'chaotic.'" Senior Manhattan Institute fellow Walter Olson, blogging about an article titled "Congress Looks in on Kids' Furniture: New Legislation *Rocks* Manufacturers of Juvenile Furniture" appearing in a recent issue of *Modern Woodworking*. According to the article, new consumer product safety requirements impose short testing and certification timelines without taking into account the breadth of the new law's impact on an industry "that takes pride in its own self-regulated testing and strict standards."

Overlawyered.com, August 20, 2009.

Industry Using Full Array of Resources to Block Bisphenol A Regulation?

"In the latest installment of their investigation into bisphenol A, [*Milwaukee Journal-Sentinel* journalists] report that the plastics industry is [funding its own research and using familiar tactics] to fight against BPA regulation, but with a 21st-century twist: They're posting what appears to be neutral, unbiased information on YouTube and blogs without revealing the funding source." Liz Borkowski, with the Project on Scientific Knowledge and Public Policy at the George Washington University School of Public Health and Health Services, discussing an article about how chemical manufacturers have been working to defeat bisphenol A regulation in the United States.

The Pump Handle, August 24, 2009.

THE FINAL WORD

Disbarred Lawyers Sentenced in Fen-Phen Fraud Case

A U.S. district court has reportedly sentenced two disbarred Kentucky lawyers to 20- and 25-year prison sentences, respectively, for allegedly defrauding clients in a $200 million fen-phen class action settlement. Shirley Cunningham, 54, and William Gallion, 58, were guilty of "unbridled greed," Judge Danny Reeves was quoted as saying at the August 17, 2009, sentencing. Claiming neither showed a "grain of remorse," Reeves also ordered the former lawyers to pay $127 million in restitution to their victims and surrender $30 million to the government.

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PRODUCT LIABILITY LITIGATION REPORT

AUGUST 27, 2009

After an initial 2008 trial ended in a hung jury, Cunningham and Gallion were convicted in April 2009 of eight counts of fraud and one count of conspiracy for taking about $55 million more than there were entitled to from the settlement. According to news sources, the disbarred lawyers should have collected only about $60 million in fees, but kept some $94.6 million for themselves and other lawyers, and put about $20 million into a foundation they paid themselves to manage. The scandal captured worldwide attention after it was disclosed that Cunningham and Gallion bought the thoroughbred Curlin, twice named Horse of the Year.

The defendants had contended that they kept tens of millions of dollars from their 440 clients to cover the claims of others injured by fen-phen, a diet drug withdrawn from the market after it was purportedly linked to heart-valve damage. No additional claims materialized, but then the lawyers argued that they were entitled to keep the rest because their clients had already been adequately compensated. *See Courier-Journal; Product Liability Law 360,* August 17, 2009,

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, originally scheduled to participate in a discussion on "Global Food Safety: Factoring in New Threats Associated with Foreign Food Product Imports," will be replaced by Shook, Hardy & Bacon Pharmaceutical & Medical Device Litigation Partner Paul La Scala.

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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).