Shook, Hardy & Bacon L.L.P.

JANUARY 20, 2011

PRODUCT LIABILITY LITIGATION REPORT

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U.S. SUPREME COURT DENIES REVIEW OF CONTINGENCY FEE COUNSEL RULING IN LEAD PAINT LITIGATION

The U.S. Supreme Court has decided not to hear an appeal from a California Supreme Court ruling allowing government prosecutors to hire private law firms on a contingency-fee basis to pursue public nuisance claims involving lead paint. *Atlantic Richfield Co. v. Santa Clara County*, No. 10-546 (U.S., *cert.* denied January 10, 2011). Additional information about the case appears in the **August 5, 2010, Issue** of this *Report*. The California court determined that this practice was acceptable as long as government lawyers retain the power to control and supervise the litigation. The court remanded the matter for the parties to adjust their contingency-fee agreements to include specific oversight requirements.

While the U.S. Supreme Court's ruling effectively ends any challenge to this aspect of the state court's ruling, it does not serve as precedent on the issue. Further limiting its scope is the California high court's recognition that the "unique circumstances of each prosecution may require a different set of guidelines for effective supervision and control of the case, and public entities may find it useful to specify other discretionary decisions that will remain vested in government attorneys."

Companies opposing governmental entities' use of contingency-fee attorneys contend that the agreements, which offer a share of the proceeds, create a conflict of interest by giving private counsel a stake in the outcome. City and county attorneys counter that they would be unable to prosecute complex public nuisance lawsuits if they were unable to hire private lawyers with the expertise and resources to sue major corporations. *See San Francisco Chronicle*, January 11, 2011.

SEVENTH CIRCUIT FINDS CAFA REMOVAL OF AIRLINE CRASH SUIT TO FEDERAL COURT PREMATURE

The Seventh Circuit Court of Appeals has determined that an airline manufacturer prematurely attempted to remove to federal court state-court actions arising out of a 2009 crash that occurred in the Netherlands. ***Koral v. Boeing Co.*, Nos. 10-8035, -8036, -8039, -8040, -8041, -8042, -8048 (7th Cir., decided January 4, 2011)**. Boeing had sought to remove individual actions to federal court under the Class

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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Action Fairness Act (CAFA) provision that allows the removal of mass actions, i.e., those involving the "claims of 100 or more persons . . . proposed to be tried jointly."

In all, 29 separate lawsuits involving 117 plaintiffs have been filed in Illinois against Boeing. When the company filed a motion to dismiss on the basis of forum non conveniens, the plaintiffs responded that Boeing's Washington-based witnesses would not be inconvenienced because "[a]s this Court is aware, in aviation disaster cases, several exemplar cases are routinely tried on one occasion at which time the issue of liability is determined for the remainder of the cases." According to Boeing, this statement constituted a proposal to try the claims jointly.

The court disagreed, stating, "[W]e think the plaintiff's [sic] statement falls just short of a proposal, as it is rather a prediction of what might happen if the judge decided to hold a mass trial. It would be odd to think that plaintiffs could not make a telling response to a motion for dismissal of a suit on the ground of forum non conveniens without thereby having forfeited their chosen forum; by arguing against dismissal, they would be arguing for it."

The court affirmed the lower court orders remanding the actions to state court.

EXPERT EVIDENCE IMPROPERLY EXCLUDED IN BEDBUG INFESTATION CASE

The First Circuit Court of Appeals has ordered a new trial in a case against a discount furniture retailer, finding that the trial court erred in excluding the causation testimony of the exterminator whom the plaintiffs consulted when they discovered a bedbug infestation in their home. ***Downey v. Bob's Discount Furniture Holdings, Inc.*, No. 09-2137 (1st Cir., decided January 14, 2011)**. The plaintiffs had designated the exterminator as a fact and expert witness, but did not produce a written report delineating his anticipated testimony or his qualifications.

The trial court granted the defendant's motion in limine precluding the exterminator from testifying about the cause of the infestation and did not allow him to testify as to its cause during trial. Without sufficient evidence to "show either that 'bedbugs existed in the furniture at the time it was delivered' or that the defendant 'breached the relevant standard of care,'" the trial court granted the defendant's motion for judgment as a matter of law.

The appeals court first noted that the plaintiffs had complied with their obligation under Federal Rule of Civil Procedure 26 to disclose the exterminator's identity. Then the court considered whether this witness had been "retained or specially employed to provide expert testimony in the case." The proponent of such witnesses must submit to the opposing party a written report detailing the witness's qualifications and intended testimony.

Distinguishing between "a percipient witness who happens to be an expert and an expert who without prior knowledge of the facts giving rise to litigation is recruited to provide expert testimony, the court determined that the exterminator was not retained or specially employed for the purpose of offering expert testimony. Rather, "his opinion testimony arises . . . from his ground-level involvement in the events giving rise to the litigation." Drawing an analogy to treating physicians and those recruited to render expert opinion testimony, the court said that the exterminator here was like a treating physician and that a written report was not required. Remanding the case for a new trial, the court noted that the question of the exterminator's qualifications was still open.

CLASS ACTION FILED AGAINST ATHLETIC SHOEMAKER FOR MISLEADING PERFORMANCE CLAIMS

Seeking to certify a nationwide class of consumers, a California resident has filed a putative class action in a Massachusetts federal court, claiming that the defendant's toning athletic shoe line does not deliver the advertised benefits. *Pashamova v. New Balance Athletic Shoe, Inc.*, No. 11-10001 (U.S. Dist. Ct., D. Mass., filed January 3, 2011). The named plaintiff alleges that independent scientific testing has shown that people do not increase either their exercise response or muscle activation as a result of wearing the shoes and thus do not derive any benefit in heart rate, kilocalories burned, oxygen consumed, or muscle tone when compared to those wearing normal athletic shoes. The plaintiff also claims that some users may experience injury from using the toning shoes, a risk the company allegedly does not disclose.

Litigation funding companies help plaintiffs with financial emergencies as they await the outcome of their personal injury and other claims; the companies contend that their high interest rates are fully disclosed and are justified because recovery is not certain and could take years.

Claiming that consumers would not have paid higher prices for or would not have purchased the toning shoes, the plaintiff alleges untrue and misleading advertising, breach of express warranty and unjust enrichment. She seeks class certification, restitution and disgorgement, an order requiring the company to cease its wrongful conduct, attorney's fees, and costs.

BINYAMIN APPELBAUM, "LAWSUIT LOANS ADD NEW RISK FOR THE INJURED," *THE NEW YORK TIMES*, JANUARY 16, 2011

Shining a light on the industry that lends money to plaintiffs who pledge to repay the loans from the proceeds of their lawsuits, this article reports that most states do not regulate the practice and that these companies, for the most part, are not subject to laws, such as interest caps, that apply to other lenders. Litigation funding companies help plaintiffs with financial emergencies as they await the outcome of their personal injury and other claims; the companies contend that their high

interest rates are fully disclosed and are justified because recovery is not certain and could take years. They also claim that they are not lenders, because plaintiffs do not have to repay the money if they lose their cases. Still, those plaintiffs who do recover sometimes find that most of the recovery must be paid to the company due to accrued interest.

Colorado has apparently charged two litigation funding companies with violating the state's lending laws, and they have in turn sued the state, seeking to stop Colorado from using lending laws to regulate them. The article notes that some of the loans are not high risk, as they involve plaintiffs who are part of massive settlement classes, yet the companies charge the same high rates to these plaintiffs as they do to those whose cases are more tenuous. Some courts have disallowed repayment, finding that the risks did not justify the costs, and some lenders have since attempted to avoid judicial scrutiny by investing only in cases expected to be settled before trial. Many trial lawyers reportedly counsel their clients not to use these services, but at least one has said, "[T]he reality is, sometimes there's no other place to turn."

ALL THINGS LEGISLATIVE AND REGULATORY

CPSC Schedules Public Hearing on Lead Limits in Children's Products

A **public meeting** focusing on the technological feasibility of meeting the 100 parts per million (ppm) lead content limit for children's products has been scheduled for February 17, 2011, in Bethesda, Maryland. The Consumer Product Safety Commission (CPSC) notes that the Consumer Product Safety Improvement Act requires this lead content limit beginning August 14, 2011, unless the agency determines that it is not feasible.

Comments on this issue were requested in 2010, and the CPSC meeting notice includes an overview of the submissions. The agency is requesting new or additional information not addressed previously with a specific focus on products already meeting the standard, the technologies that would enable manufacturers to comply with the 100 ppm limit, industrial strategies or devices that have been developed "that are capable or will be capable of achieving a lead limit of 100 ppm by August 2011," alternative practices that would allow compliance, data on laboratory variability, and health effects associated with reducing the lead content limit from 300 ppm to 100 ppm. *See CPSC What's New*, January 13, 2011.

CPSC Opens Overseas Office in China

The Consumer Product Safety Commission (CPSC) has reportedly opened its first foreign office. Located in Beijing, China, the office was created to help reduce the number of unsafe Chinese products reaching the United States. More than 200 U.S. recalls of such products apparently occurred in 2010.

"It is very important we maintain a good relationship with the AQSIQ (China's General Administration of Quality Supervision, Inspection and Quarantine), as well as have a proactive approach in working with the Chinese government and Chinese manufacturers," CPSC Chair Inez Tenenbaum said. According to CPSC, 45 percent of all consumer products and 90 percent of all toys sold in the United States come from mainland China and Hong Kong.

Located in Beijing, China, the office was created to help reduce the number of unsafe Chinese products reaching the United States.

While Tenenbaum noted that the overall quality of imported Chinese products had improved, product safety enforcement in Chinese provinces is still challenging. The Beijing office will be staffed by an attaché and a safety specialist to help educate manufacturers and importers about U.S. product and safety standards. *See BBC News*, January 10, 2011; *China Business News,* January 11, 2011.

CPSC Enters MOU with Australia

The Consumer Product Safety Commission (CPSC) and the Australian Competition & Consumer Commission (ACCC) have signed a Memorandum of Understanding (MOU) to help reduce the risks of injuries and fatalities associated with consumer products common in the United States and Australia. The agreement reportedly formalizes the "already well established" product safety relationships between both countries, according to an ACCC press release.

"The collaboration between the ACCC and the CPSC reflects the clear recognition in both Australia and the U.S. that consumer product safety is an increasingly international issue," ACCC Deputy Chair Peter Kell said. He noted that the MOU will help both countries coordinate and share product safety data "that will ultimately lead to a safer marketplace for consumers." *See ACCC Press Release,* January 13, 2011.

Comments Requested on Draft National Nanotechnology Initiative Strategy

The White House Office of Science and Technology Policy and the Nanoscale Science, Engineering, and Technology Subcommittee of the National Science and Technology Council have released a **draft strategy** that aims to assess the environmental, health and safety of nanomaterials, including those used in commercial products. The **comment period** on draft "National Nanotechnology Initiative 2011 Environmental, Health, and Safety Strategy" (draft NNI EHS strategy) has been extended to January 21, 2011.

Set to update and replace the NNI EHS Strategy of February 2008, the draft NNI EHS strategy "aims to ensure the responsible development of nanotechnology by providing guidance to the [f]ederal agencies that produce the scientific information for risk management, regulatory decision-making, product use, research planning, and public outreach. The core research areas providing this critical information are measurement, human exposure assessment, human health, and the environment, in order to inform risk assessment and management." *See Federal Register,* January 13, 2011.

Congressman Asks Trade Groups to Identify Regulations Affecting Job Growth; President Seeks to Streamline Regulations

U.S. Representative Darrell Issa (R-Calif.) has reportedly sent a **letter** to 150 companies, trade groups and think tanks asking "for your assistance in identifying existing and proposed regulations that have negatively impacted job growth in your members' industry." The letter also asked for suggestions on regulation and rulemaking reform.

The order also requires a review of existing regulations to eliminate or revise those "that may be outmoded, ineffective, insufficient, or excessively burdensome."

According to published reports, groups receiving the letter include the U.S. Chamber of Commerce, National Association of Manufacturers and Financial Services Roundtable, Association of Pool & Spa Professionals, Fertilizer and Salt Institutes, Kitchen Cabinet Manufacturers Association, and the Color Pigments Manufacturers Association. Issa, who is chair of the Committee on Oversight and Government Reform, has apparently pledged to publicly release responses to the letter. *See The Hill*, January 10, 2011.

Meanwhile, President Barack Obama (D) has signed an **executive order** establishing principles for agencies to follow in adopting regulations addressing such matters as product safety, toxic chemicals, labor, energy, and the environment. The order also requires a review of existing regulations to eliminate or revise those "that may be outmoded, ineffective, insufficient, or excessively burdensome." A memorandum to agency heads accompanying the order affirms the administration's commitment "to eliminating excessive and unjustified burdens on small businesses, and to ensuring that regulations are designed with careful consideration of their effects, including their cumulative effects." A second memorandum calls for federal agencies to develop plans to make their regulatory compliance and enforcement activities "accessible, downloadable, and searchable online."

GAO Criticizes FDA's Approach to False and Misleading Claims for Functional Foods

The U.S. Government Accountability Office (GAO) has issued a **report** that examines the Food and Drug Administration's (FDA's) approach to regulating health claims used by food manufacturers to promote their products. Titled "Food Labeling: FDA

Needs to Reassess Its Approach to Protecting Consumers from False or Misleading Claims," the report recommends that FDA seek authority from Congress to access evidence from food companies that would allow the agency to establish whether they can support their claims scientifically and provide guidance to industry "on the type and strength of scientific evidence needed to prevent false or misleading information in a structure/function claim." While the report does not call for such claims to be prohibited, the GAO notes that the European Union does not allow qualified health claims on food labels, in part because FDA research has shown that consumers are confused by them.

LEGAL LITERATURE REVIEW

Linda Mullenix, "Dropping the Spear: The Case for Enhanced Summary Judgment Prior to Class Certification," *Akron Law Review* (2010 Summary Judgment Symposium)

University of Texas School of Law Professor Linda Mullenix examines the use of summary judgment in complex litigation and suggests that the time is ripe for the Advisory Committee on Civil Rules to give "federal judges explicit authority to rule on summary judgment motions prior to class certification." She contends that a provision of this nature has doctrinal and policy support "embodied in the general trends requiring heightened pleading in complex cases and rigorous analysis of class certification requirements." According to Mullenix, "pre-certification summary judgment practice, with discovery limited to the merits of the plaintiff's individual claims, strikes a sensible and fair accommodation to the pre-certification discovery dilemma." She concludes, "[C]omplex litigation ought to be viewed as especially suitable for summary judgment adjudication, given the size and complexity of the stakes involved."

"[C]omplex litigation ought to be viewed as especially suitable for summary judgment adjudication, given the size and complexity of the stakes involved."

Theodore Eisenberg and Michael Heise, "Judge-Jury Difference in Punitive Damages Awards: Who Listens to the Supreme Court?," *Cornell Law School Working Paper* (January 2011)

Cornell Law School Professors Theodore Eisenberg and Michael Heise report the results of their continuing research into punitive damages awards from thousands of bench- and jury-tried cases and confirm that "compensatory awards are strongly associated with punitive awards." Because they had access to 2005 data, which would show any effects attributable to the proportionality review standard established in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), they found "for the first time, systematic differences between judges and juries in the punitive-compensatory relation." Apparently, juries began awarding more punitive damages than judges per unit of compensatory damages in 2005, and the authors "attribute the emerging difference to selection effects resulting from litigants' strategic decisions about whether to pursue bench or jury trials."

LAW BLOG ROUNDUP

Alternative to Litigation Funding Companies?

"Missing from the article is recognition that today, without LFCs, we still have an unregulated market in which the needy plaintiff can sell her claim at a big discount. It is called settlement and the claim can only be sold to one buyer, the defendant, who will want a big discount, bigger if the plaintiff is especially in need." NYU School of Law Professor Stephen Gillers, blogging about a *New York Times* article discussing the business of lending to plaintiffs who contract away their potential recovery of damages in products liability cases for the money they need to survive until their claims are resolved.

Legal Ethics Forum, January 17, 2011.

Companies Respond to Call for Regulatory Hit Lists

"Soon enough we will find out which regulations lobbyists believe are complicating their clients' ability to amass record profits." OMB Watch Regulatory Policy Analyst Matt Madia, discussing Representative Darrell Issa's (R-Calif.) plan to release industry responses to his request for those existing regulations companies would like to see repealed. According to Madia, industry lobbyists compile such lists as a matter of course—"They often serve as a manifesto for conservative lawmakers and other figures in the anti-regulatory crowd. It's useful for those of us who believe that government has a responsibility to prevent crises like oil spills, foodborne illness outbreaks, and Wall Street collapses to know which public protections the other side will be attacking."

OMB Watch, January 11, 2011.

Pace of E-Discovery Sanctions Picking Up

"Oh, electronic discovery. You were supposed to make life so much easier for everyone." *WSJ* journalist and lead law blog writer Ashby Jones, discussing a new study showing that "lawyers are getting sanctioned for electronic-discovery violations at an unprecedented rate."

WSJ Law Blog, January 13, 2011.

THE FINAL WORD

Law360 Names Shook, Hardy & Bacon Among "Product Liability Groups of 2010"

Citing the firm's success in defending its products clients against long odds in 2010, *Law360* has included Shook, Hardy & Bacon's 325-attorney product liability team on

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its list of distinguished Product Liability Groups of 2010. The legal newswire pointed to significant courtroom victories, pre-trial dismissals and settlement negotiations on behalf of tobacco, automobile and pharmaceutical clients that shielded "top-tier clients from potentially crippling losses" in announcing its selection. Shook, Hardy & Bacon Pharmaceutical & Medical Device Litigation Chair **Harvey Kaplan** attributed the firm's success to flexibility, stating "we field very strong teams with a deep trial bench, but our overriding goal and philosophy is client service and client results."

UPCOMING CONFERENCES AND SEMINARS

GMA, Scottsdale, Arizona – February 22-24, 2011 – "2011 Food Claims & Litigation Conference: Emerging Issues in Food-Related Litigation." Shook, Hardy & Bacon Agribusiness & Food Safety Partner **Paul LaScala** will participate in a panel addressing "Standards and Expectations of Corporate Social Responsibility: The Retailer's Perspective." Business Litigation Partner **Jim Eiszner** and Global Product Liability Partner **Kevin Underhill** will share a podium to discuss "Labels Certainly Serve Some Purpose—But What Legal Effect Do They Have?" Shook, Hardy & Bacon is a conference co-sponsor.

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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).