Shook, Hardy & Bacon L.L.P.

MARCH 4, 2010

PRODUCT LIABILITY LITIGATION REPORT

CONTENTS

U.S. SUPREME COURT SIMPLIFIES TEST FOR CORPORATION'S "PRINCIPAL PLACE OF BUSINESS"

The U.S. Supreme Court has determined that a corporation's "principal place of business" is located in the state where its "high level officers direct, control and coordinate the corporation's activities," otherwise referred to as its "nerve center." ***The Hertz Corp. v. Friend*, No. 08-1107 (U.S., decided February 23, 2010)**. The unanimous decision resolves an issue that has been approached in different ways over time and has split the federal circuit courts and the courts within those circuits.

The case involved a wage and hour dispute filed by California residents in state court against a corporation that conducts business throughout the United States. The defendant removed the case to federal court, claiming that it was a citizen of a different state, New Jersey, the location of its corporate headquarters, and, thus, that the court had diversity-of-citizenship jurisdiction over the litigation. The purpose of diversity jurisdiction is to open federal court doors to those who might otherwise suffer from the local prejudice presumed to exist in state courts against out-of-state parties.

The district court and Ninth Circuit Court of Appeals ordered the case remanded to state court after applying a citizenship test based on a state-by-state comparison of the corporation's business activity. Finding that its activity substantially predominated in California, the lower courts determined that diversity of citizenship was lacking and they could not exercise jurisdiction over the matter.

Writing for the U.S. Supreme Court, Justice Stephen Breyer traced the history of diversity jurisdiction in the federal courts and noted how courts, faced with the issue of a corporation's citizenship, have decided the question in various ways over time based on (i) the citizenship of the corporation's shareholders, *Bank of United States v. Deveaux*, 5 Cranch 61 (1809); and (ii) the state of incorporation, *Marshall v. Baltimore & Ohio R. Co.*, 16 How. 314 (1854). Because the latter test apparently allowed corporations to unduly manipulate jurisdiction, Congress adopted as the test of citizenship for diversity purposes the corporation's "principal place of business," §2, 72 Stat. 415 (1958).

According to Justice Breyer, this test turned out to be "more difficult to apply than its originators likely expected," and he described how the federal courts have adopted an array of "highly general multifactor tests" that failed to result in a uniform application

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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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of the diversity jurisdiction rule and may have reflected the courts' "effort to find the State where a corporation is least likely to suffer out-of-state prejudice when it is sued in a local court."

For a more uniform interpretation of the statute, the Court looked to a 1959 bankruptcy decision for its new "nerve center" rule, and concluded that the statute's language supports this approach, the rule's simplicity "is a major virtue in a jurisdictional statute," and the statute's legislative history "offers a simplicity-related interpretive benchmark." The Court acknowledged that this test may not be perfect and could be difficult to apply in those situations where a corporation divides its "command and coordinating functions among officers who work at several different locations, perhaps communicating over the Internet." Still, the test "points courts in a single direction, towards the center of overall direction, control, and coordination."

Finding that defendant's corporate headquarters are located in New Jersey, the court vacated the Ninth Circuit's judgment and remanded the case for further proceedings.

PLAINTIFF NOT ENTITLED TO ATTORNEY'S FEES IN WASHING MACHINE LITIGATION

Stating that "no sane person incurs fees in that amount [$246,000] to prosecute a claim worth at most $3,000," the Seventh Circuit Court of Appeals has affirmed a lower court's decision that no attorney's fees be awarded to a plaintiff who unsuccessfully sought to certify a class of purchasers of allegedly mislabeled washing machines. **Thorogood v. Sears, Roebuck & Co., No. 09-3005 (7th Cir., decided February 12, 2010)**. The court had previously decertified the class, calling it "a notably weak candidate for class treatment" and questioning "the merits of the plaintiff's individual claim."

On remand to the district court, the defendant made an offer of judgment of $20,000 inclusive of attorney's fees to resolve the individual claim; the parties agreed that plaintiff could recover, at most, $3,000 for that claim under Tennessee law. Because the district court believed the plaintiff should receive no attorney's fees, it dismissed the suit for lack of subject-matter jurisdiction. In addition, because the offer exceeded the amount in controversy, the case was moot.

The plaintiff argued on appeal that he was entitled to attorney's fees of $246,000 in that his theory of liability was vindicated by defendant's offer of damages in excess of the maximum damages available. While the court recognized that attorney's fees in excess of the relief obtained can be awarded, this rule ordinarily applies where the relief is ordered by a court rather than provided by settlement. The court reiterated that plaintiff's claim was weak and stated that "[t]he defendant's offer of $20,000 was intended to get rid of a nuisance claim." According to the court, "The plaintiff's effort to exalt his meager claim into a sprawling nationwide class action was a flop. Sears should not have to bear the entire cost of the flop."

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FEDERAL COURT ALLOWS FCA LITIGATION TO PROCEED AGAINST BULLETPROOF VEST FABRIC MAKER

A federal court in the District of Columbia has denied the motion to dismiss filed by a company that made the fabric used in bulletproof vests sold to the United States and various law enforcement agencies. *U.S. ex rel. Westrick v. Second Chance Body Armor*, No. 04-280 (U.S. Dist. Ct., D.D.C., decided February 23, 2010). A whistleblower who formerly worked for the bulletproof vest manufacturer filed this qui tam action under the False Claims Act (FCA) after several police officers were killed or injured when wearing the vests and the company finally stopped making them, warning customers about the fabric's tendency to degrade with exposure to light, heat and humidity. The government intervened and filed an amended complaint, adding individual defendants and asserting violations of the FCA through presenting fraudulent claims, making false statements and conspiring to defraud; common law fraud; and unjust enrichment.

The fabric manufacturer, Toyobo Co., sought to dismiss the suit for failure to state a claim and the government's failure to sufficiently plead fraud. The court analyzed each claim under the pleading standard adopted by the U.S. Supreme Court in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal* and determined that each had been pleaded with sufficient particularity and stated claims for relief plausible on their face. The complaint alleged a fraudulent scheme in which Toyobo played a part, including that the defendants knew the body armor was defective, but continued to warrant and sell it as highly durable with a long life cycle. The complaint also specified particular meetings, involving certain executives, during which agreement was reached to continue making "confidence inspiring" communications about the product.

CALIFORNIA COURT FINDS OKLAHOMA LAW APPLIES TO ASBESTOS-RELATED CLAIMS

The California Supreme Court has determined that Oklahoma's 10-year statute of repose bars the claims of a California resident who allegedly contracted mesothelioma as a result of exposure to asbestos in Oklahoma in 1957. ***McCann v. Foster Wheeler LLC*, No. S162435 (Cal., decided February 18, 2010)**. The workplace exposure at issue occurred over a two-week period when the plaintiff lived in Oklahoma and observed the installation of a massive boiler at an oil refinery in Oklahoma. The company that made the boiler was located in New York, and the boiler was designed and manufactured there. The plaintiff's disease was not diagnosed until 2005, some 35 years after he moved to California. Under California law, his claims were timely filed.

The court of appeal held that California law should apply, because its interest in having California law apply under the state's choice-of-law principles was greater than Oklahoma's interest in having its law apply. According to the court of appeal, Oklahoma's statute of repose was primarily directed at the protection of Oklahoma defendants and not those from out of state where the allegedly tortious conduct, that is, the design and fabrication of the boiler, took place. Because California has

an interest in limiting health care costs that accrue as a result of barred claims, the court of appeal determined that "California's interests would be more significantly impaired by the application of Oklahoma law than the converse." The court of appeal did not reach the issue of whether the boiler was an improvement to real property and thus covered by the Oklahoma statute.

The California Supreme Court disagreed with the lower court's analysis. According to the court, because both states have an interest at stake, it was called on to determine "which jurisdiction should be allocated the predominating lawmaking power under the circumstances." Oklahoma's interest extends to any construction-related businesses, whether located in state or out of state, while California choice-of-law cases "continue to recognize that a jurisdiction ordinarily has 'the predominant interest' in regulating conduct that occurs within its borders, and in being able to assure individuals and commercial entities operating within its territory that applicable limitations on liability set forth in the jurisdiction's law will be available to those individuals and businesses in the event they are faced with litigation in the future."

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The court also observed that "when the law of the other state limits or denies liability for the conduct engaged in by the defendant in its territory, that state's interest is predominant, and California's legitimate interest in providing a remedy for, or in facilitating recovery by, a current California resident properly must be subordinated because of this state's diminished authority over activity that occurs in another state." The court remanded the case for the court of appeal to address whether the trial court erred in finding that the boiler was an improvement to real property within the meaning of Oklahoma's statute of repose.

Shook, Hardy & Bacon Global Product Liability Partner **Patrick Gregory** filed an *amicus curiae* brief in support of the boiler manufacturer's position on behalf of a number of interested organizations including the American Tort Reform Association, Chamber of Commerce of the United States of America, American Chemistry Council, and National Association of Manufacturers.

COLORADO SUPREME COURT ALLOWS CLAIMS OVER DEFECTIVE TANNING BED TO PROCEED

The Colorado Supreme Court has determined that a release signed by a tanning salon patron as a condition for using the facilities does not shield a tanning bed manufacturer from claims for strict liability. ***Boles v. Sun Ergoline, Inc.*, No. 08SC970 (Colo., decided February 8, 2010)**. The release provided, in relevant part, "I have read the instructions for proper use of the tanning facilities and do so at my own risk and hereby release the owners, operators, franchisor, or manufacturers, from any damage or harm that I might incur due to use of the facilities." The plaintiff allegedly partially amputated her fingers when they came into contact with an exhaust fan at the top of a tanning booth. The trial and intermediate appellate courts determined that the release barred the plaintiff's strict liability claim, and the state's high court reversed.

According to the court, the principles the lower courts relied on applied to claims for simple negligence. The court discussed the different interests served by the development of strict products liability law and noted, "In addition to the typical inaccessibility of information and inequality of bargaining power inherent in any disclaimer or ordinary consumer's agreement to release a manufacturer, a claim for strict products liability is also premised on a number of public policy considerations that would be flatly thwarted by legitimizing such disclaimers or exculpatory agreements. Not the least among these is the deliberate provision of economic incentives for manufacturers to improve product safety and take advantage of their unique 'position to spread the risk of loss among all who use the product.'"

Relying on the *Restatement (Third) of Torts: Products Liability* and decisions from other states, the court held that "an agreement releasing a manufacturer from strict products liability for personal injury, in exchange for nothing more than an individual consumer's right to have or use the product, necessarily violates the public policy of this jurisdiction and is void." The court remanded the case for further proceedings.

UNITED STATES SUES IMPORTERS AND SELLERS OF TOYS CONTAINING LEAD AND PHTHALATES

The U.S. government has filed a complaint in a California federal court seeking civil penalties and permanent injunctive relief against companies and one individual who allegedly imported and sold toys containing illegal levels of lead, phthalates and lead paint. *U.S. v. Daiso Holdings USA, Inc.*, No. 10-cv-795 (U.S. Dist. Ct., N.D. Cal., filed February 25, 2010). According to the complaint, the Consumer Products Safety Commission (CPSC) collected sample products from the companies between 2006 and 2008 and again in 2009. The CPSC allegedly found many children's products that contained lead, lead paint and phthalates in excess of legal limits that existed both before and after the Consumer Product Safety Act (CPSA) was amended, as well as toys, intended for children younger than age 3, with small parts. The CPSC also allegedly found "household chemicals, children's art materials and children's toys with small parts lacking the required labeling."

The government contends that unless restrained by court order, there is a "substantial likelihood" that the defendants will continue to violate the law. Alleging violations of the CPSA and the Federal Hazardous Substances Act, the government seeks an order enjoining the defendants from importing or selling consumer products that do not conform to applicable product safety rules, assessing civil penalties and enjoining defendants from introducing into interstate commerce any banned or misbranded hazardous substances.

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ALL THINGS LEGISLATIVE AND REGULATORY

OEHHA Issues Notice of Intent to Add Acrylamide to Prop. 65 List

California EPA's Office of Environmental Health Hazard Assessment (OEHHA) has issued a **notice** of its intent to list acrylamide, a chemical formed when certain foods have been cooked at high temperatures, as a reproductive toxicant under Proposition 65 (Prop. 65). According to OEHHA, the National Institute for Occupational Safety and Health and the National Toxicology Program's Center for the Evaluation of Risks to Human Reproduction have both determined that acrylamide is a developmental, male reproductive toxin. Under Prop. 65, a chemical must be listed when an authoritative body formally identifies the chemical as causing reproductive toxicity and the evidence it considered meets certain sufficiency criteria. Public comments must be submitted by April 27, 2010.

Under Prop. 65, a chemical must be listed when an authoritative body formally identifies the chemical as causing reproductive toxicity and the evidence it considered meets certain sufficiency criteria.

Noting the significant public interest in the chemical, which has been found in baked goods and cooked starchy foods such as potato chips and French fries, OEHHA has also published a **notice** of proposed rulemaking that would establish "a specific regulatory level having no observable effect for acrylamide." The proposed maximum allowable dose level would be 140 micrograms per day, a level "700 times greater than 0.2 micrograms per day, which is the cancer No Significant Risk Level for acrylamide" under California law. The comment deadline for this proposal is also April 27. Any request for a public hearing must be made no later than April 12.

"Statutory Housekeeping" Project Fosters Communication Between Courts and Congress

A "statutory housekeeping" project conceptualized in the mid-1990s was designed to help lawmakers with their statutory drafting responsibilities by providing to Congress federal court opinions that raise questions about or comment on problematic statutory language. The federal courts of appeals have reportedly forwarded 18 opinions to Congress since the project was revitalized in 2007. Providing a neutral means of interbranch communication, the project is intended to assist drafters make legislative intent as clear as possible.

Some of the 18 technical problems recently flagged apparently include ambiguous language that courts must resolve such as whether "not less than" in the Class Action Fairness Act should be read as "not more than" or whether the Immigration and Nationality Act's "lawfully resided continuously" for seven years requirement begins when an alien applies for adjustment of status or when that status is actually granted. *See The Third Branch*, February 2010.

Three States Introduce Laws to Ban Cadmium from Children's Jewelry

As the Consumer Product Safety Commission (CPSC) investigates cadmium in children's metal jewelry, California, Minnesota and New Jersey have introduced laws to prohibit the known carcinogen from those products. Three other states—Illinois,

Massachusetts and New York—and the U.S. Congress have already introduced legislation designed to regulate the sale and distribution of toys or jewelry made with cadmium. Further information about the Illinois, New York and congressional bills appears in the February 4, 2010, issue of this Report.

California's bill (SB 929) would amend the state's health and safety code by banning the manufacturing, shipping or selling of children's jewelry containing cadmium. Sponsored by Senator Fran Pavley, (D-Santa Monica), the bill would employ the test currently used to measure lead in jewelry. Chinese manufacturers have reportedly used cadmium in toys as a substitute for lead now that the United States has adopted stringent lead standards for consumer products. "These manufacturers are replacing one toxic metal for another when less toxic alternatives like zinc are available," Pavley was quoted as saying. "It's completely irresponsible for manufacturers to use cadmium in jewelry marketed to children."

New Jersey's bill (A 2259) would prohibit the sale of certain children's products containing lead, mercury or cadmium. Minnesota's bill (SF 2385) bans cadmium in children's jewelry.

CPSC recently opened a formal investigation into cadmium in children's metal jewelry after published reports claimed that the toxin was found in 103 pieces of children's jewelry purchased in California, New York, Ohio, and Texas in late 2009. After the agency said it planned to warn Chinese manufacturers against replacing lead in children's products with other heavy metals, the importer of metal necklaces identified as "The Princess and the Frog" voluntarily recalled about 55,000 of the necklaces in response to CPSC's crackdown. *See Fran Pavley Web Site,* February 2, 2010; *Product Liability Law 360*, February 17, 2010.

LEGAL LITERATURE REVIEW

Sarah Cravens, "Judging Discretion: Contexts for Understanding the Role of Judgment," *University of Miami Law Review* (2010 forthcoming)

University of Akron Associate Law Professor Sarah Cravens examines how appellate courts apply an "abuse of discretion" standard of review in three different areas of the law: federal sentencing, injunctive relief and civil case management. She identifies commonalities across subject matter lines as well as those types of cases in which judicial discretion cannot be meaningfully or consistently judged for abuse. Among other matters, Cravens observes that appellate review for abuse of discretion requires (i) "some form of legal authority that sets bounds on the decisionmaking process or on the range of legitimate outcomes," and (ii) "some form of written reasoned opinion that can be reviewed by an appellate court to determine compliance with the legal authority that sets the bounds on the lower court's discretion." Cravens recommends alternative terminology and mechanisms for oversight and lays a foundation for future scholarship that seeks "a more specific understanding of the role of certain individual personality traits or personal values or commitments that might enter into decision-making where judgment, or discretion, is exercised."

LAW BLOG ROUNDUP

Animal Rights Under the Microscope

"This book also makes a compelling case—the best I have read anywhere—for the idea that 'animal rights' is a system of ideological belief as rigid (and vulnerable to unreasoning abuse) as any religion." Former Vice President of Investigations with the Humane Society of the United States, David Wills, blogging about a new book, *A Rat Is a Pig Is a Dog Is a Boy*, that provides a detailed overview of the animal rights movement. Wills writes for a blog recently launched by Rick Berman and his Center for Consumer Freedom to purportedly "harass" the Humane Society.

HumaneWatch, February, 28, 2010.

Tort Sharks and Congressional Allies?

"Last week ended with the chairman of the House Committee on Oversight and Government Reform, Rep. Edolphus Towns (D-NY), attacking the company in terms that could have been written by any one of the personal injury or class action lawyers suing Toyota." National Association of Manufacturers Senior Communications Advisor Carter Wood, discussing recent developments in Toyota's recall of millions of vehicles for braking and sudden acceleration problems. Wood's blog post is titled, "It's cheaper if Congress conducts discovery, does the PR," and quotes a *National Review Online* commentary: "The tort sharks will use their Congressional allies and their public- and press-relation affiliates to extract maximum pain."

PointofLaw.com, March 1, 2010.

THE FINAL WORD

Paul Waldman, "Political Malpractice: Contrary to Republican Arguments, Tort Reform is No Health-Care Cure-All. So Why Are Democrats Seriously Considering It?," *The American Prospect, Online,* March 2, 2010

This article discusses the Republican proposal to reform health care in the United States by, among other matters, enacting tort reforms such as capping damages recoverable for medical malpractice. Waldman contends that while half the states already cap non-economic damages (those awarded for pain and suffering) in all civil lawsuits, no savings have been realized in terms of spending on "defensive medicine" practices, including diagnostic testing. He argues that tens of thousands of patients die each year as a result of preventable medical errors, but that few actually turn to the courts to be compensated. According to the article, the Congressional Budget Office has estimated that a national cap on pain-and-suffering damages would reduce national health spending "by roughly 0.5 percent." Waldman suggests that the "keen interest Republicans have in medical malpractice" can be explained

as follows: "When a jury renders a large award, a trial lawyer makes money. And trial lawyers are significant donors to Democrats. Make large awards go away, and you cut off money to the Democratic Party."

UPCOMING CONFERENCES AND SEMINARS

GMA, Washington, D.C. – April 7-9, 2010 – "Consumer Complaints Conference." Shook, Hardy & Bacon Pharmaceutical & Medical Device Litigation Partner Madeleine McDonough will discuss "Pre-Litigation Risk Management Strategies," for an audience of food industry staff working in the areas of consumer affairs, call center management, consumer complaints, product liability claims, and quality assurance.

ABA, Phoenix, Arizona – April 8-9, 2010 – "2010 Emerging Issues in Motor Vehicle Product Liability Litigation." Shook, Hardy & Bacon Tort Partner H. Grant Law is serving as program co-chair and will moderate a panel session involving in-house counsel from six manufacturers who will discuss "How Not to Settle Your Case: Mistakes Plaintiffs' and Defense Lawyers Make Leading up to and at Mediation." Shook, Hardy & Bacon Public Policy Partner Mark Behrens will participate on a panel addressing "Products Liability in Transition: Is There a Sea Change or Steady as She Goes?" The American Bar Association's Tort Trial & Insurance Practice Section's Products, General Liability and Consumer Law Committee and the Automobile Law Committee are presenting the program.

DRI, San Francisco, California – May 20-21, 2010 – "26th Annual Drug and Medical Device Seminar." Shook, Hardy & Bacon Pharmaceutical & Medical Device Litigation Partner Mark Hegarty will serve on a panel discussing "Potential Civil and Criminal Liability Arising from Clinical Trials." The firm is a co-sponsor of this continuing education seminar. ■

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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).