Shook, Hardy & Bacon L.L.P.

APRIL 26, 2012

PRODUCT LIABILITY LITIGATION REPORT

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FEDERAL CIRCUIT RULING ON TOLLING UNDER VACCINE INJURY COMPENSATION FUND STANDS

The U.S. Supreme Court has denied a request to review the Federal Circuit's determination that the National Childhood Vaccine Injury Compensation Act's statute of limitations cannot be tolled by the discovery rule. ***Cloer v. Sebelius,* No. 11-832 (U.S., certioriari denied April 16, 2012)**. Additional details about the case appear in the August 25, 2011, **issue** of this *Report.* Although the Federal Circuit ruled that the Act does not contain a discovery rule "that would key the accrual of a non-Table injury and the beginning of the statute of limitations to a claimant's discovery that the vaccine caused her injury" and that the discovery rule cannot be read by implication into the law's statute of limitations, it also concluded that equitable tolling applies under the Act.

TIME-BARRED VACCINE ACT CLAIMANT COULD BE ENTITLED TO ATTORNEY'S FEES

A deeply divided Federal Circuit Court of Appeals, sitting *en banc*, has determined that a National Childhood Vaccine Injury Compensation Act (Vaccine Act) claimant, whose petition was filed beyond the applicable statute of limitations, may be able to recover attorney's fees under a provision allowing an award when "the petition was brought in good faith and there was a reasonable basis for the claim for which the petition was brought." ***Cloer v. Sec'y of HHS,* No. 2009-5052 (Fed. Cir., decided April 11, 2012)**. So ruling, the court remanded the matter to the Court of Federal Claims "for a determination of whether reasonable attorney's fees and costs incurred in proceedings related to the petition should be awarded."

As noted elsewhere in this *Report*, the U.S. Supreme Court recently declined to review the claimant's petition for *certiorari*; her application under the Vaccine Act for injury allegedly caused by a Hepatitis B vaccine had been denied as time-barred. While claimant Melissa Cloer acknowledged her failure to prevail on the merits of her claim before the Federal Circuit, she contended that "her appeal prompted a change of law in a limited way that potentially opens the door to certain Vaccine Act petitioners who otherwise would have been precluded from seeking redress."

According to the Federal Circuit majority, "Congress did not intend for only prevailing petitioners to receive an award of reasonable attorney's fees and costs.…

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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[and t]he good faith and reasonable basis requirements apply to the claim for which the petition was brought; this applies to the entire claim, including timeliness issues." The court also noted that the claimant "deserves a determination as to whether she is eligible to receive attorney's fees because her appeal inspired a shift in vaccine jurisprudence" given that the court's August 2011 decision "overruled our precedent treating the statute of limitations as jurisdictional and did not endorse the underlying statutory interpretation of such cases. Rather, it eliminated the entire bases for such opinions."

The six dissenting jurists would have adopted a strict rule allowing attorney's fees for "a timely filed petition and a judgment on the merits of the compensation request" only. They found it "quite implausible that in a case in which the claimant's submission was held to be untimely, Congress would have wanted the special master and the court to conduct a collateral proceeding to determine whether, had the claim been eligible for consideration, it would have had a reasonable chance of success. Yet that is the effect of the court's ruling today."

MALPRACTICE POLICY FOR FEN-PHEN COUNSEL PROPERLY RESCINDED

The Sixth Circuit Court of Appeals has determined that an insurance company was entitled to rescind the malpractice policy that covered one of the plaintiff's lawyers successfully sued for millions of dollars for malpractice related to the settlement of a class action involving the diet drug Fen-Phen. ***Cont'l Cas. Co. v. Law Offices of Melbourne Mills, Jr., PLLC*, Nos. 10-5813/5814 (6th Cir., decided April 13, 2012)**. Thus, the court left in place a $234,000 monetary judgment against the attorney, "which was the amount of the defense costs Continental paid on his behalf in the initial class action." The class claimants joined the attorney in appealing the district court's grant of the carrier's motion for summary judgment to the Sixth Circuit.

According to the court, the attorney knew, when he answered questions on the policy's application about potential claims against the firm or its attorneys, of pending ethics investigations into his conduct arising from the class-action settlement, but failed to acknowledge this in his response. The attorneys involved in settling the claims did not disclose to class members that the settlement would provide just 37 percent of the $200-million settlement fund to them, while the attorneys took most of the remainder. "Because Mills made a material misrepresentation, in his malpractice insurance application with Continental, the policy was properly voided under Kentucky law," the court said. The court also found that the policy could have been rescinded "under the plain terms of a clause in the policy excluding coverage for dishonest acts." Although Mills was apparently acquitted of criminal charges, the Kentucky Supreme Court order disbarring him from the practice of law was, in the court's view, "a sufficient basis for precluding coverage under the policy's dishonesty exclusion clause."

PARTIES AGREE TO SETTLE CLAIMS THAT MOTORCYCLE HELMETS WERE FALSELY LABELED

Following the Sixth Circuit Court of Appeals' determination that class claims alleging the misrepresentation of safety information against a motorcycle helmet manufacturer had been sufficiently pleaded to survive the U.S. Supreme Court's plausibility pleading standard, the parties have agreed to settle the dispute. *Fabian v. Fulmer Helmets, Inc.*, No. 09-cv-02305-STA-dkv (U.S. Dist. Ct., W.D. Tenn., W. Div., settlement reached April 11, 2012). Additional information about the Sixth Circuit's ruling appears in the January 6, 2011, **issue** of this *Report*.

Under terms of the proposed agreement, a settlement class will be certified, and each class member may opt to either receive a new motorcycle helmet or a cash payment of $25. The defendant, which continues to deny liability, has also agreed to pay class counsel $415,000 for fees and expenses as well as an incentive payment of $2,500 to the named plaintiff.

BABY BOOK AUTHOR COULD BE LIABLE FOR INFANT DEATH IN DEFECTIVE BABY SLING LITIGATION

A federal district court has denied the summary judgment motion filed by a pediatrician sued for the death of an infant who allegedly suffocated in a defective baby sling that the pediatrician promoted in his baby-care book and to which the pediatrician held an exclusive licensing agreement. *Heneghan v. Crown Crafts Infant Prods., Inc.*, No. C10-05908RJB (U.S. Dist. Ct., W.D. Wash., decision entered April 13, 2012).

The pediatrician claimed that he was not a "product seller" or "manufacturer" of the baby sling under the Washington product liability statute; the plaintiffs contended that he could be deemed a product seller and manufacturer due to his involvement in its design, development, promotion, and marketing.

The pediatrician, who apparently calls for "babywearing" in his book, which includes his Website as place to buy the sling, also apparently hired the engineer who designed it. The court agreed with the plaintiffs, finding that the statute's definitions were broader than the defendant asserted and stating, "the question of whether Dr. Sears is a product seller or manufacturer of the relevant product should be determined by the trier of fact."

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COLORADO COURT AWARDS $65,000 FOR EMOTIONAL INJURIES IN DEATH OF PET

According to a news source, a pet owner has been awarded $65,000 for the emotional distress she experienced over the death of her 18-month-old dog. Owner Robin Lohre reportedly left the dog at home after being assured by housekeepers

cleaning her home that the dog would not be a problem and they would not allow the dog to go outdoors. In Lohre's absence, the dog apparently escaped the house and was struck by a car. The housekeepers said they left the dog "whimpering a little" under the dining room table, where Lohre found it dead on her return. Lohre sued the cleaning service for negligence, alleging that they failed to contact her or seek emergency veterinary care after the accident. Her attorneys with The Animal Law Center contend that the award is the highest on record in the state for the loss of a pet, claiming, "The ruling sets a damages precedent that animals are worth more than their replacement value." *See The National Law Journal*, April 20, 2012.

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Courts hearing products cases stemming from injuries allegedly caused by pet food contaminated with adulterated wheat gluten from China in 2007 were also asked to award non-economic damages to pet owners, but such requests were routinely denied. Shook, Hardy & Bacon Public Policy Partners **Victor Schwartz** and **Phil Goldberg** and Associate **Chris Appel**, comprehensively addressed the issue in an **article** titled "Plaintiffs' Bar Campaign to Introduce Pain and Suffering Damages in Pet Food Cases Will Only Increase the Pain and Suffering of People's Pets."

ALL THINGS LEGISLATIVE AND REGULATORY

FDA Issues Draft Guidance for Cosmetics Industry on Nanomaterial Safety

The Food and Drug Administration (FDA) has issued for public comment **draft guidance** for industry relating to the safety of nanomaterials used in cosmetic products. While comments may be submitted at any time, to be considered as FDA finalizes the guidance, they should be submitted no later than July 24, 2012.

Noting that it has not adopted a formal definition of nanotechnology, nanoscale or related terms, the agency recognizes that "[t]he application of nanotechnology may result in product attributes that differ from those of conventionally manufactured products, and thus may merit examination." Still, FDA "does not categorically judge all products containing nanomaterials or otherwise involving application of nanotechnology as intrinsically benign or harmful. Rather, for nanotechnology-derived and conventionally manufactured cosmetic products alike, FDA considers the characteristics of the finished product and the safety for its intended use."

The guidance further provides an overview of the agency's general framework for and points to consider in assessing the safety of nanomaterials in cosmetic products. FDA encourages those using nanomaterials in cosmetic products, "either a new material or an altered version of an already marketed ingredient," to meet with FDA "to discuss the test methods and data needed to substantiate the product's safety, including short-term toxicity and other long-term toxicity data as appropriate." *See Federal Register*, April 25, 2012.

FDA to Hold Public Meeting on International Cosmetics Regulations

The Food and Drug Administration (FDA) has **scheduled** a May 15, 2012, public meeting in Rockville, Maryland, to provide information and receive comments on topics to be discussed during the July 10-13 International Cooperation on Cosmetics Regulations (ICCR) meeting. According to FDA, the ICCR is "a voluntary international group of cosmetics regulatory authorities" who, by entering into "constructive dialogue with their relevant cosmetics' industry trade associations," plan to "implement and/or promote actions or documents within their own jurisdictions and seek convergence of regulatory policies and practices." Representing the United States, Japan, the European Union, and Canada, ICCR members hope to "pave the way for the removal of regulatory obstacles to international trade while maintaining global consumer protection." The public meeting agenda will be made available on FDA's **ICCR** Website.

14 Federal Courts Participate in Pilot Project Allowing Video Cameras

Although 14 federal trial courts have been approved to participate in a voluntary three-year pilot project that allows limited use of video cameras, only a few proceedings have reportedly been uploaded for public viewing. Launched July 18, 2011, by the Administrative Office of the U.S. Courts, the project allows selected courts, including the District of Kansas, Eastern District of Missouri, Northern District of California, Southern District of Florida, and Western District of Washington, to be digitally recorded by court staff and uploaded to **uscourts.gov** if the presiding judge, the lawyers and their clients agree to be filmed.

According to a news source, however, few federal trials have been filmed because the parties did not agree to participate. For her part, Kansas District Court Judge Julie Robinson noted that she did not even notice the courtroom camera during a water-rights hearing, calling it "a little eyeball in the ceiling." Asserting that the project needed better marketing, the judge said, "I'm encouraging the pilot judges to be more proactive. What we're hearing are not substantive objections to it, but fear of the unknown." *See The Seattle Times,* April 15, 2012.

For her part, Kansas District Court Judge Julie Robinson noted that she did not even notice the courtroom camera during a water-rights hearing, calling it "a little eyeball in the ceiling."

Minnesota Governor Vetoes Bill Limiting Liability in Asbestos Cases

Minnesota Governor Mark Dayton (DFL) recently **vetoed** legislation (SF 1236) that would have shielded corporate successors from asbestos-related liability. According to Dayton, "[i]t is contradictory to define an 'innocent successor' as a corporation that has done nothing wrong and yet subsequently absolves it of its 'known' liabilities." He also contended that providing this immunity to corporations which merged before 1972 "will simply increase the financial exposure of remaining responsible parties, or deny any remedy to asbestos victims in certain cases. This is unfair to other asbestos defendants, injured Minnesotans, and insurance companies that would all shoulder a greater burden as a result of this litigation."

Legal Literature Review

Jason Zager, "Defending Claims Premised on the Design Hierarchy," *For the Defense*, April 2012

Shook, Hardy & Bacon Tort Associate **Jason Zager** discusses how plaintiffs rely on the "design hierarchy," a three-step process used in product development to reduce the potential for a product to cause injury, as a basis for product-defect allegations. Zager provides practical suggestions for defense counsel to counter the theory. According to Zager, the theory is popular because it "is easy for jurors to grasp and allows a plaintiff's attorney to simplify complex technical issues, sometimes inappropriately so." He advises that defendants embrace the theory by having company witnesses address the product's development in depth and explain how it complies with the design hierarchy. He also recommends attacking alternative designs, focusing a jury on a minimal complaint rate or lack of other injuries under similar circumstances and highlighting any improper use of the product by the plaintiff.

Robert Klonoff, "The Decline of Class Actions," *Washington University Law Review*, 2013

Lewis & Clark Law School Dean and Law Professor Robert Klonoff examines how the courts, once amenable to use of the class action device "for achieving mass justice," have increased the class-certification burdens on plaintiffs to such an extent that, with some narrow exceptions, "sprawling mass tort cases" are rarely certified today. He also argues that the adoption of Rule 23(f) and the Class Action Fairness Act have made further inroads on class certification and settlement. Among other matters, he suggests the courts should cease weighing competing evidence as part of the class certification process and they should alter their stringent approach to class definition, numerosity, commonality, adequacy, issues classes, and settlement classes. He also notes that some rules may need to be changed and Congress may need to take some action to reverse a trend "that undermines the compensation, deterrence and efficiency functions of the class action device."

Troy McKenzie, "Toward a Bankruptcy Model for Non-Class Aggregate Litigation," *New York University Law Review* (forthcoming 2012)

According to this article, certain aspects of bankruptcy practice could serve as a useful model for the "quasi-class action," a device increasingly used to resolve aggregate personal injury and products liability litigation adjudicated in multidistrict litigation proceedings and then settled without certification. New York University School of Law Assistant Professor Troy McKenzie notes that objections to the quasi-class action, including that "it over-empowers lawyers and devalues the consent of individual claimants in the name of achieving 'closure' in litigation," could be resolved by viewing the device through the bankruptcy lens, because it "starts with an assumption that collective resolution is necessary but tempers the collective with individual and subgroup consent as well as with institutional structures to counterbalance excessive power by lawyers or particular claimants."

Donald Gifford, "The Constitutional Bounding of Adjudication: A Fuller(ian) Explanation for the Supreme Court's Mass Tort Jurisprudence," *Arizona State Law Journal*, 2012

University of Maryland School of Law Professor Donald Gifford considers in this article how the U.S. Supreme Court appears to be "slouching" toward an approach to mass tort litigation once espoused by mid-20th century legal philosopher Lon Fuller, what Gifford refers to as a "model of bounded adjudication." Under this approach, the current Court finds it "constitutionally inappropriate for a common law court to adjudicate the rights, liabilities and interests of persons who either have not yet been harmed or who cannot be identified or described with a reasonable degree of specificity at the time of the adjudication … Thus, any *judicial* attempt to address plaintiffs' allegations of generalized or diffuse harms violates the Constitution." Focusing on the public interest tort action, whereby plaintiffs seek "judicially imposed—but explicit and comprehensive—regulation of the conduct of private actors, usually corporations," Gifford suggests that the model of bounded adjudication should not be used to "serve as a straightjacket," "if a court is otherwise capable of resolving an intractable, mass social or ecological problem."

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LAW BLOG ROUNDUP

How Plaintiffs' Counsel Succeed in Garnering Lopsided Fees in Class Action Settlements

"[O]ne of the popular ways to exaggerate the value of a settlement is through a claims-made process. The settling parties tell the court that all of the class members are eligible for relief, then create a claims process that is sufficiently burdensome that only 3% of the class actually recovers, but ask the court to evaluate the settlement on the fiction that the entire class collected." Center for Class Action Fairness Center President Ted Frank, blogging about the organization's effort to stop "this abuse of the class action process" in a case where the class purportedly received $0.5 million in cash, while class counsel sought and received $7 million in fees and expenses.

PointofLaw.com, April 20, 2012.

Report Touts the Effectiveness of Safety Regulations

"Consumers get so accustomed to certain safety measures that they forget (at least, often I forget) that they are the result of government mandates." Institute for Public Representation at Georgetown University Law Center Co-Director Brian Wolfman, discussing a recent National Highway Traffic Safety Administration **report** on the number of lives saved in the United States in the years 2006-2010 attributable to seat belts, air bags, motorcycle helmets, and other safety measures.

CL&P Blog, April 23, 2012.

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THE FINAL WORD

Judge Rules Protestor Did Not Violate Jury-Tampering Laws

A federal court in New York has reportedly dismissed an indictment against an 80-year-old retired chemistry professor who had been charged with jury tampering for providing brochures in support of jury nullification to anyone who passed by the Manhattan federal courthouse. Jury nullification refers to the controversial doctrine that allows jurors to acquit criminal defendants based on their disagreement with the law the defendant is accused of violating instead of following the judge's instructions on the law. Professor Julian Heicklen, acting as his own lawyer, apparently contended that although he had hoped jurors would take one of the brochures he distributed while holding a "Jury Info" sign, he did not try to influence specific jurors. Judge Kimba Wood agreed, ruling that a violation of the jury tampering statute occurs when a person knowingly tries to influence a juror's decision through written communication "made in relation to a specific case pending before that juror." *See The New York Times*, April 19, 2012.

UPCOMING CONFERENCES AND SEMINARS

Pincus Professional Education, Los Angeles, California – June 1, 2012 – "E-Discovery in 2012: What Attorneys Need to Know." Shook, Hardy & Bacon eDiscovery, Data & Document Management Partner Amor Esteban will join a distinguished faculty to discuss the current state of e-discovery law in California, early case assessment and rule 26(f) in federal court, modern search and review techniques, managing large projects, coordinating with in-house counsel, and ethical issues. ■

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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 95 percent of our more than 470 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).