Shook, Hardy & Bacon L.L.P.

APRIL 29, 2010

PRODUCT LIABILITY LITIGATION REPORT

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FAILURE TO CERTIFY CLASS DOES NOT DIVEST FEDERAL COURT OF JURISDICTION UNDER CAFA

The Ninth Circuit Court of Appeals has joined two other circuit courts that have considered the issue and determined that a refusal to certify a class properly removed to federal court under the Class Action Fairness Act (CAFA) does not divest the court of jurisdiction. ***United Steel, Paper & Forestry, Rubber Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union, AFL-CIO v. Shell Oil Co.*, No. 10-55269 (9th Cir., decided April 21, 2010)**. The issue arose in a labor dispute filed in a California state court.

The defendants removed the putative class action to federal court, and the parties agreed that it satisfied CAFA's numerosity and aggregated amount-in-controversy requirements. The district court later denied certification of two classes of employees after determining that the class action would be difficult to manage and damages would be difficult to calculate. The district court remanded the case to state court at plaintiffs' request, ruling that it no longer satisfied CAFA's jurisdictional requirements.

Reversing, the Ninth Circuit agreed with the Seventh and Eleventh Circuits which have held that "the post-removal denial of class certification does not divest federal courts of jurisdiction." If a case satisfies CAFA's jurisdictional requirements and the case belongs in federal court before class certification, the Ninth Circuit found nothing in CAFA's text to say that it must be remanded in the absence of class certification. According to the court, "Had Congress intended that a properly removed class action be remanded if a class is not eventually certified, it could have said so."

CALIFORNIA APPEALS COURT REVERSES ASBESTOS AWARD

A California appeals court has reversed a $5.6 million judgment against a company that made valves for the U.S. Navy, ruling that it had no liability for injuries allegedly caused by exposure to the asbestos gaskets made by others that were used with the valves. *Walton v. The William Powell Co.*, No. B208214 (Cal. Ct. App., 2d Dist., Div. 4, decided April 22, 2010). The court analyzed the issues under the "component parts doctrine, which in some circumstances exempts a manufacturer from liability arising from a finished product that incorporates a component supplied by the manufacturer."

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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Here, the plaintiffs alleged that the defendant's valves had "warning" and design defects because the company failed to warn about the danger of exposure to the asbestos gaskets that would be used with the valves, and, in fact, manufactured the valves specifically to be used with asbestos gaskets.

According to the court, the defendant was not part of the chain of distribution for the injury-causing products and had no duty to warn about the hazards of asbestos released from products made or supplied by others. The court also determined that the evidence did not show that the valves were themselves defective or that defendant had played a material role in the design of the shipboard systems. The Navy had, in fact, specified that the valves it ordered from the defendant were to have a certain type of flange, which would accommodate the gaskets and be integrated into a system the Navy had designed. The court relied on the *Restatement Third of Torts, Products Liability* to note that the seller of a nondefective component part should not be held liable for another's product. "To impose liability on [defendant] for the hazards associated with asbestos would have obliged it to scrutinize the development of several products—the gaskets, packing, and insulation made by others, and the Navy's shipboard systems—over which it had no control."

PLAINTIFFS WITH PRE-EXISTING PRODUCTS CLAIMS AGAINST AUTOMAKER CANNOT DISTURB BANKRUPTCY SALE

A federal court in New York has dismissed as moot an appeal filed by plaintiffs with products liability claims pending against General Motors Corp. (GM) before it was sold in bankruptcy. *In re: Motors Liquidation Co.*, No. 09 Civ. 6818 (U.S. Dist. Ct., S.D.N.Y., decided April 13, 2010). The plaintiffs sought to overturn a bankruptcy court's approval of the automaker's sale "free and clear" of their existing products liability claims as well as any successor liability claims they may have against the "new" GM. According to the court, the appeal was moot because the plaintiffs failed to secure a stay of the sale order, a requirement under the Bankruptcy Code, which "limits appellate jurisdiction over an unstayed sale order issued by a bankruptcy court to the narrow issue of whether the property was sold to a good faith purchaser."

Plaintiffs did not challenge the sale order on this ground; rather, they raised jurisdictional issues. While the court expressed its sympathy for the plaintiffs, it stated, "[W]e note that their position in the bankruptcy appears to be neither better nor worse than that of any other unsecured contingent creditor. Moreover, the relief [plaintiffs] sought in the Bankruptcy Court and now seek from this Court would unravel the 363 Transaction, the only alternative to which was a liquidation in which they and other unsecured creditors would have received nothing."

MULTIDISTRICT LITIGATION PANEL CONSOLIDATES CASES FROM 2009 AIR CRASH

The Judicial Panel on Multidistrict Litigation has consolidated before a federal court in California a number of lawsuits filed against Société Air France, Airbus SAS and several suppliers seeking to recover for a June 2009 airline crash over the Atlantic Ocean that took the lives of 228 passengers and crew. *In re: Air Crash over the Mid-Atlantic on June 1, 2009*, MDL No. 2144 (J.P.M.L., order entered April 14, 2010). The consolidated cases were filed in California, Illinois and Texas; an additional 31 related actions are pending in California, Florida and Texas and are considered "potential tag-along actions." The plaintiffs reportedly allege that negligence and defective design, manufacturing and assembly led the plane to crash off the coast of Brazil. The court handling the consolidated actions will oversee discovery and pre-trial proceedings; if the litigation survives pre-trial proceedings, the cases will be returned to the originating courts for trial. *See Product Liability Law 360*, April 19, 2010.

FEDERAL COURT LIFTS SANCTIONS IMPOSED ON LAWYERS FOR WITHHOLDING DOCUMENTS IN DISCOVERY

A federal court in California has decided not to impose sanctions on lawyers who were found in 2008 to have assisted Qualcomm Inc. in withholding tens of thousands of documents that had been requested in discovery. *Qualcomm Inc. v. Broadcom Corp.*, No. 05cv1958 (U.S. Dist. Ct., S.D. Cal., decided April 2, 2010). The court's $8.5 million sanction against Qualcomm was not appealed and so remains in place. According to the court, "this massive discovery failure" was caused by "significant mistakes, oversights, and miscommunication on the part of both outside counsel and Qualcomm employees." While the court found that the attorneys made a number of critical errors, because they also "made significant efforts to comply with their discovery obligations" and did not act in bad faith, it did not believe sanctions should be imposed.

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The court identified the following issues as contributing to the improper withholding of requested documents: (i) in-house and outside counsel failed to meet with key company personnel "at the beginning of the case to explain the legal issues and discuss appropriate document collection"; (ii) outside counsel failed to obtain sufficient information about the company's computers or electronic storage systems; (iii) "no attorney took supervisory responsibility for verifying that the necessary discovery had been conducted"; and (iv) the participants failed to agree about responsibility for document collection and production. The court found that all of these failures "were exacerbated by an incredible lack of candor on the part of the principal Qualcomm employees" as well as "an inadequate follow-up in response to contradictory, or potentially contradictory evidence."

CONSUMERS TAKING NEW SHOTS AT PRODUCT MANUFACTURERS

With an increasing number of companies touting their products as "green" or "environmentally friendly," consumers have reportedly begun challenging those claims in court complaining that they paid more for products that did not meet their expectations. According to a news source, some manufacturers have added self-designed labels that imply they have earned a third-party seal of approval when that is not the case and some call their products "biodegradable," when the products have little chance of actually decomposing in a landfill. At least four consumer lawsuits alleging misleading advertising about environmental impact have apparently been filed since 2007, and dozens of Federal Trade Commission and industry self-policing actions have been initiated over the past 18 months.

A putative class action involving cleaning products with a self-designed "Greenlist" label is pending in California. Scheduled for trial in December 2010, it seeks purchase price refunds and injunctive relief. Similar litigation is reportedly pending in a federal court in Wisconsin. A business economics professor noted that this litigation could represent "a turning point in corporate green claims," suggesting that regardless of outcome, the cases will pressure companies "to hone their green messages and make them more factual and credible." *See The Wall Street Journal*, April 24, 2010.

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ALL THINGS LEGISLATIVE AND REGULATORY

CPSC Issues Proposed Definition for "Children's Product" Under CPSIA

The Consumer Product Safety Commission (CPSC) has proposed an **interpretive rule** to provide guidance on how the term "children's product" is to be defined under the Consumer Product Safety Improvement Act of 2008 (CPSIA). The proposal aims to help manufacturers comply with the commission's sweeping new safety requirements and elaborates on the statutory definition and accompanying factors when evaluating whether a consumer product constitutes a children's product.

Under CPSIA, a children's product is defined as "a consumer product designed or intended primarily for children 12 years of age or younger." The statutory definition also specifies certain factors to consider when determining whether a consumer product is primarily intended for this age group. Those factors are (i) manufacturers' statements or labels about the intended use of the product, (ii) whether the product is represented as appropriate for use by children, (iii) how the product is commonly recognized by consumers, and (iv) the product's appeal to a specified age group as defined by CPSC's 2002 Age Determination Guidelines.

The proposed rule clarifies that the term "for use" by children 12 and younger should be interpreted to generally mean that children "will physically interact with such products based on the reasonably foreseeable use and misuse of such product." Products that may appeal to consumers older than age 12, such as backpacks or certain recreational equipment, would not be considered children's products. "Where a product's appeal lessens as a child moves past the age of 12, it is likely the product may be considered or intended primarily for children 12 years of age or younger," CPSC states. Comments are requested by June 21, 2010. *See Federal Register,* April 20, 2010.

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Congressman Urges Removal of Lead-Paint Loophole

Representative Henry Waxman (D-Calif.) has written a **letter** to the Office of Management and Budget (OMB) in support of removing "a dangerous loophole" that exempts child-free homes from compliance with new rules governing the removal of toxic lead paint from homes built before 1978.

Waxman, who chairs the House Energy and Commerce Committee, wrote that while he supports the "full and on-time implementation of regulations to protect children, families, and workers from lead poisoning resulting from renovation activities in older homes," the original April 2008 version of the rule provides homeowners without young children an "opt-out" provision.

In his April 19, 2010, letter to OMB Administrator Cass Sunstein, Waxman wrote, "If not eliminated, the opt-out will endanger children who visit or move into homes that have been contaminated with toxic lead dust during unsafe renovations. In addition, it imperils children who live in homes next to properties where owners choose to opt out of lead-safe practices." Announcing the rule's April 22, 2010, effective date, the Environmental Protection Agency also stated that it had prepared a final rule that would apply the lead-safe work practices to all pre-1978 homes to close the loophole. The rule will become effective 60 days after publication in the *Federal Register*. *See EPA Press Release,* April 23, 2010.

House Committee Raises Cadmium Concerns with Three Major Retailers

Leaders of the House Energy and Commerce Committee have sent **letters** to three major retailers requesting details on how the companies intend to stop selling children's products containing the toxic metal cadmium.

The April 16, 2010, letters asked for information about the retailers' efforts to "identify, address and prevent hazardous materials, such as heavy metals, from being used in children's jewelry and other products intended for children."

Committee Chair Henry Waxman (D-Calif.) and Oversight Subcommittee Chair Bart Stupak (D-Mich.) specifically ask the stores to (i) detail their policies and procedures related to preventing the sale of products intended for children that contain hazardous

products; (ii) list all manufacturing and distribution companies that provide them with products intended for children, including those identified in a January 10, 2010, *Associated Press* (*AP*) investigation as having supplied items containing cadmium; (iii) provide an explanation of what they are doing to confirm the safety of their children's products; and (iv) describe all of their policy and procedure changes that pertain to the sale of children's products containing hazardous materials since the *AP* report was published.

According to the *AP*, 12 percent of 103 children's jewelry items purchased in New York, California and Texas contained at least 10 percent cadmium, a known cancer-causing agent that has apparently been linked to brain development deficiencies in children. While Waxman and Stupak praised two of the retailers for removing affected bracelets from their shelves, they cautioned, "[W]e remained concerned that unscrupulous manufacturers may substitute other hazardous materials for lead in products for children."

The Consumer Product Safety Commission is reportedly pressing manufacturers, especially those in the Asia-Pacific region, to avoid replacing lead with toxic metals like cadmium. *See Product Liability Report 360*, April 19, 2010.

LEGAL LITERATURE REVIEW

Patrick Borchers, "Punitive Damages, Forum Shopping, and the Conflict of Laws," *Louisiana Law Review*, 2010

Creighton University Professor of Law Patrick Borchers explores how conflict-of-laws principles intersect with the availability and dimensions of punitive damages in state courts. His goal is "to catalog the different conflicts issues that affect punitive damages liability," and he focuses his analysis on jurisdictional, judgment-recognition and choice-of-law rules. Among other matters, Borchers notes that while U.S. courts must recognize punitive damages judgments rendered in other states, litigation involving international parties will present obstacles to plaintiffs seeking to enforce punitive awards in foreign courts, thus making it more critical in these cases for plaintiffs to choose and remain in a venue where the defendant has significant assets.

Catherine Sharkey, "The *Exxon Valdez* Litigation Marathon: A Window on Punitive Damages," *University of St. Thomas Law Journal*, 2010

New York University School of Law Professor Catherine Sharkey carefully examines the U.S. Supreme Court's resolution of a two-decade long dispute over punitive damages arising from a massive oil spill off the coast of Alaska and suggests that it raises punitive damages issues that could occupy state and federal courts for the next two decades. According to Sharkey, the Court was fixated on unpredictability which drove it to "an exclusively retributive rationale for punitive damages." She contends that this raises three issues for future punitive damages doctrine and

policy: (i) whether the Court's focus can be linked to a "broader trend in the Court's jurisprudence of circumscribing the role of the civil jury in the name of certainty, predictability, and efficiency"; (ii) whether the ruling will affect the Court's acceptance of a mandatory punitive damages class under Federal Rule of Civil Procedure 23; and (iii) "how far the Court will press its federalization of the punitive damages remedy, especially if states step forward as antagonistic players."

David Stras & James Spriggs II, "Explaining Plurality Decisions," *Georgetown Law Journal* (forthcoming 2011)

A law professor and a professor of government have conducted empirical research on U.S. Supreme Court plurality decisions rendered between the Court's 1953 and 2006 terms. These decisions achieved a 5-4 majority as to the result only and thus provide little definitive guidance for lower courts or future Court decisions with respect to their rationale. According to the authors, plurality results are more likely to occur if the case involves constitutional interpretation relating to a civil liberties issue and lower court conflict did not affect the decision to grant certiorari. The article suggests that identifying the factors that lead an individual justice to join the majority coalition or join while writing a separate concurrence can be essential for evaluating the ramifications of plurality decisions and the development of federal law. The authors call for further research into the precedential value of plurality decisions at both the state and federal levels and whether changes to institutional rules and norms of the Court should be considered to discourage plurality rulings.

LAW BLOG ROUNDUP

One Professor's Take on Litigation as Solution to Public Health Issues

"State attorneys general have neither the competence nor the legitimacy to comprehensively regulate products or to solve public health problems." University of Maryland School of Law Professor Don Gifford, discussing his most recent publication, a book titled *Suing the Tobacco and Lead Pigment Industry: Government Litigation as Public Health Prescription*, and opining that this type of litigation is costly and has not worked.

Concurring Opinions, April 26, 2010.

Calling for Regulation of Sugar-Added Formula for Toddlers

"FDA: this package has front-of-package health claims clearly aimed at babies under the age of two. Uh oh. Shouldn't you be sending out one of those package label warning letters to Mead-Johnson on this one?" Nutrition professor and author Marion Nestle, blogging about a new product for toddlers, chocolate- and vanilla-flavored formulas fortified with nutrients, omega-3s and antioxidants.

Food Politics, April 26, 2010.

Urban Myth as Basis for Regulation?

"It is absolutely outrageous that *an urban myth* could send thousands of businesses down the river and cost literally **billions** in compliance and regulatory expenses. While common toy boxes are not themselves a myth, their ability to cause bodily injury is certainly fantastic." Toy company owner Rick Woldenberg, calling for changes to the Consumer Product Safety Improvement Act (CPSIA) and explaining why Congress is resisting making age-limit changes to the law—the fear that small children could be affected by the toys of older children in the same home.

Amend the CPSIA, April 19, 2010.

THE FINAL WORD

Magistrate Judges Offer Views on Resolving Electronic Discovery Disputes

During a recent conference of the American Bar Association's litigation section, three magistrate judges discussed how litigants can best resolve their electronic discovery disputes. Being forthcoming with information and specific about objections were among the tips they provided. They also emphasized (i) addressing key issues early in the discovery process, (ii) keeping the court apprised of potential conflicts, (iii) bringing into court information technology personnel in a company involved in a discovery dispute, (iv) working out compromises with opposing counsel, (v) being open to the use of clawback agreements to address the inadvertent disclosure of privileged data, and (vi) recognizing that the Sedona Conference e-discovery principles are advisory only and not set in stone. *See Product Liability Law 360*, April 23, 2010.

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UPCOMING CONFERENCES AND SEMINARS

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.

ABA, Washington, D.C. – May 27, 2010 – "The Fourth Annual National Institute on E-Discovery: Practical Solutions for Dealing with Electronically Stored Information (ESI)." Shook, Hardy & Bacon Tort Partner John Barkett is serving as moderator for two panels during this American Bar Association (ABA) continuing legal education program, which features some of the federal judges, practitioners, in-house counsel, and scholars most knowledgeable about e-discovery issues today.

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American Conference Institute, New York City – July 21-22, 2010 – "Products Liability Boot Camp for the Life Sciences Industry." Shook, Hardy & Bacon Pharmaceutical & Medical Device Litigation Partner Marie Woodbury will join a distinguished faculty of top defense lawyers for life sciences companies to share their expertise on the liability risks facing this industry. Woodbury will analyze clinical-trials processes from a products liability perspective, discussing potential litigation issues related to the scope of the trial, transparency and non-disclosure of results, and discovery involving investigators and subjects. ■

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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).