Shook, Hardy & Bacon L.L.P.

MAY 12, 2011

PRODUCT LIABILITY LITIGATION REPORT

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EIGHTH CIRCUIT DISMISSES PREEMPTED CLAIMS OF INADEQUATE LABELING FOR CONTACT CEMENT

The Eighth Circuit Court of Appeals has determined that a lower court correctly granted the defendant's motion for summary judgment, concluding that the claims filed by survivors of a man killed when a contact-cement spill ignited as he tried to clean it up would have imposed label warnings not required under federal law. ***Mwesigwa v. DAP, Inc.*, No. 10-1821 (8th Cir., decided April 28, 2011)**.

The can containing the product that spilled had label warnings about the flammability of the adhesive and its vapors with precautionary measures that users must adopt to avoid the potential hazards. Federal hazard-labeling laws preempt state law claims with the exception of those claims alleging failure to comply with federal law. The plaintiffs contended that the label did not comply with federal law because it failed to warn of one of the product's principal hazards, that is, "the label should have included the risk of fire from an accidental spill … as a principal hazard separate from the product's general flammability." The court disagreed, noting "[r]egardless of how the product is exposed to elements outside its container, the risk created is the potential for a fire," and the product adequately warned of this risk.

The plaintiffs also asserted that "the label should have informed the consumer that in the event of a spill, the product should not be wiped and spread but absorbed with an inert absorbent." Again, the court disagreed, finding that federal law did not require this additional warning. "The label complies with the [Federal Hazardous Substances Act] because the principal hazard to be avoided is flammability, and the way to avoid that hazard is to remove all potential ignition sources."

COURT RULES CAFA DOES NOT ALLOW ADDED COUNTERCLAIM DEFENDANT TO REMOVE ACTION

The Ninth Circuit Court of Appeals has determined that a party joined to an action as a counterclaim defendant may not remove the case to federal court under the Class Action Fairness Act of 2005 (CAFA). ***Westwood Apex v. Contreras*, No. 11-55362 (9th Cir., decided May 2, 2011)**. The issue arose in a case that began as an effort to collect an unpaid student loan. The former student filed a counterclaim against, among others, the school he attended, alleging violations of consumer-protection laws on behalf of a class. The school removed the case to federal court

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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under CAFA, and the district court remanded it to state court, finding that the statute did not authorize an additional counterclaim defendant to remove a case to federal court.

The Ninth Circuit agreed, extending to its CAFA interpretation a 1941 U.S. Supreme Court principle that only an original defendant can remove a case. A concurring judge agreed that the interpretation was correct, but urged Congress to consider whether this result makes sense when a simple debt-collect action involving $20,000 is transformed into "an unrelated multi-million dollar class action." As the concurring judge noted, "Had Contreras filed this class action separately and not by means of a counterclaim, the defendants could have removed the case from state court to federal court."

"DATE OF INITIAL PURCHASE" CLARIFIED IN DEATH CASE INVOLVING LOG-STACKING EQUIPMENT

Dismissing wrongful death claims arising out of an accident involving a log-stacking machine, the Arkansas Supreme Court has determined that the applicable statutes of repose barred the action because it was brought more than six years after the equipment was initially started up and placed into use. ***Conway v. Hi-Tech Eng'g, Inc.*, No. 09-1049, 2011 Ark. 180 (Ark., decided April 28, 2011)**.

The machine was first placed in service December 7, 1998. The decedent's mother claimed, however, that the operative date for the two statutes of repose at issue was the date of satisfactory start-up or completion of performance under the machine's contract of sale, which date she argued was March 7, 1999, thus making her February 3, 2005, filing timely. The contract required the seller to assist in the machine's installation and start-up and gave the buyer the right to inspect and test it before and after installation; the stacker would not apparently "be deemed accepted until after said final inspection."

Because the statute of repose for product liability claims clearly bars defect claims "brought more than six years after the date of the initial purchase for use or consumption," the court held that the operative date was the date the machine was initially used, and thus the claim was time-barred. The statute of repose for improvements to real property bars actions to recover damages for product defects brought "more than six years from the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement." The court concluded that the "trigger date" for this statute was also December 7, 1998, because no activities that happened later interfered with or prevented the buyer "from using the stacker for the purpose for which it was intended," and the plaintiff "failed to demonstrate a direct connection between the harm alleged and the last acts or omissions alleged to have occurred after" that date.

MDL COURT PRELIMINARILY APPROVES SETTLEMENT OF FAULTY PLUMBING CLAIMS

A federal multidistrict litigation (MDL) court in Texas has granted a motion for the preliminary approval of a class action settlement involving claims that a plumbing system installed in homes throughout the United States and Canada failed. *In re: Kitec Plumbing Sys. Prods.*, MDL No. 2098 (U.S. Dist. Ct., N.D. Tex., Dallas Div., order entered April 29, 2011). The settlement will also require and is contingent on approval by courts in Quebec and Ontario.

According to the court, a settlement fund of US$125 million would be created by the defendants and their insurers under the agreement, and class members would be notified through advertising, direct mail to builders and plumbers, and press releases. The court has characterized the settlement fund as "particularly remarkable because the plaintiffs allege that Kitec Systems have only a 'propensity-to-fail,' and the vast majority of class members have incurred no actual damages and likely never will." A fairness hearing has been scheduled for November 17, 2011. The court has also issued an injunction staying related actions pending in any U.S. court. If the settlement is finally approved, class members will have eight years to file claims.

MISSISSIPPI SUPREME COURT ALLOWS PLAINTIFF TO PROVE SHE WAS COMMON-LAW WIFE IN SILICOSIS LITIGATION

Reconsidering a matter that divided the court in 2010, the Mississippi Supreme Court has reversed itself and will allow some claims to proceed in wrongful-death litigation involving silica exposure filed by the decedent's purported common-law wife. ***Clark Sand Co., Inc. v. Kelley*, No. 2008-01437 (Miss., decided April 28, 2011)**.

The plaintiff, an Alabama resident, referred to herself as the decedent's executrix and widow when she filed the lawsuit, but the defendant challenged her standing on the ground that she was not the decedent's wife. When she filed the action, the plaintiff had not yet been formally appointed the executrix of the decedent's estate, so her standing to pursue the claims depended on her status as the decedent's wife, rather than on her role as executrix.

Mississippi law does not provide for common-law marriages, but the state "gives full faith and credit to a valid common-law marriage from another state." While the Mississippi litigation was pending, the plaintiff obtained an Alabama court order recognizing her common-law marriage, a decree that was later vacated. Because Alabama law does not require judicial notice or recognition of a marriage for the relationship to be valid, the Mississippi court determined that the plaintiff had provided sufficient evidence as to the existence of a common-law marriage to survive a summary judgment motion and remanded the case for trial on her wrongful-death action, "during which a determination as to whether Kelley was Bozeman's common-law wife at the time of his death—and hence whether she had standing as his 'widow'—must be made."

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Concurring and dissenting justices would have found that the plaintiff had standing as an "interested party," because she was a devisee under the decedent's will, and Mississippi "has clearly held that the deceased's heirs under the laws of intestate succession qualify as 'interested parties.'" That the will had not yet been probated did not alter their analysis as it did the court's majority. One justice also disagreed with the majority that the "survival-type" claims were time-barred. According to the majority, the plaintiff had not been substituted for the decedent in an earlier lawsuit after he died, and she was not yet his estate's executrix when she filed the suit, so her lawsuit was not a continuation of the earlier one.

CLASS COMPLAINT FILED IN NEW YORK OVER ANTI-BACTERIAL HAND SOAP CLAIMS

A New York resident has filed a putative class action in federal court against a company that makes anti-bacterial hand washes, alleging that its product promotions are deceptive and misleading. *Feuer v. The Dial Corp.*, No. 11-2205 (U.S. Dist. Ct., E.D.N.Y., filed May 5, 2011). Seeking to represent a statewide class of claimants, the plaintiff claims that the company's "misleading marketing campaign begins with a deceptive name—Dial Complete—as it implies that it will completely protect you from germs…. In truth, Defendant has no independent, competent and reliable support for these claims."

The complaint cites research on anti-bacterial soaps allegedly refuting the company's claims, as well as agency findings that evidence fails to show these products "provide any extra health benefit over soap and water alone." As a result of the company's "aggressive marketing," consumers were allegedly induced to buy its products "at a price premium compared to ordinary soap." The plaintiff contends that he relied on the product claims, promotions, commercials, and advertisements for Dial Complete in making his decision to buy the products, without knowing that "there was and still is no reasonable basis in fact or substantiation for Dial's claims that Dial Complete 'kills 99.99% of germs,' is the '#1 Doctor Recommended' liquid hand wash, 'kills more germs than any other liquid hand soap,' is 'over 1,000 times more effective at killing disease-causing germs than other antibacterial liquid hand soaps,' and is 'over 10x more effective at killing disease-causing germs than ordinary liquid soaps.'"

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Alleging violations of state consumer protection laws, breaches of contract and express warranty, unjust enrichment, tortious breach of warranty, and negligent design and failure to warn, the plaintiff seeks an order certifying a class action; restitution; disgorgement; actual, statutory and punitive damages; attorney's fees; and costs. He also seeks injunctive relief to stop the defendant "from continuing to engage in the business practices complained of herein."

ALL THINGS LEGISLATIVE AND REGULATORY

CPSC Considers Changes to Bicycle Regulation Definitions, Testing

Consumer Product Safety Commission (CPSC) staff has issued responses to more than a dozen stakeholder comments on proposed amendments to the agency's bicycle regulations and three **recommended changes** to the proposed rule. The final rule will be effective 30 days after publication in the *Federal Register*.

CPSC issued the proposed rule on November 1, 2010; it would amend definitions for "sidewalk bicycle" and "track bicycle"; create a new definition for "recumbent bicycle"; establish certain mechanical requirements for bicycles and their steering systems, wheel hubs and seats; and amend the fork and reflector-performance test procedures. According to CPSC, "the proposed rule would update 16 C.F.R. part 1512, *Requirements for Bicycles*, by adding and clarifying terms and requirements necessary for bicycle manufacturers to conduct testing and certification in accordance with the Consumer Product Safety Improvement Act of 2008 (CPSIA), and excepted certain types of bicycles or components from testing under specific sections of the regulations."

In its April 25, 2011, briefing package, CPSC staff offered the following changes to the proposed bicycle regulation: (i) "In the definitions, clarify that track bicycles [those designed and intended to be used as competitive 'velodrome' machines] have no brake levers or calipers"; (ii) "Revise the term used in the wheel hub quick-release requirement from 'carbon fiber material' to 'fiber-reinforced plastics'"; and (iii) "Revise the requirement for seat posts on bicycles with integrated seat masts to require a mark or means to ensure that the seat or seat post is installed safely." *See BNA Product Safety & Liability Reporter,* May 2, 2011.

Florida Legislature Approves "Crashworthiness" Reform Bill

The Florida Legislature recently approved a **bill** (S.B. 142) that reduces the liability exposure of automobile manufacturers in "crashworthiness" cases. Under the state's crashworthiness doctrine, car makers can be held liable for design defects that did not sufficiently protect the occupants and enhanced the damages incurred in an accident. Expected to be signed into law by Governor Rick Scott (R), the bill will require juries to weigh the fault of all those involved in an accident and apportion it accordingly.

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The reform legislation will overturn a 2001 Florida Supreme Court decision precluding juries from considering anything other than product defect in cases alleging injury enhancement due to a defective product, such as the failure of an air bag, seatbelt, roof integrity or some other aspect of a car's design. Thus, a jury could not consider whether intoxication or high speed was a contributing factor. The supreme court ruling apparently made Florida the only state that prohibited a jury from considering evidence about a driver's condition at the time of a car accident. Once signed, the bill will take effect immediately and apply retroactively.

SHB Public Policy Attorneys Victor Schwartz and Cary Silverman provided support to the Florida Justice Reform Institute, which was involved in this legislative initiative.

Florida Legislature to Let Voters Decide on State Court Overhaul

The Florida Legislature has passed a proposed constitutional amendment (H.J.R. 7111) that puts an overhaul of the state's court system before Florida voters. Set to go on the November 2012 ballot, the measure needs 60 percent voter approval before it can be enacted into law.

The Florida Senate's 24-11 vote was just enough needed for final passage. The measure is intended to increase the legislature's influence over the state court system by requiring Senate confirmation of justices, giving the legislature authority to repeal court-approved procedural rules and mandating that an investigative panel charged with looking into judicial misconduct share its information with lawmakers.

Missing from the final bill is a House of Representatives' proposal that would have added three justices to the state supreme court and split the court into two separate divisions for civil and criminal appeals. The House plan would also have given Florida Governor Rick Scott (R) the authority to appoint three new justices to hear appeals in civil cases.

A part of the legislative package that included the overhaul would reportedly guarantee full financing of Florida's court system. With fewer lawsuits bringing in less revenue from declining filing fees, the courts are apparently facing a $74 million shortfall. Several senior judges have complained that the exchange of financial security for a less-independent bench was a poor deal. House Speaker Dean Cannon (R-Winter Park), who supports the overhaul and made it a priority, apparently disagrees. "Is the judiciary independent? Yes," he was quoted as saying. "Omnipotent? No. Florida went too far with power to the judiciary after the late '60s and early '70s, and all we are doing is trying to establish a more efficient judicial branch." *See The New York Times*, May 3, 2011; *The Associated Press,* May 5, 2011.

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Texas House Passes "Loser Pays" Tort Reform

The Texas House of Representatives has reportedly passed without discussion or amendment a "loser pays" tort reform bill (H.B. 274).

After a day of heated contention among House lawmakers over a number of bills, the tort reform legislation was apparently the only one approved on May 7, 2011. Now headed to the Texas Senate, the bill has garnered the support of business interests because it would require losers of certain lawsuits to pay the attorney's fees or other costs of litigation incurred by the prevailing party.

The requirement would apply to civil actions seeking "damages for personal injury, property damage, breach of contract or death, regardless of the legal theories or statutes on the basis of which recovery is sought," and those seeking "damages other

than for alleged personal injury, property damage, or death allegedly resulting from any tortious conduct, regardless of the legal theories or statutes on the basis of which recovery is sought." Attorneys representing parties on the losing side of "abusive civil actions" will be liable jointly and severally for the litigation costs awarded. *See The Houston Chronicle,* May 8, 2011.

Federal Courts to Take Part in Pilot Program Providing Public Access to Opinions

Twelve federal courts have reportedly been selected to participate in a one-year pilot program that will give the public free access to court opinions through the Government Printing Office's **FDsys system**. When fully implemented later in 2011, the program will include the Second and Eighth Circuit Courts of Appeals, as well as seven federal district courts and three bankruptcy courts. The Judicial Conference has approved a pilot expansion that will include up to 30 additional courts. While federal court opinions have been available to the public via the PACER service, FDsys apparently has a "robust search engine." *See U.S. Courts News Item*, May 4, 2011.

LEGAL LITERATURE REVIEW

Michael Steven Green, "Horizontal *Erie* and the Presumption of Forum Law," *Michigan Law Review*, 2011

College of William & Mary School of Law Professor Michael Steven Green argues in this paper that the rule requiring federal courts to interpret state law as the state's supreme court would interpret it should be applied when a state court interprets a sister-state's law. While some may think this is established law, Green notes that the U.S. Supreme Court "has in fact given state courts significant freedom to misinterpret sister-state law. And state courts have taken advantage of this freedom, by routinely presuming that the law of a sister state is the same as their own." He calls for the U.S. Supreme Court to recognize "horizontal *Erie*," particularly given the pervasiveness of nationwide class actions which can require a court to apply the laws of numerous jurisdictions. Because state courts are "constitutionally obligated under full faith and credit to apply the law of a sister state," Green writes, "the forum may not presume that unsettled sister-state law is the same as its own. It must decide as the sister state's supreme court would."

He calls for the U.S. Supreme Court to recognize "horizontal Erie*," particularly given the pervasiveness of nationwide class actions which can require a court to apply the laws of numerous jurisdictions.*

Colin Miller, "What's the Alternative?: 9th Circuit Opinion Shows Flaws with *Forum Non Conveniens* Analysis; Professor Suggests Solution," *Civil Procedure & Federal Courts Blog,* April 29, 2011

John Marshall Law School Associate Professor Colin Miller suggests that recent research and case law runs counter to the U.S. Supreme Court's 1947 test for *forum non conveniens* under which "the plaintiff's choice of forum should rarely be disturbed." According to Miller, the federal courts have in recent years increasingly granted inconvenient forum motions, a trend that peaked in 2008 at 54 percent. And this apparently occurs without many of the courts conducting a sufficiently

rigorous analysis of whether an adequate alternative forum (AAF) existed. Miller endorses the analytical framework proposed by Law Professor Joel Samuels, who called for the courts to use a six-factor test that considers whether an AAF is available, that is, whether (i) all defendants are subject to the other forum's jurisdiction according to its laws, (ii) the other forum provides a meaningful remedy, (iii) the other forum's courts will treat the plaintiff fairly, (iv) all plaintiffs have practical access to the other forum's courts, (v) the other forum can ensure procedural due process; and (vi) the other forum is stable.

Jordan Singer, "Proportionality's Cultural Foundation," *Santa Clara Law Review* (forthcoming 2011)

In this article, New England Law-Boston Associate Professor Jordan Singer proposes "a radically different approach to combating excessive discovery." According to Singer, the "proportionality" rules incorporated into the Federal Rules of Civil Procedure to prevent excessive pretrial discovery "have not met their stated goals." Under this approach, pretrial discovery is expected to be "proportional" to the specific needs of each case. Unfortunately, writes Singer, "the legal community cannot even develop a clear and consistent definition of the key term." Attributing the rules' failure to achieve proportionality to the "disconnect between the rules [which assume excessive discovery is caused by abuse of attorney discretion] and the prevailing litigation culture [which "naturally promote[s] controlled discovery"], Singer calls for doing away with rules limiting attorney discretion. Arguing that "[f]aith in core values such as access to justice, adjudication on the merits, efficiency and predictability ordinarily motivates lawyers to tailor the scope and volume of their discovery requests without judicial intervention," the author contends that allowing greater discretion "is a closer approximation to the cultural patterns that ordinarily keep discovery under control."

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LAW BLOG ROUNDUP

An Unpersuasive U.S. Supreme Court Decision?

"On Wednesday, the Supreme Court handed down a 5-4 ruling in *AT&T Mobility LLC v. Concepcion*…. The opinion is unpersuasive. Indeed, the case is arresting because the Court's ruling runs away from principles that conservatives purport to value in other contexts." Cornell Law Professor Mike Dorf, blogging about the Court's determination that federal law preempts a state-contract rule that considers class-action waivers unconscionable. According to Dorf, the core problem with the opinion is that the Court majority interpreted the federal statute according to its purpose, "where that purpose is not clearly expressed in the text," and these justices "have been very hostile" to this approach to decisionmaking. Dorf also criticizes the majority for using a disparate impact test to decide the case, thus "betraying their general hostility to disparate impact for its own sake."

Dorf on Law, April 29, 2011.

Ludicrous Claims About U.S. Supreme Court Class Action?

"[T]he typical media coverage of the 5-4 decision gives a loud megaphone to the ludicrous claim that the Supreme Court opened the way for consumers to be raped with impunity. Not one of these attacks on the decision points out that AT&T's arbitration clause makes it *easier* for an individual consumer to bring a profitable claim against the phone company. The only thing it does is to preclude a class action that would rip off the vast majority of consumers for the benefit of attorneys." Blog Editor and Manhattan Institute Center for Legal Policy Adjunct Fellow Ted Frank, providing his take on the U.S. Supreme Court's ruling in *AT&T Mobility LLC v. Concepcion*.

PointofLaw.com, May 2, 2011.

Extreme Discovery Sanction?

"In a scathing opinion issued Monday, U.S. District Court Chief Judge Royce Lambreth accused [Washington, D.C.] and its attorneys of 'repeated, flagrant, and unrepentant failures to comply with Court orders' in their handling of discovery in a six-year class action." *Legal Times* Reporter Zoe Tillman, discussing an order some are calling a wake-up call to attorneys and clients who may fail to comply with discovery orders in the future. Lambreth ordered the city to produce within a week all of the e-mails the plaintiffs had requested and ruled that the city's attorneys had waived their right to a privilege review.

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The BLT: The Blog of LegalTimes, May 10, 2011.

THE FINAL WORD

U.S. Supreme Court Approves Rules Amendments; Now Up to Congress

The U.S. Supreme Court has approved for congressional review a number of amendments to the rules of appellate procedure and the Federal Rules of Evidence. If Congress takes no action, the **proposed changes** will take effect December 1, 2011. The appellate-rule changes would clarify the extended time that the government has to appeal in cases involving the United States, a federal agency or a federal employee as a party. To avoid any potential jurisdictional issues, the Judicial Conference has apparently requested that Congress adopt a proposed amendment to 28 U.S.C. § 2107, to coordinate with the proposed amendments to appellate rules 4 and 40. The Federal Rules of Evidence have been restyled and simplified without any substantive changes. *See U.S. Law Week*, May 3, 2011.

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UPCOMING CONFERENCES AND SEMINARS

Advanced Medical Technology Association, London, England – May 18-20, 2011 – "2011 International Medical Device Industry Compliance Conference." Shook, Hardy & Bacon Government Enforcement & Compliance Partner Nate Muyskens is scheduled to moderate a panel discussion on "Best Practices in Distributor Risk Management: Pre-Contract Diligence, Training, Auditing and Monitoring." Organized by medical device industry leaders, the conference will feature an array of panel discussions with distinguished speakers from around the world. Shook, Hardy & Bacon is a conference co-sponsor.

ACI, Chicago, Illinois – June 22-23, 2011 – "4th Advanced Forum on Defending & Managing Automotive Product Liability Litigation: Expert Defense Strategies for Singled-Out Vehicles and Media-Focused Issues." Shook, Hardy & Bacon Tort Associate Amir Nassihi will join a distinguished faculty to moderate a panel discussion on "The View from the Bench: A Unique Opportunity to Hear How Judges Interpret Evidence/Arguments in the Automotive Context."

The Sedona Conference®, Lisbon, Portugal – June 22-23, 2011 – "Third Annual Sedona Conference® International Programme on Cross-Border Discovery and Data Privacy." Shook, Hardy & Bacon eDiscovery, Data & Document Management Partner Amor Esteban joins a distinguished faculty that will provide practical guidance on mitigating the risk and cost of processing and transferring information in cross-border litigation and regulatory matters. Shook, Hardy & Bacon is a program co-sponsor. Esteban currently sits on The Sedona Conference's steering committee and is the chief editor for its Working Group 6, which focuses on data privacy and electronic discovery internationally; the group will hold a special meeting in Lisbon. ■

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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).