Shook, Hardy & Bacon L.L.P.

MAY 27, 2010

PRODUCT LIABILITY LITIGATION REPORT

CONTENTS

U.S. SUPREME COURT AGREES TO HEAR APPEAL IN AUTO SAFETY PREEMPTION LITIGATION

The family of a woman killed in an auto accident while riding in a van that provided a lap-only seatbelt where she was seated learned on May 24, 2010, that the U.S. Supreme Court has agreed to hear whether federal vehicle safety standards preempt state common-law claims that the manufacturer should have installed a lap/shoulder belt or provided a warning of the alleged dangers posed by a lap-only seatbelt. *Williamson v. Mazda Motor of Am., Inc.*, No 08-1314 (U.S., certiorari granted May 24, 2010). The plaintiffs' claims were dismissed by a California court of appeal which found that a federal motor vehicle safety standard authorizing car makers to install lap-only seat belts preempted the lawsuit.

They argue that the applicable 1989 regulations allowing the lap-only seat belts to protect rear-seat passengers represented the federal agency's recognition "that lap/shoulder seatbelts were inherently safer and its regulations were intended to achieve 'the *earliest possible implementation* of a requirement for rear-seat lap/shoulder belts.'" According to the plaintiffs, if the lower court's ruling is allowed to stand, it would threaten "to undermine the valuable role Congress intended state tort law to play in providing incentives for manufacturers to develop safer vehicles than the federal minimum standards… That cannot be what Congress had in mind when it stated that compliance with a motor vehicle safety standard 'does not exempt a person from liability at common law.'"

According to a news source, U.S. Supreme Court Justice-nominee Elena Kagan filed a brief in October 2009 at the Court's request on behalf of the federal government in her role as solicitor general. She apparently urged the Court to hear the appeal, suggesting that the lower court misinterpreted the federal safety standard's intent. The government's brief argued that this federal safety standard is a "minimum standard" and that "the states are not foreclosed from concluding, through a duty of care applied in common-law tort actions, that one option is superior to others."

In other U.S. Supreme Court action, the solicitor general has reportedly been asked to address the issues raised in litigation involving a woman allegedly harmed by the use of a generic prescription drug. If the Court agrees to hear the case, it will consider whether generic-drug manufacturers can be held liable for inadequate product-label warnings. The Eighth Circuit Court of Appeals determined in 2009

Shook, Hardy & Bacon L.L.P.

PRODUCT LIABILITY LITIGATION REPORT

MAY 27, 2010

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.

For additional information on SHB's Global Product Liability capabilities, please contact

Gary Long
+1-816-474-6550
glong@shb.com

Greg Fowler
+1-816-474-6550
gfowler@shb.com

or

Simon Castley
+44-207-332-4500
scastley@shb.com

that federal law does not bar these types of claims when generic-drug makers fail to change product labels to include information about safety risks. *See Product Liability Law 360*, May 24, 2010.

TENTATIVE DEAL REACHED IN DEFECTIVE HDTV LITIGATION

A federal court in New York has conditionally approved a settlement between Sony Corp. and a class of some 350,000 high-definition television (HDTV) purchasers who alleged that the sets have malfunctioning optical blocks that produce characteristic "yellow stains, green haze, and other color anomalies" on their TV screens. *In re: Sony Corp. SCRD Rear Projection Television Marketing, Sales Practices & Prods. Liab. Litig.*, MDL No. 2101 (U.S. Dist. Ct., S.D.N.Y., order entered May 19, 2010). The court preliminarily certified the class for settlement purposes; a fairness hearing will be conducted August 13, 2010.

According to the court, the proposed settlement provides a number of benefits to class members, including an extension of warranty terms, the establishment of a technical team dedicated to diagnosing problems and arranging for needed repairs, cash payments, reimbursements of out-of-pocket expenses, and a full refund of payments for extended service plans to those choosing to cancel the plans. Plaintiffs' counsel will be paid $650,000. The litigation involves seven putative class actions filed in three different federal courts and consolidated before a multidistrict litigation court.

The litigants claiming product defect with respect to one particular television model had their claims severed from the rest of the settlement, because they are challenging the commonality aspect of class certification and their counsel have apparently "made many insinuations and statements about the inadequacy or inappropriateness of counsel" for another plaintiff. The court preliminarily rejected allegations that the parties' negotiations were collusive and not conducted at arm's length.

FEDERAL COURT JURISDICTION UNDER CAFA REMAINS DESPITE LATER OMISSION OF CLASS CLAIMS

The Seventh Circuit Court of Appeals has determined that once a federal court properly obtains jurisdiction over litigation under the Class Action Fairness Act (CAFA), if plaintiffs later amend their complaint to omit the class allegations, the federal court does not lose jurisdiction. ***In re Burlington N. Santa Fe Ry. Co.*, No. 09-8023 (7th Cir., decided May 19, 2010)**. The issue arose in a case involving claims that defendant's failure to inspect and maintain a railroad trestle caused a flood that damaged the plaintiffs' properties. After the case was removed from state to federal court and the plaintiffs' motion to remand was denied, plaintiffs then sought leave to amend their complaint to omit the class allegations. Granting that motion, the lower court also construed it as an implied motion to remand, decided that it now lacked jurisdiction under CAFA and so remanded the case.

According to the appeals court, as a general rule nothing that occurs after removal affects jurisdiction. Citing its recent ruling that CAFA jurisdiction survives a denial of class certification, *Cunningham Charter Corp. v. Learjet, Inc.*, 592 F.3d 805 (7th Cir. 2010), the court explained that court action or action taken by a party post-removal affecting the class-action status of a case are indistinguishable. "The same considerations of expense and delay apply, and in addition, allowing plaintiffs to amend away CAFA jurisdiction after removal would present a significant risk of forum manipulations." The court vacated the remand order and returned the case to the district court for further proceedings.

ODOR ELIMINATION CLAIMS FOR HUNTING CLOTHES SUBJECT TO INJUNCTION

A federal court in Minnesota has determined that the maker and seller of hunting clothes with embedded activated carbon cannot continue to promote the products by claiming that they eliminate human odor or that the clothing can be reactivated to pristine condition in a standard clothes dryer. *Buetow v. A.L.S. Enter., Inc.*, No. 07-3970 (U.S. Dist. Ct., D. Minn., decided May 13, 2010). A class of claimants alleged that these claims were false and/or misleading because the clothing cannot eliminate odors and cannot be restored to be "like new." The court agreed that these statements were literally false. The court determined that other product-performance claims, which were qualified by phrases like "substantially reduces the chance" that a deer will detect a hunter's odor, or simply stated that the product could be reactivated, were capable of other reasonable interpretations and, thus, were not actionable.

The court dismissed the plaintiffs' claim under the Minnesota Uniform Deceptive Trade Practices Act because that law "provides relief from future damage, not past damage," and no risk of future harm to plaintiffs existed since they "are aware of Defendants' false advertising" and "are unlikely to be deceived by such advertising in the future." The court included graphic representations that the clothing eliminated all odor in its order granting, in part, plaintiffs' motion for summary judgment.

FEDERAL APPEALS COURT AFFIRMS VACCINE COURT RULINGS DISMISSING AUTISM-RELATED CLAIMS

Deferring to a special master's finding that the parents of a child who allegedly developed autism from the measles component of the measles-mumps-rubella (MMR) vaccine failed to establish causation, the Federal Circuit Court of Appeals has affirmed a ruling denying the parents compensation under the National Childhood Vaccine Injury Act. ***Hazlehurst v. Sec'y of Health & Human Servs.*, No. 2009-5128 (Fed. Cir., decided May 13, 2010)**.

This test case was one of three decided in 2009, based on different theories of causation and representing some 5,000 cases filed as part of the "Omnibus Autism Proceeding." The parents sought to prove that "the MMR vaccine causes an immune dysfunction that impairs the vaccinee's ability to clear the measles virus. Unable to properly clear the measles virus from the body, the vaccinee experiences measles virus persistence which leads to chronic inflammation in the gastrointestinal system and, in turn, chronic inflammation in the brain. Petitioners argue that the inflammation in the brain causes neurological damage that manifests as autism." According to the parents, the special master who heard the case erred by discounting their expert evidence and failing to exclude the expert evidence the government introduced.

The appeals court disagreed, ruling that the master appropriately discounted the parents' evidence, including medical research from Dr. Andrew Wakefield and Unigenetics, a Dublin-based for-profit, non-accredited laboratory, now closed, and from Dr. Stephen Walker, Wake Forest University School of Medicine, who "was the primary proponent of the hypothesis that the MMR vaccine could cause autism in certain children." The court found the evidence unreliable and concluded that the master properly admitted the testimony of the government's expert who corroborated other witnesses' criticisms of the Wakefield/Unigenetics and Walker research.

While the court acknowledged that Unigenetics equipment and records were unavailable due to the lab's closure, because the master gave the parents more than a year to obtain additional information to support its validity or counter the government's expert, and the parents "chose not to seek relevant reports from the UK litigation or to recall Dr. Bustin for further questioning," the court found that the master did not err in admitting Bustin's testimony.

U.S.-MADE DRYWALL AT ISSUE IN NEW CLASS ACTION

Mississippi homeowners have filed a putative nationwide class action against an American drywall manufacturer, alleging that the product "emits various sulfide gases and/or other chemicals through 'off-gassing' that causes property damage and health hazards." *Mingo v. LaFarge N. Am., Inc.*, No. 1:10cv219 (U.S. Dist. Ct., S.D. Miss., S. Div., filed May 17, 2010). Numerous claims involving Chinese-manufactured drywall emissions are currently pending in a number of state and federal courts; this lawsuit contends that the same defect in domestically produced drywall is also corroding metal components in heating and cooling systems, appliances and computers, as well as causing "irritant effects and health hazards." Plaintiffs allege that removal is the only way to correct the defect. Bringing claims for negligence, strict liability, unjust enrichment, nuisance, and equitable and injunctive relief and medical monitoring, they seek compensatory and statutory damages, attorney's fees, costs, environmental and air monitoring, and medical monitoring.

AUTO INJURY PLAINTIFFS TO APPEAL RULING AFFIRMING GM BANKRUPTCY SALE FREE OF EXISTING CLAIMS

Product liability claimants who lost their right to recover from General Motors LLC (GM) when that company's assets were sold in bankruptcy have reportedly filed a notice of their intent to file an appeal to the Second Circuit Court of Appeals. As we noted in the April 29, 2010, issue of this ***Report***, a federal district court in New York dismissed as moot an appeal from a bankruptcy court ruling filed by plaintiffs with products liability claims pending against GM before it was sold in bankruptcy. The plaintiffs sought to overturn the bankruptcy court's approval of the sale "free and clear" of their existing products liability claims. *See Product Liability Law 360*, May 18, 2010.

SENATE TO CONDUCT CONFIRMATION HEARINGS ON U.S. SUPREME COURT NOMINEE IN LATE JUNE

Senate Judiciary Committee Chair Patrick Leahy (D-Vt.) has reportedly announced that U.S. Supreme Court-nominee Elena Kagan's confirmation hearings will begin June 28, 2010. Leahy apparently hopes that full Senate action on the nomination will occur before the August recess, allowing Kagan, if confirmed, to take her seat when the Court's new term begins in October. According to a news source, Senate Republicans have called for hearings to begin after the Independence Day break in early July, claiming that insufficient time has been allowed to review the nominee's record, including the tens of thousands of pages of documents released since President Barack Obama (D) nominated her in early May. Court watchers have been publishing commentary about Kagan on the basis of materials that have been made public, such as the senior thesis about the socialist movement in New York City that she authored while attending Princeton University. *See U.S. Law Week*, May 19, 2010.

ALL THINGS LEGISLATIVE AND REGULATORY

CPSC Proposes Rule to Establish Procedures for Product Safety Information Database

The Consumer Product Safety Commission (CPSC) has released a **notice of proposed rulemaking** that would implement a requirement under the Consumer Product Safety Improvement Act of 2008 that the agency establish and maintain a publicly available consumer product safety information database. While CPSC has always gathered information about product-related injuries or incidents for consumer goods within its jurisdiction, it could not disclose that information without first giving manufacturers the opportunity to comment on it. The proposed rule, to be codified at 16 C.F.R. Part 1102, would allow consumers, public health officials, day care providers, and others to submit reports of harm through the CPSC's Internet Website or via phone, e-mail or written report.

The proposed rule would require that specific information be provided in these incident reports, including verification that the information is true and accurate and a consent to publish the report on the database, if the submitter so wishes. The CPSC would forward redacted versions of the reports to the manufacturer; the proposed rule has provisions for a manufacturer to comment on a report of harm where it is identified as the manufacturer and to verify and affirmatively request that the comment be published on the database.

Manufacturers may request that confidential information be designated as such and removed before an incident report is published, and the proposed rule would give manufacturers a way to obtain a court order to remove confidential information that has been published on the database. Manufacturer comments may be designated as materially inaccurate, and the person making that request must justify it. If successful, the comment would be excluded from the database. Manufacturers would also have a procedure under the rule to have incident reports designated as materially inaccurate. Voluntary and mandatory recall information would be accessible and searchable. *See Federal Register*, May 24, 2010.

CPSC Proposes Labeling, Testing Rules for Children's Products

The Consumer Product Safety Commission (CPSC) has proposed two new rules to improve testing and labeling standards for consumer products, including those for children. Comments on both proposals are requested by August 3, 2010.

The commission's **notice of proposed rulemaking** would require manufacturers of toys and other products to test individual components to ensure they are safe and comply with the Consumer Product Safety Act (CPSA). The rule would require manufacturers or private labelers to issue a "Children's Product Certificate" showing that the product complies with each applicable safety rule.

Other proposed requirements include (i) "that finished product certifiers may not rely on component part testing conducted by another unless such component parts are traceable"; (ii) that testing parties who are not themselves certifying a component part provide to the "component part certifier" a description of the component part tested, the lot or batch number for which testing applies, and the "applicable rules, bans, standards, and regulations" for each component part tested; and (iii) the results of each test on a component part.

CPSC invites comments on whether finished product certifiers should be permitted to rely on other types of certifications in addition to component part certifications from third parties and whether a provision should be modified allowing a product importer to rely on a "subordinate" certificate from a foreign manufacturer stating that the finished product complies with safe standards.

The other **proposed rule** would establish CPSC's requirements for a "reasonable testing program and for compliance and continuing testing for children's products" under the Consumer Product Safety Improvement Act (CPSIA), as well as how consumer products should be labeled to show they comply with the agency's certification requirements.

Noting that "the Commission understands the economic ramifications that small businesses (and even large businesses) face regarding the testing costs" required under CPSIA, CPSC states that it "wants to emphasize to retailers and sellers of children's products that they can rely on certificates provided by product suppliers if those certificates are based on testing conducted by a third party conformity assessment body."

According to the rule, labels should indicate that the products comply with product safety rules under CPSA and with any safety requirements in other acts enforced by CPSC. *See Federal Register*, May 20, 2010.

CPSC Seeks Comments on Safety Standards for Bicycle Helmets, Multi-Purpose Lighters, Mattresses

The Consumer Product Safety Commission (CPSC) is seeking comments "on the proposed extension of an existing collection of information" from manufacturers and importers of **bicycle helmets**, **multi-purpose lighters** and **mattresses and mattress pads**. CPSC uses product-testing information compiled and maintained by these manufacturers, importers or private labelers to help protect product users from injuries or accidental death and to obtain corrective actions if the companies "fail to comply with the standard in a manner that creates a substantial risk of injury to the public."

CPSC invites comments on (i) "whether the proposed collection of information is necessary for the proper performance of CPSC's function, including whether the information will have practical utility"; (ii) "the accuracy of CPSC's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used"; (iii) "ways to enhance the quality, utility, and clarity of the information to be collected"; and (iv) "ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology." Comments regarding all three products are requested by July 19, 2010. *See Federal Register*, May 18, 2010.

Louisiana Bill Aimed at Closing Tulane Environmental Law Clinic Dies in Committee

The Louisiana Senate Commerce Committee has reportedly shelved a bill (**S.B. 549**) that would have shut down the Tulane Environmental Law Clinic. Sponsored by state Senator Robert Adley (R-Benton) at the request of the Louisiana Chemical

Association, the bill would have blocked university law clinics that receive state money from suing government agencies, people or businesses for monetary damages, or challenging the state's constitution.

Adley, who told the committee that Tulane receives some $45 million in state revenues each year, claimed that the school's environmental law clinic hurt Louisiana's economy by driving jobs out of the state with excessive litigation against industry and government agencies. According to an industry spokesperson, the chemical association apparently asked Adley to sponsor the legislation in anger over a lawsuit seeking millions in fines from Baton Rouge business interests over alleged ozone standard violations.

Tulane President Scott Cowen criticized the bill's timing given the massive oil spill currently threatening fisheries and wildlife habitat in the Gulf of Mexico. "We are dealing with one of the most catastrophic environmental issues we've ever had in the history of the United States, and yet we're here arguing about cutting off access to people, to those who couldn't get it without the law clinic," he was quoted as saying. *See Courthouse News Service*, May 25, 2010.

LEGAL LITERATURE REVIEW

Lori McGroder, "A New Way to Keep Junk Science Out of the Courtroom," *Pharma*, March/April 2010

Shook, Hardy & Bacon Pharmaceutical & Medical Device Litigation Partner **Lori McGroder** has authored an article that calls on courts to require, early in litigation, that plaintiffs produce properly conducted pharmacoepidemiological evidence to support their claims of injury from a prescription drug. According to McGroder, this type of evidence provides "a far superior and reliable method of assessing whether a drug is truly associated with an increased risk for the specific adverse event alleged than the alternatives most often used by plaintiffs." While acknowledging the limitations of pharmacoepidemiologic studies, McGroder calls them a cost-effective method of eliminating meritless claims on general causation grounds during bifurcated discovery in multidistrict litigation when a court can determine if the plaintiffs' theories survive *Daubert's* test for the admissibility of expert evidence.

Charles Silver, "Ethics and Innovation," *George Washington Law Review* (forthcoming 2011)

University of Texas at Austin Law Professor Charles Silver has prepared an article that will appear in a symposium issue of the *George Washington Law Review* addressing various aspects of aggregate litigation. Responding to several of the symposium papers, Silver contends that "improper behavior by lawyers in mass actions" may be attributable more to professional rules of conduct that stifle innovations than to significant self-serving behavior. According to Silver, "When lawyers try to make mass tort representations more transparent and themselves more accountable,

courts and legal ethicists respond negatively. The law governing lawyers locks claimants and attorneys into suboptimal relationships by preventing them from planning for litigation contingencies in advance." He concludes by calling for "deeper justifications" for informed consent requirements.

LAW BLOG ROUNDUP

Researcher Who Linked Autism to Vaccine Under Attack

"There's even a comic book about the controversy." Cato Institute Senior Fellow Walter Olson, blogging about an online **cartoon** that suggests former British surgeon Andrew Wakefield, who raised concerns about a connection between the measles-mumps-rubella vaccine and autism and whose 1998 *Lancet* paper has been discredited, may have been motivated to do so after a plaintiffs' lawyer hired him two years before the paper was published. According to the cartoon, their financial arrangement was apparently never disclosed; Wakefield is no longer employed at the Royal Free Hospital and has lost his license to practice medicine in the UK.

Overlawyered.com, May 25, 2010.

Plaintiffs' Lawyers in Toyota Unintended Acceleration Lawsuits Have Been Around

"The 26 lawyers appointed to steer the nationwide Toyota litigation are not new to mass actions, … Many of the attorneys selected for the Toyota case enjoy relationships that date to the tobacco litigation of the 1990s." Justice Department Reporter Mike Scarcella, linking to a longer article about the lawyers who will be leading the multidistrict litigation against the car maker currently pending in a federal court in California.

The BLT: The Blog of Legal Times, May 24, 2010.

In Defense of Corporate Interests

"As if there aren't more important things for them to worry about, last week BP's trade association, the Louisiana Chemical Association (LCA), tried to do what polluters in Maryland just tried and failed: to cut state funding from any school whose law clinic sues a government agency or business." Consumer advocates at the Center for Justice & Democracy, writing about the Louisiana State Senate's unanimous vote against legislation targeting Tulane's Environmental Law Clinic and designed, according to the LCA president, to stop law students'"job killing lawsuits."

ThePopTort, May 20, 2010.

Shook, Hardy & Bacon L.L.P.

PRODUCT LIABILITY LITIGATION REPORT

MAY 27, 2010

THE FINAL WORD

Social Networking Discussed on Public Radio, Lawyers Use Facebook® for Jury Research

Shook, Hardy & Bacon Global Product Liability Practice Partner **Kevin Underhill** recently provided commentary during a public radio program that focused on "Protecting Your Privacy on Social Networking Sites." Underhill discussed how lawyers use online networking sites, such as Facebook®, to find evidence about opposing parties that can be used to defend their clients' cases and to research potential jurors who may not reveal all their potential biases on juror questionnaires. Underhill noted that at least one bar association has issued a formal opinion indicating that it is unethical for lawyers to become a person's Facebook® friend to view private information to which only Facebook® friends have access. *See National Public Radio*, May 21, 2010.

UPCOMING CONFERENCES AND SEMINARS

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.

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. ■

OFFICE LOCATIONS

Geneva, Switzerland
+41-22-787-2000

Houston, Texas
+1-713-227-8008

Irvine, California
+1-949-475-1500

Kansas City, Missouri
+1-816-474-6550

London, England
+44-207-332-4500

Miami, Florida
+1-305-358-5171

San Francisco, California
+1-415-544-1900

Tampa, Florida
+1-813-202-7100

Washington, D.C.
+1-202-783-8400

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).