Shook, Hardy & Bacon L.L.P.

JUNE 24, 2010

PRODUCT LIABILITY LITIGATION REPORT

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OHIO SUPREME COURT LIMITS PREMISES OWNER'S LIABILITY IN ASBESTOS EXPOSURE CASE

The Ohio Supreme Court has determined that, under a state law applicable to all tort actions for asbestos claims brought against a premises owner, the wife of a pipefitter who brought asbestos dust on his clothes into the home for 10 years cannot sue the owner of the property where the pipefitter worked. ***Boley v. Goodyear Tire & Rubber Co.*, Slip Op. No. 2010-Ohio-2550 (Ohio, decided June 10, 2010)**. The wife allegedly inhaled the dust when she shook out her husband's work clothes before washing them and was diagnosed some years later with malignant mesothelioma. According to the court, the statute requires that the exposure occur at the owner's property. Because the wife's exposure occurred elsewhere, i.e., in her home, the majority held that the legislature intended to bar the premises owner's liability.

A concurring justice opined that the plaintiffs were not without any legal recourse, noting that they were able to and did sue other defendants, "including the manufacturers or suppliers of the asbestos that caused Mary Adams's illness and death." A dissenting justice agreed with the plaintiffs that the statute simply does not apply to them because it affects the rights of those claiming they were exposed to asbestos on a premises owner's property only. Because the plaintiffs here never alleged that the wife entered the premises owner's property, they were not seeking relief under the statute. "It seems mean-spirited to deny her claim while so obviously misconstruing it," the dissent contends.

Shook, Hardy & Bacon Public Policy Partners **Victor Schwartz** and **Mark Behrens** represented amicus curiae interests urging the court to reject the claim. Among those on whose behalf they filed an amicus brief were the Ohio Chamber of Commerce, American Insurance Association, Coalition for Litigation Justice, Chamber of Commerce of the United States of America, and American Tort Reform Association.

SEVENTH CIRCUIT DENIES WRIT SEEKING RECUSAL OF JUDGE WHO AUTHORED ARTICLE ON LEAD PAINT CASE

The Seventh Circuit Court of Appeals has denied a paint manufacturer's request that it order the recusal of a federal district court judge who co-authored a law review article commenting favorably on a Wisconsin Supreme Court ruling allowing plaintiffs

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

to sue the makers of lead-based paint for injuries allegedly caused by exposure to lead under a risk-contribution theory where the specific manufacturer cannot be identified. ***In re: Sherwin-Williams Co.*, No. 10-1639 (7th Cir., writ of mandamus denied June 7, 2010)**. Sherwin-Williams sought the recusal because it intended to challenge the validity of the Wisconsin court's decision in defending lead-paint exposure litigation pending before the federal district court judge.

According to the Seventh Circuit, "we do not think that a reasonable person, having actually read the article, would think that Judge Adelman had expressed any view as to the merits in *Thomas* in arguing that it and the other decisions fell within the Wisconsin high court's authority." Of even greater significance to the appellate court was the irrelevance of any view the court might hold regarding a state court opinion.

In this regard, the court stated, "Because these are diversity cases, Judge Adelman is obligated to follow state law, as interpreted by the state supreme court. He cannot revisit the holding in *Thomas*, not even if he were persuaded that Sherwin-Williams's objections are meritorious." The court also noted that cases requiring recusal when a judge provides comments to the media about certain litigation can be distinguished from this case because they involved a "commented-upon-case" that was pending before the district judge. As the court observes, "*Thomas* is not before Judge Adelman and never has been."

BERYLLIUM EXPOSURE NOT SUITABLE FOR MEDICAL MONITORING UNDER PENNSYLVANIA LAW

The Third Circuit Court of Appeals has determined that nearby residents and workers at Pennsylvania factories that allegedly exposed them to beryllium cannot seek medical monitoring. ***Sheridan v. NGK Metals Corp.*, No. 08-4873 (3d Cir. 06/07/10)**. Alleging negligence, the two lawsuits sought to establish a medical monitoring trust fund based on the plaintiffs' alleged increased risk of developing chronic beryllium disease (CBD). The district court dismissed the claims, and the plaintiffs appealed.

Affirming, the appellate court explained that, to obtain medical monitoring under Pennsylvania law, plaintiffs must prove that because of exposure to chemicals, they have a significantly increased risk of contracting a serious disease. As to CBD, only certain people have the specific genetic marker that can recognize beryllium particles in the lungs as antigens, potentially leading to the formation of granulomas. Expert testimony conflicted over what percentage of the population would become sensitized from exposure, and only one of the multiple plaintiffs had developed beryllium sensitivity. The court concluded that the plaintiffs had not shown they were at a significantly increased risk of contracting the disease as a proximate result of their alleged exposure.

LAW CHANGE POST-DATING CLASS ACTION SETTLEMENT IS NO GROUNDS FOR RESCISSION

The Third Circuit Court of Appeals has determined that a trial court erred when it vacated its order giving preliminary approval to a class action settlement after passage of a law extinguishing the plaintiffs' claims, because "changes in the law after a settlement is reached do not provide ground for rescission of the settlement." ***Ehrheart v. Verizon Wireless*, No. 08-4323 (3d Cir., decided June 15, 2010)**.

The litigation involved putative class claims that the defendant violated a law which prohibits a seller from printing a receipt displaying more than the last five digits of a buyer's credit or debit card and from printing the card's expiration date. The parties apparently participated in court-ordered mediation and reached a settlement at the same time that Congress was considering legislation which would have eliminated the plaintiffs' cause of action. The district court entered a preliminary order approving the settlement shortly before the legislation was signed into law. After former President George W. Bush (R) signed the law, the defendant immediately moved to vacate the order. The court granted the motion and later granted defendant's motion for judgment on the pleadings.

According to the appeals court, a settlement agreement is a contract first and foremost, and it is binding once reached. Court approval is a second step in settling a class action, but this step involves the court's evaluation of the agreement as a fiduciary for absent class members and not for the defendants "who are in a position to protect their own interests during negotiations." The court noted that choosing to settle "implicitly acknowledges calculated risks and, in the end, reflects the deliberate decision of both parties to opt for certainty in terminating their litigation. We will not relieve a party of that decision because hindsight reveals that its decision was, given later changes in the law, probably wrong."

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A dissenting judge opined that the change in the law that became effective after the settlement agreement was reached rendered the named plaintiffs' cases moot. Congress made the law apply to transactions that took place between 2004 and 2008 and to any legal action brought before or after the law's effective date. The dissenter would have held that the district court was thus obligated to dismiss the case immediately, saying. "[i]t lacked the authority to hold the required fairness hearing, enter an order of final approval for the settlement, or enter final judgment in the action. To do so would have violated Article III's 'case or controversy' limitation on its jurisdiction."

CHINESE DRYWALL LITIGATION ADVANCES; FIRST JURY AWARD RENDERED

While a defective-drywall default judgment is on appeal in the Fifth Circuit and a Florida state court has certified the first class in a Chinese drywall lawsuit, a Florida jury just awarded a couple more than $2.45 million, concluding the first trial in the United States over allegedly defective Chinese-manufactured drywall. The drywall was used widely in the United States after hurricanes destroyed or damaged thousands of homes.

According to a news source, China-based Taishan Gypsum Co., which has not previously participated in multidistrict litigation involving its drywall, filed a notice of appeal in the Fifth Circuit Court of Appeals seeking review of Judge Eldon Fallon's $2.6 million award to seven Virginia families to cover the cost of removing all the drywall in their homes and replacing items allegedly damaged by corrosion. The award followed a February 2010 bench trial. *In re: Chinese-Manufactured Drywall Prods. Liab. Litig.*, MDL No. 2047 (U.S. Dist. Ct., E.D. La., damages awarded April 8, 2010).

In late May, a Miami-based state court judge certified a class of 152 claimants who had purchased homes in several Florida subdivisions and alleged that their homes were built with Chinese drywall, defective due to its potential to emit sulfur gases that can damage surfaces and household objects. Defendants in this litigation include a homebuilder, realtor and drywall supplier. *Harrell v. S. Kendall Const. Corp.*, No. 09-8401 (Eleventh Judicial Circuit of Fla., Miami-Dade County, order granting class cert. motion entered May 27, 2010).

The same drywall supplier reportedly lost its dispute with a Florida couple in the first U.S. jury trial over the building material. A jury agreed with the couple that the Chinese drywall in their $1.6 million home made the house smell and corroded their appliances. According to the couple's attorney, the drywall "destroyed their home. It's like a cancer growing inside a body, and spreading." He claimed that the supplier cut a deal with the manufacturer to cover up the problem, and that "caused tens of thousands of Americans to lose their homes." *See Product Liability Law 360*, May 27, June 14 & 18, 2010.

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ALL THINGS LEGISLATIVE AND REGULATORY

U.S. Senate Passes Bill Setting Tough Formaldehyde Limits on Wood Products

The U.S. Senate has approved a bill **(S. 1660)** establishing stringent emission standards for formaldehyde in new domestic composite wood products and foreign imports. The Formaldehyde Standards for Composite Wood Act, sponsored by Senators Amy Klobuchar (D-Minn.) and Mike Crapo (R-Idaho), would amend the Toxic Substances Control Act to set a formaldehyde emission standard of approximately

0.09 parts per million on all composite wood products sold in the United States beginning January 1, 2013. "Collectively, these would be the toughest standards in the world," the senators said in press statements. Secondhand products and antiques would be exempt under the legislation.

Most composite wood, which is used in furniture, cabinets, shelving, countertops, flooring, and molding, contains some formaldehyde, raising concerns about potential health hazards. The legislation would require third-party testing and certification to ensure that products with formaldehyde comply with the national standards. It would also direct the Environmental Protection Agency to work with federal agencies such as Customs and Border Protection to enforce standards for imported wood products. "Not only does this legislation protect consumers; it also ensures that foreign wood products adhere to the same safety standards we employ here in the U.S.," Crapo was quoted as saying. A bipartisan companion bill awaits action in the House of Representatives. *See Senators Amy Klobuchar & Mike Crapo News Releases*, June 15, 2010.

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CPSC Announces International Effort for Window-Covering Safety Standards

In a coordinated initiative with Health Canada and the European Commission's Directorate General for Health and Consumers, the Consumer Product Safety Commission (CPSC) has demanded that industry and standard-setting organizations immediately develop strong global safety standards for window coverings. In a June 15, 2010, **letter**, officials of the three safety agencies, representing 29 countries, call for a "swift and comprehensive process that concurrently eliminates the risk factors causing deaths and injuries from all types of corded window covering products."

According to a CPSC press release, the international effort could lead to "cost-effective product development and testing and manufacturing processes in the global economy while putting the safety of children first." CPSC reports that since 1999, 120 children have died by strangulation in the United States and 113 were injured by corded window coverings. Health Canada reports 28 strangulations and 23 near-strangulations since 1986. European member states report that 90 children visited hospital emergency departments for injuries involving corded window coverings since 2002, with at least six deaths occurring since 2008. *See CPSC Press Release*, June 17, 2010.

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CPSC Takes New Action on Infant Walkers

The Consumer Product Safety Commission (CPSC) has issued a **final rule** on the safety of infant walkers. Effective December 21, 2010, the new safety standard "is substantially the same as a voluntary standard developed by ASTM International [ASTM F 977-07] but with several modifications that strengthen the standard in order to reduce the risk of injury associated with walkers." The rule will apply to both domestic and

imported infant walkers; manufacturers will have to submit their products to testing by an accredited third party conformity assessment body and issue a certificate of compliance based on that testing. When it adopted the new rule, the safety agency also (i) revoked existing baby-walker regulations due to their replacement by the more comprehensive standard and (ii) issued a notice of requirements for accrediting third party conformity assessment bodies. Comments on the latter notice must be submitted by July 21, 2010. *See Federal Register*, June 21, 2010.

Chronic Hazard Advisory Panel Plans Second Meeting on Phthalates

The Consumer Product Safety Commission has **announced** a second meeting of the Chronic Hazard Advisory Panel (CHAP) to examine the risks of all phthalates and phthalate alternatives used in children's toys and child care products.

The July 26-28, 2010, meeting will address a number of issues, including the chemicals' potential to disrupt human hormones. Written comments are requested by July 12, 2010.

CHAP is interested in comments and data on matters including (i) "current and anticipated future uses of phthalates and phthalate substitutes in products, including market data, production levels, and the range and uses of specific phthalates and phthalate substitutes in different products types"; (ii) "types and levels of phthalates and phthalate substitutes found in consumer products, cosmetics, pharmaceutical drugs, medical device, food, food supplements, food packaging, and pesticides"; (iii) "relative importance of different sources, routes, and pathways of exposure in the general population, expectant mothers, and children"; (iv) "consumer use patterns including the use of cosmetics and consumer products that may contain phthalates"; (v) "children's activity patterns, including mouthing activity, exposure to household dust, dermal exposure to toys, and other potential child-specific exposure pathways"; (vi) "human exposure to phthalates and phthalate substitutes"; and (vii) "new, unpublished, or soon-to-be-published data on the types and levels of phthalates, phthalate substitutes, or their metabolites in human urine, blood, milk, or other biological media." *See Federal Register*, June 3, 2010.

President Issues Memorandum Regarding Lobbyists on Agency Boards, Commissions

President Barack Obama (D) has issued a **memorandum** directing agencies in the executive branch not to appoint or reappoint currently registered federal lobbyists to advisory boards or commissions in an effort to reduce lobbyists' purported "undue influence" in the federal government.

"Although lobbyists can sometimes play a constructive role by communicating information to the government, their service in privileged positions within the executive branch can perpetuate the culture of special interest access that I am committed to changing," Obama stated.

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The June 18, 2010, memorandum directs the Office of Management and Budget to publish implementing guidance in the *Federal Register* within 90 days. Final guidance will be issued following public comment on the proposed guidance.

LEGAL LITERATURE REVIEW

Victor Schwartz & Christopher Appel, "Rational Pleading in the Modern World of Civil Litigation: The Lessons and Public Policy Benefits of *Twombly* and *Iqbal*," *Harvard Journal of Law & Public Policy*, 2010

In this article, Shook, Hardy & Bacon Public Policy Attorneys **Victor Schwartz** and **Christopher Appel** provide an in-depth analysis of the U.S. Supreme Court's recent rulings that effectively changed the "notice pleading" standard of the Federal Rules of Civil Procedure into a "plausibility" standard. They suggest that the new standard be adopted in state courts as well so that both federal and state judges will "faithfully fulfill their gatekeeping role and ensure the sufficiency of the pleadings." The authors also provide rational principles for the courts to use in applying the *Twombly* and *Iqbal* standards, including (i) "complex cases should require more refined pleadings"; (ii) "specific pleadings are appropriate when more than just facts are at issue"; (iii) "anticipated discovery burdens should factor into the required sufficiency of a pleading"; (iv) "novel or untested claims should require more specific pleadings"; and (v) "allegations of intentional conduct should be supported by specific facts."

Nancy Moore, "The Absence of Legal Ethics in the ALI's Principles of Aggregate Litigation: A Missed Opportunity—And More," *George Washington Law Review* (forthcoming 2010)

Boston University School of Law Professor Nancy Moore, who has apparently criticized the American Law Institute's recently adopted *Principles of Aggregate Litigation* in other law journals and as a member of the project's consultative group, focuses this article on her concerns that the *Principles* do not adequately address issues of lawyer ethics. Among other matters, Moore contends that "the Principles' failure to address ethical rules governing communication and conflicts of interest outside the context of aggregate settlements makes it likely that mass tort lawyers will continue to treat their clients as if they were absent members of a class, without the protections afforded a class."

A.Mitchell Polinsky & Steven Shavell, "The Uneasy Case for Product Liability," *Harvard Law Review*, 2010

Authored by professors of law and economics at Harvard and Stanford, this article analyzes the costs and benefits of product liability and concludes, "Given the limited nature of the benefits and the high costs of product liability, we come to the judgment that its use is often unwarranted. This is especially likely for products for which market forces and regulation are relatively strong, which includes many widely

sold products." According to the authors, "the three beneficial effects of product liability—inducing firms to improve product safety, causing prices of products to reflect their risks, and providing compensation to injured consumers—are, for many products, likely to be outweighed by the litigation and related costs of product liability."

Law Professors John Goldberg and Benjamin Zipursky published a **response** to this article to argue that "the case for some form of products liability—whether fault-based or defect-based is really quite easy." They find extraordinary Polinsky and Shavell's contention that "the threat of tort liability creates no additional incentives to safety beyond those already provided by regulatory agencies and market forces, and that tort compensation adds little or no benefit to injury victims beyond the compensation already provided by various forms of insurance."

LAW BLOG ROUNDUP

Wacky Warning Label Winners Announced

"'Never operate your speakerphone while driving,' warns a label on a product called 'Drive 'N' Talk.'" Charleston School of Law Associate Law Professor Sheila Scheuerman, blogging about the finalists in a "wacky warning labels contest." Other "winners" include "This product moves when used," on a motorized go-cart; "For animal use only," on a bottle of swine growth supplement; and "Use of a headset that covers both ears will impair your ability to hear other sounds," on a Bluetooth® headset.

"'Never operate your speakerphone while driving,' warns a label on a product called 'Drive 'N' Talk.'"

TortsProf Blog, June 15, 2010.

Plaintiffs' Lawyers Using New Technologies to Find Clients on the Internet

"[P]laintiffs lawyers are making like big-company marketing strategists and using all sorts of technological tools in order to reach the masses, and drum up business." Lead *Wall Street Journal* law blog writer Ashby Jones, discussing how plaintiffs' lawyers are reaching out to new clients online by setting up Websites with names that searchers would find when looking for information about products or disasters, such as the Gulf of Mexico oil spill, or by launching social-media campaigns to connect with individuals who might be members of a putative class action.

WSJ Law Blog, June 15, 2010.

And Yet Another Emerging Plaintiffs' Lawyers Tactic

"In cases involving the 1789 Alien Tort Statute as well as other litigation—including U.S. litigation to enforce dubious, fraudulently obtained foreign verdicts—plaintiff's lawyers are increasingly trying to use American courts to recover for alleged conduct

that happened overseas. As the report documents, such litigation is typically accompanied by out-of-court media, community organizing, investor-relations, and political tactics." Manhattan Institute Center for Legal Policy Director James Copland, writing about a new **paper** that discusses the tactics plaintiffs have adopted in transnational tort cases.

PointofLaw.com, June 22, 2010.

THE FINAL WORD

Study Ranks Tort Systems of All 50 States

A recent **study** ranks the tort systems in all 50 states by the amount of money paid in plaintiff awards and settlements and the number of lawsuits filed. Titled "U.S. Tort Liability Index: 2010 Report," the study from the Pacific Research Institute and Manufacturers Alliance/MAPI, Inc. used 13 variables to measure each state's monetary tort losses and litigation risks and 29 variables to measure tort rules.

The study found that New Jersey had the highest risk of litigation and high tort costs, followed by New York, Florida, Illinois, Pennsylvania, Missouri, Montana, Michigan, Connecticut, and California.

The study found that New Jersey had the highest risk of litigation and high tort costs, followed by New York, Florida, Illinois, Pennsylvania, Missouri, Montana, Michigan, Connecticut, and California. Alaska had the lowest risk, followed by Hawaii, North Carolina, South Dakota, North Dakota, Maine, Idaho, Virginia, Wisconsin, and Iowa.

States with favorable tort rules for defendants were Oklahoma, Texas, Ohio, Colorado, and Mississippi. The least favorable were Rhode Island, New York, Pennsylvania, Minnesota, and Illinois.

"Direct tort costs account for almost 2 percent of GDP in the United States—that's the highest in the world," the study's co-author was quoted as saying. "These high costs impact American businesses when firms have to divert revenue to fight lawsuits. But all of us ultimately shoulder the burden through higher prices and insurance premiums, lower wages, restricted access to health care, less innovation, and higher taxes to pay for court costs." Former Alaska Governor Sarah Palin (R) authored the report's foreword. *See Product Liability Law 360*, June 4, 2010.

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UPCOMING CONFERENCES AND SEMINARS

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).