Shook, Hardy & Bacon L.L.P.

SEPTEMBER 5, 2013

PRODUCT LIABILITY LITIGATION REPORT

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LAW FIRM NEWS

MDL Court Removes Hundreds of Cases from Asbestos Docket

A multidistrict litigation (MDL) court in Pennsylvania has granted 418 motions to dismiss in asbestos-related litigation initiated in an Ohio federal court in the mid-1980s. *In re Asbestos Prods. Liab. Litig. (No. VI)*, MDL No. 875 (U.S. Dist. Ct., E.D. Pa., decided August 26, 2013). According to the court, the Ohio court lacked personal jurisdiction over the defendants, maritime interests that either had no contact with the state or whose minimal contacts did not give rise to the plaintiffs' purported injuries. The plaintiffs claimed that these defendants had waived the defense by filing answers to the complaints, but the Pennsylvania court found that they had done so not of their own volition and had preserved the defense by filing the answers under protest.

The court rendered its ruling after noting that the litigation had reached "Dickensian proportions. Plaintiffs have passed away; memories have faded; corporations have filed for bankruptcy; the legislature has enacted new laws; lawyers have come and gone, and so have judicial officers. . . . Now, some 25 years later, the Court, with the assistance of counsel, is called upon to divine the meaning of less-than-pellucid orders entered long ago by prior courts, and to disentangle the parties from a web of procedural knots that have thwarted the progress of this litigation."

The original hearing to determine whether the Ohio court had jurisdiction over the 418 defendants was held in 1989. And while that court found personal jurisdiction lacking, it indicated that it would transfer the cases to jurisdictions where jurisdiction may lie rather than grant the motions to dismiss. Still, the court entered an order that appeared to grant the motions while transferring the cases to other courts. Because the court failed to identify which claims and defendants were transferred, or, if they were to be transferred, to which jurisdictions they were to be transferred, the cases remained in Ohio until transferred and consolidated in the MDL in 1991. In addition to finding that jurisdiction was lacking and that the defendants had not waived the defense, the MDL court refused the plaintiffs' request that it transfer the cases to other jurisdictions, finding that it lacked the authority to do so under 28 U.S.C. § 1407(a).

The court rejected the motions to dismiss filed by 147 defendants claiming they had not been properly served. The court found that service was appropriate under applicable Ohio law and that it was bound by a 1987 ruling that the return receipt

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of the registered mail, which the plaintiffs' had proffered as proof of actual notice, "would serve as proof of actual notice [to defendant]."

Kentucky Supreme Court Reinstates Adverse Ruling Against Diet Drug Lawyers

The Kentucky Supreme Court has determined that a trial court did not err in granting partial summary judgment to Kentucky residents who alleged that their attorneys breached their fiduciary duties in settling claims related to the residents' use of the diet drug Fen-Phen, thus upholding a $42-million verdict awarded to the residents. ***Abbott v. Chesley*, No. 2011-SC-000291-DG (Ky., decided August 29, 2013)**.

According to the court, each of the 431 residents had a contingency-fee agreement with attorneys Shirley Cunningham, William Gallion or Melbourne Mills Jr., who each maintained a separate law office. The attorneys later entered an agreement that also included Stanley Chesley outlining their respective responsibilities and fee sharing in negotiating a settlement of the claims of all their clients. The defendant agreed to pay an aggregate sum of $200 million to settle the claims of these clients, and the attorneys, without court approval or notification to their clients, distributed nearly $73.3 million to the clients, $20 million to a non-profit they had established and $106 million to themselves in fees, an amount that far exceeded the 30 percent to 33.33 percent allowed in the contingency-fee agreements.

The court observed that "the only question for the trial court was whether those facts established a breach of fiduciary duty that entitled Appellants to summary judgment . . . as a matter of law." Stating, "It is beyond rational dispute that [the attorneys] breached their fee agreements with Appellants by claiming excessive fees and, in doing so, that [the attorneys] failed to ensure that each Appellant received his or her contractual share of the settlement," the court agreed that the breach was established as a matter of law. An intermediate appellate court had faulted the trial court for not finding that an affidavit submitted by renowned mass-tort litigation attorney Kenneth Feinberg raised a genuine issue of material fact. According to the supreme court, Feinberg's comments were simply his opinion on an issue of law and did not controvert "the essential facts upon which Appellants' claims are based."

Among other matters, the court also determined that (i) the plaintiffs could not appeal the trial court's denial of summary judgment against attorney Chesley, because it was an interlocutory order; (ii) the trial court properly designated the damages as joint and several because the underlying claim was essentially contractual and because the way the defendants structured their efforts in the Fen-Phen litigation constituted a joint enterprise, and joint and several damages are available for breach of contract and for conduct involving a joint enterprise or partnership; and (iii) the trial court improperly incorporated Mills's overhead expenses into the calculation of expenses for contingency-fee agreements. The court remanded the matter to the trial court for further proceedings.

ALL THINGS LEGISLATIVE AND REGULATORY

CPSC Seeks Comments on Extension of Infant Bath Seat Information Collection

The Consumer Product Safety Commission (CPSC) has requested **comments** on the estimated burdens of complying with the safety standard for infant bath seats, including modifications to warning labels affixed to the seats. The Office of Management and Budget (OMB) previously approved the information collection under control number 3041–0145, but that approval will expire October 30, 2013. CPSC plans to review all comments before requesting an extension of approval from OMB. In particular, the agency seeks information on the following: (i) whether the information is critical and/or useful; (ii) whether the estimated burden of the proposed collection is accurate; (iii) whether the quality, utility and clarity of the information could be enhanced; and (iv) whether the use of automated, electronic or other technological collection techniques, or other forms of information technology would decrease any burden imposed. Comments will be accepted until October 29. *See Federal Register,* August 30, 2013.

CPSC Adjusts Top Value for Cigarette Lighters Subject to Child-Resistance Standard

The Consumer Product Safety Commission (CPSC) has announced a final **rule** that establishes a new threshold value for disposable and novelty cigarette lighters required to meet a child-resistance safety standard. Pegged to the product's customs valuation and originally set at lighters worth $2 or less in June 1993, the standard provides that the customs value of these items will adjust every five years for inflation as measured in the producer price index (PPI) for "miscellaneous fabricated products." The threshold price was last adjusted in November 2003 to $2.25 and, due to a PPI increase, is now $2.50, thus bringing more products deemed likely to fall into children's hands within the rule's requirements. The change to 16 C.F.R. part 1210.2(b)(2)(ii) took effect August 26, 2013. *See Federal Register,* August 26, 2013.

NHTSA Proposes Changing Angle of License Plates on Motorcycles

The National Highway Traffic Safety Administration (NHTSA) has requested comments on a proposed **amendment** to a safety standard on "lamps, reflective devices and associated equipment [FMVSS No. 108] to allow the license plate mounting surface on motorcycles to be at an angle of up to 30 degrees beyond vertical." According to the agency, the change would bring the U.S. rule "more in line with European regulations" (Directive 93/94 EEC), increase design flexibility without compromising safety or increasing costs, and allow license plate recognition technology used by law enforcement organizations to continue reading license plate characters. Depending on the comments received, NHTSA may extend the proposed change to other motor vehicles. Comments are requested by November 4, 2013. *See Federal Register*, September 3, 2013.

California Governor Abandons Plan to Curtail Nuisance Prop. 65 Lawsuits

According to news sources, California's Environmental Protection Agency (Cal/EPA) has informed stakeholders that the effort to reform Proposition 65 (Prop. 65) procedures to either exempt small business from its warning requirements or otherwise curb abusive or frivolous lawsuits has been dropped. California's Safe Drinking Water and Toxic Enforcement Act of 1986 (Prop. 65) requires the governor to publish a list of chemicals known to the state to cause cancer or reproductive toxicity and then imposes on businesses the obligation to provide warnings to citizens exposed to these chemicals. The law allows private citizens to sue to enforce the warning requirements.

California Gov. Jerry Brown (D) had earlier announced that his office and Cal/EPA would introduce legislation to reform the chemical warning law, but efforts to gain consensus among stakeholders was apparently impossible. Environmental and consumer protection interests objected to shielding smaller retailers from the litigation, contending that it would illegally change the law's intent. Information about Brown's initiative appears in Issue 483 of Shook, Hardy & Bacon's *Food & Beverage Litigation Update*.

Because the Prop. 65 implementing agency, Cal/EPA's Office of Environmental Health Hazard Assessment (OEHHA), cannot make significant changes in the absence of revisions to the law, it may reportedly attempt "some" litigation reforms through rulemaking. OEHHA may also continue pursuing regulations that redefine Prop. 65 warnings; it recently held a public meeting to discuss potential changes to the way the warnings are structured. Industry officials reportedly opposed those changes. The Civil Justice Association of California, which apparently represents business interests, responded to the latest development by lauding the governor for recognizing "the problem of Proposition 65 abuse" and expressed disappointment "that meaningful Prop. 65 reform is not going to happen this legislative session." *See Inside Cal/EPA* and *The Recorder*, August 29, 2013.

NAD Refers Insulation Company's "Green" Ad Claims to FTC

The National Advertising Division (NAD) has referred advertising claims made by cellulose insulation manufacturer GreenFiber, LLC, to the Federal Trade Commission (FTC) for review after the company declined to participate in a self-regulatory proceeding stemming from a competitor's challenges. Johns Manville apparently argued that GreenFiber's product name, the "pervasive green imagery" used in its advertising and the "environmentally-friendly" claims listed on its product packaging, point-of-sale material and Website, conveyed a message of "general environmental benefit that is misleading to consumers."

Arguing that it "had already committed to modifying seven of the nine claims" challenged, GreenFiber declined to participate in a review of its advertising claims, leading NAD to refer the matter to FTC for action. NAD is the investigative unit of the advertising industry's system of self regulation, administered by the Council of Better Business Bureaus. *See Advertising Self-Regulatory Council Press Release,* August 20, 2013.

Debate over Changes to Federal Discovery Requirements Heats Up

According to a news source, plaintiffs' counsel and defense attorneys are sharply divided over a U.S. Judicial Conference rules committee proposal to amend the Federal Rules of Civil Procedure to limit the number of depositions and interrogatories allowed without asking a judge or opposing counsel for an extension. More than 260 individuals have apparently submitted comments on the proposal, most filed before the draft was officially released.

The committee reportedly defended the limits, claiming that the "lower limit can be useful in inducing reflection on the need for depositions, in prompting discussions among the parties, and—when those avenues fail—in securing court supervision." While defense attorneys applaud the limits, they are also asking the committee to reinstate a proposed change that would limit requests for documents and electronically stored information. Details about public hearings on the pending proposed amendments appear in the August 22, 2013, **issue** of this *Report*. *See Law360*, August 30, 2013.

Evidence and Appellate Procedure Rules Committees to Meet

The U.S. Judicial Conference has scheduled **meetings** of two of its rules advisory committees. While both are open to the public for observation, participation will not be allowed. The Advisory Committee on Appellate Procedure will meet October 3-4, 2013, at Seton Hall University School of Law in Newark, New Jersey, and the Advisory Committee on Rules of Evidence will meet October 11, at the University of Maine School of Law in Portland, Maine. *See Federal Register*, August 26, 2013.

LEGAL LITERATURE REVIEW

Alan Trammell, "Jurisdictional Sequencing," *Georgia Law Review*, 2013

Brooklyn Law School Visiting Assistant Professor Alan Trammel proposes a theory that distinguishes between "conduct" and "allocative" rules to explain how the U.S. Supreme Court, in a trio of cases, advanced its doctrine of jurisdictional sequencing—"the decision of certain issues, and even the dismissal of cases, before a federal court has verified that it has subject matter jurisdiction." According to Trammell, conduct rules "govern primary obligations, rights, and prohibitions. They usually are rules of decision—the elements of a cause of action and defenses that respond directly to those elements." In contrast, "allocative rules govern access to courts, regulate procedural and administrative matters, and thus do not create conduct rules. They govern two essential litigation questions: *who* decides, and *how*?"

Trammell contends that "[c]ourts may dismiss a case based on an allocative rule even before they resolve subject matter jurisdiction. On the other hand, a court may not interpret, announce, or apply a conduct rule until it has verified jurisdiction." He suggests that this jurisdictional sequencing theory explains the case law and advances "a vision of subject matter jurisdiction's unique importance in protecting the power of states and the political branches to create substantive law."

Alexandra Lahav, "Symmetry and Class Action Litigation," *UCLA Law Review*, 2013

In a special law review issue celebrating the work of Professor Steven Yeazell, University of Connecticut Law Professor Alexandra Lahav raises questions about recent developments in class action law, such as (i) "Why is it that critics of class actions (and some judges) argue that class actions ought not to be certified for litigation purposes because they 'blackmail' defendants into settling suits, but they approve of the practice of certifying class actions for settlement when defendants seek to settle clearly meritless claims?" and (ii) "Should asymmetry of resources in litigation be considered a problem for our court system, or is it right for courts to take litigants as they find them, even if litigants have vastly unequal resources to devote to pursuing their lawsuits?" Suggesting that "much of the ire against the class action stems from the fact that this procedural device alters the status quo ante by creating symmetry between litigants," Lahav contends, "The illusion of symmetry offered by settlement-only class actions is not enough. Enforcing rights and obligations in the courts requires litigation."

LAW BLOG ROUNDUP

Disturbing Legal Warfare?

"A couple of weeks ago I wrote about the very disturbing legal war being waged by the Consumer Product Safety Commission [CPSC] against Craig Zucker, CEO of a company that made Buckyballs, the adult magnetic-balls desk toy. After the CPSC decided to ban his product, Zucker fought back in the arena of public opinion, aiming satirical barbs at the commission and individual commissioners. CPSC then proceeded to pull him into the action personally as a party, seeking (on the basis of legal theories rarely if ever used in the past) to tag him with recall liability that the agency estimated at $57 million." Cato Institute Senior Fellow Walter Olson, blogging about an August 31, 2013, *Wall Street Journal* interview with Zucker, who, according to the article, "spends most of his waking hours fighting off a vindictive U.S. Consumer Product Safety Commission that has set out to punish him for having challenged its regulatory overreach."

Overlawyered.com, September 3, 2013.

Fen-Phen Verdict Against Plaintiffs' Lawyers Reinstated

"We've been following this case for years. An intermediate appellate court threw out the verdict against attorneys who stole from the settlement fund based on a later-discredited and –disclaimed affidavit from Ken Feinberg; the Kentucky Supreme Court ruled that that affidavit didn't create a factual dispute, but simply opined on legal issues that the lower court correctly disregarded." Manhattan Institute Center for Legal Policy Adjunct Fellow Ted Frank, succinctly summarizing the ruling discussed elsewhere in this *Report*, reinstating the $42-million verdict rendered against plaintiffs' lawyers for alleged fraudulent conduct in the settlement of claims arising from use of a diet drug.

PointofLaw.com, August 30, 2013.

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THE FINAL WORD

U.S. Chamber Institute Compares Legal Costs in Europe, U.S. and Canada

The U.S. Chamber Institute for Legal Reform recently released a **report** which concludes that among Canada, European nations and the United States, the latter "has the highest liability costs as a percentage of GDP of the countries surveyed, with liability costs at 2.6 times the average level of the Eurozone economies." When compared to the countries with the lowest liability costs, U.S. costs "are four times higher," although several countries are apparently catching up—"liability costs in the U.K., Germany and Denmark have risen between 13% and 25% per year since 2008." The "study builds on prior research that relied upon aggregate insurance premium and loss data by using individual companies' purchases of general liability insurance policies to estimate liability costs." The authors defend this data base as meaningful for analysis "because a large fraction of liability costs are covered by insurance, and coverage is sufficiently similar in Europe, the U.S. and Canada."

UPCOMING CONFERENCES AND SEMINARS

ACI, New York, NY – October 7-9, 2013 – "5th Annual Forum on: Sunshine Act Compliance & Aggregate Spend Reporting, HCP Reporting Risk Mitigation and Compliance Strategies for Biopharmaceutical and Medical Device Manufacturers." Shook, Hardy & Bacon Government Enforcement & Compliance Partner **Carol Poindexter** will join a distinguished faculty to discuss "Mastering the Challenges of Identifying and Tracking Research and Pre-clinical Related Payments."

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Shook, Hardy & Bacon is widely recognized as a premier litigation firm in the United States and abroad. For more than a century, the firm has defended clients in some of the most substantial national and international product liability and mass tort litigations.

Shook attorneys have unparalleled experience in organizing defense strategies, developing defense themes and trying high-profile cases. The firm is enormously proud of its track record for achieving favorable results for clients under the most contentious circumstances in both federal and state courts.

The firm's clients include many large multinational companies in the tobacco, pharmaceutical, medical device, automotive, chemical, food and beverage, oil and gas, telecommunications, agricultural, and retail industries.

With 95 percent of our more than 440 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).