Shook, Hardy & Bacon L.L.P.

SEPTEMBER 29, 2011

PRODUCT LIABILITY LITIGATION REPORT

CONTENTS

FOURTH CIRCUIT RULES TORTURE VICTIMS LAW INAPPLICABLE TO CORPORATION MAKING MUSTARD GAS CHEMICAL USED IN IRAQ

The Fourth Circuit Court of Appeals has determined that Kurdish plaintiffs may not sue the company that makes a chemical used in mustard gas under either the Torture Victim Protection Act or the Alien Tort Statute (ATS). ***Aziz v. Alcolac, Inc., No. 10-1908 (4th Cir., decided September 19, 2011)***. According to the court, the torture victim law excludes corporations from liability, and the plaintiffs failed to plead sufficient facts to support the intent element, i.e., that the defendant intended to aid and abet violations of international law, as required to bring an ATS claim.

The defendant allegedly sold the chemical at issue, thiodiglycol (TGD), to Saddam Hussein's Iraqi regime, which used it to "manufacture mustard gas to attack Kurdish enclaves in northern Iraq during the late 1980s." While TGD has lawful commercial applications, including dyeing textiles and producing inks, the defendant was purportedly aware as early as 1982 that the chemical "could be used to manufacture mustard gas." U.S. government officials allegedly warned the defendant that TGD was subject to export restrictions, but the company filled an order in 1987 for 120 tons of the chemical that was eventually shipped to Iran and then filled additional orders for more than 1 million pounds that reached Iraq where the chemical was purportedly used in mustard gas attacks on Kurds leaving "thousands dead, maimed, or suffering from physical and psychological trauma."

The plaintiffs, individuals of Kurdish descent who were either victims of the attacks or family members of deceased victims, filed their complaint on behalf of two putative classes: (i) those who are U.S. citizens and permanent residents, alleging liability under the torture victim law, and (ii) those who are foreign nationals and sought relief under the ATS. The district court granted the defendant's motion to dismiss, and the plaintiffs appealed.

Noting that the torture victim law allows recovery against "individuals," the Fourth Circuit agreed with the district court that the defendant, "as a corporation, is not an 'individual' subject to liability" under the law. Agreeing with sister circuits that the ATS applies to aiding and abetting claims, the court adopted the Second Circuit's specific intent *mens rea* standard, which requires allegations that "the defendant acted

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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with the purpose of facilitating the violation of an international norm." Because the plaintiffs made a cursory allegation only about the defendant's intentional conduct, the court affirmed the district court's judgment as to the ATS claims.

HONG KONG MANUFACTURER FAILS TO STAY COFFEE-MAKER DEFECT PROCEEDINGS

A federal court in Ohio has refused to stay proceedings against the Hong Kong-based manufacturer of a coffee-maker that allegedly caused a house fire in 2009, ruling that the company's filing of an appeal from the court's denial in part of its motion to dismiss did not divest the court of jurisdiction and that the company failed to demonstrate exceptional circumstances to warrant interlocutory appeal and thus warrant a permissive stay of the proceedings. *Erie Indem. Co. v. Keurig, Inc.*, No. 10-2899 (U.S. Dist. Ct., N.D. Ohio, decided September 19, 2011).

The plaintiffs filed negligence and strict liability claims in December 2010 against Keurig, Inc., believing that it manufactured the allegedly defective coffee machine. After learning that Hong Kong company Simatelex was likely involved in its manufacture, the plaintiffs filed an amended complaint in March 2011 to add it as a defendant. Service was effected under the Hague Convention by April 28. Simatelex moved to dismiss the claims, arguing that the negligent design claim was abrogated by Ohio's product liability statute and that both claims were barred by Ohio's two-year statute of limitations, which ran two weeks before the plaintiffs amended the complaint.

The district court dismissed the negligence claim, agreeing that it was abrogated, but determined that the plaintiffs' mistaken identification of the product's manufacturer allowed the strict liability claims against Simatelex to "relate back" to the original filing, thus making them timely. To reach the latter determination, the court was compelled to interpret a U.S. Supreme Court decision that other district courts in the Sixth Circuit have, according to the court, read in "an unduly narrow fashion." *Krupski v. Costa Crociere, S.p.A.*, 130 S. Ct. 2485 (2010). Given the split authority in the circuit, Simatelex filed an appeal to the Sixth Circuit Court of Appeals and then filed a motion to stay proceedings before the district court.

According to the court, Simatelex's notice of appeal did not divest the court of jurisdiction because its order denying the motion to dismiss was not a final appealable order. The court also noted that the Sixth Circuit clerk's order docketing the appeal and ordering Simatelex to demonstrate the basis, if any, for the Sixth Circuit's jurisdiction "neither divests this Court of jurisdiction nor creates any proper basis for a stay pending the Sixth Circuit's potential review of a non-final judgment." In the court's view, no exceptional circumstance warranted a permissive stay of proceedings pending appellate review, because "Simatelex cannot establish any 'irreparable' injury'" other than the time and money spent defending the claim.

NORTH DAKOTA SUPREME COURT SPLITS OVER CERTIFIED QUESTION ON "APPARENT MANUFACTURER" DOCTRINE

Answering a question certified to it by a federal court, the North Dakota Supreme Court has ruled 3-2 that the seller of an allegedly defective meat grinder cannot be held liable as a manufacturer of the product under state law; the court thus declined to adopt the "apparent manufacturer" doctrine espoused in the *Restatement (Second) of Torts* § 400 or *Restatement (Third) of Torts: Product Liability* § 14. ***Bornsen v. Pragotrade, LLC*, No. 20110087 (N.D., decided September 15, 2011)**.

Without providing a factual basis for its certified question, the federal court asked whether North Dakota would adopt the apparent manufacturer doctrine. The issue arose when defendant Cabela's Retail, Inc. filed a motion to dismiss claims involving a meat grinder it sold to the plaintiffs. They had also sued the product's manufacturer, basing their claims on alleged design defect and failure to warn. The plaintiffs contended that Cabela's was not entitled to dismissal because it was an "apparent manufacturer" of the product.

The state supreme court relied on the plain language of a state law applicable to products liability actions to conclude that sellers are not liable when the manufacturer is subject to suit and where the seller (i) did not exercise significant control over the design and manufacture, (ii) did not have actual knowledge of the product defect, or (iii) did not create the product defect causing the harm. According to the court, the statute evidences the legislature's intent to "sharply curtail the liability of a 'nonmanufacturing seller.'" The court thus indicated that it would not adopt the common-law "apparent manufacturer" rule.

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The dissenting justices would have declined to answer the certified question, "[o]n the state of the record before this Court." They said, "The statement of facts in a certification order should present all of the relevant facts. The purpose is to give the answering court a complete picture of the controversy so that the answer will not be given in a vacuum." They further observed, "[A]n undeveloped record creates risks of unintended consequences," and noted that this precise shortcoming made it impossible to determine whether "Cabela's satisfies the definition of a 'manufacturer' or the possible application" of other statutory exceptions.

According to the dissenting opinion, "Cabela's name was prominently engraved on the meat grinder and displayed on the informational brochures and packaging for the meat grinder, but this record does not reflect who prepared those documents or caused the name to be engraved on the grinder." The opinion also notes that the record "does not establish the relationship between Pragotrade and Cabela's" and thus, "[i]t is unknown to this Court what control Cabela's exercised over the product causing the injury."

KENTUCKY SUPREME COURT DISBARS ANOTHER ATTORNEY IN FEN-PHEN SETTLEMENT DEBACLE

The Kentucky Supreme Court has permanently disbarred an attorney who participated in the settlement of claims involving the diet drug Fen-Phen. ***Ky. Bar Ass'n v. Helmers*, No. 2011-000106 (Ky., decided September 22, 2011)**. According to the court, the attorney was admitted to the bar in 1997 and spent the greater part of his career as an associate working on the Fen-Phen litigation. He signed the settlement agreement and met with 39 clients to obtain their releases as instructed by the other attorneys, including his employers, representing the putative class. Part of his duties involved offering each client an amount "substantially below the amount assigned to that client in the predetermined allocations that [defendant] AHP had approved." He did not give the clients a copy of the documents they signed, did not tell them they could refuse the offer and told many of them they would be penalized $100,000 if they discussed their settlement awards with others.

The attorney was charged with a number of ethical violations, and, following a hearing, was found guilty of most of them. The trial commissioner recommended a five-year suspension from the practice of law, noting that this attorney was not the "mastermind" and that he had cooperated in the criminal investigation. The board of governors of the Kentucky Bar Association considered the matter *de novo*, found the attorney guilty on most counts and recommended permanent disbarment and payment of all costs. The supreme court acknowledged the mitigating factors, including the attorney's youth and inexperience, but found that the personal and direct deceit of clients, "some of whom had been egregiously injured," rendered permanent disbarment reasonable. The attorney was also ordered to pay nearly $40,000 in costs.

INJURY FROM WATER FLUORIDATION ALLEGED IN NEW LAWSUIT

A Maryland resident has sued companies that make bottled water and baby food products containing fluoride, alleging that her 13-year-old daughter consumed these products from infancy and now has permanent teeth disfigured with dental fluorosis, a condition purportedly linked to the excessive consumption of fluoride. *Nemphos v. Nestlé USA, Inc.*, No. 11-2423 (U.S. Dist. Ct., D. Md., filed August 30, 2011). According to the complaint, the defendants failed to provide dose control over fluoride exposure sources and failed to warn consumers about the alleged risks of fluoride.

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Alleging strict liability, negligence, breach of implied warranties, fraud, and negligent infliction of emotional distress, the plaintiff seeks compensatory, special, punitive, and triple damages; attorney's fees; costs; and interest. According to news sources, the plaintiff's daughter needs dental veneers to cover the damage, and the veneers

will have to be replaced four or five times throughout her life at a cost of more than $100,000. Plaintiff's counsel has reportedly said that his client told him, "I thought I was doing the right thing for my daughter when she was a child, by giving her bottled water that contained fluoride. Her teeth have now been permanently damaged by fluorosis. She is extremely self-conscious about her smile. Her friends ask her about her teeth. And now we're faced with extensive cosmetic restorations." The Lillie Center, a Georgia-based organization that advocates for the removal of fluoride from municipal water systems, has characterized the lawsuit as precedent-setting. *See Fluoride Action Network* and *Lillie Center Press Release*, September 21, 2011.

ALL THINGS LEGISLATIVE AND REGULATORY

Dune Buggy Maker to Pay $715,000 Penalty for Alleged Failure to Report Defects

The Consumer Product Safety Commission (CPSC) has entered into a **settlement agreement** with a dune buggy manufacturer over claims that the company failed to immediately report to the agency an electric motor defect that resulted in sudden acceleration incidents and injuries to consumers. Without admitting wrongdoing, Bad Boy Enterprises LLC has agreed to pay a civil penalty of $715,000.

According to a CPSC press release, the settlement resolves staff allegations that the Natchez, Mississippi-based buggy maker failed to report within 24 hours as required by federal law "a defect involving Classic Buggies off-road utility vehicles with Series brand and SePex brand electric motors." Sold nationwide between spring 2003 and June 2010, "the Series and SePex off-road utility vehicles could suddenly accelerate during use or while the ignition is in the idle position, creating a runaway vehicle situation," CPSC said.

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According to the agreement, Bad Boy received its first complaint about an acceleration problem with the SePex motors in April 2005, and, by May 2008, it had developed new software to remedy the problem. But the company did not inform CPSC until August 2009, and a recall for the buggies was announced in October of that year. Subsequent CPSC investigations apparently uncovered Series motor acceleration problems, which Bad Boy "did not give CPSC full information about" until May 2010. A new repair program was subsequently initiated for both types of motors, and a second recall for Classics buggies using the motors was announced in December 2010. "By that time, there were over 50 reports of sudden acceleration incidents, resulting in injuries such as arm and leg fractures, a fractured toe, rotator cuff injury, and sore muscles," CPSC said. *See CPSC Press Release,* September 23, 2011.

Final Rule Amending Mattress Flammability Standard Issued

The Consumer Product Safety Commission (CPSC) has issued a **technical amendment** to its "standard for the flammability of mattresses and mattress pads to revise the ignition source specification in that standard." Effective September 23, 2012, the ignition source cigarette now specified is "a standard reference material cigarette, which was developed by the National Institute of Standards and Technology." According to CPSC, the ignition source cigarette previously specified for use in the standard's performance tests is no longer produced. *See Federal Register*, September 23, 2011.

CPSC Issues Plan to Regulate Play Yard Safety

The Consumer Product Safety Commission (CPSC) has issued a **notice of proposed rulemaking** that would establish safety standards for play yards. The Consumer Product Safety Improvement Act of 2008 requires CPSC to issue a mandatory play yard standard similar to or more stringent than applicable voluntary standards "if the Commission concludes that more stringent requirements would further reduce the risk of injury associated with the product." Additional information about the proposal appears in the **August 25, 2011**, issue of this *Report*. CPSC requests comments by December 5, 2011.

FDA Submits Proposed Biological Product Information Collection to OMB

The Food and Drug Administration (FDA) has **submitted** a proposed collection of information involving certifications to accompany drug, biological products and device applications or submissions to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act. Comments must be submitted by October 26, 2011.

According to the *Federal Register* notice, amendments to the Public Health Service Act and the Federal Food, Drug, and Cosmetic Act require "that a certification accompany human drug, biological, and device product submissions made to FDA," including expanded information about results of clinical trials. The agency proposes to extend the collection of information to meet statutory requirements. OMB certification control numbers and expiration dates for human drugs have already expired, but those for biological products expire December 31, 2011, and those for device products expire December 31, 2013. Those failing to submit required certification are subject to civil penalties.

FDA previously published a notice seeking public comment on its proposed collection of information and received several comments. This notice discusses the comments and reiterates the time burdens FDA estimated for the collection of information involving the certification requirement. *See Federal Register,* September 26, 2011.

CPSC Staff Recommends Comments on Third-Party Testing of Children's Products

Consumer Product Safety Commission (CPSC) staff have **recommended** that the agency seek public comments about ways to reduce the cost of third-party testing requirements for children's products. The proposed request for comments is required under H.R. 2715, which President Barack Obama (D) signed into law on August 12, 2011. The recommendation will be presented to CPSC commissioners on October 12. If the recommendation is approved, the questions on which the agency would seek comment include whether sampling procedures be used for third-party testing, how to avoid redundant third-party testing, how products with many component parts be tested to comply with the requirements, and whether conformity with other national or international standards substitute for third-party testing.

New York Adopts Law Allowing Legal Fee Awards to Any Person Benefiting a Class

New York Governor Andrew Cuomo (D) has reportedly signed a law (S. 4577) that will allow courts to award attorney's fees in class actions to those acting to benefit the class, such as settlement objectors. Previously, the law reserved attorney's fees to "representatives of a class" only, and the state's courts have interpreted this to exclude lawyers representing class members who object to a settlement's terms. According to a news source, the bill's proponents said the law will encourage objections and make it more difficult for class-action defendants to resolve the disputes with "coupon" settlements, in which plaintiffs receive purportedly token awards and class counsel receive millions in fees. *See Reuters*, September 21, 2011; *New York Law Journal*, September 27, 2011.

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LEGAL LITERATURE REVIEW

Georgene Vairo, "The Class Action Fairness Act and State AGs," *The National Law Journal,* September 19, 2011

Loyola Law School Professor Georgene Vairo discusses in this article how federal courts are applying the Class Action Fairness Act of 2005 (CAFA) to lawsuits brought by state attorneys general (AGs). The Fifth Circuit allowed the removal from state court of a class action filed by Louisiana's attorney general in a *parens patriae* capacity on behalf of the state's citizens in litigation arising out of damages wrought by Hurricane Katrina. The Fourth Circuit, however, did not allow the removal under CAFA of a *parens patriae* action brought by the state on behalf of its citizens, finding that it did not fit within the law's class-action definition. The dispute in that case involved prices charged by pharmacies for generic drugs. According to Vairo, who supports the Fourth Circuit's approach, the district courts are also split on the issue.

Cara Wilking, "Reining in Pester Power Food and Beverage Marketing," *The Public Health Advocacy Institute,* September 21, 2011

Cara Wilking, a Public Health Advocacy Institute (PHAI) staff attorney, has authored this issue brief, which is intended to provide a legal foundation for consumer protection lawsuits against food companies that advertise "unhealthy food and beverage products" to children in a manner that she describes as "pester power" marketing. She explains that such marketing "targets children who, unable to purchase products for themselves, nag, pester and beleaguer their parents into purchasing unhealthy food products for them." Wilking's premise is that "[p]ester power marketing tactics are similar to oppressive and unscrupulous 'high pressure' sales tactics," and that parents, for a number of reasons, are unable to say "no" when their children beg for these products in public.

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According to Wilking, two primary legal theories can support private litigant claims and also "be applicable to actions initiated by state attorneys general to protect the public interest." Those theories are (i) "pester power marketing as unfair 'indirect' marketing to parents," and (ii) "pester power marketing as unlawful direct marketing to children." PHAI researchers have studied the consumer protections laws of every state, and Wilking explains how the two theories fit into the different protections provided under those laws. A separate **paper** discusses the researchers' findings from the state-law survey.

Formed in the early 2000s to tackle obesity by taking on "Big Food" and to continue advocacy and litigation-support efforts against "Big Tobacco," PHAI is affiliated with Northeastern University School of Law and headed by law professor and anti-tobacco advocate Richard Daynard.

LAW BLOG ROUNDUP

Duty to Warn About Insect Ingredients in Food?

"Let's say a major food company starts to use grasshopper abdomens, which they euphemistically call 'melanoplus core,' as a key ingredient in cookies. Would the law come to require a warning? The scenario is not so far fetched. As the most recent *New Yorker* and *Atlantic Monthly* both observe, bugs are a very cheap and efficient source of nutrients. And they are growing in culinary popularity." Center for Internet and Society Director Ryan Calo, blogging about the possibility that a potential subjective response to a food ingredient could be sufficient to trigger a duty to warn about its presence.

Concurring Opinions, September 23, 2011.

Tort Law and Deterrence

"To say this message is often lost in the current political discourse about the tort system is a bit of an understatement. More like it's been ground down, chewed up and spit out into something not quite recognizable anymore." A Center for Justice & Democracy blogger, opining that legislative tort-reform initiatives which place limits on litigation seeking to recover for injuries and deaths lessen the deterrence function of the tort system. According to this blog post, "the prospect of 'tort' liability deters manufacturers, polluters, hospitals and other potential wrongdoers from repeating their negligent behavior and provides them with an economic incentive to make their practices safer."

The Pop Tort, September 26, 2011.

The Death of the Class Action?

"There is no question that this term … the Supreme Court's decisions in *AT&T v. Concepcion* and *Wal-Mart v. Dukes* justify a gloomy prognosis for class actions. But the patient was already very sick.… CAFA [the Class Action Fairness Act] plus the predominance standard of 23(b)(3) means the diagnosis for national consumer class actions in the case where there isn't an arbitration clause is 'start making plans for the next life.'" University of Connecticut School of Law Professor Alexandra Lahav, providing a brief analysis of recent rulings on federal class-action jurisprudence.

Mass Tort Litigation Blog, September 23, 2011.

THE FINAL WORD

States Debate Merit-Based Selection of Judges Versus Judicial Elections

Focusing on efforts underway in Tennessee to switch from a merit-based selection process for appellate court judges to an elective system, a recent *Reuters* article explores what has motivated some groups to call for such changes in their states. Apparently, the concern in Tennessee is on "the political orientation of its judges," many of whom are "vestiges of the days of Democratic control, when a Democratic governor, working with the liberal bar association, picked judges," according to a Vanderbilt University Law School professor. When these judges issue unpopular opinions that, for example, overturn legislative initiatives favorable to business, the debate over how judges are selected intensifies. Still, in those states where judges are elected and judicial campaigning requires millions of dollars in contributions, some are calling for the adoption of merit-based selection. *See Reuters*, September 26, 2011.

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UPCOMING CONFERENCES AND SEMINARS

The Masters Conference, Washington, D.C. – October 3-5, 2011 – "Masters Conference 2011." Shook, Hardy & Bacon Tort Partner **Amor Esteban** will join other thought leaders to serve as a moderator and speaker during this event which will focus on "Security, Privacy and Compliance within Corporate Litigation." Esteban will address "Update on International Privacy and Discovery."

Georgetown Law CLE, Arlington, Virginia – November 17-18, 2011 – "Advanced eDiscovery Institute." Shook, Hardy & Bacon Tort Partner **Amor Esteban** joins a distinguished faculty to serve on a panel addressing "Corporate Approaches to Electronic Information Management: How to Manage Data and Prepare for Litigation in an Increasingly Mobile World."

Practicing Law Institute, San Francisco, California – December 2, 2011 – "Electronic Discovery Guidance 2011: What Corporate and Outside Counsel Need to Know." Shook, Hardy & Bacon Tort Partner **Amor Esteban** will participate in this CLE event as moderator and speaker on a panel discussing "Litigation Begins: Early Case Assessment and the Rule 26(f) Conference." ■

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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).