Shook, Hardy & Bacon L.L.P.

NOVEMBER 6, 2014

PRODUCT LIABILITY LITIGATION REPORT

CONTENTS

CASE NOTES

Manufactured Homes Too Permanent to Be Consumer Product, Sixth Circuit Says

A split Sixth Circuit Court of Appeals panel has determined that a pre-made home is not a consumer product within the meaning of the Magnuson-Moss Warranty Act (MMWA) in a case brought against a manufactured house installer that allegedly failed to adjust the house to the plaintiffs' satisfaction. ***Bennett v. CMH Homes, Inc., No. 13-5423 (6th Cir., order entered October 30, 2014)***. A dissenting judge drew upon the distinction between mobile homes and modular homes, finding that the MMWA applies to the former but not the latter.

In 2004, the plaintiff couple purchased a "2180-square-foot, 'triple-wide' manufactured home" from CMH Homes, which delivered the house in three pieces the following year and assembled it on their property. The couple noticed that the house was not level before closing the sale, and CMH promised to make the repair. After several inspection and repair attempts, the company was unable to level the house to the couple's satisfaction. They sued and prevailed in a bench trial but appealed the nearly $40,000 damages award to the Sixth Circuit.

At the outset, the majority assessed whether it had subject-matter jurisdiction, because "[w]hether plaintiffs' home is a 'consumer product' appears at first to be both a jurisdictional question and a merits question." Applying *Gentek Bldg. Prods., Inc. v. Sherwin-Williams Co.,* 491 F.3d 320 (6th Cir. 2007) (when a question of "subject-matter jurisdiction also implicates an element of the cause of action, then the district court should 'find that jurisdiction exists and deal with the objection as a direct attack on the merits of the plaintiff's claim'"), the court held that it had jurisdiction.

The court then considered the MMWA's legislative history, citing a sponsoring senator's statement that a "house would not fall within the definition of consumer product since a house is not 'tangible personal property.'" The court also found that the couple's manufactured house is permanent, "would be taxed as real property and, at 2180 square feet, has the size and appearance of a regular house." It further consulted the dictionary used during the general era of the law's enactment and found "consumer" and "consumer goods" definitions which "describe products that are expendable or meant to be replaced periodically—not a permanent dwelling." Dismissing the federal claim, the court then remanded the case for the district court to determine whether it would consider the couple's state law claims under supplemental jurisdiction.

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

Walt Cofer
+1-816-474-6550
wcofer@shb.com

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

or

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

or

Marc Shelley
+41-22-787-2000
mshelley@shb.com

The dissenting jurist contended that a manufactured home falls within the definition of consumer product under the MMWA, because a "manufactured home" is now the accepted term for what were once called "mobile homes" before the negative connotations associated with that term caused a name change in federal housing laws, Tennessee law and the manufactured-home industry's own labels. She distinguished them from a modular home, which is "largely manufactured somewhere away from the eventual home site and brought to the local home site for installation," and stick-built homes, which "are built using traditional construction techniques, largely on the final home site" and fall outside the MMWA's purview. According to the dissent, the U.S. Federal Trade Commission (FTC), which administers the MMWA, and the Department of Housing and Urban Development (HUD) "have concluded that manufactured (or mobile) homes are consumer products for the purposes of the Act," but "found no MMWA coverage for modular homes" in a 1977 advisory opinion. She also asserted that "the structure of the MMWA definition further supports the FTC's and HUD's interpretation." The MMWA covers fixtures like furnaces and garbage disposals, she stated, so whether they are permanently installed "does not resolve the question of whether that product is a 'consumer product' under the MMWA."

First Circuit Interprets CAFA in Employment Dispute

In finding a putative class action removable to federal court under the Class Action Fairness Act (CAFA), the First Circuit Court of Appeals has clarified removal time periods and mechanisms under the law in line with other circuits that have adopted a "bright-line approach." ***Romulus v. CVS Pharmacy, Inc.*, No. 14-1937 (1st Cir., decided October 24, 2014)**. Several issues of first impression for the court arose in the context of a dispute involving overtime pay.

Employer CVS sought to remove the action within 30 days of service, estimating damages in excess of $10 million assuming that the class members lost each meal break during the class period. The district court rejected the calculation and granted the plaintiffs' motion to remand, concerned that CVS's assumptions were not rooted in the complaint's allegations and thus failed to prove the requisite jurisdictional amount. The parties thereafter conducted preliminary discovery, and the plaintiffs emailed the defendant a data analysis showing 116,499 meal breaks between August 2010 and June 2012 when just one shift supervisor was working—according to the complaint, this meant that the shift supervisors would not have been paid for breaks, since the company allegedly required them to remain on the store premises when no other managerial employees were on duty.

CVS filed its second notice of removal within 30 days of receiving the email, arguing that by extrapolating the alleged number of violations over the entire class period, which started in 2008, there was a "reasonable probability that the amount in controversy exceeds $5,000,000." The district court again remanded the matter to state court, finding CVS's second notice untimely and that it had failed to show that more than $5 million was at stake in the litigation. According to the district court, the only possible qualifying document was the plaintiffs' email, and it deemed the email inadequate to serve as an "other paper" under 28 U.S.C. § 1446(b)(3) because

"it was based entirely on information provided by defendant" and was readily available to it from the start. Thus, the court deemed the proper date for calculating timeliness to the date for the return of service. The First Circuit granted CVS's request for an interlocutory appeal.

The First Circuit held that section 1446(b)'s 30-day clocks are triggered "only when the plaintiffs' complaint or plaintiffs' subsequent paper provides the defendant with sufficient information to easily determine that the matter is removable. The district court erred in imposing too great a duty of inquiry on the defendant." Here, the email triggered the 30-day deadline "by providing sufficient information from which to easily ascertain the amount in controversy for the first time." The court also concluded that an email constitutes an "other paper" under CAFA, finding persuasive authority that gives the phrase an expansive construction.

Putative Class Claims Ebola Virus Can Pass Through "Impermeable" Medical Gowns

A California physician has filed a putative class action against Kimberly-Clark Corp. alleging that its Microcool Breathable High Performance Surgical Gowns® do not meet industry standards, as the company advertises, and that reliance on this alleged false advertising could expose health care workers using the defective gowns while treating Ebola patients to an increased risk of infection. *Shahinian v. Kimberly-Clark Corp.*, No. 14-8390 (U.S. Dist. Ct., C.D. Cal., filed October 29, 2014). He seeks damages in excess of $500 million.

The physician alleges that Kimberly-Clark advertises its line of gowns as Association for the Advancement of Medical Instrumentation (AAMI) Level 4, the highest level of gown protection that AAMI awards, despite the company's knowledge of 2013 tests in which "the High Performance Gowns failed at rates that greatly exceeded failure rates acceptable for satisfying AAMI Level 4 standards, with many of the gowns experiencing catastrophic failures. Among other things, the tests revealed that the gowns allowed liquid and bacterial and viral pathogens to penetrate the gowns, thus placing physicians, health care professionals and patients at considerable risk." The plaintiff, a skull-base surgeon, points to recent Kimberly-Clark advertisements that allegedly advise "health care facilities to use the High Performance Gowns in connection with patients who may be infected with the Ebola virus." Alleging affirmative misrepresentation, fraudulent concealment, negligent misrepresentation, and violations of the California Unfair Competition Law and False Advertising Law, the plaintiff seeks an injunction, class certification, compensatory and punitive damages, and attorney's fees.

THE INTERNATIONAL BEAT

Tort Law in China Is Focus of Two Research Papers

Singapore Management University School of Law Visiting Professor Wei Zhang has recently published two articles that discuss the origins of China's tort law and how it is currently being applied. In "The Evolution of the Law of Torts in China:

The Growth of a Liability System," the author suggests that changes to the tort system's formal legal rules, which were adopted in 1986, have transformed them into a "liability system moving predominantly in favor of tort victims." Zhang's article "Understanding the Law of Torts in China: A Political Economy Perspective" attempts to address an academic shortfall by "connecting the text of the Chinese tort law with the institutional context in which the law was conceived" to demonstrate how "injurers' political influence" and populist pressure on the part of those injured have interacted to direct "the course of lawmaking in China." He concludes in the latter paper that, while organized interest groups "excel at maneuvering the policy orientation in China just as in democracies, the CCP's [Chinese Communist Party's] recent governance strategy enables the otherwise muffled voice of tort victims to be heard in the course of legislation."

Mexico City Event to Focus on Regulatory Practices and Cooperation

The American National Standards Institute (ANSI) and U.S. Agency for International Development will co-host the "North American Conference on Good Regulatory Practices and Regulatory Cooperation" in Mexico City on December 10-11, 2014. The event also involves Mexico's Secretariat of Economy and Federal Regulatory Improvement Commission and the Canadian Department of Foreign, Affairs, Trade and Development. Advance registration is required, and individuals and groups may attend at no charge. Conference sessions include principles of good regulatory practices, scientific- and evidence-based rulemaking, regulatory impact assessment, public consultation, and case studies. *See ANSI News Release*, October 27, 2014.

ALL THINGS LEGISLATIVE AND REGULATORY

Baja and One World Technologies to Pay CPSC a Record $4.3 Million

The U.S. Consumer Product Safety Commission (CPSC) has reached an agreement with Baja Inc. and its corporate affiliate One World Technologies Inc. to settle charges that "the firm knowingly failed to report to CPSC immediately, as required by federal law, defects and unreasonable risk of serious injury involving 11 models of minibikes and go-carts," according to an October 28, 2014, CPSC press release. CPSC alleged several defects in Baja's products, including a leaking or detaching gas cap and a sticking throttle, and claimed that Baja knew about four faulty gas cap reports—including one that apparently led to a child's serious burn injury—and "two dozen consumer reports of stuck throttles" but failed to notify CPSC or consumers of potential problems.

In a record high for civil-penalty settlements, Baja will pay $4.3 million and will "maintain a program designed to ensure compliance with the safety statutes and regulations enforced by the Commission," including written standards, systematic procedures for reports of potential safety issues, compliance oversight, and records retention. By agreeing to the settlement, Baja has not admitted to wrongdoing. Public comments are requested by November 14, 2014. *See Federal Register*, October 30, 2014.

CPSC Provisionally Accepts $700,000 Window-Covering Cord Settlement

The U.S. Consumer Product Safety Commission (CPSC) has provisionally **accepted** a settlement with Williams-Sonoma Inc. requiring the company to pay a $700,000 civil penalty to resolve claims that the company sold window shades with exposed inner cords that posed a strangulation hazard to young children and failed to timely inform CPSC about the purported product hazard. According to the agency, Williams-Sonoma had sufficient information by August 2007 that children were becoming entangled in the inner cords of the PBK Roman® shades, but did not file a full report with CPSC until September 2008 in violation of section 15(b)(3) of the Consumer Product Safety Act. The company has neither admitted nor denied the staff's charges, but it has agreed not to seek further administrative or judicial review. Comments on the proposed agreement are requested by November 18, 2014. *See Federal Register*, November 3, 2014.

Winners Announced in CPSC Mobile Safety App Competition

The U.S. Consumer Product Safety Commission (CPSC) has **honored** four winners in its first-ever Safety Apps Challenge. The proposals used the agency's SaferProducts.gov and recalls application program interface to create mobile applications (apps) that would help consumers access CPSC recall and incident data. All are now available free of charge from various online sources.

The "Safety Checker" app provides access to incident and product recall information with a few taps—consumers can start the process by completing three fields about a product or can scan a product's bar code to access CPSC information. The "Recall Pro" app "uses a Google Chrome extension and allows a consumer who is shopping to highlight a product for sale on the Web, right-click on the product, choose 'RecallPro This,' and have recall information displayed for that product." The "Slice App" "organizes users' email inboxes with everything they have bought online and alerts them to delivery progress, price changes or a recall of that product." The "Total Recall 101" app also checks a user's emails and archives "for references to products, including product receipts and conversations with friends," and matches the products against CPSC's recalled products list. It generates emails to alert users about recalls. *See CPSC News Release*, October 27, 2014.

Safety Organizations Call on White House to Appoint Highly Qualified NHTSA Chief

Expressing concerns over recent vehicle defects that have resulted in massive auto recalls, representatives of a number of consumer advocacy organizations have **called** on the president to carefully select the next administrator of the National Highway Traffic Safety Administration (NHTSA). The October 29, 2014, letter states, in part, "It is clear that NHTSA's identification and response to deadly vehicle safety defects have been inadequate and ineffective. Unfortunately, the public's confidence in the Agency's ability to assure their safety is waning." The groups ask the president "to nominate an individual who will be a strong leader, an effective regulator, and a committed champion of consumer protection, public safety and

government transparency." Among those signing the letter were representatives of Advocates for Highway and Auto Safety, KidsAndCars.org, Center for Auto Safety, Public Citizen, and Consumer Federation of America.

LEGAL LITERATURE REVIEW

Cheryl Preston, "'Please Note: You Have Waived Everything': Can Notice Redeem Online Contracts?," *American University Law Review* (forthcoming)

Brigham Young University J. Reuben Clark Law School Professor Cheryl Preston surveys the law that has developed regarding the "clickwrap" and "browsewrap" contracts that purport to limit the rights of consumers to recover damages for injuries allegedly caused by the goods and services they purchase online. The courts have increasingly focused on whether consumers had sufficient notice of the contracts when making their purchases, a concept that, in Preston's view, "relies on the purely fictional notion that a reasonable consumer with notice of legal provisions will stop, read them, understand the terminology, appreciate their legal significance, and decide to proceed or not. The relish for notice is irreconcilable with our knowledge that consumers do not, and cannot, read and comprehend even a fraction of the wrap contracts they encounter." The author discusses the types of notice proposals that some have put forward to improve on the "I accept" button concept, but contends that they do not address the comprehensibility and time matters at issue.

With some studies showing that the average American Internet user needs 201 hours or the equivalent of more than $3,500 a year to read the privacy policies of each Website she visits, Preston suggests that wrap contracts be revised to resemble "calorie and content" boxes on food product labels. These would simply have a phrase such as "mandatory arbitration," including a link to the relevant provision if appropriate, and tell the consumer whether the contract has such a provision. Thus, competitor agreements could easily be compared, and the clauses would contain simple words that can be put into an online search engine, so the consumer understands what is being given up. Ultimately, Preston recommends that, until courts reconsider the scope and enforceability of wrap contracts under a variety of fact situations, consumers not read the contracts before accepting. Apparently, courts are less likely to enforce them if they have not been read.

Jeff Sovern, et al., "'Whimsy Little Contracts' with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements," *St. John's Legal Studies Research Paper*, October 2014

St. John's University School of Law professors have authored a paper presenting the results of research "exploring the extent to which consumers are aware of and understand the effect of arbitration clauses in consumer contracts." The study involved 668 consumers "approximately reflecting the population of adult Americans with respect to race/ethnicity, level of education, amount of family income, and age." They were shown a "typical" credit-card contract "with an arbitration clause

containing a class action waiver and printed in bold and with portions in italics and ALLCAPS," and then asked questions about the contract, a hypothetical contract with a "properly worded" arbitration clause and their own experiences with actual consumer contracts.

According to the paper, 43 percent recognized that the sample contract contained an arbitration clause, but 61 percent of those respondents "believed that consumers would, nevertheless, have a right to have a court decide a dispute too large for a small claims court." Fewer than 9 percent "realized both that the contract had an arbitration clause and that it would prevent consumers from proceeding in court." As for a class action waiver printed twice in bold, including once in italics and the second time in ALLCAPS, "four times as many respondents thought the contract did not block them from participating in a class action as realized that it did." In addition, of the 303 who claimed that they had never entered into contracts with arbitration clauses and also indicated that they had accounts with certain companies, 264 (87%) "did indeed have at least one account subject to an arbitration clause."

The authors conclude that many citizens believe that they have a right to judicial process and cannot lose that right by agreeing to a form consumer contract, a consequence of unknowingly giving up rights or failing to understand the legal consequences of doing so. Given such levels of misunderstanding, the authors "question whether meaningful consent is possible in the consumer arbitration context."

LAW BLOG ROUNDUP

Judge's Statutory Interpretation Book Garners Attention

"While there seems to be no end to books, articles, essays, blog posts and symposia on *constitutional* interpretation, relatively little attention is paid to the all-too-important issue of *statutory* interpretation. Well, that is changing with the advent of a new book by the Chief Judge of the Second Circuit Court of Appeals." University of Washington Acting Professor of Law Ronald Collins, blogging about *Judging Statutes* by The Hon. Robert Katzmann. Even U.S. Supreme Court justices have expressed an interest in the judge's work, with two apparently attending a recent Georgetown University Law Center event marking its publication.

Concurringopinions.com, November 3, 2014.

THE FINAL WORD

NYT Explores Lobbyist Influence on State Attorneys General

Based on disclosures in documents obtained via open records laws, interviews and attendance at conferences involving state attorneys general and corporate lobbyists, *The New York Times* has reported that lobbying in some instances has successfully concluded some states' investigations into alleged corporate misconduct including

deceptive advertising, securities fraud and Internet crimes. Both Republican and Democratic attorneys general organizations reportedly conduct member events at posh resorts where representatives of corporations and trade organizations gain access to top law enforcement officials and nurture relationships through sports and other activities. The article also discusses how a revolving door between attorneys general offices and lobbyist ranks is another way for corporations to counter a growing trend in government compliance initiatives launched by multistate attorneys general investigations. The article also suggests that contributions to attorneys general election campaigns may have also had an effect on shaping policy or negotiating favorable settlements. *See The New York Times*, October 28, 2014.

UPCOMING CONFERENCES AND SEMINARS

ABA, Chicago, Illinois – November 5-7, 2014 – "The Women of the Section of Litigation: Leading, Litigating, and Connecting." Shook, Hardy & Bacon Global Product Liability Partner Rebecca Schwartz will participate in a panel discussion during this American Bar Association (ABA) continuing legal education conference. In "Spoliation in Complex Litigation: Lessons Learned," Schwartz will discuss recent spoliation rulings and approaches that companies can take to prevent spoliation issues from arising.

ACI, Washington, D.C. – January 15-16, 2015 – "15th Advanced Global Legal & Compliance Forum on Cyber Security & Data Privacy and Protection." Shook, Hardy & Bacon Data Security & Data Privacy Practice Co-Chair Al Saikali will join a distinguished faculty to serve as co-moderator of the opening session, titled "Federal Regulatory, Legislative, and Enforcement Landscape: Changes on the Horizon and Integrating New and Anticipated Initiatives Into Your Privacy and Compliance Program." The session panel includes Federal Trade Commission, Department of Justice and Federal Bureau of Investigation representatives.

OFFICE LOCATIONS

Denver, Colorado
+1-303-285-5300
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
Philadelphia, Pennsylvania
+1-267-207-3464
San Francisco, California
+1-415-544-1900
Seattle, Washington
+1-206-344-7600
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.