Shook, Hardy & Bacon L.L.P.

MAY 21, 2009

PRODUCT LIABILITY LITIGATION REPORT

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THINKING GLOBALLY

Third Circuit Finds Insufficient Contacts in Pennsylvania in Defective Aircraft Litigation Against Swiss Manufacturer

The Third Circuit Court of Appeals has agreed that a Swiss aircraft manufacturer had insufficient contacts with Pennsylvania, and thus, a federal court there lacked jurisdiction over the company in litigation involving a plane crash in the state allegedly caused by an aircraft defect. ***D'Jamoos v. Pilatus Aircraft Ltd.*, No. 08-2690 (3d Cir., decided May 14, 2009)**. The court remanded the case to the district court, however, for it to determine whether the claims against the company can be pursued in Colorado, where its U.S.-based subsidiary conducts significant business on its behalf, and whether the claims should be severed from the lawsuit, which involves a number of other defendants unaffected by the ruling on jurisdiction.

The aircraft crashed in Pennsylvania in 2005, killing the pilot and five passengers, all of whom were Rhode Island residents. Their survivors, also Rhode Island residents, sued the Swiss company and the manufacturers of several of the allegedly defective component parts in a Pennsylvania federal court, and the company filed a motion to dismiss the claims for lack of personal jurisdiction. After the case was argued, the plaintiffs filed a similar lawsuit against the Swiss company in a federal court in New Hampshire and requested the opportunity to pursue jurisdictional discovery, which request was granted. Immediately after filing in New Hampshire, the plaintiffs filed a motion in the Pennsylvania court seeking to transfer the action to Colorado. The district court granted the motion to dismiss and denied the motion to transfer.

The appeals court detailed why the Swiss company, which did no business in the state, could not be sued in Pennsylvania, noting that just because the accident occurred there or that people flew the company's aircraft through Pennsylvania airspace were insufficient "contacts" for the court to exercise jurisdiction. As the court noted, "the critical finding that the defendant purposefully availed itself of the privilege of conducting activities within the forum requires contacts that amount to a deliberate reaching into the forum state to target its citizens." According to the court, a stream-of-commerce theory also did not confer jurisdiction because the aircraft had been sold to a French buyer who resold it to a Swiss company that resold it to a Massachusetts company that brought it to the United States and sold it to the Rhode Island company that owned it when the crash occurred.

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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 Product Liability capabilities, please contact

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

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

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

or

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

Still, the court returned the case to the district court because the Swiss company's subsidiary was based in Colorado and conducted a significant amount of business for the company in that state. According to the court, "the record demonstrates that [plaintiffs] have established a prima facie basis for a conclusion that a Colorado court may exercise general jurisdiction over [the Swiss company] predicated on its direct contacts within Colorado or, alternatively, on the conduct of [the subsidiary] as its agent." The district court was directed to determine whether it is "in the interest of justice" to order the transfer.

Ninth Circuit Allows Claims Against Foreign Gun Manufacturers to Proceed

While the Ninth Circuit Court of Appeals has found that a federal law retroactively immunized domestic gun manufacturers from liability for harm caused by criminals using guns, state-based claims against foreign manufacturers are not preempted because these companies are not licensed under federal law. ***See Ileto v. Glock, Inc.*, No. 06-56872 (9th Cir., decided May 11, 2009)**. The issue arose from a 1999 shooting at a Jewish Community Center summer camp in California that resulted in the injury of several children and an adult. Later that day, the shooter also shot and killed a postal worker.

The victims and survivors sued domestic and foreign firearms manufacturers, marketers, importers, distributors, and sellers in a California federal court, alleging under state law that they intentionally placed more guns on the market than legitimately demanded, "to take advantage of re-sales to distributors that they know or should know will, in turn, sell to illegal buyers." The district court dismissed the suit for failure to state a claim under state law, and the Ninth Circuit affirmed in part and reversed in part, finding that plaintiffs stated cognizable negligence and public nuisance claims under California law with respect to the firearms actually used in the shootings. While the case was pending, Congress enacted legislation that preempts claims against manufacturers and sellers of firearms and ammunition resulting from criminal use of the products. The law expressly applied to pending lawsuits.

The district court then dismissed the claims against the domestic manufacturers, while upholding the law against plaintiffs' constitutional challenge. The court denied a foreign manufacturer's motion for summary judgment because it is not a federal firearms licensee as required under the law. With one dissenting judge, the Ninth Circuit affirmed. The court reached its conclusions by considering and interpreting ambiguous parts of the statute and finding that Congress had the authority to and did intend to preempt common-law claims like those pursued by the plaintiffs. According to the court, "We have no trouble concluding that Congress rationally could find that, by insulating the firearms industry from a specified set of lawsuits, interstate and foreign commerce of firearms would be affected."

U.S. LITIGATION DEVELOPMENTS

ABA Files *Amicus* Brief to Support Immediate Appeals from Privilege Waiver Rulings

The American Bar Association (ABA) has filed an *amicus curiae*, or friend of the court, brief in a case before the U.S. Supreme Court from the Eleventh Circuit Court of Appeals, which ruled that a party does not have a right of immediate appeal when a trial court orders a party to disclose previously privileged documents. *Mohawk Indus. v. Carpenter*, No. 08-678 (U.S., brief filed May 4, 2009).

The issue arose in wrongful termination litigation brought by an employee who claimed he was fired to keep him from testifying in a case against the company alleging that it improperly hired illegal aliens. The district court granted the employee's motion to compel the disclosure of material related to the company's internal investigation into his claims to human resources about the hiring of undocumented workers; the investigation involved the company's outside counsel. The trial court found that the company had waived its attorney-client privilege by mentioning the investigation and outside counsel interview in a brief filed in the other case. Recognizing the seriousness of its waiver finding, the court stayed the production deadline so the company could seek interlocutory review of the order.

The Eleventh Circuit dismissed the appeal, finding that the discovery order was not appealable under the collateral order doctrine because it was an order that could be effectively reviewed on appeal. The appeals court then stayed the effect of its ruling, pending the outcome of the company's certiorari petition to the U.S. Supreme Court.

The ABA filed its brief to argue that erroneously compelled disclosure of privileged material cannot be cured on appeal. According to the ABA, "[A] new trial will not cure the damage … To the contrary, allowing an adversary to see privileged documents that are later held inadmissible at retrial 'may alert adversary counsel to evidentiary leads or give insights regarding various claims and defenses. Moreover, attorneys cannot unlearn what has been disclosed to them.'" The association also noted that shortly after the U.S. Supreme Court agreed to hear the case, the ABA House of Delegates adopted a resolution supporting "the right of participants in federal proceedings to take an immediate appeal from an order that rejects a claim of attorney-client privilege and on that basis requires the production of information or materials for which the privilege has been claimed."

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Oral argument has not been scheduled, but is expected to take place some time during the Court's 2009-2010 term. Oral arguments have concluded for the Court's current term.

Sanctions Imposed on Attorney for Frivolous Claims in Defective Roofing Suit

The Iowa Supreme Court has imposed $25,000 in sanctions against an attorney for bringing unfounded class claims against a company that allegedly manufactured defective roofing shingles and its chief executive officer. **Barnhill v. Iowa Dist. Ct. for Polk County, No. 06-0163 (Iowa, decided May 1, 2009)**. The attorney apparently brought the litigation against the CEO under contract theories that cannot be asserted against corporate officers.

According to the trial court, "the pleadings and other documents filed by [plaintiffs' counsel] in this case have in general such a confusing, convoluted, self-congratulatory and elusively vague, ambiguous, indirect and constantly shifting quality as to compel the conclusion that the case was made up as it went along. It is as though [plaintiffs' counsel] said whatever needed to be said at each step just to get past the moment, whether there was a legitimate basis for saying it or not." The supreme court agreed and used the case as a vehicle for establishing the factors that trial courts must consider when they determine the appropriate amount to impose as a sanction. Among the factors are those articulated by the American Bar Association and the Fourth Circuit Court of Appeals.

Two dissenting justices contended that the trial court failed to consider several of the factors, including the reasonableness of the opposing party's attorney's fees and the sanctioned lawyer's ability to pay. In this case, most of the claims were dismissed as frivolous, and the $25,000 award was made from $150,000 in legal fees purportedly incurred by the CEO to defend all of the claims.

Court Declines Request to Sanction Plaintiffs' Lawyers in Failed Defective Truck Litigation

Despite dismissing product defect claims in a case referred to as a discovery "train wreck," a federal court in North Carolina has reportedly refused to impose defense costs on plaintiffs' lawyers who represented over-the-road truck drivers suing a manufacturer for the heavy front ends in certain models that allegedly caused tire blow outs and other problems. *Tri-Con Inc. v. Volvo Trucks N. Am. Inc.*, No. 06-cv-00577 (U.S. Dist. Ct., M.D.N.C., order entered May 8, 2009). According to the court, the named plaintiffs, who ignored the company's discovery requests and stopped cooperating with their own attorneys, were responsible for the discovery failures that protracted the litigation. *See Product Liability Law 360*, May 11, 2009.

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American Law Institute Meets to Consider Proposed Final Draft on the Law of Aggregate Litigation

The American Law Institute (ALI) conducted its annual meeting May 18-20, 2009, in Washington, D.C. Among the agenda items was consideration of the proposed final draft of the "Principles of the Law of Aggregate Litigation." When this Report was

prepared, it was unknown whether the draft was approved by the ALI membership in its present form. It has generated considerable discussion among practitioners who are involved in class actions and other aggregate litigation procedures. Their concerns range from the draft's statements about class actions and the Constitution, single-issue class actions and medical monitoring to choice-of-law in aggregated litigation. Further details will be forthcoming when the final draft is approved. ALI statements of the law address fundamental principles of the common-law system "to improve the law and the administration of justice in a scholarly and scientific manner." The courts often rely on the statements when deciding what the law is or should be in a given jurisdiction.

ALL THINGS LEGISLATIVE AND REGULATORY

Obama Picks CPSC Nominees, Seeks 71 Percent Budget Increase

President Barack Obama (D) has tapped South Carolina Superintendent of Education Inez Moore Tenenbaum to head the Consumer Product Safety Commission (CPSC) and University of North Carolina Law and Business Professor Robert Adler to fill one of two new commission seats. Obama hopes to expand the number of commissioners from three to five.

Obama praised Tenenbaum's history of child and family safety advocacy, and her experience working with administrative and regulatory bodies. Before working as schools superintendent, Tenenbaum practiced health, environmental and public interest law.

Adler's resume includes serving as an attorney-adviser to two CPSC commissioners between 1973 and 1984 and as deputy attorney general in Pennsylvania's Bureau of Consumer Protection. He was a member of the Obama-Biden transition team, co-authored an agency review report on the CPSC, and was elected six times to the board of directors of Consumers Union, a non-profit organization that publishes *Consumer Reports* and advocates on behalf of consumer interests.

Obama also reportedly plans to increase CPSC's annual budget in 2009 to $107 million, a 71 percent increase from its 2007 level.

Obama's nominations and budget-increase plan have garnered praise from some consumer advocacy groups. "We are very pleased that the president is increasing the budget and installing new leadership at the CPSC," said U.S. PIRG Public Health Advocate Elizabeth Hitchcock in a press release. David Arkush, director of Public Citizen's Congress Watch Division, said in a statement: "With its new resources—effective leadership, additional funding and new authority under the new law—the CPSC may finally have the tools it needs to fulfill its mission to protect the public from unsafe products." *See Product Liability Law 360, citizen.org/pressroom*, and *U.S. PIRG,* May 5, 2009.

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Small-Business Owners Complain About CPSIA Rules

A panel of small-business owners from across the country appeared recently before the Subcommittee on Investigations and Oversight of the House Committee on Small Business, claiming that portions of the Consumer Product Safety Improvement Act of 2008 (CPSIA), imposing lead and phthalate restrictions on children's products, are unduly burdensome for their operations.

Nancy Nord, acting chair of the Consumer Product Safety Commission (CPSC), testifying during the first congressional hearing on the matter, admitted that implementing the law has proven difficult and put smaller businesses at a disadvantage compared with their larger competitors. "We really can't do risk assessment and can't tailor our approaches to look at real risks," she was quoted as saying. "We need to figure out a way to make sure it fulfills the objective to help consumers without undue impact on small businesses."

David McCubbin, the president of McCubbin Hosiery LLC in Oklahoma City, echoed other witness testimony when he questioned the need for the law, particularly in the context of businesses like his own with no history of lead in its products. For example, he pointed out how the law's lead-content testing requirements forced his company to test all yarns and every sock, which in turn caused delayed shipments and strained relations with customers and suppliers. "We have been asked to search at considerable expense for something that does not exist and has not been alleged to exist," he said.

Susan Baustian, the director of Once Upon a Child, a Minnesota children's clothing reseller, complained that the guidelines issued so far have been too vague, especially given that her company will still be liable for the offending product even though it is technically exempt from the testing requirements. "The ill-executed implementation of this legislation has brought fear into the industry and that fear, especially in economic times like these, can bring a halt to successful and productive businesses," she was quoted as saying. *See Product Liability Law 360,* May 14, 2009.

Oklahoma State Lawmakers Reach Compromise in Tort Reform; Legislation on Governor's Desk

Compromise legislation (**H.B. 1603**), forged over months of negotiations with trial attorneys and patient advocacy groups and designed to help block frivolous lawsuits and lower medical malpractice costs, has been forwarded to Oklahoma's governor after overwhelming approval in the House and Senate. The new civil justice bill, described as an historic agreement by legislative leaders, is apparently expected to be signed into law by Governor Brad Henry (D).

Under the new bill, companies that manufacture firearms, junk food and items that pose an obvious danger would be immune from lawsuits based on injury caused by proper use of the product.

Under the new bill, companies that manufacture firearms, junk food and items that pose an obvious danger would be immune from lawsuits based on injury caused by proper use of the product. The bill would also require

plaintiffs in asbestos-related lawsuits to show that they have actually been injured by asbestos exposure.

The bill's sweeping changes include (i) redefining what constitutes a frivolous lawsuit; (ii) strengthening summary judgment rules to make it easier for a judge to dismiss a lawsuit that has no merit before it goes to trial; (iii) allowing defendants that are more than 50 percent at fault to pay an additional portion of damages in a revision to joint and several liability rules that typically allow plaintiffs to recover all of their damages against any defendant regardless of percentage of fault; (iv) capping non-economic damages, also known as pain and suffering, at $400,000 but allowing a judge or jury to waive the cap in cases of gross negligence or catastrophic injury; (v) requiring the state to explore purchasing a $20 million insurance policy by May 2011 to create an indemnity fund for non-economic damages in excess of $400,000; (vi) applying a certificate-of-merit requirement to all professional liability cases, not just medical malpractice; and (vii) capping appeals bonds for businesses at $25 million and eliminating bonds in punitive damages appeals.

The bill would also make a variety of changes to class-action lawsuit guidelines, including setting specific guidelines for certifying a class and determining attorney's fees. Republicans evidently dropped their attempt to make all parties to a class-action lawsuit "opt in" to participate. Current Oklahoma law considers all potential members of a class-action lawsuit a participant unless the party "opts out." *See The Associated Press*, May 11, 2009; *The Journal Record*, May 12, 2009; *NewsOK.com*, May 15, 2009.

LEGAL LITERATURE REVIEW

Jack Weinstein, "Preliminary Reflections on Administration of Complex Litigations," *Cardozo Law Review de novo*, 2009

In this article, U.S. District Court Judge Jack Weinstein, whose rulings and creative aggregation of claims in mass tort cases have long been debated by legal practitioners and scholars, discusses some of the personal injury cases over which he has presided, including those involving Agent Orange, asbestos and prescription drugs and medical devices. Noting that "[t]he problem of individual justice in disputes involving large masses of people is endemic in a huge heterogeneous population such as ours," and that appellate courts are generally hostile to class actions and other devices for administering mass litigation, Weinstein "reluctantly" concludes that "the law—and certainly I—have failed to rise sufficiently to meet the challenges of modern litigation." He suggests that administrative agencies should shoulder most of the burden of ensuring consumer protection and observes, "The criminal law also has its place."

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[Rachel Lee, "Ex Parte Blogging: The Legal Ethics of Supreme Court Advocacy in the Internet Era," Stanford Law Review, 2009]

Claiming that an IP address registered to the U.S. Supreme Court was used to access a law blog more than 100 times in a single day, this law student author raises concerns about the ethics of *ex parte* blogging, which she defines as lawyers' use of the Internet to shape the justices' views in particular cases. With federal courts in general turning more frequently to the World Wide Web and law blogs to conduct their research, the article suggests two ways to prevent unethical conduct. First, the author recommends a new rule of professional conduct forbidding a lawyer representing a party or an *amicus curiae* from making "an online statement concerning the merits of a pending or impending proceeding before the Supreme Court of the United States in the matter." The author also suggests that the Court and its staff simply refrain from reading any blog post relating to a pending case, "whether written by attorneys involved in the case or not."

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LAW BLOG ROUNDUP

Asbestos Wrongdoing Goes Beyond the Courtroom

"Investigators in Massachusetts are still stunned at the extent of the scam they discovered at a 'school' where both classes and examinations were often just pretend." Manhattan Institute Center for Legal Policy Senior Fellow Walter Olson, blogging about the prosecution of a woman who apparently set up a diploma mill where undocumented immigrants could obtain asbestos-removal certification simply by handing over $400. Thousands were apparently certified and, without proper training, potentially exposed themselves and many others to the asbestos they tore out of buildings. The woman who ran the school is currently on the lam, having reportedly abandoned her family (including a 3-year-old) immediately before sentencing.

PointofLaw.com, May 18, 2009.

Blogging and Its Influence on the Courts

"The legal system often calls on judges to filter out information they should not consider in their decisions. Is it too much to expect the [U.S.] Supreme Court to ignore these blog posts which are potentially intended to influence their decisions? Should they have to ignore them? Or is this a nonissue?" University of Pittsburgh law student Josh Camson, discussing the law review article, summarized above, that explores the potential influence that blogging may have on the courts.

Social Media Law Student, May 14, 2009.

Will New Regulatory Czar Strike the Right Balance for Public Health and Safety?

"We're going to hope for the best with Cass Sunstein. He did testify that he'd be "inclusive and humanized" and more moral in his approach to regulation." Center for Justice & Democracy consumer advocate Andy Hoffman, expressing concerns about President Barack Obama's nomination of Harvard Law Professor Cass Sunstein to serve as the director of the Office of Management and Budget's Office of Information and Regulatory Affairs. The person in this position has the final say on whether the most significant federal regulations can be adopted, and consumer advocates have been pressing for someone who takes a "precautionary principle" approach to health and safety regulation. Sunstein evidently favors cost-benefit analysis and once wrote, "people fear things like toxic chemicals or pesticides because of 'mass delusions' … and interest-group campaigns."

ThePopTort, May 18, 2009.

THE FINAL WORD

Chief Justice John Roberts Declared "No More Mr. Nice Guy"

U.S. Supreme Court watcher and author Jeffrey Toobin has published a profile of John Roberts, Chief Justice of the United States, in the May 25, 2009, issue of *The New Yorker*. Titled "No More Mr. Nice Guy: The Supreme Court's Stealth Hard-Liner," the article notes, "In every major case since he became the nation's seventeenth Chief Justice, Roberts has sided with … the corporate defendant over the individual plaintiff. Even more than [Justice Antonin] Scalia, who has embodied judicial conservatism during a generation of service on the Supreme Court, Roberts has served the interests, and reflected the values, of the contemporary Republican Party."

Writing of Roberts's first four years on the Court, Toobin describes his record as "not that of a humble moderate but, rather, that of a doctrinaire conservative." He writes that "Roberts's hard-edged performance at oral argument offers more than just a rhetorical contrast to the rendering of himself that he presented at his confirmation hearing." Toobin quotes Roberts saying during the hearing, "Judges are like umpires. Umpires don't make the rules. They apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role. Nobody ever went to a ballgame to see the umpire." Roberts also said his jurisprudence would be characterized by "modesty and humility."

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Toobin quotes Steven Teles, a professor of political science at Johns Hopkins and author of *The Rise of the Conservative Legal Movement*, as saying that Roberts came from the world of judicial restraint and strict constructionism. "The Department of Justice in [President Ronald Reagan's] first term was full of serious, principled people [including Roberts]," Teles said. "They didn't see themselves as part of the

Christian right, or even necessarily part of a larger political movement, but they did think of themselves as real lawyers who were reacting to what they thought of as the excesses of liberalism." Liberal critics, Toobin writes, "regard this view as unduly deferential to the status quo and thus a kind of abdication of the judicial role."

Roberts's career as a lawyer, Toobin believes, marked him in other ways. "In private practice and in the first Bush Administration, a substantial portion of his work consisted of representing the interests of corporate defendants who were sued by individuals," he writes. "As a lawyer and now as Chief Justice, Roberts has always supported legal doctrines that serve a gatekeeping function" and keep plaintiffs out of court.

UPCOMING CONFERENCES AND SEMINARS

American Bar Association, Chicago, Illinois – May 22, 2009 – "Third Annual National Institute on E-Discovery." Shook, Hardy & Bacon Tort Partner John Barkett is chairing this event. Barkett frequently speaks and writes about electronic discovery issues and has authored two books on the subject: *The Ethics of E-Discovery* and *E-Discovery: Twenty Questions and Answers.*"

American Conference Institute, New York, New York – June 24-25, 2009 – "3rd Annual Drug and Medical Device on Trial." Shook, Hardy & Bacon Pharmaceutical and Medical Device Litigation Partner Harvey Kaplan will conduct a "Cross-Examination of the Plaintiff's Cardiologist." Designed around a detailed fact pattern, this interactive seminar gives a distinguished faculty of judges, in-house counsel and practitioners the opportunity to demonstrate and critique a variety of trial skills. A seminar brochure is available on request from the sponsor.

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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).