Shook, Hardy & Bacon L.L.P.

JUNE 18, 2009

PRODUCT LIABILITY LITIGATION REPORT

CONTENTS

CPSC LEVIES HIGHEST PENALTY EVER AGAINST MATTEL

The Consumer Product Safety Commission (CPSC) has **imposed** a $2.3 million civil penalty against Mattel, Inc. for selling children's toys that the company allegedly knew contained lead levels well beyond those permitted by law. The fine is the highest CPSC has imposed for a product safety violation.

Denying that they knowingly violated federal law, Mattel and subsidiary Fisher-Price, Inc. have agreed to the settlement to resolve CPSC allegations that they knowingly imported toys with paints or other surface coatings containing illegal lead levels, CPSC announced June 5, 2009. The toy makers purportedly sold more than 95 different types of children's products that exceeded the 30-year-old federal limit of 0.06 percent lead.

According to CPSC, Mattel imported more than 900,000 noncompliant toys from September 2006 to August 2007, including several Barbie® doll accessories and Sarge® toy cars. Fisher-Price imported approximately 1.1 million noncompliant toys between July 2006 and August 2007, including Geotrax® locomotive sets and Go Diego Go Rescue® boat toys. Between August 2007 and October 2007, Mattel and CPSC recalled approximately 2 million Mattel and Fisher-Price toys after tests revealed lead counts in excess of the legal limit.

"These highly publicized toy recalls helped spur congressional action last year to strengthen CPSC and make even stricter the ban on lead paint on toys," CPSC acting Chair Thomas Moore said. "This penalty should serve notice to toy makers that CPSC is committed to the safety of children, to reducing their exposure to lead, and to the implementation of the Consumer Product Safety Improvement Act."

Mattel officials reportedly said that they addressed the compliance issues promptly after discovering them.. "We were able to effectively minimize any potential concerns by launching a fast-track recall of the affected product in conjunction with the CPSC and other global regulatory agencies, and by taking several steps to enhance our product compliance protocols and procedures to confirm that every Mattel toy is safe for children to enjoy," according to a statement issued by the toy maker. "Mattel continues to be vigilant and rigorous in ensuring the quality and safety of our toys."

Shook, Hardy & Bacon L.L.P.

PRODUCT LIABILITY LITIGATION REPORT

JUNE 18, 2009

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

After the recall, Mattel reached a $12 million settlement with 39 states to avert litigation over unsafe lead levels in Chinese-made toys, according to a news source. The company, which has agreed to keep at least four years of source records and screening tests for its subcontractors, is also required to notify the states' attorneys general if it finds excessive lead levels in its toys. It would reportedly face charges of contempt and violations of the Consumer Protection Act if it sold lead-tainted toys in the future. *See CPSC News Release,* and *Product Liability Law 360,* June 5, 2009.

U.S. SUPREME COURT ESTABLISHES NEW PARAMETERS FOR JUDICIAL CONFLICTS OF INTEREST

The U.S. Supreme Court, in a 5-4 decision, has determined that a West Virginia Supreme Court justice should not have participated in a case involving a coal company whose president contributed millions of dollars to get the justice elected to the bench. ***Caperton v. A.T. Massey Coal Co., Inc.*, No. 08-22 (U.S., decided June 8, 2009)**. The ruling generated extensive commentary in the legal community for its creation of a new constitutional recusal standard for those judges who are elected to office in 39 states and take contributions to fund their campaigns.

The dispute arose out of a case involving a jury award of $50 million against a Massey Energy affiliate for fraud. While preparing to appeal the verdict, Massey Energy Chief Executive Officer Don Blankenship contributed more than $3 million to a 2004 judicial campaign that resulted in the election of West Virginia Supreme Court Justice Brent Benjamin, who twice provided the needed majority vote to overturn the jury's verdict despite being asked to recuse himself from hearing the case. The appeal asked the U.S. Supreme Court to decide whether Benjamin's failure to recuse violated the Due Process Clause of the U.S. Constitution.

Justice Anthony Kennedy, writing for the majority, observed, "Not every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal, but this is an exceptional case." According to the majority, "[t]he inquiry centers on the contribution's relative size in comparison to the total amount of money spent in the election, and the apparent effect such contribution had on the outcome of the election." Because Blankenship's contributions "eclipsed the total amount spent by all other Benjamin supporters and exceeded by 300% the amount spent by Benjamin's campaign committee," the Court found the risk that his influence "engendered actual bias … sufficiently substantial that it 'must be forbidden if the guarantee of due process is to be adequately implemented.'"

The majority also found the timing of the contributions and the pendency of the case critical. "It was reasonably foreseeable, when the campaign contributions were made, that the pending case would be before the newly elected justice." The Court reversed the judgment that overturned the jury verdict and remanded the case for further proceedings.

Chief Justice John Roberts, writing for the four dissenting justices, suggested that the majority opinion "will undermine rather than promote" values such as the need to maintain a fair, independent and impartial judiciary. The dissenting justices were concerned that the "probability of bias" standard cannot be defined in a limited way and thus provides no future guidance to judges and litigants. The dissenting opinion lists 40 questions that the majority's ruling raises and predicts that it will result in an avalanche of bias-based challenges. According to the Chief Justice, the Court's new rule "will inevitably lead to an increase in allegations that judges are biased, however groundless those charges may be. The end result will do far more to erode public confidence in judicial impartiality than an isolated failure to recuse in a particular case."

WASHINGTON SUPREME COURT CONFIRMS RETROACTIVITY OF STRICT PRODUCT LIABILITY IN ASBESTOS CASE

The Washington Supreme Court has determined that its decisions adopting strict product liability as a cause of action apply retroactively and thus that a man with mesothelioma who sought to recover from a company that made asbestos insulation products may proceed with his claims. ***Lunsford v. Saberhagen Holdings, Inc.*, No. 80728-1 (Wash., decided June 4, 2009)**. According to the court, it abolished the doctrine of selective prospectivity in 1992, when it stated "retroactive application of a principle in a case announcing a new rule precludes prospective application of the rule in any subsequently raised suit based upon the new rule." *Robinson v. City of Seattle*, 119 Wash. 2d 34, 830 P.2d 318 (1992).

The defendant argued that the court had implicitly overruled *Robinson* in later decisions and that before the Lunsfords could pursue their claims the court must apply a three-factor test to determine if strict product liability should apply to their cause of action. The court rejected this argument, confirming that it had not overruled *Robinson*. The court comprehensively explored the doctrine of retroactivity in its opinion, discussing decisions in other states and explaining the policy underlying the rule.

The court comprehensively explored the doctrine of retroactivity in its opinion, discussing decisions in other states and explaining the policy underlying the rule.

Three concurring judges agreed that strict liability should apply in this case, but disagreed "with the majority's unwise edict that the only exception to the general rule of retroactivity is pure prospectiv[ity] which can be determined only in the case in which the new rule is announced."

MDL COURT DISMISSES CLAIMS THAT GROUT SEALER MAKER FAILED TO NOTIFY CPSC OF PRODUCT DEFECT

A federal court in Georgia, before whom hundreds of personal injury actions involving a spray-on grout sealer have been consolidated for pre-trial proceedings, has dismissed claims for violations of the Consumer Product Safety Act. *In re: Stand 'n Seal, Prods. Liab. Litig.*, MDL No. 1804 (U.S. Dist. Ct., N.D. Ga., Atlanta Div., decided June 9, 2009). The plaintiffs allege injury from a product used to seal tile grout in kitchens and bathrooms. In 2005, the manufacturer reformulated the product, and users allegedly began experiencing respiratory problems from exposure to the new product. By August of that year, the product was recalled.

The plaintiffs alleged that the company knew about the respiratory problems as early as May 2005, but failed to immediately inform the Consumer Product Safety Commission (CPSC) as required under the Consumer Product Safety Act; the agency was not apparently notified for another month. The defendants sought to dismiss all claims under the Act, contending that it does not provide for a private right of action. The court agreed, noting that manufacturers failing to comply with the reporting requirements for products presenting a substantial hazard are subject to civil and criminal penalties imposed by the CPSC. Thus, "the express provision of civil and criminal penalties suggests that Congress intended to preclude other types of remedies."

The plaintiffs argued that they should be allowed to amend their complaints if the court ruled in defendants' favor; they were prepared to allege that the defendants instead violated CPSC product safety rules, a claim for which an express provision allows a private right of action. The rules allegedly violated, however, were the rules that "merely interpret the reporting requirements of the Consumer Product Safety Act."

According to the court, there is a split of authority in the federal courts over whether a private cause of action exists for violations of interpretative rules. Deciding to follow the majority of courts finding "that Congress did not intend to create a private cause of action for interpretative rules issued by the Commission," the court granted defendants' motion for summary judgment as to all claims under the Act and refused to allow plaintiffs to amend their complaints.

According to the court, there is a split of authority in the federal courts over whether a private cause of action exists for violations of interpretative rules.

TENTH CIRCUIT REFUSES TO VACATE DISCOVERY ORDER IN AUTOMOBILE TIRE DEFECT CASE

The Tenth Circuit Court of Appeals has denied a tire manufacturer's petition for writ of mandamus, which sought to vacate a district court's discovery order in litigation arising out of a van rollover accident that killed nine van occupants and seriously injured two. ***In re: Cooper Tire & Rubber Co.*, No. 07-4264 (10th Cir., decided June 9, 2009)**.

As to the tire manufacturer, the plaintiffs alleged that the company knew or should have known that the tires were prone to tread separation under normal use and that "prior to the production of the Van Tire, Cooper realized that its tires suffered from an unacceptably high rate of tread separations, but deliberately failed to make design changes to combat this knowledge or warn consumers about the problems with its tires." They also alleged that information available to the company before tire production even began "confirmed that Cooper knew about these dangerous and defective conditions."

Cooper sought to limit discovery to information about the specific tire design and plant at issue, and for a narrow time period. The company also argued that plaintiffs had not met their burden of demonstrating that the trade secrets they sought were relevant and necessary. The federal magistrate and district court rejected the company's contentions about the scope of the requested discovery, the burdens of production and the protection of its trade secrets.

According to the lower court, the requested discovery was relevant to the plaintiffs' broad theories of liability, and they had no obligation to demonstrate substantial similarity of the tires until they sought to admit at trial evidence about tires other than those involved in the accident. The court also noted that plaintiffs had offered to print and copy at their expense documents already produced in other cases and that a protective order would adequately protect the company's trade secrets from improper disclosure.

Emphasizing that a writ of mandamus is a request for extraordinary relief, the appeals court analyzed the lower court's application of the federal discovery rules to determine if its order amounted to a disregard for the rules. The court discussed how the rules changed in 2000 with respect to the scope of discovery that is typically available and concluded that the trial court did not err in applying a "relaxed" requirement to the discovery of information on tires manufactured to specifications other than those involved in the accident. According to the court, "Cooper essentially seeks to limit the plaintiffs' discovery based upon its own theory of what tires are substantially similar. However, a party should not be limited by its opponent's theory of the case in determining what is discoverable."

According to the court, "Cooper essentially seeks to limit the plaintiffs' discovery based upon its own theory of what tires are substantially similar. However, a party should not be limited by its opponent's theory of the case in determining what is discoverable."

The appeals court also addressed the company's complaint that the lower court did not expressly find that its burden or expense of discovery failed to outweigh plaintiffs' likely benefit from the discovery, finding "no authority in this circuit that obligated the district court to make formal and explicit findings regarding each of the factors identified in the discovery rules." Stating that most of the tire company's arguments were presented for the first time before the appeals court, the Tenth Circuit refused to "use mandamus to hold the district court responsible for failing to address arguments that were not before it, particularly where it is not clear that the district court erred."

CALIFORNIA APPEALS COURT IMPOSES TERMINATING SANCTIONS FOR DISCOVERY ABUSE IN CAR ODOR DISPUTE

A California appeals court has taken the rare step of finding that a trial court abused its discretion in failing to impose "terminating sanctions" against Bentley Motors, Inc. for the company's misuse of the discovery process in litigation over an obnoxious odor in a Bentley owned by the plaintiff. *Doppes v. Bentley Motors, Inc.*, No. 04CC06715 (Cal. Ct. App., 4th App. Dist., Div. Three, decided June 8, 2009). At trial, the plaintiff was awarded $214,000, the car's value, in damages, but the appellate decision requires the trial court to (i) find that Bentley intentionally violated California's Lemon Law and (ii) enter a default judgment against the car maker on the fraud cause of action, as terminating sanctions. The lower court was also ordered to conduct further proceedings to determine additional damages, which could include statutory double damages.

The court details the many ways, over some two years and continuing through trial, that Bentley failed to comply with discovery orders requiring it to produce information and documents about its knowledge of the odor problems, other complaints about odor and its limited efforts to fix the cars with an odor-reduction kit. The company did not implement effective litigation holds, produced discovery late or not at all, and failed to conduct diligent searches for responsive material. The company also apparently responded to some discovery orders and requests by claiming it was unable to procure records from its British arm.

The company did not implement effective litigation holds, produced discovery late or not at all, and failed to conduct diligent searches for responsive material.

The appeals court acknowledges that the conduct in this case was similar to that in cases where terminating sanctions were found appropriate, but was unable to find a case "in which the appellate court reversed an order denying terminating sanctions." Yet, the court ruled, "the trial court had to impose terminating sanctions once it was learned during trial that Bentley still had failed to comply with discovery orders and directives and Bentley's misuse of the discovery process was even worse than previously known." The court also made adjustments to the attorney fee award, finding unwarranted some of the deductions the trial court made.

FAMILIES SETTLE FOR $80 MILLION WITH SEVERAL COMPANIES OVER FATAL HURRICANE RITA BUS FIRE

The families of 23 elderly nursing home residents who were killed in September 2005 onboard a chartered bus that burst into flames while evacuating before Hurricane Rita have reportedly reached an $80 million settlement with several companies sued for a design defect in the vehicle's hub-and-axle system that was allegedly prone to failure. The National Highway Traffic Safety Commission reportedly found it likely that the accident was caused by a rear axle's insufficient lubrication, leading the axle to overheat and cause a fire in the wheel well, filling the bus with flames and heavy smoke.

The settlement, filed June 4, 2009, in Texas, ends litigation against the bus manufacturer and the hub-and-axle component designer and maker, according to published reports. Other defendants reportedly included the bus broker, bus operator, the company that serviced the bus before the evacuation, and a towing company that changed a flat tire on the axle where the fire later erupted.

The victims' families also reportedly claimed that the nursing home's corporate owner, Sunrise Senior Living Services of McLean, Virginia, and bus broker Global Charter failed to properly screen the company that supplied the buses. The settlement included a prior agreement in 2007 that called for ending a lawsuit against Sunrise Senior. *See Product Liability Law 360*, June 8, 2009.

ALL THINGS LEGISLATIVE AND REGULATORY

CPSC Requests Comments on Strategic Plan

The Consumer Product Safety Commission (CPSC) is developing its agenda and priorities for fiscal year 2011, which begins October 1, 2010, and requests **written comments** on its strategic plan by June 26, 2009. The commission is considering revisions to its current strategic plan under the Government Performance and Results Act (GPRA). The revised plan will provide an overall guide to future agency actions and budget requests.

In its 2010 performance budget request to Congress, the agency seeks more funds to hire more personnel to carry out its mandates under the Consumer Product Safety Improvement Act of 2008. A specific request of $200,000 is sought for nanotechnology research and nearly half a million is sought to pay the costs of establishing CPSC's first overseas office in China. *See Federal Register*, June 9, 2009.

A specific request of $200,000 is sought for nanotechnology research and nearly half a million is sought to pay the costs of establishing CPSC's first overseas office in China.

House Judiciary Committee Conducts Hearing on "Sunshine in Litigation Act"

A subcommittee of the House Judiciary Committee conducted a hearing on June 4, 2009, to consider opposing positions on a bill (H.R. 1508), the Sunshine in Litigation Act, that would impose requirements on federal judges, faced with issuing protective orders, to account for public health and safety in their rulings. Among those testifying were a lawyer with a public interest organization, the federal district court judge who chairs the Judicial Conference's Advisory Committee on Civil Rules and a Georgetown University law professor.

Similar legislation has been introduced in every Congress since 1991 and is intended to address the practice in litigation to premise the production of documents in discovery or the settlement of product defect or other claims on preventing the public disclosure of internal corporate documents. The Public Justice witness, who

opined that the current legislative proposal is too weak, cited specific examples of protective orders that prevented the public from learning about product hazards or wrongful corporate conduct. Judge Mark Kravitz criticized the bill, contending that it intruded on the judiciary's prerogative to adopt rules of civil procedure in a transparent process that takes into consideration the views of all stakeholders and is based on empirical evidence.

According to Kravitz, such evidence does not support legislation of this nature which would "burden judges, further delay pretrial discovery and inevitably increase the cost of civil litigation in the federal courts" by requiring judges "to review discovery information to make public health and safety determinations in every request for a protective order, no matter how irrelevant to public health or safety." He asserted that current law sufficiently protects litigants and the public by allowing judges to narrowly tailor protective orders to "grant only the protection needed."

Law Professor Sherman Cohn discussed an ethics hypothetical presented to incoming law students that demonstrates how the interests of those involved in settlement negotiations never involve or represent "the social values of the public." Cohn acknowledged the significant body of literature that has been gathered over two decades while these issues have been before Congress; he disagreed that the matter should be dealt with by the U.S. Judicial Conference, stating that it is instead "a choice to be made among various values and that that is a substantive matter rather than a mere matter of procedure."

Oregon House and Senate Approve Bill Extending Time Limits to Sue for Defective Products

The Oregon House reportedly approved a **bill** (S.B. 284) that would extend from eight to 10 years from the date of purchase the time limit for those suing manufacturers for product defects. The proposal now awaits the signature of Governor Ted Kulongoski (D). The state's Trial Lawyers Association reportedly sought an extension to 25 years, while the Oregon Liability Reform Coalition, consisting of large manufacturing interests, has opposed the measure. According to a news source, Oregon's current law is second only to North Carolina as the nation's most restrictive. *See Statesman Journal*, June 13, 2009.

Florida Supreme Court Adopts Rules to Improve Management of Complex Civil Litigation

The Florida Supreme Court has **adopted** a new procedural rule that defines "complex litigation," identifies the criteria for courts to consider in deciding whether to handle a case as complex and establishes procedures for raising and deciding the matter. The court also amended some of its rules to improve the management of such litigation. Family law matters are specifically exempted from the new rules. The court will accept comments on the rule for 60 days from the date of approval, which occurred May 28, 2009.

LEGAL LITERATURE REVIEW

Jean Eggen, "The Mature Product Preemption Doctrine: The Unitary Standard and the Paradox of Consumer Protection," *Case Western Reserve Law Review* (forthcoming)

According to Widener University School of Law Professor Jean Eggen, "The history of the U.S. Supreme Court's product preemption doctrine has been characterized by inconsistency and confusion." Eggen's article analyzes that doctrine in light of recent preemption rulings and argues that the Court's decision to embrace a "unitary standard" in its approach, that is, merging the previously discrete elements of express and implied preemption into a single, discretionary analytical process, will invite "arbitrary and unpredictable results" that pose "a threat to the public in the area of public safety." Based on purported agency failures to protect the public from unsafe products and a belief that state tort actions can advance consumer protection, Eggen urges the courts to give the presumption against preemption "primary consideration" in product liability cases, "whether the analysis is one of express preemption or implied preemption."

"The history of the U.S. Supreme Court's product preemption doctrine has been characterized by inconsistency and confusion."

LAW BLOG ROUNDUP

Comparing *Caperton* with Sotomayor's Speeches About Race, Gender and Judging

"The most intriguing aspect of Kennedy's majority opinion is his meditation on judicial bias, which sounds strikingly like the all-too-public self-scrutiny of Sonia Sotomayor." U.S. Supreme Court Correspondent Dahlia Lithwick, reflecting on the similarities between the Court's opinion in *Caperton v. A.T. Massey Coal Co.* and statements that Court-nominee Sonia Sotomayor has made about identity and judicial decisionmaking. Lithwick concludes, "Sotomayor's Berkeley speech is nothing more than a case study for Kennedy's long meditation on the judicial craft and a check against Roberts' warning about trashing the judiciary with false claims of bias. If anything, her candor should guarantee her a seat at the high court as someone who has spent years grappling with an issue most judges would prefer to pretend away."

Slate.com, June 8, 2009.

Taking the Public Pulse on *Caperton*

"We checked in with assorted and sundry smart people to get their view on the *Massey Coal* ruling. The consensus reaction, it seems: happiness." *Wall Street Journal* Legal Correspondent Ashby Jones, blogging about what some in the legal community were saying in response to the U.S. Supreme Court's ruling about judicial bias in the case from West Virginia involving a justice who ruled in favor of a political supporter.

WSJ Law Blog, June 8, 2009.

Shook, Hardy & Bacon L.L.P.

PRODUCT LIABILITY LITIGATION REPORT

JUNE 18, 2009

THE FINAL WORD

Scientists Advance Theory of How Specific Nanoparticle Could Cause Lung Cancer in Mice

In a discovery that some researchers hope will eventually protect workers and consumers, scientists state that they have apparently identified not only how a type of tiny nanoparticle could cause lung cancer in mice, but have blocked the process. The research, by the Chinese Academy of Medical Sciences, appears in the *Journal of Molecular Cell Biology*.

Lead researcher Chengyu Jiang claims that the latest discovery could help develop strategies to prevent lung damage caused by nanoparticles. "Nanomedicine holds extraordinary promise, particularly for diseases such as cancer and viral infections," he was quoted as saying. "But safety concerns have recently attracted great attention and with the technology evolving rapidly, we need to start finding ways now to protect workers and consumers from any toxic effects that might come with it. The idea is that, to increase the safety of nanomedicine, compounds could be developed that could either be incorporated into the nano product to protect against lung damage, or patients could be given pills to counteract the effects."

Cancer researcher Laura Bell said, however, that although it is "great to see new advances being made to ensure the safety of nanomedicine" the research is still at an early stage and has yet to be tested in people. "Nanotechnology is an expanding area of research with exciting potential and establishing its safety is essential if we are to realize its potential to treat people with cancer," she was quoted as saying. Other experts have reportedly said that general conclusions about all nanoparticles cannot be drawn from a study that involved one specific type.

The latest lab research apparently focused on a class of nanoparticles called polyamidoamine dendrimers (PAMAMs). Tests found that the particles could cause lung damage in mice by triggering a type of programmed cell death. Researchers found that this effect could be blocked by using a drug inhibitor. Mice exposed to PAMAMs apparently had higher levels of lung inflammation and higher death rates, while those first injected with the inhibitor were less affected. *See BBC News*, June 11, 2009. ■

OFFICE LOCATIONS

Geneva, Switzerland
+41-22-787-2000

Houston, Texas
+1-713-227-8008

Irvine, California
+1-949-475-1500

Kansas City, Missouri
+1-816-474-6550

London, England
+44-207-332-4500

Miami, Florida
+1-305-358-5171

San Francisco, California
+1-415-544-1900

Tampa, Florida
+1-813-202-7100

Washington, D.C.
+1-202-783-8400

ABOUT SHB

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

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

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

With 93 percent of our more than 500 lawyers focused on litigation, Shook has the highest concentration of litigation attorneys among those firms listed on the *AmLaw* 100, *The American Lawyer's* list of the largest firms in the United States (by revenue).