Shook, Hardy & Bacon L.L.P.

MAY 30, 2013

PRODUCT LIABILITY LITIGATION REPORT

CONTENTS

LAW FIRM NEWS

Croft and Reynolds Consider Liability Implications of Driverless Auto Technologies

Shook, Hardy & Bacon Global Product Liability Partner **Sarah Croft** and Associate **John Reynolds** have co-authored an **article** titled "Driverless vehicles: liability and new automotive technologies," appearing in the June 2013 issue of *The In-House Lawyer*. They discuss the autonomous features currently available, including automatic braking systems, self-parking and radar-controlled cruise control; the advantages these features can provide—increased mobility for the aged or blind, enhanced safety and certain environmental benefits, for example; and their potential liability implications. If lawmakers or regulators attempt to curtail liability for companies making autonomous or partially autonomous vehicles, the authors suggest that they do so with the understanding that these innovations should reduce the number of accidents by reducing the risk that driver error can cause an accident and should involve less severe crashes.

CASE NOTES

Fifth Circuit Interprets Fragmented Personal-Jurisdiction Ruling in Forklift Defect Case

According to the Fifth Circuit Court of Appeals, its "stream-of-commerce" approach to personal jurisdiction remains valid following *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011), a ruling that failed to generate a single rationale for the U.S. Supreme Court's conclusion that a foreign manufacturer could not be sued in a New Jersey state court for injury allegedly caused by a defective product. ***Ainsworth v. Moffett Eng'g*, No. 12-60155 (5th Cir., decided May 9, 2013)**. Applying that approach, the Fifth Circuit affirmed a lower court determination that it had jurisdiction over the defendant, a forklift manufacturer with its principal place of business in Ireland, in a product-liability and wrongful-death action brought by the widow of a man killed while working at a Mississippi farm after he was run over by the defendant's allegedly defective forklift.

The Fifth Circuit acknowledged that its stream-of-commerce approach—under which the minimum contacts requirement of personal jurisdiction is met if the court

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

"finds that the defendant delivered the product into the stream of commerce with the expectation that it would be purchased by or used by consumers in the forum state"—conflicts with the *J. McIntyre* plurality opinion, which would permit the exercise of jurisdiction "only where the defendant can be said to have targeted the forum." But where "no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" According to the Fifth Circuit, the narrowest grounds were provided by Justice Stephen Breyer's concurring opinion, resolving the issue by adhering to existing precedent. A single sale in New Jersey was not, in Justice Breyer's view, an adequate basis for personal jurisdiction.

In contrast, the Fifth Circuit observed that the Irish manufacturer, through an exclusive agreement with a U.S.-based distributor, sold 203 forklifts to customers in Mississippi from 2000 to 2010. The court further noted that the distributor sells or markets the manufacturer's products in all 50 states, "and Moffett makes no attempt to limit the territory in which [the distributor] sells its products." During that period, Moffett sold more than 13,000 forklifts to its distributor. The Mississippi sales accounted for some 1.55 percent of the defendant's U.S. sales, and, the court said, "[T]he record indicates that Moffett designed and manufactures a forklift for poultry-related uses. Thus, even though Moffett did not have specific knowledge of sales by [its distributor] in Mississippi, it reasonably could have expected that such sales would be made, given the fact that Mississippi is the fourth largest poultry-producing state in the United States."

Third Circuit Rules 10-Year Exposure to Hazardous Releases a Single Event Under CAFA

The Third Circuit Court of Appeals has determined that plaintiffs who filed a toxic exposure lawsuit in a Virgin Islands court may litigate their claims in that court, because it falls within an exclusion to removal as a mass action under the Class Action Fairness Act (CAFA). ***Abraham v. St. Croix Renaissance Group, L.L.P.*, No. 13-1725 (3d Cir., decided May 17, 2013)**. That exclusion applies to any civil action in which "all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State." 28 U.S.C. § 1332(d)(11)(B)(ii)(I).

The issue arose from the exposure of 459 plaintiffs to the airborne allegedly hazardous by-products of a former alumina refinery on the south shore of St. Croix. The defendant purchased the property in 2002 and allegedly failed to abate the hazard or control the emissions. It removed the lawsuit to federal court, and the plaintiffs moved to remand, claiming that CAFA excluded their action from the definition of "mass action." The district court and Third Circuit agreed.

The Third Circuit determined that "an event or occurrence" is not confined "to a discrete happening that occurs over a short time span such as a fire, explosion, hurri-

cane, or chemical spill." And nothing in the plain text limits the words to "a specific incident with a fixed duration of time," the court stated, adding that its "broad reading does not thwart Congress's intent, which recognized that some aggregate actions are inherently local in nature and better suited to adjudication by a State court."

SCOTUS Allows Attorney's Fees Under Vaccine Injury Compensation Fund

The U.S. Supreme Court has determined that claimants who file time-barred petitions for compensation under the National Childhood Vaccine Injury Act, a no-fault compensation system for injuries allegedly caused by vaccines, may recover attorney's fees if their petitions were "brought in good faith and there was a reasonable basis for the claim for which the petition was brought." ***Sebelius v. Cloer*, No. 12-236 (U.S., decided May 20, 2013)**. Writing for the court—unanimous as to the outcome—Justice Sonia Sotomayor said that the Act did not distinguish between timely and untimely petitions in addressing a court's discretion to award attorney's fees and costs. So ruling, the court affirmed the en banc Federal Circuit Court of Appeals.

The timeliness of the claimant's petition was addressed by several courts. She claimed that a Hepatitis-B vaccine in 1997 caused symptoms that were ultimately diagnosed in 2003 as multiple sclerosis. She filed her claim in 2005, one year after learning about an alleged link between the disease and the vaccine. The Federal Circuit panel determination that her claim was timely is discussed in the May 13, 2010, **issue** of this *Report*. And the en banc Federal Circuit ruling dismissing her claim as untimely, while accepting the doctrine of equitable tolling, is addressed in the August 25, 2011, **issue**.

MDL Court Approves Settlement of Class Claims Against Toning Shoe Maker

A multidistrict litigation (MDL) court in Kentucky has approved a $45-million settlement of nationwide class-action lawsuits alleging that Skechers deceived consumers by claiming that its toning shoes could confer certain health benefits. *In re Skechers Toning Shoe Prods. Liab. Litig.*, MDL No. 2308 (U.S. Dist. Ct., W.D. Ky., Louisville Div., decided May 10, 2013). Under the agreement, the company, which denies liability, will also work with the Federal Trade Commission (FTC) to change the way it markets, advertises and labels its shoes, eschewing health benefit claims "unless supported by scientific evidence substantiating those claims." The 520,000 claimants will share a $40-million settlement fund, and attorneys for several of the class actions consolidated before the court will share $5 million in fees and costs, with most awarded to class counsel. Any remaining funds will be paid to the FTC.

Briefs Filed in Appeal over Secrecy in CPSC Product-Incident Database Litigation

Public interest groups and a consumer-product manufacturer have filed their briefs in litigation pending before the Fourth Circuit Court of Appeals; at issue are district court orders allowing the company to proceed under a pseudonym and sealing the docket and proceedings in its lawsuit against the Consumer Product Safety Commission (CPSC) to keep a "materially inaccurate" incident report off the agency's online database, saferproducts.gov. *Company Doe v. Public Citizen*, No. 12-2209 (4th Cir., filed May 10 and 13, 2013). The district court agreed with Company Doe that the incident report was materially inaccurate and thus could not be published in the database, which was established under the Consumer Product Safety Improvement Act.

As Company Doe frames the issue, "The sole question before this Court is whether outside groups may intervene post-judgment, after the underlying case has already been closed, to challenge the sealing order entered by the district court and thus publicly disclose the very same incident report that Company Doe successfully sued to exclude and, furthermore, identify the manufacturer of an innocent product." The appellants claim that the district court erred in granting the sealing motion "on the ground that the company's desire to avoid potentially adverse publicity overrides the public's First Amendment and common law rights of access to court proceedings." They also argue that permitting the company to litigate under a pseudonym to protect its business reputation constituted an abuse of discretion.

ALL THINGS LEGISLATIVE AND REGULATORY

Companion Bills Call for Enhanced Sports Safety Equipment Standards

Bills have been introduced in the U.S. House and Senate that would instruct the Consumer Product Safety Commission to review a forthcoming National Academy of Sciences report on sports-related concussions in youth, make recommendations to protective equipment manufacturers and, if necessary, promulgate standards based on the report's findings. The "Youth Sports Concussion Act" (S. 1014/H.R. 2118) would also allow the Federal Trade Commission to impose civil penalties for false or misleading claims about the safety benefits of protective equipment and give state attorneys general the authority to enforce the law.

Introduced on May 22, 2013, the Senate bill has been referred to the Committee on Commerce, Science, and Transportation, and the House bill has been referred to the Committee on Energy and Commerce. According to Senate sponsor Tom Udall (D-N.M.), numerous sports organizations, advocacy groups, trade associations, and medical associations support the measures. *See Sen. Tom Udall News Release,* May 22, 2013.

CPSC Seeks Comments on Proposed Safety Standard for Carriages and Strollers

The U.S. Consumer Product Safety Commission (CPSC) has published a **notice** of proposed rulemaking that would adopt, with some additional requirements, ASTM F833-13, "Standard Consumer Safety Specification for Carriages and Strollers." CPSC has proposed adding to the ASTM standard a "requirement and test method to address scissoring, pinching, or shearing hazards at the hinge link of 2D fold strollers." While ASTM's standard is protected under U.S. copyright law, it can be viewed as a read-only document during the comment period on this proposal. Comments are requested by August 5, 2013.

According to CPSC, four fatalities involving strollers were reported from January 2008 through December 2012, with an additional 1,203 stroller-related nonfatal incidents reported for the same period. These incidents involved children younger than age 4. Hazard patterns included problems associated with wheels, parking brakes, lock mechanisms, restraints, structural integrity, stability, clearance between components, car-seat attachments, canopies, handlebars, seats, sharp points or edges, and trays. Incidents apparently involving older children and adults mostly resulted in finger injuries.

CPSC also notes that 29 recalls occurred during this four-year period, including 6.82 million strollers made by 15 different companies. "The recalls related to incidents involving finger injuries, strangulation hazards, brake failures, choking hazards, and fall hazards." Among the matters on which CPSC requests comments is a specific request "on whether 18 months is an appropriate length of time for carriage/stroller manufacturers to come into compliance with the rule." *See Federal Register*, May 20, 2013.

Petition Seeks CPSC Rulemaking on Window Covering Product Cords

Consumer advocacy organizations have filed a **petition** with the Consumer Product Safety Commission (CPSC) requesting that it "promulgate a mandatory standard that prohibits any window covering cords where a feasible cordless alternative exists, and for those instances where a feasible cordless alternative does not exist, requires that all cords be made inaccessible through the use of passive guarding devices." According to the petition, voluntary industry measures have proven inadequate to protect children from the strangulation hazards posed by accessible cords. In this regard, the petitioners claim, "28 years after Industry agreed to work with CPSC to address this hazard, and having been given clear direction and multiple opportunities to develop a meaningful standard, and having been duly warned of the inadequacies of the proposed standard, even this latest version (the sixth attempt) of the ANSI/WCMA A100.1-2012 standard fails to eliminate or adequately reduce the risk of injury and death from accessible window covering cords."

NHTSA Solicits Technical Report Comments

The National Highway Traffic Safety Administration (NHTSA) has issued a technical report titled "Injury Vulnerability and Effectiveness of Occupant Protection Technologies for Older Occupants and Women," that compares "the injury and fatality risk in crashes of older and younger vehicle occupants and of male and female occupants." The agency requests comments on the report by September 25, 2013. *See Federal Register*, May 28, 2013.

LEGAL LITERATURE REVIEW

Sheila Sheuerman, "The NFL Concussion Litigation: A Critical Assessment of Class Certification," *Florida International University Law Review*, May 2013

Charleston School of Law Professor Sheila Scheuerman considered recent lawsuits filed by football players seeking to hold the National Football League (NFL) responsible for the "long-term effects of on-field head injury," including repeated concussions. Noting that personal injury class actions are considered "dead" because "too many individual issues, such as causation and medical history, doom the typical personal injury case," the author reports that plaintiffs are trying "to avoid this problem by asserting class claims only for 'medical monitoring.'" The article explores the courts' apparent "uncertainty on whether medical monitoring class actions should be treated as an injunctive class under Federal Rule of Civil Procedure 23(b)(2) or as a damages class under Federal Rule of Civil Procedure 23(b)(3)." She concludes that the medical monitoring claims as currently pleaded do not satisfy the criteria for class certification regardless of the category into which they fit.

LAW BLOG ROUNDUP

Champagne for Everyone?

"The Federal Rules of Civil Procedure are 75 years old this year. Imagine a fete thrown in their honor—mini rule books as party favors, balloons emblazoned with Rule numbers 1-86, and a cake decorated with the words 'Just, Speedy, and Inexpensive.'" Seattle University School of Law Professor Brooke Coleman, blogging about an article on the federal civil rulemaking process, summarized in the August 23, 2012, issue of this *Report*. Coleman highlights the article's call for the rules committee to amend Rule 8 to overrule *Twombly/Iqbal*, if the empirical findings warrant such an amendment, even if the U.S. Supreme Court would be inclined to stop any Rule 8 change. She concludes that the author celebrates the rulemaking process while articulating "bumps in the road," "gives advice about how the process might improve and closes his toast with an inspiring call to action. After reading his article, we should all lift a glass, wish the civil rulemaking process well, and take a celebratory sip of champagne."

Courtslaw.jotwell.com, May 15, 2013.

The Government's Fourth Branch Under Scrutiny

"Whoa . . . who knew?" University of Notre Dame Law School Professor Richard Garnett, commenting on a *Washington Post* item authored by Law Professor Jonathan Turley about administrative agencies. Garnett's comment was a response to Turley's statement, "The rise of this fourth branch represents perhaps the single greatest change in our system of government since the founding. We cannot long protect liberty if our leaders continue to act like mere bystanders to the work of government."

PrawfsBlawg, May 28, 2013.

THE FINAL WORD

JPML Panel Chair Explains Increase in MDL Request Rejections

The U.S. Judicial Panel on Multidistrict Litigation (JPML) has in recent years rejected a higher percentage of centralization requests than in previous years. For example, the rejection rate between 2000 and 2006 was less than 10 percent in three years, while the rejection rates for 2010 through 2012 were 48 percent, 43 percent and 38 percent, respectively. According to JPML Chair U.S. District Judge John Heyburn, part of the increase can be attributed to changes in the types of cases presented for centralization, such as patent claims and claims of false marketing against food companies, where the question of centralization is less clear. Heyburn also noted that he has prioritized studying the effects of JPML decisions since taking a lead role in 2007, with the panel consulting multidistrict litigation (MDL) judges and attorneys. "All of that information has made the panel more nuanced in its judgments, and that's part of the reason, perhaps, for the increase in [rejections]," he reportedly said. *See Law360*, May 24, 2013.

UPCOMING CONFERENCES AND SEMINARS

ACI, New York City – June 5-7, 2013 – "4th Annual Advanced Forum on Biosimilars." Shook, Hardy & Bacon Life Sciences & Biotechnology Partner **John Garretson** will participate in a panel discussion on "Preparing for the Impending Reality of Biosimilars Patent Litigation: Immediate Action Plans for the First Wave," during this event. Garretson joins a distinguished faculty including in-house counsel for major pharmaceutical companies focusing on biosimilar IP, regulatory, commercial, and policy issues. Shook, Hardy & Bacon is a conference co-sponsor.

ACI, Chicago, Illinois – June 26-27, 2013 – "Consumer Products Regulation & Litigation." Shook, Hardy & Bacon Pharmaceutical & Medical Device Litigation Partner **Harley Ratliff** will join a panel of speakers discussing "Total Recalls: Counsel Perspective on Processes for Streamlining the Response to Product Issues and Effectively Working with the CPSC." Designed to provide consumer product manufacturers with

a "safety net" in balancing regulatory compliance and litigation risks, this conference brings together a distinguished faculty of judges, regulators and in-house and outside counsel "to give consumer products professionals the most up-to-date, expert tested advice possible on navigating this terse terrain."

DRI, Washington, D.C. – July 25-26, 2013 – "2013 DRI Class Actions Conference." Shook, Hardy & Bacon Class Actions & Complex Litigation Partners Tim Congrove and Jim Muehlberger will participate in this event. Congrove, who is also serving as program vice-chair, will moderate a panel of distinguished in-house counsel discussing "Inside and Out: A Wide-Ranging Discussion of Class Actions from the Client's Perspective." Muehlberger "will discuss the current state of issue classes, techniques for addressing them, and his experience in trying a case involving a Rule 23(c)(4) class" during a presentation titled "Making an Issue Out of It: The Trial of a 23(c)(4) Class." SHB is a conference co-sponsor.

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
Philadelphia, Pennsylvania
+1-267-207-3464
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 95 percent of our more than 440 lawyers focused on litigation, Shook has the highest concentration of litigation attorneys among those firms listed on the *AmLaw* ***100,*** *The American Lawyer's* list of the largest firms in the United States (by revenue).