Shook, Hardy & Bacon L.L.P.

OCTOBER 27, 2011

PRODUCT LIABILITY LITIGATION REPORT

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U.S. SUPREME COURT GRANTS *CERT.* ON CORPORATE CIVIL TORT LIABILITY UNDER ALIEN TORT STATUTE

The U.S. Supreme Court has decided to review a Second Circuit Court of Appeals decision involving whether the Alien Tort Statute (ATS) confers federal jurisdiction over tort claims against corporations. ***Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (U.S., *cert. granted*, October 17, 2011)**. The plaintiffs allege that the corporate defendants aided and abetted the Nigerian government in committing violations of the law of nations.

The Second Circuit determined that because corporate tort liability is a matter of domestic law and the ATS is restricted to offenses defined by customary international law, a plaintiff bringing an ATS suit against a corporation has not alleged a violation of customary international law. According to the court, "customary international law has steadfastly rejected the notion of corporate liability for international crimes, and no international tribunal has ever held a corporation liable for a violation of the law of nations." The case was dismissed *sua sponte* for lack of subject matter jurisdiction.

The plaintiffs framed their issues on appeal as (i) "Whether the issue of corporate civil tort liability under the Alien Tort Statute is a merits question, as it has been treated by all courts prior to the decision below, or an issue of subject matter jurisdiction, as the court of appeals held for the first time"; and (ii) "Whether corporations are immune from tort liability for violations of the law of nations such as torture, extrajudicial executions or genocide, as the court of appeals decision provides, or if corporations may be sued in the same manner as any other private party defendant under the ATS for such egregious violations, as the Eleventh Circuit has explicitly held." The case will be argued with another case raising similar issues under the Torture Victim Protection Act.

Meanwhile, the Ninth Circuit Court of Appeals, joining the Seventh, Eleventh and D.C. Circuits, has determined that corporations may be held liable in U.S. courts for genocide and war crimes under the ATS. ***Sarei v. Rio Tinto, PLC*, Nos. 02-56256, 02-56380 and 09-56381 (9th Cir., decided October 25, 2011)**. Residents of the island of Bougainville in Papua New Guinea alleged that a multinational mining company is responsible for the deaths of some 15,000 residents in the 1980s following an uprising against the company involving purported pollution and discrimination issues.

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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.

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JURY AWARDS PLAINTIFFS $20.6 MILLION FOR DEATH FROM INFLATABLE POOL SLIDE INJURY

According to news sources, the family of a woman who died after using an inflatable, in-ground pool slide that partially collapsed before she reached the pool has been awarded more than $20 million in compensatory and punitive damages following a jury trial in Massachusetts. *Aleo v. SLB Toys USA Inc.*, No. 2008-20149-A (Essex Super. Ct., Mass., verdict rendered October 13, 2011). The award was rendered against one defendant, the company that sold the Banzai Falls® slide, which was imported from China and apparently never underwent tests to determine whether it complied with federal safety standards. Two other companies, including the product's manufacturer, reportedly agreed to settle the claims before the case went to the jury. The plaintiffs alleged that the defendants negligently designed and manufactured the product and failed to provide adequate instructions and warnings.

The retailer's lawyers reportedly argued that federal regulations did not apply to the slide because it was inflatable and that the company was not responsible for safety testing. They also purportedly challenged how the accident occurred. Witnesses said the 29-year-old mother of a toddler climbed to the top of the slide and then started sliding down head-first. Near the bottom, the slide allegedly bottomed out, and the woman struck her head on the edge of the pool. Unable to breathe from the paralysis caused by a broken neck, she died the following day when life support was removed. Court watchers indicated that the verdict could be the largest ever awarded by an Essex County jury. *See Eagle-Tribune*, October 14, 2011; *Law 360*, October 17, 2011.

PRODUCT MAKER ASKS COURT TO STOP CPSC FROM PUBLISHING INCIDENT REPORT ON PUBLIC DATABASE

An anonymous company has reportedly filed a lawsuit under seal in a federal court in Maryland seeking to stop the Consumer Product Safety Commission (CPSC) from posting on its public safety reporting database an incident report involving one of the company's products. The incident report, apparently filed by an unnamed government agency, claims injury to a child; the company contends that it lacks factual, scientific or medical evidentiary support. A CPSC spokesperson reportedly confirmed that the complaint had been filed, that it marked the first time a company had taken such action, and that the agency was seeking to unseal the record.

Some apparently speculate that the litigation could have a crippling effect on the database, which has been publishing product incident reports since March 2011, if other manufacturers take similar action. CPSC procedures provide manufacturers with an opportunity to review and respond to incident reports, and inaccuracies are removed before posting. Companies are also allowed to post comments that appear with the reports online. Information about a Government Accountability

Office report analyzing the database since its inception appears in the October 13, 2011, issue of this *Report*. *See The Washington Post*, October 18, 2011; *Associated Press*, October 19, 2011; *Government Executive*, October 20, 2011; *BNA Product Safety & Liability Reporter*, October 24, 2011.

ALL THINGS LEGISLATIVE AND REGULATORY

Lawmakers to Introduce Bill Calling for Cost-Benefit Analysis of Federal Agency Rules

U.S. Senators Mark Pryor (D-Ark.) and Rob Portman (R-Ohio) reportedly plan to introduce a bill that would require federal agencies, including the Consumer Product Safety Commission (CPSC), to involve stakeholders and conduct cost-benefit analyses at the earliest stages of rulemaking. Participating in a recent product-risk seminar, Pryor said that the bill would amend the Administrative Procedure Act by putting "a dose of common sense into the regulatory regime."

While praising recent amendments to the Consumer Product Safety Improvement Act of 2008 giving CPSC additional product safety authority, Pryor said "everybody is holding their breath" about the outcome of current budget negotiations and their potential effect on agency rulemaking and enforcement. Speaking about the congressional debt committee and its upcoming recommendations, Pryor said the "supercommittee" has "gone to total radio silence." He and Portman reportedly plan to push their bill by the end of 2011 or early 2012. *See Product Liability Law360,* October 19, 2011.

GAO Issues Report on Administration of Asbestos Injury Compensation Trusts

A recently released Government Accountability Office (GAO) report apparently confirms defense counsel complaints that trusts established to compensate those purportedly injured by asbestos exposure operate, for the most part, secretly, thus providing some plaintiffs with opportunities to make contradictory claims to recover from multiple funds.

Titled "Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts," the report is based on a study of 52 of the 60 trusts that were created as dozens of asbestos defendants declared bankruptcy under a crushing litigation burden. According to the report, just one trust publicly discloses the identity and claims of those paid. The remainder apparently resist disclosure on the ground of claimant medical confidentiality and costs associated with redacting confidential information.

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GAO found that the trusts have paid approximately 3.3 million claims valued at about $17.5 billion. Most of the trusts "publish for public review annual financial reports and generally include total number of claims received and paid. Other information in the possession of a trust, such as an individual's exposure to asbestos, is generally not available to outside parties but may be obtained, for example, in the

course of litigation pursuant to a court-ordered subpoena." On the issue of potential fraud, the report observes, "Although the possibility exists that a claimant could file the same medical evidence and altered work histories with different trusts, each trust's focus is to ensure that each claim meets the criteria defined in its [trust rules], meaning the claimant has met the requisite medical and exposure histories to the satisfaction of the trustees. Of the trust officials that we interviewed that conducted audits, none indicated that these audits had identified cases of fraud."

The report acknowledges the differing views on transparency among claimant and industry stakeholder interests and describes efforts to reform existing compensation systems, including a number of legislative proposals that have periodically been introduced in the U.S. Congress since 1973 when the first appellate opinion upheld a product-liability judgment against an asbestos manufacturer. *See Forbes*, October 19, 2011.

Toy Manufacturer to Pay $1.1 Million for Failure to Report Product Defects to CPSC

The Consumer Product Safety Commission (CPSC) has **reported** that a New Jersey-based toy company has agreed to pay a $1.1-million civil penalty for knowingly failing to report to CPSC the safety defect and hazard presented by its "Auto Fire Target Set." The alleged defect involves the "soft, pliable, plastic toy dart[s]" that children could place in their mouths. If inhaled, the darts could apparently become lodged in the throat and prevent a child from breathing; the product was associated with three deaths by 2010 when Family Dollar Stores, Inc. and CPSC announced a product recall because manufacturer Henry Gordy refused to conduct the recall. While the company denies the allegations of product defect or violation of the reporting requirement, it apparently agreed to settle the claims by paying the penalty. CPSC commissioners voted 5-0 to provisionally accept the agreement. *See CPSC News Release*, October 14, 2011.

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CPSC Adopts Third-Party Testing for Children's Products

The Consumer Product Safety Commission (CPSC) has narrowly approved new third-party testing requirements for children's products. The rules call for domestic manufacturers, importers and private labelers to adhere to a regulatory framework for independent testing to ensure that children's products continue to comply with the Consumer Product Safety Improvement Act of 2008 (CPSIA).

Once published in the *Federal Register*, the rules, which will take effect 15 months thereafter, stipulate that if a children's product undergoes a material change, such as in its design, manufacturing process or in its component parts source, affected firms must retest and recertify that the product complies with federal safety standards. Products complying with the law may feature a voluntary "Meets CPSC Safety Requirements" label.

CPSC also narrowly approved a rule that, 30 days after publication, will allow firms to rely on the component part and finished product testing conducted by their suppliers to meet the testing and certification requirements. According to CPSC, the regulation aims to reduce the regulatory burden on affected companies that are already required to perform initial testing on some products, including those with lead in the paint and those with small parts, and full size and non-full size cribs, pacifiers, and children's metal jewelry. "The new rules will require firms to go beyond initial testing to ensure that their products continue to meet safety standards," CPSC noted. "All domestic manufactures, importers and private labelers of children's products will be required to test the products periodically to ensure continued compliance with federal safety standards."

In a related matter, CPSC unanimously voted to publish a proposed rule that would require affected firms to periodically test representative product samples. It also unanimously approved a measure allowing the agency to seek public comment on how to reduce the costs of third-party testing.

In a **prepared statement**, CPSC Chair Inez Tenenbaum and Commissioners Robert Adler and Thomas Moore, voting in the majority, called the new third-party testing rule the "capstone" of CPSIA and a move that "parents and grandparents have waited years to happen." Meanwhile, Commissioner Nancy Nord issued a **statement** criticizing the third-party and component regulations. Characterizing the regime as "overreaching" and a cost burden that will be passed onto to consumer, Nord said, "The majority did this without demonstrating safety gains that justify these extraordinary costs." *See CPSC News Release,* October 20, 2011.

CPSC Plans to Propose Improve Safety Measures for Table Saws

The Consumer Product Safety Commission (CPSC) has issued an advance notice of proposed rulemaking (**ANPR**) aimed at improving table saw safety for consumers and professionals. Applicable to power tools such as bench saws, contractor saws and cabinet saws, the ANPR could result in mandatory safety standards. CPSC requests comments by December 12, 2011, on issues such as injury risks, regulatory alternatives and economic impacts of various alternatives.

Citing data from a CPSC **study** conducted in 2007 and 2008, commission staff claim that U.S. consumers experienced approximately 67,300 medically treated table saw blade contact injuries at a cost of $2.36 billion in each of those two years. Based on that data, CPSC staff estimate that hospital emergency rooms treat on a daily basis an average of 11 fractures, 11 amputations and eight avulsions, a process in which a body part is torn away, not cut, due to contact with a saw blade.

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CPSC Chair Inez Tenenbaum issued a **statement** saying the commission voted unanimously to initiate the proposed rule after the table saw industry failed to voluntarily take steps to prevent injuries. Commissioner Robert Adler **released** a

statement suggesting that "flesh-sensing technology" may help manufacturers prevent table saw injuries. "On this point," he wrote, "I note that when CPSC writes product safety standards, we do not mandate a particular technology. We write performance standards and leave it to manufacturers to decide how to meet them."

According to CPSC, existing Occupational Safety and Health Administration regulations on table saw safety do not adequately protect home consumers. "Professional woodworkers are more likely to have had training and to be experienced in performing any special or complex operations with the saw and are more likely to recognize situations and set-ups that may be dangerous or require extra care and caution," CPSC said. "Amateur woodworkers generally have little or no safety training, nor training in the proper use of the table saw." *See Federal Register,* October 11, 2011; *CPSC News Release*, October 17, 2011.

CPSC Invites Comments on Product Safety Regulation Review

The Consumer Product Safety Commission (CPSC) has **issued** a request for comments and information on its plan to implement a July 2011 executive order (E.O. 13579) directing that independent regulatory agencies "develop and provide to the public a plan for periodic review of existing significant rules." The review's guiding principles include the identification of "significant" rules that "may be outmoded, ineffective, insufficient, or excessively burdensome." And the agency is required to "modify, streamline, expand, or repeal" identified rules.

The agency notes that it conducted regulatory consistency reviews beginning in 2004 and used as selection criteria the age of the rule, its complexity, and whether it was issued under different statutes. The agency also has criteria for periodic review of rules with a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act. Because E.O. 13579 does not define "significant" rule, CPSC seeks guidance on criteria for the selection of candidate rules for review, as well as possible exclusions, a process for review, how to involve the public, coordination with other agencies, prioritization, and the substance of a regulatory review. Comments are requested by December 19, 2011. *See Federal Register*, October 19, 2011.

Pennsylvania Legislative Committee Considers Venue and Forum Shopping Issues

The Pennsylvania House Judiciary Committee conducted a hearing on October 24, 2011, to consider a bill (H.B. 1552) that would allow a personal injury or wrongful death suit to be filed only "in the county in which the cause of action arose." Shook, Hardy & Bacon Public Policy Partner **Mark Behrens** provided **testimony** in support of the proposal, focusing his remarks on current venue rules that allow a disproportionate number of civil cases to be filed in Philadelphia, which the American Tort Reform Association has characterized as a "judicial hellhole." According to Behrens, "plaintiffs' lawyers expect more favorable outcomes at trial in Philadelphia than in other areas of the Commonwealth. Evidence suggests that they may be right."

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LEGAL LITERATURE REVIEW

Marie Woodbury, Christopher Gramling & William Northrip, "Keeping the Lid on Pandora's Box: Using Traditional Limits on Liability to Defend Corporate Defendants Against Civil Liability Based on Criminal Misuse of Legal Products," *Mealey's Personal Injury Report*, October 24, 2011

Shook, Hardy & Bacon Pharmaceutical & Medical Device Litigation Attorneys **Marie Woodbury**, **Christopher Gramling** and **William Northrip** explain in this article how creative plaintiffs' lawyers have been trying in recent years to pin tort liability on product manufacturers for the harm caused by a criminal who misuses a product "in furtherance of some criminal scheme or activity." Thus, corporations have faced litigation involving the criminal misuse of ammonium nitrate, insecticides, ammunitions, over-the-counter cold medications, chemical carcinogens, firearms, and automobiles. According to the authors, by filing such complaints, plaintiffs "overlook and ignore well-established legal limits on liability." The article discusses those limits and suggests that this attempted expansion of legal liability "would contravene sound public policy."

Linda Sandstrom Simard & Jay Tidmarsh, "Foreign Citizens in Transnational Class Actions," *The Legal Workshop*, October 17, 2011 (*Cornell Law Review*, forthcoming 2012)

Suffolk University Law School Professor Linda Sandstrom Simard and Notre Dame Law School Professor Jay Tidmarsh argue that courts should adopt a new framework for deciding whether foreign citizens may be included as members of American class actions. Until now, courts have generally excluded foreign citizens if their home countries would not recognize the judgment of an American court. The authors claim that this factor plays only a small role in weighing the costs and benefits of including foreign citizens in U.S. class actions and propose instead a rule based on "standard tools of economic analysis."

Thus, say the authors, foreign citizens should be presumptively included "when they assert small-stakes claims," unless the defendant can show that one or more foreign forums are open to these citizens, do not recognize either an American class judgment or settlement, provide cost-effective procedures for resolving small claims, and have rules "likely to result in a more favorable outcome for the foreign citizens than the rules employed in the American court." Foreign citizens should be presumptively excluded, however, if their claims would be viable as individual suits in U.S. courts. This presumption could be overcome by a showing that the foreign citizens expressly consent to be bound by the class judgment or settlement, and they have no available foreign forum.

Jean Sternlight, "Tsunami: *AT&T Mobility v. Concepcion* Impedes Access to Justice," *Oregon Law Review* (forthcoming)

University of Nevada, Las Vegas, Boyd School of Law Professor Jean Sternlight discusses the U.S. Supreme Court's decision in *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), in which a 5-4 Court majority held that federal law preempted lower courts from using a state rule to hold that arbitral class action waivers are unconscionable, thus allowing companies to use arbitration clauses to exempt themselves from class actions. Sternlight claims that lower courts are interpreting the decision broadly as a "'get out of class actions free' card." She contends that, unless corrected by Congress, the case will "provide companies with free rein to commit fraud, torts, discrimination, and other harmful acts without fear of being sued."

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LAW BLOG ROUNDUP

24/7 Access to Information in New Media Age Skews Perception?

"[W]hen it comes to the civil justice system, what you're learning isn't so great. [New media is] deeply skewed, fueling common misperceptions that civil juries routinely award plaintiffs eye-popping verdicts for frivolous claims." A PopTort blogger, discussing a recent study purportedly showing that while we are spending more time with news each day, it is delivered in bits of information shared via digital news aggregators such as Google® and social media such as Facebook® and Twitter®, often as headlines, which "means that the public is being exposed to an overwhelming amount of brief, sensationalized and often incomplete coverage of civil jury verdicts."

ThePopTort, October 19, 2011.

Tort Reformers Address State AG Relationships with Trial Lawyers

"To react to the report and address the subject in more detail, we have brought together a fascinating group of practitioners, journalists, and tort-reform activists to discuss the issue in this featured discussion." A PointofLaw blogger, introducing an online discussion of the Manhattan Institute's latest "Trial Lawyers, Inc." report summarized below. Among those taking part in the discussion will be Shook, Hardy & Bacon Public Policy Partner **Victor Schwartz**.

PointofLaw, October 25, 2011.

THE FINAL WORD

Manhattan Institute Focuses on State Attorneys General Link to "Trial Lawyers, Inc."

The Manhattan Institute's Center for Legal Policy has published the **16th edition** of its "Trial Lawyers, Inc." series, focusing on the purported alliance between state attorneys general (AGs) and the plaintiffs' bar. According to the report, while most understand that trial lawyers have a "powerful political" influence on legislators and elected judges, "[f]ew realize, however, just how in bed the litigation industry is with the very officials we entrust to enforce the law itself—the attorneys general of the various states." The authors contend that state AGs "make possible the payment of windfall fees to their allies in the plaintiffs' bar, whose lawyers in turn gratefully fill the officials' campaign coffers with a share of their easily obtained cash." The report explores this relationship and calls for (i) sunshine laws that would expose the terms of the contingency-fee contracts AGs enter into with plaintiffs' counsel to bring consumer fraud and nuisance actions against business interests, and (ii) other tort reforms "to rein in those who are supposed to be no more than the law's enforcers."

The authors contend that state AGs "make possible the payment of windfall fees to their allies in the plaintiffs' bar, whose lawyers in turn gratefully fill the officials' campaign coffers with a share of their easily obtained cash."

UPCOMING CONFERENCES AND SEMINARS

IBA, Dubai, United Arab Emirates – October 30-November 4, 2011 – "2011 Annual Conference." Shook, Hardy & Bacon International Litigation & Dispute Resolution Practice Co-Chair **Gregory Fowler** will participate in two working sessions, "Hot Topics for International Sales, International Franchising and Product Law and Advertising" and "Damages for Product Liability: Is the Consumer Adequately Protected?" New registrations can be made at the conference venue.

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

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

ACI, New York City – December 5-7, 2011 – "16th Annual Drug and Medical Device Litigation Conference." Co-sponsored by Shook, Hardy & Bacon, this event brings together leading litigators and in-house counsel to share their insights about current

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products liability defense strategies. A number of judges will provide the view from the bench. Shook, Hardy & Bacon Pharmaceutical & Medical Device Partner Michael Koon will join a distinguished panel to discuss "Personal Liability Concerns for Life Sciences Counsel and Other Industry Professionals." Shook, Hardy & Bacon Partner Madeleine McDonough, who co-chairs the firm's Pharmaceutical & Medical Device Practice, will participate on a panel addressing the topic, "Creating Exit Strategies for Mass Torts and Selecting the Most Advantageous Settlement Model." ■

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ABOUT SHB

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

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

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

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