Shook, Hardy & Bacon L.L.P.

JANUARY 7, 2010

PRODUCT LIABILITY LITIGATION REPORT

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EXPANSION OF EXCEPTION TO ECONOMIC LOSS RULE OVERRULED IN AUTO DEFECT CASE

Affirming the dismissal of claims for a defect in the design of an automobile's cruise control switch, the South Carolina Supreme Court has overruled a recent decision "to the extent it expands the narrow exception to the economic loss rule." ***Sapp v. Ford Motor Co.*, No. 26754 (S.C., decided December 21, 2009)**. The court issued the ruling in two cases involving 2000 model Ford F-150 pickup trucks that caught fire due to allegedly defective cruise controls. The only injury involved in both lawsuits was damage to the trucks. The truck owners sought to recover under negligence, strict liability, breach of warranty, and fraud or negligent misrepresentation theories. The courts below dismissed the lawsuits, finding that "the economic loss rule precluded the tort claims."

According to the court, "The purpose of the economic loss rule is to define the line between recovery in tort and recovery in contract. Contract law seeks to protect the expectancy interests of the parties. Tort law, on the other hand, seeks to protect safety interests and is rooted in the concept of protecting society as a whole from physical harm to person or property." If the only loss is damage to the product itself, "tort law provides no remedy and the action lies in contract."

In 2008, the court expanded to all manufacturers a narrow exception to the economic loss rule that had apparently been recognized in the residential home-building context. In *Colleton Preparatory Academy, Inc. v. Hoover Universal, Inc.*, the court "held that the economic loss rule will not preclude a plaintiff from filing a products liability suit in tort where only the product itself is injured when the plaintiff alleges breach of duty accompanied by a clear, serious, and unreasonable risk of bodily injury or death." The dissenting judges in *Colleton Prep* expressed their concern that this expansion of the exception would completely alter products liability law in the state.

Concluding that the *Colleton Prep* majority was in error, the court determined in the auto defect case that "the traditional economic loss rule provides a more stable framework and results in a more just and predictable outcome in products liability cases," and thus partially overruled *Colleton Prep*. Two justices concurred in the result, but wrote separately to urge the court to provide consistency in the application of the economic loss rule, noting its different uses in other contexts. According

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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 Global Product Liability capabilities, please contact

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

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

or

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

to the concurring justices, to clear up any confusion to the bench and bar,"[t]he Court should simply pronounce a list of areas to which public policy prohibits the application of the economic loss doctrine and forego any legal analysis."

FEDERAL COURT DISREGARDS EXPERT'S EFFORT TO CHANGE TESTIMONY IN DISMISSING AUTO DEFECT CLAIMS

A federal court in Oklahoma has dismissed claims alleging that the lack of front-wheel anti-lock brakes (ABS) on a Ford pickup truck caused an accident that seriously injured a child who rode her bicycle into its path. *Bancfirst v. Ford Motor Co.*, No. CIV-09-76 (U.S. Dist. Ct., W.D. Okla., decided December 21, 2009). The court granted Ford's motion for summary judgment after deciding not to consider an affidavit from plaintiff's expert that contradicted his deposition testimony.

According to the court, the expert stated during his deposition that he could not determine when the pickup truck driver initiated a counter steer to the right to avoid the accident. The affidavit, submitted in response to Ford's motion for summary judgment, contained "a new and extremely precise opinion about the timing of the alleged counter steer" and was accompanied by a deposition errata sheet. Finding these new opinions "diametrically opposed to [the expert's] prior statements under oath," the court observed that he inappropriately "treated the deposition like a take home examination" in "an attempt to create a sham factual issue to avoid summary judgment."

The court disregarded the affidavit and errata sheet and concluded that it was "left with a failure of proof on plaintiff's part. Plaintiff has no competent evidence that the accident would not have occurred had Moore's truck been equipped with four-wheel ABS."

LAWSUIT FILED AGAINST TASER MAKER IN PHYSICIAN'S DEATH

A 33-year-old physician and single father allegedly died after he was subjected to five discharges of a TASER "electronic control device" during a traffic stop. According to the complaint filed by his personal representative and the guardians of his minor child, Ryan Rich had a seizure while driving his pickup truck on his way to work. *Rich v. Taser Int'l, Inc.*, No. 2:09-cv-02450 (U.S. Dist. Ct., filed December 30, 2009). He caused several minor traffic accidents and then came to a stop before a police officer approached the truck and ordered him to get out. Due to his physical condition, he was apparently unable to respond immediately. The officer allegedly broke into the truck and then tried to handcuff Rich who began to resist and was ultimately hit five times with the officer's TASER and died shortly thereafter.

Alleging negligence, strict product liability, intentional misrepresentation, fraudulent concealment and deceit, and negligent misrepresentation, the plaintiffs seek economic and non-economic damages, punitive and exemplary damages, attorney's fees, and costs of suit. Plaintiffs contend that the defendant falsely represented that its product was not potentially lethal and would not cause cardiac arrest.

ALL THINGS LEGISLATIVE AND REGULATORY

EPA Takes Initial Steps to Limit or Ban Use of Certain Chemicals Including Phthalates

The Environmental Protection Agency (EPA) has announced that it will take a series of actions on four chemicals that purportedly raise serious health or environmental concerns, including phthalates, which are plasticizers used in a wide array of consumer products. The agency will establish a "Chemicals of Concern" list under the Toxic Substances Control Act and intends to place eight phthalates and a number of poly-brominated diphenyl ethers (PBDEs), which are used as flame retardants, on the list.

According to EPA, "[i]nclusion on the list publicly signals EPA's strong concern about the risks that those chemicals pose and the agency's intention to manage those risks. Once listed, chemical manufacturers can provide information to the agency if they want to demonstrate that their chemical does not pose an unreasonable risk."

EPA also announced that it is considering initiating a rulemaking to limit or ban long-chain perfluorinated chemicals (PFCs), which are used in numerous industrial and consumer applications, including "as a processing aid in the manufacture of non-stick and stain-resistant surfaces." EPA has provided more **information** and a fact sheet on the chemicals that it intends to address. *See EPA Press Release*, December 30, 2009.

CPSC Plans Workshop to Review Possible Consumer Product Safety Incident Database

The Consumer Product Safety Commission (CPSC) has announced a **public workshop** to receive stakeholder input on establishing a public consumer product safety incident database, which is required under the Consumer Product Safety Improvement Act of 2008. The January 11-12, 2010, workshop in Bethesda, Maryland, will focus on five aspects of the public database: (i) data analysis and reporting; (ii) reports of harm; (iii) manufacturer notification and response; (iv) additional database content; and (v) dealing with materially inaccurate information. *See Federal Register,* December 22, 2009.

Studies Raise Questions About FDA's Approval Methods for Medical Devices

Two new studies take issue with the way that the Food and Drug Administration (FDA) approves medical devices for human use. In one study, University of California

researchers found that two-thirds of approved devices went through a single clinical trial before they were placed on the market, and most of those trials involved fewer than 300 subjects. Sanket Dhruva, et al., "Strength of Study Evidence Examined by the FDA in Premarket Approval of Cardiovascular Devices," *Journal of the American Medical Association*, December 23-30, 2009.

"Premarket approval of cardiovascular devices by the FDA is often based on studies that lack adequate strength and may be prone to bias," the study concluded. The researchers reviewed 123 summaries of safety and effectiveness data for 78 high-risk cardiovascular devices approved from 2000 through 2007. They found that 65 percent of the devices were approved after one study only, and 78 percent of the studies contained discrepancies between the number of patients enrolled and the number actually analyzed.

In the other study, researchers from FDA and Boston's Beth Israel Deaconess Medical Center indicated that about 40 percent of the studies used to decide which devices will be approved lack clear safety-requirement definitions. Daniel Kramer, et al., "Premarket Clinical Evaluation of Novel Cardiovascular Devices: Quality Analysis of Premarket Clinical Studies Submitted to the Food and Drug Administration 2000-2007," *American Journal of Therapeutics*, December 24, 2009.

The study also purportedly found that FDA's studies lacked sufficient patient accounting information and underrepresented women, nonwhite populations and children. "Manufacturers, regulators, and the clinical community should collaborate to address these study shortcomings to ensure that patients are treated with reliable, safe, and clinically useful medical devices," the researchers concluded. *See Science Daily, The Wall Street Journal* and *BusinessWeek*, December 30, 2009.

CPSC Seeks Public Comment on Rulemaking to Require Identifying Labels on Drywall

Following a determination that it is often difficult to determine the manufacturer and origin of drywall, the Consumer Product Safety Commission (CPSC) has issued a **notice of inquiry** seeking public comment and information about a potential rulemaking to require identifying labels on drywall. The rule would likely require labels to identify the date and place of manufacture, batch and run numbers or other identifying characteristics, and the drywall's manufacturer.

Since December 2008, CPSC has received reports of various issues related to drywall in homes throughout the United States, particularly imported Chinese drywall. Problems reportedly include odor, adverse health effects and corrosion of metal components. The commission requests comments on specific issues such as ways the agency can ensure that the label and its markings are accessible after drywall is installed. Comments are requested by February 16, 2010. *See Federal Register,* December 16, 2009.

CPSC Issues Various Year-End Announcements Related to Children's Toys and Products

As 2009 drew to a close, the Consumer Product Safety Commission (CPSC) issued a variety of announcements and decisions involving children's toys and products.

For example, on December 29, the commission announced that RC2 Corp. of Oak Brook, Illinois, agreed to pay a $1.25 million civil penalty to settle allegations that it violated the federal lead paint ban, although RC2 denied that it knowingly violated federal laws under the agreement. CPSC staff alleged that RC2 failed to take adequate action to ensure that its toys would comply with the lead paint ban and that its failure created a risk of lead poisoning and adverse health effects to children.

RC2 allegedly imported up to 1.5 million units of non-compliant Thomas & Friends™ Wooden Railway toys between January 2005 and June 2007 and distributed them to its retail customers for sale to U.S. consumers. The toys were recalled in June 2007. The agreement also settles allegations that RC2 imported up to 200,000 units of five additional non-compliant toys from the Thomas & Friends™ product line between March 2003 and April 2007 and distributed them for sale to its retail customers. In September 2007, the original June 2007 recall was expanded to include these additional units. *See CPSC Press Release,* December 29, 2009.

In other action, CPSC has approved a **final rule** requiring manufacturers of durable infant or toddler products to establish and maintain a registration card program. The rule requires each manufacturer to (i) "provide a postage-paid consumer registration form with each product"; (ii) "keep records of consumers who register their products with the manufacturer"; and (iii) "permanently place the manufacturer's name and contact information, model name and number, and the date of manufacture on each product." The rule specifies the text and format for the registration form and establishes requirements for online registration.

According to a December 24 CPSC press release, the rule will "greatly promote a higher rate of product registrations and in turn provide better notification for product owners, thereby increasing the overall effectiveness of our recall process." The rule becomes effective June 28, 2010, for "full-size cribs and nonfull-size cribs; toddler beds; high chairs, booster chairs and hook-on chairs; bath seats; gates and other enclosures for confining a child; play yards; stationary activity centers; infant carriers; strollers; walkers; swings; and bassinets and cradles." The rule takes effect December 29, 2010, for "children's folding chairs, changing tables, infant bouncers, infant bath tubs, bed rails and infant slings." *See Federal Register,* December 29, 2009.

CPSC also issued a **notice** announcing an interim enforcement policy, effective December 16, 2009, applicable to component testing and certification of children's products and other consumer products. CPSC intends to issue rules that address when certification may be based on testing of paints before they are applied to a product rather than after they have been applied and then scraped off the product.

Until those rules are issued, CPSC will permit certification of a children's product as compliant with a 90 parts per million (ppm) lead paint limit if, for each paint used on the product, the domestic manufacturer or importer certifies that the product has either obtained a passing test report from a third-party test laboratory or holds a paint certificate from another person based on passing test results from a recognized third-party test laboratory. *See Federal Register,* December 28, 2009.

In a related matter, CPSC also **revised** its product testing enforcement by extending the testing and certification of many regulated children's products one year past the original February 2010 deadline. "While enforcement of specific CPSC testing requirements has been stayed, the products must still comply with all applicable rules and bans," according to a December 18, 2009, CPSC press release. Products that will remain covered under the stay include toys with banned phthalates, toy guns, clacker balls, electronically operated toys, baby walkers, bath seats, other durable infant products, youth mattresses, children's bicycles, and children's sleepwear.

"The stay of enforcement will remain in effect for these children's products while the CPSC continues to work toward recognizing labs for testing," CPSC said. "Independent third-party testing and certification will only be required for the products 90 days after the CPSC publishes the laboratory accreditation requirements for any individual category in the *Federal Register*."

CPSC also extended the stay on certification and third-party testing for children's products subject to lead content limits. "Under this decision, products must still meet the 300 ppm lead limit now, but certification and third party testing to show compliance will be required for all children's products manufactured after February 10, 2011," CPSC said.

The stay will end as originally planned on February 10, 2010, for bicycle helmets, bunk beds, infant rattles, and dive sticks, according to CPSC. "These children's products, manufactured after February 10, 2010, will be required to have certification based on independent third party testing," CPSC said. "The testing must be conducted by a laboratory recognized by CPSC." *See Federal Register,* December 28, 2009.

Federal Judicial Center Report Analyzes Cases Sealed in Federal Courts

The Federal Judicial Center has released a **report** that describes why and how cases filed in 2006 in the federal courts were sealed. The *New U.S. Courts News* listserve announced the availability of the report in late December 2009. According to the report, of the 245,000 cases filed in 2006, only 0.2 percent, or 576 cases, were sealed. While a number of these involved action taken to protect minors (22 cases), national secrets (two cases) and confidential business information (13 cases), only six cases were sealed to protect confidential settlement agreements.

The report concludes, "Civil cases appear to be sealed for one of two reasons: either they are qui tam actions filed under the False Claims Act, which requires that the cases be filed under seal, or they are sealed because one or both sides of the litigation

want to keep the facts in the case private." As for cases on appeal, the report notes, "[m]ost sealed appeals are sealed because the district court cases appealed from are sealed, and commonly the district court case is sealed either because it is a grand jury matter or because it is a prosecution of a juvenile or a cooperator." The report further observes, "Very seldom are sealed appeals resolved by sealed opinions."

LEGAL LITERATURE REVIEW

Michael Green, "Not So Fast—Appreciating the Role of Traditional Tort Law in Mass and Toxic Torts," *U.S. Law Week,* December 22, 2009

Wake Forest University Law Professor Michael Green defends the use of traditional tort law principles to assess whether duties are owed by various defendants to plaintiffs who allege asbestos-related injuries. Green, who also serves as a co-reporter for the *Restatement (Third) of Torts: Liability for Physical and Emotional Harm,* focuses on "cases in which family members are exposed to asbestos brought home from the workplace." They arise in several contexts: (i) where employers expose employees to asbestos fibers that are carried on clothing to the employees' homes; (ii) where a land possessor hires an independent contractor to conduct operations on the land; and (iii) where product manufacturers' products are the source of asbestos brought from work to home. Green analyses related case law and discusses the distinction between misfeasance and nonfeasance, the duty of reasonable care and the foreseeability of harm. He concludes that "family-member asbestos cases are well-grounded in long-standing tort principles, including the use of policy in deciding whether a duty exists."

Symeon Symeonides, "Choice of Law in the American Courts in 2009: Twenty-Third Annual Survey," *American Journal of Comparative Law,* 2010

Willamette University – College of Law Professor Symeon Symeonides has once again provided a compendium of state and federal appellate court decisions involving choice-of-law issues that arise when the litigants or causes of action in a case may involve the substantive law of different jurisdictions. According to the survey, which focuses on the cases "that may contribute something new to the development or understanding of conflicts law," no state supreme court altered its choice-of-law methodology in 2009, and several "expressly or tacitly reaffirmed their previously followed methodology." The survey covers a range of substantive legal areas including torts, products liability, contracts, statutes of limitations, and domestic relations. In the products liability section, the survey provides information about choice-of-law decisions arising from claims over pharmaceuticals, automobiles, medical devices, and other equipment.

LAW BLOG ROUNDUP

House Considers Legislation to Overrule New Pleading Standard

"While the Senate was wrestling with health care reform last week, the House turned once again to whether and how to legislatively overrule *Iqbal*," the U.S. Supreme Court decision that imposed more stringent pleading standards on civil lawsuits filed in federal courts. University of Cincinnati College of Law Professor Adam Steinman, blogging about a December 16, 2009, **hearing** before the House Judiciary Committee's Subcommittee on Courts and Competition Policy to consider H.R. 4115, the "Open Access to the Courts Act of 2009."

Civil Procedure & Federal Courts Blog, December 22, 2009.

Ruling on Interplay of Federal and State Class Action Law Could Ultimately Benefit Plaintiffs

"While many children are spending today waiting for Santa, I thought I'd talk about a [U.S.] Supreme Court decision that the civil-procedure world is eagerly awaiting: *Shady Grove v. Allstate*, which was argued last month." University of Cincinnati College of Law Professor Adam Steinman, discussing a clash between federal and state class action laws currently pending before the U.S. Supreme Court. Steinman observes that "If New York's law *prohibiting* certain class actions is held to be binding in federal court, a more *lenient* state-law approach to class actions could be binding as well." He suggests that the Court's ruling may extend beyond class certification to standards for pleading and "could pave the way for plaintiffs to argue that more lenient state-law pleading standards should be binding in federal court."

Civil Procedure & Federal Courts Blog, December 24, 2009.

Hold on There, Professor Steinman…

"I disagree. I predict that this case will end up being a one way ratchet. I think that the Court will rule that because the NY rule bars class actions entirely for this type of case, [Federal Rule of Civil Procedure] 23 does not even kick in…. In other words, the Court is likely to distinguish between cases where the rule *bars* class actions entirely (the state rule trumps) and cases where the state rule permits class action (the Federal rule trumps)." University of Connecticut School of Law Alexandra Lahav, taking issue with Professor Steinman's suggestion that while *Shady Grove* may end up badly for *these* plaintiffs, it may benefit plaintiffs generally "because now plaintiff-friendly state class action law will be imported into the federal courts thanks to the Class Action Fairness Act of 2005."

Mass Tort Litigation Blog, December 31, 2009.

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THE FINAL WORD

Shook, Hardy & Bacon Recognized for Product Liability Litigation Defense

The American Lawyer has named Shook, Hardy & Bacon as a finalist in the Product Liability category of its Litigation Department of the Year Awards. The firm was recognized "for the breadth of its work, from wins in traditional one-off cases for clients like Kia Motors America, Inc., to its role in managing the massive *Engle* tobacco litigation in Florida for Altria Group, Inc." The legal magazine, which invites the largest U.S. firms to participate in its biannual competition, also cited the firm's pharmaceutical defense work and its attraction of clients through the use of alternative fee arrangements. *The American Lawyer*, January 1, 2010.

Meanwhile, *Law360* has recognized Shook, Hardy & Bacon as a Product Liability Defense Firm of the Year. The publication cited medical device and pharmaceutical victories that the firm secured for its clients and quoted firm chair John Murphy, who attributes its success to the "Midwestern work ethic that pervades" the firm. Murphy also noted that Shook's litigators rely on a pool of experts on staff with advanced degrees in products-related fields such as biology and chemistry to "take [a] complicated issue and boil it down to where the lawyers understand it and where the juries understand." He referred to collaborations with other law firms as another trend that has led to success in the defense of product liability litigation. "I think we do that very well, and I can't say that's true of all firms," he was quoted as saying. "We tend, as a firm, to play well in the sandbox with others."

UPCOMING CONFERENCES AND SEMINARS

GMA, Washington, D.C. – April 7-9, 2010 – "Consumer Complaints Conference." Shook, Hardy & Bacon Pharmaceutical & Medical Device Litigation Partner Madeleine McDonough will discuss "Pre-Litigation Risk Management Strategies," for an audience of food industry staff working in the areas of consumer affairs, call center management, consumer complaints, product liability claims, and quality assurance. ■

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).