Shook, Hardy & Bacon L.L.P.

FEBRUARY 4, 2010

PRODUCT LIABILITY LITIGATION REPORT

CONTENTS

ELEVENTH CIRCUIT VACATES AWARD IN IRAQI TRAFFIC DEATH FOR LACK OF PERSONAL JURISDICTION

The Eleventh Circuit Court of Appeals has affirmed a district court's order vacating a $4.9 million default judgment against a Kuwaiti company sued by the parents of an American soldier who died in a traffic collision with a truck operated by the company in Iraq. ***Baragona v. Kuwait Gulf Link Transp. Co.*, No. 09-12770 (11th Cir., decided January 21, 2010)**. The company refused service of the complaint and summons after suit was filed under Georgia tort law in a U.S. federal district court, but the company did retain counsel in the United States to monitor the proceedings. The plaintiffs filed a motion for entry of a default judgment, and because the company did not appear, the court entered the judgment. The Kuwaiti company then sought to set aside the judgment, and the district court granted its motion, finding that the company "lacked minimum contacts with Georgia sufficient to support the exercise of personal jurisdiction under Georgia's long-arm statute."

The plaintiffs argued on appeal that the company waived its personal jurisdiction defense through "lawyerly gamesmanship." The appeals court determined that refusing service, monitoring court proceedings and filing a motion to vacate judgment only after an adverse default judgment is rendered do not constitute the narrow circumstances under which a defendant waives a personal jurisdiction defense. Waiver is "normally" found if a defendant "has entered an appearance or was involved in overt wrongdoing to deceive the court and avoid service of process." The Eleventh Circuit cited U.S. Supreme Court precedent providing that "[a] defendant is always free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding."

The plaintiffs also argued that the company had waived its personal jurisdiction defense by entering into contracts with the United States containing a section of the Federal Acquisition Regulation that requires contractors to maintain liability insurance "to indemnify and hold harmless the Government against" third-party personal injury and property loss claims. According to the court, this section "does not alter the required constitutional analysis that the court must consider in lawfully exerting personal jurisdiction over [the company]."

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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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SEVENTH CIRCUIT JOINS ELEVENTH'S CAFA INTERPRETATION IN AIRPLANE PRODUCTS LIABILITY SUIT

The Seventh Circuit Court of Appeals has determined that federal courts do not lose subject-matter jurisdiction over a putative class action removed under the Class Action Fairness Act (CAFA) of 2005 when the court has determined that the proposed class does not satisfy the criteria for certification under federal or state law. ***Cunningham Charter Corp. v. Learjet, Inc.*, No. 09-8042 (7th Cir., decided January 22, 2010)**. So ruling, the court joined the Eleventh Circuit on a matter that has divided the courts, with the First Circuit issuing a decision that conflicts with this interpretation.

The case involved claims for breach of warranty and products liability brought in an Illinois state court by a company on behalf of itself and all other Learjet buyers who had received the same manufacturer's warranty. The defendant removed the case to federal court under CAFA, and the plaintiff then moved to certify two classes. Denying the plaintiff's motion for failure to meet certification criteria, the federal district court determined that it lacked subject-matter jurisdiction under CAFA in the absence of certification and remanded the case to state court.

According to the appeals court, CAFA allows a defendant to remove a putative class action to federal court before or after the entry of a class certification order. "As actually worded," this section, "implies at most an expectation that a class will or at least may be certified eventually." It does not mean that "in the absence of such an order a suit is not a class action," unless the litigation involves a "[f]rivolous" attempt to invoke federal jurisdiction. All that the law "means is that a suit filed as a class action cannot be *maintained* as one without an order certifying the class. That needn't imply that unless the class is certified the court loses jurisdiction of the case."

To rule otherwise, said the court, could result in a federal court's refusal to certify a class in a case that could then continue as a class action in state court on remand. "That result would be contrary to [CAFA's] purpose of relaxing the requirement of complete diversity of citizenship so that class actions involving incomplete diversity can be litigated in federal court." The court also observed that its conclusion "vindicates the general principle that jurisdiction once properly invoked is not lost by developments after a suit is filed, such as a change in the state of which a party is a citizen that destroys diversity." While the plaintiff's attempt to maintain the suit as a class action in this case had "a number of fatal flaws," the court found that they were not so obvious as to make the attempt frivolous. Thus, the court reversed the order remanding the case to state court and remanded it to the federal district court for further proceedings.

SEVENTH CIRCUIT FINDS *ROOKER-FELDMAN* DOCTRINE APPLIES TO PROCEEDINGS UNDER CAFA

The Seventh Circuit Court of Appeals has determined that a doctrine which allows only the U.S. Supreme Court, and not other federal courts, to set aside state-court civil-litigation decisions applies to cases removed to federal court under the Class Action Fairness Act (CAFA) of 2005. ***Bergquist v. Mann Bracken, LLP*, Nos. 09-8046, 09-8047 (7th Cir., decided January 26, 2010)**. The issue arose in a case brought by a credit card borrower seeking to set aside awards rendered by the National Arbitration Forum because the forum and debt collector were allegedly secretly under common control. The borrower had apparently defaulted on a loan and been subject to an adverse arbitration ruling. A state court entered a judgment to enforce the award but later dismissed the case without prejudice at the borrower's request.

The borrower then filed an action seeking relief for a class of persons whose disputes had been arbitrated by the National Arbitration Forum when Mann Bracken represented the creditor. On removal from state court under CAFA, a federal district court concluded that the *Rooker-Feldman* doctrine required that the case be remanded because the doctrine "prevents federal adjudication of any claim that seeks to invalidate judgments entered by state courts." While the Seventh Circuit agreed that the doctrine applied to cases removed to federal court under CAFA, it found that the doctrine did not apply to the named plaintiff's claim because the state court's order dismissing the action "restores the parties to the position they occupied before [the creditor] filed suit. Any injury comes from the award itself, and the *Rooker-Feldman* doctrine does not apply to arbitral awards."

On removal from state court under CAFA, a federal district court concluded that the Rooker-Feldman *doctrine required that the case be remanded because the doctrine "prevents federal adjudication of any claim that seeks to invalidate judgments entered by state courts."*

The court held that the district court had jurisdiction over the claims because at least one of the putative subclasses, the one involving the named plaintiff, involved arbitral awards not confirmed in state court. When a federal court has jurisdiction over at least part of a lawsuit, "the need to remand some of it does not entail a power to remand all." The appeals court reiterated that the district court lacks jurisdiction to vacate a state court's judgments, and to the extent some of the putative subclasses involved debtors whose adverse arbitration awards were confirmed in state court, those could not be adjudicated in the federal court proceeding. The Seventh Circuit advised the lower court to limit the class definition on remand to avoid any *Rooker-Feldman* problem.

L.A. SCHOOL DISTRICT SUES ARTIFICIAL TURF INSTALLATION COMPANY UNDER PROPOSITION 65

The Los Angeles Unified School District has reportedly filed a lawsuit against the company it hired to install artificial turf systems on its playgrounds and playing fields, alleging the company failed to inform the district that the turf would be installed over a base of carcinogens, including carbon black and lead, that would

come into direct contact with children. *L.A. Unified Sch. Dist. V. Forever Green Athletic Fields of the West*, No. n/a (Cal. Super. Ct., filed January 2010). Alleging violations of Proposition 65, breach of contract, product liability, and negligence, the school district apparently contends that it believed the carcinogens, used in crumb rubber, would be applied as a foundation layer and would not be in direct human contact. According to the complaint, the defendant used the crumb instead as "infill," between plots of synthetic grass in areas where children would have direct exposure and the crumb would be subjected to intense weather conditions that contribute to the breakdown and release of chemicals.

According to a news source, the school district issued a Proposition 65 violation notice in November 2009, informing the defendant of its intent to bring a lawsuit under the state's carcinogen warning law. The chemicals at issue, lead and carbon black, are known to the state to cause cancer and reproductive harm. Under Proposition 65, manufacturers and others exposing the public to carcinogens and reproductive toxicants are required to provide warnings. *See Courthouse News Service*, January 29, 2010.

LAWMAKERS CALL FOR SHIPMENT OF KATRINA-ERA TRAILERS TO EARTHQUAKE-STRICKEN HAITI

A state senator from Mississippi, where the formaldehyde-emitting trailers formerly used by survivors of hurricanes Katrina and Rita have apparently come to rest, is calling for them to be sent to Haiti to help the homeless in that beleaguered nation. U.S. Representative Bennie Thompson (D-Miss.), who chairs the House Committee on Homeland Security, also apparently called for the trailers to be used as temporary shelter or emergency clinics in a January 15, 2010, letter to the Federal Emergency Management Agency.

According to a news report, trailer industry lobbyists have been talking with members of Congress and disaster relief agencies about sending the trailers to Haiti. Bidding is apparently underway to sell the trailers cheaply in large lots, and the industry is concerned about a stagnant market filling up with low-priced trailers. An industry spokesperson claimed that most are "perfectly safe," and that the few with problems can remain in the United States.

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As noted in previous issues of this Report, government regulators found that the trailers emitted significant levels of formaldehyde, and a number of class action lawsuits filed by those allegedly sickened from the exposure while living in them are currently pending in state and federal courts. Responding to the proposal to export the trailers for human habitation, a man whose mother allegedly died from formaldehyde exposure after living in one of the trailers, was quoted as saying, "Just go ahead and sign their death certificates." *See Courthouse News Service*, February 1, 2010.

ALL THINGS LEGISLATIVE AND REGULATORY

House Committee on Energy and Commerce Launches Inquiry into Toyota Recall

In light of Toyota Motor Corp.'s recent massive recall, the House Energy and Commerce Committee has scheduled a February 25, 2010, **hearing** to "examine the persistent complaints of sudden unintended acceleration" in vehicles manufactured by the Japanese automaker.

Committee Chair Henry Waxman (D-Calif.) and Oversight and Investigations Subcommittee Chair Bart Stupak (D-Mich.) also sent **letters** to the National Highway Traffic Safety Administration (NHTSA) and Toyota's president in North America requesting additional information and documents related to Toyota vehicles sold in the United States.

Specifically, Waxman and Stupak want to know when NHTSA and Toyota officials first learned about the purported safety defects, what they did to resolve the hazards and how they investigated and responded to consumer complaints. The January 28 letters state that, according to NHTSA, "sudden acceleration events in Toyota vehicles have led to 19 deaths in the past decade, nearly twice the number of deaths associated with similar events in cars manufactured by all other automakers combined." "Failure to take every step possible to prevent future deaths or injury is unacceptable," Stupak said in announcing the upcoming hearing.

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The January 21 recall involves approximately 2.3 million vehicles, including certain 2009-2010 Corollas, 2005-2010 Avalons, certain 2007-2010 Camrys and certain 2010 Highlanders. A separate recall at the end of 2009 involved some 4 million vehicles and concerns about pedal entrapment by incorrect or improperly positioned floor mats. The company also halted production to ensure that new vehicles do not suffer the same pedal defects and has reportedly initiated recalls of unspecified models in Europe and China. *See Product Liability Law 360*, January 29, 2010.

Recall Initiated; Laws Introduced to Regulate Cadmium After CPSC Launches Investigation

The Consumer Product Safety Commission (CPSC) has announced the recall of children's metal necklaces, specifically those identified as "The Princess and the Frog," that were imported by FAF, Inc., a Greenville, Rhode Island-based company. The items were apparently sold from November 2009 through January 2010 for $5. According to the CPSC notice, the recalled necklaces "contain high levels of cadmium. Cadmium is toxic if ingested by young children and can cause adverse health effects." *See NEWS from CPSC*, February 1, 2010.

After the CPSC recently announced a formal investigation into cadmium in children's metal jewelry such as charm bracelets and pendants, at least three states and the U.S. Congress introduced measures designed to regulate the sale and distribution of toys or jewelry made with the known carcinogen. Chinese manufacturers have

reportedly used cadmium in toys as a substitute for lead now that the United States has adopted stringent lead standards for consumer products.

Illinois State Representative Naomi Jakobsson (D-Champaign) introduced the "Child-Safe Chemicals Act" (**HB5040**), which would require manufacturers and trade associations to notify the state's Environmental Protection Agency if their products contain cadmium or other chemicals of high concern; ban the manufacture, sale or distribution in the state of any children's product containing cadmium at more than 0.004 percent by weight; and include measures to collect information on other hazardous chemicals in these products to determine if further action is warranted. Similar bills have been introduced in New York (**S06446**) and Mississippi (**HB540**).

The New York bill would prohibit cadmium in jewelry products intended for children and in glazed ceramic tableware. "Young children are most vulnerable to the many health hazards that exist in our world, including cadmium poisoning that causes irreversible damage to the brain, kidneys, lungs and intestines," wrote the New York bill's sponsor, Senator James Alesi (R-Perinton) in a statement. "As we all know, young children tend to put things in their mouth, and products that contain cadmium can leech off into their bloodstream and have tragic results." The Mississippi bill, which sets limits on lead, cadmium and phthalates in consumer products, extends the ban to car seats, bicycles, BB guns, and consumer electronics such as computers, wireless phones and hand-held video devices.

As we all know, young children tend to put things in their mouth, and products that contain cadmium can leech off into their bloodstream and have tragic results."

U.S. Senator Charles Schumer (D-N.Y.) introduced a **bill** that would treat any children's jewelry containing cadmium, barium or antimony as a banned hazardous substance under federal law. "It is shocking and unacceptable that Chinese manufacturers are putting a deadly toxic metal that threatens our children's health and well-being into jewelry and trinkets that kids play with and chew on," Schumer said in a press release. "It makes your blood boil. This has to end, and end now." *See James Alesi Web Site* and *Charles Schumer Web Site,* January 13, 2010.

CPSC Issues Final Rule Exempting Certain Electronic Devices from Lead Limits

The Consumer Product Safety Commission (CPSC) has issued a **final rule** that exempts certain electronic devices intended for children from meeting the lead limits required by the Consumer Product Safety Improvement Act (CPSIA) of 2008. The relaxed rule, effective January 20, 2010, applies to electronic products that contain lead components for which substitutes are not "technologically feasible."

The exempted products include (i) "lead blended into the glass of cathode ray tubes, electronic components, and fluorescent tubes," (ii) "lead used in lead-bronze bearing shells and bushings," (iii) "lead used in compliant pin connector systems," (iv) "lead used in optical and filter glass," (v) "lead oxide in plasma display panels (PDP) and surface conduction electron emitter displays (SED) used in structural elements," (vi) "lead oxide in the glass envelope of Black Light blue (BLB) lamps," and (vii) "components of electronic devices that are removable or replaceable, such as battery packs and light bulbs that are inaccessible when the product is assembled in functional form." Lead

used as an alloy in steel up to 3,500 parts per million (ppm), lead used in aluminum manufacturing up to 4,000 ppm and lead used in copper-based alloys up to 40,000 ppm will also be allowed.

According to the rule, "Children are not expected to experience significant exposures to lead from these few applications. The lead-containing components that are being exempted are components that one would not expect children to mouth, swallow, or handle for significant periods under normal and reasonably foreseeable conditions." *See Federal Register*, January 20, 2010.

LEGAL LITERATURE REVIEW

Richard Levy & Robert Glicksman, "Access to Courts and Preemption of State Remedies in Collective Action Perspective," *Case Western Reserve Law Review*, 2009

University of Kansas School of Law Professor Richard Levy and George Washington University School of Law Professor Robert Glicksman call for the courts to apply preemption with reluctance in product liability cases, particularly where its application would leave the injured with no remedy. They contend, "courts should not lightly infer remedial preemption unless: (1) a primary purpose of federal law is to ensure uniform standards to promote free movement of goods, prevent the export of regulatory burdens by 'downstream' states, or solve a not-in-my-backyard (NIMBY) problem; and (2) there is strong evidence that state judicial remedies (as opposed to direct state regulation through legislation or the actions of administrative agencies) would interfere with the achievement of these goals." The authors suggest that "the regulatory effect of common law tort remedies is less than that of legislative rules. As a result, it is often possible to accommodate the federal purpose within the remedial jurisprudence of the state courts without displacing that remedial authority entirely."

LAW BLOG ROUNDUP

Does He or Doesn't He?

"As he points out in a comment to the ABA article, both pieces 'somewhat overstate and simplify my position. I do not really suggest that class actions are inherently unconstitutional.'" Florida State University Law Professor Elizabeth Chamblee Burch, discussing recent commentary in the *ABA Journal* and *Forbes* about Professor Martin Redish's book, *Wholesale Justice*. Redish claims to be a liberal Democrat, but believes some class-action devices, such as "settlement class actions," violate due process because the named plaintiffs and defendants agree beforehand to settle the case, thus leaving the court to approve the settlement of a dispute that has no "case or controversy" aspect to it.

Torts Prof Blog, January 22, 2010.

Automotive Recall Generates Quick Court Filings

"Apparently class actions have already been filed by consumers who claim that their cars are now worthless." University of Connecticut School of Law Professor Alexandra Lahav, blogging about litigation spurred by the Toyota recall of millions of vehicles with the potential to suddenly accelerate due to a purportedly stuck gas pedal.

Mass Tort Litigation Blog, January 29, 2010.

Strict Liability and Ordinary Negligence Not Entirely Useful Theories

"A short column cannot explore all the complex variations. But it can point them out, as a stubborn reminder that context matters in tort, especially in those cases with strong contractual overtones." University of Chicago Professor of Law Richard Epstein, explaining in this guest blog the types of cases where strict liability or negligence theories may not provide courts with appropriate standards for assessing fault and assigning liability. Discussing the contexts in which "negligence and strict product liability rules do a very poor job," Epstein highlights (i) "the occurrence of harm that arises out of some kind of consensual arrangement," (ii) "medical malpractice," (iii) "occupier's liability cases," and (iv) "cases where harms are inflicted by third parties on strangers."

Torts Prof Blog, February 1, 2010.

THE FINAL WORD

Report Shows Women Still Largely Absent From Some State and Federal Courts

A report titled "Women in Federal and State-Level Judgeships," released by a leadership development, academic research and policy think tank based on a college campus in Albany, New York, shows that the representation of women on state and federal benches continues to lag. Despite reaching equal numbers among law school graduates, women are missing altogether from some state and federal courts and are significantly underrepresented on the vast majority of benches. According to the report, which provides detailed state-by-state data, "Twenty two percent of all seats in federal-level courts, and twenty-six percent of all seats in state-level courts are filled by women." The report contends that "[w]omen's equal representation matters, not only because of their different life experiences which makes their perspectives diverse, and in turn enrich and broaden knowledge of the courts, but because it is critical to representative democracy and to equal citizenship."

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UPCOMING CONFERENCES AND SEMINARS

Drug Information Association, Inc., Washington, D.C. – February 25, 2010 – "Liability Risks in Clinical Trials." Shook, Hardy & Bacon Pharmaceutical & Medical Device Litigation Partners Mark Hegarty, Lori McGroder and Douglas Schreiner,

and Corporate Law Partner **Carol Poindexter** have organized and will present during this continuing education program, which will include sessions on "Who's Watching You: Government Enforcement in Clinical Trials," "Litigation Update: What Can Happen with Clinical Trials," "Avoiding Liability, 'Bad' Documents and Bad Press," and "Clinical Trials on Trial: Potential Legal Liability Arising from Clinical Trials (Mock Trial)."

HB Litigation Conferences, Marina del Rey, California – March 3-5, 2010 – "3rd Annual Emerging Trends in Asbestos Litigation Conference." Shook, Hardy & Bacon Public Policy Partner **Mark Behrens** will participate in a panel to discuss "The Role of the Bankruptcy Trusts in Civil Asbestos."

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.

ABA, Phoenix, Arizona – April 8-9, 2010 – "2010 Emerging Issues in Motor Vehicle Product Liability Litigation." Shook, Hardy & Bacon Tort Partner **H. Grant Law** is serving as program co-chair and will moderate a panel session involving in-house counsel from six manufacturers who will discuss "How Not to Settle Your Case: Mistakes Plaintiffs' and Defense Lawyers Make Leading up to and at Mediation." Shook, Hardy & Bacon Public Policy Partner **Mark Behrens** will participate on a panel addressing "Products Liability in Transition: Is There a Sea Change or Steady as She Goes?" The American Bar Association's Tort Trial & Insurance Practice Section's Products, General Liability and Consumer Law Committee and the Automobile Law Committee are presenting the program.

DRI, San Francisco, California – May 20-21, 2010 – "26th Annual Drug and Medical Device Seminar." Shook, Hardy & Bacon Pharmaceutical & Medical Device Litigation Partner **Mark Hegarty** will serve on a panel discussing "Potential Civil and Criminal Liability Arising from Clinical Trials." The firm is a co-sponsor of this continuing education seminar. ■

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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).