Shook, Hardy & Bacon L.L.P.

MARCH 8, 2012

PRODUCT LIABILITY LITIGATION REPORT

CONTENTS

U.S. SUPREME COURT ORDERS REARGUMENT IN ALIEN TORT STATUTE CASE

The U.S. Supreme Court has issued an **order** restoring *Kiobel v. Royal Dutch Petroleum*, No. 10-1491 (U.S., order entered March 5, 2012), to its calendar for reargument and setting a supplemental briefing schedule for the parties to address "[w]hether and under what circumstances the Alien Tort Statute, 28 U.S.C. §1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States." Because the reply brief will be due on June 29, 2012, at the end of the Court's current term, the case will be reargued during the Court's next term, or some time after October 1. Additional details about the case appear in the **October 27, 2011**, issue of this *Report*.

FEDERAL COURT FINDS CONTACTS LACKING FOR SUIT AGAINST TAIWAN-BASED ELECTRONICS MANUFACTURER

A federal court in Pennsylvania has dismissed for lack of personal jurisdiction the third-party defendant, a Taiwan-based manufacturer of consumer electronics, from a lawsuit to recover for damages and injuries from a house fire allegedly caused by a defective power tap. *Sieg v. Sears Roebuck & Co.*, No. 10-606 (U.S. Dist. Ct., M.D. Pa., decided February 24, 2012). The plaintiffs initiated this lawsuit in state court, naming as defendants the retailer and apparent manufacturer/distributor of the purportedly defective product, Leviton Manufacturing Co. Leviton removed the action to federal court and then filed a third-party complaint against Primax Electronics, Ltd., the Taiwan-based company from which Leviton had purchased the product for sale in the United States.

According to the court, Primax "has no employees, offices, property or other assets in Pennsylvania …. Primax has not paid taxes to Pennsylvania and it is not registered as a corporation in Pennsylvania." Still, the company has "a presence in the United States." It apparently opened a U.S. sales office in 1990 and "has sold thousands of products to Leviton. . . . The purchase order indicates a New York billing address and that Leviton and Primax consented to New York City courts as the forum for legal dispute. Primax also has appeared in lawsuits initiated in the Courts of Common Pleas of Lehigh and Bucks Counties [Pennsylvania] in 2002 and 2003 respectively." Primax contested personal jurisdiction.

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

Taking note of the U.S. Supreme Court's recent pronouncements on the "stream-of-commerce theory" for the establishment of personal jurisdiction over a foreign manufacturer, the court found that a majority had failed to clearly adopt either one of the two *Asahi* standards. In *Asahi Metal Industries Co. v. Superior Court of California*, 480 U.S. 102 (1987), the U.S. Supreme Court enunciated two standards, neither of which commanded a majority. Under one, "something in addition to placing the product into the stream of commerce [is] necessary to establish personal jurisdiction, and . . . this additional conduct [is] needed to demonstrate an intent to serve the forum market." Under the second, "placing goods into the regular flow of product distribution with an awareness of where those products would ultimately be sold is sufficient for the courts to constitutionally exercise personal jurisdiction over the out-of-state party."

Because the Third Circuit Court of Appeals uses both *Asahi* standards, the district court decided to consider whether Leviton had met its burden with respect to either of them. According to the court, while the evidence shows that Primax attempts to "cater to the United States market as a whole," this evidence "is insufficient in itself to demonstrate that Primax purposefully availed itself of the Commonwealth of Pennsylvania." The court was also unpersuaded that evidence of litigation in Pennsylvania involving Primax a decade ago established that the company "would anticipate being haled into Pennsylvania again, years later, for an accident involving unrelated products and a seemingly unrelated distribution system. Thus, the court finds that merely attaching documentation of prior, unrelated litigation in Pennsylvania state court is not enough, in itself, to establish specific jurisdiction under either *Asahi* standard as it provides little information about the product currently at issue."

The court further found that a 2001 purchase order between Leviton and Primax did not support an allegation that Primax purposefully availed itself of Pennsylvania because the order was for 14,600 units of four different products, identified by number only. Because Leviton failed to assert "which of the four products identified on the purchase order is the product at issue in this case" and because the purchase order did not indicate whether products were to be shipped to Pennsylvania, the court ruled that "Leviton has not provided evidence or made allegations sufficient to establish that Primax's goods regularly flow through the stream-of-commerce into Pennsylvania."

PENNSYLVANIA SUPREME COURT FINDS ASBESTOS DAMAGES AWARD NO BAR TO SEPARATE LAWSUIT FOR NEW ASBESTOS-RELATED INJURY

The Pennsylvania Supreme Court has determined that a plaintiff who previously recovered for a malignant disease allegedly resulting from asbestos exposure may file a separate lawsuit under the "two-disease" rule for another malignant disease that manifests later and is allegedly due to the same asbestos exposure. ***Daley v. A.W. Chesterton, Inc.*, No. J-98-2010 (Pa., decided February 21, 2012)**.

So ruling, the court rejected the argument that prior case law allowed a second lawsuit only when the first disease was nonmalignant and the second was malignant. The dissenting justice would have adopted this interpretation.

The plaintiff settled claims in 1994 for pulmonary asbestosis and squamous-cell carcinoma of the right lung. In summer 2005, the plaintiff was diagnosed with malignant pleural mesothelioma and filed suit against different defendants, alleging that his "mesothelioma was caused by the same asbestos exposure that resulted in his lung cancer and pulmonary asbestosis, for which he sought and obtained compensation." The companies argued that the "two-disease" rule did not apply to two malignant diseases associated with the same exposure.

According to the majority, while Pennsylvania's "two-disease" rule was set forth in cases involving plaintiffs with an earlier nonmalignant disease and a later malignant disease, the courts' reasoning did not require limiting the rule's application to this circumstance. In this regard, the court noted, "Requiring a plaintiff to seek damages for a potential future diagnosis of mesothelioma at the time he is diagnosed with lung cancer not only imposes nearly insurmountable evidentiary hurdles on the plaintiff, but also may subject a defendant to payment of damages for a serious disease which a vast majority of plaintiffs will not actually develop."

According to the majority, while Pennsylvania's "two-disease" rule was set forth in cases involving plaintiffs with an earlier nonmalignant disease and a later malignant disease, the courts' reasoning did not require limiting the rule's application to this circumstance.

The court limited its ruling by stating, "The burden of establishing that a particular asbestos-related malignant disease is 'separate and distinct' from another must be borne by the plaintiff. In this regard, we note that relevant factors may include evidence that the diseases: developed by different mechanisms; originated in different tissue or organs; affected different tissue or organs; manifested themselves at different times and by different symptoms; progressed at different rates; and carried different outcomes." The court affirmed an intermediate appellate court reversal of the trial court's grant of the defendants' motion for summary judgment and remanded the matter for further proceedings.

PLAINTIFFS CHALLENGE "CRUELTY FREE" ADS FOR COSMETIC PRODUCTS

California residents have filed a lawsuit in federal court on behalf of a putative nationwide class of consumers against several cosmetic companies alleging that while the defendants marketed and advertised their products as "cruelty free," that is, not tested on animals, "in fact Defendants were testing their cosmetic products on animals so that they could sell products in China and other foreign countries, thereby reaping hundreds of millions of dollars in sales." *Beltran v. Estee Lauder, Inc.*, No. 12-0312 (U.S. Dist. Ct., C.D. Cal., filed February 28, 2012).

According to the complaint, the companies' representations earned them placement on a list that includes cosmetic companies which do not test products on live

animals and is maintained by People for the Ethical Treatment of Animals (PETA). PETA apparently removed the companies from the list "a matter of weeks ago" after their alleged "wrongful conduct" was discovered. The plaintiffs contend that they purchased products from the defendants as a result of their deceptive and misleading practices in advertising and marketing.

Seeking to certify national and California classes, the plaintiffs allege concealment and violations of California's Unfair Business Practices Act, False Advertising Law and Consumers Legal Remedies Act. They request a declaration that the defendants' acts and practices as alleged are "unlawful, unfair, deceptive and/or fraudulent"; preliminary and permanent injunctions; restitution; compensatory damages in excess of $100 million; punitive damages; interest; attorney's fees; and costs.

STRICT PRODUCT LIABILITY ALLEGED IN MEAT GRINDER-RELATED MORTALITY

The family of a man allegedly killed while he was cleaning and maintaining a meat grinder in his place of employment has sued the equipment's manufacturer, claiming that it was unsafe because it lacked a warning signal to signify that "it was powered on and about to start operating" as well as an emergency stop device. *Beas v. Weiler West, Inc.*, No. CIVRS1201608 (Cal. Super. Ct., San Bernardino County, filed February 28, 2012). For his alleged "gruesome and painful death" and alleging negligence, negligence per se, strict product liability, breach of express warranty, and breach of implied warranty of merchantability, the plaintiffs seek special and general damages, interest and costs.

ALL THINGS LEGISLATIVE AND REGULATORY

Court Rejects FTC Allegations That Dietary Supplement Maker Violated Consent Decree

According to a news source, a company that makes dietary supplements has prevailed before a federal court considering claims filed by the U.S. Federal Trade Commission (FTC) alleging that the company violated a 2006 consent decree. *FTC v. Garden of Life*, No. n/a (U.S. Dist. Ct., S.D. Fla., decided February 29, 2012). FTC reportedly alleged that the company made misleading marketing claims for four products launched in the first half of 2009, but the court apparently determined that the agency failed to establish by clear and convincing evidence that the company had violated the consent decree which obligates it to possess competent and reliable scientific evidence to support its marketing claims. *See Atrium Innovations Press Release*, February 29, 2012.

CPSC Issues Final Safety Standard on All-Terrain Vehicles

The Consumer Product Safety Commission (CPSC) has issued a **final rule** amending its current mandatory All-Terrain Vehicles (ATVs) standard to incorporate revisions

to the standard adopted by industry since 2007. Applicable to ATVs manufactured or imported after April 30, 2012, the final updated version of the "American National Standard for Four Wheel All-Terrain Vehicles Equipment Configuration, and Performance Requirements" was unanimously approved by CPSC on February 14. Details about CPSC's proposed rulemaking appear in the **July 28, 2011, issue** of this *Report*.

First developed by the Specialty Vehicle Institute of America (SVIA) in 2007 under the auspices of the American National Standards Institute (ANSI), the new rule, ANSI/SVIA 1-2010, allows time for ATV companies to update their certification labels. Representing mostly minor changes from the 2007 version, the 2010 standard continues to allow the manufacture of age-appropriate ATVs intended for children older than ages 6, 10 and 12. ANSI/SVIA 1-2007 called for ATVs intended for youths older than 12 to be phased out, but the new standard reverses that, in part, so that youths of that age will not resort to riding adult-sized ATVs.

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Other differences from the 2007 version include (i) "a change in how to calculate the speed for the braking test of youth ATVs"; (ii) "a change in the force applied to passenger handholds during testing"; (iii) "the addition of a requirement that youth ATVs shall not have a power take-off mechanism"; (iv) "the addition of a requirement that youth ATVs shall not have a foldable, removable, or retractable structure in the ATV foot environment"; (v) "additional specificity concerning the location and method of operation of the brake control"; (vi) "tightening the parking brake performance requirement, by requiring the transmission to be in 'neutral' during testing, rather than in 'neutral' or 'park'"; and (vii) "the requirement that tire pressure information be on the label, when the previous requirement could be interpreted to allow tire pressure information to be on the label, or in the owner's manual, or on the tires."

CPSC Commissioner Robert Adler said in a **statement** that he voted for the standard "not because it represents a giant leap forward in safety," but because it "does not diminish the safety of the ATV vehicle. To state the obvious, this is a low threshold for federal safety standards." According to Adler, at least 2,775 children younger than 16 have died in ATV-related accidents in the past three decades, with at least 807,000 treated in emergency rooms for the same reason. "Sadly, these numbers continue to grow," Adler said. "We have already seen far too many death and injury reports in 2012 involving children as young as four. I hope, now that we have completed this mainly ministerial rulemaking . . . we can place greater emphasis on finding ways to address these tragic ATV deaths and injuries." *See Federal Register,* February 29, 2012.

CHAP Report Expected Soon on Safety of Phthalates in Children's Products

The Consumer Product Safety Commission's (CPSC's) Chronic Hazard Advisory Panel (CHAP) is reportedly preparing to release a safety report that will recommend which phthalate substances should be restricted or banned in children's products. CHAP

was charged in 2010 with evaluating the exposure and risk of a full range of phthalates used in those products.

Currently, the Consumer Product Safety and Improvement Act permanently bans the sale of toys and child care products that contain more than 0.1 percent of three specified phthalates: dibutyl phthalate (DBP), di-(2-ethylhexyl) phthalate (DEHP) and benzyl phthalate (BBP). On an interim basis, the law also bans the sale of any "children's toy that can be placed in a child's mouth" or "child care article" containing more than 0.1 percent of three additional phthalates: diisononyl phthalate (DINP), diisodecyl phthalate (DIDP) and di-n-octyl phthalate (DNOP). Based on CHAP's report, CPSC will determine whether to promulgate rules that continue the temporary ban and if other phthalates or phthalate substitutes should also be banned. *See BNA Product Safety & Liability Reporter,* February 2, 2012.

In a related development, the Food and Drug Administration (FDA) has **announced** the availability of draft guidance for the pharmaceutical industry on potential human health risks associated with DBP and DEHP. FDA requests comments on the **draft guidance** titled "Limiting the Use of Certain Phthalates as Excipients in CDER-Regulated Products" by May 31, 2012.

Asserting that "there is evidence that [human] exposure to DBP and DEHP from pharmaceuticals presents a potential risk of development and reproductive toxicity," FDA has recommended the use of "safer alternatives." According to the agency, studies have confirmed the presence of the phthalates in human amniotic fluid, breast milk, urine, and serum. *See Federal Register,* March 2, 2012.

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LEGAL LITERATURE REVIEW

Kyle Graham, "Of Frightened Horses and Autonomous Vehicles: Tort Law and its Assimilation of Innovations," *Santa Clara Law Review* (forthcoming 2012)

Part of a symposium, this article addresses the uncertainties that tend to "surround the application of tort law to emerging technologies." Authored by Santa Clara University Assistant Professor of Law Kyle Graham, the article describes how legal principles develop over time to address the liabilities involving product innovations. According to Graham, by examining how tort law was applied to technologies such as automobiles, airplanes, radio and television, and Tasers, five recurring features can be discerned. Among them are atypical initial cases, difficulties isolating unreasonable risks from the innovation's perceived benefits, and uncertainty among potential plaintiffs and their counsel over "the existence of a cause of action and the likelihood of recovery." Responding to the concerns of another symposium participant who opined that fear of potential liability could chill investment and research into technologies such as the "autonomous vehicle," Graham contends that lawsuits are more likely to emerge gradually "such that the technology will have an opportunity to evolve and further reduce its risk profile prior to encountering a wave of tort litigation."

Catherine Sharkey, "The Vicissitudes of Tort: A Response to Professors Rabin, Sebok & Zupursky," *DePaul Law Review* (2011)

New York University School of Law Professor Catherine Sharkey explores recent scholarly articles about tort law and concludes that the core issue in the debate over whether the tort system is out of control is a matter of predictability. Some contend that adherence to rules, such as categorical "no duty" rules, should replace standards, which allow juries to determine on a case-by-case basis whether certain conduct is reasonable. Sharkey contends that rules can go in either direction, citing strict liability, which imposes liability without fault.

Others call for a form of champerty, that is, third-party litigation investment, which has raised the same types of arguments that were made before the industrial revolution about liability insurance, "thought to create moral hazard by encouraging negligent behavior." As an aside, Sharkey notes that while insurers want predictability, they certainly do not want diminished liability, and thus, "[t]he last thing an insurance company should clamor for is the end of tort liability, for the insurance business would dry up alongside." Sharkey calls for more discussion and analysis of champerty's potential "socially useful function" in the quest for predictability.

She also observes how the U.S. Supreme Court, "the newest player on the scene," has made "inroads into traditional domains of state tort law" by, for example, limiting punitive damages and wielding the First Amendment in *Snyder v. Phelps* to "chip away at the common law torts of intrusion upon seclusion and intentional infliction of emotional distress." The Court has also imposed new pleading standards with which it has "pushed its regulation earlier in the pre-trial phase."

According to Sharkey, with the relaxation of contract and property-based restraints on common law torts and the expansion of "open-textured liability standards, renewed efforts have been directed at restraining the twin evils of 'floodgates liability' and 'crushing liability.'" The efficacy of these efforts, she concludes, "is, at present, a story without an ending."

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LAW BLOG ROUNDUP

Unseaworthiness and Product Liability Claims Developed in Tandem

"The maritime equivalent of product liability is the unseaworthiness action, which is based on the vessel owner's provision of a defective shop. Much like product liability, the unseaworthiness tort action evolved from nothing, to negligence, and then to strict liability, which is the current rule." Indiana University Robert H. McKinney School of Law Professor Gerard Magliocca, blogging about potential analogies worthy of exploration given the parallel doctrinal transformations of the land-based and sea-based defect actions.

Concurring Opinions, February 28, 2012.

Corporate Liability Under the Alien Tort Statute? No.

"[T]he precedents for extending international law to corporate entities range from few to embarrassingly few." Hofstra University Maurice A. Deane School of Law Professor Julian Ku, commenting about the U.S. Supreme Court's consideration of corporate liability under the Alien Tort Statute in *Kiobel v. Royal Dutch Petroleum*, which was argued February 28, 2012, and will be reargued during the Court's next term.

PointofLaw.com, February 27, 2012.

Corporate Liability Under the Alien Tort Statute? Yes.

"[S]ome scholars are urging the Court to decide the case on other grounds.… [i.e.,] that the ATS only allows suits by aliens against U.S. citizens. … [but t]he very first case to reference the ATS further refutes the notion that the statute was understood only to apply to diversity cases. *Bolchos v. Darrel*, 3 F. Cas. 810 (D.S.C. 1795)" (even with aliens on both sides of the case, the court found that the ATS removed "all doubt" about federal jurisdiction). "I would wager that a federal judge in 1795 had a pretty good understanding of the ATS and its jurisdiction limits." EarthRights, International Legal Director Marco Simons, analyzing the arguments of conservative legal scholars, "who intensely dislike the ATS," and are trying new theories to shield corporations from liability for alleged serious human rights abuses committed abroad.

"I would wager that a federal judge in 1795 had a pretty good understanding of the ATS and its jurisdiction limits."

Concurring Opinions, February 27, 2012.

THE FINAL WORD

Federal District Judge Calls for Revival of the Jury Trial

Recently releasing his latest ranking of the nation's most productive federal district courts, U.S. District Judge William Young reportedly called on the courts to reverse a trend that has seen jury trials marginalized. His productivity ranking is based on how much time federal judges spend on the bench and in civil and criminal trials annually. Young contends that trials are a key part of the U.S. system of justice. He was quoted as saying, "Historically, this nation was founded on, and all up through the populist era believed passionately in, direct democracy. The belief was, the people were equal partners with the judge in doing justice." He apparently laments the more modern view that judges are "some sort of administrative officer[s]" and suggests that the trend may have grown out of the civil rights movement of the 1960s when judges saw Southern juries failing to convict defendants allegedly responsible for violence against civil rights activists. Thus, according to Young, they no longer wanted juries, "because juries weren't sound." He contends that the courts are less effective by thinking about a jury trial as a last resort; instead, under the administrative model, a judge gets a case and asks "How am I going to get rid of" it? *See Law360*, February 29, 2012.

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PRODUCT LIABILITY LITIGATION REPORT

MARCH 8, 2012

UPCOMING CONFERENCES AND SEMINARS

ABA, Phoenix, Arizona – March 28-30, 2012 – "2012 Emerging Issues in Motor Vehicle Products Liability Litigation." Shook, Hardy & Bacon Tort Partners Robert Adams and H. Grant Law join a distinguished faculty discussing an array of topics relating to motor vehicle litigation and products liability law during this 22nd annual national CLE program. Adams will present on "Communicating with the Modern Juror at Trial," and Law will serve as co-moderator of a panel addressing the topic, "An Automobile Is Only as Good as the Sum of Its Parts: The Component Parts Panel."

Shook, Hardy & Bacon Tort Associate Amir Nassihi, who is serving as conference co-chair, will join several panels to discuss "The Rise and Fall of the Consumer Expectations Test" and "The Blockbuster Developments in Class Action Litigation." He will also participate as co-moderator of a panel discussion addressing "Managing and Developing the Corporate Counsel Relationship: The Inside View on Diversity, Retention and Client Expectations." Shook, Hardy & Bacon is a conference co-sponsor.

ABA, Beijing, China – April 19, 2012 – "Doing Business in the United States: What You Need to Know About Investing, Product Liability and Dispute Resolution." As a Premiere Sponsor for this program, presented in conjunction with the China Council for the Promotion of International Trade and the American Chamber of Commerce, Beijing, Shook, Hardy & Bacon will also moderate and present during the event. Employment Litigation Partner William Martucci will serve on a panel discussing "Operations in the United States and Compliance with United States Employment and Labor Laws." Global Product Liability Partner H. Grant Law will serve as the moderator of a program session focusing on "Minimizing Exposure for Product Liability." Pharmaceutical & Medical Device Litigation Chair Madeleine McDonough will introduce U.S. agency officials with the Consumer Product Safety Commission (CPSC) and Food and Drug Administration (FDA) and provide an overview of "The United States Regulatory Landscape: Focusing on the CPSC and the FDA." ■

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 95 percent of our more than 470 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).