Shook, Hardy & Bacon L.L.P.

APRIL 14, 2011

PRODUCT LIABILITY LITIGATION REPORT

CONTENTS

MEXICAN COURT DECLINES JURISDICTION IN DEFECTIVE EYE-SURGERY PRODUCT SUIT; DISPUTE BACK IN U.S. COURTS

After a Mexican court refused to exercise jurisdiction over personal injury claims involving an allegedly defective product used in eye surgery conducted in a Mexican clinic, the Ninth Circuit Court of Appeals has remanded the claims of elderly Mexican residents to a U.S. district court that had dismissed the suit on forum non conveniens grounds. ***Gutierrez v. Advanced Med. Optics, Inc.*, No. 09-55860 (9th Cir., decided April 7, 2011)**.

While the Ninth Circuit found that the district court did not err in its initial inconvenient forum analysis, because the Mexican courts dismissed the claims in the interim, the Ninth Circuit decided that the district court should reconsider its ruling. On remand, the court must consider why the Mexican courts refused to hear the claims, and, "if the district court determines that the Mexican courts declined to take jurisdiction of Plaintiffs' case because Defendant is not domiciled in Mexico and cannot submit to Mexico's jurisdiction, it would be an abuse of discretion for the district court to dismiss Plaintiffs' case based on forum non conveniens grounds."

STATUTE OF REPOSE APPLIED TO DEFECTIVE AIRCRAFT LITIGATION IN WASHINGTON

In a split decision, the Washington Supreme Court has determined that the statute of repose set forth in a federal statute bars a lawsuit involving an aircraft manufactured more than 18 years before the crash giving rise to the litigation. ***Burton v. Twin Commander Aircraft LLC*, No. 83030-4 (Wash., decided April 7, 2011)**. The personal representative of the estates of the seven people who died in the crash relied on the "fraud exception" to the statute of repose, arguing that the defendant manufacturer was required to (i) re-evaluate a previous accident that had been reported and investigated by the National Transportation Safety Board, (ii) conclude that it involved the same problem that led to other aircraft accidents in 2002 and 2003, and (iii) connect the earlier accident to the later accidents in reports to the Federal Aviation Administration (FAA).

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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According to the majority, the earlier accident did not involve the same problem, and the personal representative failed to produce sufficient evidence to show that the defendant misrepresented, concealed or withheld FAA-required information. Without this evidence, the majority ruled, "there is no material fact issue as to whether the exception applies. This being the case, [the federal law's] statute of repose bars this action." The court reinstated the summary judgment the trial court granted in the defendant's favor.

The three dissenting jurists **opined** that the majority failed to apply the correct summary judgment standard and would have determined that material issues of fact regarding the applicability of the fraud exception remain. According to the dissent, the majority incorrectly placed the burden on the plaintiff to prove his fraud case as a matter of law on the face of his pleadings in response to the defendant's summary judgment motion. "It is not [the plaintiff's] burden on summary judgment to present us with a 'smoking gun,' as the majority seems to require." The dissenters were apparently concerned that certain information about aircraft failures appearing in company e-mails was not disclosed to FAA.

SEVENTH CIRCUIT CLARIFIES CAFA AMOUNT-IN-CONTROVERSY STANDARD

Because a potential punitive damages award in litigation removed to federal court under the Class Action Fairness Act (CAFA) could bring the total damages above the law's $5 million amount-in-controversy minimum, the Seventh Circuit Court of Appeals has determined that the federal courts have jurisdiction over the matter. ***Back Doctors Ltd. v. Metro. Prop. & Cas. Ins. Co.*, No. 11-8003 (7th Cir., decided April 1, 2011)**. The issue arose in a contract dispute originally filed in state court but removed under provisions allowing the removal of class actions "in which the stakes exceed $5 million, provided that at least minimal diversity of citizenship exists."

The district court agreed with the plaintiff that the defendant insurer had not established a "reasonable probability" that the amount in controversy exceeded $5 million and remanded the matter to state court. Noting that the reference to a "reasonable probability" standard "entered this circuit's jurisprudence in 1993 and, we thought, departed in 2006," the Seventh Circuit clarified that "unless recovery of an amount exceeding the jurisdictional minimum is legally impossible, the case belongs in federal court. Only jurisdictional *facts*, such as which state issued a party's certificate of incorporation, or where a corporation's headquarters are located, need be established by a preponderance of the evidence."

Here, the recovery of more than $5 million was not impossible, despite the lack of an express request for a punitive award in the complaint or allegations of wanton or egregious conduct. According to the court, such an omission does not make a punitive award impossible because "Plaintiffs can amend their complaints as the litigation progresses. The Illinois statute is about fraud, after all, and the complaint

alleges that the insurer concealed from its clients the means it used to avoid paying what the insurance contracts promise. Fraud is a common ground of punitive damages in Illinois." With $2.9 million in compensatory damages at stake, the court indicated that more than $2.1 million in punitive damages is possible in the litigation, thus meeting the CAFA minimum. The court remanded the case to the district court for a ruling on the merits.

FEDERAL COURT APPLIES NEW EXPERT DISCLOSURE RULES RETROACTIVELY

Without providing detailed analysis, a federal court in Kentucky has decided that it was "just and practicable" to apply the amendments to Federal Rule of Civil Procedure 26 to litigation instituted before its December 1, 2010, effective date. *Daugherty v. Am. Express Co.*, No. 08-48 (U.S. Dist. Ct., W.D. Ky., decided March 23, 2011). The issue arose in a dispute over insurance coverage; the plaintiff sought to withhold documents his attorney provided to an expert witness, which documents would only be protected from disclosure under the new version of Rule 26. Previously, Rule 26 required disclosure of all information provided to testifying experts. Now, the rule protects communications between a party's attorney and a testifying expert except those relating to the expert's compensation, identifying facts or data provided by counsel to the expert and considered by the expert in forming her opinion, as well as identifying assumptions provided by counsel and relied on by the expert in forming her opinion.

According to the court, while discovery was scheduled to close on the day the rule's amendment took effect, it was extended to December 14. The insurance company issued a subpoena for the expert's file, and plaintiff's counsel accepted service on November 30. The expert's deposition took place on December 9. The insurance company argued that because discovery of the file was sought before December 1 and the expert "is a key witness who offered new opinions despite having received no new information," that "it would not be just and practicable to apply the amendments to this case." The court disagreed, apparently finding that the circumstances of the case met the "just and practicable" standard set forth in the rule for its application to pending proceedings.

LEAD-PAINT LITIGATION ALLOWED TO PROCEED UNDER RISK-CONTRIBUTION THEORY

A federal court in Wisconsin has reportedly determined that children allegedly poisoned by lead paint can pursue damages against a number of companies without identifying the specific company that manufactured the product. *Burton v. Sherwin-Williams Co.*, No. n/a (U.S. Dist. Ct., E.D. Wis., decided April 2011). According to a news source, the ruling conflicts with a decision reached by another jurist sitting on the same bench and recognizes a theory eliminated this year by the state

legislature. The "risk-contribution" theory was apparently adopted by the Wisconsin Supreme Court in 2005; the jurist who wrote the opinion was subsequently defeated in a retention election, and the legislature passed a tort-reform bill in January 2011 that requires a plaintiff to prove that a particular manufacturer made the product that allegedly harmed her.

Before February 1, the date the new law took effect, plaintiffs' lawyers apparently filed lawsuits against six companies in federal court on behalf of more than 150 children who claim they ingested lead paint over the past decade. The federal district court's chief judge reportedly dismissed a lead-paint lawsuit filed on behalf of one of the children, holding that a company cannot be held liable retroactively, in the absence of proof that its product harmed someone, without violating its constitutional due process rights. U.S. District Court Judge Lynn Adelman refused to dismiss the lead-paint lawsuit assigned to his courtroom, rejecting the defendants' due process violation claims. The matter will require a Seventh Circuit Court of Appeals ruling to resolve the conflict. *See* (Milwaukee) *Journal Sentinel*, April 10, 2011.

U.S. District Court Judge Lynn Adelman refused to dismiss the lead-paint lawsuit assigned to his courtroom, rejecting the defendants' due process violation claims.

Judge Adelman's decision to preside over a number of lead-paint cases filed previously was upheld by the Seventh Circuit Court of Appeals in 2010. Paint companies sought his recusal, arguing that a law review article he co-authored provided a favorable comment on the state supreme court ruling adopting the risk-contribution theory. Additional information about the ruling appears in the **June 24, 2010, Issue** of this *Report*.

ALL THINGS LEGISLATIVE AND REGULATORY

House Subcommittee Considers Revising CPSIA to Require Risk-Based Regulation

The U.S. House Subcommittee on Commerce, Manufacturing, and Trade recently held a hearing on **draft legislation** that would revise the Consumer Product Safety Improvement Act (CPSIA) of 2008. Seeking to give the Consumer Product Safety Commission "greater flexibility to regulate based on risk and to reduce unnecessary regulatory burdens on businesses while maintaining strong safety protections," the proposal could amend controversial lead and phthalate content requirements for certain children's products.

In remarks during the April 7, 2011, **hearing**, subcommittee chair Mary Bono Mack (R-Calif.) said that the proposal's "fundamental premise is that the commission can actually protect consumers far better when it is allowed to set priorities and regulate based on risk. Where possible, we should spare the commission from having to make time-consuming, case-by-case determinations, and let it spend more time on bigger problems." For example, Bono Mack said the draft legislation (i) "leaves open

the age for defining the term 'children's product'" in an attempt to determine which products intended for use by children should be subject to more stringent lead and phthalate mandates; (ii) "gives the commission the discretion to decide what standards should require third-party testing"; (iii) "gives the commission new authority and flexibility to require testing for only some portions of a standard or only for certain classes of products"; (iv) "spells out in greater detail who can submit reports of harm for the public portions" on CPSC's new public database; and (v) "strengthens the commission's authority to investigate complaints."

"Congress must move quickly, too, because the clock is ticking—unless we act soon, the 100 ppm (part per million) lead limit will take effect retroactively in August and once again millions of dollars worth of products will become illegal to sell, donate or export," Bono Mack said. A number of witnesses representing industry and public-health interests testified during the hearing. The former were united in their opposition to the CPSIA, noting its failure to make allowances for small businesses or to give the agency discretion in its application. They claimed that businesses are already closing because of the law's requirements. An American Academy of Pediatrics representative endorsed the current law and urged the subcommittee not to roll back any of its protections.

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CPSC Revises Lead-Paint Regulations

The U.S. Consumer Product Safety Commission (CPSC) has **announced** that it is "amending the criteria and process for commission acceptance of accreditation of third party conformity assessment bodies for testing to the lead paint ban regulations."

Effective April 5, 2011, the revised requirements specify the test methods that must be referenced when third-party conformity assessment bodies apply for accreditation. CPSC requests comments by May 5.

CPSC will require that one or more of the following test methods be referenced: (i) "the existing CPSC Standard Operating Procedure for Determining Lead (Pb) in Paint and Other Similar Surface Coatings, CPSC–CH–E1003–09 and/or CPSC–CH–E1003–09.1"; and/or (ii) "ASTM [formerly the American Society for Testing and Materials] F2853–10, 'Standard Test Method for Determination of Lead in Paint Layers and Similar Coatings or in Substrates and Homogenous Materials by Energy Dispersive X-Ray Fluorescence Spectrometry Using Multiple Monochromatic Excitation Beams.'"

According to the commission, because "many third party conformity assessment bodies operate on a two year cycle for review and renewal of accreditation," CPSC-accepted third-party conformity assessment bodies already listed on the CPSC Website will have until April 5, 2013, to reapply and be accepted. "After that date, previously accepted third-party conformity assessments bodies that test for 16 CFR part 1303 must have been accepted by the CPSC for one or more of the required test methods to maintain CPSC-accepted status." New applicants will have the option to

apply without reference to a specific test method until April 5, 2012. After that date, "the option for third party conformity assessment bodies to apply for CPSC-acceptance of accreditation to 16 CFR part 1303 without reference to a CPSC required test method will not be permitted." *See Federal Register,* April 5, 2011.

Oklahoma Governor Signs Bill That Caps Non-Economic Damages at $350,000

Oklahoma Governor Mary Fallin (R) has signed a **bill** (H.B. 2128) that caps non-economic damages in bodily injury cases at $350,000. Effective November 1, the legislation includes an exception to the cap in cases involving reckless disregard for the rights of others, gross negligence, fraud, and intentional or malicious conduct. Placing no limit on economic damages, the law defines bodily injury as "actual physical injury to the body of a person and sickness or disease resulting therefrom" and applies to medical malpractice suits and other personal-injury litigation.

In related developments, Fallin also recently signed S.B. 862, which eliminates joint-and-several liability to ensure that plaintiffs seek defendants most at fault rather than those with the most financial assets, and S.B. 865, which requires juries to be instructed that damage awards are not subject to state or federal income tax. "I'm thrilled to be able to sign into law measures which will directly address skyrocketing legal fees, protect our doctors, and help to bring more jobs and businesses into Oklahoma while still protecting the rights of plaintiffs and those who have suffered injuries," the governor was quoted as saying. *See Product Safety and Liability Reporter*, April 11, 2011.

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Pennsylvania Lawmakers Poised to Abolish Joint-and-Several Liability

The Pennsylvania House of Representatives has reportedly passed a **bill** (H.B. No. 1) that would change the way damages are awarded in most civil lawsuits. Apparently supported by the business community and opposed by the state's trial lawyers, the bill would change Pennsylvania's "joint-and-several" liability rule to allow defendants deemed responsible for a percentage of a judgment in a wrongful-death or injury lawsuit to pay no more than that percentage.

Referred to by proponents as the "Fair Share Act," the bill would bring "significant commonsense reform," Majority Leader Mike Turzai (R-Allegheny) told a news source. "People are tired of having to spend significant dollars to defend baseless suits." Minority Leader Frank Dermody (D-Allegheny), who has reportedly dubbed the legislation the "Wrongdoer Protection Act," asserted that the bill will not work. "We're going to bring this to the people," he said. Paul Lyon, a spokesperson for a Pennsylvania trial lawyers association, claims the bill would under compensate seriously injured people. "It unfairly places the burden on the backs of injured people instead of the negligent defendants who cause the injuries," he was quoted as saying.

According to insurance industry interests, agents support the bill and expect the state Senate to vote on the tort reform legislation this month. They also predict that Governor Tom Corbett (R) will support it. The bill apparently passed the House by a 112-88 vote, with several Democrats joining the Republican majority. *See The Associated Press,* April 8, 2011; *Insurance Journal*, April 12, 2011.

LEGAL LITERATURE REVIEW

Victor Schwartz & Cary Silverman, "Flawed CPSC Product Hazard Database," *LJN's Product Liability Law & Strategy*, April 2011

Shook, Hardy & Bacon Public Policy Attorneys **Victor Schwartz** and **Cary Silverman** have co-authored this "Practice Tip" about the Consumer Product Safety Commission's (CPSC's) new public database on which consumers and others can post reports of injury or risks of harm from consumer products. They contend that "[a]s designed, this tool may unnecessarily alarm both consumers who rely on the CPSC to provide accurate information, and manufacturers whose reputations will be tarnished by rumors, unfounded allegations, and outright fabrications." They recommend that manufacturers and product sellers both familiarize themselves with the database and "develop a quick-response system to address submitted reports." According to the article, the database lacks helpful information, the product reports may lack first-hand knowledge, and inaccurate information may be placed on the database without any particular incentives to correct or remove it.

They recommend that manufacturers and product sellers both familiarize themselves with the database and "develop a quick-response system to address submitted reports."

LAW BLOG ROUNDUP

Republican-Controlled House Looks to Reform Consumer Product Safety Amendments

"Reform efforts are finally afoot in the House of Representatives, at least two years after they should have started, but a three-member majority of the [Consumer Product Safety Commission] (two Obama appointees and a holdover) is defending the law on many though not all of its worst points." Blog editor Walter Olson, discussing the House Commerce subcommittee hearing on a draft bill that would roll back some of the requirements of the Consumer Product Safety Improvement Act.

Overlawyered.com, April 11, 2011.

Tort Reform Whacks and Curtailed Debate in Pennsylvania

"The state House took its first whack at tort reform last night, as the Republican-led chamber first rejected several Democrat-sponsored amendment[s] and then cut off debate on the bill entirely … But Democrats weren't the only ones getting snubbed.

The Republicans went through something of a family feud last night as they also rejected an amendment sponsored by Rep. Kate Harmer, R-Montgomery, that came up with a rival version of liability reform." *Morning Call* journalist John Micek, blogging on a site affiliated with former presidential candidate Ron Paul about the tort reform bill that would abolish joint-and-several liability in Pennsylvania.

PaRevolution.com, April 12, 2011.

THE FINAL WORD

FDA Prepares for International Meeting on Cosmetics Regulations

The Food and Drug Administration (FDA) has **scheduled** an April 26, 2011, meeting in Rockville, Maryland, to discuss topics that will be addressed by a voluntary international group of cosmetics regulatory authorities June 28-July 1 in Paris, France. According to FDA, the International Cooperation on Cosmetics Regulations (ICCR) is composed of regulatory authorities from the United States, Japan, European Union, and Canada. Agenda items for FDA's public meeting include overviews of the ICCR process and issues, such as sunscreen concerns. Time will be provided for comments by industry, non-governmental organizations and the public.

ICCR's "multilateral framework" is designed to "pave the way for the removal of regulatory obstacles to international trade while maintaining global consumer protection." Consensus decisions the group makes "will be compatible with the laws, policies, rules, regulations, and directives of the respective administrations and governments. Members will implement and/or promote actions or documents within their own jurisdictions and seek convergence of regulatory policies and practices." ICCR members "will enter into constructive dialogue with their relevant cosmetics' industry trade associations." *See Federal Register,* April 5, 2011.

UPCOMING CONFERENCES AND SEMINARS

ACI, Chicago, Illinois – April 27-28, 2011 – "Reducing the Legal Risks in the Sales and Marketing of Medical Devices: Fortifying Domestic and International Fraud and Abuse Compliance Efforts in the Face of Increasing Scrutiny." Shook, Hardy & Bacon Government Enforcement & Compliance Practice Co-Chair **Carol Poindexter** will conduct a half-day "master class" that will focus on region-specific compliance strategies and best practices in "high-risk emerging markets," such as Latin America, China and India.

DRI, Chicago, Illinois – May 5-6, 2011 – "Drug and Medical Device Seminar." Co-sponsored by Shook, Hardy & Bacon, this 27th annual CLE program will include a presentation by Pharmaceutical & Medical Device Litigation Partner **Matthew Keenan**, who will discuss "Rambo vs. Atticus Finch: Ethical Consideration and the Preservation of Professionalism in Drug and Medical Device Litigation."

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Advanced Medical Technology Association, London, England – May 18-20, 2011 – "2011 International Medical Device Industry Compliance Conference." Shook, Hardy & Bacon Government Enforcement & Compliance Partner Nate Muyskens is scheduled to moderate a panel discussion on "Best Practices in Distributor Risk Management: Pre-Contract Diligence, Training, Auditing and Monitoring." Organized by medical device industry leaders, the conference will feature an array of panel discussions with distinguished speakers from around the world. Shook, Hardy & Bacon is a conference co-sponsor.

ACI, Chicago, Illinois – June 22-23, 2011 – "4th Advanced Forum on Defending & Managing Automotive Product Liability Litigation: Expert Defense Strategies for Singled-Out Vehicles and Media-Focused Issues." Shook, Hardy & Bacon Tort Associate Amir Nassihi will join a distinguished faculty to moderate a panel discussion on "The View from the Bench: A Unique Opportunity to Hear How Judges Interpret Evidence/Arguments in the Automotive Context." ■

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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).