Shook, Hardy & Bacon L.L.P.

MAY 26, 2011

PRODUCT LIABILITY LITIGATION REPORT

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SECOND CIRCUIT FINDS JURISDICTIONAL ISSUES ABANDONED BY OUT-OF-STATE GUN RETAILERS

The Second Circuit Court of Appeals has upheld a default judgment entered against out-of-state retail firearms dealers, but remanded for the district court to reconsider the injunctive relief imposed. *City of New York v. Mickalis Pawn Shop, LLC*, Nos. 08-4804, 09-1345 (2d Cir., decided May 4, 2011). New York City filed a nuisance lawsuit in a New York federal court against numerous out-of-state gun dealers, alleging that they intentionally or negligently sold firearms in a manner susceptible to illegal trafficking to the city. The appellants are dealers located in South Carolina and Georgia; one had no contacts with New York, and the other's contacts were limited to Websites that allowed out-of-state purchasers to place an order that could be consummated by an in-store visit only.

Both defendants participated in the proceedings for several years by contesting personal jurisdiction at every opportunity. Counsel for each eventually filed motions to withdraw at their clients' request, and the lower court granted the motions after the gun dealers were fully advised that failure to defend would lead to the entry of a default judgment against them and the imposition of injunctive relief. Default judgments were entered against both, and injunctions were imposed. The defendants appealed, continuing to assert a lack of personal jurisdiction and citing the district court's failure to require that the plaintiff prove its case, including the existence of personal jurisdiction over the defendants.

The Second Circuit determined that the defendants waived the issue by affirmatively signaling to the court their intention to cease participating in their own defense, despite warnings that a default would result. According to the court, "a defendant forfeits its jurisdictional defense if it appears before the district court to press that defense but then willfully withdraws from the litigation and defaults, even after being warned of the consequences of doing so." The court also found that the defendants submitted to the district court's jurisdiction by appearing, litigating and then intentionally withdrawing from the proceedings. In this regard, the court stated, "We will not allow the defendants to 'escape the consequences' of their strategic decisions simply because they have proven to be disadvantageous to them."

Still, the court vacated the injunctions because they were vague and overbroad and invested a special master with too much authority to determine the content of the injunctions and wield the court's contempt powers.

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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

GEORGIA SUPREME COURT DISMISSES VACCINE-RELATED DESIGN DEFECT CLAIMS

On remand from the U.S. Supreme Court, the Georgia Supreme Court has dismissed design-defect claims filed by the parents of a child who purportedly sustained neurological injury from a vaccine. ***Am. Home Prods. Corp. v. Ferrari,* No. 07-1708 (Ga., decided May 16, 2011)**. As the court notes, the U.S. Supreme Court has determined that the National Childhood Vaccine Injury Compensation Act of 1986 "preempts all design-defect claims against vaccine manufacturers brought by plaintiffs who seek compensation for injury or death caused by vaccine side effects." The state court had previously allowed the claim, rejecting a "far-reaching interpretation" that "the statute granted complete tort immunity from design defect liability to an entire industry."

PLAINTIFFS CHALLENGE NEED FOR MEDICAL RECORDS TO SUPPORT MEDICAL MONITORING CLAIM

According to a news source, Pennsylvania residents who allege property damage and personal injury in litigation against companies extracting natural gas by means of hydraulic fracturing have sought a protective order to deny the defendants access to their medical records. *Fiorentino v. Cabot Oil & Gas Corp.*, No. 09-2284 (U.S. Dist. Ct., M.D. Pa., pleading filed May 2, 2011). The court previously entered an order denying a defense motion to dismiss the plaintiffs' medical monitoring claim, and the plaintiffs have reportedly argued that their past or present physical health is not relevant to that claim under Pennsylvania law. The defendants apparently responded to the request for protective order by arguing, "To prove a remedy of medical monitoring trust fund, Plaintiffs must show [that] monitoring beyond that normally recommended in the absence of exposure is required. A jury cannot determine what is beyond that normally recommended for each individual without knowledge of the Plaintiffs' medical histories." *See Mealey's Emerging Toxic Torts*, May 17, 2011.

FIRING RIFLE WITHOUT BOLT-ASSEMBLY PIN RULED NOT A REASONABLY ANTICIPATED USE

A divided Fifth Circuit Court of Appeals panel has determined under Louisiana products liability law that a rifle manufacturer could not have reasonably anticipated that someone would fire its rifle when it was missing a bolt-assembly pin. ***Matthews v. Remington Arms Co., Inc.*, No. 09-31217 (5th Cir., decided May 18, 2011)**. Accordingly, the court affirmed the lower court's determination after a bench trial that the manufacturer was not liable for the plaintiff's injuries, including the loss of an eye from the rifle's backward explosion during target shooting.

The majority ruled that the manufacturer could not reasonably anticipate that someone would disassemble the rifle and reassemble it without the pin; therefore, the manufacturer could not anticipate that someone would fire its rifle without the pin.

While the presence of the pin was contested at trial, the district court concluded that it was missing when the plaintiff fired the rifle. No evidence established who might have been responsible for the pin's removal. It was clear, however, that the rifle had been successfully fired several times with the pin in place before the injury occurred.

The dissenting judge opined that the majority misapplied Louisiana law by focusing on whether a third person's omission of the bolt-assembly pin made the rifle more dangerous than Remington subjectively expected. According to the dissent, "This model of Remington rifle has a dangerous characteristic that Remington did not warn users about either in the owners' manual or on the rifle itself, *viz*., when the pin holding its two-piece bolt assembly together is missing or defective, the rifle can explode in the face of a shooter, although its bolt assembly may appear to be working properly [without the pin] when a user inserts a rifle shell and prepares to pull the trigger."

CLASS COMPLAINT CHALLENGES VACUUM CLEANER'S "GERM KILLING" CLAIMS

An Illinois resident has filed a putative class action against a company that makes vacuum cleaners, alleging that the "germ killing" promotions it uses to sell one of its products are deceptive and misleading. *Ruscitti v. Oreck Corp.*, No. 11-03121 (U.S. Dist. Ct., N.D. Ill., filed May 10, 2011). According to a news source, the company settled similar allegations filed by the Federal Trade Commission for $750,000 and a promise to discontinue the product claims. The plaintiff seeks to represent a nationwide class of consumers who purportedly paid several hundred dollars more for the company's Halo® vacuum cleaner relying on its claims that the product could kill "virtually all bacteria, germs, mold and allergens that exist in households."

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The complaint alleges violations of the Uniform Deceptive Trade Practices Act, Consumer Fraud and Deceptive Business Practices Act and state consumer protection laws; breaches of express warranty and implied warranty of merchantability and fitness for a particular purpose; and unjust enrichment. The plaintiff seeks compensatory and punitive or treble damages, costs and attorney's fees. *See Law360*, May 12, 2011.

ALIEN TORT CLAIMS ALLEGED AGAINST COMPANY THAT DESIGNED SURVEILLANCE SYSTEM FOR CHINA

Named and unnamed plaintiffs claiming to be U.S. and Chinese citizens who practice Falun Gong have filed a putative class action under the Alien Tort Claims Act, alleging that the defendants developed and made a surveillance system that the Chinese government used "to eavesdrop, tap and intercept communications,

identify, and track Plaintiffs as Falun Gong members for the specific purpose of subjecting them to gross human rights abuses." *Doe I v. Cisco Systems, Inc.,* No. 11-02449 (U.S. Dist. Ct., N.D. Cal., San Jose Div., filed May 19, 2011).

The plaintiffs claim that Falun Gong is "a peaceful religious practice that is based on the tenets of Zen Shan Ren (Truthfulness, Compassion, and Tolerance)." According to the complaint, government officials identified the plaintiffs by means of the defendants' system, and the defendants knew the Chinese government would use the system for this purpose. Alleging torture, arbitrary detention, forced labor, cruel and degrading treatment, assault, false imprisonment, wrongful death, and unfair business practices, the plaintiffs seek compensatory and punitive damages, injunctive relief, attorney's fees, and costs.

ALL THINGS LEGISLATIVE AND REGULATORY

Senate Committee Approves Bill Involving Sealed Product Liability Agreements, Settlements

The U.S. Senate Judiciary Committee has reportedly approved bipartisan legislation (**S. 623**) requiring judges who oversee product liability suits to consider public health and safety concerns before sealing legal agreements and settlements. If such deals had been disclosed, the public would have known about dangers purportedly associated with a variety of products, including medical devices, pharmaceuticals, side-saddle gas tanks, and tires, according to the bill's sponsor, Senator Herb Kohl (D-Wis.), who first introduced such legislation nearly 20 years ago. Kohl has announced his intention to retire at the end of his fourth Senate term, which will expire in January 2013.

"Had information about these harmful products not been sealed by court orders, injuries could have been prevented and lives could have been saved," Kohl said to the committee, which approved the "Sunshine in Litigation Act of 2011" in a 12-6 vote. Companion legislation has evidently been introduced in the U.S. House of Representatives.

The legislation has its critics. In a **letter** to Senators Orrin Hatch (R-Utah) and Chuck Grassley (R-Iowa), L. Joseph Loveland, chair of the American College of Trial Lawyers' Federal Rules of Civil Procedure Committee, claims that the bill would establish "an undesirable precedent by circumventing the process" Congress established for amending the Federal Rules of Civil Procedure. As drafted, the law "would unduly restrict the discretion of trial judges to regulate civil litigation and would impose substantial new fact-finding burdens on the courts, without a demonstrated need for those changes," Loveland wrote. He also noted that that protective orders governing discovery or confidentiality are not frequently abused, nor do "they serve to keep private information that is important to protecting public health and safety." *See Senator Herb Kohl Press Release* and *Product Liability Law 360,* May 19, 2011.

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CPSC Offers Recommendations for Harmonizing International Toy Safety Standards

The Consumer Product Safety Commission (CPSC) has issued a 131-page staff roadmap document recommending ways to achieve global harmonization of existing toy safety regulations. The document calls for industry to play a key role in harmonizing the regulatory standards of international jurisdictions.

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Urging regulators to "cooperate primarily on the core work for which they are responsible, not on aligning the world's voluntary industry standards," CPSC notes that "industry is better placed than governments to select which areas of the world's various industry toy safety standards make the best candidates for alignment, as well as the schedule for undertaking such work." According to CPSC, most jurisdictions draw their toy safety requirements from major industry reference standards, such as ASTM, CEN and ISO. And the major standards organizations "are almost exclusively guided by industry experts."

To align standards, CPSC recommends that industry and regulators (i) "continue to examine carefully input from stakeholders about potential improvements in toy safety, including suggestions for improved safety stemming from alignment of existing unique CPSC regulations with requirements in other jurisdictions"; (ii) "coordinate with foreign regulators on future toy safety rules to the extent that U.S. consumers may benefit from increased product safety"; (iii) "facilitate an annual international regulators meeting on emerging consumer product safety issues" to "discuss future toy safety regulations in all represented jurisdictions in order to better inform coordination work"; (iv) "ask other regulators to use their influence to press for improved international coordination on toy safety standards by their relevant standards bodies"; and (v) "promote international coordination among ASTM International and the other key toy safety standards bodies." *See BNA Product Safety & Liability Reporter,* May 23, 2011.

Tennessee Lawmakers Advance Tort Reform Package

Tennessee lawmakers have approved a tort reform package (HB 2008/SB 1522) designed to improve the state's business climate. Slated to take effect October 1, 2011, the Tennessee Civil Justice Act of 2011 is a gubernatorial priority and awaits Governor Bill Haslam's (R) signature. According to Lt. Governor Ron Ramsey (R), the legislation aims to "provide certainty and predictability for businesses, while ensuring that injured plaintiffs receive all of the economic, quantifiable damages they suffer."

Ramsey said that the bill (i) "limits the maximum appeal bond amount from $75 million to $25 million or 125 percent of the judgment amount"; (ii) "defines two components of compensatory damages: economic and non-economic damages"; (iii) "places a cap on non-economic damages, which are subjective damages like pain and suffering, at $750,000 per injured plaintiff for both healthcare liability action and other personal injury actions," which cap would not apply if the harm

were caused by intentional conduct; (iv) "raises the cap to $1.0 million if the plaintiff becomes a paraplegic or quadriplegic because of spinal cord injury, sustains third degree burns over 40 percent or more of his or her body or face, [or] has an amputation of a hand or foot," or if the matter involves the wrongful death of a parent "leaving one or more minor children"; (v) "places no cap on economic damages and [allows] any damages that can be objectively quantified [to] be recovered"; (vi) "caps punitive damages, which must be proved by clear and convincing evidence, at two times compensatory damage or $500,000, whichever is greater unless the defendant intended to injure the plaintiff, was under the influence of drugs or alcohol, or intentionally falsified records to avoid liability"; (vii) "prevents punitive damages in products liability actions, unless the seller had substantial control over the design or manufacturing of the product or had actual knowledge of the defect in the product at the time it was sold." *See Lt. Governor Ron Ramsey Press Release,* May 16, 2011.

Texas Senate Approves New Version of "Loser Pays" Tort Reform Bill

The Texas Senate has passed a new version of a "loser pays" tort reform bill recently approved in the Texas House of Representatives. Set for reconciliation with the House legislation, the measure is apparently supported by Governor Rick Perry (R), trial lawyers, defense attorneys, and tort-reform proponents.

The Senate's revised version of **H.B. 274** aims to help businesses burdened by meritless lawsuits by allowing judges to rule on merits of civil cases much earlier in the process, limiting discovery and assessing court costs equitably at the end of a case. "Attorneys fees can be assessed against prevailing parties," Senator Joan Huffman (R-Houston), a former judge who helped craft the revisions, told a news source. "The Supreme Court will write the rules concerning how these cases are handled, and we'll have to see over time how they are used, but this will be another tool in the tool box that judges can use."

The House had passed a watered-down version of the "loser pays" bill, calling for lawsuit losers to pay the winning side's court costs and legal fees. Additional details about the House bill appear in the May 12, 2011, **issue** of this *Report*. *See Austin American-Statesman,* May 21, 2011; *Associated Press,* May 24, 2011.

LEGAL LITERATURE REVIEW

William Janssen, "*Iqbal* 'Plausibility' in Pharmaceutical and Medical Device Litigation," *Louisiana Law Review,* 2011

Charleston School of Law Assistant Professor William Janssen has assessed pharmaceutical and medical device litigation filed in federal court since the U.S. Supreme Court adopted its new "plausibility" pleading standard and concludes that the standard "has not had a dramatically recalibrating effect." Of the 264 decisions Janssen studied, "nearly 80% of the time, *Iqbal* did not

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drive the outcome of the dismissal motion." While the remaining 20 percent of cases are not negligible, Janssen found that a frequent grant of amendment opportunities and a pattern of reducing incidence, among other matters, appear to blunt the initial concerns of the new standard's critics. In fact, Janssen found, "Plaintiffs confronting dispositive pleadings attacks in this litigation context are succeeding in completely resisting those motions at a greater rate today than federal pleaders generally in the year before *Twombly* first announced the 'plausibility' test and are losing such motions today at the lowest rate since *Iqbal* was decided."

Mark Behrens, "The Constitutional Foundation for Federal Medical Liability Reform," *American Tort Reform Association,* May 2011

Shook, Hardy & Bacon Public Policy Partner **Mark Behrens** has authored this American Tort Reform Association white paper, which supports congressional efforts (H.R. 5) to adopt limits on medical liability as some states have already done to improve health care. According to Behrens, "federal medical liability reform legislation is constitutional, consistent with federalism principles, and represents sound public policy." He explores how tort reform does not run afoul of due process, equal protection and right to jury trial protections. The federal bill would allow those states that have already adopted medical liability reforms to continue to impose their own limitations on damages; federal limits on noneconomic and punitive damages for medical liability would govern "only when state law would otherwise allow for unlimited damages."

Catherine Sharkey, "Inside Agency Preemption," *Michigan Law Review* (forthcoming 2012)

New York University School of Law Professor Catherine Sharkey contends that the 21st century has seen a profound shift in who decides when federal law displaces state law. Exploring the preemption question in the context of the Food and Drug Administration, National Highway Traffic Safety Administration, Consumer Product Safety Commission, and Environmental Protection Agency, Sharkey discusses how agencies have purported to preempt state regulation "by preamble" and contends that stakeholders ignore preemptive rulemaking processes within the agencies at their own risk. Given the shift in institutional power, the author suggests reforms, including notification to state attorneys general so that state regulatory interests can be considered during rulemakings anticipated to have a preemptive effect.

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LAW BLOG ROUNDUP

Tort Reform's Effect on Case Filings in Pennsylvania

"In 2010, there were 1,491 filings, representing a 38.5 percent decline from the 'base years' 2000-2002. In Philadelphia, the state's judicial district with the largest caseload, the decline has been by nearly 70 percent during the same period." Widener University

School of Law Associate Professor Christopher Robinette, discussing the release of data in Pennsylvania showing that after the judiciary adopted reforms to rein in medical malpractice suits, the number of lawsuits filed statewide declined for a sixth consecutive year. The rules require plaintiffs to secure a certificate of merit from a medical professional establishing that the procedures at issue fell outside acceptable standards and prohibit forum shopping.

TortsProf Blog, May 18, 2011.

Star Power Fails to Stop Tort Reform in Tennessee

"Legislative debate over the bill took a celebrity turn when the Tennessee Association for Justice, the trial lawyer group, hired actor-turned-Senator-turned-actor Fred Thompson (R-TN) to lobby against the bill. The mixture of star power and avuncular testimony obviously didn't work." National Association of Manufacturers Senior Advisor Carter Wood, blogging about a tort reform package sent to Tennessee's governor by lawmakers who passed the legislation by two-to-one margins.

PointofLaw.com, May 21, 2011.

Debate over Mandatory Arbitration Ruling Continues

"His letter defends the decision largely on the basis of the particular design of AT&T's arbitration program, which Pincus claims is favorable to consumers even though it bans class actions through a contract of adhesion. Pincus does not address the Supreme Court's reasoning, which may render the states powerless to defeat contractual class action bans regardless of their specific terms, so long as the bans are laundered through mandatory arbitration clauses." Georgetown University Law Center Visiting Professor Brian Wolfman, considering recent competing letters to the editor in *The New York Times* about the U.S. Supreme Court's *AT&T v. Concepcion* decision. Andrew Pincus represented AT&T before the Court, and NYU Law Professor Arthur Miller countered his defense of the ruling, stating "[t]his Supreme Court no longer even tries to hide its pro-business orientation."

CL&P Blog, May 22, 2011.

THE FINAL WORD

Agencies Slow in Responding to Executive Order on Economic Review of Regulations

According to a news source, numerous executive branch departments and agencies, which were required to make public their plans for reviewing existing and pending regulations for economic impacts, have declined to do so or may be planning to release the plans in the next few weeks. Manufacturing interests in the United States have long contended that burdensome regulations affect job growth, profits and the ability to compete in international markets. With Republican legislators looking for ways to cut spending and eyeing the budgets of regulatory agencies, the Obama

administration issued Executive Order 13563. Intended to eliminate or modify outdated or costly regulations, it required the agency's plans to be submitted by May 18, 2011.

The Office of Management and Budget (OMB) asked the agencies to describe how they would review their existing regulations to determine whether any should be modified, streamlined, expanded, or repealed. OMB's Office of Information and Regulatory Affairs (OIRA) issued guidance to help the agencies and asked independent agencies not subject to the executive order to comply voluntarily.

In a memo, OIRA emphasized the value of public participation and transparency in the rulemaking process and said agencies "should make their preliminary plans available to the public within a reasonable period (not to exceed two weeks) after May 18." According to OIRA, agencies should publish their plans online in an open, downloadable format. *See BNA Product Safety & Liability Reporter*, May 23, 2011.

UPCOMING CONFERENCES AND SEMINARS

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."

The Sedona Conference®, Lisbon, Portugal – June 22-23, 2011 – "Third Annual Sedona Conference® International Programme on Cross-Border Discovery and Data Privacy." Shook, Hardy & Bacon eDiscovery, Data & Document Management Partner Amor Esteban joins a distinguished faculty that will provide practical guidance on mitigating the risk and cost of processing and transferring information in cross-border litigation and regulatory matters. Shook, Hardy & Bacon is a program co-sponsor. Esteban currently sits on The Sedona Conference's steering committee and is the chief editor for its Working Group 6, which focuses on data privacy and electronic discovery internationally; the group will hold a special meeting in Lisbon. ■

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).