Shook, Hardy & Bacon L.L.P.

JULY 22, 2010

PRODUCT LIABILITY LITIGATION REPORT

CONTENTS

1 *Federal Court Allows Failure to Provide Adequate Warning Claim to Proceed Against Motorcycle Maker*

1 *Expert Testimony Excluded as Unreliable; Consumer's Popcorn Lung Claims Dismissed*

2 *Federal Court Rules Coalition Lacks Standing to Force FDA to Stop Allowing Thimerosal in Pharmaceuticals*

3 *Washington State High Court Rejects Federal Plausibility Pleading Standard in Contract Dispute*

3 *Cookware Manufacturer Settles Complaint Alleging Fraudulent Health-Related Advertising*

4 *Commentator Suggests U.S. Supreme Court Has Entered "Assertive," "Volatile" Phase*

4 *All Things Legislative and Regulatory*

6 *Legal Literature Review*

7 *Law Blog Roundup*

7 *The Final Word*

8 *Upcoming Conferences and Seminars*

FEDERAL COURT ALLOWS FAILURE TO PROVIDE ADEQUATE WARNING CLAIM TO PROCEED AGAINST MOTORCYCLE MAKER

A federal court in Georgia has determined that the plaintiff's failure to read the warnings provided by the companies that made a motorcycle and tires involved in a fatal crash is not a bar to claims that the defendants "failed to provide an adequate warning regarding the dangers of overloading the motorcycle." *Morris v. Harley Davidson Motor Co.*, No. 3:09-cv-74 (U.S. Dist. Ct., M.D. Ga., Athens Div., decided July 7, 2010). The owner's manual and information on the motorcycle itself provided warnings about not exceeding the gross vehicle weight rating, which would have allowed "an additional 420 pounds of weight capacity for the rider, any passenger, cargo, and accessories." The weight of the motorcycle's owner and his deceased wife alone exceeded this limit. The owner's manual also warned against using the motorcycle to pull a trailer; when the rear tire blew out, the owner, with his wife as a passenger, was pulling a trailer with the motorcycle.

The defendants sought to dismiss the strict-liability inadequate-warning claim, saying it failed as a matter of law because the plaintiff failed to read the warnings in the owner's manual or provided on information plates attached to the motorcycle. According to the court, the defendant misconstrued the nature of the failure to warn claim by framing it as an alleged inadequacy of the language used. Here, the allegation challenged "the adequacy of the efforts of the manufacturer or seller to communicate the dangers of the product to the buyer or user." Questions about a warning's placement, color, print size, or symbolism are for the jury in Georgia, and the court determined that genuine issues of material fact exist "as to the adequacy and reasonableness of Harley-Davidson's means and method of conveying the warnings."

EXPERT TESTIMONY EXCLUDED AS UNRELIABLE; CONSUMER'S POPCORN LUNG CLAIMS DISMISSED

A federal court in Washington has dismissed the lawsuit filed by a man who alleged that inhaling the diacetyl in fumes from four to six bags of microwave popcorn daily caused his lung disease. *Newkirk v. ConAgra Foods, Inc.*, No. 08-273 (U.S. Dist. Ct., E.D. Wash., decided July 2, 2010). The chemical is used in many food products for its butter-flavoring properties.

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

Represented by the Independence, Missouri, attorney who has brought claims on behalf of popcorn factory workers and other consumers, Larry Newkirk sought to introduce the general causation opinion of physician David Egilman and the specific causation opinions of Dr. Charles Pue, Dr. Allan Parmet and William Ewing. The court analyzed Egilman's proposed testimony and found it unreliable on a number of grounds, including that he sought to extrapolate residential diacetyl exposures from industrial exposures, which have been extensively studied and associated with bronchilitis obliterans, a debilitating lung disease also referred to as "popcorn lung." According to the court, the witness had no basis for making this extrapolation.

Because the proffered specific causation witnesses relied on Egilman's opinion, the court ruled that their testimony was also unreliable and must be excluded. Lacking any evidence of causation, the plaintiffs' claims for negligence, design defect, failure to warn, and loss of consortium were dismissed with prejudice, and the court ordered the file closed.

FEDERAL COURT RULES COALITION LACKS STANDING TO FORCE FDA TO STOP ALLOWING THIMEROSAL IN PHARMACEUTICALS

A federal court in the District of Columbia has determined that an organization opposed to the use of mercury-based preservatives, such as Thimerosal, in vaccines, lacks standing to challenge in court the Food and Drug Administration's (FDA's) denial of its citizen petition seeking to ban the use of Thimerosal in pharmaceutical products, including vaccines. *The Coal. For Mercury-Free Drugs v. Sebelius*, No. 09-0015 (U.S. Dist. Ct., D.D.C., amended memorandum opinion filed June 29, 2010). FDA challenged the standing of the organization's members who must have "standing to sue in their own right" so that an organization may file suit on their behalf in federal court.

The coalition members who filed declarations alleging injuries fell into three categories: those fearing the harmful effects of receiving these types of vaccinations, those actually injured by exposure to mercury-based compounds in vaccines and medical professionals alleging that their reputations would be harmed "absent action being taken by the defendants to address the presence of mercury-based compounds in vaccines." Because the coalition members who feared injury acknowledged that Thimerosal-free alternatives are available, the court found that they lacked standing. The coalition members with past injuries could not meet standing requirements because the coalition was seeking prospective relief, "not relief that would remedy their past harm." As to the medical professionals, the court indicated that allegations relating to their reputations "due to the damage done to the profession by the increasing evidence that the FDA has not been assuring that vaccines which these professionals have administered … are safe," was nothing more than "a generalized grievance on behalf of the medical community." Such generalized grievances are not judicially cognizable and do not satisfy the U.S. Supreme Court's requirement for "specific, concrete facts demonstrating a particularized injury."

The court granted FDA's motion to dismiss the complaint.

WASHINGTON STATE HIGH COURT REJECTS FEDERAL PLAUSIBILITY PLEADING STANDARD IN CONTRACT DISPUTE

The Washington Supreme Court has decided not to change its standard for dismissing a civil lawsuit to reflect the new plausibility standard adopted by the U.S. Supreme Court. ***McCurry v. Chevy Chase Bank,* FSB, No. 81896-7 (Wash., decided June 24, 2010)**. The issue arose in a case challenging bank fees. Under Washington law, "a plaintiff states a claim upon which relief can be granted if it is *possible* that facts could be established to support allegations in the complaint."

The defendant urged the court to reconsider that standard and read the *Twombly/Iqbal* "plausibility" component into it. According to the court, the U.S. Supreme Court's plausibility standard "is predicated on policy determinations specific to the federal trial courts," i.e., the likelihood that failing to weed out weak claims results in costly discovery that can pressure defendants to settle meritless claims. The parties did not show the court that the same policy considerations "hold sufficiently true in the Washington trial courts" and did not address "countervailing policy considerations." Without relevant data, and indicating its reluctance to change a rule in effect in the state for nearly 50 years, the court refused to rewrite the rule and directed those seeking change to the state's rule-making process.

Without relevant data, and indicating its reluctance to change a rule in effect in the state for nearly 50 years, the court refused to rewrite the rule and directed those seeking change to the state's rule-making process.

COOKWARE MANUFACTURER SETTLES COMPLAINT ALLEGING FRAUDULENT HEALTH-RELATED ADVERTISING

According to a news source, a company that makes high-priced cookware and targets its sales to Spanish-speaking immigrants in the Los Angeles area has agreed to settle litigation accusing it of fraudulently claiming that its products could cure diseases ranging from cancer and Alzheimer's to diabetes and heart disease. *California v. Rena Ware Int'l, Inc.*, No. BC437981 (Cal. Super. Ct., Los Angeles County, settlement reached July 1, 2010). California Attorney General Edmund Brown brought the lawsuit, alleging unfair competition and false advertising. Sales representatives reportedly told consumers that the cookware reduced high blood pressure by removing hormones from meat while it cooked. Under the agreement, the manufacturer will pay a total of $625,000 to resolve the dispute and must ensure, by means of an independent monitor, that it will refrain from using either false information or high-pressure sales tactics. *See Mealey's Personal Injury Report*, July 12, 2010.

COMMENTATOR SUGGESTS U.S. SUPREME COURT HAS ENTERED "ASSERTIVE," "VOLATILE" PHASE

According to *New York Times* U.S. Supreme Court correspondent Adam Liptak, the court's recently concluded term should leave no doubt that Chief Justice John Roberts has abandoned judicial minimalism and is leading a new movement that is "assertive," "volatile" and shows "great solicitude to the interests of corporations." The court's decision to give corporations the same First Amendment rights as individuals in terms of campaign financing is viewed as a portent of decisions to come that could threaten new legislation overhauling the financial industry and health care if challenges to the laws reach the court.

While the Chief Justice does not appear to be motivated by a single judicial methodology, such as originalism, i.e., interpreting the Constitution as immutable and fixed, he has apparently pushed the court on the issues about which he is most concerned and given ground on other matters in the interest of pragmatism. Among other matters, Liptak notes that Chief Justice Roberts does not seem as interested in issues, such as limits on federal power vis-à-vis the states, which once absorbed the attention of the late Chief Justice William Rehnquist and retired Justice Sandra Day O'Connor. *See The New York Times*, June 29, 2010.

ALL THINGS LEGISLATIVE AND REGULATORY

New Law Sets Formaldehyde Emission Standards for Composite Wood Products

President Barack Obama (D) has signed into law an **amendment** to the Toxic Substances Control Act that sets formaldehyde emission standards for composite wood products sold in the United States as of January 1, 2013. Sponsored by Senators Amy Klobuchar (D-Minn.) and Mike Crapo (R-Idaho), the legislation requires manufacturers to ensure via third-party testing and certification that both raw and finished products emit fewer than approximately 0.09 parts per million of formaldehyde. It also directs the Environmental Protection Agency (EPA) "to work with Customs and Border Protection and other relevant federal agencies to enforce the standards for imported wood products," according to Klobuchar's July 7, 2010, press release.

An EPA indoor air quality assessment states that pressed wood products, such as particleboard, hardwood plywood paneling and fiberboard, frequently contain urea-formaldehyde resin, which releases emissions at room temperatures. The agency cautions consumers that the chemical can cause eye, nose and throat irritation; difficulty breathing; nausea and fatigue; skin rash; severe allergic reactions; and possibly cancer. As a result, U.S. industry has voluntary reduced formaldehyde use while facing competition from less regulated imports. "High levels of formaldehyde are a health threat," Klobuchar was quoted as saying. "This law establishes national standards that will both protect public health and ensure an even playing field between domestic wood products and foreign imports."

"This law establishes national standards that will both protect public health and ensure an even playing field between domestic wood products and foreign imports."

FTC Issues Final Appliance Labeling Rule for Light Bulbs

The Federal Trade Commission (FTC) has issued a **final rule** that amends lamp labeling requirements in the Appliance Labeling Rule (16 CFR Part 305). As directed by the Energy Independence and Security Act of 2007, FTC has reconsidered the effectiveness of light bulb labeling in advance of standards that will eliminate low-efficiency incandescent bulbs from the market in 2012. According to the FTC notice, "The remaining higher efficiency light bulbs will include products widely available now, such as compact fluorescent lamps ('CFLs'), as well as products likely to become increasingly available in the future, such as high efficiency solid-state lighting (*e.g.,* light-emitting diode ('LED') products)."

Effective July 19, 2011, the amendments will require manufacturers "to provide brightness and energy-cost information on the front of light bulb packages," as well as "a detailed 'Lighting Facts' label on the side or rear." Similar to the Nutritional Facts on food items, the Lighting Facts panel must contain disclosures about "brightness, energy cost, bulb life, light appearance, watts, and, in some cases, voltage and mercury information." For the first time, brightness will also be indicated in lumens as opposed to watts, which measure energy use but not the strength of light.

In making these disclosures, manufacturers must also follow Department of Energy test procedures and submit data for their labeled lamps. FTC will accept comments on the final rule until September 20, 2010. *See FTC Press Release,* June 18, 2010; *Federal Register,* July 19, 2010.

EPA Welcomes FDA to Chemical Screening Collaboration

The Environmental Protection Agency (EPA) has welcomed the Food and Drug Administration (FDA) to a federal agency collaboration that involves chemical testing. According to EPA, the National Institute of Environmental Health Sciences' National Toxicology Program and the National Institute of Health's Chemical Genomics Center have already joined with EPA to merge federal agency resources "to develop ways to more effectively predict how chemicals will affect human health and the environment." The collaboration, referred to as Tox21, involves robotic screening that has already evaluated 2,000 chemicals "against dozens of biological targets." An EPA spokesperson was quoted as saying, "This collaboration is revolutionizing the current approach to chemical risk assessment by sharing expertise, capabilities and chemical information, which will lead to both a faster and deeper understanding of chemical hazards." *See EPA News Release*, July 19, 2010; *Federal Register*, July 20, 2010.

The collaboration, referred to as Tox21, involves robotic screening that has already evaluated 2,000 chemicals "against dozens of biological targets."

LEGAL LITERATURE REVIEW

Victor Schwartz & Cary Silverman, "Preemption of State Common Law by Federal Agency Action: Striking the Appropriate Balance that Protects Public Safety," *Tulane Law Review*, 2010

Shook, Hardy & Bacon Public Policy Attorneys Victor Schwartz and Cary Silverman criticize the battle waged by trial lawyers and consumer advocates to do away with the federal preemption of state tort-law claims. They discuss why federal agency regulations should preempt claims based on product safety, noting how the regulatory process fully considers comparative risks and benefits in a way that litigation cannot. And they suggest that regulatory compliance should fulfill the common law standard of care. They conclude, "Sometimes, reasoned decisions reached by government agencies after long study represent the best approaches for the overwhelming majority of the American public."

Ben Depoorter, "Law in the Shadow of Bargaining: The Feedback Effect of Civil Settlements," *Cornell Law Review*, 2010

Duke University School of Law Visiting Professor Ben Depoorter contends that while confidential settlements have been criticized for withholding information from the public, because they are discussed fairly often within the legal community, particularly when "extravagant," their impact can actually "introduce a potential bias in the information that is available from the larger pool of settlements." According to Depoorter, "media reports focus on outlier cases; lawyers' networks and professional interest organizations circulate information on spectacular settlements; and special interest groups bring attention to extravagant settlements that are most likely to induce legislative counteraction." This can, in turn, lead plaintiffs to be more demanding and give courts and juries higher benchmarks against which to value claims. He suggests that requiring disclosure could reduce this "distorting effect," but cautions that confidentiality restrictions could "lead publicity-conscious defendants to settle in the prefiling stages … further reducing the availability of transparent, public available information on settlements."

Margaret Williams & Tracey George, "Deciding Who Decides: Consolidating Multidistrict Litigation," Draft Paper, July 2010

A Federal Judicial Center researcher and a Vanderbilt Law School professor have prepared a preliminary assessment, based on sample data from an ongoing project, which could ultimately show what types of factors most often lead the Judicial Panel on Multidistrict Litigation (MDL) to consolidate multiple lawsuits filed in the federal courts for pre-trial proceedings and where and to whom they are most often assigned. Since it was created some 40 years ago, the panel "has transferred roughly 325,000 lawsuits," including mass torts involving chemical spills, pharmaceuticals and airline

Since it was created some 40 years ago, the panel "has transferred roughly 325,000 lawsuits," including mass torts involving chemical spills, pharmaceuticals and airline disasters.

disasters. The article notes that "nearly all" transferred cases are resolved without returning to the originating courts. According to the authors, "Given the increasing importance of MDLs as a percentage of all cases on the docket, the increasing rate at which transfers are granted, the discretion given to the Panel assigning cases, as well as the discretion of judges deciding these cases, understanding this process is more important than ever."

LAW BLOG ROUNDUP

White House Asks Corporate Execs for List of Laws Hindering Growth and Jobs

"The Business Roundtable, a coalition of top corporate executives, has submitted to the White House a list of laws, regulations, taxes, and other policies it believes are hurting businesses and would like to see rolled back—a roadmap for a dangerous, deregulatory future." OMB Watch Regulatory Policy Analyst Matt Madia, discussing a White House invitation to business interests to identify pending laws and regulations that would have "a dampening effect on economic growth and job creation." The **list** includes pending food safety and auto safety legislation.

OMBWatch, The Fine Print, July 16, 2010.

Driver Error and Sudden Acceleration?

"Will plaintiffs' lawyers who have been conspiracy-theorizing about a non-existent electronic defect withdraw their class actions and product-liability suits, much less apologize? Don't count on it." Manhattan Institute's Center for Legal Policy Adjunct Fellow Ted Frank, blogging about the U.S. Department of Transportation's finding that, in dozens of sudden-acceleration accidents involving Toyota Motor Corp. automobiles, the throttles were wide open and the brakes had not been engaged.

PointofLaw.com, July 13, 2010.

THE FINAL WORD

Recall System Fails to Reach Consumers

Federal officials, regulators and other experts have reportedly expressed concern that the current recall system fails to elicit a response from most consumers. According to a recent *Washington Post* article, those responsible for product safety fear that "the public is suffering from 'recall fatigue,'" a constant stream of information that makes it easier to ignore or overlook important announcements. "We call it the Chicken Little syndrome," one company spokesperson was quoted as saying. "If you keep shouting at the wind—'The sky is falling! The sky is falling!—people literally become immune to the message."

Data gathered by the *Post* apparently showed that consumers were most likely to return expensive items, such as cars or appliances, as well as products recalled for lethal defects. But they were far less responsive when it came to "everyday consumer goods," including food items. As the Centers for Disease Control and Prevention noted, it continued to receive *Salmonella* reports even after highly publicized recalls of tainted peanut butter and frozen pot pies. "We do a good job of getting dangerous products off store shelves, but we do believe the greatest challenge is getting products out of homes," said Consumer Product Safety Commission Chair Inez Tenebaum.

Other experts told the *Post* that the most effective recalls involve direct notification of purchasers. One store that tracks sales through rewards or membership cards has purportedly started using them to contact shoppers within 24 hours of a recall, with a success rate that in some cases approaches 90 percent. The federal government has also sought to replicate these results for durable baby items by requiring manufacturers to include registration cards with their products. Still, opined one consumer advocate, "the most effective solution is to have stricter standards and make safer products to we don't need a recall in the first place." *See The Washington Post,* July 2, 2010.

UPCOMING CONFERENCES AND SEMINARS

The Missouri Bar/Missouri Judicial Conference, Columbia, Missouri – September 29-October 1, 2010 – "2010 Annual Meeting." Shook, Hardy & Bacon Product Liability Litigation Partner Denise Talbert will co-present a session titled "E-Discovery Roadmap – 2010 and Beyond," a continuing legal education track program. Talbert will discuss emerging best practices, cost efficiencies, and competencies in managing and conducting e-discovery. ■

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).