Shook, Hardy & Bacon L.L.P.

DECEMBER 8, 2011

PRODUCT LIABILITY LITIGATION REPORT

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SEVENTH CIRCUIT FINDS LACK OF JURISDICTION OVER REMOVED AG LAWSUIT INVOLVING LCD PRODUCTS

The Seventh Circuit Court of Appeals has determined that federal courts lack jurisdiction under the Class Action Fairness Act (CAFA) to consider *parens patriae* claims filed in state court by the Illinois attorney general (AG). ***LG Display Co., Ltd. v. Madigan*, No. 11-8017 (7th Cir., decided November 18, 2011)**.

Illinois AG Lisa Madigan sought to recover, under state antitrust law, allegedly inflated prices on LCD products sold to the state, its agencies and residents. The defendant removed the case to federal court, and then sought to appeal the district court's ruling remanding the matter to state court, arguing that the case presented unsettled CAFA-related questions.

The appeals court disagreed that the issue was novel or that the case was a disguised class action or mass action removable to federal court under CAFA, and concluded that it therefore lacked jurisdiction to consider the appeal. Noting that the Fourth and Ninth Circuits had exercised jurisdiction in similar cases and then denied the appeals on the merits, the court disagreed with their approach, but found "their discussions of the relationship between *parens patriae* actions and CAFA helpful and persuasive." Additional details about the Ninth Circuit's decision appear in the **October 13, 2011, issue** of this *Report*.

The Seventh Circuit declined the defendant's invitation that it consider who the parties in interest actually were on a claim-by-claim basis, an analysis that has been adopted in other circuits. According to the court, while CAFA was intended to expand federal courts' jurisdiction over class actions, "it does not follow that 'federal courts are required to deviate from the traditional "whole complaint" analysis when evaluating whether a State is the real party in interest in a *parens patriae* case.'" The court also noted, "Restraint is particularly appropriate in light of the [U.S.] Supreme Court's directive that removal statutes should be 'strictly construed,' and the sovereignty concerns that arise when a case brought by a state in its own courts is removed to federal court."

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SHB offers expert, efficient and innovative representation to clients targeted by class action and complex litigation. We know that the successful resolution of products liability claims requires a comprehensive strategy developed in partnership with our clients.

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CLASS COUNSEL MISCONDUCT NEED NOT BE EGREGIOUS TO WARRANT CERTIFICATION DENIAL

Writing for the Seventh Circuit Court of Appeals, Judge Richard Posner has held that misconduct by putative class counsel does not have to be egregious for a court to deny a motion to certify the class. ***Creative Montessori Learning Ctrs. v. Ashford Gear LLC*, No. 11-8020 (7th Cir., decided November 22, 2011)**. The case involved allegations that the defendant, a home-furnishings wholesaler in California with three employees and annual sales of $500,000, violated the Telephone Consumer Protection Act by sending unsolicited fax advertisements to more than 14,000 people.

The lawyers representing the putative class plaintiffs had apparently learned about the faxes from a fax broadcaster who sends such advertisements as an agent of the advertiser. According to the court, the lawyers "asked her for transmission reports of faxes that she had sent and information on how to communicate with the intended recipients, but promised not to disclose any of this material to a third party." The broadcaster provided the reports, and thus the lawyers learned that the named plaintiff was one of the recipients, although there was apparently some question as to whether the plaintiff actually received the defendant's fax. The lawyers, who "specialize in bringing class actions under the Act," then notified the named plaintiff that they had "determined that you are likely to be a member of the class. You might not remember receiving the junk faxes, but if the lawsuit is successful, you would receive compensation (up to $1,500) for each junk fax sent."

The district court agreed with the defendant that these actions constituted misconduct by the lawyers, i.e., (i) concealing the purpose of obtaining material from the broadcaster, which purpose was inconsistent with maintaining the promised confidentiality, and (ii) implying to the plaintiff that "there already was a certified class to which the school belonged." But the court did not find that such misconduct cast a "shadow on the adequacy of class counsel to represent the class," one of the requirements for certifying a class, because it determined that the conduct was not egregious and was best left to bar disciplinary authorities.

The appeals court explained in some detail the prejudice to a defendant of an order certifying a class action against it and observed in particular, "this case turns a dispute of at most $3,000 (the maximum statutory penalty for the two unsolicited fax advertisements allegedly, though, as we'll note, probably not, received by the plaintiff) into an $11.11 million suit (assuming no trebling)—an almost four-thousand-fold increase—against" a small company. According to the court, "To suggest as the district court did that 'only the most egregious misconduct' by class counsel should require denial of class certifications on grounds of lack of adequate representation was bad enough. To rule that only the most egregious misconduct 'could *ever arguably* justify denial of class status,' as the court went on to hold, would if taken literally condone, and by condoning invite, unethical conduct. Misconduct by class counsel that creates a serious doubt that counsel will represent the class loyally requires denial of class certification."

The court reversed and remanded the order certifying the class for the district court to "re-evaluate the gravity of class counsel's misconduct [in light of the 'serious doubt' standard] and its implications for the likelihood that class counsel will adequately represent the class."

FEDERAL APPEALS COURT REFUSES TO INTERFERE WITH MANAGEMENT OF MDL APPEALS

Denying a petition for writ of mandamus, the Seventh Circuit Court of Appeals has upheld a case management order entered by the Judicial Panel on Multidistrict Litigation (JPML), which order could result in appeals of similar issues raised in different consolidated cases going before different federal circuits. ***FedEx Ground Package Sys., Inc. v. U.S. JPML*, No. 11-2438 (7th Cir., decided November 17, 2011)**. The issue arose in the context an employment-classification dispute by delivery drivers who filed numerous class actions against the defendant. While filed under different state laws, the lawsuits apparently presented common questions of fact, so the JPML consolidated more than 70 and transferred them to a multidistrict litigation (MDL) court for consolidated pretrial proceedings.

The MDL court issued summary-judgment rulings that effectively resolved the claims in 22 of the still-pending cases, and where the transferee court entered final judgments, those appeals were pending before the Seventh Circuit. The Seventh Circuit noted, however, "There is no final appealable judgment in the remaining 12 cases, and there's the rub." The MDL court could have issued partial final judgments in those cases under Federal Rule of Civil Procedure 54(b), "so that plaintiffs would have to appeal immediately in those cases and the appeals would come to this circuit." Or the MDL court could "follow the usual course at the end of consolidated pretrial proceedings: transfer the cases with the remaining claims back to the original transferor courts for further proceedings, including possible appeal after a final judgment."

The Seventh Circuit observed that the Rule 54(b) option allows the consolidation of closely related appeals before one circuit, although the cases may be "chopped up for piecemeal appeals," whereas the remand option ensures that "all issues in the same case, involving the same parties and the same facts, will be appealed at once, and to the same circuit." Still, the remand option, according to the court, "means that the appeals of similar issues (though under different states' laws) in different cases will go to different circuits." Deferring to the transferee judge's remand recommendation, the JPML chose the remand option noting, "The evident merit in both views highlights an interesting intersection between Rule 54(b) and [28 U.S.C.] Section 1407. No doubt, one can make strong arguments for either a preference for consistent appeals from a transferee court ruling or a preference that related claims in the same case be taken in the same appeal."

The Seventh Circuit observed that the Rule 54(b) option allows the consolidation of closely related appeals before one circuit, although the cases may be "chopped up for piecemeal appeals," whereas the remand option ensures that "all issues in the same case, involving the same parties and the same facts, will be appealed at once, and to the same circuit."

Because a request for mandamus requires a showing that the right to the writ is "clear and indisputable," the Seventh Circuit found no exceptional circumstances warranting such relief and deferred to the discretion of the transferee court and JPML. The court found that the choice between the two case management methods is best left to them, "without trying to impose a rigid rule for all cases and circumstances. The transferee court knows well the issues and dynamics of the particular case. The JPML brings to bear decades of experience with more than a thousand MDL proceedings, which have included some of the most complex and challenging cases in the history of the federal courts." According to the court, "[i]n terms of the standards for issuing writs of mandamus, it would be rare for one party to have a 'clear and indisputable right' to one method over the other."

GEORGIA APPEALS COURT OVERTURNS OFF-ROAD VEHICLE PLAINTIFF'S VERDICT

The Georgia Court of Appeals has reversed a jury verdict awarding more than $300,000 for injuries sustained when Yamaha's Rhino, a "four-wheeled, open-air, off-road vehicle," rolled over on the driver. ***Yamaha Motor Corp. v. McTaggart*, No. A11A1022 (Ga. Ct. App., decided November 15, 2011)**. The plaintiffs claimed that the Rhino was defective because it lacked a door; Yamaha argued on appeal of the trial court's denial of its motions for a directed verdict and judgment notwithstanding the verdict that "the undisputed evidence at trial demanded a finding that [plaintiff] assumed the risk of his injuries."

Reviewing the plaintiff's trial testimony, the appeals court concluded that the defendant demonstrated that the plaintiff "had actual and subjective knowledge of the specific danger associated with the doorless design of the Rhino, that he fully appreciated the risks associated therewith, and that he voluntarily exposed himself to those risks." According to a news source, the court thus reversed the only decision favoring a plaintiff of the nine cases involving Yamaha's Rhino that have gone to trial. The company indicated that it will continue to vigorously defend the product and claims that "[t]he Rhino is a safe and useful off-road vehicle when driven responsibly." *See Law360*, November 16, 2011.

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LAWSUITS ALLEGING FALSE "ORGANIC" LABELING ON PERSONAL CARE PRODUCTS SETTLE

The Center for Environmental Health, which earlier this year filed complaints against numerous personal-care product makers alleging that they falsely represented their products as "organic," has announced a settlement with 11 companies. *Ctr. for Envtl. Health v. Advantage Research Labs., Inc.*, No. RG 11-580876 (Cal. Super. Ct., Alameda County, filed June 16, 2011); *Ctr. for Envtl. Health v. Naked Earth Inc.*, No. 11-585234 (Cal. Super. Ct., Alameda County, filing date unknown). The center reports that the

legal agreements certified by the court "call on the companies to comply with COPA [California's Organic Product Act], either by increasing their use of organic ingredients or changing their labels, and to make their organic ingredient records available to [the center] for inspection." Additional information about one of the lawsuits appears in the **June 23, 2011, issue** of this *Report*. *See Center for Environmental Health News Release*, November 30, 2011.

MICHIGAN PARENTS SEEK DAMAGES FROM BABY SEAT MAKER FOR INFANT'S DEATH

The parents of a 4-month-old girl who died when her face became wedged between a portable recliner and her crib bumper have sued the product's manufacturer in federal court for damages in excess of $75,000. *Thiel v. Baby Matters, LLC*, No. 11-15112 (U.S. Dist. Ct., E.D. Mich., S. Div., filed November 18, 2011). They claim that the death occurred when the defendant was negotiating with the Consumer Product Safety Commission over appropriate warning labels and instructions relating to the recliner's use in a crib or playpen. While the product is purportedly shown in the company's patent applications placed in a crib and the company repeatedly denied the product was defective, it recalled the recliners after receiving word of the infant's death and allegedly blamed the parents for using it in a crib.

Alleging negligence, gross negligence and negligent and intentional infliction of emotional distress, the plaintiffs seek compensation in excess of the statutory cap, exemplary damages, costs, interest, and attorney's fees. They claim that the product had a defective harness and was sold with inadequate labeling or warnings. According to the complaint, the company knew the harness would not stop an infant from falling out over the side of the recliner and had received more than two dozen reports of similar incidents before the death occurred in this case.

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ALL THINGS LEGISLATIVE AND REGULATORY

Congressional Discovery Hearing Rescheduled

A congressional hearing titled "The Costs and Burdens of Civil Discovery" has been rescheduled for December 13, 2011. Originally set for November 16, the hearing before the House Subcommittee on the Constitution will focus on e-discovery and recent developments before the advisory committees considering changes to the Federal Rules of Civil Procedure.

According to the Lawyers for Civil Justice Website, the hearing is expected to cover the (i) "scope and dimensions of the problems with the federal litigation system"; (ii) "costs and burdens faced by litigants particularly in the areas of preservation and discovery of information"; (iii) "impact of those costs and burdens on the American economy and the competitiveness of American companies"; (iv) "magnitude of the

costs savings that would better be spent on improving projects and services and creating jobs"; and (v) "expressions of support for the Judicial Conference Committee on Practice and Procedure's primary responsibility to develop rule[-]based solutions that would help relieve some of those costs and burdens, increase efficiency, and improve access to the federal court system."

Scheduled witnesses include William Hubbard, University of Chicago Law School assistant professor; Rebecca Love Kourlis, executive director of the University of Denver's Institute for the Advancement of the American Legal System; and Thomas Hill, General Electric's senior counsel. According to a published report, Hubbard and Love Kourlis assert that rule changes are necessary because the increasing volume of electronically stored information makes it difficult for lawyers and the e-discovery software industry to keep up. *See Law Technology News,* November 18, 2011.

Product Safety Agency Launches Enhancements to Online Reporting Tool

The Consumer Product Safety Commission (CPSC) has announced enhancements to its online reporting tool to make it easier for businesses to submit information about potentially hazardous or defective products. Details about the **Saferproducts.gov** database, which was launched earlier this year, appear in the **March 17, 2011**, issue of this *Report*.

Based largely on requests and feedback from businesses and trade associations, the improvements will allow reporting of product safety issues electronically rather than by postal mail, according to CPSC. A comprehensive **online form** provides manufacturers, private labelers and importers an opportunity to quickly report potential problems with their products.

A **Business Portal** allows all database-registered businesses, including manufacturers, private labelers and importers, to receive notices of incident reports electronically, regardless whether the reports are eligible for publication on the database. Previously, businesses could receive only database-eligible reports electronically.

According to CPSC, "the structure has been put in place to eventually allow businesses registered in the Business Portal to add brand names for products they sell or have sold. Along with brand names, the time periods during which the company sold each brand also can be identified. This information will help CPSC more easily contact the appropriate business when a report about a product is submitted to SaferProducts.gov." *See CPSC Press Release,* November 8, 2011.

CPSC Warns About Dangers of Children Swallowing High-Powered Magnets

The Consumer Product Safety Commission (CPSC) has issued a warning about the dangers of children swallowing high-powered magnets. Calling the consequences "severe," the agency reports 22 incidents since 2009 involving children ages 18 months to 15 years old. Seventeen cases involved

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magnet ingestion, and 11 required surgery that often led to the repair of damaged stomachs and intestines.

"Although the risk scenarios differ by age group, the danger is the same," CPSC said in a November 10, 2011, press release. "When two or more magnets are swallowed, they can attract one another internally, resulting in serious injuries, such as small holes in the stomach and intestines, intestinal blockage, blood poisoning and even death."

According to CPSC, the high-powered, ball-bearing magnets are of a size that can be swallowed and are prohibited in toys for children younger than age 14. Sold as component magnets in sets of at least 200, they are marketed as desk toys for adults to create shapes and relieve stress. Toddlers have evidently swallowed loose magnets found on tables, refrigerators, sofas, and floors; teenagers have either intentionally or unintentionally swallowed them when placing two or more on opposite sides of their ear lobes, tongues or noses to mimic body piercings.

Magnetic desk-toy manufacturers Kringles Toys and Gifts, which makes Nanospheres®, and Maxfield and Oberton, which manufactures Buckyballs®, have urged consumers who have purchased these sets for children younger than 14 or have children younger than 14 in the home, to "remove access to the sets by children immediately and contact the firms for a refund."

Baby Seat Injuries Continue Despite Additional Warnings

The Consumer Product Safety Commission (CPSC) has issued an **alert** due to continuing injuries sustained by infants placed in a Bumbo® baby seat, which was subject to a recall in 2007 and has since been sold with a warning label to deter use on elevated surfaces. Apparently, some 45 incidents involving injury after the recall from use on an elevated surface have been reported to CPSC and the manufacturer. In 17 of those cases, the infants, ranging in age from 3 to 10 months, sustained skull fractures. Some 3.85 million of these baby seats have been sold in the United States since 2003, and CPSC personnel have indicated that further action could be taken as investigation into the incidents continues. *See* BNA *Product Safety & Liability Reporter*, December 5, 2011.

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Phthalate Hazard Advisory Panel Teleconference Scheduled

The Consumer Product Safety Commission (CPSC) has **announced** that its Chronic Hazard Advisory Panel on phthalates and phthalate substitutes will conduct a teleconference on December 19, 2011. While no opportunity for public comment will be provided during the call, the panel will discuss its progress in preparing a final report. The panel was charged with studying the effects on children's health of these substances, which are used in toys and child-care articles. The panel is also required to provide recommendations to CPSC about those phthalates that should be prohibited from use or otherwise restricted. The deadline for requesting access to the teleconference is December 14, 2011. *See Federal Register*, December 2, 2011.

LEGAL LITERATURE REVIEW

Mark Latham, Victor Schwartz & Christopher Appel, "The Intersection of Tort and Environmental Law: Where the Twains Should Meet and Depart," *Fordham Law Review* (2011)

Vermont Law School Professor Mark Latham and Shook, Hardy & Bacon Public Policy Attorneys **Victor Schwartz** and **Christopher Appel** explore how a proliferation of statutory remedies for environmental harms has affected traditional tort law which historically provided a way to redress environmental injuries. Among other matters, they note that "nuisance law has emerged as a widely used theory to address environmental interests, in part, because of the perceived vagueness and broad latitude of the tort action." The authors urge courts to narrowly draw the intersection between tort law and environmental law and refrain from sacrificing "the guiding and fundamental principles of tort law … to afford short-sighted relief and distort the basis of the common law of torts."

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Sarah Croft, "When can international manufacturers be sued in the US?," *The In-House Lawyer,* October 2011

Discussing recent U.S. Supreme Court decisions that involved whether state courts could exercise jurisdiction over foreign product manufacturers, Shook, Hardy & Bacon Global Product Liability Partner **Sarah Croft** notes that "these decisions reaffirm that non-US manufacturers cannot be sued in a state court unless their commercial conduct has a link to that state." Thus, "the focus of the courts should be on the commercial conduct of the companies rather than, for example, whether the ultimate location of a product is foreseeable."

Alison Newstead, "International co-ordinating counsel in product liability cases: is it really necessary?," *The In-House Lawyer,* November 2011

Authored by Shook, Hardy & Bacon Global Product Liability Associate **Alison Newstead**, this article provides compelling reasons for global manufacturing companies' in-house attorneys to retain international coordinating counsel before lawsuits are filed in a multitude of foreign jurisdictions. Newstead notes that international coordinating counsel can, among other matters, quickly locate reliable local counsel in other countries, handle a company's defense consistently across jurisdictions and provide advice on responding to emerging trends.

Jonah Gelbach, "Locking the Doors to Discovery? Conceptual Challenges in and Empirical Results for Assessing the Effects of *Twombly* and *Iqbal* on Access to Discovery," *Yale Law Journal* (forthcoming)

This article, authored by a law student who was formerly an economics professor, suggests that data comparing motion-to-dismiss rates before and after the U.S. Supreme Court adopted a plausibility pleading standard fail to answer whether such

motions are more likely to be granted after *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). According to Yale J.D. candidate Jonah Gelbach, any changes in grant rates fail to account for "party selection effects," that is, effects attributable to "changes in the number and composition of cases in which motions to dismiss are filed." By accounting for these effects, Gelbach concludes that a significant number of cases (nearly 20 percent) no longer reach the discovery phase "as a result of the switch to heightened pleading." The focus of Gelbach's research was defendant selection; he is currently exploring plaintiff-selection effects and empirical data involving the merits of cases affected by the new pleading standard.

LAW BLOG ROUNDUP

Should the Sentimental Value of a Lost Pet Be Compensated?

"I don't think anyone would question that owners feel affection for their pets and that injuries to pets can cause their owners sadness, grief and emotional distress. Thus, I really don't see why owners should not have the right to try to claim these types of injuries." John Marshall Law School Professor Alberto Bernabé, blogging about a recent Texas Court of Appeals ruling allowing the owners of a mistakenly euthanized dog to recover damages for the sentimental value of their pet. *Medlen v. Strickland*, No. 02-11-00105 (Tex. Ct. App., decided November 3, 2011).

Torts Blog, November 28, 2011.

Sentimental Value Redux

"While this story brings hope to animal lovers alike, veterinarians are displeased. Both the American and Texas Veterinary Medicine [sic] Associations have plans to appeal this ruling." Pace Law School Professor David Cassuto, discussing the *Medlen* case and observing that the court of appeals rejected a 120-year-old Texas Supreme Court decision to reach its ruling, relying on more recent precedent allowing recovery for the sentimental value of destroyed personal property.

Animal Blawg, November 28, 2011.

And Once Again

"What's puzzling is why some self-proclaimed animal lovers are ecstatic with the court's decision. Ironically, the opinion is based on the fact that animals are considered property, and as such, owners are entitled to emotional damages that are unique to their loss … if this becomes the law of the land, it will lead to higher costs to own a pet, disproportionally hurting middle class and low income pet owners. Who will pay for those higher damage awards? The rest of us pet owners of course." The American Veterinary Medical Association's (AVMA's) Legislative and Regulatory Attorney Adrian Hochstadt, explaining "why non-economic damages are bad for both pets and their owners."

AVMA@Work, November 30, 2011.

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THE FINAL WORD

Second Alien Tort Statute Case Could Be Added to U.S. Supreme Court Docket

Chief legal counsel for the Washington Legal Foundation's (WLF's) litigation division suggests in a recent "Legal Pulse" article that if the U.S. Supreme Court adds a second Alien Tort Statute (ATS) case to its docket, it would "be in a position to hear combined arguments in *Kiobel* and *Sarei* in April. Any decision in those combined cases would provide a comprehensive picture of the likely future of ATS litigation." The Court has granted review in *Kiobel v. Royal Dutch Petroleum* to consider whether ATS lawsuits can be filed against corporate entities or the law is limited to individuals as defendants.

The Ninth Circuit recently issued a ruling in *Sarei v. Rio Tinto, PLC*, that, according to WLF's Richard Samp, would provide the U.S. Supreme Court "a vehicle to address the scope of the ATS more broadly." Samp notes that the Ninth Circuit minority in *Sarei* would have held that Congress did not intend that the ATS apply to activities occurring in a foreign country and further that the law does not impose liability on those who simply aid and abet human rights violations. He contends that this view has "attracted considerable support among federal appellate judges" and that if the Court grants review and reverses, nearly all pending ATS cases would be subject to dismissal because they involve activities allegedly occurring in a foreign country. ■

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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).