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HIGHLIGHTS

BNA INSIGHTS: How *Cappuccitti* Will Affect CAFA Jurisdiction

The recent opinion by the U.S. Court of Appeals for the Eleventh Circuit in *Cappuccitti v. DIRECTV Inc.* adds unprecedented new requirements to the jurisdictional amount-in-controversy provision of the Class Action Fairness Act, say attorneys Anthony Rollo, H. Hunter Twiford III, Richard A. Freshwater, and Stephen T. Masley in this BNA Insight. The authors say the ruling wrongly interprets CAFA in requiring that at least one plaintiff allege $75,000 in controversy to trigger CAFA jurisdiction for class actions originally filed in federal court, as well as $5 million in controversy for the class as a whole. The authors warn that the decision ''may effectively shut down access'' to federal courts in the Eleventh Circuit for most new class actions and that the ruling will be argued as authority nationwide by those opposing CAFA jurisdiction in new and pending cases. **Page 879**

S.C. Supreme Court Vacates $31 Million Verdict in Rollover Suit

The South Carolina Supreme Court vacates a $31 million verdict for a minor who was injured in a Ford Bronco rollover accident and sends the case back for a new trial. The court also discards the consumer expectation test in design defect cases, saying the exclusive test is now the risk-utility test, with its requirement of showing a feasible alternative design. **Page 860**

California, Alabama Juries Return Defense Verdicts in Rhino ATV Suits

Juries in San Bernardino County, Calif., and Tallapoosa County, Ala., return verdicts for Yamaha Motor Corp. U.S.A. in injury cases involving the company's Rhino off-road vehicle. **Page 861**

Court OKs Defense Judgment; Woman Negligent for Using Drug After Rash

A federal appeals court affirms a ruling that a woman's contributory negligence in continuing to take Children's Motrin after noticing a rash barred her recovery against the manufacturer, despite a jury award of $3.5 million in damages. **Page 862**

New Motorcoaches To Have Lap/Shoulder Seat Belts for All Under Proposal

New motorcoaches would be required to be equipped with lap/shoulder seat belts for every passenger seat, the National Highway Traffic Safety Administration proposes. The driver's seats of motorcoaches and of large school buses also would be required to have a lap/shoulder belt, instead of either a lap belt or a shoulder belt, as is currently required. The proposal aims to minimize the likelihood of motorcoach driver and passenger ejections. **Page 873**

Groups Ask CPSC for Standards Restricting Cadmium in Children's Jewelry

The Consumer Product Safety Commission is seeking comments on a petition by environmental advocates for standards to restrict the presence of cadmium in children's products—specifically in toy metal jewelry—in light of the harm the metal poses to children. **Page 875**

ALSO IN THE NEWS

CHINESE DRYWALL: A $6.5 million settlement between the Lowe's home improvement store chain and a nationwide class of drywall purchasers in a Georgia state court case draws objections from participants in the federal Chinese drywall multidistrict litigation. **Page 865**

MEDICAL DEVICES: A federal trial court in North Carolina stands by its initial decision denying class certification in a case involving allegedly flawed panacryl sutures. **Page 865**

VACCINES: The United States, vaccine manufacturers, physicians' groups, scientists, and other amici file briefs with the U.S. Supreme Court, supporting a manufacturer's stance that federal vaccine law preempts all design defect claims against vaccine makers. **Page 866**

STEEL GRATING: Two steel grating manufacturers seek a meeting with the Occupational Safety and Health Administration and CPSC to address potential safety concerns of steel grating made in China and exported to the United States. **Page 877**

RECALL REPORT

LISTING: A compilation of child restraints, consumer products, and motor vehicles recalled in July. **Page 886**

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Product Liability

Motor Vehicles

S.C. Top Court Vacates $31 Million Award; Post-Manufacture Evidence Not Allowed

The South Carolina Supreme Court Aug. 16 vacated a $31 million verdict for a minor injured in a Ford Bronco rollover accident and sent the case back for a new trial, faulting post-manufacture evidence introduced at trial to show Ford Motor Co.'s liability, as well as closing arguments by the plaintiff's counsel (*Branham v. Ford Motor Co.*, S.C., No. 26860, 8/16/10).

The high court also discarded one of the tests previously used in the state to determine whether a product is unreasonably dangerous in design—a consumer expectations test. ''While the consumer expectations test fits well in manufacturing defect cases, we do agree with Ford that the test is ill-suited in design defect cases. We hold today that the exclusive test in a products liability design case is the risk-utility test with its requirement of showing a feasible alternative design.''

The court also addressed other issues. It said the verdict form should not have apportioned fault among joint tortfeasors because doing so presented a ''very real risk that the jury . . . would . . . inflate the actual damage award to ensure [plaintiff Jesse Branham III] received a full recovery from the one deep-pocket defendant.'' It ruled on the propriety of certain arguments for punitive damages, clarified dismissal rules for negligence and strict liability claims with common elements, and, looking at a ''novel issue,'' said trial courts have the authority to realign parties.

Two justices on the five-member court concurred in part and dissented in part. They disagreed with the manner in which the court got rid of the consumer expectations test and also criticized the majority's view of post-manufacture evidence. ''I believe the majority's [evidence] rule sweeps too broadly,'' Justice Costa M. Pleicones wrote, ''and absorbs within its ambit evidence which is properly admissible in a design defect case.''

David R. Kelly, an attorney for Ford who tried the case, told BNA, ''It was a very significant opinion for product liability cases in South Carolina.''

He added, ''We're of course ready, willing, and able to try the case again.''

Back-Seat Distraction. On June 17, 2001, Cheryl Hale was driving her 1987 Ford Bronco II 4x2 to her house with several children on board, according to the court. No one in the vehicle was wearing a seat belt. The children were excited and Hale turned to the back seat to quiet them. But when she did so, the car veered right, toward the shoulder. Hale realized what was happening and turned the steering wheel to the left, overcorrecting. The vehicle rolled over and Branham, one of the children, was ejected.

The boy suffered a brain injury, Kelly said.

Branham's father sued Ford and Hale on the minor's behalf in Hampton County Circuit Court. The jury found both Ford and Hale liable. It awarded $16 million in actual damages and $15 million in punitive damages. Ford appealed directly to the supreme court.

Shared Absent Element Knocks Out Both Claims. Branham brought negligence and strict-liability claims related to a seat belt sleeve in the Bronco. The trial court had dismissed the strict-liability claim on the basis that the sleeve was not defective as a matter of law. Because the negligence claim shared with the strict-liability claim the element that the product be ''in a dangerous condition unreasonably dangerous to the user,'' it, too, should have been dismissed, rather than going to the jury, the court said.

Ford challenged the sufficiency of the evidence for Branham's design-defect claim related to handling and stability. The high court, reviewing the testimony about the development of the Bronco, the suspension choices Ford made, and how the suspension types affected the vehicle's center of gravity, said Branham's evidence was sufficient to support the verdict.

Risk-Utility. The court then turned to Ford's contentions that Branham failed to prove a reasonable alternative design under the state's risk-utility test, and that South Carolina law requires that a risk-utility test be used in design-defect cases.

Referring to the evidence of different types of suspension, the high court said Branham produced evidence of a feasible alternative design. ''Whether this evidence satisfies the risk-utility test is ultimately a jury question,'' the court said.

The court decided that the risk-utility test should be the exclusive test for design-defect cases, departing from the *Restatement (Second) of Torts § 402A*, adopted in 1974 by the South Carolina Legislature. The court noted that the *Restatement (Third) of Torts: Product Liability* ''effectively moved away from the consumer expectations test for design defects, and towards a risk-utility test. We believe the Legislature's foresight in looking to the American Law Institute for guidance in this area is instructive.'' Since the legislature expressed ''no intention to foreclose court consideration of developments in products liability law,'' the court's move ''in no way infringes on the Legislature's presence in this area,'' Justice John W. Kittredge wrote.

Pleicones, joined by Justice John H. Waller Jr. differed on the point. ''I do not believe that this court has the authority to simply reject the General Assembly's chosen test, even if we believe that body would approve of the change,'' they said. But Pleicones said the court could simply interpret the consumer expectations test to incorporate a risk-utility test: ''The ordinary consumer expects that the manufacturer will weigh the foreseeable risks against the benefits and only offer a product for sale if the latter outweighs the former.''

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When Did They Know It? The court then turned to the factors mandating reversal. ''[W]hether a product is defective must be measured against information known at the time the product was placed into the stream of commerce,'' Kittredge wrote. ''Post-distribution evidence,'' that is, ''evidence of facts neither known nor available at the time of distribution,'' is inherently prejudicial, he said.

''When a claim is asserted against a manufacturer, post-manufacture evidence is generally not admissible,'' Kittredge wrote.

The court specifically mentioned four pieces of evidence—Ford memoranda, another document, and a film—that, it said, should not have been introduced, all dating from 1989. Hale's model-year 1987 Bronco was manufactured in 1986. Kittredge said policy reasons supported the rule, noting the benefits ''when a manufacturer continues to test and evaluate its product after initial manufacture.''

Pleicones said he generally agreed with the majority that ''Ford's 1986 design and manufacture decision should be assessed on the evidence available at that time, not the increased evidence of additional rollover data that came to light after 1986.'' But he said that ''*when* the reports were generated or tests conducted is of little consequence, since . . . the vehicles tested were substantially the same as the model involved in the accident, the testing methods were available to Ford prior to the date of manufacture, and the rollover risk was known to Ford prior to the date of manufacture.'' Pleicones and Waller viewed the memoranda, document, and film as properly admitted.

The court also addressed the admissibility of evidence of similar incidents. Although the court initially said evidence at trial violated the rule that there be ''a substantial similarity between the other incidents and the accident in dispute tending to prove or disprove some fact in controversy.'' But in its discussion of the evidence Ford objected to, the court signaled its approval of comparative rollover data for the Bronco II and other vehicles, even where accident causes are not known. Furthermore, Hale's inattention at the wheel should not rule out such comparative evidence, Kittredge said. ''[C]areless driving is a foreseeable reality,'' Kittredge said, and distraction such as Hale's ''was (or should have been) part of [Ford's] evaluative process.''

The court also based reversal on the closing argument by Branham's counsel, which ''was designed to inflame and prejudice the jury'' and sought to have the jury punish Ford for harm to other accident victims as well as Branham, Kittredge wrote.

In addition to clarifying issues of apportionment and damages, the court also addressed the new issue of whether a trial court may realign a party. Ford asked that Hale be realigned as a plaintiff so it would not have to share its peremptory jury strikes with her. Although the issue was not preserved for review, the court took note of Hale's position during the trial and concluded, ''The only *bona fide* defendant in this case was Ford.'' The supreme court said a trial court does have the authority to realign parties.

John R. Hetrick and Robert J. Bonds of Hetrick, Harvin & Bonds in Walterboro, S.C.; along with Ronnie L. Crosby, John E. Parker, and Grahame E. Holmes of Peters, Murdaugh, Parker, Eltzroth & Detrick PA in Hampton, S.C., represented Branham.

C. Mitchell Brown and others at Nelson Mullins Riley & Scarborough in Columbia, S.C.; Elbert S. Dorn and Nicholas W. Gladd of Turner, Padgett, Graham & Laney PA in Columbia; David R. Kelly and C. Paul Carver of Bowman and Brooke LLP in Minneapolis, Minn.; and Edward C. Stewart of Wheeler Trigg O'Donnell LLP of Denver, Colo., represented Ford.

All-Terrain Vehicles

Two More Defense Verdicts in Rhino Cases; No-Defect Finding to Be Challenged

Juries in San Bernardino County, Calif., and Tallapoosa County, Ala., returned verdicts for Yamaha Motor Corp. U.S.A. Aug. 11 and Aug. 12, respectively, in injury cases involving the company's Rhino off-road vehicle (*Lewis v. Yamaha Motor Corp. U.S.A.*, Cal. Super. Ct., No. CIVVS 801680, *verdict* 8/11/10; *Mathis v. Yamaha Motor Co. Ltd.*, Ala. Cir. Ct., No. CV-08-900003, *verdict* 8/12/10).

In the San Bernardino case, plaintiffs Jacob Daniel Lewis and Patrick Hernandez sought $15 million in compensatory damages, according to Paul Cereghini, an attorney for Yamaha, but the jury found that the vehicle met consumer expectations of safety and was not defective. Alabama plaintiff Paul Mathis, whose claims were also rejected, sought approximately $608,000 in compensatory damages and $1.8 million in punitive damages, Cereghini said.

The back-to-back results follow another defense verdict, rendered July 26 in Orange County, Calif., in *Holt v. Yamaha Motor Corp. U.S.A.* (38 PSLR 792, 8/2/10).

''Between the three cases,'' Cereghini told BNA, ''they involved claims concerning upper-extremity occupant protection, lower-extremity occupant protection, occupant protection for the driver, and occupant protection for the passenger, as well as handling and stability claims. The three cases covered almost all the claims that plaintiffs have been asserting in Rhino cases, and all of those claims were rejected . . . . So the combination of the three trials sends a very strong message that the Rhino is a safe and defect-free vehicle, and that Yamaha can and will successfully defend this product.''

Charles S. LiMandri, who represented Lewis and Hernandez, told BNA, ''We believe we have a very good chance of getting the judge to turn around on post-trial motions. I know those are routinely done and rarely granted, but in our case, the Rhino which rolled over had just been purchased and was only a few hours from the shop when my clients were trying it out for the first time. We did not try it on handling and disability like a lot of these cases, because in our case the seats and seat belts broke when it rolled over.''

LiMandri, who says he has tried dozens of cases, said, ''There'll be 10 percent [of verdicts] where you're scratching your head. On this one we're dumbfounded. I can't see how we could lose on that threshold issue,'' that is, the finding of no defect.

Sped Into Berms? In the *Lewis* case, Lewis, the driver, was operating a 2007 Rhino 660. Cereghini said the parties' speed estimates varied from 30 to 40 miles per hour, whereas LiMandri said the range discussed at trial was 30 to 35 miles per hour. The Rhino's top speed

is 40 miles per hour. Cereghini characterized the speed as high for an all-terrain vehicle. The men were wearing seat belts but not helmets. The vehicle struck a pair of berms and overturned. Cereghini said they were high berms, but according to LiMandri, Lewis and Hernandez ''were going on relatively flat, level ground . . . on a trail . . . and they crossed [a dirt] road. The road was graded; it built up on both sides with small berms, and by small I mean they were rounded areas that looked like little speed bumps as you approached them.'' He added that ''people would go through there 50 to 60 miles per hour on dirt bikes.''

Lewis and Hernandez each suffered head and upper-body injuries. LiMandri said one of the men sustained a severe brain injury.

During the seven-week trial, overseen by Judge Gilbert G. Ochoa, the plaintiffs argued that the Rhino should have had roll-bar padding and four-point, rather than three-point, seat belts, Cereghini said. They also criticized the vehicle's handling and stability, according to Cereghini.

LiMandri indicated the plaintiffs' case focused on the seats and seat belts breaking. He said he did not base his clients' case on handling and stability, partly in order to get away from the consolidated proceedings in Orange County Superior Court, where the wait for a trial would have been longer than for an individual proceeding in San Bernardino County.

Yamaha argued that the plaintiffs' failure to wear helmets constituted a misuse, given that Yamaha's warnings urged helmet use.

The jury deliberated ''three or four hours'' before delivering its verdict, Cereghini said.

LiMandri said the jury split 9–3. He said that in interviews with the three jurors in the minority and a fourth juror, he got the impression that the majority's view was ''that '[If] you get in an accident in an off-road vehicle, it's your fault no matter what happens,' and that's just not the law.''

Drove Into Ditch? The Alabama case also involved a 2007 Rhino 660, Cereghini said. The driver, attempting a U-turn on a slope, drove the vehicle into a ditch, which tipped the vehicle onto the passenger side. Paul Mathis, the passenger, suffered a degloving injury on his right lower leg, Cereghini said.

The trial, in which the plaintiff questioned lower-extremity occupant protection in the Rhino, lasted two weeks, and the jury returned its verdict after 50 minutes of deliberation. A general verdict form was used.

An attorney for Mathis could not be reached for comment.

Hundreds of Rhino cases have been filed nationwide. Consolidated proceedings are underway in a federal multidistrict litigation and in California state court.

Last August, Yamaha prevailed in lawsuit filed in a Texas court involving the death of a 13-year-old boy who was driving the vehicle (*Ray v. Yamaha Motor Corp. USA*, Tex. Dist. Ct., B070626-C, 8/27/10). Earlier this year, however, a jury awarded $317,000 in damages to plaintiffs in a Georgia case (*McTaggart v. Yamaha Motor Corp.*, No. 08C-18950-2, Ga. Super. Ct., 5/29/10).

Van Holmes, public relations manager for ATVs at Yamaha, said in a statement, ''The Rhino is a safe and useful off-road vehicle that has won virtually every 'first in class' award and top safety ratings in independent reviews since its introduction. Yamaha stands firmly behind the Rhino and will continue to vigorously defend the product.''

LiMandri and Richard Salpietra, who practice in Rancho Santa Fe, Calif., represented Lewis and Hernandez.

Robert Miller, Richard Stuhlbarg, and Timothy J. Mattson of Bowman and Brooke's Los Angeles, Calif., and Minneapolis, Minn., offices, along with Brian Gabel of Yamaha Motor Corp. U.S.A.'s legal department, represented Yamaha in the *Lewis* case. Cereghini is with Bowman and Brooke's Phoenix office.

Jason Shamblin of Cory Watson Crowder & DeGaris in Birmingham, Ala., represented Mathis.

De Martenson and J. Patrick Strubel of Huie, Fernambucq & Stewart LLP in Birmingham represented Yamaha in the *Mathis* case.

Motrin

Seventh Circuit Affirms Defense Judgment; Woman Negligent for Continuing to Use Drug

A federal appeals court Aug. 11 affirmed a ruling that a woman's contributory negligence in continuing to take Children's Motrin after noticing a rash barred her recovery against the manufacturer, despite a jury award of $3.5 million in damages (*Robinson v. McNeil Consumer Healthcare*, 7th Cir., No. 09-4011, 8/11/10).

The U.S. Court of Appeals for the Seventh Circuit agreed with the trial court that the suit is governed by Virginia law—which deems contributory negligence a complete defense and rejects strict liability as a basis for product liability.

According to the appeals court, there was enough evidence that the plaintiff was contributorily negligent to bar her claim under Virginia law. In a decision by Judge Richard A. Posner, the court said there was also enough evidence that her negligence exceeded the defendant's to bar the claim under the comparative negligence principles of Illinois law, even accepting her argument that Illinois law applied.

''We think this case was wrongly decided and we do plan to move for rehearing en banc,'' Lisa W. Shirley, one of the plaintiffs' attorneys, said.

Medication Bought for Plaintiff's Child. Karen Robinson purchased a bottle of Children's Motrin for her child. The active ingredient in Motrin is ibuprofen, a nonsteroidal anti-inflammatory drug. The ''Warnings'' section on the bottle begins, ''Allergy alert: Ibuprofen may cause a severe allergic reaction which may include: hives, facial swelling, asthma (wheezing), shock.'' After additional warnings of side effects the label says, ''Stop use and see a doctor if an allergic reaction occurs.'' According to the court, Robinson read the warnings before buying the drug.

In September 2005, some months after the purchase, Robinson awoke in the middle of the night with a headache and took two teaspoonfuls of the Motrin—the dose suggested for a child 6 to 8 years old. She did not reread the warning, and had forgotten the specifics of it, the opinion said.

When she woke up the next morning, she noticed a rash on her chest, which worsened throughout the day. Robinson took a second dose of Motrin that night, after waking up with a fever. The following morning, she saw

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