Shook, Hardy & Bacon L.L.P.

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PRODUCT LIABILITY LITIGATION REPORT

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JAPANESE TRACTOR COMPANY CANNOT BE SUED IN ARKANSAS COURTS

The Arkansas Supreme Court has reversed a jury award of $2.5 million to the widow of a man killed when a 27-year-old tractor rolled over him, finding that the Japan-based defendant lacked sufficient contacts with the state for the court to exercise jurisdiction over it and that its U.S.-based subsidiary owed no duty to the plaintiff. *Yanmar Co., Ltd. v. Slater*, No. 11-370 (Ark., decided February 2, 2012).

Yanmar Japan manufactured and sold the tractor in 1977 to an authorized Yanmar distributor in Japan. Twenty-six years later, the tractor came into the possession of a Vietnamese company that exported it to the United States the following year through the "gray market." It was eventually sold to the decedent by an Oklahoma company whose owner said that it looked "brand new" when he purchased it at auction in 2004 from a Texas company. The plaintiff alleged that Yanmar Japan's tractor was unreasonably defective or dangerous because it was manufactured without a rollover-protection system and that the company had a post-sale duty to warn of the absence of such a system or to retrofit the tractor. The plaintiff also alleged that Yanmar America's negligence caused the accident.

On appeal, Yanmar Japan argued that the trial court lacked personal jurisdiction over the company. According to the court, while Yanmar Japan sold its tractors in the United States until 1991, it (i) is incorporated and has its principle place of business in Japan; (ii) is not authorized to do business in Arkansas; (iii) lacks an agent for service of process in the state; and (iv) does not have any offices, employees, assets, bank accounts, or property in Arkansas. Past contacts and its subsidiary's current connection to the state through selling Yanmar replacement parts were, in the court's view, insufficient to establish the minimum contacts needed to warrant the exercise of general jurisdiction over the company.

Among other matters, the court also noted that jurisdiction over a nonresident parent corporation can be based on the actions of its resident subsidiary only if the parent "so controlled and dominated the affairs of the subsidiary that the latter's corporate existence was disregarded so as to cause the residential corporation to act as the nonresidential corporate defendant's alter ego." The court agreed with Yanmar Japan that such control and domination had not been shown. Thus, the court reversed the judgment and dismissed the claims as to the Japanese manufacturer.

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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Yanmar America argued on appeal that it owed no duty to the decedent because it did not design, manufacture, sell, or import the tractor and never sold the decedent a part for his tractor and because it is an entity separate and distinct from its parent. The court agreed with Yanmar America that it owed no duty and refused to impute any duty of Yanmar Japan to Yanmar America. Accordingly, the court reversed the circuit court's denial of the subsidiary's motion for a directed verdict.

U.S. SUPREME COURT DENIES *CERT.* IN BICYCLE HELMET INJURY LITIGATION

The U.S. Supreme Court has denied a petition seeking review of a Third Circuit Court of Appeals ruling which predicted that Pennsylvania state courts would adopt portions of the *Restatement (Third) of Torts* rather than adhere to Section 402A of the *Restatement (Second)*. ***Covell v. Bell Sports Inc.*, No. 11-577 (U.S., cert. denied February 21, 2012)**. According to a news source, the plaintiffs, parents of a man who sustained a brain injury in a bicycle accident, contended that Section 402A remains the law in Pennsylvania and, thus, that evidence of the defendant helmet maker's regulatory compliance should not have been admitted during their federal court trial, which concluded in a defense verdict. The *Restatement (Third)* allows consideration of a defendant's conduct in strict-liability lawsuits. For now, the question of which rule applies in Pennsylvania will persist. *See BloombergBNA Product Safety & Liability Report*, February 22, 2012.

NINTH CIRCUIT UPHOLDS DISMISSAL OF DEFECTIVE LAPTOP POWER JACK COMPLAINT

The Ninth Circuit Court of Appeals has dismissed putative class claims alleging that a computer manufacturer concealed a laptop computer design defect that manifested after the warranty expired and created an unreasonable safety hazard in violation of state consumer protection laws; the court upheld a district court determination that the claims were insufficiently pleaded. ***Wilson v. Hewlett-Packard Co., No. 10-16249 (9th Cir., decided February 16, 2012)**.

The named plaintiffs alleged that the power jack and port in the defendant's laptops had "common and uniform" design defects that caused the power jacks to fail at abnormally high rates and that plugging an a/c adapter into the laptop caused it to become so hot that the adapter welded itself to the laptop, also rendering it unusable. They alleged that the company had a duty to disclose the defect to consumers, but misrepresented and concealed material information about the defect in its marketing, advertising, sale, and servicing of the laptops. According to the complaint, the alleged design defect posed a safety risk because the extreme heat caused by the power jack resulted in the laptop catching fire. The defendant refused to repair or compensate the plaintiffs either because the laptops were out of warranty or had not injured anyone.

The plaintiffs argued that California law does not require that an alleged concealed fact relate to a safety issue for liability to attach; rather the concealed fact must simply be material. The court disagreed on the basis of *Daugherty v. American Honda Motor Co.*, 144 Cal. App. 4th 824 (Cal. Ct. App. 2006), in which the court found that "the plaintiff alleged no facts establishing that the manufacturer was 'bound to disclose,' as the complaint did not allege 'any instance of physical injury or any safety concerns posed by the defect.'" The Ninth Circuit also noted, "California federal courts have generally interpreted *Daugherty* as holding that '[a] manufacturer's duty to consumers is limited to its warranty obligations absent either an affirmative misrepresentation or a safety issue.'" Finding that broadening the duty to disclose beyond safety concerns "would eliminate term limits on warranties, making them perpetual or at least for the 'useful life' of the product," and would thus make a product's failure to last forever a defect, the court determined that the district court "did not err in requiring Plaintiffs to allege that the design defect caused an unreasonable safety hazard."

The Ninth Circuit also noted, "California federal courts have generally interpreted Daugherty as holding that '[a] manufacturer's duty to consumers is limited to its warranty obligations absent either an affirmative misrepresentation or a safety issue.'"

The appeals court also determined that the plaintiffs failed to sufficiently allege a causal connection between the alleged design defect and the alleged safety hazard. The amended complaint failed to "allege how the weakening or loss of the connection between the power jack and the motherboard causes the Laptops to ignite." Apparently, the plaintiffs simultaneously alleged that "the design defect cuts off power from the Laptops and that the Laptops can ignite into flames through normal use." The court found it "difficult to conceive (and the complaint does not explain) how the Laptops could ignite if they are 'unable to receive an electrical charge.'"

The court also found that the plaintiffs did not sufficiently plead the defendant's knowledge of a defect. Not only were these allegations "merely conclusory," but the court determined that undated customer complaints or complaints post-dating the plaintiffs' purchases, submitted to prove the company had knowledge, are insufficient because (i) they simply establish the fact that some consumers were complaining, and (ii) "they provide no indication whether the manufacturer was aware of the defect *at the time of sale*."

CLASS CLAIMS ONE-CUP BREWING SYSTEM PROMOTIONS VIOLATED CONSUMER PROTECTION LAWS

According to a news source, a putative class action has been filed against companies making Tassimo® single-cup coffee brewing systems, alleging that they misled consumers by promising that Starbucks' brewing cups would remain available for use in the coffee makers despite knowing that the company would stop selling the cups. *Montgomery v. Kraft Foods Global, Inc.*, No. 12-149 (U.S. Dist. Ct., W.D. Mich., filed February 20, 2012).

Apparently, Kraft sued Starbucks in 2010, seeking an order to prevent Starbucks from breaking its Tassimo® contract, but the companies continued selling the coffee brewing systems into 2012. Plaintiffs' counsel claim that the single-serve coffee brewing system market is dominated by Tassimo® and Keurig®, which use distinct throw-away brewing cups, and that those buying the Tassimo® product did so because Starbucks supplied the brewing cup used in the system.

The complaint reportedly alleges that the companies continued selling the system "with packaging and literature stating the Tassimo was the system for which Starbucks brewing cups were available, despite knowing the same was false or would imminently become false, and … , despite knowing Starbucks brewing cups would in the immediate future become exclusively available for use with the Tassimo's competing system, the Keurig." *See PRWeb*, February 20, 2012.

ALL THINGS LEGISLATIVE AND REGULATORY

FDA Claims Tests Reveal 400 Lipsticks Contain Lead

Recent Food and Drug Administration (FDA) **tests** have apparently revealed that 400 shades of lipsticks available in the U.S. market contain trace amounts of lead. According to FDA, however, the results do not show levels of lead that would pose a safety concern to consumers, given that the product is intended for topical use with little of it actually ingested.

In 2008, FDA tested lead content in 20 lipsticks and expanded its examination to include 400 in its more recent study. Both tests reveal similar average lead contamination—1.07 parts per million (ppm) in 2008 and 1.11 ppm in the latest study. FDA said its recent tests show that five lipsticks made by L'Oreal and Maybelline were among the top 10 with the highest lead levels, along with two Cover Girl and two NARS lipsticks and one by Stargazer. The least expensive lipstick, Wet 'n' Wild Mega Mixers Lip Balm, had the lowest amount of lead.

Calling for FDA to set limits on lead in lipstick, the Campaign for Safe Cosmetics notes that the lipstick at the top of FDA's list, Maybelline's Color Sensational Pink Petal, with 7.19 ppm contains 275 times the amount of lead found in the least-contaminated product. The group has reportedly claimed that FDA has no scientific basis for its tests results and that children and pregnant women need to be shielded from lead exposure. Children's products in the United States cannot contain lead exceeding 100 ppm.

"Lead builds up in the body over time, and lead-containing lipstick applied several times a day, every day, can add up to significant exposure levels," said Mark Mitchell, co-chair of the Environmental Health Task Force for the National Medical Association. *See The Washington Post,* February 14, 2012.

CPSC Adopts ASTM Toy Safety Standard

The Consumer Product Safety Commission (CPSC) on February 15, 2012, voted to accept the toy industry's proposed revisions to the toy safety standard. Effective June 12, the new "Standard Consumer Safety Specifications for Toy Safety," or ASTM F963-11, updates safety requirements such as heavy metal and lead restrictions, according to a January 25 CPSC **staff briefing memo**.

CPSC's *Federal Register* **notice** indicates that the agency is not required to publish its decision to adopt a proposed safety standard revision under the Consumer Product Safety Improvement Act of 2008 if the agency determines that it would improve the safety of the consumer products covered by the standard, and CPSC has done so here. *See Federal Register*, February 22, 2012.

Proposed by industry in December 2011 to address toys intended for children younger than 14, the new standard "will increase safety and enhance the clarity and utility of the standard," according to the briefing memo. Specifically, the standard updates the "amount of heavy metals in substrates of toys and the test methods for determining those levels" and aligns the levels of lead allowed in surface coatings with federal requirements. In addition, approximately "43 other sections and subsections of the standard were refined, clarified, or expanded."

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In a keynote address at the American International Toy Fair on February 14, CPSC Chair Inez Tenenbaum said that the commission must continue to educate toy manufacturers, importers, wholesalers, and retailers about mandates in the toy safety standard. "A new upgrade that is especially noteworthy is the limit on cadmium and other toxic metals in surface coatings and substrates," she said. "Toys and children's jewelry will be safer."

CSPC Proposes New Infant Swing Safety Standard

The Consumer Product Safety Commission (CPSC) has issued a **proposed rule** that would set a mandatory safety standard for infant swings to reduce injuries and fatalities purportedly associated with the products. CPSC requests comments by April 25, 2012, on the proposal, a draft of which was discussed in the **January 26 issue** of this *Report*.

Effective six months after publication of the final rule to allow time for compliance, the mandatory standard would either closely mimic or be more stringent than applicable current voluntary industry standards developed by ASTM International, according to CPSC. The agency claims that at least 2,268 incidents involving 15 deaths and 600 injuries associated with infant swings occurred between January 1, 2002, and May 18, 2011. CPSC said 33 percent of reported injuries resulted from lack of proper restraint.

To address this issue, the proposed standard calls for new tests on waist and crotch restraint systems and installing shoulder straps or harnesses in swings with seat-back angles greater than 50 degrees. Other mandates would require manufacturers to perform structural-integrity tests on the swings 500 times, rather than the 50 currently required. Other performance requirements address structural concerns about seats and frames, and electrical and battery issues.

The standard would also require warning labels on swings over concerns of "slump-over deaths" due to positional asphyxia, which could happen to infants who cannot hold their heads up unassisted. "The proposed rule … establishes a mandatory safety standard for infant swings that would provide our youngest children with the highest degree of safety feasible and would give parents the peace of mind that comes from knowing these products are safer than ever before," CPSC Chair Inez Tenenbaum was quoted as saying. *See Product Law 360,* February 9, 2012; *Federal Register,* February 10, 2012.

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Final Rule Amends Consumer Registration Program for Durable Infant and Toddler Products

The Consumer Product Safety Commission has issued a **final** rule that amends a rule which requires manufacturers of durable infant or toddler products to provide postage-paid consumer registration forms with each product, maintain records of those who register and permanently place manufacturer identification information on each product. The amendment, effective February 18, 2012, simplifies and clarifies some of the original rule's requirements relating to the form itself and where registration information may be maintained. *See Federal Register*, February 17, 2012.

CPSC Reopens Comment Period on Need for Table Saw Blade Performance Safety Standard

At the request of a stakeholder, the Consumer Product Safety Commission (CPSC) has **extended** the comment period on an advanced notice of proposed rulemaking (ANPR) that invited written comments on the purported "risk of injury associated with table saw blade contact, regulatory alternatives, other possible means to address this risk, and other topics or issues."

Comments are now requested by March 16, 2012. Additional information about the ANPR appears in the **October 27, 2011, issue** of this *Report. See Federal Register,* February 15, 2012.

FDA Requests Comments on Industry Petition to Ban BPA in Sippy Cups and Baby Bottles

The Food and Drug Administration (FDA) is **requesting** comments on an American Chemistry Council (ACC) petition calling for food additive regulations to prohibit

the use of polycarbonate (PC) resins in infant feeding bottles and spill-proof cups "because these uses have been abandoned." According to the FDA notice, "PC resins are formed by the condensation of 4,4'-isopropylenediphenol (i.e., Bisphenol A (BPA)), and carbonyl chloride or diphenyl carbonate." FDA seeks comments by April 17, 2012, "that address whether these uses of PC resins have been abandoned, such as information on whether baby bottles or sippy cups containing PC resins are currently being introduced or delivered for introduction into the U.S. market." FDA is also seeking comments "on whether the uses that are the subject of ACC's petition (baby bottles and sippy cups) have been adequately defined." The agency will not consider safety-related comments. *See Federal Register*, February 17, 2012.

Minnesota Governor Vetoes Tort Reform Legislation

Minnesota Governor Mark Dayton (DFL) has **vetoed** and returned to the state Senate a number of bills that would have imposed tort reform measures on the state courts. Among the proposals were changes to class action appeal procedures, reductions in the statute of limitations for a number of civil claims, a requirement that attorney's fees be awarded in proportion to the damages in a civil case, changes to the settlement process, and reductions in the pre-judgment interest rate added to damages awards in negligence actions. According to the governor's veto messages, the bills encroached on the courts' authority, adopted reforms that had been rejected by experts, benefited wrongdoers at the expense of injured citizens, or otherwise addressed matters that did not reflect "legitimate problems" in the state.

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Loser Pays Proposals Pending Before New Hampshire and Tennessee Legislatures

A bill (**H.B. 1178**) that would require a losing party to pay the prevailing party's attorney's fees and court costs in tort actions is currently pending before the General Court of New Hampshire (the state's bicameral legislature). Due out of committee on February 23, 2012, the measure is scheduled to be considered on the House floor on March 7. It would allow the court to waive a portion of the prevailing party's fees and costs if the court determines that the losing party is unable to pay the entire amount. According to a news source, this is one of several tort reform measures introduced by Republican lawmakers during the current legislative session. Among them is a proposal to form a committee that would study whether the state's supreme and superior courts should be abolished as constitutional courts. *See Nashua Telegraph*, February 21, 2012.

Meanwhile, measures pending before the Tennessee House (H.B. 2942) and Senate (**S.B. 2586**) would shift fees to a plaintiff if she rejects an "offer of judgment" and the judgment rendered at trial is less than 80 percent of the offer. A defendant that refuses an offer of judgment must pay costs accrued after the offer if the judgment

rendered at trial is more than 120 percent of the offer. The bills, assigned to the respective bodies' judiciary committees, apparently have the support of a business coalition that backed tort reform legislation adopted in 2011 to cap non-economic damages. Another bill (**H.B. 3124/SB 2638**) would require courts to award costs and fees to the prevailing party when granting or denying, in whole or in part, a motion to dismiss in a civil proceeding.

Chief Justice Declines Request to Adopt Judicial Code of Ethics

In response to a letter from Democratic senators requesting that the U.S. Supreme Court provide greater transparency on ethical issues, Chief Justice John Roberts has referred to explanations provided in his 2011 year-end report as to the Court's decision not to "adopt the Code of Conduct of United States Judges through a formal resolution." In his February 17, 2012, **letter**, Roberts also indicates that the court "will make the 1991 resolution adopting the Judicial Conference regulations on gifts and on outside earned income available to the public."

The 2011 report to which Roberts referred defended his colleagues as "jurists of exceptional integrity and experience" who follow the same set of ethical principles as other jurists. The statements were apparently made in response to calls from Congress, law professors and outside groups for the Court to adopt a code of conduct. *See The Washington Post*, February 21, 2012.

LEGAL LITERATURE REVIEW

Lonny Hoffman, "*Twombly* and *Iqbal's* Measure: An Assessment of the Federal Judicial Center's Study of Motions to Dismiss," *Federal Courts Law Review*, 2012

University of Houston Law Center Professor Lonny Hoffman assesses Federal Judicial Center data on motions to dismiss for failure to state a claim following the U.S. Supreme Court rulings in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*. Hoffman finds that a plaintiff is now twice as likely to face a motion to dismiss, there is a higher likelihood that such motions will be granted, and limitations on the data collected make it difficult to determine whether the rulings have deterred some claims from being brought or how many meritorious cases have been dismissed. According to Hoffman, the study, by emphasizing whether the effects observed were statistically significant, unintentionally confused "readers into thinking that the study proved *Twombly* and *Iqbal* were not responsible for the substantively significant changes in dismissal practices and outcomes that were found."

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LAW BLOG ROUNDUP

Class Actions Brought to Benefit Lawyers?

"*Atlantic* reporter Rebecca Greenfield complains about meaningless relief in Apple class actions, but fails to understand that these particular class actions are brought for the benefit of the attorneys rather than the clients." Tort reform advocate and Center for Class Action Fairness President Ted Frank, blogging about an article condemning proposed settlements of claims against Apple for purportedly defective phones (dubbed by some as "antennaegate") and computer chargers and the petition he filed on behalf of a client opposing the antennaegate settlement.

PointofLaw.com, February 21, 2012.

THE FINAL WORD

Mass Tort and Asbestos Procedures Overhauled in Besieged Philadelphia Courts

Philadelphia Court of Common Pleas Administrative Judge John Herron has issued an **order** revising the court's mass tort and asbestos program procedures, which, according to the order, were not meeting American Bar Association standards and thus led to delays in disposition of these disputes and an "astonishing" increase in filings from outside the state. Among other matters, the order stops reverse bifurcation of any mass tort case unless all counsel agree, defers all punitive damage claims in mass tort cases, limits pro hoc vice counsel to no more than two trials per year, and requires the grouping of pending asbestos cases involving the same laws, disease categories and plaintiffs' law firm.

UPCOMING CONFERENCES AND SEMINARS

SHB, MINI Plant Oxford, Cowley, Oxford – March 5, 2012 – "C&I Automotive Sector: Product Recalls and the Regulator's Perspective." Shook, Hardy & Bacon is hosting this CPD event, which features Global Product Liability Partner **Alison Newstead**, who will discuss the legal and commercial implications of product liability and a recall relating to brand value and protection, impact on share price and directors' liabilities. Also on the agenda is Vehicle and Operator Services Agency (VOSA) Automotive Safety Recalls Manager Alison Martin, who will provide an overview of the VOSA approach to product recall.

ABA, Phoenix, Arizona – March 28-30, 2012 – "2012 Emerging Issues in Motor Vehicle Products Liability Litigation." Shook, Hardy & Bacon Tort Partners **Robert Adams** and **H. Grant Law** join a distinguished faculty discussing an array of topics relating to motor vehicle litigation and products liability law during this 22nd annual national

CLE program. Adams will present on "Communicating with the Modern Juror at Trial," and Law will serve as co-moderator of a panel addressing the topic, "An Automobile Is Only as Good as the Sum of Its Parts: The Component Parts Panel."

Shook, Hardy & Bacon Tort Associate **Amir Nassihi**, who is serving as conference co-chair, will join several panels to discuss "The Rise and Fall of the Consumer Expectations Test" and "The Blockbuster Developments in Class Action Litigation." He will also participate as co-moderator of a panel discussion addressing "Managing and Developing the Corporate Counsel Relationship: The Inside View on Diversity, Retention and Client Expectations." Shook, Hardy & Bacon is a conference co-sponsor.

ABA, Beijing, China – April 19, 2012 – "Doing Business in the United States: What You Need to Know About Investing, Product Liability and Dispute Resolution." As a Premiere Sponsor for this program, presented in conjunction with the China Council for the Promotion of International Trade and the American Chamber of Commerce, Beijing, Shook, Hardy & Bacon will also moderate and present during the event. Employment Litigation Partner **William Martucci** will serve on a panel discussing "Operations in the United States and Compliance with United States Employment and Labor Laws." Global Product Liability Partner **H. Grant Law** will serve as the moderator of a program session focusing on "Minimizing Exposure for Product Liability." Pharmaceutical & Medical Device Litigation Chair **Madeleine McDonough** will introduce U.S. agency officials with the Consumer Product Safety Commission (CPSC) and Food and Drug Administration (FDA) and provide an overview of "The United States Regulatory Landscape: Focusing on the CPSC and the FDA." ■

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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 95 percent of our more than 470 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).