Shook, Hardy & Bacon L.L.P.

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PRODUCT LIABILITY LITIGATION REPORT

CONTENTS

CY PRES AWARD IN BABY PRODUCTS LITIGATION SETTLEMENT FAILS COURT SCRUTINY

In a matter of first impression, the Third Circuit Court of Appeals has considered whether *cy pres* awards included in the settlement of class claims affect the fairness, reasonableness and adequacy of the settlement and determined, in consolidated antitrust claims against baby product manufacturers, that too much may have been allocated for *cy pres* distribution to pass muster. ***In re Baby Prods. Antitrust Litig.*, Nos. 12-1165, -1166, -1167 (3d Cir., decided February 19, 2013)**.

The court vacated a district court order approving the $35.5 million settlement and remanded the matter for the lower court to determine "whether the settlement will provide sufficient direct benefit to the class." The Third Circuit also intimated that attorney's fees and costs may require a reduction "based on the level of direct benefit provided to the class." Of the $35.5 million, $14 million was allocated to class counsel for fees and expenses, some $3 million was likely due to be distributed to class members who had actually filed claims, and the remainder—approximately $18.5 million, less administrative expenses—was allocated for distribution to one or more *cy pres* recipients chosen by counsel for plaintiffs and defendants.

While the court found *cy pres* distributions appropriate, particularly "where further individual distributions are economically infeasible," the court added to the class settlement approval framework "a thorough analysis of … the degree of direct benefit provided to the class. … Barring sufficient justification, *cy pres* awards should generally represent a small percentage of total settlement funds," the court opined.

The appeals court was concerned that when the district court approved the settlement, it was unaware that most settlement claimants fell into a $5 compensation category because they lacked documentary proof. "The baby products at issue cost up to $300, resulting in damages, at the estimated 18% overcharge, of over $50. Combined with the possibility of treble damages, we doubt that this is the type of small claims case where the potential awards were necessarily insufficient to motivate class members to file claims. We think it more likely that many class members did not submit claims because they lacked the documentary proof necessary to receive the higher awards contemplated, and the $5 award they could receive left them apathetic. This casts doubt on whether agreeing to a settlement with such a restrictive claims process was in the best interest of the class. If Defendants decline

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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to raise the $5 cap or alter the documentary proof requirement on remand, the Court will need to determine whether the class received sufficient direct benefit to justify the settlement as fair, reasonable, and adequate."

FEDERAL COURT RULES AGAINST HHS IN FOIA LITIGATION OVER FORMALDEHYDE CARCINOGEN LISTING

A federal court in the District of Columbia has ruled that the Department of Health and Human Services (HHS) did not "demonstrate beyond material doubt that its search was 'reasonably calculated to uncover all relevant documents'" thus allowing the American Chemistry Council (ACC) to proceed on its complaint that HHS did not conduct an adequate search for documents requested under the Freedom of Information Act (FOIA). *ACC v. HHS*, No. 12-1156 (U.S. Dist. Ct., D.D.C., decided February 13, 2013). If HHS files affidavits explaining the scope and method of its search "in reasonable detail," it may file an appropriate summary judgment motion on this issue.

ACC sought information pertaining to a publicly funded study cited in the "12th Report on Carcinogens" to support the National Toxicology Program's upgrade of formaldehyde from "reasonably anticipated to be a human carcinogen" to "known to be a human carcinogen." HHS provided some of the material requested under FOIA but refused to forward a request to the study's grantees under OMB Revised Circular A-110 for "Data and methods used for estimating 8-hr time weighted average levels for control subjects and exposed subjects" because this information was available online and the data were not used to support an agency action with the force and effect of law. The court declined to address the latter issue, agreeing with HHS that it was not required under FOIA to seek and produce information readily available to the public.

The court also addressed whether the part of ACC's FOIA request pertaining to "records" is the same as a request for "data." It found the question close, but determined that ACC failed to preserve this specific issue in its administrative appeal and therefore forfeited the challenge. The court further dismissed ACC's alternative request for relief under the Administrative Procedure Act and for mandamus, finding that the trade association had an adequate remedy under FOIA.

FALSE AD SUIT WILL PROCEED AGAINST MAKER OF RUBBER BRACELET PROMOTED AS ATHLETIC ENHANCER

A federal court in California has determined that consumer-fraud claims in a putative nationwide class action filed against a company that owns and sells bracelets and necklaces incorporating technology with the purported ability to enhance athletic performance have been adequately pleaded and thus denied the company's motion to dismiss. *Orlick v. Rawlings Sporting Goods Co., Inc.*, No. 12-6787 (U.S. Dist. Ct., C.D. Cal., order entered February 20, 2013).

According to the court, the named plaintiff alleged that she viewed the company's promotional claims for the products on its distributor's Website and, relying on the claims, purchased a bracelet which she used as instructed, but "did not experience any of the promised benefits." She further alleged that the company's business partner admitted to Australian authorities in December 2010 that these promotional claims were not supported by any scientific research.

These allegations, said the court, were sufficient to support claims for violation of California's False Advertising Law, Unfair Competition Law and Consumers Legal Remedies Act because (i) the advertising claims on the distributor's Website substantially mirrored advertisements on the defendant's Website, and (ii) the plaintiff did not cite the 2010 news reports about the defendant's partner to show that the defendant knew or should have known by 2010 that its health claims had no scientific basis, rather she used the reports to corroborate her allegation that the defendant "never had any support for its advertising claims."

The court also determined that the advertising statements about the products offering "strength, balance, and flexibility" and are in use "by most of the elite athletes"— were not non-actionable puffery.

DECEASED SOLDIER'S FAMILY SUES SUPPLEMENT MAKER FOR WRONGFUL DEATH

The parents of a deceased soldier have filed strict liability and wrongful death claims against a dietary supplement manufacturer alleging that their decedent used its Jack3d™ product containing 1,3-dimethylamylamine (DMAA) in June 2011 at the recommended dose, then "engaged in physical training with his unit during which he collapsed [and experienced] cardiac arrest, hyperthermia, rhabdomyolysis, disseminated intravascular coagulation, death and related injuries." *Sparling v. USPLabs, LLC*, No. n/a (Cal. Super. Ct., San Diego Cnty., filed February 13, 2013).

According to the complaint, the soldier purchased the product at a U.S. Army base, and after he and another soldier who allegedly used the product died, the U.S. Army "removed all DMAA containing compounds from its commissaries." The plaintiffs cite an April 2012 warning letter from the Food and Drug Administration to the defendant indicating that the agency "had received 42 adverse event reports on products containing DMAA," including Jack3d™.

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Alleging negligence, strict liability (design defect and failure to warn), breach of express and implied warranty, unlawful business acts and practices, conscious and deliberate disregard for consumer safety, and wrongful death, the plaintiffs seek actual, loss-of-services, punitive, and treble damages; interest; costs; and injunctive relief, including a corrective advertising campaign.

ALL THINGS LEGISLATIVE AND REGULATORY

Senators Urge EPA to Prioritize Safety Research for Flame Retardants in Consumer Products

Democratic U.S. senators have called on the U.S. Environmental Protection Agency (EPA) to "prioritize and conduct risk assessments on additional flame retardant chemicals that present a hazard to human health and are not currently being phased out of production." In their February 20, 2013, **letter**, the 23 senators, led by Frank Lautenberg (N.J.), claim that these chemicals are "used in large volumes across a wide range of consumer products, including furniture, electronics, and baby products." Citing studies on polyurethane foam from couches and household dust samples, the senators contend that "Americans, and particularly children, continue to be exposed to toxic flame retardant chemicals on a daily basis in their homes."

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Lead-Contaminated Toys Seized in San Juan

U.S. Customs and Border Protection (CBP) officers and Consumer Product Safety Commission (CPSC) investigators have reportedly seized multiple shipments involving nearly 30,000 toys with excessive lead levels from China entering through the port of San Juan, Puerto Rico. According to a CBP news release, the total domestic value of the shipments is estimated to exceed $335,000. The types of toys seized include cars, tea sets, punching bags, and food sets, a news source reports, and their lead levels evidently exceeded the federal limit of 100 parts per million.

The shipments were apparently targeted by the CBP Commercial Targeting and Analysis Center (CTAC). "The concerted targeting efforts of the CTAC and the vigilance of CBP officers at our ports of entry ensure that toys are safe for children," said CBP spokesperson Allen Gina. "Ensuring the safety of imported merchandise is a top priority for CBP." *See CBP News Release,* February 8, 2013; *Bloomberg BNA Product Safety & Liability Reporter,* February 14, 2013.

FDA Warns Supplement Maker About "Liking" Facebook® Comment with Health Claims

The Food and Drug Administration (FDA) recently **warned** AMARC Enterprises, Inc., a company that manufactures dietary supplements for humans and pets, that its promotions for these products cause them to be drugs that require the agency's pre-market approval. FDA also notes that a post on the company's Facebook® page states, "PolyMVA has done wonders for me. I take it intravenously 2x a week and it has helped me tremendously. It enabled me to keep cancer at bay without the use of chemo and radiation … Thank you AMARC." According to FDA, the post was "liked" by "Poly Mva," and because the company's products "are not generally recognized as safe and effective for the above referenced conditions … these products

are also 'new drugs' under section 201(p) of the Act [21 U.S.C. § 321(p)]. New drugs may not be legally marketed in the U.S. without prior approval from FDA." The agency calls for the company to correct the cited violations.

CPSC Issues New Rule on Phthalates in Children's Items

The U.S. Consumer Product Safety Commission (CPSC) has issued a final **rule** exempting phthalate-containing products from a restriction of 0.1 percent of three specific phthalates, when the phthalate-containing parts are "inaccessible."

The rule primarily adopts the same "inaccessibility" guidance that is already in place for lead, "however, vinyl- (or other plasticized material) covered mattresses/sleep surfaces that contain phthalates that are designed or intended by the manufacturer to facilitate sleep of children age 3 and younger, are considered accessible and would not be considered inaccessible through the use of fabric coverings, including sheets and mattress pads." According to CPSC, paint, coatings and electroplating may not be considered as barriers that render phthalate-containing parts inaccessible. Articles intended for children ages 9 through 12 must undergo a use-and-abuse test to demonstrate that phthalate-containing parts remain inaccessible. *See Federal Register*, February 14, 2013.

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CPSC to Conduct Pre-Hearing Conference in Action Against Magnetic Toy Makers

The U.S. Consumer Product Safety Commission (CPSC) has **scheduled** a prehearing teleconference in its administrative enforcement action against companies that sell or sold desk toys containing small, high-power magnets allegedly posing a danger to children who ingest or inhale them. The public has been invited to attend the March 6, 2013, teleconference at which an administrative law judge will consider matters such as motions, stipulations, witness disclosures, and the issuance of subpoenas. CPSC is seeking to halt the products' sale. One of the respondents, Maxfield & Oberton Holdings, LLC, has closed its doors and is no longer selling its Buckyballs® desk toy. *See Federal Register*, February 11, 2013.

Third-Party Testing Lab Criteria Approved Amidst CPSC Disagreements

While a final rule concerning the criteria that third-party testing laboratories must meet to certify the safety of children's products will not be made public until it is published in the *Federal Register*, the U.S. Consumer Product Safety Commission (CPSC) apparently approved it in private on February 21, 2013, rather than during a public session. Lone Republican Commissioner Nancy Nord issued a **statement** indicating her disagreement with some of its provisions, including a requirement that any manufacturer control over a testing lab precludes its use as a certifying entity for that manufacturer.

Commissioner Robert Adler responded to Nord in his own **statement** taking issue with her characterization of the provision considering a lab to be "firewalled" if the children's product manufacturer has the ability to appoint any of the lab's governing body members as a "key example of the compulsion to over-police." According to Adler, "The issue is whether a lab that can be forced by a manufacturer or private labeler—against its will—to appoint a board member or senior executive can truly be considered independent. To me the answer is simple—no." *See Bloomberg BNA Product Safety & Liability Reporter*, February 25, 2013.

NHTSA Adopts Final Rule Amending Air Brake Systems Standard

The U.S. National Highway Traffic Safety Administration (NHTSA) has issued a **final rule** that responds to petitions for reconsideration filed after it published a final rule amending the federal motor vehicle safety standard for air brake systems in July 2009. NHTSA has agreed to grant "the request to remove the stopping distance requirements for speeds of 20 mph and 25 mph and [denied] the request to relax to stopping distance requirements for speeds between 30 mph and 55 mph." The rule took effect on February 11, 2013, and petitions for reconsideration must be filed by March 28. *See Federal Register*, February 11, 2013.

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U.S. Motor Vehicle Fatalities Increased in 2012

According to estimated **data** released by the National Safety Council, motor vehicle fatalities in the United States increased 5 percent in 2012 from 2011 levels. The council reports that this is the first increase since 2004 to 2005 and involved approximately 36,200 deaths. The council further reported, "Crash injuries requiring medical attention also are estimated to have risen by five percent since 2011 to a total of 3.9 million." Council CEO and President Janet Froetscher said, "NSC is greatly concerned with the upswing in traffic fatalities on our nation's roads. Although we have improved safety features in vehicles today, we also have new challenges, especially as it relates to teen and distracted driving, that need to be addressed on a national scale." The loss of life, injuries and property damage in 2012 reportedly represented a cost of $276.6 billion.

ABA Approves Changes to Rules on Foreign Lawyers' Practice in the United States

The American Bar Association (ABA) House of Delegates recently approved a number of amendments to the ABA Model Rules of Professional Conduct, including **several** allowing the limited practice of law by foreign lawyers serving as in-house counsel in the United States. Resolution **107A** requires that foreign lawyers be members in good standing "of a recognized legal profession in a foreign jurisdiction," and when they provide advice about U.S. or state law, they must base that advice on the "advice of a lawyer licensed and authorized by the jurisdiction to provide it."

Resolution 107B further restricts a foreign in-house lawyer's scope of practice and adds requirements such as the payment of bar dues, payment into a client protection fund, the fulfillment of continuing legal education requirements, and notice to disciplinary counsel. Resolution 107C provides guidance to courts on the pro hac vice admission of foreign attorneys. *See ABANow*, February 11, 2013.

LEGAL LITERATURE REVIEW

Gregory Shill, "Ending Judgment Arbitrage: Jurisdictional Competition and the Enforcement of Foreign Money Judgments in the United States," *Harvard International Law Journal* (forthcoming 2013)

Hofstra University Visiting Associate Professor of Law Gregory Shill proposes that foreign money judgments not be subject to full faith and credit among the U.S. states, which would, he suggests, provide incentives among the states to compete in the recognition of foreign judgments. He contends that such competition would "encourage experimentation, the development of superior law, and, eventually, greater uniformity in an area where scholars agree uniformity is desirable." Shill refers to the current "patchwork system" of enforcement, which encourages forum shopping, as "judgment arbitrage," whereby one state's recognition of a foreign judgment must be enforced in every state regardless of differing recognition laws. He rejects proposals for a single federal rule or the creation and adoption of a uniform state law.

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Symeon Symeonides, "Choice of Law in the American Courts in 2012: Twenty-Sixth Annual Survey," *American Journal of Comparative Law*, 2013

Willamette University College of Law Dean Emeritus Symeon Symeonides has published his 26th annual survey of choice-of-law issues addressed by U.S. courts in 2012. The survey includes 1,225 reported appellate court cases of which a number involved products liability issues arising from helicopter accidents, asbestos exposure and injuries allegedly caused by heavy equipment. A few suits involved questions about which states' law would govern claims for indemnification between product sellers and manufacturers.

LAW BLOG ROUNDUP

A Change of Heart on Cameras in the Courtroom

"…the usual reasons given for keeping cameras out of the courtroom include the fear that the public wouldn't understand what they are watching and that lawyers and Justices alike would play to the cameras." Cornell University Law School

Professor Michael Dorf discussing U.S. Supreme Court Justice Sonia Sotomayor's recent change of opinion on allowing the Court's proceedings to be televised. Dorf contends that these two worries "would not come close to justifying a ban on video coverage of any other official government proceeding if the burden of persuasion were placed on those who wanted to prevent such coverage rather than, as the Justices seem to assume, placed on those who want to permit such coverage."

Dorf on Law, February 19, 2013.

A New Business Card for Tort-Reform Supporter?

"Lots of people are talking about *Baby Products,* some of whom talked to me. [Fisher @ Forbes; Legal Intelligencer; Reuters; Washington Examiner; Litigation Daily (calling me 'Class Action Settlement Scourge Ted Frank,' which I should print up on my business cards)…" Center for Class Action Fairness President Ted Frank, blogging about the Third Circuit's decision, summarized elsewhere in this *Report*, to reverse the approval of a class action settlement that included too great an allocation to a *cy pres* distribution.

PointofLaw.com, February 23, 2013

NYT Article on Food Company Marketing No More Than Empty Calories

"On Sunday the *New York Times* published a long, breathless screed attacking food company marketing ('Inside the hyper-engineered, savagely marketed, addiction-creating battle for "stomach share."') The article itself furnishes an example of empty, hype-fueled journalistic calories, or so I suggest in a new op-ed at the *Daily Caller*." Cato Institute Senior Fellow Walter Olson, opining about an article discussing food industry efforts to increase market share by making foods more palatable.

Overlawyered.com, February 27, 2013.

THE FINAL WORD

Children's Product Recalls Dropped in 2012

Advocacy organization Kids in Danger (KID) has released its annual **report** detailing children's products safety recalls throughout the previous year. Titled "Safe Sleep, Safe Play: Children's Product Recalls in 2012," the report indicates that the number of children's product recalls issued by the U.S. Consumer Product Safety Commission (CPSC) continued to decline in 2012, dropping 20 percent compared to 2011, and for the first time since 2004, children's product recalls numbered fewer than 100.

Meanwhile, as the number of product recalls has declined, the numbers of incidents (up 49 percent), injuries (up 42 percent) and deaths (up 200 percent) purportedly associated with those products has risen from 2011, states a KID news release. "We

believe that the impact of new safety regulations can be seen in reduced recalls this year," said KID Executive Director Nancy Cowles. Cowles observes that although "recalls for unsafe cribs and toys with lead continued to drop, the numbers of injuries and incidents reported merits a closer look."

Additional findings include (i) one-third of the recalls (31 percent) were for nursery products purchased for use with infants and toddlers; (ii) one product, the Flexible Flyer Swing Set®, had 1,232 reported incidents before consumers were alerted to the dangers through a recall; (iii) eight children and one adult died before a product recall, including five deaths involving the Nap Nanny® or Chill Infant Recliners®; (iv) other products involved in deaths included crib tents, travel beds and strollers; (v) sleep environment products continue to pose a significant hazard, with seven deaths associated with these products, and (vi) CPSC collected some $3 million in fines from companies that violated safety regulations, mostly for failing to report hazards from products such as drawstrings, baby boats and magnetic toy sets.

KID purportedly identified two trends from the report. First, manufacturers have allegedly placed products that violate well-established standards into the marketplace. Apparently all but one of the 22 recalls of clothing items were for violations of flammability standards, the small parts standard, lead paint standards, or the CPSC prohibition on drawstrings—all of which have been in effect for decades. A second trend, according to KID, is that products sold for use with infants are not subject to any safety standards. "Parents assume infant sleep products have been tested for safety if they are on store shelves," said Cowles. "A few families paid the ultimate price to find out this was not true." *See KID News Release*, February 13, 2013.

UPCOMING CONFERENCES AND SEMINARS

ABA Tort Trial & Insurance Practice Section, Phoenix, Arizona – April 3-5, 2013 – "2013 Emerging Issues in Motor Vehicle Product Liability Litigation." Shook, Hardy & Bacon Tort Partner **H. Grant Law** is an event co-chair, and Class Actions & Complex Litigation Associate **Amir Nassihi** serves as program chair for this annual CLE on motor vehicle litigation. Nassihi will also serve as a co-moderator for a panel discussion titled "The Blockbuster Development in Class Action Litigation"; Shook, Hardy & Bacon Global Product Liability Partner **Holly Smith** is scheduled to participate as a member of the panel. Nassihi and Tort Partner **Frank Kelly** will co-moderate a panel discussion on "Managing the Corporate Counsel Relationship: The Inside View on Diversity, Retention and Client Expectations." The distinguished faculty includes senior in-house counsel for major automobile makers and experienced trial and appellate counsel. Program sessions will address class action developments, litigating brake pad asbestos cases, regulatory developments, and issues unique to component parts manufacturers. Shook, Hardy & Bacon is a conference co-sponsor

ABA Toxic Torts and Environmental Law and Corporate Counsel Committees, Phoenix, Arizona – April 4-6, 2013 -- "Fuel, Food, Fibers and More: Blazing New Trails

in the Desert Sun." During this 22nd annual spring CLE meeting, Shook, Hardy & Bacon Agribusiness & Food Safety Co-Chair **Madeleine McDonough** will participate in a panel discussion on "Food Safety: Will What We (Don't) Know About Our Food and Its Packaging Hurt Us?"

University of Florida College of Law, Gainesville, Florida – April 5-6, 2013 -- "Electronic Discovery for the Small and Medium Case." Shook Hardy & Bacon eDiscovery Partner **Denise Talbert** will join the distinguished faculty at a joint conference presented by the University of Florida College of Law and the Electronic Discovery Reference Model (EDRM). The conference will address how to "competently and cost-effectively" handle e-discovery in these matters, featuring "a new generation of right-sized e-discovery software and tools for each phase of the e-discovery process." Talbert will serve on two panels discussing (i) effective budgeting and cost-benefit assessment across the entire EDRM and (ii) traditional analysis focused on key word searching.

Widener Law Journal, Harrisburg, Pennsylvania – April 16, 2013 – "Perspectives on Mass Tort Litigation." Shook, Hardy & Bacon Public Policy Partners **Victor Schwartz** and **Mark Behrens** will join a distinguished faculty, including legal academics and federal judges, during this symposium on mass tort litigation issues. Schwartz will serve on a panel discussing "Emerging Issues in Mass Tort Practice," and Behrens will address "Keystone State Civil Justice Issues."

DRI, New York, New York – May 16-17, 2013 – "29th Annual Drug and Medical Device Seminar." Shook, Hardy & Bacon Pharmaceutical & Medical Device Litigation Partner **Scott Sayler** will deliver opening remarks in his role as current chair of DRI's Drug and Medical Device Committee. Co-sponsored by SHB, the event will feature presentations by judges, in-house and outside counsel, and other professionals on cutting-edge topics such as (i) "How to use your advocacy skills to persuade the toughest audience," (ii) "The latest on consolidated drug and device proceedings in Philadelphia," (iii) "What jurors are thinking about the FDA," (iv) "How to help a jury understand a state-of-the-art case," (v) "The latest on 'judicial hellholes,'" (vi) "How to try a multiple-plaintiff pharmaceutical case," and (vii) "How to take the 'junk' out of junk science." ■

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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).