Shook, Hardy & Bacon L.L.P.

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# PRODUCT LIABILITY LITIGATION REPORT

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## FIRM NEWS

### Esteban Co-Authors *Inside Counsel* Article on Corporate e-Discovery Readiness Program

Shook, Hardy & Bacon eDiscovery, Data & Document Management Partner **Amor Esteban** has co-authored an article, the first in a six-part series, published on April 16, 2014, by *Inside Counsel*. Titled "How to create a corporate e-discovery readiness program (Part 1): Providing context for and highlighting the core components of an e-discovery roadmap," the article posits that a responsibly developed e-discovery roadmap can be a practical and work-product protected tool. Among other matters, the article recommends assigning ownership of the e-discovery readiness program, taking steps to ensure all content is protected and distribution restricted, establishing a strategic priority by defining the business problem, and using a variation of the Six Sigma roadmap tool "to visualize workflow and better understand operational efficiencies and risk management opportunities."

### Oot Serves on Planning Committee for Prestigious eDiscovery Training Academy

Shook, Hardy & Bacon eDiscovery, Data & Document Management Partner **Patrick Oot** has served on the planning committee for an award-winning week-long "**eDiscovery Training Academy**" that will be held June 1-6, 2014, at the Georgetown University Law Center in Washington, D.C. Magistrate Judge John Facciola and the planning team have created a personalized and interactive experience that will connect students with a renowned faculty to learn "the broad spectrum of strategic, legal, and technical aspects of this complex field." Continuing legal education credit, including ethics, will be provided.

## CASE NOTES

### Fourth Circuit Leaves Cosmetics Litigation in State Court

A divided Fourth Circuit Court of Appeals panel has refused to return to federal court asbestos-related injury lawsuits filed against a cosmetics company, despite evidence that the plaintiffs misrepresented their potential exposures to support

*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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their motion to remand. ***Barlow v. Colgate Palmolive Co.*, Nos. 13-1839, -1840 (4th Cir., decided April 30, 2014)**. The plaintiffs claimed that exposure to asbestos in face-powder products caused their mesothelioma. In their motion to remand after the case was removed to federal court, they argued that other exposures involving in-state defendants were a possibility.

After remand to state court, the plaintiffs apparently reversed that position, stating that their asbestos exposures had one cause and one cause only—face powder. Thereafter, the defendant sought an order striking the remand order as a sanction for counsel's alleged misrepresentation regarding the existence of subject-matter jurisdiction. The district court denied the request, finding that it lacked jurisdiction to consider the matter. The Fourth Circuit majority agreed, discerning "no basis to infer that Congress intended to etch a litigation-integrity exception into its prohibition on the review of remand orders" in 28 U.S.C. § 1447(d).

The dissenting judge would have found ample precedent for a court to exercise jurisdiction after remand to consider whether plaintiffs' counsel had violated Federal Rule of Civil Procedure 11 and whether sanctions should be imposed for their "(now-confirmed) intentional misrepresentations that were perpetrated upon the district judges while the cases were removed." According to this judge, Rule 11 sanctions are "collateral to the merits" of an action, and the majority, by reaching the opposite conclusion, "maroons itself on an island all alone, thereby creating a cosmic circuit split and contravening Supreme Court precedent and this Court's precedent."

**Federal Court Remands Ear Drops False Ad Claims, CAFA Minimum Not Met**

A federal court in California has determined that the defendants in litigation alleging false advertising, marketing and sale of an earache relief product failed to show by a preponderance of the evidence that damages in the case would meet or exceed the jurisdictional minimum of $5 million under the Class Action Fairness Act of 2005 (CAFA). *Manier v. Medtech Prods., Inc.*, No. 14-0209 (U.S. Dist. Ct., S.D. Cal., order entered April 22, 2014).

While the plaintiffs alleged in their complaint, which seeks to certify statewide and nationwide classes, that the defendants were wrongly enriched by millions of dollars, they also asserted that consumers "are unwittingly spending hundreds of thousands of dollars each year on a worthless product." This inconsistency, in the court's view, undermined the defendants' position that "millions of dollars" means at least $2 million, punitive damages at an estimated 1:1 ratio would also be $2 million, counsel fees could "easily reach seven figures," and a corrective advertising campaign and recall would cost $1.25 million. Still, the court denied the plaintiffs' request for attorney's fees and costs related to removal, finding that the defendants did not lack an objectively reasonable basis to remove the matter to federal court.

### Court Allows Putative Class Claims over Defective Hair Dryers to Proceed

A federal court in California has ruled on three motions in a putative class action against Conair Corp. over allegedly faulty hair dryers, granting the plaintiff leave to amend the complaint a second time and denying several of Conair's motions, including motions to strike the plaintiff's request for nationwide class certification. *Czuchaj v. Conair Corp.*, No. 13-1901 (U.S. Dist. Ct., S.D. Cal., orders entered April 16, 2014).

Originally filed in August 2013 and amended the following December, the lawsuit stems from the apparent malfunction of plaintiff's Conair hair dryer, which allegedly emanated flames and ejected hot coils during use. Conair filed a motion to dismiss, arguing that plaintiff Cynthia Czuchaj lacked standing because she failed to file a warranty claim to redress the only damage asserted in the complaint, the loss of the cost of the Conair product. The court rejected Conair's arguments because it granted Czuchaj leave to amend the claims, and Czuchaj had asserted that the amended complaint would detail more extensive damages than just the hair dryer's cost.

Conair also argued that the plaintiff failed to meet the heightened pleading standard for fraud and concealment. While the court granted Conair's motion to dismiss those claims, it also allowed the plaintiff leave to amend, directing her to remove any allegations of fraudulent misrepresentation and to further detail assertions that Conair had exclusive knowledge of the defect to support the concealment claim. Finding insufficient facts to support plaintiff's active concealment claims under California law, the court granted Conair's motion to dismiss while again granting the plaintiff leave to amend, but denied Conair's similar motions to dismiss active concealment claims under Pennsylvania, Michigan and New York law for Conair's failure to state the basis for dismissal under those states' laws.

Finally, the court denied Conair's motion to strike nationwide class allegations because the decision on that question was premature. Conair cited *Mazza v. American Honda Motor Co.* to support its contention that "nationwide classes based on California law are not proper and should be denied," but the court pointed to *Mazza*'s detailed choice-of-law analysis, suggesting that a similar exploration may be necessary to determine whether to certify the nationwide class. Without enough detail on the record to conduct such an analysis, the court denied Conair's motions to strike the nationwide class allegations in the claims brought under California law and the claim asserted under the Magnuson-Moss Warranty Act.

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### MDL Magistrate Excludes Plaintiffs' Expert in DHA Omega-3 Fortified Milk Suits

A federal magistrate in Florida has decided that the opinion proffered by the plaintiffs' expert in litigation challenging "brain health" marketing claims for algal-derived DHA Omega-3 fortified milk products is unreliable, thus granting the defendant's

motion to exclude it. *In re Horizon Organic Milk Plus DHA Omega-3 Mktg. & Sales Practices Litig.*, MDL No. 12-2324 (U.S. Dist. Ct., S.D. Fla., order entered April 28, 2014). The ruling affects claims brought by consumers in six states alleging that the defendant violated state laws by falsely claiming that the DHA in its products "Supports Brain Health" and "Supports a Healthy Brain," and that "competent, scientific evidence shows that these claims are false."

While the court found that most of the defendant's arguments in support of exclusion went to the weight of the testimony rather than its admissibility, it agreed that the expert failed to show how small studies involving 49 women and 658 children in the United Kingdom could be extrapolated to the putative class of consumers of the defendant's milk products in the United States and ruled for that reason that the testimony was unreliable under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The court disagreed that (i) the studies did not fit the case, (ii) the expert cherry-picked the studies to support his conclusion, and (iii) the five studies on which the expert relied contained contradictory conclusions.

### Shoemaker to Pay $3.75 Million to Settle Research Misrepresentation Claims

To settle allegations that it lied about the scientific research on the purported benefits of barefoot-style running in promotions for its glove-like, five-toed running shoes, Vibram USA Inc. has agreed to establish a settlement fund of $3.75 million and will not oppose counsel's request for nearly $1 million in fees. *Bezdek v. Vibram USA Inc.*, No. 12-10513 (U.S. Dist. Ct., D. Mass., motion for preliminary settlement approval filed April 30, 2014). If approved, the agreement will resolve three class actions filed in June, July and August 2012.

Without admitting any liability, the company will also refrain from making claims about FiveFingers footwear—i.e., effective in strengthening muscles or preventing injury—unless the "representation is true, non-misleading and is supported by competent and reliable scientific evidence." Under the agreement, any residual funds will be distributed to the American Heart Association "with specific earmark relating to research regarding health benefits associated with running or exercise or substantially similar research, or such other beneficiary as the parties and the Court shall agree at the time of the Final Judgment and Final Order."

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### Pa. Supreme Court Equally Divided on Protection for Attorney-Expert Communications

An equally divided Pennsylvania Supreme Court has affirmed a superior court decision adopting the bright-line exclusion from discovery of all communications between a lawyer and an expert witness. ***Barrick v. Holy Spirit Hosp. of the Sisters of***

*Christian Charity*, No. J-26-2013 (Pa., decided April 29, 2014). The issue arose in a case involving injuries allegedly sustained when a chair collapsed in the cafeteria of the defendant hospital. The expert was initially identified as the plaintiff's treating orthopedic surgeon, and early requests for his records were unopposed. After the plaintiffs designated him as an expert witness, however, they resisted disclosure on the ground that all communications between counsel and the witness were privileged.

Those justices agreeing with the intermediate appellate court concluded "that it is preferable to err on the side of protecting the attorney's work product by providing a bright-line rule barring discovery of attorney-expert communications." They reasoned that "attempting to extricate the work product from the related facts will add unnecessary difficulty and delay into the discovery process" and noted that a rules committee proposal, if adopted, will "embrace unambiguously the bright-line rule denying discovery of all attorney-expert communications." Those justices opposing a blanket prohibition would have found no particular burdens for counsel and courts to separate core attorney work product from matter subject to discovery, such as information relating to expert compensation and the facts and assumptions on which the expert relies. They also objected to the adoption of a new discovery rule in the context of litigation.

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### Public Citizen Sues FDA, Claims Warnings on Anti-Acid Drug Are Inadequate

Advocacy organization Public Citizen has sued the U.S. Food and Drug Administration (FDA), seeking a court order requiring the agency to issue a decision on its 2011 petition urging FDA to require black box warnings about certain purported adverse events associated with the use of proton pump inhibitors (PPIs), prescribed for the suppression of stomach acid. *Public Citizen v. FDA*, No. 14-0751 (U.S. Dist. Ct., D.D.C., filed April 30, 2014). According to Public Citizen, FDA's delay in ruling on its petition constitutes a violation of the Administrative Procedure Act. Claiming that PPIs "are one of the most widely used classes of drugs in the United States, with 131 million prescriptions dispensed in 2013," Public Citizen alleges that "FDA's failure to require adequate warnings on PPI labeling counsels in favor of expeditious action on Public Citizen's petition," because of evidence showing that the drugs "pose serious safety risks about which their labeling does not warn."

## THE INTERNATIONAL BEAT

### EU Court Refuses to Annul Regulation Refusing to Adopt Health Claim for Water

The European Court of Justice has rejected a challenge filed by German law professors who submitted a claim to test the limits of the nutrition and health claims regulation (NHCR) by seeking authorization of the following claim: "Regular

consumption of significant amounts of water can reduce the risk of development of dehydration and concomitant decrease of performance." *Hagenmayer v. European Comm'n*, Case No. T-17/12 (E.C.J., decided April 30, 2014). German authorities forwarded the request to the European Food Safety Authority (EFSA) to allow the claim. EFSA concluded that the "risk factors proposed by the applicants were measures of water depletion and thus measures of the disease [and thus] the claim at issue did not meet … the requirements of a claim relating to the reduction of a disease risk." Thereafter, the European Commission adopted a regulation refusing to make certain health claims on foods; the water claim was "not on the list of permitted claims of the European Union," because the reduction of a risk factor for developing a disease had not been demonstrated.

The applicants challenged the determination, seeking its annulment, and significantly were found to have standing under the NHCR to make the proposal. According to the court, "the legislature intended to permit any natural or legal person to make an application for leave and it did not restrict the circle of applicants for authorization." The applicants' standing was not, in the court's view, "undermined by the argument of the Commission that the applicants have only a theoretical interest in the Regulation." Still, the court disagreed with the applicants that the "Commission wrongly considered mandatory designation of a risk factor for disease development." In this regard, the court rejected arguments including that (i) EFSA's scientific assessment procedure is devoid of transparency and leads to inconsistent results, (ii) the Commission infringed the principle of proportionality and equal treatment in authorizing in the past "similar allegations relating to the reduction of disease risk in the absence of designation of any risk factor," and (iii) proper procedures were not followed in issuing the regulation.

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According to a news source, the German professors are weighing their options, including whether an appeal is merited. They were ordered to pay their own and the Commission's costs.

Meanwhile, a recent survey of NHCR food and nutrition sector stakeholders showed that most—84 percent—found the law just as devastating to their interests as when it was adopted. Respondents claimed that the law inappropriately imposes pharmaceutical-like scientific support for foodstuffs and nutrients. One critic said, "The NHCR has banned 100s of claims on products that consumers across Europe have been familiar and comfortable with for years. Claims such as 'dietary fibre helps maintain a healthy digestive system' and 'glucosamine helps maintain joints' are both well understood. To ban these, and claims like them, not only prevents our industry from developing products based on well-documented science, but also causes confusion in the minds of our consumers." *See Food&Drinkeurope.com*, May 2, 2014.

### NHTSA Proposes $300 Million Late Recall Fine

As part of a $302-billion, four-year plan to fund both infrastructure and highway construction, U.S. Department of Transportation (DOT) Secretary Anthony Foxx has reportedly asked Congress to allow the National Highway Traffic Safety Administration (NHTSA) to boost maximum fine amounts on automakers that fail to recall defective vehicles from the current $35 million per violation to $300 million per violation. The action follows the recent criticism of an auto company for its purported delay in handling alleged vehicle defects.

Other recall-related provisions of the legislation DOT has proposed would apparently (i) prevent rental companies and dealerships from lending or renting vehicles subject to a recall and (ii) give the federal government new authority to require removal of cars when a defect is first discovered. *See Bloomberg BNA Product Safety & Liability Reporter™*, April 29, 2014.

### Vermont House Passes Amended Toxics in Consumer Products Bill

The Vermont House of Representatives has passed legislation (S. 239) that would give the state's Health Department the authority to regulate purportedly harmful chemicals in children's consumer products. Passed by a 114-27 vote, the bill, significantly narrower than the Senate's proposal (passed on March 2014), will next go to a conference committee to iron out the differences before it is sent to Governor Peter Shumlin (D).

According to industry sources, a key difference between the two bills is that the amended House bill covers products sold for use by children 12 years old and younger only. A second difference concerns the state health commissioner's enforcement authority. In the House version, the commissioner must gain approval from the Chemicals of High Concern to Children Working Group (CHCWG) and navigate an apparently complex rulemaking process before limiting the sale or distribution of non-compliant products.

The Senate bill, on the other hand, requires consultation with CHCWG only before enforcement actions can be implemented. Both bills included a list of 66 purportedly harmful chemicals, including certain phthalates, bisphenol A, formaldehyde, toluene, and benzene. The health commissioner would have the discretion to add more chemicals to the list. Manufacturers of products subject to the legislation would be required to report chemicals of concern in concentrations of 100 parts per million, or levels above practical quantification limits. They would also be required to report toxic chemicals found in their products and pay a $200 fee every two years for each chemical reported. *See VTDigger.com*, April 29, 2014.

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### SCOTUS Approves Evidentiary Rule Changes

The U.S. Supreme Court (SCOTUS) has approved four proposed amendments to evidentiary rules pertaining to prior consistent statements and certain hearsay exceptions. Unless Congress takes contrary action, they will take effect December 1, 2014. The Federal Rules of Evidence affected by the changes are 801(d)(1)(B) and 803(6), (7) and (8). As to prior consistent statements that would otherwise be deemed hearsay, the new proposed rule will allow for the admission of a prior consistent statement to rehabilitate the credibility of the declarant who is attacked on any ground. Under the current rule, a consistent statement is not considered hearsay if it is offered to "rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying."

Hearsay exceptions for "records of a regularly conducted activity," "absence of a record of a regularly conducted activity" and "public records" have been amended to clarify that the opponent bears the burden of proof on the lack of trustworthiness. *See Evidence Prof Blog*, May 2, 2014.

## LEGAL LITERATURE REVIEW

### Maria Glover, "Mass Litigation Governance in the Post-Class Action Era: The Problems and Promise of Non-Removable State Actions in Multi-District Litigation," *Journal of Tort Law*, 2014

Observing that recent rulings have placed increasing restrictions on the class-action device, Georgetown University Law Center Associate Professor J. Maria Glover suggests that while other mechanisms, such as federal multidistrict (MDL) litigation, can help effectuate global settlements in its place, obstacles imposed by federalism principles—i.e., the non-removability of state cases into federal MDL proceedings—may be leading to unnecessary proposals for reform. Glover suggests that independent state court proceedings could allow litigants to test different types of claims "to provide some modicum of process-based assurance that sub-groups of claimants were not favored at the expense of others at the settlement table." The involvement of various, and often rival, plaintiffs' firms also, in the author's view, introduces a measure of competition in the market for various mass litigation claims, leading to "a more robust picture about the real-world value of claims" that could facilitate settlement valuations.

## LAW BLOG ROUNDUP

### U.S. Founders Blundered?

"The founders made the amendment process difficult because they wanted to lock in the political deals that made ratification of the [U.S.] Constitution possible.… But the founders blundered. They made passing an amendment too hard. In the 220-plus years since ratification of the Constitution, more than 11,000 amendments have been proposed, but only 27 have been enacted." University of Chicago Law School Professor Eric Posner, blogging about Justice John Paul Stevens' (ret.) call for amendments that would abolish the death penalty, permit gun control and rein in campaign finances, among others. Posner observes that "[m]ost liberal democracies—including the nice, stable ones in Western Europe—amend their constitutions with great frequency." He calls for people to find different ways to change the Constitution.

Slate, View from Chicago, May 5, 2014.

## THE FINAL WORD

### Business Groups Prepare to Challenge Consumer-Protection Laws

The American Tort Reform Association (ATRA) has reportedly announced "a multiyear, multistate campaign" to reform the state laws that are intended to protect consumers by allowing them to sue companies for making false and misleading claims about their products or otherwise engaging in unfair or deceptive acts and practices. Among the most active areas for such litigation in recent years have been claims against food and beverage companies, targeted in class and mass actions for misleading labels, advertising and promotions. According to ATRA President Sherman Joyce, "Though some dietary activists may be happy to see snack-food prices rise as a result of such speculative, no-injury litigation, most consumers are not. Prices for products and services all across the retail spectrum are being similarly affected by runaway litigation, which is why state policymakers should begin to revisit their respective consumer-protection acts." *See Bloomberg Businessweek*, April 24, 2014.

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## UPCOMING CONFERENCES AND SEMINARS

DRI , Washington, D.C. – May 15-16, 2014 – "Drug and Medical Device Seminar." Shook, Hardy & Bacon Pharmaceutical & Medical Device Litigation Partners Harvey Kaplan and Marie Woodbury will participate in panel sessions during this seminar.

Kaplan will serve as the moderator of a panel of judges discussing "Mass Tort Coordination Between Federal and State Jurisdiction," while Woodbury will serve on a panel demonstrating "Trial Skills: Warnings, Experts, and General Causation."

ACI, Chicago, Illinois – June 4-5, 2014 – "7th Annual Summit on Defending & Managing Automotive Product Liability Litigation." Shook, Hardy & Bacon Tort Partner H. Grant Law will participate in a panel discussion during this continuing legal education summit, which features presentations by judges as well as corporate and agency in-house counsel. His topic is "The Current Battleground for Automotive Class Action Litigation: Class Certification and Managing Experts, Attacks on Pleadings in Class Claims, Choice of Law, Arbitration and More."

ACI, Chicago, Illinois – June 11-12, 2014 – "2nd Annual Consumer Products Regulation and Litigation Conference." Shook, Hardy & Bacon Public Policy Partner Cary Silverman will serve with former Consumer Product Safety Commission Chair Inez Tenenbaum on a panel titled "Preparing for the Future of CPSC Practice." The panel will address issues including adapting to the visibility of CPSC's online product hazard database and the implications of proposed rules that would significantly alter the voluntary recall process and safeguards on public disclosure of company information. ■

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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 440 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).

ACC Association of Corporate Counsel VALUE CHAMPION 2013

2013 GLOBAL PRODUCT LIABILITY LAW FIRM OF THE YEAR WHO'S WHO LEGAL