Shook, Hardy & Bacon L.L.P.

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PRODUCT LIABILITY LITIGATION REPORT

CONTENTS

SCOTUS RULINGS ADDRESS PERSONAL JURISDICTION OVER FOREIGN TIRE AND MACHINE MAKERS

Near the end of its recently concluded term, the U.S. Supreme Court issued two decisions that determined whether U.S. courts could exercise jurisdiction over foreign companies that made products which allegedly injured U.S. residents. ***Goodyear Dunlop Tires Operations, S.A. v. Brown,* No. 10-76 (U.S., decided June 27, 2011)**; ***J. McIntyre Mach., Ltd v. Nicastro,* No. 09-1343 (U.S., decided June 27, 2011)**.

In *Goodyear*, a unanimous Court held that North Carolina courts could not adjudicate claims filed on behalf of North Carolina teenagers killed in a bus accident that happened in France and involved allegedly defective tires manufactured in Turkey by the foreign subsidiary of a U.S. corporation. Because neither the accident nor the manufacture took place in North Carolina, the courts lacked specific jurisdiction over the tire maker, and, without a "continuous and systematic" connection between the state and the foreign corporation, the courts lacked general jurisdiction as well. According to the Court, while a small percentage of the manufacturer's tires were distributed in North Carolina by the parent company, this level of economic activity was insufficient as a matter of due process for the courts to exercise general jurisdiction over it because the sporadic sales through intermediaries were not related to the cause of action.

A Court plurality in *McIntyre* reversed a New Jersey Supreme Court ruling allowing the state court to hear claims against the British manufacturer of a metal-shearing machine that purportedly injured a resident of New Jersey, where the accident occurred. The Court determined that the foreign manufacturer did not purposefully avail itself of the privilege of conducting activities within the forum state and thus did not invoke the benefits and protections of its laws. The company did not market in nor ship its machines to New Jersey, relying instead on a U.S. distributor to sell its products throughout the United States.

Still, the lower court, relying on the Supreme Court's "stream of commerce" doctrine, said jurisdiction was proper because the injury occurred in New Jersey, the company knew or reasonably should have known that its products were distributed through a nationwide distribution system that might lead to those products being sold in any one of the 50 states, and the company failed to take some reasonable step to prevent the distribution of its product in New Jersey. While rejecting the lower

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.

For additional information on SHB's Global Product Liability capabilities, please contact

Gary Long
+1-816-474-6550
glong@shb.com

Greg Fowler
+1-816-474-6550
gfowler@shb.com

or

Simon Castley
+44-207-332-4500
scastley@shb.com

court's approach, the U.S. Supreme Court was unable to muster a majority to clarify what it meant when it adopted the "stream of commerce" doctrine in *Asahi Metal Industry Co. v. Superior Court of Cal., Solano Cty.*, 480 U.S. 102 (1987).

Four justices opined that the doctrine "does not amend the general rule of personal jurisdiction. It merely observes that a defendant may in an appropriate case be subject to jurisdiction without entering the forum—itself an unexceptional proposition—as where manufacturers or distributors 'seek to serve' a given State's market." Two justices thought the lower court had unwisely announced a rule of broad applicability to accommodate "the increasingly fast-paced globalization of the world economy" in a case that did not present issues reflecting changes in commerce and communications (i.e., the Internet era). These justices refused, however, to join the plurality which had adopted strict rules limiting jurisdiction "where a defendant does not 'inten[d] to submit to the power of a sovereign' and cannot 'be said to have targeted the forum.'" They asked, "But what do those standards mean when a company targets the world by selling products from its Web site?"

The three dissenting justices contended that the plurality allowed a foreign manufacturer to escape products liability litigation in the United States simply by engaging a U.S. distributor to ship its machines to the country.

The U.S. distributor, McIntyre Machinery America, Ltd., was also a defendant, but it did not participate in the appeal; it declared bankruptcy in 2001, the same year the plaintiff was injured. It is unclear from the U.S. Supreme Court or New Jersey Supreme Court rulings whether the litigation will proceed against this party or whether it continues as a viable commercial entity. The foreign manufacturer's amenability to suit in the New Jersey courts has been the sole matter at issue since it filed a motion to dismiss after the action commenced in September 2003.

CLAIMS THAT DRYERS WERE FALSELY ADVERTISED RETURNED TO SEVENTH CIRCUIT

The U.S. Supreme Court has vacated a Seventh Circuit Court of Appeals ruling that enjoined any further filing of class actions in state court involving dryers with stainless steel drums and raising the same consumer fraud claims alleged in a putative class action that the Seventh Circuit refused to certify because individual issues predominated. *Thorogood v. Sears, Roebuck & Co.*, No. 10-1087 (U.S., decision entered June 27, 2011). Additional details about the case appear in the **November 11, 2010, issue** of this *Report*.

In its two-sentence ruling granting the plaintiff's petition for *certiorari*, the Court remanded the matter for further consideration in light of a related ruling this term. In that case, the Court held that a federal court may not enjoin state-court proceedings under the "relitigation exception" to the Anti-Injunction Act unless the issue the federal court decided is the same as the one presented before the state tribunal and the party seeking to certify the state-court action has the requisite connection to the federal suit to be bound by the federal court's judgment.

FIFTH CIRCUIT SAYS STATE UNCLAIMED FUNDS ACT TRUMPS FEDERAL CLASS SETTLEMENT RULES

The Fifth Circuit Court of Appeals has determined that the unclaimed funds of Texas residents from an antitrust settlement reached in 1999 must be placed in the custody of the state under an unclaimed property statute and that a federal court could not distribute the funds under the *cy pres* doctrine. ***All Plaintiffs v. All Defendants,* No. 10-40119 (5th Cir., decided June 27, 2011)**. At issue was some $10 million in unclaimed funds of which $4 million had been allocated to plaintiffs whose last known addresses were in Texas. The court determined that "the question of who shall have a property right in the unclaimed funds is substantive," and thus, funds allocated to plaintiffs with a last known address in Texas were governed by the Texas Unclaimed Property Act.

MEDICAL TESTIMONY PROPERLY EXCLUDED IN MEDICAL DEVICE LITIGATION

The Eleventh Circuit Court of Appeals has determined that a lower court properly excluded certain testimony by the plaintiff's treating physicians and upheld the lower court's dismissal of product liability claims against a medical device manufacturer. ***Williams v. Mast Biosurgery USA, Inc.*, No. 10-12578 (11th Cir., decided June 30, 2011)**. The product involved was intended to prevent post-surgical adhesions, a problem that the plaintiff had experienced from previous surgery. Ongoing complications following the use of the medical device led to the discovery of stiff, hard and brittle pieces of plastic in the plaintiff's colon or embedded in the colon wall. These foreign bodies were later removed along with damaged sections of her colon.

The lower court determined that parts of the treating physicians' testimony, i.e., regarding the medical device's performance and whether the foreign body removed from the plaintiff was the medical device, could not be admitted under the standards established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Noting "the great care and circumspection" that must be accorded the testimony of treating physicians, the appeals court determined that the district court's analysis was sound. According to the court, the proffered testimony of treating physicians can often go beyond a simple "account of their experience of providing care to their patients" and instead "purport to provide explanations of scientific and technical information not grounded in their own observations and technical experience," as was the case here.

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LEAD PAINT NUISANCE CLAIMS SETTLED WITH ONE COMPANY IN CALIFORNIA

A bankrupt holding company has reportedly agreed to pay $8.7 million to settle nuisance claims brought by a number of California cities and counties alleging public health problems caused by lead paint in homes and buildings. The funds will apparently be used to remediate lead paint-related health issues. Other defendants include lead paint manufacturers and distributors; trial against them is expected in 2012. California prosecutors are seeking an order requiring the cleanup of lead-contaminated buildings and a monetary contribution for public health efforts. *See Law360*, June 24, 2011.

PUTATIVE CLASS ALLEGES VACUUM CLEANERS DO NOT PERFORM AS ADVERTISED

California and Utah residents have filed a putative class action against a company that makes an upright vacuum cleaner advertised as effective in killing virtually all common viruses, germs and allergens; the complaint alleges that the claims are false, misleading and inaccurate. *Chenier v. Oreck Corp.*, No. 11-05321 (U.S. Dist. Ct., C.D. Cal., filed June 24, 2011). Seeking to certify a nationwide class of consumers, the plaintiffs refer to a fine imposed on the company by the Federal Trade Commission for making allegedly false and deceptive claims about the product's ability to prevent illness. The plaintiffs allegedly paid $600 for the vacuum cleaner believing that it would provide health benefits and claim that they would not have paid "the exorbitant cost" if they had known the "flu fighting" capability claims were baseless.

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Alleging violations of the implied warranties of merchantability and fitness for a particular purpose and violation of the California Consumers Legal Remedies Act, as well as unfair competition and false advertising, the plaintiffs seek compensatory damages, treble and/or punitive damages, attorney's fees, and costs.

ALL THINGS LEGISLATIVE AND REGULATORY

House Democrats Introduce Safe Cosmetics Act of 2011

Claiming that cosmetics are "the least regulated consumer products on the market today," Democratic Representatives Jan Schakowsky (Ill.), Ed Markey (Mass.) and Tammy Baldwin (Wis.) have introduced the Safe Cosmetics Act of 2011 (**H.R. 2359**). The bill would, among other matters, amend the Food, Drug, and Cosmetic Act to require post-market testing, company registration, ingredient labels, the compilation of a prohibited ingredients list, recall authority for misbranded products, and mandatory reporting of adverse health effects. The bill would also allow states to adopt even more stringent standards and requirements.

According to Schakowsky, the cosmetics industry "uses roughly 12,500 unique chemical ingredients in personal care products—the vast majority of which have never been assessed for safety by any publicly accountable body." She noted that similar legislation introduced in the 111th Congress has been changed to ease potential burdens on small cosmetic companies and clarify the bill's intent. *See Rep. Jan Schakowsky Press Release*, June 24, 2011.

FTC Settlement to Stop Skin Cream Promotions Implying Beneficial Effects on Body Size

The Federal Trade Commission (FTC) has **reached** a settlement that will require the company which makes a skin cream advertised as a product that can firm skin and slim consumers down to pay $900,000 to settle false advertising charges. The settlement also bars the company from making any claim that a "product applied to the skin causes substantial weight or fat loss or a substantial reduction in body size." The product at issue, Nivea My Silhouette!®, was promoted with a TV ad that showed a woman flitting into a pair of old jeans after applying the cream to her stomach and thighs. According to FTC Chair Jon Leibowitz, "The real skinny on weight loss is that no cream is going to help you fit into your jeans. The tried and true formula for weight loss is diet and exercise." *See FTC News Release*, June 29, 2011.

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GAO Identifies Monitoring and Data Gaps Affecting Assessment of Antibiotic Resistance

The Government Accountability Office (GAO) has issued a **report** titled "Antibiotic Resistance: Data Gaps Will Remain Despite HHS Taking Steps to Improve Monitoring." The report calls for the Centers for Disease Control and Prevention (CDC) to collect more comprehensive data on antibiotic use in the United States to "help policymakers determine what portion of antibiotic resistance is attributed to human antibiotic use, and set priorities for action to control the spread of resistance."

According to GAO, the CDC does not monitor inpatient antibiotic use or collect data on "all types of resistant infections to make facilitywide estimates." Apparently, the agency's information is also "not nationally representative." Without this information, GAO contends that "CDC's ability to assess the overall scope of the public health problem and plan and implement preventive activities will be impeded." The report notes that federal agencies have detected antibiotics intended for human use and for use in animals in the environment.

CPSC Phthalates Advisory Panel to Meet

The Consumer Product Safety Commission (CPSC) has **scheduled** the fifth meeting of its Chronic Hazard Advisory Panel on Phthalates and Phthalate Substitutes for July 25-26, 2011, in Bethesda, Maryland. While the meeting will be open to the public

and will be available via live Webcast, the public will not be allowed to participate. According to CPSC, this meeting "will include discussion of the [panel's] progress in its analysis of potential risks from phthalates and phthalate substitutes." CPSC charged the panel with studying the effects on children's health of these chemicals as used in toys and child care articles. *See Federal Register*, June 29, 2011.

Joint and Several Liability Abolished in Pennsylvania for Defendants Less Than 60% at Fault

Pennsylvania Governor Tom Corbett (R) has signed into law the Fair Share Act (**S.B. 1131**), which essentially eliminates joint and several liability in strict liability lawsuits filed in the state.

Defendants found to be less than 60 percent at fault would be required to pay only that part of the total dollar amount for which they have been found liable. In cases involving intentional misrepresentation, an intentional tort, greater than 60 percent fault, a release or threatened release of a hazardous substance, or certain violations of the Liquor Code, joint and several liability would apply.

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On signing the bill, Corbett said, "Pennsylvania is open for business." He claimed that the measure "will encourage companies to move here, grow here and stay here in Pennsylvania." According to a news source, the General Assembly passed the bill three times; it was previously rejected by the state supreme court and vetoed by former Governor Ed Rendell (D).

Shook, Hardy & Bacon Public Policy Partner **Mark Behrens** testified before the Senate Judiciary Committee in April 2011 in support of a companion bill on behalf of the American Tort Reform Association. *See Pittsburgh Tribune-Review*, June 28, 2011.

LEGAL LITERATURE REVIEW

W. Jonathan Cardi, "The Hidden Legacy of *Palsgraf*: Modern Duty Law in Microcosm," *Boston University Law Review* (forthcoming)

Wake Forest University School of Law Professor W. Jonathan Cardi assesses the competing claims about duty and proximate cause in the majority and dissenting opinions of Judges Benjamin Cardozo and William Shankland Andrews in *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928), and examines which has prevailed among today's courts. Cardi focuses on several elements of the debate, that is, (i) whether duty is relational or act-centered; (ii) whether plaintiff-foreseeability is a duty inquiry or an aspect of proximate cause; and (iii) whether the court or jury is the proper arbiter of foreseeability. He concludes after reviewing hundreds of cases from 51 jurisdictions that the answer to the question "who won?" is complicated.

The 1928 case involved an injury to a woman standing on a railroad platform. A passenger hurrying to catch a train dropped a package containing fireworks when two railroad employees attempted by pushing and pulling to help him board the train. The ensuing explosion purportedly knocked down scales at the other end of the platform and caused the injury. Judge Cardozo found no liability because the employees had no way of knowing that a newspaper-wrapped package was dangerous and that pushing the passenger would cause an explosion. The dissenters saw the case in terms of duty rather than foreseeability and would have held the railroad liable because the injury could be traced immediately to the wrong.

According to Cardi, "[o]n the theoretical substance of duty, neither the vision of Cardozo nor of Andrews dominates today's courts." The most "enduring lesson" of Cardi's investigation "is that courts are anything but clear or consistent in resolving these duty issues. In fact, the disarray is rather overwhelming."

David Caudill, "Lawyers Judging Experts: Oversimplifying Science and Undervaluing Advocacy to Construct an Ethical Duty?," *Pepperdine Law Review*, June 2011

Observing that "the notion that lawyers have a duty to evaluate the validity of their proffered [expert testimony] has been lurking in post-*Daubert* scholarly discourse," Villanova University School of Law Professor David Caudill expresses reservations about this trend. He explains how "the trend toward greater ethical duties on the part of lawyers to 'vet' their experts is based on an unrealistic view of the scientific enterprise *and* the role of advocates." Because controversy and uncertainty may be the hallmarks of good science, Caudill suggests that attorneys will have a difficult task assessing the validity of an expert's views and, if required to do so, may compromise their client's interests and shift their role "from zealous advocate to a kind of neutral, court-appointed scientific expert."

Lee Anne Fennell, "Unbundling Risk," *Duke Law Journal*, The Legal Workshop, June 27, 2011

Authored by University of Chicago Law School Professor Lee Anne Fennell, this article is drawn from a longer piece of the same title and was developed for a generalist audience as part of an ongoing project involving eight leading law reviews to keep readers abreast of contemporary legal scholarship. Fennell notes that her article provides a framework for answering questions about how we allocate risks inherent in the goods and services we choose and states, "[t]he answers implicate both law and policy, given the government's role in setting the rules for risk rearrangement among private entities and in directly delivering risk protection." She contends that activities or goods may be consumed not because of their risk profile, but in spite of it, noting "people seem to vary in their tolerance and taste for risk." According to Fennell, exposure to risk can be modulated, "but often only by changing what you do or buy," and suggests that risk-customization opportunities are not only quite limited, but exhibit gaps and inconsistencies. She invites "inquiries into risk baselines and the choices society affords for moving away from them."

LAW BLOG ROUNDUP

Scholars Lament Lack of Clarity Following SCOTUS Rulings on Personal Jurisdiction

"The bottom line: no revolution in the doctrine of personal jurisdiction—it's as messy as ever." University of Connecticut School of Law Professor Alexandra Lahav, blogging about the U.S. Supreme Court's end-of-term decisions on when courts may exercise jurisdiction over the foreign litigants appearing before them. Still, Lahav enjoyed reading the rulings and plans to use them in the classroom.

Mass Tort Litigation Blog, June 27, 2011.

Report to Congress Says Benefits of Regulations Exceed Costs

"Although many House Republicans claim that regulations are too costly and negatively impact jobs, this report presents findings consistent with recent independent research from the Economic Policy Institute (EPI) concluding that the benefits of regulation greatly exceed the costs. The BPI research also indicates that 'regulations do not tend to significantly impede job creation.'" OMB Watch Regulatory Policy Analyst Katie Greenshaw, discussing a June 24, 2011, Office of Management and Budget **annual report** analyzing the costs and benefits of federal regulations with an annual effect of $100 million or more on the U.S. economy.

OMB Watch, June 28, 2011.

Inadvertent Disclosure Rules Enrich Lawyers?

"If a law firm is not allowed to make mistakes in producing documents, it has to take much more care, and spend much more time and money and resources double-checking to ensure that no one has made a mistake in approving the production of privileged documents." Point of Law blog editor Ted Frank, decrying courts' adoption of a discovery rule that allows an opposing party to keep and use privileged documents inadvertently disclosed. He claims the rule is a "socially wasteful one that transfers wealth to attorneys."

PointofLaw.com, July 1, 2011.

THE FINAL WORD

New York Adopts Rule Prohibiting Judges from Hearing Cases Involving Campaign Donors

New York's judiciary has adopted a **new rule** that will prevent the assignment of cases to elected judges "where the assignment would give rise to a campaign contribution conflict."

Under the rule, attorneys, law firms and parties that have individually contributed $2,500 or more to a judicial campaign could not appear before the judge for a period of two years after the contribution is made. Collective contributions of $3,500 or more are also subject to the rule. New York Chief Judge Jonathan Lippman reportedly indicated that the strict conflict-of-interest rule makes the state's judiciary the first in the nation to systematically oversee judicial campaign contributions. He was quoted as saying, "This rule promotes public confidence in the independence, fairness and impartiality of the judiciary. It makes New York a leader in national efforts to address head-on the issue of monetary contributions to judicial campaigns." *See Law360*, June 28, 2011.

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UPCOMING CONFERENCES AND SEMINARS

The General Counsel Forum, Houston Chapter, Houston, Texas – July 27, 2011 -- "The ABCs of Strategic Legislative Outreach: How to Knock on Government's Door." Shook, Hardy & Bacon Public Policy Partner **Phil Goldberg** will moderate the chapter's Third Quarterly Event at the Houstonian Hotel. Chaired by SHB Houston and coordinated by Business Litigation Partner **Kristi Belt**, the event will consider how "recent paradigm shifts in American public policy and elections have ushered in an era of dynamic and unprecedented activity by all branches of the federal government." ■

OFFICE LOCATIONS

Geneva, Switzerland
+41-22-787-2000

Houston, Texas
+1-713-227-8008

Irvine, California
+1-949-475-1500

Kansas City, Missouri
+1-816-474-6550

London, England
+44-207-332-4500

Miami, Florida
+1-305-358-5171

San Francisco, California
+1-415-544-1900

Tampa, Florida
+1-813-202-7100

Washington, D.C.
+1-202-783-8400

ABOUT SHB

Shook, Hardy & Bacon is widely recognized as a premier litigation firm in the United States and abroad. For more than a century, the firm has defended clients in some of the most substantial national and international product liability and mass tort litigations.

Shook attorneys have unparalleled experience in organizing defense strategies, developing defense themes and trying high-profile cases. The firm is enormously proud of its track record for achieving favorable results for clients under the most contentious circumstances in both federal and state courts.

The firm's clients include many large multinational companies in the tobacco, pharmaceutical, medical device, automotive, chemical, food and beverage, oil and gas, telecommunications, agricultural, and retail industries.

With 93 percent of our more than 500 lawyers focused on litigation, Shook has the highest concentration of litigation attorneys among those firms listed on the *AmLaw* ***100,*** *The American Lawyer's* list of the largest firms in the United States (by revenue).