Shook, Hardy & Bacon L.L.P.

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PRODUCT LIABILITY LITIGATION REPORT

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FLORIDA SUPREME COURT ALLOWS ASBESTOS-RELATED CLAIMS TO PROCEED

In a split decision, the Florida Supreme Court has determined that an asbestos-litigation reform bill enacted in 2005 does not apply retroactively to deprive plaintiffs with pending claims of their day in court. ***Am. Optical Corp. v. Spiewak*, Nos. SC08-1616, SC08-1640 (Fla., decided July 8, 2011)**. The plaintiffs filed their claims before the law was adopted, alleging various degrees of asbestosis that did not rise to the level required under the new law, which included an express retroactivity provision to extinguish such claims in cases that had not yet gone to trial. The law makes particular impairment symptoms an essential element of an asbestos cause of action.

According to the majority, the plaintiffs had a vested property interest in their right to pursue an action based on asbestos-related injury under Florida common law, which simply requires a plaintiff alleging negligence to demonstrate "some actual harm," as one element of her cause of action, to "open the courthouse doors." In this regard, the majority said, "[t]he phrase 'some actual harm' does not require a precise technical or particular threshold of injury or impairment symptom that a plaintiff must satisfy to file an action." The court also determined that the legislature's attempt to apply the law retroactively to these plaintiffs' claims by characterizing it as remedial violated the Florida Constitution.

Two dissenting justices opined that Florida common law did not allow asbestos-related claims by plaintiffs whose health was unimpaired. According to the dissenting opinion, evidence of pleural thickening or pleural plaques, without more, did not establish a clear right to recover before the law was enacted, and thus, the law did not interfere with vested causes of action.

PLAUSIBILITY PLEADING STANDARD SHUNNED IN TENNESSEE

Invited to adopt the U.S. Supreme Court's new plausibility pleading standard in an employment law dispute, the Tennessee Supreme Court has declined to do so, citing the state's long-standing adherence to the more liberal "notice" pleading standard previously applied in the federal courts. ***Webb v. Nashville Area Habitat for Humanity, Inc.*, No. M2009-01552-SC-R11-CV (Tenn., decided July 21, 2011)**. The court explores the state rule's application and then describes how the U.S. Supreme Court's *Twombly* and *Iqbal* decisions significantly changed the pleading

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standard that the state follows. The court also cites a number of scholarly articles about the topic, including an article co-authored by Shook, Hardy & Bacon Public Policy Attorneys **Victor Schwartz** and **Christopher Appel**.

According to the court, the pleading standard change has resulted in "a loss of clarity, stability and predictability in federal pleadings practice." Among other matters, the court said that adopting the plausibility pleading standard would (i) "require the substantial alteration or abandonment of pleading principles that have been stable and predictable for forty years in Tennessee"; (ii) incorporate "an evaluation and determination of likelihood of success on the merits—a judicial weighing of the facts pleaded to see if they 'plausibly present a claim for relief—at the earliest stage of the proceedings before a sworn denial is even required"; (iii) require courts to distinguish between facts and conclusions, a distinction that is "fine, blurry, and hard to detect"; (iv) result "in the disproportionate dismissal of certain types of potentially meritorious claims that require discovery to be proven"; and (v) implicate policy issues more prevalent in federal than state courts.

Applying the state's motion-to-dismiss jurisprudence, the court determined that the amended complaint for retaliatory discharge stated a cause of action by including "a short and plain statement of the claim showing that the pleader is entitled to relief" and "a demand for judgment for the relief the pleader seeks."

MISSISSIPPI SUPREME COURT TO CONSIDER JUDICIAL BIAS IN $322 MILLION ASBESTOS VERDICT

The Mississippi Supreme Court has issued a stay to halt any further proceedings in an individual asbestos lawsuit that resulted in a $322 million jury verdict for the plaintiff after more than three weeks of trial. *Union Carbide Corp. v. Brown*, No. 2011-M-00874 (Miss., order filed July 13, 2011). The court established a briefing schedule on charges that the trial judge should have recused himself from presiding over the matter because his parents were purportedly involved in asbestos-related personal injury lawsuits, a matter about which he allegedly failed to inform the parties before trial. The judge must file his response by August 11, 2011.

JURY AWARDS DAMAGES FOR DEATH OF TEEN ZAPPED WITH STUN GUN

According to a news source, a federal jury in North Carolina has awarded $10 million in compensatory damages to the parents of a teenager who died after a law enforcement officer fired a stun gun into his chest, finding that the company which made the product provided inadequate warnings about its risks. *Fontenot v. TASER Int'l, Inc.*, No. 3:10-125 (U.S. Dist. Ct., W.D.N.C., verdict reached July 19, 2011). The plaintiffs reportedly alleged in their wrongful death lawsuit that the officer would not have shot their son in the chest had the company warned that doing so posed the risk of cardiac arrest. The company indicated in a written statement that it would appeal the verdict, claiming that the trial court excluded key evidence and failed to instruct the jury about contributory negligence. *See BNA Product Safety & Liability Reporter*, July 21, 2011.

COURT REFUSES REQUEST FOR DESTRUCTIVE TESTING IN ATV ACCIDENT CASE

A federal court in Colorado has denied a request for destructive testing of all-terrain vehicle (ATV) parts in a wrongful death lawsuit filed by the parents of a man who died while operating the ATV. *Blackmore v. Polaris Indus., Inc.*, No. 10-00631 (U.S. Dist. Ct., D. Colo., filed July 21, 2011).

According to the court, the plaintiffs "allege that the ATV was defective, and as a result of its defects, the right front wheel attached to the front suspension and the steering linkage broke, causing the ATV to come to an abrupt stop," thereby ejecting the decedent from the ATV. The ATV manufacturer contended, to the contrary, that the accident was caused by the decedent's negligence, claiming that "he went over a non-perpendicular dip on a dirt trail," lost control and rolled the ATV, which "came down on its right front wheel," thus overloading the suspension and causing the suspension to fail. The defendant further claimed that the decedent, who was injured when the ATV rolled over him, had a pre-existing paraplegia condition that contributed to his loss of control of the ATV.

Apparently, the plaintiffs' expert witness proposed "destructive testing of the ATV's front suspension, ball joint housing, welds, and failed tube regions . . . to view and assess the nature of the welding defects and the tube misalignments." The defendant objected to the request, claiming that testing the welds would be irrelevant because the lower control arm tubes did not break in the welds. The defendant also indicated that the proposed testing would directly affect its ability to effectively present evidence at trial, because the defendant "intends to show the jury all of the pieces of the lower control arm to allow the jury to understand the tremendous force applied to the lower control arm when the subject ATV rolled over."

Noting that a request for destructive testing is within the court's discretion, the court determined that, in this case, such testing was not necessary, it would hinder the defendant's ability to present evidence to the jury, the plaintiffs have other evidence to support their theory, and photographs of the relevant ATV parts would not be adequate to minimize the prejudice to the defendant if it were unable to let the jury see the actual ATV and its parts.

COMPANY AGREES TO SETTLE COMPLAINTS ABOUT ITS ENVIRONMENTALLY FRIENDLY PRODUCT CLAIMS

S.C. Johnson & Son, Inc. has reportedly agreed to settle putative class actions filed in California and Wisconsin federal courts alleging that the company falsely advertised its Windex products as good for the environment. *Koh v. S.C. Johnson & Son, Inc.*, 09-00927 (U.S. Dist. Ct., N.D. Cal.); *Petlack v. S.C. Johnson & Son, Inc.*, No. 08-00820 (U.S. Dist. Ct., E.D. Wis.).

According to a news source, the company will not use its "Greenlist" logo on Windex products for one year; a company spokesperson said he believed the company had "a strong legal case," but "could have been more transparent about what the logo signified." He also apparently indicated that the company's Greenlist process, based on internal "environmentally friendly" standards, "is such a fundamentally sound and excellent process we use to green our products, that we didn't want consumers to be confused about it due to a logo on one product." Under the terms of the agreement, the company will apparently be allowed to create and use a different Greenlist logo.

The plaintiffs reportedly alleged that the company's window cleaners contain a synthetic ingredient that is toxic to animals and young children. Characterizing the company's conduct as "greenwashing," they reportedly claimed that the product representations violated their respective state consumer fraud laws. *See Law360*, July 8, 2011.

NON-PROFIT FILES SECOND COMPLAINT AGAINST "ORGANIC" PERSONAL CARE PRODUCT MAKERS

The Center for Environmental Health has filed a new lawsuit, seeking injunctive relief against a number of companies that make personal care products promoted as organic, in a California state court. *Ctr. for Envtl. Health v. Naked Earth, Inc.*, No. 1158523 (Cal. Super. Ct., Alameda County, filed July 13, 2011). Details about a similar lawsuit the center filed a month earlier against different defendants appear in the **June 23, 2011, Issue** of this *Report*.

According to the complaint, most of the products' ingredients are not organic, a matter made clear by consulting the fine print on the back of each label. At issue are hair dyes and conditioners, shave creams, body lotions, and cleansers purportedly "marketed, labeled and sold as 'organic,' but which in fact contain less than 70% organic ingredients." Alleging violations of the California Organic Products Act of 2003 (COPA), the center asks the court to "preliminarily and permanently enjoin Defendants from violating COPA and require Defendants to correct their past violations of COPA." The center also seeks attorney's fees and costs.

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ALL THINGS LEGISLATIVE AND REGULATORY

House Poised to Cut Funds for Product Safety Database Despite Reports of Accuracy and Utility of Incident Reports

The Republican-controlled House of Representatives is expected to approve an appropriations bill that would prohibit the Consumer Product Safety Commission (CPSC) from spending any funds on the recently launched consumer product safety database mandated under the Consumer Product Safety Improvement Act of 2008. Democratic staff of the House Energy and Commerce Committee **analyzed** information

appearing on the database since it went live on March 11, 2011, and concluded that the incident reports are detailed and accurate.

Of the 1,600 incident reports filed between March and June, 11 involved fatalities and 483 involved injuries. Product manufacturers have apparently challenged 202 of the reports, and CPSC accepted more than 75 percent of their claims, removing inaccurate information or not publishing the incident report in the database. The staff report also indicated that hundreds of thousands of consumers have visited the database and conducted nearly 1.8 million product searches. The report concludes, "Efforts by House Republicans to eliminate this database would deprive the public and government officials of critical information needed to improve consumer safety." Manufacturing interests have complained that insufficient attention is being paid to legitimate issues such as manufacturers' goodwill and reputation as well as unnecessary consumer panic and use of the information by plaintiffs' lawyers in litigation.

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FDA Solicits Comments on CDER Research Needs Report

The Food and Drug Administration (FDA) has **issued** for public comment a report prepared by the Center for Drug Evaluation and Research (CDER) identifying "current priorities in regulatory science related to [CDER's] mission." The **draft report**, titled "Identifying CDER's Science and Research Needs," will also "guide strategic planning and internal research efforts." Comments on related "research and initiatives that may be ongoing" and "opportunities to collaborate with external partners and stakeholders to maximize resources to address the areas for development discussed previously" should be submitted by September 26, 2011.

According to FDA, CDER grouped science and research needs into seven categories: (i) improve access to post-market data sources and explore whether they can be used in different types of analyses; (ii) "improve risk assessment and management strategies to reinforce the safe use of drugs"; (iii) evaluate whether various regulatory communications are effective, (iv) "evaluate the links among product quality attributes, manufacturing processes, and product performance"; (v) "develop and improve predictive models of safety and efficacy in humans"; (vi) make improvements to clinical trials; and (vii) individualize patient treatment. *See Federal Register*, July 26, 2011.

Settlements Entered with Retailer and Manufacturer for Product Safety Violations

The Consumer Product Safety Commission (CPSC) has provisionally approved a settlement with Macy's, Inc., over claims that the retailer sold children's outerwear products with drawstrings at the neck from 2006 to 2010 in violation of applicable safety standards. Without admitting liability, Macy's has apparently agreed to pay a $750,000 civil penalty and provide training to its employees about drawstring prohibitions and rules. CPSC has published **notice** of the agreement, seeking comments on whether the commission should accept its terms; the deadline for submission is July 29, 2011.

Meanwhile, Viking Range Corp. has agreed to pay a $450,000 civil penalty for failing to report to CPSC that its defective refrigerator door hinge support mechanisms had caused incidents and injuries to consumers from detached and falling doors over the past 10 years. While the company denied the allegations, 45,000 of the purportedly defective refrigerators were recalled. The settlement agreement was provisionally accepted by the commission, which requested comments on its contents by July 13. *See CPSC News Release*, July 5, 2011; *Federal Register*, July 14, 2011.

CPSC Lowers Lead Limit for Children's Products

The Consumer Product Safety Commission (CPSC) voted on July 13, 2011, to require children's products sold in the United States to adhere to a 100 parts per million (ppm) lead-content limit. The 3-2 vote followed a June 29 commission **compliance data report** finding it technologically feasible for product manufacturers and sellers to reduce the allowable amount of lead in children's products from 300 to 100 ppm. According to CPSC staff, materials containing less than 100 ppm total lead content are commercially available for manufacturers, and many tested products currently on the market already comply with the new limit.

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Effective August 14, the **new rule** was required under the Consumer Product Safety Improvement Act (CPSIA), which called for a three-year phase-in period starting in 2009, with the final total lead limit set at 100 ppm unless CPSC determined it was not technologically feasible. According to CPSC, the new lead limit does not apply to internal parts of children's products and certain component parts for children's electronic devices, such as connectors and headphone plugs. CPSC will not enforce CPSIA's independent third-party testing requirement for total lead content until December 31, because of a stay of enforcement already in place. The stay does not apply to children's metal jewelry, which currently requires independent third-party testing.

Meanwhile, the commission has reportedly voted unanimously to impose a stay of enforcement on third-party testing of children's toys until after the winter holidays. The accreditation requirements for third-party conformity laboratories will not take effect until December 31 allowing home crafters to simply provide general conformance certificates, indicating compliance with child product safety rules. Small business interests apparently appreciated the delay, but maintain that after the new deadline "handmade toys will be illegal." *See Law360,* July 13, 2011; *CPSC News Release,* July 15, 2011; *BNA Product Safety & Liability Reporter*, July 20, 2011; *Federal Register*, July 26, 2011.

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ANSI Standard for All-Terrain Vehicles to Be Adopted

The Consumer Product Safety Commission (CPSC) has issued a **notice** of proposed rulemaking that would amend its current All-Terrain Vehicles (ATV) standard by

referencing the 2010 version of an industry standard that became mandatory in 2008. The updated version of the "American National Standard for Four Wheel All-Terrain Vehicles Equipment Configuration, and Performance Requirements" was first developed by the Specialty Vehicle Institute of America (SVIA) in 2007.

Despite initial concerns that certain changes from the 2007 version would result in diminished ATV safety, CPSC staff endorsed the updated mandatory industry standard to allow manufacturers, importers and third-party testing laboratories to operate under one standard, according to a CPSC **briefing memo**. Noting that the changes are relatively minor, CPSC asserts that the proposal would not significantly affect most small businesses.

Among other things, SVIA has recommended that all ATV riders operate age-appropriate vehicles. CPSC data evidently show that approximately 90 percent of injuries to children younger than 16 occur on adult-sized ATVs. CPSC requests comments and data on a variety of topics, including whether the revisions would enhance the clarity of the ANSI standard. Comments are requested by October 11, 2011. *See Product Safety & Liability Reporter,* July 12, 2011; *Federal Register,* July 25, 2011.

LEGAL LITERATURE REVIEW

Doug Rendleman, "Measurement of Restitution: Coordinating Restitution with Compensatory Damages and Punitive Damages," *Washington and Lee Law Review* (2011 forthcoming)

Washington and Lee University School of Law Professor Doug Rendleman considers the confusion over boundaries between certain civil remedies and suggests that the American Law Institute's *Restatement (Third) of Restitution and Unjust Enrichment* can provide clarity and guidance to practitioners with its "lucidly stated rules and supporting illustrations." According to Rendleman, a misunderstanding of basic restitution principles and rules has hampered lawyers' and courts' analyses and prevented well-reasoned decisions on these matters. He discusses the types of situations where restitution should be available as a remedy and how it should be measured to appropriately coordinate with compensatory and punitive damages depending on "context, culpability, plaintiff's interest, and remedial alternatives."

LAW BLOG ROUNDUP

Grim Findings in Book on Federal Regulatory Agencies?

"Using case studies, the book shows how the protector agencies are malfunctioning and explores the sources of the trouble. … The book offers thoughtful solutions that are carefully tailored to the problems that the authors identify." University of Maryland School of Law Professor Danielle Citron, blogging about the "grim findings" in *The People's Agents and the Battle to Protect the American Public: Special Interests, Government,*

and Threats to Health, Safety, and the Environment, a new book that analyzes the performance of agencies such as the Consumer Product Safety Commission, Food and Drug Administration and National Highway Traffic Safety Administration.

Concurring Opinions, July 22, 2011.

THE FINAL WORD

House Committee Approves Amendments to Frivolous Lawsuit Rule, Sanctions Would Be Mandatory

The House Judiciary Committee has approved the "Lawsuit Abuse Reduction Act of 2011" (H.R. 966, S. 533), which would require that courts impose sanctions on lawyers or parties found to have filed lawsuits without merit. Federal Rule of Civil Procedure 11 currently allows courts to impose an appropriate sanction for frivolous lawsuits or pleadings, but the proposed bill would require the payment of reasonable attorney's fees and costs while allowing additional sanctions, such as "striking the pleadings, dismissing the suit, or other directives of a nonmonetary nature."

Representative Lamar Smith (R-Texas), who introduced the legislation, reportedly said, "Federal rules mandating sanctions for frivolous lawsuits were watered down in 1993, resulting in the current crisis of widespread lawsuit abuse. The Lawsuit Abuse Reduction Act is just over a page long, but it would prevent the filing of hundreds of thousands of pages of frivolous legal pleadings in federal court." The U.S. Judicial Conference apparently opposes the measure, objecting that it would reinstate a rule in effect in the 1980s that "was abused by resourceful lawyers, and an entire 'cottage industry' developed that churned tremendously wasteful satellite litigation that had everything to do with strategic gamesmanship and little to do with underlying claims." *See BNA U.S. Law Week*, July 12, 2011. ■

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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).