Shook, Hardy & Bacon L.L.P.

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PRODUCT LIABILITY LITIGATION REPORT

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SEVENTH CIRCUIT PANEL DIFFERS OVER SOURCES OF FOREIGN LAW IN CONTRACT DISPUTE

Applying French-law principles, a Seventh Circuit Court of Appeals panel has determined that a French-press coffee maker sold in the United States does not violate an agreement carving up the global marketplace between two companies that make and sell similar coffee makers. ***Bodum USA, Inc. v. La Cafetière, Inc.*, No. 09-1892 (7th Cir., decided September 2, 2010)**. Each member of the three-judge panel wrote separately to discuss whether it is appropriate in cases requiring the application of foreign law for courts to consider expert testimony or to conduct independent research on foreign-law precepts.

Chief Judge Frank Easterbrook and Judge Richard Posner favored the latter approach, particularly where abundant English-language material exists to explain the foreign law. Judge Diane Wood did not object to the use of written sources of foreign law," but concurred to object to any disparagement of oral testimony from foreign law experts. "That kind of testimony has been used by responsible lawyers for years," according to Wood, "and there will be many instances in which it is adequate by itself or it provides a helpful gloss on the literature." She was apparently concerned that translation nuances could mislead or confuse the court.

CLAIMS AGAINST KNIFE MAKER FILED TOO LATE

The First Circuit Court of Appeals has affirmed a district court ruling that overturned a verdict in a personal injury action against the company that made the industrial paper-cutting knife that allegedly caused the plaintiff's injury. ***Coons v. Indus. Knife Co., Inc.*, Nos. 09-1489, 09-1791 (1st Cir., decided September 10, 2010)**.

Industrial Knife, the defendant found liable, had been added by amended complaint in May 2005, some four years and eight months after the plaintiff was injured. Industrial Knife asserted a statute-of-limitations defense (i) in its answer to the amended complaint, (ii) in an untimely joint motion to dismiss and (iii) at the close of plaintiff's case in a motion for judgment as a matter of law. After the trial court entered judgment on the jury verdict against Industrial Knife, the company filed a motion under Federal Rule of Civil Procedure 59(e), again asserting that the claims against it were time-barred. The trial court agreed.

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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On appeal, the plaintiff argued that Industrial Knife waived the statute-of-limitations defense by "failing to raise it through a timely pre-trial motion or a renewed motion for judgment as a matter of law." According to the court, "a party does not waive a properly pleaded defense by failing to raise it by motion before trial." And while the court agreed that a renewed motion for judgment as a matter of law filed after trial under Rule 50(b) "is the standard way to raise a limitations defense that has been rejected by the jury," the court noted that Rule 59(e) authorizes the correction of a "manifest error of law," into which category this issue fell. Because the defendant filed its 59(e) motion within the time allowed for a 50(b) motion, the trial court was correct, according to the appeals court, in construing it through the lens of Rule 50(b). Assessing the issue under either rule, the court found the complaint against Industrial Knife untimely, because it was filed outside the three-year limitations period.

As for whether the amended complaint was timely under an exception to the statute of limitations, that is, whether it "related back" to the filing of the original timely-filed complaint, the court agreed with Industrial Knife's argument that it could not relate back because the notice requirement of Rule 15(c)(1)(c) had not been met. Because the plaintiff had not raised or briefed whether the amended complaint might relate back under applicable state law, the court found the argument forfeited.

FEDERAL COURT DISMISSES OTC DRUG LITIGATION; RELIANCE ON AGENCY WARNING LETTER MISPLACED

A federal court in Ohio has dismissed with prejudice a putative class action alleging that promotions for over-the-counter (OTC) cold- and flu-symptom relief products with vitamin C were false or misleading and violated state consumer protection laws. *Loreto v. The Procter & Gamble Co.*, No. 1:09-cv-815 (U.S. Dist. Ct., S.D. Ohio, W. Div., decided September 3, 2010).

The plaintiffs did not allege that the products were actually ineffective, but instead relied on a Food and Drug Administration (FDA) warning letter to the manufacturer stating that the products did not comply with the agency's final monograph for OTC cold and cough drugs because they contained vitamin C. FDA apparently decided not to allow vitamin C to be added to these types of products because the data did not show that vitamin C alone "is unequivocally effective for the prevention or treatment of the 'common cold' although some data tended to favor effectiveness for the treatment of cold symptoms." To obtain FDA recognition of its products as safe and effective for intended use and to sell the products in interstate commerce, the manufacturer was purportedly told that it was required to submit a "new drug" application and have FDA approve it.

Determining whether the plaintiffs had stated a claim upon which relief could be granted, the court emphasized that nothing in the warning letter or the complaint suggested that "the addition of vitamin C renders the other ingredients in the Products literally ineffective as 'pain reliever/fever reducer, cough suppressant, nasal decongestant, and antihistamine.'" The court also observed that the plaintiffs failed

to allege any ascertainable loss or that they "did not receive what they bargained for when they purchased the Products." The court agreed with the defendant that the plaintiffs' state law claims essentially sought to enforce the federal Food, Drug, and Cosmetic Act, which does not provide for a private right of action, to the extent that the plaintiffs were seeking damages for the company's alleged failure to seek and obtain FDA approval before selling their products.

APPARENT MANUFACTURER DOCTRINE NOT APPLIED TO PRODUCT LIABILITY CLAIM FILED UNDER KENTUCKY LAW

A federal court in Kentucky has denied a plaintiff's motion for summary judgment in strict liability litigation against a company that sold, under its own label, allegedly defective boat tie-down straps made by another company. *Rushing v. Flerlage Marine Co.*, No. 3:08CV-531 (U.S. Dist. Ct., W.D. Ky., decided August 27, 2010). The plaintiff sought to hold Donovan Marine, Inc. liable under the "apparent manufacturer" doctrine, which has been adopted by a few states and is articulated in the *Restatement (Third) of Torts: Product Liability* § 14 (1998). Noting that the Kentucky Legislature has not adopted this doctrine and, indeed, has a "middleman statute" immunizing under most circumstances those other than a product manufacturer from strict product liability, the court predicted that "if given the opportunity, Kentucky's courts would not adopt the apparent manufacturer doctrine."

CLAIMS ALLEGING CARCINOGENS IN CHILDREN'S BATH PRODUCTS DISMISSED

A federal court in California has dismissed a putative class action alleging that companies making and selling children's bath products violated state consumer protection laws by promoting their products as safe when they, in fact, contain carcinogens and other toxic substances. *Herrington v. Johnson & Johnson Consumer Cos.*, No. C 09-1597 (U.S. Dist. Ct., N.D. Cal., decided September 1, 2010). Because the court found that the plaintiffs had not pleaded an injury-in-fact sufficient to confer Article III standing and did not allege facts tending to show an imminent threat of future harm or actual economic damage, the court concluded that it lacked subject matter jurisdiction over their claims.

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Still, the court gave the plaintiffs leave to amend their complaint "to plead facts that support their standing to bring suit." The court also carefully analyzed each of their claims "to provide guidance for any amended pleading." In this regard, the court sets forth the elements for pleading each claim and discusses how the specific allegations fall short. For example, the court notes that the plaintiffs' fraud claims include allegations that "they would not have purchased Defendants' products had they known of the presence of 1,4-dioxane and formaldehyde," but because they "have not averred facts that show that the levels of these substances caused them or their children harm, under the objective test for materiality, the alleged non-disclosures are not actionable."

SECONDHAND ASBESTOS EXPOSURE VERDICT SURVIVES APPEAL

A New Jersey appellate court has upheld a $7 million jury award to a woman who allegedly developed mesothelioma, in part, from exposure to the asbestos on her husband's clothing, which she purportedly shook out before laundering. *Anderson v. A.J. Friedman Supply Co.* No.A-5892-07T1 (N.J. Super. Ct. App. Div., decided August 20, 2010). The plaintiff also apparently alleged that she had direct exposure to asbestos from her employment with one of the defendants from 1969 to 2003. One of the issues on appeal was whether the state's workers' compensation law barred the action. The court rejected that argument as it related to bystander exposure and found that the plaintiff could recover in tort if she could prove that "her mesothelioma was caused from exposures while she was not employed" and her "bystander exposure was a substantial cause of her mesothelioma." According to a news source, defendant ExxonMobil Corp. is considering whether to appeal the decision. *See nj.com*, August 20, 2010.

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ALL THINGS LEGISLATIVE AND REGULATORY

Revisions to Vaccine Injury Table Proposed

The U.S. Department of Health and Human Service's National Vaccine Injury Compensation Program (VICP) has issued a **proposed rule** that would revise the vaccine injury table to create "distinct and separate listings" for four vaccines that have not yet caused any "illness, disease, injury, or condition." The vaccines protect against hepatitis A, trivalent influenza, meningococcal disease, and human papillomavirus (HPV).

The VICP "provides a system of no-fault compensation for certain individuals who have been injured by covered childhood vaccines." The four vaccines are already covered under the VICP, but their placement in a "placeholder category" rather than under separate listings "has sometimes led to confusion regarding their coverage status." The plan to move them to separate listings on the vaccine injury table with "[n]o conditions specified" is an attempt to make the vaccine injury table clearer to the public. Comments are requested by March 14, 2011. *See Federal Register*, September 13, 2010.

CPSC, Health Canada Still Find No Link Between Pampers Dry Max Diapers™ and Diaper Rash

The Consumer Product Safety Commission (CPSC) and Health Canada (HC) have recently issued statements saying their investigations have yet to identify a specific cause linking diaper rash and Pampers diapers with Dry Max™. The agencies reviewed consumer incident reports from parents who claimed the diapers caused their babies' and toddlers' persistent diaper rashes and blisters resembling chemical burns. Procter & Gamble began selling the diapers in March 2010 with updated

technology that replaced the paper pulp previously used with an "absorbent gelling material." The diaper rash claims were previously discussed in the May 13, 2010, issue of this *Report*.

According to agency press releases, CPSC reviewed about 4,700 incident reports from April through August 2010, with nearly 85 percent of them received in May. HC received about 125 reports since May. The agencies evaluated the diapers' materials, construction, heat and moisture retention, and clinical and toxicological data submitted by Procter & Gamble. While no specific cause linked the diapers to diaper rash, the agencies acknowledged the "serious concerns expressed by parents" and said they will continue to evaluate consumer complaints and provide parents updated information as warranted.

Pampers Vice President Jodi Allen said in a statement that the company welcomed the "thorough review" and that the evaluation "will reassure the millions of moms and dads and child caregivers who placed their trust in Pampers and Dry Max every day." *See CPSC, HC* and *Pampers Press Releases*, September 2, 2010.

Consumer Reports Claims Some Products Contain "Worrisome" Heavy-Metal Levels

According to the latest *Consumer Reports* tests, some children's and household products contain lead or cadmium at "worrisome" levels despite "sweeping new rules and increased vigilance" by manufacturers and retailers to limit toxic metal levels.

Federal regulations call for the current standard of 300 parts per million (ppm) lead limit for all children's products to drop to 100 ppm by August 2011, but there are no clear standards for cadmium, which *Consumer Reports* calls a "newly recognized threat."

The magazine apparently tested heavy metals in more than 30 products, including children's jewelry and other products, window shades, pens, sunglasses, and lipstick. According to a report summary, published in the October 2010 *Consumer Reports* issue, 14 of the products showed "relatively high levels" of toxic metals, and three products had "heavy metals near or above regulatory limits or levels that could be hazardous under certain circumstances." The three items were a clover-shaped cell phone charm "with lead levels so high that it would be illegal if it were considered a children's product," a metal hair barrette with small colored rhinestones "with total cadmium at levels as high as 292,000 ppm," and a children's vinyl raincoat "with parts that exceeded legal lead limits for children's products."

According to a report summary, published in the October 2010 Consumer Reports *issue, 14 of the products showed "relatively high levels" of toxic metals, and three products had "heavy metals near or above regulatory limits or levels that could be hazardous under certain circumstances."*

The Consumer Product Safety Commission is currently developing specific exposure limits for cadmium in children's products. "The limits on lead are well defined for children's products, but lead and cadmium also should be regulated in products that can result in exposure via direct ingestion, such as cell-phone charms or garden hoses from which consumers might drink," the magazine's editors were quoted as saying. *See PR Newswire*, September 7, 2010.

Public Oblivious to Crisis Posed by Federal Court Vacancies

According to court watcher and legal writer Dahlia Lithwick, that one in eight federal judicial seats is now vacant poses a significant crisis "with bipartisan consequences." While Democrats blame Republicans for delaying hearings on President Barack Obama's (D) nominees for the vacancies, Republicans contend that the president has been slow in making his nominations. Lithwick gives both sides their due, but says this "is only half the story. The real problem lies in convincing Americans that it matters."

Lithwick suggests that the acrimony created by contentious judicial-election campaigns in the states and the constant drum beat attacking "activist judges" have contributed to "an enthusiasm gap over all things judicial." With 102 of 854 seats vacant, Lithwick contends, the impact on litigation for everyday Americans is serious and inevitable. She concludes, "The unspoken paradox of the judicial-vacancy deadlock is that in regularly denigrating and politicizing the judiciary, we've come to believe that a broken judiciary is not in fact a problem at all." *See Newsweek*, September 11, 2010.

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LEGAL LITERATURE REVIEW

Andrew Pollis, "The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation," *Legal Studies Research Paper No. 2010-24*

According to this article, because one-third of all existing civil cases pending in federal court have been consolidated in multidistrict litigation (MDL) proceedings, a mechanism for interlocutory review of pre-trial rulings is essential to ensure the system's integrity. Author Andrew Pollis, a visiting assistant professor at Case Western Reserve University School of Law, apparently represented one of the defendants in MDL litigation involving a gasoline additive that purportedly polluted water supplies. He uses that experience to demonstrate how the presiding MDL court issued a number of rulings that were not reviewed by an appellate court under the discretionary standard applied to interlocutory appeals. He contends that the lack of appellate oversight inevitably led to the settlement of some claims over which he believes the federal MDL court lacked jurisdiction. Pollis suggests that Congress or the U.S. Supreme Court adopt a mandatory interlocutory review procedure in MDL proceedings for issues of pure law, involving unsettled matters or a district court's refusal to follow settled law, where an immediate appeal "may have a potentially dispositive impact on a significant number of the cases consolidated within the MDL."

Kenneth Simons, "Statistical Knowledge Deconstructed" *Boston University School of Law Working Paper No. 10-26*

Boston University School of Law Professor Kenneth Simons explores why the legal system generally imposes liability on those who act with individualized knowledge that harm will result to another but absolves those with statistical knowledge that,

despite employing a particular level of care, harm will come to some number of people. This principle is embodied in the *Restatement (Third) of Torts* § 1, which rejects the imposition of liability on companies that conduct "careful risk-benefit cost-benefit analyses of whether to adopt precautions that would reduce the health and safety risks of their products or activities."

Concluding that this approach is appropriate, the author addresses questions such as whether (i) individualized knowledge should be treated as an especially culpable state of mind, (ii) recidivists deserve a punishment premium, (iii) a more stringent duty is owed where the potential to harm an "identifiable" victim exists, and (iv) it is often wrong for people to intuitively "condemn corporate decision-makers for proceeding in the face of a cost-benefits analysis which predicts that their decision not to take a safety precaution will cause death or serious harm."

LAW BLOG ROUNDUP

Employment Spat Heats Up for Auto Maker

"It's rare for in-house lawyers to sue their former employers, and it's particularly uncommon to see a legal battle as pitched as *Biller v. Toyota*." *Wall Street Journal* court watcher Nathan Koppel, blogging about the wrongful termination lawsuit filed by former in-house counsel Dimitrios Biller and a recent arbitrator's ruling "that preliminary evidence shows that Toyota hired Biller to illegally withhold evidence in rollover and accidents suits." Koppel suggests that privileged documents submitted in the employment dispute may now be available as evidence in cases accusing the company of selling defective automobiles. Biller has also apparently filed a civil racketeering lawsuit against Toyota, alleging that the company destroyed test data in rollover cases and concealed evidence in other lawsuits.

WSJ Law Blog, September 10, 2010.

Foreign Manufacturers Flex Muscle on the Hill?

"While at first the bill looked like it would sail through, recent highly vocal and stunningly well-funded opposition from foreign automobile manufacturers and others … has placed its future in doubt." American University Washington College of Law Professor Andy Popper, guest-blogging about H.R. 4678, The Foreign Manufacturers Legal Accountability Act, which would require "foreign manufacturers of certain products and component parts to designate a registered U.S. agent to accept service of process in a state where the manufacturer has a substantial connection either through importation, distribution, or sale of its products." Popper supports the bill, claiming that it "imposes on foreign manufacturers the same responsibilities and obligations of domestic sellers and products." Opponents apparently claim that the legislative proposal violates World Trade Organization "constructs."

TortsProf Blog, September 13, 2010.

THE FINAL WORD

U.S. Legal Commentators Consider Whether Justice Is Served by Putting Experts Together in a "Hot Tub"

As courts around the world continue to grapple with the complex technical and scientific issues raised in toxic tort and product liability lawsuits, some U.S. commentators have recently looked to Australia where the "concurrent evidence procedure," also known as "hot tubbing," may provide a cost-effective and efficient way for factfinders to sort through the challenging expert witness battles that often confront them.

According to University of New South Wales School of Law Professor Gary Edmond, the procedure allows "experts from similar or closely related fields to testify together during a joint session. The openings of these sessions tend to be more informal than examination-in-chief (that is, direct) and cross-examination, which are associated with conventional adversarial proceedings." "Merton and the Hot Tub: Scientific Conventions and Expert Evidence in Australian Civil Procedure," *Law & Contemporary Problems* (2009).

Edmond also notes that "[f]or at least part of their testimony, experts are freed from the constraints of formally responding to lawyers' questions. During concurrent-evidence sessions, expert witnesses are usually presented with an opportunity to make extended statements, comment on the evidence of the other experts, and are sometimes encouraged to ask each other questions and even test opposing opinions." While Edmond concludes that the practice "is not a panacea for partisanship, adversarial bias, or the difficulties created by expert disagreement and decisionmaking in the face of uncertainty," he concedes that it does have "the potential to improve communication and comprehension in the courtroom."

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At least two U.S. legal commentators have recently seized on the idea and believe that it could significantly improve the presentation and evaluation of scientific expert testimony here. Scott Welch, writing in the *Journal of International Commercial Law & Technology*, states, "Granted, the procedure stands in stark contrast to the traditional adversarial methods of conducting expert witness examination used in American courtrooms; it seemingly fits in well with the liberal interpretation of the Federal Rules of Civil Procedure and Evidence." "From Witness Box to the Hot Tub: How the 'Hot Tub' Approach to Expert Witnesses Might Relax an American Finder of Fact," Vol. 5, Issue 3 (2010).

Megan Yarnall, who authored "Dueling Scientific Experts: Is Australia's Hot Tub Method a Viable Solution for the American Judiciary?" published in the *Oregon Law Review,* concludes that this innovative approach, while it may require modification for use in U.S. courts, would provide "significant improvements in the presentation and evaluation of scientific expert testimony." Both commentators were particularly

enthusiastic about adopting the procedure during pretrial proceedings, such as hearings testing the admissibility of expert testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993).

UPCOMING CONFERENCES AND SEMINARS

Ethisphere, Webinar, September 22, 2010 – "Internal Investigations: Best Practices for In-House Counsel." Shook, Hardy & Bacon Corporate Law Partner Jonathan Rosen will share the podium with general counsel for Corpedia to discuss how in-house counsel can effectively address corporate compliance investigations while keeping an eye on parallel civil proceedings.

American Conference Institute, Chicago, Illinois – September 22-23, 2010 – "3rd Annual Advanced Forum on Defending and Managing Automotive Product Liability Litigation." Shook, Hardy & Bacon Tort Associate Amir Nassihi will join a distinguished panel to discuss "Damages: Minimizing the Risk of Punitives and Responding to the Rise in Compensatory Verdicts."

The Missouri Bar/Missouri Judicial Conference, Columbia, Missouri – September 29-October 1, 2010 – "2010 Annual Meeting." Shook, Hardy & Bacon eDiscovery, Data & Document Management Practice Co-chair Denise Talbert will co-present a session titled "E-Discovery Roadmap – 2010 and Beyond," a continuing legal education track program. Talbert will discuss emerging best practices, cost efficiencies, and competencies in managing and conducting e-discovery. ■

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ABOUT SHB

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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.

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