Shook, Hardy & Bacon L.L.P.

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PRODUCT LIABILITY LITIGATION REPORT

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TEXAS HIGH COURT RULES FEDERAL BUS SAFETY STANDARDS HAVE NO PREEMPTIVE EFFECT

The Texas Supreme Court has determined that federal safety standards not requiring passenger seatbelts in motorcoaches and standards giving manufacturers window glazing material options do not preempt state law claims arising from a rollover accident that killed and injured a number of passengers. ***MCI Sales & Serv., Inc. v. Hinton,* No. 09-0048 (Tex., decided December 17, 2010)**.

A jury awarded more than $17 million in damages to the motorcoach occupants and their estates, finding that "the lack of seatbelts caused injuries to all of the Plaintiffs, and the lack of laminated-glass windows caused injuries to those ejected from the bus." When the vehicle was manufactured, federal safety standards neither required nor prohibited passenger seatbelts in motorcoaches and also offered manufacturers options as to the type of glazing material to use in their windows. Laminated glass was one of those options.

The manufacturer argued on appeal that (i) the absence of a federal seatbelt regulation was deliberate and has the same preemptive force as a regulation forbidding passenger seatbelts, and (ii) the federal government's decision to give manufacturers a choice among several different materials preempts a jury's conclusion that another of the required types should have been used.

Rejecting the company's interpretation of an agency's intent in the absence of regulation, the court stated, "[A]n agency's mere decision to leave an area unregulated is not enough to preempt state law. Instead, the agency must, consistent with the authority delegated to it by Congress, affirmatively indicate that no regulation is appropriate. That is, the agency must state that not only will it leave the area unregulated, it will not allow any regulation in that area as a matter of policy."

The court examined the history of the seatbelt issue, which the National Highway Traffic Safety Administration (NHTSA) considered for some years, and disagreed with the manufacturer that agency comments or chief counsel's communications indicated that NHTSA intended to rely on seating design rather than seatbelts and promulgated standards to that effect. Thus, the court ruled, "the jury's finding that MCI should have installed seatbelts on its motorcoach does not conflict with any federal law and is not preempted."

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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The court also rejected the manufacturer's assertion that a government regulation giving manufacturers a "choice of glazing materials is enough to preempt a jury's finding that a different material should have been used." In this regard, the court noted that its interpretation of U.S. Supreme Court precedent on the issue was narrower than other courts. According to the court, the glazing material standard "merely narrows the range of manufacturers' choice . . . from potentially unlimited to a short list, [emphasizing] the choice among options as an important and integral part of the overall safety scheme. We find nothing in the standard's text, history, or NHTSA's comments to indicate that [the standard] is anything other than a minimum standard. As a minimum standard, [it] does not preempt the jury's finding that MCI should have used laminated glass in the motorcoach's windows."

SIXTH CIRCUIT FINDS SUFFICIENT FACTS IN MOTORCYCLE HELMET LITIGATION TO SURVIVE MOTION TO DISMISS

The Sixth Circuit Court of Appeals has reinstated safety misrepresentation claims against the manufacturer of a motorcycle helmet, finding that the putative class pleadings stated sufficient facts to survive the plausibility pleading standard established in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). ***Fabian v. Fulmer Helmets, Inc.*, No. 10-5009 (6th Cir., decided December 23, 2010)**.

A man who purchased two of defendant's large motorcycle helmets filed the litigation on behalf of a class. He had apparently sold one of the helmets to a friend who later died of brain trauma after crashing his motorcycle while wearing the helmet. Among other matters, he alleged fraudulent and negligent misrepresentation and claimed that he had "relied on Fulmer's material misrepresentations that such helmets were 'DOT approved.'" Apparently, smaller helmets failed government testing in 2002, while the large helmets passed each component of tests conducted in 2000.

According to the court, "There are at least two legitimate ways to think about the significance of the [government safety] tests, and they point in opposite directions when it comes to the merits of this lawsuit. One is that the difference between the 2000 and 2002 test results turns on the differences between the small and large … helmets. If so, that would support the district court's ruling that the disparity between the size of the helmet bought and the size of the helmet tested is fatal to Fabian's claims. The other reasonable inference, however, is that helmets of the same model, even if differently sized, perform the same. Two differently sized helmets, for example, may be no more distinct as a matter of performance than differently sized pairs of shoes or two differently sized pairs of pants. If so, the failed 2002 test potentially exposed a defect in all [model] AF-50 helmets, no matter their size."

With nothing in the record to credit one set of reasonable inferences over the other, the court determined that the "Rules of Civil Procedure entitle Fabian to pursue his

claim (at least with respect to this theory [i.e., fraud]) to the next stage—to summary judgment or, if appropriate, a trial after the parties have engaged in any relevant discovery to support one or the other interpretation." Because the court found that the plaintiff had "'nudged his claims across the line from the conceivable to the plausible,'" it ruled that "he deserves a shot at additional factual development, which is what discovery is designed to give him." Also determining that the claims were not preempted by federal regulations, which were deemed to establish minimum performance requirements, the court remanded the case for further proceedings.

FLEA AND TICK COLLARS TO CARRY CANCER EXPOSURE WARNING IN CALIFORNIA

A California court has approved a consent judgment between the Natural Resources Defense Council (NRDC) and a number of makers and retailers of flea and tick collars. ***NRDC v. Petco Animal Supplies Stores, Inc.*, No. 09487873 (Cal. Super. Ct., approved December 10, 2010)**. Under the agreement, flea and tick collars containing propoxur may not be sold in the state unless they carry a notice under Proposition 65 (Prop. 65) that they contain "a chemical known to the State of California to cause cancer." Without admitting any liability, the companies have also agreed to make monetary payments totaling $120,000 for civil penalties, attorney's fees and costs.

The defendants continue to maintain that exposure to the chemical does not occur in amounts that would require a Prop. 65 warning. Meanwhile, the advocacy organization that brought the lawsuit claims, "these products are so dangerous that they don't belong on store shelves." Responding to the court's approval of the settlement, an NRDC scientist was quoted as saying, "When you pick up a flea collar at the pet store, you just want to stop your dog or cat from scratching; you don't want to put their health—or your family's—in jeopardy. Warning labels will now help pet owners better avoid bringing dangerous chemicals into their homes against their will." *See NRDC Press Release*, December 16, 2010.

The defendants continue to maintain that exposure to the chemical does not occur in amounts that would require a Prop. 65 warning.

ALL THINGS LEGISLATIVE AND REGULATORY

New Mexico Senator Calls for FTC to Investigate Football Helmet Safety Claims

According to news sources, Senator Tom Udall (D-N.M.) has written to Federal Trade Commission (FTC) Chair Jon Leibowitz asking for an investigation of companies that "appear to be using misleading advertising claims" by promoting their new and reconditioned football helmets as "meeting an industry safety standard." Udall apparently broached the issue of helmet safety standards with the Consumer Product Safety Commission in November 2010, asking whether they are adequate to protect football players from concussions.

In his January 3, 2011, letter, Udall reportedly contends that the voluntary industry standard "does not specifically address concussion prevention or reduction," yet some manufacturers promote their products claiming that they reduce the risk of concussion. Udall apparently discusses how the helmet industry regulates itself, noting that manufacturers test their own helmets without any third-party surveillance, follow-up testing or oversight to ensure compliance with industry certifications. He is particularly concerned about reconditioned helmets, asserting that they are "commonly worn by players at all levels of football" and may not be subject to testing by anyone.

The New York Times reports that the chief executive for helmet maker Ridell, specifically cited by Udall, responded to news of the investigation request by saying, "I'm sure the senator is well intentioned. We'll be transparent and we'll welcome the scrutiny and review. We hope that that scrutiny and review goes to all helmet manufacturers." The CEO of a Ridell competitor reportedly responded in writing to Udall, asserting "At no time do we claim, or intimate, that our helmets are 'anticoncussion,' 'concussion proof,' 'concussion reducing' or the like." It has been estimated that 500,000 concussions are sustained annually by the 4.4 million athletes under 18 who play organized football. *See The New York Times* and *Associated Press*, January 3, 2011.

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Drop-Side Cribs No Longer Allowed, CPSC Approves Stringent Crib Safety Standards

The Consumer Product Safety Commission (CPSC) has approved new mandatory standards that prohibit the manufacture, sale and lease of drop-side cribs. Effective June 28, 2011, the **federal standards** also call for stronger mattress supports, more durable crib hardware and rigorous safety testing. CPSC will give the nation's 59,000 child care facilities, family child care homes and public accommodations, such as hotels and motels, 24 months to comply with the new rule.

More than 11 million cribs have been recalled since 2007, according to CPSC, and drop-side cribs have been associated with the suffocation and strangulation deaths of at least 32 infants since 2000. Additional deaths have resulted from faulty or defective hardware. CPSC's new, consolidated rules mark the first time in nearly 30 years that federal standards for full-size and non-full-size baby cribs have been updated. CPSC also issued accreditation requirements for third-party testing of these products.

CPSC Chair Inez Tenenbaum told a news source that the drop-side crib ban gives the United States some of the strongest protections in the crib product category. Senator Kirsten Gillibrand (D-N.Y.) was among the congressional lawmakers who reportedly pushed for the ban. "These products are deadly, and this critically needed action will prevent further senseless deaths by ensuring they never reach another

home, nursery room, store, or day care center," she was quoted as saying. *See Product Liability Law 360,* December 15, 2010; *CPSC News Release*, December 17, 2010; *Federal Register,* December 28, 2010.

CPSC to Require Compliance Certification for Certain Non-Children's Products

The Consumer Product Safety Commission (CPSC) has **announced** the expiration of its stay of enforcement of certain certification requirements for "non-children's" vinyl plastic film, carpets and rugs, and clothing textiles. As of January 26, 2011, manufacturers and importers of these products will be required to issue a general compliance certificate. Unlike children's products, third-party testing is not required, but certification must be based on a test of the product or a reasonable testing program. *See Federal Register,* December 27, 2010.

Crocs Agrees to Pay Penalty for Selling Unregistered Antimicrobial Shoes

Crocs, Inc. has entered a **consent agreement** with the Environmental Protection Agency (EPA) that requires it to pay a $230,000 civil penalty for marketing certain shoe products in 2009 and 2010 with the claim that they killed or controlled bacterial growth. Products claiming to act as pesticides, that is, "intended for preventing, destroying, repelling, or mitigating any pest," cannot be sold in the United States unless they are registered with EPA under the Federal Insecticide, Fungicide, and Rodenticide Act.

"We're seeing more and more consumer products making a wide variety of antimicrobial claims. Whether they involve shoes or other common household products, EPA takes these unsubstantiated public health claims seriously."

According to EPA, the company has also agreed to remove antimicrobial language from its product packaging. An agency spokesperson said, "We're seeing more and more consumer products making a wide variety of antimicrobial claims. Whether they involve shoes or other common household products, EPA takes these unsubstantiated public health claims seriously." *See EPA Press Release,* December 30, 2010.

Pretrial Practice Changes Under New Plausibility Pleading Standard

According to an *ABA Journal* article, the U.S. Supreme Court's adoption of a more stringent plausibility pleading standard has had a noticeable impact on lawyers considering whether to file civil lawsuits in federal court. Even when potential clients bring a considerable amount of evidence to their meetings with counsel, a decision to invest in additional costly investigation is often made before the lawsuit is filed. At least one business litigator was quoted as saying, "It's more difficult to get an ultimate decision on the merits. I'm telling clients it's not worth filing cases that are no doubt meritorious. People simply cannot afford it."

Briefly discussing the *Twombly* and *Iqbal* rulings, the article observes, "[b]oth anecdotal and empirical evidence show that these decisions have significantly changed pretrial practice…. Defendants and judges are increasingly citing [them]

as complaints are dismissed." While plaintiffs apparently believe the new pleading standard creates an unfair burden, requiring them to present detailed facts from the outset of litigation, defendants believe it gets rid of borderline frivolous cases.

The Judicial Advisory Committee on Civil Rules reportedly commissioned the Federal Judicial Center to study cases dismissed after the new standard was adopted, and the center is expected to complete its research sometime in 2011. A law professor who serves on the advisory committee noted that changes could be made to the rule or its application if the center's study shows a large uptick in dismissals. *See ABA Law Journal*, January 1, 2011.

LEGAL LITERATURE REVIEW

Aaron Twerski & Neil Cohen, "Resolving the Dilemma of Non-Justiciable Causation in Failure-to-Warn Litigation," *Southern California Law Review* (2010)

Brooklyn Law School Professors Aaron Twerski and Neil Cohen propose that in most failure-to-warn cases courts eliminate causation as a separate requirement and instead merge fault and cause and allow proportional recovery. They make the case for their proposal by showing how injured plaintiffs can never recover in these cases if they are required to prove they would have read the warning, would have acted differently if warned of the risk at issue, and that acting differently in light of the warning would have prevented the injury or made it less severe. Likewise, they show how "heeding" presumptions that courts have adopted to "cure" the traditional approach have a tendency to push the legal system to the other extreme. The authors note, "It is not credible that *all* injuries would have been prevented by an adequate warning, and equally incredible that *no* injuries would have been prevented by an adequate warning."

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Under their proposal, "a manufacturer who has failed to warn in circumstances in which a warning should have been given should be charged with a fraction of the harm that followed from that failure, with the size of the fraction to be determined by taking into account both the seriousness of the defendant's failure to warn (which necessarily incorporates both the frequency and magnitude of the harm to be avoided) and the likelihood that the warning would have been effective in preventing harm." They would not apply the standard to cases "at the margins in which a factfinder can credibly conclude either that an injury would not have occurred had a warning been given or that the warning would not have prevented the injury."

Stephen Burbank & Tobias Wolff, "Redeeming the Missed Opportunities of Shady Grove," *University of Pennsylvania Law Review* (2010)

University of Pennsylvania Law School Professors Stephen Burbank and Tobias Wolff take issue with the U.S. Supreme Court's ruling in a case that raised important but

esoteric issues about the overlap of federal and state law in the context of the class action. They discuss *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*, 130 S. Ct. 1431 (2010), in some detail, noting that it "was a federal diversity case involving a potential conflict between a provision of New York law that prohibits the award of penalties or statutory damages on a classwide basis unless expressly authorized, and Federal Rule 23, which broadly authorizes federal courts to certify, manage, and hear class action proceedings." The Court's plurality decision, according to the authors, "shed little light" on the issue.

The article proposes an approach to the Rules Enabling Act, which both authorizes and limits the Federal Rules of Civil Procedure, recognizing "the indeterminacy inherent in prospective rulemaking, the role of federal common law in the interpretation of the Rules, and the role of the Rules in federal common law." With a more dynamic approach to the federal rules, the authors then address the interests served by Rule 23, asserting that it "is not the source of the aggregate-liability policies" that have served to dramatically affect substantive liability and regulatory regimes. Rather, they claim, "Rule 23 is merely the mechanism for carrying an aggregate proceeding into effect when the underlying law supports the result."

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LAW BLOG ROUNDUP

"Judicial Hellholes®" Report Focuses on Philadelphia Court

"Corporate defendants are wringing their hands over a specialized local court in Philadelphia that handles tort claims, putting the city atop their latest list of the worst places for companies to be sued." *Legal Times* Capitol Hill Reporter David Ingram, blogging about the American Tort Reform Association's (ATRA's) ninth annual **report** on those U.S. jurisdictions providing unequal access to justice. Shook, Hardy & Bacon Public Policy Partner **Victor Schwartz**, who serves as ATRA's general counsel, noted at the report's release that the organization was also launching a Website to provide updates on court systems and information about legislative and executive branch actions with an effect on civil litigation. Schwartz called the organization's action necessary "as both technology and the liability-expanding strategies of the always formidable litigation industry evolve."

The BLT: The Blog of Legal Times, December 13, 2010.

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THE FINAL WORD

Small Companies Break Into "Green" Toy Market

Massive toy recalls in recent years have reportedly prompted small American businesses to venture into the "eco-friendly" toy market as a way to help consumers avoid toxic products. According to a news source, more than 17 million toys were recalled in 2007 because of federal violations of lead paint standards, and, in 2010, 55,000 units of children's costume jewelry and 12 million promotional drinking glasses were recalled due to concerns over cadmium.

Small manufacturers are apparently working to find ways to be environmental stewards, such as purchasing recycled plastic and recycling existing toys, while trying to keep costs down. "Small companies, particularly startups, are well positioned to meet customer demand for greener products," University of Massachusetts sustainability researcher Sally Edwards was quoted as saying. "The process of figuring out how to make the safest, healthiest, greenest toys is easier to do on a small scale than on a large scale. Many small companies have benefitted from being able to design the product from the ground up." *See BusinessNewsDaily*, December 19, 2010.

UPCOMING CONFERENCES AND SEMINARS

GMA, Scottsdale, Arizona – February 22-24, 2011 – "2011 Food Claims & Litigation Conference: Emerging Issues in Food-Related Litigation." Shook, Hardy & Bacon Agribusiness & Food Safety Partner Paul LaScala will participate in a panel addressing "Standards and Expectations of Corporate Social Responsibility: The Retailer's Perspective." Business Litigation Partner Jim Eiszner and Global Product Liability Partner Kevin Underhill will share a podium to discuss "Labels Certainly Serve Some Purpose—But What Legal Effect Do They Have?" Shook, Hardy & Bacon is a conference co-sponsor. ■

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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 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).