Shook, Hardy & Bacon L.L.P.

FEBRUARY 3, 2011

PRODUCT LIABILITY LITIGATION REPORT

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CALIFORNIA SUPREME COURT EXPLORES LIMITS OF STANDING IN CONSUMER PROTECTION LAW

In a case alleging that a lockset manufacturer violated consumer protection laws by falsely labeling its products as "Made in the U.S.A.," the California Supreme Court has determined that the plaintiff has standing to bring the action despite the enactment of Proposition 64, which placed some limitations on those who can file unfair competition and false advertising lawsuits. ***Kwikset Corp. v. Super. Ct.*, No. S171845 (Cal., decided January 27, 2011)**. The court held, "[P]laintiffs who can truthfully allege they were deceived by a product's label into spending money to purchase the product, and would not have purchased it otherwise, have 'lost money or property' within the meaning of Proposition 64 and have standing to sue."

The plaintiff prevailed after a bench trial, and the trial court ordered the company to cease labeling any lockset intended for sale in the state as "All American Made" or "Made in the USA," if the lockset "contains any article, unit, or part that is made, manufactured, or produced outside of the United States." The court also ordered the defendant to notify its California retailers and distributors about the "falsely labeled products" to give them the opportunity to return the inventory for a refund or replacement. The court denied the plaintiff's request for restitution on behalf of a class of consumers.

Both parties appealed, and while the appeal was pending, California voters approved Proposition 64. The plaintiff was allowed to amend his complaint to plead standing, since the law was made applicable to all false advertising actions pending when it was adopted. He added several plaintiffs and alleged that each had "purchased several Kwikset locksets in California that were represented as 'Made in the U.S.A.' or [contained] similar designations," that each was induced to purchase and did purchase the locksets relying on this misrepresentation and "would not have purchased them if they had not been so misrepresented." While the trial court determined that the plaintiffs had adequately alleged standing, an intermediate appellate court reversed, explaining that the plaintiffs had adequately alleged injury but had not alleged any loss of money or property, a Proposition 64 requirement designed to eliminate standing for those who have not engaged in any business dealings with would-be defendants.

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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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According to the state supreme court, Proposition 64 did not define or limit the concept of "lost money or property," thus the traditional ways of showing economic injury from unfair competition have not changed. They include showing that a plaintiff (i) surrendered in a transaction more, or acquired in a transaction less, than she would otherwise have; (ii) had a present or future property interest diminished; (iii) was deprived of money or property to which she has a cognizable claim, or (iv) was required to enter into a transaction, costing money or property, that would have otherwise been unnecessary. The only change Proposition 64 made, said the court, was to require that a private plaintiff filing suit establish that she has personally suffered such harm.

Noting that "labels matter," and for some plaintiffs, "processes and places of origin matter," the court said that simply alleging reliance on a product label and that the plaintiff would not have purchased the product but for the misrepresentation are sufficient to allege causation and economic injury. Two dissenting justices complained that the majority was making it easier for plaintiffs to achieve standing under the unfair competition law, thus disregarding "the express language of the amendment."

BULLETPROOF VEST IMPORTER AGREES TO SETTLE FALSE CLAIMS ACT ALLEGATIONS

NI Teijin Shoji Co. Ltd. and an American subsidiary will pay the United States $1.5 million to settle False Claims Act allegations involving the importation and sale of defective Zylon fiber, used as a key ballistic material in bulletproof vests. The U.S. government alleged that the companies were aware that the fiber degraded quickly, rendering the vests containing the Zylon unfit for use. The settlement is apparently part of a larger investigation of the industry's use of Zylon in body armor. Previous settlements have netted more than $59 million. Teijin has also apparently agreed to cooperate with the ongoing investigation. *See FBI Press Release*, January 25, 2011.

SEVENTH CIRCUIT ALLOWS APPEAL TO EXAMINE SUFFICIENCY OF PLEADINGS UNDER *TWOMBLY*

The Seventh Circuit Court of Appeals has further refined its approach to the appealability of lower court determinations as to the sufficiency of the pleadings under the U.S. Supreme Court's new plausibility pleading standards in a case alleging a conspiracy to fix the prices of text messaging services in violation of federal antitrust law. ***In re: Text Messaging Antitrust Litig.*, No. 10-8037 (7th Cir., decided December 29, 2010)**.

The lower court issued an order allowing the plaintiffs to file a second amended complaint after determining that the original complaint and first amended complaint did not plead sufficient facts to withstand a motion to dismiss. The defendants asked the court to certify for interlocutory appeal the question of the

second amended complaint's adequacy, and the court agreed. Because the law also requires that the appeals court grant permission to appeal, the defendants sought that permission, "and the plaintiffs urge us to turn them down," arguing that the proposed appeal does not present a 'controlling question of law.'"

Initially noting that the question presented is controlling, "because if the second amended complaint does not state a claim, the case is likely (though, as the district judge said, not certain) to be over," the court queried whether it is a "controlling question of *law*." According to the court, the defendants "are asking us to apply a legal standard—the pleading standard set forth in *Twombly*—to a set of factual allegations taken as true for purposes of the appeal." Because "the question requires the interpretation, and not merely the application, of a legal standard—that of *Twombly*," because the scope of that opinion is unsettled and the court had "only twice discussed the application of *Twombly* to antitrust violations, and in both cases only in passing," the court said it was justified in concluding that the appeal presented a genuine question of law.

The court was also concerned that if a district court misapplied the standard, defendants would be unnecessarily put to the burden of responding to at least a limited discovery demand. "When a district court by misapplying the *Twombly* standard allows a complex case of extremely dubious merit to proceed, it bids fair to immerse the parties in the discovery swamp—'that Serbonian bog … where armies whole have sunk' (*Paradise Lost* ix 592-94)—and by doing so create irrevocable as well as unjustifiable harm to the defendant that only an immediate appeal can avert. Such appeals should not be routine, and won't be, because as we said both district court and court of appeals must agree to allow an appeal under section 1292(b); but they should not be precluded altogether by a narrow interpretation of 'question of law.'"

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While the plaintiffs had not alleged any direct evidence of price fixing, such as an employee's admission, the Seventh Circuit agreed with the district court that "the second amended complaint provides a sufficiently plausible case of price fixing to warrant allowing the plaintiffs to proceed to discovery."

SUIT SEEKING REGULATION OF ANTI-BACTERIAL SOAP INGREDIENTS DISMISSED

A federal court in New York has dismissed claims filed by the Natural Resources Defense Council (NRDC) against the Food and Drug Administration (FDA), seeking to force the agency to regulate two anti-bacterial soap ingredients that NRDC alleges pose health risks. *NRDC v. FDA*, No. 10-05690 (U.S. Dist. Ct., S.D.N.Y., decided January 20, 2011). According to the court, the NRDC lacked standing to bring the lawsuit, apparently agreeing with FDA, which argued in its motion for summary judgment,

"NRDC hypothesizes that its members may be subject to increased risks from exposure to triclosan and tricolcarbon, but, as NRCD must acknowledge, its members can and do take steps to avoid exposure to these ingredients."

According to a news source, NRDC intends to file an appeal from the ruling. The organization reportedly contends that scientific research shows that the chemicals are reproductive toxins that can harm reproductive organs, adversely affect sperm quality and compromise thyroid and sex hormone production and activity. *See Product Liability Law 360*, January 21, 2011.

EIGHTH CIRCUIT RULES ADULTERATED DRUG CLAIMS NOT PREEMPTED BY FEDERAL LAW

The Eighth Circuit Court of Appeals has reinstated claims for economic injury brought against the maker of a hypertension medication, finding that allegations of adulteration and failure to comply with federal regulations were not impliedly preempted by the Federal Food, Drug, and Cosmetic Act. ***LeFaivre v. KV Pharm. Co.*, No. 10-1326 (8th Cir., decided January 19, 2011)**.

The putative class complaint alleged that the company breached its implied warranty of merchantability and violated the state Merchantability Practices Act and further alleged that the company admitted product adulteration in a consent decree with the Food and Drug Administration (FDA).

The appeals court agreed with the plaintiff that the district court's finding of implied preemption was contrary to *Wyeth v. Levine*, 129 S. Ct. 1187 (2009). According to the court, state law has long been regarded as "a complementary form of drug regulation" and that "state law offers an additional, and important layer of consumer protection that complements FDA regulation." The court noted that it would not be impossible for the defendant to comply with both federal and state law, thus precluding a finding of conflict preemption, and also said that the state-law claims were not fraud-on-the-FDA claims, to the extent that they focus on harm allegedly perpetrated against consumers rather than the FDA.

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CLASS ACTION COMPLAINT ALLEGES THAT WRISTBANDS, PENDANTS DO NOT PROMOTE WELLNESS

Alabama residents have filed a putative class action in federal court against Power Balance, LLC, alleging false and misleading claims for the company's "holographic wristbands and pendants" *Keller v. Power Balance, LLC*, No. 11-00243 (U.S. Dist. Ct., N.D. Ala., Ne. Div., filed January 26, 2011). According to the complaint, the company claims that its products "help to promote balance, flexibility, strength, and overall

wellness." Noting that the company used celebrity athletes to endorse the products and that the company was forced to issue corrective advertising after a governmental investigation in Australia and to issue refunds, the plaintiffs seek to certify a nationwide class of consumers.

Alleging breach of express warranty, unjust enrichment and the violation of state deceptive trade practices law, the plaintiffs ask for injunctive relief, including corrective advertising, notification to purchasers giving them the opportunity to obtain restitution, disgorgement, punitive damages, attorney's fees, and costs. The complaint alleges that the defendant's false advertising campaign for "ordinary rubber jewelry," has boosted initial sales in 2007 of $8,000 to $35 million in 2010. The complaint also alleges that Power Balance admitted, in response to the Australian investigation that "there is no credible scientific evidence that supports our claims."

ALL THINGS LEGISLATIVE AND REGULATORY

CPSC Issues *Federal Register* Notice for Lead Content Hearing

The Consumer Product Safety Commission (CPSC) has issued a **notice** about its public hearing on the technological feasibility of manufacturers achieving a 100 parts per million standard for lead content in children's products. The date of the hearing is February 16, 2011, and not February 17 as indicated in the previous meeting notice reported in the **January 20, 2011, Issue** of this *Report*. Registration closes February 15, and a live webcast of the hearing is also available. *See Federal Register*, January 26, 2011.

Wisconsin Governor Signs Sweeping Tort Reform Bill into Law

Wisconsin Governor Scott Walker (R) has signed a tort reform **bill** (A.B. 1) designed to provide businesses and nursing homes with added protection from lawsuits.

Passed 57-36 along party lines by the Wisconsin Assembly during a special January 20, 2011, session, the legislation sets new standards for burdens of proof and expert testimony, and establishes a cap on punitive damages in personal injury lawsuits. Noting that the bill will "help create a job friendly legal environment," Walker said after the state senate approved the bill January 18 that Wisconsin has "sent a clear message to employers that we are open for business."

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According to an "Analysis by the Legislative Reference Bureau" contained in the 32-page bill, the legislation "makes several changes to current law regarding civil actions for negligence in long-term care facilities product liability, actions in strict liability, punitive damage awards, and awards for defending a frivolous lawsuit."

Among other things, the bill (i) requires plaintiffs to meet tougher standards in proving a product defective; (ii) blocks lawsuits from going forward when plaintiffs cannot prove who harmed them; (iii) limits noneconomic damages, such as those for pain and suffering, to $750,000 in medical malpractice cases at nursing homes; and (iv) caps punitive damages at $200,000 or double the amount of compensatory damages, whichever is higher. The bill also "limits a defendant's liability for damage caused by a manufactured product to those products manufactured within 15 years before the claim accrues unless the manufacturer specifies that the product will last longer or unless the action is based on a claim for damages caused by a latent disease."

The law takes effect on the first day of the second month after publication and applies to those injured before its approval, so plaintiffs' attorneys are reportedly rushing to file personal injury cases before it officially takes effect. The legislation has apparently drawn criticism from some Wisconsin lawmakers and trial attorneys who claim the measure will not create jobs but will hurt consumers and patients. "It just prevents those wrongdoers from having their day in court to be held accountable for their actions," Senator Julie Lassa (D) reportedly told a news source. *See Governor Scott Walker Press Release,* January 18, 2011; *Milwaukee Journal Sentinel,* January 18 and 25, 2011; *Courthouse News Service,* January 21, 2011.

LEGAL LITERATURE REVIEW

Mark Behrens & Christopher Appel, "The Need for Rational Boundaries in Civil Conspiracy Claims," *Northern Illinois University Law Review,* 2010

Shook, Hardy & Bacon Public Policy Partner **Mark Behrens** and Associate **Christopher Appel** explore the growing trend of plaintiffs' lawyers to use civil conspiracy allegations to reach remote, but solvent, defendants in mass tort litigation. They note how the courts have divided over whether a most basic tort law element—the existence of a duty of care—should apply to a civil conspiracy claim and argue that sound public policy requires adherence to a fundamental tort law tenet. They conclude, "Without an independent duty of care owed to a plaintiff, civil conspiracy liability can be boundless and open-ended. Rational limits are needed in civil conspiracy claims, and courts should adopt them."

S.I. Strong, "Jurisdictional Discovery in Transnational Litigation: Extraterritorial Effects of United States Federal Practice," *Journal of Private International Law,* 2011

University of Missouri Associate Professor of Law S.I. Strong explores a procedural device available to plaintiffs in U.S. courts to obtain information and documents from defendants located outside the country, which information will be used to establish the court's authority to hear the dispute. Known as jurisdictional discovery,

the procedure may come as a surprise to foreign companies lacking experience with it. Strong describes how it works, what defendants can expect from it, as well as "the special means by which multinational actors can avoid or limit jurisdictional discovery, based on recent decisions from the United States Supreme Court." He also describes how the international legal community is exploring ways to create specialized transnational civil procedures.

Stephen Burbank & Stephen Subrin, "Litigation and Democracy: Restoring a Realistic Prospect of Trial," *Harvard Civil Rights-Civil Liberties Law Review* (forthcoming 2011)

University of Pennsylvania and Northeastern University Law School professors address the "vanishing trial" in federal civil jury cases in the context of the U.S. Supreme Court's new plausibility pleading standard. They suggest that the cost to democratic values, including the right to a jury trial under the Seventh Amendment, of rulings that limit access to the courts requires remediation. The article proposes the adoption of a separate procedural track for simple cases and calls for empirical research into electronic discovery because it "presents the most difficult reform challenge." According to the authors, "Our citizens deserve better. The aspirations of our founders for trials in open court and jury trial are not obsolete, and neither is the duty of the judiciary, within constitutional limits, to respect clearly articulated statutory norms and clearly articulated legislative policy."

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LAW BLOG ROUNDUP

Tort Professors Recognize SHB's Victor Schwartz as "Torts Master"

In homage to the best-selling book *Tuesdays with Morrie*, the professors who maintain the TortsProf Blog have launched their own "Tuesdays with Torts Masters." This week, they recognize Shook, Hardy & Bacon Public Policy Partner **Victor Schwartz**, who co-authors the nation's leading torts casebook, serves as general counsel to the American Tort Reform Association, and has served on the advisory committees of all three of the American Law Institute's *Restatement (Third) of Torts* projects.

TortsProf Blog, February 1, 2011.

California High Court Allows Suit Cited by Prop. 64 Reformers

"During the successful campaign for Proposition 64 in California, reformers cited as an example of the sort of the 'shakedown lawsuit' they hoped to eliminate a suit in which Bill Lerach's class action firm demanded money from lock maker Kwikset because its product was marked 'Made in the U.S.A.' but included screws made in Taiwan. Nonetheless, the California Supreme Court has now ruled 5-2 that the

proposition does not ban such suits after all." Cato Institute Senior Fellow Walter Olson, blogging about the court's recent decision allowing consumers to allege harm from mislabeled products.

Overlawyered.com, January 28, 2011.

Consumer Advocacy Documentaries Better Than Corporate-Sponsored Films?

"One of the truisms of the extreme right and its corporate backers is that, while they may own networks and demagogue on talk radio, they are incapable of making films that anyone wants to watch." A Center for Justice & Democracy consumer advocate, discussing a movie titled "Hot Coffee" premiering at the Sundance Film Festival. It was apparently made to "blow a hole through the 'tort reform' movement."

The Pop Tort, January 24, 2011.

THE FINAL WORD

Andrew Martin, "Regulators Tighten Scrutiny of Baby Sleep Products," *The New York Times,* January 31, 2011

Discussing the most recent initiatives undertaken by the Consumer Product Safety Commission (CPSC) involving the safety of crib bumpers, baby monitor cords, cribs, strollers, high chairs, and other baby products, this article refers to such activity as "another sign of a heightened regulatory atmosphere among many agencies in the Obama administration." Journalist Andrew Martin notes that the agency's new focus on baby sleep products resulted from converging factors including a public outcry over contaminated toys imported from China and congressional action to increase CPSC's budget and authority. He also notes that consumer advocates have long expressed concerns about the safety of these products, with reports of suffocation and strangulation deaths prompting research and investigations. Manufacturers reportedly challenge allegations that their products pose a danger to infants, suggesting that parents using them properly will not encounter problems.

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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KCMBA, Kansas City, Missouri – March 11, 2011 – "Civil Jury Trial Demonstration." Shook, Hardy & Bacon Tort Partner Michael Kleffner will represent the defendant in a session on "Direct and Cross-Examination of Plaintiff's Non-Expert Witness" during this CLE program co-sponsored by the Young Lawyers Section of the Kansas City Metropolitan Bar Association and the UMKC School of Law. ■

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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).