Shook, Hardy & Bacon L.L.P.

APRIL 24, 2014

PRODUCT LIABILITY LITIGATION REPORT

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FIRM NEWS

Silverman Comments on Ruling Unsealing Records in Challenge to Public Product-Hazard Listing

Shook, Hardy & Bacon Public Policy Partner **Cary Silverman** commented in a *National Law Journal* news story that "[a] public database of unverified, inaccurate reports not only poses an unwarranted risk to the reputations of responsible businesses, but does a disservice to consumers." He was responding to news that the Fourth Circuit Court of Appeals had ordered the docket unsealed on First Amendment grounds in a case involving a challenge to the Consumer Product Safety Commission's (CPSC's) decision to post on its Website—saferproducts.gov—a questionable report involving a product made by a company that the lower court allowed to proceed under the name Company Doe.

The lower court ruled that the report was "materially inaccurate" and refused to allow its posting; that decision is unaffected by the Fourth Circuit's ruling. Silverman represented the National Association of Manufacturers in an amicus brief supporting Company Doe in its effort to keep the litigation, its name and the product at issue secret. Discussing the case with *Reuters*, Silverman said that the April 16, 2014, ruling "could result in needlessly alarming people about things that are not true, and harming the reputations of businesses. From a policy perspective, it is in the interests of businesses and consumers to make sure that information being released about the safety of products is accurate." Additional details about the case appear elsewhere in this *Report*.

CASE NOTES

Fourth Circuit Orders Record Unsealed in Company Doe Case Against CPSC

The Fourth Circuit Court of Appeals has determined that the public's First Amendment right to access court records and proceedings was violated when a federal district court sealed the case docket and allowed a company to proceed anonymously in a closely watched lawsuit challenging the Consumer Product Safety Commission's (CPSC's) decision to post a product safety-incident report on its saferproducts.gov Website. ***Company Doe v. Public Citizen*, No. 12-2209 (4th Cir.,**

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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decided April 16, 2014). The company had challenged the posting, claiming that it was materially inaccurate, and sued the agency to keep it off the Website; the district court agreed and enjoined CPSC from doing so. That aspect of the lower court's ruling was not at issue before the Fourth Circuit.

Claiming a First Amendment right to access the court records, a number of consumer-advocacy organizations sought to intervene in the litigation after the lower court issued its heavily redacted written opinion that omitted "virtually all of the facts, expert testimony, and evidence supporting its decision." The purpose of the motion was to appeal the sealing order and the lower court's decision allowing the company to proceed under a pseudonym. The court did not deny the motion until after the groups filed an appeal from its "constructive denial" of their motion to intervene. According to the Fourth Circuit, the notice of appeal deprived the district court of jurisdiction to entertain the motion to intervene; thus the appellate court vacated that order. While CPSC did not file an appeal, the Fourth Circuit also determined that the groups, despite their non-party status before the lower court, could seek appellate review of the sealing and pseudonymity orders "because they meet the requirements for nonparty appellate standing and have independent Article III standing to challenge" the orders.

On the merits, the court determined that the public's presumptive right of access to the docket sheets and pleadings is not outweighed by a company's bare allegation of reputational harm, particularly where, as here, the district court's entry of a judgment in the company's favor "vindicated the company and its product." The Fourth Circuit also rejected the "district court's conclusion that sealing was justified to safeguard the statutory right Company Doe sought to vindicate by bringing the underlying action. . . . The relief Company Doe secured by prevailing on its claims was the right to keep the challenged report of harm removed from the online database. That remedy is distinct from the right to litigate its claims in secret and to keep all meaningful facts about the litigation forever concealed from public view." According to the Fourth Circuit, when parties bring their disputes to court, "they must accept the openness that goes with subsidized dispute resolution by public (and publicly accountable) officials."

The appeals court further disagreed with the lower court that allowing access "would impermissibly impinge upon the manufacturer's First Amendment right to petition the courts." In the Fourth Circuit's view, "The First Amendment right to petition the government secures meaningful access to federal courts. It does not provide for a right to petition the courts in secret." The court also determined that the public interest in access to the civil proceedings was heightened "by the fact that this legal action marked the first challenge to the accuracy of material sought to be posted on the Commission's database." Measured against this interest, the court found, "Company Doe has failed to demonstrate any interest sufficient to defeat the public's First Amendment right of access and to justify continued sealing."

The Fourth Circuit also faulted the lower court for failing to rule on the motion to seal for some nine months, "thereby allowing the case to remain under temporary seal pursuant to the district court's local rules," and emphasized in this regard that "the public and press generally have a contemporaneous right of access to court documents and proceedings when the right applies." According to the court, a district court must make on-the-record findings on a sealing request "as expeditiously as possible."

As to the lower court's order allowing the company to proceed as "Company Doe," the court reiterated that "proceeding by pseudonym is a 'rare dispensation'" and may be allowed only under "extraordinary circumstances." The court noted, "[U]se of a pseudonym 'merely to avoid the annoyance and criticism that may attend . . . litigation' is impermissible." A concurring judge agreed with the judgment, but wrote separately to point out that the company had failed to produce sufficient concrete evidence of the potential harm of proceeding without secrecy. "Had Company Doe supported its motion to seal with expert testimony establishing a high likelihood that denying its motion to seal would cause it to suffer substantial and irreparable economic harm, the disposition of the present appeal, in my view, would be completely different." Without more than a common sense feeling about potential harm, the concurring judge agreed that the company should not have prevailed on its sealing motion.

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Second Circuit Decides When CAFA 30-Day Removal Periods Apply

The Second Circuit Court of Appeals has determined that the Class Action Fairness Act's (CAFA's) 30-day removal periods are triggered only when the plaintiff files a pleading with sufficient information to put the defendant on notice that the size of the putative class and amount in controversy are sufficient to establish subject matter jurisdiction in the federal courts. ***Cutrone v. Mortg. Elec. Registration Sys., Inc.*, No. 14-0455 (2d Cir., decided April 17, 2014)**. The issue arose in the context of litigation over the defendant's allegedly deceptive business practices associated with the online provision of mortgages to consumer borrowers.

The two named plaintiffs alleged that they were required to pay additional recording fees when refinancing the mortgages they secured using the defendant's service. Their complaint simply indicated their damages at about $6,000, the amount of the mortgage recording tax they paid on their refinanced mortgage, and estimated that the class includes "hundreds, and likely thousands, of persons and entities." According to the court, this was insufficient to put the defendant on notice of the amount in controversy.

More than 90 days after the plaintiffs filed their complaint in state court, the defendant filed a notice of removal under CAFA, alleging that it had examined its own records and concluded that more than 3,000 registered promissory notes in

electronic form were secured by mortgages on real property located in New York. The notice estimated that given the large number of relevant promissory notes "even using a conservative estimate of damages for each possible class member, there is a reasonable probability that the matter in controversy exceeds the value of $5,000,000 as required by 28 U.S.C. § 1332(d)."

Examining CAFA rulings from sister circuits, the court held that "in CAFA cases, the removal clocks of 28 U.S.C. § 1446(b) are not triggered until the plaintiff serves the defendant with an initial pleading or other document that explicitly specifies the amount of monetary damages sought or sets forth facts from which the amount in controversy in excess of $5,000,000 can be ascertained. While a defendant must still apply a 'reasonable amount of intelligence' to its reading of a plaintiff's complaint, we do not require a defendant to perform an independent investigation into a plaintiff's indeterminate allegations to determine removability and comply with the 30-day period. Thus, a defendant is not required to consider material outside of the complaint or other applicable documents for facts giving rise to removability."

The court further held that the two 30-day periods listed in 28 U.S.C. § 1446(b) are not the exclusive authorizations for removal. Accordingly, once a defendant determines on its independent investigation that 28 U.S.C. § 1332(d) conveys CAFA federal jurisdiction because the amount in controversy, number of plaintiffs and minimal diversity requirements are satisfied, it may properly remove the case. The court reversed the district court's order remanding the matter to state court and remanded for further proceedings.

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Federal Court Excludes Art Expert's Damages Testimony in Dryer Fire Litigation

A federal court in New York has granted Electrolux's motion to exclude an art appraiser's expert testimony in product-liability litigation filed to recover losses sustained in a fire caused by an allegedly defective dryer. ***Oleg Cassini, Inc. v. Electrolux Home Prods., Inc.*, No. 11-1237 (U.S. Dist. Ct., S.D.N.Y., decided April 15, 2014)**. According to the court, plaintiff Oleg Cassini, Inc. failed to establish that the expert testimony and report were reliable under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

Oleg Cassini claims that the fire caused "significant property damage" and the destruction of art, sketches and designs created by the company's namesake fashion designer. Two years later, the company hired Phillis Rogoff, an art appraiser with experience in fashion, to assess the damage to the sketches and artwork. Rogoff prepared a report of her findings, including a four-page "appraisal report" and a brief "narrative analysis" of the artwork, the artist and her evaluation. She assessed total damages to the artwork at about $233,300. The defendant conducted her deposition some three years after she completed the report, and she was unable to bring any supporting data because it had been destroyed by flooding after Hurricane Sandy. She submitted re-created back-up research several months later.

The court found that Rogoff was qualified to testify as an expert witness, her use of the comparative market approach was appropriate in assessing the artwork's value, and her testimony would be relevant to the calculation of fire-related damages. The court agreed with Electrolux, however, that Oleg Cassini "failed to provide sufficient information" to enable the court to "conduct a 'rigorous examination of the facts on which the expert relies . . . and how the expert applies the facts and methods to the case at hand.'" Among other matters, Rogoff's report lacked any actual calculations to elucidate how she arrived at the damages figure, failed to explain how she applied the market comparison approach to arrive at a dollar value for each piece, and did not include information about comparable sales or the factors considered in selecting comparable works.

THE INTERNATIONAL BEAT

European Parliament Approves Directive on CSR Reporting

The European Parliament has **adopted** a Directive that will require large companies and groups to disclose non-financial, corporate social responsibility (CSR) information such as "policies, risks and results as regards environmental matters, social and employee-related aspects, respect for human rights, anti-corruption and bribery issues, and diversity on boards of directors."

When adopted by the European Council, the measure will apply to companies with more than 500 employees and allow them some flexibility in meeting their reporting obligations. For example, companies may use international, European or national guidelines, such as the U.N. Global Compact, ISO 26000 or the German Sustainability Code. *See European Commission Statement*, April 15, 2014.

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ALL THINGS LEGISLATIVE AND REGULATORY

AGs Criticize Preemption Provisions in Proposed Chemical Regulation Reforms

The attorneys general (AGs) of 13 states have **written** to U.S. House of Representatives subcommittee members in response to draft legislation proposing amendments to the Toxic Substances Control Act of 1976 (TSCA), 15 U.S.C. §§ 2601 *et seq*. They oppose the inclusion of preemption language that would, in their view, "effectively eliminate the existing federal-state partnership on the regulation of toxic chemicals by preventing states from continuing their successful and ongoing legislative, regulatory and enforcement work that has historically reduced the risks to public health and the environment posed by toxic chemicals." While the AGs support TSCA reform, they note that the draft bill "would preempt state regulation of a chemical irrespective of whether EPA [the U.S. Environmental Protection

Agency] took required action regarding that chemical" and would further "bar states from requesting health or safety information from a company regarding a toxic chemical once EPA has made a risk determination for that chemical." *See New York AG Eric Schneiderman Press Release*, April 17, 2014.

CPSC Schedules Carbon Monoxide/Combustion Sensor Forum; Issues RFI

The U.S. Consumer Product Safety Commission (CPSC) will **conduct** a June 3, 2014, forum in Rockville, Maryland, aimed at creating a standard for carbon monoxide (CO) sensors in vented gas heating appliances (e.g., gas furnaces, boilers, wall furnaces and floor furnaces). In preparation for the forum, the agency has also issued a request for information (RFI), noting that, despite safety improvements made to the gas appliance voluntary standards in the 1980s, "the governing standards for gas-fired central furnaces, boilers, and wall and floor furnaces do not protect against many of the failure modes or conditions observed to cause or contribute to CO exposure incidents."

Specifically, CPSC seeks information on the availability of sensors that are capable of (i) operating within the flue passageways of a gas appliance or similar environment; (ii) directly or indirectly monitoring CO levels or other gases or environmental conditions associated with the production of dangerous CO levels; and (iii) providing a shutdown or other preemptive signal in response to dangerous CO levels. Individuals interested in serving on forum panels should register by May 9, and attendees must register by May 23. *See Federal Register*, April 16, 2014.

CPSC Seeks Extension of Approval on Information Collection for Consumer Opinion Forum

The U.S. Consumer Product Safety Commission (CPSC) has **requested** from the Office of Management and Budget an extension of approval of an information collection from persons who may voluntarily register and participate in a Consumer Opinion Forum on the CPSC Website.

Additional details about the Consumer Opinion Forum appear in the **February 6, 2014**, issue of this *Report*. Comments are requested by May 9, 2014. *See Federal Register*, April 9, 2014.

NHTSA Gives Update on Global Harmonization of Vehicle Regulations

The U.S. National Highway Traffic Safety Administration (NHTSA) has **issued** an update of its activities under a 1998 agreement to harmonize vehicle regulations throughout the world and requests comments by May 16, 2014. Noting that any U.S. regulations emerging from the international activities will undergo formal rulemaking procedures, NHTSA reports that global technical regulations (GTRs) under development before international working groups include (i) GTR 9 on

pedestrian safety, (ii) GTR 7 on head restraints, (iii) a GTR on alerts for quiet electric and hybrid-electric vehicles, (iv) a proposed GTR on the safety and environmental issues associated with electric vehicles, (v) a GTR on tires for light vehicles, and (vi) a GTR for side-impact dummies. *See Federal Register*, April 16, 2014.

WA Ecology Department Finds Toxic Chemicals in Children's Products

Tests conducted by the Washington Department of Ecology (Ecology) have revealed that although "most" manufacturers are evidently following laws that regulate the use of toxic chemicals in children's products, out of more than 200 children's products tested, some 15 contained levels of phthalates, lead or cadmium exceeding legal limits. Under the state's Children's Safe Product Act of 2008, which limited the amounts of lead, cadmium and six phthalates allowed in children's products sold in Washington after July 1, 2009, the Ecology Department can levy a $5,000 penalty for a first violation of failing to notify the department about the presence of a listed "chemical of high concern to children" in a product. According to an Ecology statement, the department has not yet issued such a penalty and "is working with state and federal partners to ensure compliance." *See Department of Ecology News Release*, April 14, 2014.

Civil Rules Advisory Committee Changes e-Discovery Proposals

The Advisory Committee on Civil Rules has voted to adopt a revised version of Rule 37(e) that would state, "(e) Failure to preserve electronically stored information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve the information, and the information cannot be restored or replaced through additional discovery, the court may: (1) Upon a finding of prejudice to another party from the loss of the information, order measures no greater than necessary to cure the prejudice; (2) Only upon a finding that the party acted with the intent to deprive another party of the information's use in the litigation, (A) presume that the lost information was unfavorable to the party; (B) instruct the jury that it may or must presume the information was unfavorable to the party; or (C) dismiss the action or enter a default judgment."

The committee also voted unanimously to withdraw presumptive limit proposals in Rules 30, 31 and 33; they would have reduced the allowable numbers and time limits for interrogatories and depositions. The Standing Committee on Rules of Practice and Procedure will review the proposed changes at the end of May, and they will be subject to further review by the Judicial Conference, U.S. Supreme Court and Congress. If no changes are made, the amendments will take effect December 1, 2015.

ISO and IEC Revise Safety Guidelines

The International Organization for Standardization (ISO) and International Electrotechnical Commission (IEC) have reportedly published a revised 2014 edition of ISO/IEC Guide 51, "Safety Aspects—Guidelines for their inclusion in standards." Relevant to "standards intended for workplace, household, or recreational needs, and [applicable] to any safety aspect related to people, property, and/or the environment," the guide is intended to serve as a reference for regulators, manufacturers and other stakeholders. According to the American National Standards Institute (ANSI), this edition adds information about risk reduction considerations and increases the focus on vulnerable consumers' safety needs. *See ANSI News Release*, April 15, 2014.

LEGAL LITERATURE REVIEW

Rhonda Wasserman, "*Cy Pres* in Class Action Settlements," *Southern California Law Review* (forthcoming 2014)

University of Pittsburgh School of Law Professor Rhonda Wasserman explores *cy pres* remedies in the context of class action settlements, in which a portion of the settlement owed to absent class members is donated to a charity that furthers the class goals. Wasserman identifies four problems with such *cy pres* distributions: the charities chosen for the distributions are sometimes not well-tailored to serve the interests of the class; the distributions may actually serve the defendant's interests to the detriment of the class; the distributions may serve class counsel's interests more than the interests of the class; and the distributions may create an appearance of impropriety when a judge is allowed to choose the charities receiving the funds.

Wasserman proposes that courts explain in writing the reasoning for their approval of settlements with cy pres distributions as a way to encourage judges to scrutinize such settlements more closely.

Assessing these flaws, Wasserman suggests a few ways to minimize the appeal of *cy pres* to counsel and the court when negotiating and approving class action settlements. First, she argues that attorney's fees should be preemptively reduced in cases with *cy pres* distributions to encourage attorneys to negotiate a settlement that maximizes the class recovery. Recognizing that class counsel and defense counsel unite in their efforts to secure settlement approval, Wasserman suggests that, during hearings on agreements with *cy pres* distributions, class counsel should be required to disclose data underlying the settlement's terms so that class members can evaluate how class counsel has served their interests. In addition, she argues that because of class counsel and defense counsel's union of interests, the court should appoint a devil's advocate to argue against the proposed settlement when *cy pres* distributions are included in the plan. Finally, Wasserman proposes that courts explain in writing the reasoning for their approval of settlements with *cy pres* distributions as a way to encourage judges to scrutinize such settlements more closely.

Joan Steinman, "The Puzzling Appeal of Summary Judgment Denials: When Are Such Denials Reviewable?" *Michigan State Law Review* (forthcoming 2014)

Chicago-Kent College of Law Professor Joan Steinman contends that post-judgment appeals of summary judgment denials should be permitted when the denials were based on rulings of law. Following circuit splits and U.S. Supreme Court dicta, the question of whether such denials may be appealed post judgment remains unsettled. In *Ortiz v. Jordan* (2011), the Court stated, "Once the case proceeds to trial, the full record developed in court supersedes the record existing at the time of the summary judgment motion." Accordingly, a post-judgment appeal should be based on that full record rather than the abbreviated record available when summary judgment was denied, and, in the Court's view, reviews of summary judgment denials should not be permitted after final judgment.

Steinman calls the Court's *Ortiz* dicta "seriously misguided," arguing that even after trial, an appeal of a summary judgment denial should be permitted and based on the record existing when the motion was denied if the denial was based on a ruling of law rather than the existence of genuine issues of material fact. She explains that litigants lack adequate alternative remedies and dismisses the fear of wasted trials and arguments of unfair surprise to the trial winners as insufficient reasons to disallow post-judgment appeals of summary judgment denials.

Jay Tidmarsh, "Resurrecting Trial by Statistics," *Minnesota Law Review* (forthcoming 2015)

Notre Dame Law School Research Professor Jay Tidmarsh proposes a system of determining damages amounts for aggregated groups of claims based on the abandoned method of trial by statistics. Using this approach, courts try a random sample of claims from the group and extrapolate that result to the remaining claims. The approach was rejected following the U.S. Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes* (2011). Finding redeemable aspects, however, Tidmarsh proposes a similar system he calls the "presumptive-judgment approach" that seeks to fix the shortcomings of trial by statistics.

Finding redeemable aspects, however, Tidmarsh proposes a similar system he calls the "presumptive-judgment approach" that seeks to fix the shortcomings of trial by statistics.

His system also extrapolates the results of a few sample cases to the broader group of claims, but instead of permanently assigning a fixed number of damages to each of the remaining claims, the presumptive-judgment approach would allow either party to contest the judgment for an individual claim. Tidmarsh argues that many presumptive judgments would stand uncontested because both parties would be discouraged by the costs of further litigation, but he concedes that some parties could reject the presumptive judgment to extort a different amount based on the projected costs of litigation to the other party. To combat this behavior, he proposes that the reasonable costs of litigation beyond rejection of the judgment shift to the party who rejects the presumptive award. Tidmarsh acknowledges that his proposed solution

is imperfect but argues that it can serve as a pragmatic alternative to the trial-by-statistics method of resolving a large number of aggregated claims.

THE FINAL WORD

Mass Tort and Complex Litigation Filings Drop 60 Percent in Phillie Courts

Since reforms were implemented to control Philadelphia's mass tort pharmaceutical and asbestos filings, they have apparently fallen 60 percent. In a new **report**, Judge John Herron associates the "inventory reduction" with reforms adopted in February 2012.

Among them were a prohibition on mass-tort case consolidation without an agreement of all the parties, requiring that discovery take place in Philadelphia, limitations on the number of trials that can be tried by pro hac vice counsel, and a mandate deferring punitive damages in asbestos cases. Other report data note that out-of-state asbestos plaintiffs filed 33 percent of new asbestos cases in 2013, compared to 44 percent in 2012. Out-of-state pharmaceutical plaintiffs filed 89 percent of all new pharmaceutical cases in 2013, up 3 percent from 2012.

UPCOMING CONFERENCES AND SEMINARS

DRI , Washington, D.C. – May 15-16, 2014 – "Drug and Medical Device Seminar." Shook, Hardy & Bacon Pharmaceutical & Medical Device Litigation Partners **Harvey Kaplan** and **Marie Woodbury** will participate in panel sessions during this seminar. Kaplan will serve as the moderator of a panel of judges discussing "Mass Tort Coordination Between Federal and State Jurisdiction," while Woodbury will serve on a panel demonstrating "Trial Skills: Warnings, Experts, and General Causation."

ACI, Chicago, Illinois – June 4-5, 2014 – "7th Annual Summit on Defending & Managing Automotive Product Liability Litigation." Shook, Hardy & Bacon Tort Partner **H. Grant Law** will participate in a panel discussion during this continuing legal education summit, which features presentations by judges as well as corporate and agency in-house counsel. His topic is "The Current Battleground for Automotive Class Action Litigation: Class Certification and Managing Experts, Attacks on Pleadings in Class Claims, Choice of Law, Arbitration and More."

ACI, Chicago, Illinois – June 11-12, 2014 – "2nd Annual Consumer Products Regulation and Litigation Conference." Shook, Hardy & Bacon Public Policy Partner **Cary Silverman** will serve with former Consumer Product Safety Commission Chair Inez Tenenbaum on a panel titled "Preparing for the Future of CPSC Practice." The panel

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will address issues including adapting to the visibility of CPSC's online product hazard database and the implications of proposed rules that would significantly alter the voluntary recall process and safeguards on public disclosure of company information.

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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 95 percent of our more than 440 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).