Shook, Hardy & Bacon L.L.P.

APRIL 25, 2013

PRODUCT LIABILITY LITIGATION REPORT

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LAW FIRM NEWS

Barkett Meets with Federal Civil Rules Advisory Committee

Shook, Hardy & Bacon eDiscovery, Data & Document Management Partner **John Barkett**, who sits on the federal Civil Rules Advisory Committee, participated in its most recent meeting and reports that the committee forwarded a number of proposed changes to the Standing Committee on Rules recommending that they be published for public comment.

Among the proposed changes are those forwarded by the "Duke" Subcommittee including (i) reducing the time to serve a complaint from 120 to 60 days, (ii) reducing the time for a judge to issue a scheduling order to 90 days after any defendant has been served or 60 days after any defendant has appeared, (iii) adding to the list of topics to be covered in the Rule 16(b)(3) list of permitted contents of a scheduling order and in a Rule 26(f) discovery plan the preservation of electronically stored information and agreements on implementing Rule 502(d) of the Federal Rules of Evidence to protect the privileged or protected status of inadvertently disclosed information, and (iv) making explicit the allocation of expenses in discovery under Rule 26(c)(1)(B).

Significant proposed changes to Rule 26(b)(1) would include limiting discovery to matters relevant to a party's "claim or defense" instead of "relevant to subject matter involved in the action"; including "proportionality" within the scope of discovery, that is, discovery must be "proportional to the needs of the case considering the amount in controversy, the importance of the issues at stake in the action, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit"; and deleting text regarding "calculated to lead to the discovery of admissible evidence." As to the latter, the proposed rule would state, "Information within this scope of discovery need not be admissible in evidence to be discoverable."

Garretson to Join ACI Biosimilars Conference Panel

Shook, Hardy & Bacon Life Sciences & Biotechnology Partner **John Garretson** will participate in a panel discussion on "Preparing for the Impending Reality of Biosimilars Patent Litigation: Immediate Action Plans for the First Wave," during the

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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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American Conference Institute's (ACI's) "**4th Annual Advanced Forum on Biosimilars**," scheduled for June 5-7, 2013, in New York City. Garretson joins a distinguished faculty including in-house counsel for major pharmaceutical companies focusing on biosimilar IP, regulatory, commercial, and policy issues. Shook, Hardy & Bacon is a conference co-sponsor.

CASE NOTES

U.S. Supreme Court Narrows Alien Tort Statute's Reach

The U.S. Supreme Court has determined that, under a presumption against extraterritorial application of U.S. statutes, the Alien Tort Statute (ATS) does not apply to conduct committed on foreign soil in violation of the law of nations or a treaty of the United States unless "the claims touch and concern the territory of the United States [and] do so with sufficient force to displace the presumption." ***Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (U.S., decided April 17, 2013)**.

The issue arose in a lawsuit filed by U.S. residents, who were Nigerian nationals, alleging that the defendant foreign corporations "aided and abetted the Nigerian Government in committing violations of the law of nations in Nigeria." They claimed that complaints about the environmental effects of defendants' oil exploration and production practices in Nigeria elicited violence against local residents in the 1990s. They sought to hold the companies liable under the ATS for extrajudicial killings; crimes against humanity; torture and cruel treatment; arbitrary arrest and detention; violations of the rights to life, liberty security, and association; forced exile; and property destruction.

A federal district court dismissed all but the claims for crimes against humanity, torture and cruel treatment, and arbitrary arrest and detention, finding that the facts underlying the dismissed claims "did not give rise to a violation of the law of nations." The Second Circuit dismissed all the claims, "reasoning that the law of nations does not recognize corporate liability." After oral argument, the U.S. Supreme Court directed the parties to address an additional question: "Whether and under what circumstances the [ATS] allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States." And the Court decided the case on the basis of its answer to the additional question.

Meanwhile, based on its ruling in *Kiobel,* the U.S. Supreme Court has remanded and ordered **reconsideration** of a Ninth Circuit Court of Appeals ruling in *Rio Tinto v. Sarei*, which similarly arose under the ATS with plaintiffs seeking to hold London-based Rio Tinto responsible for the deaths of thousands of indigenous people on the island of Bougainville, where the company took part in a consortium operating an open-pit copper mine. The Ninth Circuit allowed several parts of the lawsuit to proceed. According to a news source, global corporations faced dozens of ATS lawsuits in recent years seeking to hold them accountable for alleged human rights violations, environmental damage and labor abuses. *See Bloomberg*, April 22, 2013.

Illinois Supreme Court Confirms Jurisdiction over French Helicopter-Parts Maker

The Illinois Supreme Court has determined that the French manufacturer of a custom tail-rotor bearing for a helicopter involved in a crash is subject to personal jurisdiction in the state and must answer to product liability claims filed against it. ***Russell v. SNFA*, No. 113909 (Ill., decided April 18, 2013)**. Noting the confusion engendered by the U.S. Supreme Court's plurality decision in *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011), the court decided that its outcome was consistent with Illinois precedent requiring "at a minimum, that the alien defendant is 'aware that the final product is being marketed in the forum State.'"

According to the court, other defendants, including the helicopter's manufacturer, "effectively operated as an American distributor for [the French manufacturer's] tail-rotor bearings in the United States market." Without these other defendants, the French manufacturer "would have no market or corresponding sales of those bearings anywhere in the United States." And during a seven-year period, between 2000 and 2007, the helicopter manufacturer "sold approximately 2,198 parts manufactured by [the French company] to entities located in Illinois." Because sales of the French defendant's products in Illinois were not isolated, the court found that it had "engaged in Illinois-specific activity to establish minimum contacts with Illinois [even] under" Justice Sandra Day O'Connor's more demanding and narrow stream-of-commerce theory, espoused in *Asahi Metal Industry Co. v. Superior Court,* 480 U.S. 102 (1987). The court refused, however, to find that the *J. McIntyre* plurality adopted that narrow theory.

The court bolstered its conclusion by referring to other business relationships the French company had in the state involving invoicing for multiple shipments of the company's aircraft bearings to other states. The majority decided that, for purposes of its jurisdictional inquiry, the helicopter bearings and airplane bearings should be considered a single type of product, that is, "custom-made bearings for the aerospace industry," thus bringing the French company's business relationship with an Illinois company for custom-made bearings used in airplanes within the court's stream-of-commerce analysis. The court also concluded that it was reasonable to require the French manufacturer to litigate in Illinois.

A dissenting justice argued that the majority had mischaracterized Justice Stephen Breyer's concurrence in *McIntyre* and that the court should distinguish between component part manufacturers and finished product manufacturers in a "distributor/stream of commerce analysis." This justice also objected to the majority's inclusion of business activity involving airplane bearings into its analysis, stating, "These are not the same types of bearings, helicopter bearings, that were sold to Agusta and that were in the helicopter that crashed and gave rise to the instant litigation."

Ninth Circuit Joins Sister Circuits on Inconsistent Federal and State Class Action Mechanisms

The Ninth Circuit Court of Appeals has determined, in the context of a wage-and-hour dispute, that different opting mechanisms for class members provided by

federal and state law "do not require dismissal of the state claims." ***Busk v. Integrity Staffing Solutions, Inc.*, No. 11-16892 (9th Cir., decided April 12, 2013)**. So ruling, the court joined the Second, Third, Seventh, and D.C. circuits, finding that they had "correctly reasoned that FLSA's [the Fair Labor Standard Act's] plain text does not suggest that a district court must dismiss a state law claim that would be certified using an opt-out procedure." The FLSA does not bind a potential plaintiff unless she "affirmatively 'opts in'" to the lawsuit.

Jury Finds Football Helmet Manufacturer Liable for High School Player's Injury

While a Colorado jury recently decided that a football helmet was not defectively designed, it has reportedly awarded an injured high school football player $3.1 million, finding that the helmet's manufacturer failed to warn him about the risks of concussion. *Ridolfi v. Begano*, No. 2010-cv-58 (Colo. Dist. Ct., Las Animas Cnty., verdict entered April 13, 2013). The jury also found the plaintiff's coaches at fault; they will not be required to pay their share of a total $11.5 million verdict due to their immunity as government employees. The plaintiff, who has allegedly sustained permanent and irreversible brain damage, was cleared by his coaches to continue practicing after undergoing a concussion and was not brought to a hospital until he began stumbling and slurring his speech.

According to a news source, the company, which has had a string of victories in cases disputing helmet safety, plans to appeal the verdict and will likely argue that the trial court erred in excluding one of its expert witnesses. In 2012, a Mississippi federal jury rejected liability in a similar personal injury suit, and a Florida federal judge dismissed a putative class action challenging company claims that its helmets reduce the likelihood of concussions. Another lawsuit against the company filed by an injured football player was expected to go to trial in California this month. *See Law360*, April 15, 2013.

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ALL THINGS LEGISLATIVE AND REGULATORY

CPSC Seeks Information on Third-Party Testing for Lead, Phthalates

The Consumer Product Safety Commission (CPSC) has **issued** a request for information (RFI) regarding third-party testing for "lead content, phthalate content, and the solubility of the eight elements listed in ASTM F963-11." In particular, the agency has asked whether "there are materials, used in the manufacture of consumer products, that can be determined not to include a prohibited element (lead or certain other elements) or chemical (the six prohibited phthalates that are listed in section 108 of the Consumer Product Safety Improvement Act of 2008 (CPSIA)), such that third party testing is not required." CPSC has also requested information about "materials that do not, and will not, contain the prohibited elements or chemicals in concentrations above their applicable limit."

To this end, the four-part RFI has solicited data on the following children's products and materials used to manufacture those products: (i) "toys subject to ASTM F963-11, *Standard Consumer Safety Specification for Toy Safety,* and the presence, if any, or at what levels, of the eight elements designated in section 4.3.5 of the standard"; (ii) "toys and certain child care articles, and the presence, if any, or at what levels, of the six prohibited phthalates listed in section 108 of the CPSIA"; (iii) "manufactured woods and the presence, if any, or at what levels, of lead"; and (iv) "synthetic food dyes and the presence, if any, or at what levels, of lead." CPSC has also has asked for information concerning the paints, surface coatings and substrates of children's toys subject to ASTM F963-11; phthalate concentrations in plasticized component parts; and lead concentrations in "complex, nonhomogeneous" wood manufactured products. The agency requests written responses to the RFI by June 17, 2013. *See Federal Register*, April 16, 2013.

CPSC Announces Buckyball® Recall by Six Retailers

The Consumer Product Safety Commission (CPSC) and six retailers have **announced** "the voluntary recall of all Buckyballs and Buckycubes high-powered magnet sets," which the commission maintains are defective by design and "pose a substantial risk of injury and death to children and teenagers." According to an April 12, 2013, press release, CPSC previously filed an administrative complaint against Buckyballs® importer, Maxfield & Oberton Holdings LLC, after the company failed to initiate an adequate recall plan following reports that children and teens who ingested the small magnets required medical treatment.

The six retailers behind the latest recall include Barnes & Noble, Bed Bath & Beyond, and Brookstone, which have joined CPSC in advising consumers "to contact the retailer from which they purchased the product to obtain instructions for their remedy." The commission has estimated that approximately "three million sets of Buckyballs and Buckycubes have been sold in U.S. retail stores nationwide and online since 2010." Additional details about CPSC's efforts to ban the sale of high-powered magnet sets appear in the December 13, 2012, **issue** of this *Report*.

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Maker of Children's Nap Mats Agrees to Remove Flame Retardant Chemicals

The Center for Environmental Health has reportedly reached an agreement with Peerless Plastics, a company that makes children's nap mats, requiring it to remove the flame retardant chemicals in its products by August 1, 2013. The agreement was reached under California's Proposition 65 (Prop. 65), which lists chemicals known to the state to cause cancer or reproductive harm and requires companies to warn consumers if their products contain such chemicals. The center apparently initiated legal action against Peerless and more than 50 other companies earlier this year under Prop. 65 after finding that most of the company's nap mats tested contained flame retardants. According to the center and other advocacy organizations, children are exposed to these chemicals when they leach into the air and settle in dust that children touch and ingest. *See Center for Environmental Health Press Release*, April 15, 2013.

FDA Proposes Regulations for Stand-Alone Symbols on Medical Devices

The Food and Drug Administration (FDA) has **proposed** revising medical device and biological product labeling regulations "to explicitly allow for the inclusion of stand-alone graphical representations of information, or symbols, if the symbol has been established as part of a standard developed by a nationally or internationally recognized standards development organization." Under the proposed rules, manufacturers could use these standardized symbols provided they are "recognized by FDA for use on the labeling of medical devices (or on a subset of medical devices" and "explained in a symbols glossary that contemporaneously accompanies the medical device." The revised regulations would also authorize "the use of the symbol statements 'Rx only' on the labeling of prescription devices."

According to its April 19, 2013, *Federal Register* notice, FDA ultimately seeks "to harmonize U.S. regulatory requirements with those of the European Commission" in the belief that "certain symbols contained in national or international standards are 'likely to be read and understood by the ordinary individual under customary conditions of purchase and use.'" Once it finalizes these regulations, FDA plans on posting up-to-date information on its Website about the stand-alone symbols permitted for use in medical device labeling. In particular, FDA has pointed to international symbols standards developed by the Association for the Advancement of Medical Instrumentation as among those that are currently recognized by U.S. regulators. FDA will accept comments on the proposed rule until June 18.

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LEGAL LITERATURE REVIEW

Arthur Miller, "Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure," *New York University Law Review*, 2013

In this article, New York University School of Law Professor Arthur Miller considers the shift in civil procedure that has occurred during the past three decades and has, in his view, produced "negative consequences for our civil justice system." He contends that when the Federal Rules of Civil Procedure were promulgated in 1938, "they embodied a justice-seeking ethos," based on a "relatively comprehensible, plainly worded, and nontechnical system" that would provide citizens access to the courts for the "resolution of disputes on their merits, not by tricks or traps or obfuscation." He outlines how the shift to a "judicial gatekeeping" system has limited access to the courts through decisions involving expert testimony, class action certification, arbitration clauses in contracts of adhesion, pleading standards, jurisdiction, and pretrial discovery. Miller concludes that our aspirations "should not be to impede meaningful citizen access to our justice system or to impair the enforcement of our public policies and constitutional principles by constructing a procedural Great Wall of China or Maginot Line around the courtrooms in our courthouses."

Jaime Dodge, "Disaggregative Mechanisms: The New Frontier of Mass-Claims Resolution Without Class Actions," *University of Georgia Legal Studies Research Paper*, April 2013

University of Georgia Assistant Law Professor Jaime Dodge posits that mass claims resolution has evolved from the aggregation mechanism that arose with the class action device in the 20th century to a "disaggregative" dispute resolution system, which focuses on the individual but uses procedural or substantive streamlining "to correct asymmetries that prompted the creation of class actions." These new mechanisms can be created by contract, such as the "common single-plaintiff arbitration clauses in consumer and employment agreements," or post-litigation, by "allowing a defendant to submit the equivalent of a no-contest plea, removing the question of liability but leaving the determination of damages to a public arbiter." The author hopes, in identifying "this new branch of disaggregative mechanisms," to begin a discussion "about how their existence has informed the viability of aggregation" and vice versa.

Elizabeth Chamblee Burch, "Adequately Representing Groups," *Fordham Law Review* (forthcoming 2013)

University of Georgia School of Law Associate Professor Elizabeth Chamblee Burch addresses the doctrinal shortcomings to consent and identity-of-interest theories that are dominant to assess adequacy of representation in representative litigation, noting that they "fail to explain a number of situations that arise in mandatory litigation under *parens patriae* statutes or in Rule 23(b)(2) lawsuits, such as school-busing cases and Title IX litigation." The author proposes "an aggregate-rights framework for distinguishing between collective and individual rights and contends that the right to adequate representation is, likewise, a group or individual right." She concludes by applying the framework to *parens patriae* actions and multidistrict litigation.

LAW BLOG ROUNDUP

A Gift to Civil Procedure Professors

"Who among us has not relished the extraordinary gift the [U.S.] Supreme Court gave to civil procedure teachers in the form of *J. McIntyre Machinery, Ltd. v. Nicastro*, allowing professors to punctuate the already absurd personal jurisdiction case line with the story of the unlucky Mr. Nicastro (he who lost four fingers to a metal shearing machine in New Jersey), with nary a place to sue?" University of Texas at Austin School of Law Professor Linda Mullenix, opening her review of a recently released paper by Duke University School of Law Professor Stephen Sachs titled "How Congress Should Fix Personal Jurisdiction." Sachs refers to this "near-perfect teaching vehicle" as "an incoherent three-way split."

Jotwell: Courts Law, April 15, 2013.

Obscenity Definition Turned on Its Head

"It may be fair to say that *Kiobel* takes Justice Potter Stewart's definition of obscenity and turns it on its head: rather than 'I know it when I see it,' *Kiobel* gives us 'I know it when I don't see it.' It tells us that the *Kiobel* facts do not satisfy the territorial nexus—I guess they don't touch and concern U.S. territory with sufficient force—but … provides almost no guidance on which facts would." Richmond School of Law Assistant Professor Andrew Spalding, blogging about the U.S. Supreme Court's invocation of the presumption against extraterritorial application to determine that the Alien Tort Statute does not allow a foreign plaintiff to sue a foreign defendant in a U.S. court for conduct occurring in a foreign country.

PrawfsBlawg, April 18, 2013.

Kiobel Redux: Cabal Playpen?

"The ATS [Alien Tort Statute] has become a playpen for a cabal of international law enthusiasts and plaintiffs' lawyers. Couple the former's wild-eyed global aspirations with the latter's eagerness to drag corporations through our one-of-a-kind tort system, and it's Katy, bar the door." George Mason University School of Law Professor Michael Greve, discussing the U.S. Supreme Court's ruling in *Kiobel v. Royal Dutch Petroleum*, summarized elsewhere in this *Report*.

Liberty Law Blog, April 17, 2013.

THE FINAL WORD

Chief Justice Forwards Civil Procedure Rule Changes to Congress

U.S. Chief Justice John Roberts has forwarded to Congress proposed **amendments** to the federal rules, including the Federal Rules of Civil Procedure (FRCP). Unless Congress takes action to stop the changes, they will take effect December 1, 2013. The FRCP changes focus on Rules 37 and 45 and are intended to simplify Rule 45 and subpoena practice. The proposed amendments would make the court where an action is pending the issuing court and permit service throughout the United States. All provisions on the place of compliance would be combined in a new Rule 45(c). Among other matters, the amendments would dispense with distinctions between parties, party officers and all other witnesses to the extent that a subpoena may command any person to testify within the limits that apply to all witnesses.

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Proposed **amendments** to the Federal Rules of Appellate Procedure include briefing requirements in Rules 28 and 28.1 that would establish a new "concise statement of the case" rather than a separate "statement of the case" and "statement of facts."

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UPCOMING CONFERENCES AND SEMINARS

DRI, New York, New York – May 16-17, 2013 – "29th Annual Drug and Medical Device Seminar." Shook, Hardy & Bacon Pharmaceutical & Medical Device Litigation Partner Scott Sayler will deliver opening remarks in his role as current chair of DRI's Drug and Medical Device Committee. Co-sponsored by SHB, the event will feature presentations by judges, in-house and outside counsel, and other professionals on cutting-edge topics such as (i) "How to use your advocacy skills to persuade the toughest audience," (ii) "The latest on consolidated drug and device proceedings in Philadelphia," (iii) "What jurors are thinking about the FDA," (iv) "How to help a jury understand a state-of-the-art case," (v) "The latest on 'judicial hellholes,'" (vi) "How to try a multiple-plaintiff pharmaceutical case," and (vii) "How to take the 'junk' out of junk science."

ACI, Chicago, Illinois – June 26-27, 2013 – "Consumer Products Regulation & Litigation." Shook, Hardy & Bacon Pharmaceutical & Medical Device Litigation Partner Harley Ratliff will join a panel of speakers discussing "Total Recalls: Counsel Perspective on Processes for Streamlining the Response to Product Issues and Effectively Working with the CPSC." Designed to provide consumer product manufacturers with a "safety net" in balancing regulatory compliance and litigation risks, this conference brings together a distinguished faculty of judges, regulators and in-house and outside counsel "to give consumer products professionals the most up-to-date, expert tested advice possible on navigating this terse terrain."

DRI, Washington, D.C. – July 25-26, 2013 – "2013 DRI Class Actions Conference." Shook, Hardy & Bacon Class Actions & Complex Litigation Partners Tim Congrove and Jim Muehlberger will participate in this event. Congrove, who is also serving as program vice-chair, will moderate a panel of distinguished in-house counsel discussing "Inside and Out: A Wide-Ranging Discussion of Class Actions from the Client's Perspective." Muehlberger "will discuss the current state of issue classes, techniques for addressing them, and his experience in trying a case involving a Rule 23(c)(4) class" during a presentation titled "Making an Issue Out of It: The Trial of a 23(c)(4) Class." SHB 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 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).