Shook, Hardy & Bacon L.L.P.

SEPTEMBER 18, 2014

# PRODUCT LIABILITY LITIGATION REPORT

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## FIRM NEWS

### Schwartz & Goldberg Applaud Iowa Court Ruling on "Competitor" Liability

Shook, Hardy & Bacon Public Policy Partners **Victor Schwartz** and **Phil Goldberg** have **authored** a September 12, 2014, Washington Legal Foundation *Legal Opinion Letter* titled "Iowa High Court Exposes Pharma 'Innovator Liability' for What it Is: Deep-Pocket Jurisprudence." They discuss a recent Iowa Supreme Court decision rejecting the effort by plaintiffs' lawyers to impose liability on brand-name drug makers despite admitting that the plaintiff took only generic versions of a drug. Noting that some 100 state and federal courts have rejected what has been referred to as the "innovator" or "competitor" theory of liability, they observe, "only four have accepted it."

While Alabama's supreme court recently affirmed a ruling allowing the theory, the Iowa high court "parted ways with and specifically took on the Alabama Court's ruling, calling it an 'outlier' and explaining why its adoption is hollow and unsound. With perfect clarity, it said blaming one company for allegations against another is 'deep-pocket jurisprudence [which] is law without principles.'" The authors recommend that the opinion be studied by every state supreme court justice, legal scholar and casebook author in America. They also refer to a Sixth Circuit decision that "reminded federal judges to follow state law, even if they have a personal affinity for this theory."

### Behrens Criticizes "Outlier" Ruling on Punitive Damages Cap

Shook, Hardy & Bacon Public Policy Partner **Mark Behrens** has **authored** a September 11, 2014, Washington Legal Foundation *Legal Pulse* guest commentary titled "Missouri Supreme Court Invalidates State's Legislative Cap on Punitive Damages." Addressing the Missouri high court's ruling invalidating a statutory cap on punitive damages as to the fraud claims in "an unremarkable fraudulent misrepresentation and unlawful merchandising suit," Behrens characterizes the decision as an "outlier. Virtually every other state court that has considered the constitutionality of punitive damages caps has held that such laws do not violate the jury trial right because the jury's fact-finding function is preserved." He discusses other court opinions upholding similar caps. Additional details about the Missouri Supreme Court ruling appear elsewhere in this *Report*.

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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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## *Law360* Highlights Shook's Win for Boston Scientific in Second Bellwether Trial

A Shook, Hardy & Bacon team led by Pharmaceutical & Medical Device Litigation Partners **Eric Anielak** and **Matthew Keenan** has **obtained** a defense verdict for Boston Scientific Corp. in the second bellwether trial involving pelvic mesh devices. According to *Law360*, a Massachusetts jury "cleared the company of all liability involving the Obtryx-brand sling following two days of deliberations and a two-week trial." Finding that the device was not defectively designed and that the company provided adequate warnings, this latest verdict is Shook's second favorable result for Boston Scientific in recent weeks. See *Law360*, August 29, 2014.

## CASE NOTES

### Fifth Circuit Refuses to Recognize German Judgment

The Fifth Circuit Court of Appeals has determined that the German heirs of a defendant voluntarily dismissed with prejudice from a property dispute litigated in a Mississippi chancery court filed redundant litigation in Germany to establish their non-liability, and because the German court refused to consider the preclusive effect of the dismissal with prejudice, its ruling awarding $300,000 in attorney's fees and costs to the German litigants was not entitled to enforcement in the United States under comity principles. ***Derr v. Swarek*, No. 13-60904 (5th Cir., decided September 9, 2014)**. So ruling, the court affirmed a lower court determination but on different grounds.

The Fifth Circuit disagreed with the lower court that the mere initiation of a foreign parallel proceeding is a ground on which a court may refuse to enforce the resulting foreign judgment. According to the court, the parallel-proceeding rule "'applies only until a judgment is reached in one of the actions.' Even if the [German heirs] instituted their declaratory suit in Germany for the purpose of obtaining a judgment before one could be reached in the Mississippi litigation, this 'interference,' in the absence of a final judgment in the Chancery Court, does not fit within one of the narrow exceptions permitting a court to refuse comity to a valid foreign judgment."

Still, the court ruled that the unilateral dismissal with prejudice of the Mississippi litigation "was a final judgment on the merits invoking a res judicata bar to reasserting the dismissed claims against the [German heirs]." The court found that the German heirs were in privity with the defendant who remained in the Mississippi litigation despite his passing in 2006; the chancery court had not acted on his initial motion to dismiss or the plaintiffs' motions to substitute his estate or his heirs, so these claims were still pending when the voluntary dismissal occurred. In the court's view, "It is

clear that the Heirs are in privity with Derr. The alleged purpose of the Heirs' German action was to protect them from the claims filed against Derr in the Mississippi litigation, which would affect them only as successors-in-interest to his property."

The court concluded that the German court's "failure to respect [the plaintiffs'] dismissal with prejudice of their claims against Derr—and by the rule of privity, the Derr Heirs—violated Mississippi public policy and rendered meaningless the right of the [plaintiffs] to put an end to litigation of their claims. . . . The defect in the German appellate proceedings was not the Higher Regional Court's application of German law and procedure to rule on the Heirs' claim for a declaratory judgment, but its disregard of the binding dismissal with prejudice in the Mississippi litigation that obviated the need to entertain the duplicative action at all." The German court's refusal to accord comity to the outcome of the chancery court proceedings violated "the Mississippi public policy of res judicata and the [plaintiffs] right to permanently terminate their claims. Comity must be a two-way street," the court said.

### Guilty Pleas Entered in Hazardous Toy Imports Case

According to the U.S. Department of Justice (DOJ), two New York residents have pleaded guilty to charges arising from importing more than 100,000 counterfeit and hazardous children's toys from China. Sentencing will occur at a later date. For nearly a decade, Chenglan Hu, her husband Hua Fei Zhang and other individual defendants allegedly used five corporations to import and sell toys from China from locations in Ridgewood, Brooklyn, and Queens, New York. Customs officials seized shipments on 33 separate occasions and found toys prohibited in the United States because of "excessive lead content, excessive phthalate levels, small parts that presented risks of choking, aspiration or ingestion, and easily accessibly battery compartments." They also seized toys bearing copyright-infringing images and counterfeit trademarks.

U.S. Attorney Loretta Lynch said, "[T]he defendants lined their pockets while putting at risk the health of our children by smuggling dangerous and copyright-infringing toys into the United States. Today's guilty pleas signify the end of this dangerous pipeline from China." Hu and Zhang, who were the last of the individual defendants to plead guilty, have agreed to forfeit $700,000 and more than 120,000 unsafe children's toys, and the government has already seized three luxury vehicles and six bank accounts related to the operation. An August 27, 2014, DOJ news release stated that "Hu, Zhang, and the other individual defendants changed their use of the companies, sometimes even forming new companies, and alternated their formal titles in order to conceal their continued importation and distribution of hazardous and counterfeit toys." *See hlntv.com*, August 30, 2014.

### Federal Court Finds California an Inconvenient Forum in Costa Concordia Wreck Suit

A federal court in California has granted Carnival Corp.'s motion for dismissal on the basis on forum non conveniens in an admiralty lawsuit alleging negligence, gross negligence and *res ipsa loquitur* in the 2012 shipwreck of the MS Costa Concordia off the coast of Italy. *Sandoval v. Carnival Corp.*, No. 12-5517 (U.S. Dist. Ct., C.D. Cal., decided September 15, 2014) (unpublished). The court was persuaded that an alternative foreign forum would be adequate, given the defendant's agreement to submit to the jurisdiction of an Italian court and the availability of some remedy under Italian law.

Weighing the private and public interests at stake, the court found that granting dismissal would be appropriate particularly in light of the significant number of witnesses and evidence located in Italy and the difficulty of procuring much of it under the Hague Convention. As well, the plaintiffs had indicated that they intended to pursue legal action in Italy against Italian defendants, so the court found that avoiding duplicative proceedings that create the risk of inconsistent results would further weigh in favor of dismissal. The court was also persuaded that with just 100 U.S. citizens involved as passengers out of more than 3,000, the public interest would be served by dismissing the U.S. action.

### Missouri Supreme Court Rejects Punitive Damages Cap on Common-Law Claim

In a unanimous ruling, the Missouri Supreme Court has determined that a legislatively imposed cap on punitive damages applied to a jury's finding of common-law fraud unconstitutionally interferes with the right to a trial by jury. ***Lewellen v. Franklin*, No. SC92871 (Mo., decided September 9, 2014)**. The issue arose in the context of fraudulent misrepresentation and fraud claims brought under the Missouri Merchandising Practice Act (MMPA) and the common law by a 77-year-old plaintiff who convinced a jury that a car dealer and his dealership tricked her into buying a car by promising that she would have to pay just $49 dollars each month for it. After nine months, the defendants stopped paying her the difference between what the loan actually cost and the $49 payment, which she had repeatedly insisted was all she could afford to pay. They had legally bound her to the full amount of the loan by allegedly failing to explain or misrepresenting the paperwork she signed. The jury awarded the plaintiff $1 million in punitive damages against both defendants, but the trial court cut the awards approximately in half under a statutory cap.

The supreme court reversed as to the punitive damages cap applied to the common-law claim against the dealership's owner because the cause of action existed in 1820 when the Missouri Constitution was adopted. According to the court, "Under the common law as it existed at the time the Missouri Constitution was adopted imposing punitive damages was a peculiar function of the jury." The punitive damages cap later adopted by the legislature thus "necessarily changes and impairs the right of a trial by jury 'as heretofore enjoyed.'" The court did not address the reduced punitive damages award against the dealership for violation of the

MMPA, noting that the issue was not appealed, evidently in light of a prior ruling that the cap is constitutional as to MMPA claims, which did not exist in 1820. The court also rejected the defendants' argument that the punitive damages violated their due process rights, finding that they were not grossly excessive "considering [the defendants'] intentional and flagrant trickery and deceit employed to target a financially vulnerable person causing her to lose her means of transportation, subject her to suit, and damage her credit."

## THE INTERNATIONAL BEAT

### Argentina Senate Passes Bill to Create Small Claims Courts for Consumer Cases

The Argentine Senate has approved a package of bills introduced in August 2014 to create two new agencies within the executive branch and a new tribunal, all with jurisdiction over consumer claims for up to US$25,000. Specifically, the bill would establish (1) a Mandatory Conciliation Service in Consumer Relations (COPREC), (2) Auditor of Consumer Relations, and (3) Federal Justice for Consumer Relations. If the bills are enacted, COPREC would hear individual consumer claims in instances where the amount claimed does not exceed US$25,000. The Auditor of Consumer Relations would hear liability cases where damages pursued are less than US$6,500, and the Federal Justice for Consumer Relations would hear claims related to the Consumer Protection Code and other regulations related to users and consumers rights up to US$25,000. Following the Senate's September 4, 2014, approval, the bills will now go to the House of Representatives where they will likely be submitted for review by one or more committees.

## ALL THINGS LEGISLATIVE AND REGULATORY

### CPSC Considers Rule on High-Power Magnet Sets

While Republican Consumer Product Safety Commissioner Ann Marie Buerkle will not participate in the safety agency's rulemaking restricting the power of magnets of a certain size sold in sets, staff reportedly **briefed** the remaining commissioners on the proposed final rule during a September 10, 2014, meeting. Buerkle apparently determined that the Consumer Product Safety Commission (CPSC) could not simultaneously pursue an enforcement action against a high-power magnet-set manufacturer and adopt a mandatory standard that could be applied in the enforcement action and ultimately come before the commission if called upon to review the administrative law judge's determination in the enforcement action. She contends that this constitutes a conflict of interest.

If the final rule is adopted without change during CPSC's September 24 meeting, it would require "that if a magnet set contains a magnet that fits within the small parts cylinder that CPSC uses for testing toys, all magnets from that set must have a flux

index of 50 $kG^2$ $mm^2$ or less. In addition, individual magnets intended or marketed for use with or as magnet sets must meet these requirements." CPSC has determined that an estimated 2,900 ingestions of magnets from magnet sets were treated in emergency departments from January 1, 2009, to December 31, 2013. The staff report notes that strong magnets interact in the gastrointestinal tract, "which can lead to tissue death, perforations, and/or fistulas, and possibly intestinal twisting and obstruction."

Democratic Commissioner Robert Adler saw no conflict for CPSC in working on a rulemaking while pursuing an enforcement action against Zen Magnets. Shook, Hardy & Bacon Public Policy Partner **Cary Silverman** reportedly noted that the law allows CPSC to use both rulemaking and administrative actions to protect consumers. He evidently acknowledged, however, that the magnet-set action has placed CPSC in a unique position. "It's very rare that CPSC actually goes to the extent of having an administrative action at all," he said and further observed, "Having the rule is a little bit broader, in that it applies to anybody in the future. Whereas litigation against individual companies puts other companies on notice, but it doesn't bind them to anything." *See Bloomberg BNA Product Safety & Liability Reporter™*, September 11, 2014.

**Flame Retardant Chemical Disclosure Law Awaits Gov. Jerry Brown's Signature**

The California Legislature has approved a bill (**S.B. 1019**) that, if signed by Gov. Jerry Brown (D), would require upholstered-furniture manufacturers to disclose on already-required tags whether the product contains added flame retardant chemicals and to maintain sufficient documentation to show if flame retardant chemicals were added to a covered product or component. If enacted, the requirements will take effect January 1, 2015, when manufacturers must comply with a new smoldering-test standard technical bulletin (117-2013).

According to the bill's findings, since 1975, California has required that materials used in upholstered furniture, such as polyurethane foam, be able to withstand a small, open flame for 12 seconds. After flame retardant chemical use became widespread to meet the requirement, women and children in California were found to have "much higher levels of toxic flame retardant chemicals" in their bodies than comparable populations elsewhere. Citing studies that purportedly link "exposure to flame retardants to cancer, lower IQs and attention problems, male infertility, male birth defects, and early puberty in girls," and noting that Technical Bulletin 117-2013 now allows furniture manufacturers to meet a smoldering standard that does not require the use of flame retardant chemicals, the legislature determined that consumers want informed choice about their purchases and that this measure will give consumers clear information about the furniture they buy.

Part of the required disclosure would state that (i) "California has updated the flammability standard and determined that the fire safety requirements for this product can be met without adding flame retardant chemicals" and (ii) "The state has

identified many flame retardant chemicals as being known to, or strongly suspected of, adversely impacting human health or development." The bill would allow the assessment of fines for failure to maintain the required documentation or to supply the documentation to the state on request. It would also establish a testing protocol to ensure that label statements are accurate. Additional fines could be imposed if the state finds that a product labeled as containing no added flame retardant chemicals actually contains them.

### California Releases Draft Three-Year Plan to ID Chemical Risks in Consumer Products

California's Department of Toxic Substances Control has **released** a draft three-year plan under the Safer Consumer Products program to guide the selection of priority products containing toxic chemicals for which safer alternatives must be evaluated. While the work plan does not identify specific products or chemicals, it "outlines some of the considerations behind [the agency's] product category selections." The work plan's categories of interest include beauty, personal care and hygiene products; building products and household, office furniture and furnishings; cleaning products; clothing; fishing and angling equipment; and office machinery. Public workshops to provide an overview of the draft plan have been slated for September 25, 2014, in Sacramento and September 29 in Cypress.

## LEGAL LITERATURE REVIEW

**Jason Cantone, et al., "Whither Notice Pleading?: Pleading Practice in the Days Before *Twombly*," (Public draft available September 2014)**

Authors who work for the Federal Judicial Center have developed databases of automobile-accident complaints filed in the federal courts before the U.S. Supreme Court established the plausibility pleading standard in *Bell Atlantic Corp. v. Twombly* and "found that complaints before *Twombly* often departed from notice pleading." Expressly distancing their views from the Federal Judicial Center, the authors nonetheless conclude that "[p]leading practice before *Twombly* already resembled what we call narrative pleading, supported by sufficient facts to describe the context of the claims, rather than the fact-barren notice pleading of Form 11 (formerly Form 9). If the Supreme Court killed notice pleading, as has been suggested, it was only pulling the plug on a pleading practice that had already lost its vitality."

**Richard Freer, "Preclusion and the Denial of Class Certification: Avoiding the 'Death by a Thousand Cuts,'" *Iowa Law Review Bulletin* (2014)**

Emory University Law Professor Richard Freer discusses suggestions by other legal scholars that the way to address the problem posed by putative class members bringing subsequent class actions as class representatives after a court has denied class certification as to other representatives is to bar the class lawyer—the *de facto* real party in interest—from bringing a second certification motion. Freer (i)

examines "the asymmetry between the requirement that one may not be bound without having had a 'day in court,' on the one hand, and preclusion doctrine, on the other"; (ii) argues that non-party putative class members can be bound under the preclusion doctrine because "they are in privity with the class representative, so long as the court expressly found that the class representative was adequate under rule 23(a)(4)"; and (iii) contends that issue preclusion is problematic due principally to "the requirement that multiple cases present the same 'issue.'" He concludes by recommending that the rules advisory committee consider adopting a preclusion rule applicable to class counsel to avoid serial litigation of class certification, a matter that the courts have failed to address in a consistent way.

**Richard Freer, "Four Specific Problems with the New General Jurisdiction," *Nevada Law Journal* (forthcoming 2014-2015)**

Emory University Law Professor Richard Freer explores the ramifications of recent U.S. Supreme Court rulings—*Goodyear Dunlop Tires Operations, S.A. v. Brown* (2011) and *Daimler AG v. Bauman* (2014)—that have imposed an "at home" restriction on general jurisdiction.

According to Freer, these rulings have "upset accepted understanding of activities-based general jurisdiction," and created "four specific problems." They include, in his view, (i) an unnecessary prohibition on general jurisdiction based on sales into a forum, a matter potentially affecting cases alleging Internet contact; (ii) a conclusion about a corporation's principal place of business that "ignores the sorts of contacts that could render a principal place of business analogous to human domicile"; (iii) the marginalization of activities-based general jurisdiction by requiring "exceptional" circumstances, which could affect the ability of U.S. plaintiffs attempting to sue foreign corporations in the United States; and (iv) the rejection of a consideration of fairness factors in deciding general jurisdiction, "an issue neither raised nor briefed in [*Daimler*]."

## LAW BLOG ROUNDUP

### Senate to Federal Courts: Restore Access to Court Records

"Now Senate Judiciary Committee Chairman Patrick Leahy (D-Vt.) has weighed in on the situation and is urging the judiciary to restore online access to the archives." *Washington Post* Reporter Andrea Peterson, blogging about an abrupt and controversial decision in August 2014 to remove the archives for five courts, including four federal courts of appeals, from the PACER system—"a digital warehouse for public court records maintained by the Administrative Office of the U.S. Courts, or the AO." The office defended the action by blaming technical differences between local court archives and the new electronic case file system adopted by the judiciary. Still, according to Leahy, "Wholesale removal of thousands of cases from PACER, particularly from four of our federal courts of appeals, will severely limit access to information not only for legal practitioners, but also for legal scholars, historians,

journalists, and private litigants. . . . Given the potential impact of the AO's recent decision, I urge that the AO take immediate steps to restore access to these documents."

The Switch, September 12, 2014.

## THE FINAL WORD

**Plaintiffs' Bar Challenges Defense Use of Industry "Litigation" Guidelines**

Counsel representing plaintiffs' interests recently weighed in on the Eleventh Circuit Court of Appeals ruling in *Adams v. Laboratory Corp. of America*, which determined that industry guidelines on how plaintiff's experts must review Pap tests in the litigation context could not be applied to assess the reliability of an expert witness's testimony under Federal Rule of Evidence 702 and *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Further details about the *Adams* opinion appear in the **August 14, 2014**, issue of this *Report*. Some called the guidelines part of an "unprecedented attempt to limit access to the courts for women who are injured because of the negligent misreading of Pap smears." Others indicated that the opinion will be helpful in persuading other courts that they should not "defer to professional groups with interest in the outcome of litigation."

Some defense counsel argued that the Eleventh Circuit was wrong to criticize the professional societies that developed the guidelines, which were apparently designed to ensure that member testimony is "fair, reliable and represents the consensus of understanding within their community." The College of American Pathologists (CAP), a group that prepared one of the guidelines on which the trial court based its decision to exclude the plaintiff expert's testimony, reportedly indicated that it was "reviewing its policy" in light of *Adams*.

What particularly disturbed the Eleventh Circuit was that the rules applied only to plaintiffs' experts; a plaintiff's lawyer noted that they had not always been that way, and when drafted in 1998, the CAP rules were to apply to "both plaintiff and defense consultants and experts." In 2000, when the American Society of Cytopathologists adopted its version, the group "dropped the requirement that experts who defend its members should reach their opinions in an unbiased or nonprejudicial manner."

Harvard Medical School Associate Professor of Medicine Aaron Kesselheim, who is also an attorney, said that such guidelines can help professional societies self-regulate, but the trial court should not have used them as "a hard and fast exclusionary rule that would take the place of the judge's judgment." He supported the Eleventh Circuit's decision and said it sent a "strong message to societies about guidelines that 'cross the line' and directly seek to position themselves inside litigation processes (which this court saw as beyond the scope of the medical professional societies) as well as to district courts about relying solely on these guidelines as the only way of assessing expertise." See *Bloomberg BNA Product Safety & Liability Reporter™*, September 4, 2014.

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## UPCOMING CONFERENCES AND SEMINARS

ABA, Austin, Texas – October 9, 2014 – Section of Litigation CLE Workshop. Shook, Hardy & Bacon Pharmaceutical & Medical Device Partner Debra Dunne will join a distinguished panel during a session titled "Regulation of Molecular Diagnostics and Potential Litigation Issues." The panel will focus on the U.S. Food & Drug Administration's existing bifurcated regulatory pathway for molecular diagnostic tests, including laboratory-developed tests, and draft agency guidance meant to simplify the requisite steps for approval by adopting a risk-based process. The event was organized by the Products Liability Committee's Medical Device and Pharmaceutical Subcommittees.

RILA, Charlotte, North Carolina – October 15-17, 2014 – "Retail Law 2014." Shook, Hardy & Bacon Public Policy Partner Phil Goldberg and Pharmaceutical & Medical Device Litigation Practice Chair Madeleine McDonough will present on "Crisis Communications: PR Pros are from Venus and Lawyers are from Mars." Their presentation will be the first session during the Retail Industry Leaders Association's (RILA's) three-day conference, which is co-sponsored by Shook and open to executives from retail and consumer goods product manufacturing companies.

ABA, Chicago, Illinois – November 5-7, 2014 – "The Women of the Section of Litigation: Leading, Litigating, and Connecting." Shook, Hardy & Bacon Global Product Liability Partner Rebecca Schwartz will participate in a panel discussion during this American Bar Association (ABA) continuing legal education conference. In "Spoliation in Complex Litigation: Lessons Learned," Schwartz will discuss recent spoliation rulings and approaches that companies can take to prevent spoliation issues from arising.


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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.

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