Shook, Hardy & Bacon L.L.P.

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PRODUCT LIABILITY LITIGATION REPORT

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LAW FIRM NEWS

IBA Products Newsletter Addresses Recall Issues

Shook, Hardy & Bacon Global Product Liability Partners Gregory Fowler and Marc Shelley and Associate John Reynolds have published articles appearing in the September 2013 issue of *Product Law and Advertising*, a newsletter of the International Bar Association (IBA) Legal Practice Division.

With a focus on product recalls, the newsletter includes an article titled "The sky is falling! Recall Trends in the United States," co-authored by Fowler and Shelley, and one titled "New EU Regulation to Improve Product Safety and Market Surveillance: Part 1, General discussion of the improvements and key provisions of the EU's reform package" authored by Reynolds.

As the Product Law and Advertising Committee's publications officer, Shelley co-authored a brief introduction to the newsletter, noting that the committee would also address international trends in product recall during IBA's annual conference scheduled for October 6-11, 2013, in Boston. Fowler serves as committee senior vice-chair.

CASE NOTES

Seventh Circuit Says Adequate Support-Stand Warning May Not Preclude Design-Defect Liability

The Seventh Circuit Court of Appeals has determined that adequate instructions and warnings on the use of a motor-vehicle support stand do not amount to a complete defense to a defective-design claim under Indiana law. *Weigle v. SPX Corp., Moore v. SPX Corp.*, Nos. 12-3024, -3025 (7th Cir., decided September 6, 2013).

The plaintiffs, experienced truck mechanics, had allegedly been injured when the defendant's support stand became unstable as they worked underneath a semi-truck trailer supported by two of the stands. Plaintiff Scott Weigle did not read the safety instructions for use of the support stand and did not use a locking pin that was part of the device. Plaintiff John Moore did not check to see that the locking pin was in place before joining Weigle beneath the truck. A federal district court granted

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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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the manufacturer's motion for summary judgment, finding that the written and pictorial instructions warning users to insert a locking pin in the stand before using it as support were adequate and thus that the manufacturer could not be held liable for a design defect.

The Seventh Circuit agreed that the warning was adequate and affirmed the motion for summary judgment on this claim. The court reversed as to design defect, however, finding that a reasonable fact finder could conclude, on the basis of the plaintiffs' designated evidence, that the defendant's support stands were in an unreasonably dangerous defective condition. The evidence showed that no other support stand in the industry was unstable when used without a locking pin in the lowest extended position, which was how Weigle had used the defendant's stand. The evidence also showed that, in the opinion of some experts, the stand's design did not comport with an industry standard and that neither the designer nor the company considered alternative designs, conducted field studies to determine whether the support stand was being used without the pin or tested the warnings' effectiveness. The designer himself "admitted that it was foreseeable that a user might operate the support stand without the pin, which is why the instruction that the pin should always be used was included." The plaintiffs' expert indicated that he was able to fix the alleged defect for about $10.

The court determined that while the failure to read and heed the adequate warnings could be taken into account in allocating fault, the current version of Indiana's product liability law "furnishes no basis for SPX's adequate-warnings defense, and that defense is inconsistent with the standard of care required of product designers." The court remanded the case for further proceedings.

Federal Magistrates Act Allows Judges to Approve Class Settlement Without Class Member Consent

A divided Eleventh Circuit Court of Appeals panel has determined, like the Third and Seventh Circuits, that the consent of absent class members to a magistrate judge's jurisdiction under the Federal Magistrates Act is unnecessary for the judge to exercise subject-matter jurisdiction and enter a final judgment approving a class-action settlement. ***Day v. Persels & Assocs., LLC,*** **No. 12-11887 (11th Cir., decided September 10, 2013)**. The issue arose in the context of a dispute over whether certain companies and law firms providing credit-counseling services had violated Florida consumer-protection law for failing to disburse payments to the creditors of the named plaintiff and putative class members.

The named plaintiff and defendants consented, under 28 U.S.C. § 636(c), to have a magistrate judge conduct all the proceedings and enter a final judgment. While the case was originally brought on behalf of affected debtors in Florida, it was expanded for purposes of settlement to all persons in the United States "who had entered agreements for legal advice concerning debt with the legal service defendants," amounting

to some "125,000 absent plaintiffs." According to the court, "The agreement provided no monetary relief to the absent plaintiffs, but released any claims that an absent plaintiff had against the legal services defendants."

Settlement notice was provided to more than 98 percent of class members and the attorneys general of every state except Washington where a similar class action is pending. More than 300 class members opted out, and five class members and the attorneys general of five states objected to the agreement. The agreement was revised in response to the objections, and the magistrate conducted a fairness hearing during which just one of seven defendants demonstrated that it was unable to pay a meaningful award. The magistrate took the lack of monetary recovery into account in approving the settlement as fair, certified the class and awarded class counsel $300,000 and the named plaintiff $5,000.

On appeal, the objectors challenged the magistrate's subject-matter jurisdiction and argued that he abused his discretion in finding that all seven defendants would be financially unable to satisfy a judgment without evidence introduced as to the financial position of six of them. Two panel members determined that absent class members are not parties under 28 U.S.C. § 636 and thus their consent was not required for the magistrate to enter a binding judgment settling their claims. They remanded the case, however, finding that the magistrate judge "abused his discretion when he found that the legal service defendants were financially unable to satisfy a significant judgment."

Two panel members determined that absent class members are not parties under 28 U.S.C. § 636 and thus their consent was not required for the magistrate to enter a binding judgment settling their claims.

The concurring and dissenting judge would have ruled that the term "party" in the Federal Magistrates Act includes absent class members, explaining that the three options identified by the majority as a means for these litigants to exercise their rights—opting out, intervening as parties or collaterally attacking the decision to proceed before a magistrate judge on the ground of potential significant intra-class conflict—"are illusory if the unnamed class members are not aware of their right to an Article III judge." The class notice did not apparently inform them of this right. This jurist also applied *Standard Fire Insurance Co. v. Knowles*, 133 S. Ct. 1345 (2013), to support the argument that named class representatives cannot bind putative unnamed class members before certification.

Posner Warns District Courts That Small Remedy Does Not Bar Class Certification

In an opinion authored by Judge Richard Posner, the Seventh Circuit Court of Appeals has reversed a district court order decertifying a class in a case involving compliance with a federal law, since amended, that required automatic teller machine (ATM) owners to notify users by sticker and on-screen information that a fee is charged when they use the ATM. ***Hughes v. Kore of Ind. Enter., Inc.*, No. 13-8018 (7th Cir., decided September 10, 2013)**.

The case involved ATMs in two Indianapolis bars "said to be popular with college students." A putative class claimed that the owner violated the law's sticker requirement, which is no longer part of the law. The parties stipulated to some 2,800 ATM transactions during the class period and total damages of $10,000—or 1 percent of the defendant's net worth—which would provide a recovery of no more than the $3 transaction fee per class member.

The district court decertified the class on the grounds that (i) class members would be better off bringing individual suits, because under the statute, an individual can recover at least $100 and up to $1,000; and (ii) the requirement of class-member notice could not be satisfied without issuing subpoenas to every bank involved in the transactions, given that ATMs do not store users' names but assign digital identification numbers to the transactions identifying each user's bank.

Asserting that individual actions were unlikely to be filed due to the reluctance of attorneys to represent someone seeking $100 in damages, Judge Posner noted that these small claims are best pursued as class actions. Still, acknowledging that most class claimants would not submit proof of a claim to recover damages that are so small, the judge suggested that the best resolution in such cases would be a *cy pres* payment to a charity with a mission relating in some way to the interest of the class. In this regard, he said, "In a class action the reasons for a remedy modeled on cy pres is to prevent the defendant from walking away from the litigation scot-free because of the infeasibility of distributing the proceeds of the settlement to the class members." As to class notice, the court found that the publication notice proposed by the parties—in the bars, on a Website and in the principal Indianapolis newspaper—would be seen by some class members.

The court decided to reach the "deeper question," that is, "whether a class action should be permitted when the stakes, both individual and aggregate in a class action are so small—so likely to be swamped by the expense of litigation—as they are in this case. But we don't think smallness should be a bar." According to the court, the class action device and the law have a deterrent as well as a compensatory objective. "[A] judgment would remind [the defendant] to take greater care in the future to comply with federal law, however irksome compliance may seem." Remanding the matter for further proceedings, the court said, "A time-saving alternative might be a class action with the stated purpose, at the outset of the suit, of a collective award to a specific charity. We are not aware of such a case, but mention the possibility of it for future reference."

According to the court, the class action device and the law have a deterrent as well as a compensatory objective.

Third Circuit Rules Jurisdiction Lacking to Review Order in Aircraft Accident Suit

The Third Circuit Court of Appeals has determined that it lacks jurisdiction to consider an appeal from a federal district court order denying reconsideration of an order remanding a matter to state court. [***Agostini v. Piper Aircraft Corp.,*** **No. 12-2098 (3d Cir., decided September 5, 2013)**]. The issue arose in a case brought by the personal representatives for the estates of individuals killed in an airplane crash.

The defendants removed the action to federal court, but the district court granted the plaintiffs' motion to remand on finding that one of the defendants, a Pennsylvania citizen, was not diverse from all the plaintiffs. The defendants moved for reconsideration, arguing that the court based its ruling on "unsubstantiated argument, unauthenticated documents and facts outside the record that had not been established by affidavit or testimony." The court denied the motion.

According to the appeals court, 28 U.S.C. § 1447(d) clearly bars review of a remand order. The defendants argued, however, that "a remand order is distinct from a motion to reconsider a remand order" and that the rule does not bar appellate court review of the latter. They argued that the motion to reconsider a remand order is a "collateral issue" over which the court retains jurisdiction. The court disagreed that such a motion "cannot affect" the progress of a case which has been returned to state court, saying "reversal of the District Court's reconsideration order would necessarily affect the District Court's decision to remand the case to state court." Thus, according to the court, "the very purpose of this appeal is to subvert the remand order by convincing this Court that diversity jurisdiction does, indeed, exist."

Still, even though it found its own jurisdiction lacking, the Third Circuit determined that the district court had jurisdiction to consider the motion to reconsider because the "jurisdiction-transferring" event of its remand order—that is, "the mailing of a certified copy of the remand order to state court"— had not yet occurred when the motion was filed. The court denied the plaintiffs' request for attorney's fees "for responding to what they claim is a baseless appeal," because the court had not previously "conclusively settled" the question presented. The court dismissed the appeal.

Parties Settle Infant Sling Death Suit for $8 Million

With trial scheduled to begin on September 16, 2013, the parties to a lawsuit alleging that a defectively designed infant carrier caused the death of a 7-1/2-week old baby boy have reportedly settled the claims for $8 million. *Medley v. Infantino, LLC*, No. 2010-00103 (Philadelphia C.P. Ct., Pa., settled September 4, 2013). The plaintiff had alleged that "the unsafe design of the Infantino SlingRider created a potentially lethal impairment of an infant's ability to breathe" and that the company, after recalling the product in 2010, admitted that it posed a "risk of suffocation" when used with infants younger than four months. The product had reportedly been associated with three other deaths. The mother in this case had purchased the carriers in 2008 to use with her newborn twins. *See The Legal Intelligencer*, September 4, 2013.

ALL THINGS LEGISLATIVE AND REGULATORY

CPSC Commissioners Approve Proposed Rule on Staff Work with SDOs

The Consumer Product Safety Commission (CPSC) has reportedly approved for publication a proposed rule that would allow agency staff to hold leadership positions

and exercise voting rights in voluntary standards development organizations (SDOs). Permission to engage in such activity would be given on a case-by-case basis, although how a staff member votes would not require preapproval. The move apparently follows a Government Accountability Office (GAO) report recommending that CPSC review regulatory restrictions on staff participation in SDOs. GAO had suggested that allowing greater participation could strengthen voluntary standards without compromising CPSC independence. Once published in the *Federal Register*, the proposed rule will be available for public comment for 30 days. *See Bloomberg BNA Product Safety & Liability Reporter*, September 16, 2013.

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NNCO and European Commission to Hold Joint Nanotechnology Workshop

The National Nanotechnology Coordination Office (NNCO) and European Commission (EC) will **conduct** a December 2-3, 2013, joint workshop in Arlington, Virginia, to bring together the U.S.-EU Communities of Research (CORs) to "publicize progress towards COR goals and objectives, clarify and communicate future plans, share best practices, and identify areas of cross-community collaboration." NNCO and EC also plan to host CORs meetings on environmental, health and safety issues related to nanomaterials between this notice's publication date and September 30, 2014.

The CORs, "a platform for scientists to develop a shared repertoire of protocols and methods to overcome research gaps and barriers and to address environmental, health, and safety questions about nanomaterials," were proposed at the first U.S.-EU workshop on "Bridging NanoEHS Research Efforts" in March 2011. The following CORs were launched in 2012: (i) Exposure through the Life Cycle, with Material Characterization; (ii) Ecotoxicity Testing and Predictive Models, with Material Characterization; (iii) Predictive Modeling for Human Health, with Material Characterization; (iv) Databases and Ontologies; (v) Risk Assessment; and (vi) Risk Management and Control. They directly address a goal of the 2011 National Nanotechnology Initiative Strategic Plan—"Develop tools and procedures for … international outreach and engagement to assist stakeholders in developing best practices for communicating and managing risks." *See Federal Register,* September 16, 2013.

NHTSA Seeks Public Comment About Crash Data Collection Burdens

The National Highway Traffic Safety Administration (NHTSA) has **requested** public comments on the burdens of collecting information used to support the establishment and enforcement of motor-vehicle safety regulations to reduce the severity of injury and property damage caused by automobile accidents. The request relates to the extension of a currently approved method of information collection that allows the agency to use National Automotive Sampling System (NASS) Crashworthiness Data System (CDS) data to investigate high-severity motor-vehicle crashes in the United States. The agency estimates that nearly 9,500 passenger motor-vehicle operators will spend more than 5,500 hours annually providing interview data to investigators.

According to NHTSA, when a crash has been selected for investigation, "researchers locate, visit, measure, and photograph the crash scene; locate, inspect, and photograph vehicles; conduct a telephone or personal interview with the involved individuals or surrogate; and obtain and record injury information received from various medical data sources. NASS CDS data are used to describe and analyze circumstances, mechanisms, and consequences of high severity motor vehicle crashes in the United States. The collection of interview data aids in this effort." Comments will be accepted until November 15, 2013. *See Federal Register*, September 16, 2013.

NHTSA Issues Final Rule on Ejection Prevention in Vehicles

The National Highway Traffic Safety Administration (NHTSA) has **issued** a final rule in response to petitions for reconsideration of Federal Motor Vehicle Safety Standard No. 226, "Ejection Mitigation," established in 2011 to reduce complete and partial ejections of vehicle occupants through side windows in crashes, particularly rollovers. In its statement denying the petitions, NHTSA noted that the petitioners generally took issue with (i) technical engineering aspects of the rule, including compliance testing; and (ii) policy issues related to implementation of the standard, such as lead time. Although NHTSA made a few "minor" changes in response to the petitions, the agency reported that the petitioners did not make a strong enough case to warrant the requested changes.

The new rule, effective October 9, 2013, requires automobile manufacturers to enhance "side curtain air bags to make them larger to cover more of the window opening, more robust to remain inflated longer, and more advanced to deploy in side impacts and in rollovers." The rule also requires that curtains be made "not only to cushion but also to be sufficiently strong to reduce the likelihood that an occupant will be fully or partially ejected through a side window." *See Federal Register,* September 9, 2013.

LEGAL LITERATURE REVIEW

Anne Bloom, "The Radiating Effects of Torts," *DePaul Law Review*, 2013

University of Pacific, McGeorge School of Law Professor Anne Bloom explores the broader social effects of tort cases in this article, which was inspired by Marc Galanter's 1983 article "The Radiating Effects of Courts." Bloom contends that tort law "influences social norms and practices in ways other than deterrence" and that "focusing more closely on these radiating effects may help us to uncover the ways in which tort law plays a role in shaping how we perceive the world and our place in it." Bloom suggests that tort law can influence cultural values and public agendas, shift political power and enforce and construct social hierarchies.

Reginald Sheehan, et al., "Winners and Losers in Appellate Court Outcomes: A Comparative Perspective," APSA Annual Meeting Paper, 2013

Presented during the annual meeting of the American Political Science Association (APHA), this paper analyzes data from the appellate courts in six countries and compares them to findings from similar research in the United States. According to the authors, "The overall picture derived from these six countries is that businesses on average are less successful than individuals. Perhaps more importantly, the relative chances of success of individuals versus businesses var[y] substantially across nations and across issues. This is in contrast to most studies of courts in the U.S. in which businesses consistently win against individuals." Acknowledging that additional research is needed to understand why these variations occur, they suggest that "[l]itigant resources may not be the best explanation for the variation among the parties but rather the relationship between the governments and the courts could be an important factor."

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LAW BLOG ROUNDUP

Conversion Disorder, Toxic Tort and Facebook

"Can mass hysteria now spread even faster because of Facebook? Great writing, interesting hypothesis." Science writer and blogger Kyle Hill, linking to a September 11, 2013, article in *The Atlantic* that suggests Facebook and social media could have contributed to the comeback of mass hysteria episodes in the United States. According to author Laura Dimon, "It starts with conversion disorder, when psychological stressors, such as trauma or anxiety, manifest in physical symptoms. The conversion disorder becomes 'contagious' due to a phenomenon called mass psychogenic illness, historically known as 'mass hysteria,' in which exposure to cases of conversion disorder cause other people—who unconsciously believe they've been exposed to the same harmful toxin—to experience the same symptoms." New Zealand sociologist Robert Bartholomew, who has studied mass hysteria for 20 years, suggests that social media could be playing a role in its resurgence.

Scientific American Blogs, September 15, 2013.

EPA About Face on Chemical Safety Rules Raises Questions

"Despite the Obama administration's stated objective of increasing federal government transparency and the EPA's [Environmental Protection Agency's] stated intent to improve public access to chemical risk information, the lack of OIRA [Office of Information and Regulatory Affairs] action on EPA's rule to limit the use of confidential business information to improve public and worker access to critical health and safety information on chemicals undercuts the administration's commitment to improving transparency in government." Center for Effective Government Director of

Regulatory Policy Ronald White, blogging about EPA's withdrawal of chemical safety rules that had languished in the Office of Management and Budget's OIRA.

Center for Effective Government Blog, September 10, 2013.

THE FINAL WORD

Litigation Finance Faces Rocky Road in the U.S.

The Wall Street Journal recently addressed the growing practice of litigation-finance firms advancing funds for parties to pursue their disputes in court in exchange for percentages of jury awards or settlements. Jennifer Smith's September 15, 2013, article opens by observing, "Investing in high-stakes litigation isn't for the faint of heart." She discusses two lawsuits that cost their investors when the U.K. and U.S. courts dismissed the funder-backed cases. The U.S. case apparently involved an investment firm that has since closed its doors. According to Smith, at least five litigation-finance companies in the United States, United Kingdom and Australia have $100 million or more under management. With some investors controlling large investment portfolios, some losses will not apparently have a great impact, Smith observes. She also reports critics' claims that this practice could generate frivolous litigation and allow outside investors to exert control over legal decisions, resulting in an increase in overall costs.

UPCOMING CONFERENCES AND SEMINARS

ACI, New York, NY – October 7-9, 2013 – "5th Annual Forum on: Sunshine Act Compliance & Aggregate Spend Reporting, HCP Reporting Risk Mitigation and Compliance Strategies for Biopharmaceutical and Medical Device Manufacturers." Shook, Hardy & Bacon Government Enforcement & Compliance Partner Carol Poindexter will join a distinguished faculty to discuss "Mastering the Challenges of Identifying and Tracking Research and Pre-clinical Related Payments." ■

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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).