Shook, Hardy & Bacon L.L.P.

SEPTEMBER 30, 2010

PRODUCT LIABILITY LITIGATION REPORT

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FTC CHARGES JUICE MAKER WITH DECEPTIVE ADVERTISING AFTER JUICE MAKER CHARGES FTC WITH EXCEEDING AUTHORITY IN REGULATING HEALTH-RELATED CLAIMS

Less than two weeks after POM Wonderful LLC filed a complaint against the Federal Trade Commission (FTC) alleging that new requirements imposed on food producers making health-related claims exceeded the agency's authority, FTC filed a complaint charging the pomegranate juice maker with "making false and unsubstantiated claims that their products will prevent or treat heart disease, prostate cancer, and erectile dysfunction." ***In re: POM Wonderful LLC,* No. 9344 (F.T.C., filed September 24, 2010)**. According to FTC, POM Wonderful's scientific studies either did not show the benefits claimed for the product or were not sufficiently rigorous.

As part of this administrative action against the company, FTC also reached an **agreement** with a former POM Wonderful executive in which he will provide the agency with documents relating to the purported product misrepresentations and refrain from making any additional misrepresentations in the future. Mark Dreher has also apparently agreed to cooperate with FTC in connection with the litigation against POM Wonderful. The agreement is subject to public comment until October 27, 2010.

POM Wonderful filed its complaint for declaratory relief in a D.C. federal court alleging that FTC (i) exceeded its authority in requiring Food and Drug Administration (FDA) pre-approval of health-related claims on food products, that is, those claims stating that a product treats, mitigates or prevents disease, and substantiation of non-disease-related claims with two "well-controlled" clinical studies; (ii) violated advertisers' First and Fifth Amendment rights by requiring compliance with these new standards; and (iii) failed to comply with notice-and-comment rulemaking procedures in establishing the standards. *POM Wonderful LLC v. FTC*, No. 1:10-cv- 01539 (U.S. Dist. Ct., D.C., filed September 13, 2010).

According to the complaint, FTC has advised POM Wonderful that it must comply with standards recently announced in consent orders against other companies and now apparently applicable to the food and dietary supplement industry as a whole. POM Wonderful contends that these standards apply "regardless of whether or not the [advertising] claims are true or supported by competent, reliable scientific evidence." Calling the standards a significant departure from FTC's prior regulation of "deceptive" speech or advertising only, the plaintiff alleges that FTC has exceeded its statutory authority and is "encroaching upon the exclusive authority reserved for the FDA."

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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POM Wonderful also alleges that it has spent "tens of millions of dollars in funding independent research and in establishing a research program to better understand and promote the nutritional qualities and health benefits of pomegranates. The new FTC rules essentially bar POM from discussing or disclosing the results of its research and the benefits of its products," and thus, the agency has violated its free speech rights. The plaintiff characterizes this agency action as a prior restraint on truthful speech. The plaintiff seeks declarations that (i) FTC's new requirements are invalid, (ii) the agency exceeded its statutory jurisdiction, (iii) requiring FDA pre-approval violates First and Fifth Amendment rights, and (iv) FTC failed to comply with rulemaking procedures and has acted arbitrarily, capriciously and contrary to law. The company also seeks an award of costs.

MARYLAND HIGH COURT UPHOLDS NON-ECONOMIC DAMAGES LIMIT

The Maryland Court of Appeals has determined that a statutory cap on non-economic damages does not violate a plaintiff's constitutional rights. ***DRD Pool Serv., Inc. v. Freed*, No. 104-2009 (Md., decided September 24, 2010)**. The issue arose in a case alleging negligent pool maintenance in the drowning death of a 5-year-old boy. A jury awarded the child's parents more than $4 million, which was reduced to about $1 million under a damages cap in effect in the state since 1986 and applicable to non-economic damages in wrongful death cases since 1994. The parents challenged the cap's constitutionality on appeal, claiming that it violated their right to a jury trial.

The court had previously upheld the cap and determined that *stare decisis* principles constrained it from overruling prior case law except on the narrowest grounds. According to the court, the cap does not affect the right to a jury trial "because plaintiffs will still have a jury determine the facts and assess liability." The General Assembly has the authority in Maryland to "modify common law rights and remedies" and "[s]uch changes will invariably favor one party to the disadvantage of another in litigation," stated the court. Still, the court found that this result did not create "a classification," requiring heightened scrutiny, between affected parties. Using a rational basis standard to assess the statute's constitutionality, the court found nothing had changed in the 17 years since it last upheld the law, and the underlying rationale and "the Cap itself have become embedded in the bedrock of Maryland law." Opining that the cap "continues to serve a legitimate government purpose, the court affirmed a lower court's decision to deny the parents' motion to amend or alter the judgment.

Shook, Hardy & Bacon Public Policy attorneys **Mark Behrens**, **Philip Goldberg** and **Cary Silverman** filed an *amicus* brief in the matter on behalf of a number of business-related interests, in support of the defendant's position that the cap should be upheld. Those *amici* included the Maryland Chamber of Commerce, Chamber of Commerce of the United States of America, American Tort Reform Association, American Trucking Associations, American Chemistry Council, and National Association of Mutual Insurance Companies.

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FEDERAL COURT IMPOSES SANCTIONS FOR FAILURE TO PRESERVE ELECTRONICALLY STORED EVIDENCE

A federal magistrate judge in Maryland has recommended the entry of a default judgment against a defendant that failed to preserve or intentionally destroyed evidence in violation of court orders and has further ordered the incarceration of defendant's president "unless and until he pays to Plaintiff the attorney's fees and costs that will be awarded to Plaintiff as the prevailing party." *Victor Stanley, Inc. v. Creative Pipe, Inc.*, No. 06-2662 (U.S. Dist. Ct., D. Md., decided September 9, 2010). The magistrate was inclined to refer the case to a U.S. attorney for criminal prosecution so that a fine could be imposed to reimburse the government for the hundreds of hours of court time the case has consumed, but did not do so given its four-year history and the availability of "appropriately severe sanctions as a form of civil contempt."

The case involved alleged copyright and patent violations. The plaintiff claimed that someone at the defendant's company downloaded design drawings and specifications from the plaintiff's Website and that those drawings were used to compete with the plaintiff. According to the magistrate, defendant's president Mark Pappas embarked on a zealous attempt to prevent the discovery of electronically stored information (ESI) discovery against him, repeatedly deleted countless ESI, had confederates assist him in these efforts, and flouted court preservation and production orders. Because plaintiff was able to document the destruction and "ascertain the relevance of many deleted files," the magistrate referred to the matter as "the case of the 'gang that couldn't spoliate straight.'" The magistrate's lengthy discussion of the events leading to the recommendation and order includes details tending to show what he characterized as the willful, bad faith and intentional nature of Pappas's actions.

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The magistrate also explains at some length why lesser sanctions would be inappropriate and why he recommended dismissing the plaintiff's copyright claim only. According to the magistrate, the plaintiff had not made the requisite showing that the destroyed evidence would be relevant to proving its unfair competition, false advertising and patent violations claims.

INFANT FORMULA RECALL FOLLOWED BY CLASS ACTION COMPLAINT

A Louisiana attorney has filed a putative class action against the company that makes Similac® infant formula and a retailer, alleging that they deceptively promoted the product as safe for infant consumption while it was believed to contain "insect pieces and larvae," which "may cause diarrhea, gastrointestinal discomfort, and other serious health problems." *Brandner v. Abbott Labs., Inc.*, No. 10-03242 (U.S. Dist. Ct., E.D. La., filed

September 23, 2010). Plaintiff Kathleen Brandner brings the action on behalf of her minor son and a nationwide class of consumers, alleging negligence, strict liability, intentional and negligent misrepresentation, breach of express and implied warranties, and unjust enrichment. She seeks class certification, declaratory relief, injunctive relief, refunds, damages, punitive damages, special damages, attorney's fees, and costs.

According to the complaint, the damages exceed $5 million and should include the cost of medical monitoring. While the plaintiff does not indicate whether her son became ill after consuming the formula, she asserts, in addition to monetary injury, "other forms of injury and/or damage and/or mental anguish and/or physical pain and suffering." The defendant manufacturer issued a product recall the day before the lawsuit was filed, and the Food and Drug Administration (FDA) has posted a **list** of affected products. According to FDA, no immediate risk was posed by the potentially contaminated infant formula, although "there is a possibility that infants who consume formula containing the beetles or their larvae could experience symptoms of gastrointestinal discomfort and refusal to eat as a result of small insect parts irritating the GI tract." *See FDA Press Release*, September 22, 2010.

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CLASS ACTION FILED AGAINST SOAP MANUFACTURER FOR FALSE ADVERTISING

An Illinois man has filed a putative class action against the maker of an antibacterial hand soap contending that the product is no better than regular soap at killing germs but is deceptively advertised as superior to other soap products and sold at a premium price. *Walls v. The Dial Corp.*, No. 10-00734 (U.S. Dist. Ct., S.D. Ill., filed September 23, 2010). According to the complaint, the antibacterial ingredient in Dial Complete Foaming Antibacterial Hand Wash® is triclosan, which "was developed as a surgical scrub for medical professionals" but has been added to many consumer products.

Citing Food and Drug Administration, Environmental Protection Agency and congressional concerns about the increasing use of triclosan, the plaintiff notes that it is registered as a pesticide and purportedly poses human health and environmental risks. Seeking to certify a statewide class, the plaintiff cites extensive advertising for the product, reliance on that advertising and independent scientific research indicating that "soaps containing added ingredients such as tricolsan in liquid soap and triclocarbon in bar soap do not show a benefit above and beyond plain soap in the consumer environment."

The complaint alleges violations of the Illinois Consumer Fraud and Deceptive Practices Act, breach of express warranty and unjust enrichment. The plaintiff seeks injunctive relief to stop the defendant from marketing the product "as having benefits

that is does not have," and to require a public information campaign and corrective advertising; disgorgement and restitution; *cy pres* recovery "where necessary and as applicable"; compensatory and other damages; attorney's fees; and costs.

NEW YORK TRIAL JUDGE ORDERS ACCESS TO PRIVATE FACEBOOK® AND MYSPACE® POSTINGS

In a personal injury lawsuit involving an allegedly defective desk chair, a Suffolk County, New York, trial court has reportedly ordered the plaintiff to give the defendant manufacturer authorization to access the private postings on her social networking sites. *Romano v. Steelcase, Inc.*, No. 2006-2333 (Suffolk County S. Ct., filing date n/a). Plaintiff Kathleen Romano has apparently alleged that she fell off the chair and herniated several discs, effectively confining her to her house and bed. According to a news source, the defendant has countered that the public portions of her Facebook® and MySpace® profiles include pictures revealing that she is pursuing an active lifestyle "and can travel and apparently engages in many other physical activities inconsistent with her claims in this litigation."

Romano argued that the defendant's request for discovery relating to the private sections of her social media sites amounted to a "blatant attempt by defendant to intimidate and harass" her and would give access to wholly irrelevant and extremely private information. The court disagreed, noting, "Plaintiffs who place their physical condition in controversy, may not shield disclosure material which is necessary to the defense of the action." The court also observed that the popular social networks warn users that their profiles are public forums and that they post content at their "own risk." He reportedly wrote, "Thus, when Plaintiff created her Facebook and MySpace accounts, she consented to the fact that her personal information would be shared with others, notwithstanding her privacy settings. Indeed, that is the very nature and purpose of these social networking sites or they would cease to exist." Romano is considering filing an appeal. *See Law.com*, September 24, 2010.

ALL THINGS LEGISLATIVE AND REGULATORY

New CPSC Office to Help Small Businesses Comply with CPSIA

The Consumer Product Safety Commission (CPSC) has decided to launch a **new office** to help manufacturers, retailers, small businesses, consumers, and foreign governments comply with Consumer Product Safety Improvement Act mandates. When operational, the Office of Education, Global Outreach, and Small Business Ombudsman will (i) provide "quality assurance in the manufacturing process to enhance manufacturer compliance with relevant standards"; (ii) ensure "that recall information is distributed 'in a timely manner' and that retailers are informed about how to respond in a timely manner to CPSC-issued safety alerts"; (iii) act "as a liaison between the agency and small businesses to offer guidance specifically for small-batch manufacturers on compliance with applicable requirements"; and (iv) work "with foreign

regulators to help them develop effective product surveillance strategies, product testing methods, and voluntary and mandatory product safety standards."

"We realize that many manufacturers may not know where to turn for information on our regulations or might experience difficulty accessing the information they need to fully address safety in the manufacturing process," CPSC Chair Inez Tenenbaum was quoted as saying at the September 23, 2010, launch. "I believe that by establishing an office dedicated to addressing the questions and concerns of the regulated community, CPSC can facilitate the transfer of knowledge across industries. This, I believe, will ultimately create safer products and better educated manufacturers." *See Product Safety & Liability Reporter*, September 27, 2010.

SBA Report Claims Small Businesses Bear Largest Regulatory Burden

The U.S. Small Business Administration's (SBA's) Office of Advocacy has issued a new **report** consistent with its previous studies concluding that small businesses still face a disproportionate burden of federal regulatory costs compared to larger firms. "The Impact of Regulatory Costs on Small Firms" details regulatory costs for five major U.S. economic sectors: manufacturing, wholesale and retail trade, services, health care, and "other" sectors not included in the previous four categories.

Among other matters, the report includes data about economic regulation, which are those rules affecting how businesses operate, that is, "what products and services they produce, how and where they produce them, and how products and services are priced and marketed to consumers." The total burden on business of economic regulations increased $63 billion between 2004 and 2008, according to the report, and small companies with fewer than 20 employees spent in total almost as much complying with them as firms with more than 500 employees. The report also noted that compliance with environmental regulations on a per employee basis costs small firms 364 percent more than large firms, and tax compliance costs 206 percent more.

SBA Chief Counsel for Advocacy Winslow Sargeant said in a statement that the report "shows that on a per employee basis it costs small firms $2,830 more than larger firms to comply with government regulations. That is a 36 percent difference and that is an unfair burden to place on American small business." Findings show that the disproportionate impact is "particularly stark" for the manufacturing sector and that the "other" category shows a high level of disproportion between small and large firms. The report states that small manufacturers face more than double the compliance cost per employee than medium- and large-sized firms. *See SBA News Release,* September 21, 2010.

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LEGAL LITERATURE REVIEW

Brian Fitzpatrick, "Do Class Action Lawyers Make Too Little," *University of Pennsylvania Law Review*, 2010

Vanderbilt University Law School Assistant Professor Brian Fitzpatrick concludes that, particularly where the stakes are small, plaintiffs' lawyers should be awarded 100 percent of any class judgments. According to Fitzpatrick's research, "judges are awarding class action lawyers some $2.5 billion in fees from the 300 or so class actions settled every year in federal court." Because the settlements on which the fees were based amounted to about $16 billion annually, "in the aggregate, class action lawyers appear to be taking only 15% of all the money they recover for class members in federal court." Fitzpatrick contends that judges applying a "highly indeterminate" multifactor test to award lawyers a percentage of the recovery "appear more or less to pluck percentages out of thin air or to replicate the percentages plucked out of thin air in previous awards." He argues that to "maximize social welfare" and deter defendants from causing harm, "we should not be so concerned about compensating class members in small-stakes class actions and, instead, should be concerned only with incentivizing class action lawyers to bring as many cost-justified actions as possible."

"Federal Courts, Practice and Procedure: Shady Grove," *Notre Dame Law Review* (forthcoming 2011)

The upcoming annual federal court review published by the *Notre Dame Law Review* will explore the U.S. Supreme Court's ruling in *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*, discussed in the **April 15, 2010, issue** of this *Report*. Draft articles on the topic by law school professors, including Richard Nagareda, Adam Steinman and Catherine Struve, are available online and will focus on various aspects of the decision, including the differing approaches taken by Justice Antonin Scalia and retired Justice John Paul Stevens, whose concurrence was needed by the majority. One of the issues the Court addressed is whether federal or state law will be applied in a case before a federal court under the court's jurisdiction over disputes between parties from different states (diversity jurisdiction). In *Shady Grove*, the 5-4 majority held that a state law barring certain claims from eligibility for class certification is procedural and thus, will not be applied in a federal court with diversity jurisdiction over the claims.

LAW BLOG ROUNDUP

Judicial Elections May Give Rise to Future Recusal Motions

"West Virginia Supreme Court of Appeals Justice Menis Ketchum today reversed course and decided to recuse himself in a pending case on damage caps in malpractice cases, an issue on which he had taken a stand during his election campaign." *National Law Journal* U.S. Supreme Court correspondent Tony Mauro,

blogging about Ketchum's about-face on removing himself from a case directly raising an issue about which he apparently said in 2008, when campaigning for a seat on the bench, "I will not vote to overturn it, I will not vote to change it. I will not vote to modify it." While Ketchum reportedly said he continued to believe "there is absolutely no legal basis for my disqualification … it appears to me that the lawyers who moved to disqualify me are attempting to create a 'firestorm' by assaulting the integrity and impartiality of West Virginia's Supreme Court."

The BLT: The Blog of Legal Times, September 27, 2010.

Standing, or Who Can File the Lawsuit, Is the New Hot Topic?

"[C]onsider this column a standing alert: recent developments of potentially great consequence are pushing the question of standing to the forefront in a way that promises to make it one of the hot legal topics of the coming months or even years. Litigation over health care and stem cell research is scrambling the usual playlist. Conservative federal judges, who typically take a constricted view of eligibility to bring a federal lawsuit, are suddenly throwing the courthouse doors wide open." U.S. Supreme Court commentator Linda Greenhouse, discussing recent cases that challenge traditional positions on standing, an issue often viewed as "dry and technical," often of interest to "courthouse geeks" only. Greenhouse continues, "Personally, I can hardly wait to watch Chief Justice John G. Roberts Jr. and his allies, for whom raising the barriers to standing is a core part of their agenda, figure out how to respond when one of the new issues reaches the Supreme Court."

NYTimes.com, Opinionator Blog, September 23, 2010.

THE FINAL WORD

Judges Offer Differing Opinions on Declining Federal Civil Jury Trials

Two federal judges have reportedly provided differing **views** on why the percentage of federal civil cases tried before a jury has dropped from 11.5 percent in 1962 to 1.2 percent in 2009. Participating in a recent Federal Bar Association program titled "The Future of the Civil Jury Trial in Federal Court," Judge William Young of the District of Massachusetts claimed that federal judges are partly responsible while Judge D. Brock Hornby of the District of Maine attributed the decline to external factors.

Young was quoted as saying that he advocated court system changes to encourage judges to spend more time on the bench by (i) "setting firm trial dates," (ii) "rejecting requests for continuances," (iii) "publishing judges' time on the bench by district," and (iv) "getting judges to conduct trials or hearings for other judges in busier districts." "We should manage our cases to get them to trial," he said.

Hornby's assessment, which focused on changes in lawyers' and clients' attitudes, included the following reasons for the declining civil trial numbers: (i) "lawyers have learned to measure which cases will be profitable"; (ii) "clients are far more

sophisticated about how they use lawyers"; (iii) "companies are more skilled in risk management, including litigation, than they were many years ago"; (iv) "many causes of action and the bases for liability have matured, so litigants can more easily settle sexual harassment or asbestos cases, for example"; (v) "Congress hasn't recently passed new laws creating liability for actions, such as the Americans with Disabilities Act of 1990"; (vi) "more lawyers and law firms use alternative dispute resolution and more contracts contain clauses requiring it"; (vii) "lawsuits are extremely expensive, partially due to electronic discovery"; (viii) "news and entertainment portray juries as irrational, unpredictable and out of control"; and (ix) "disputes are increasingly international and more amenable to international arbitration."

"We are there to respond. We have to serve litigants and their lawyers in a way that meets their needs. As federal judges, we don't have a roving mandate to go out and bring cases in and compel people to go to trial."

Hornby asserted that judges ultimately need to respond to societal and legal forces regarding use of the court system. "Disputes come to us," he said. "We are there to respond. We have to serve litigants and their lawyers in a way that meets their needs. As federal judges, we don't have a roving mandate to go out and bring cases in and compel people to go to trial." *See The National Law Journal*, September 20, 2010.

UPCOMING CONFERENCES AND SEMINARS

International Bar Assocation, Vancouver, British Columbia – October 3-8, 2010 – "Annual Conference." Shook, Hardy & Bacon Global Product Liability Partner Greg Fowler will serve as a session chair at the IBA's Annual Conference. An officer of the IBA Product Law and Advertising Committee, Fowler will moderate a panel titled "Legal trends and developments in consumer product warranties and indemnities," focusing on both legislative reform and product claims in Canada, the United States, Latin America, and the Asia-Pacific region. ■

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ABOUT SHB

Shook, Hardy & Bacon is widely recognized as a premier litigation firm in the United States and abroad. For more than a century, the firm has defended clients in some of the most substantial national and international product liability and mass tort litigations.

Shook attorneys have unparalleled experience in organizing defense strategies, developing defense themes and trying high-profile cases. The firm is enormously proud of its track record for achieving favorable results for clients under the most contentious circumstances in both federal and state courts.

The firm's clients include many large multinational companies in the tobacco, pharmaceutical, medical device, automotive, chemical, food and beverage, oil and gas, telecommunications, agricultural, and retail industries.

With 93 percent of our more than 500 lawyers focused on litigation, Shook has the highest concentration of litigation attorneys among those firms listed on the *AmLaw* ***100,*** *The American Lawyer's* list of the largest firms in the United States (by revenue).