Shook, Hardy & Bacon L.L.P.®

NOVEMBER 8, 2012

PRODUCT LIABILITY LITIGATION REPORT

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LAW FIRM NEWS

Schwartz & Silverman Publish Article on DOL Preemption Reversal

Shook, Hardy & Bacon Public Policy Attorneys **Victor Schwartz** and **Cary Silverman** have co-authored an article in the November 5, 2012, issue of *Bloomberg BNA Product Safety & Liability Reporter*. Titled "Preemption: Department of Labor Reversal and Ruling By Washington Supreme Court Could Impact Respirator Availability," the article discusses a change in the government's position on whether federal regulation of respirators preempts state law-based product-defect claims and a state court ruling expanding the liability of respirator manufacturers for injury allegedly caused by products they did not make.

According to Schwartz and Silverman, the Department of Labor, at the plaintiffs' bar urging, issued an opinion letter to state that federally certified respirators could be found defective in state-court proceedings. They explain why this new view of preemption comports neither with statutory provisions nor case law and does not represent "a reasoned policy change." They contend that it does not merit deference. In light of a recent Washington Supreme Court decision allowing a plaintiff with mesothelioma to pursue respirator manufacturers for failing to warn him of the dangers of the asbestos to which he was exposed while cleaning the respirators, the authors contend that manufacturers have little incentive to produce and sell these safety products in the United States. They suggest that courts could avoid the preemption issue altogether by applying a common-law compliance-with-standards defense under the *Restatement (Third) of Torts: Products Liability*.

Chambers UK Recognizes Firm's London-Based Global Product Liability Practice

Legal directory *Chambers UK: A Client's Guide to the UK Legal Profession* has praised Shook, Hardy & Bacon's London-based Global Product Liability Practice for performing "above its weight in a range of sectors," including the global food, automotive, pharmaceutical, tobacco, and technology industries. SHB's London Managing Partner **Simon Castley** received individual acclaim as "a very good lawyer in command of his subject, who understands the science not just the law." Also receiving *Chambers UK* recognition was Health and Safety Practice Partner **Alison Newstead** who was listed as a "key individual."

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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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Shook Associate Explores Product Liability Risk in Counterfeiting Context

Shook, Hardy & Bacon Global Product Liability Associate **John Reynolds** has authored an **article** titled "Counterfeit goods and product liability" published in the November 2012 issue of *The In-House Lawyer*. Reynolds suggests that more than loss of revenue and profits may be at stake for manufacturers whose products, such as pharmaceuticals, electronics and spare parts, are copied by counterfeiters. A consumer injured by a counterfeit product may sue the brand manufacturer and embroil it in costly litigation requiring the company to prove that it did not produce a close imitation. Reynolds advises in-house counsel to register IP rights, urge design teams to consider how to make their products "harder to replicate," include sanctions in contracts with distributors that cross-contaminate the supply of genuine goods with counterfeit goods, and identify and pursue counterfeiters legally.

The article concludes, "Where product liability claims are incorrectly filed against the manufacturer, it will be necessary to prove that the products are imitations and a robust anti-counterfeiting strategy will play a vital role in reducing risk and defending any claims which arise."

CASE NOTES

Defense Interests Urge SCOTUS to Rein in Jurisdictional Threshold Workarounds Under CAFA

In a case that could affect whether limits on the exercise of original federal jurisdiction will continue to be applied when putative class actions are removed to federal court under the Class Action Fairness Act (CAFA), *amicus* briefing is complete and the matter is scheduled for argument before the U.S. Supreme Court on January 7, 2013. *Standard Fire Ins. Co. v. Knowles*, No. 11-1450 (U.S., cert. granted August 31, 2012).

The issue before the Court, as stated by the **petitioner**, is whether a named plaintiff may bind absent putative class members and thus defeat a defendant's right of removal under CAFA by stipulating to class-wide damages less than the $5 million threshold for federal jurisdiction, where the defendant establishes that the actual amount in controversy exceeds $5 million. In *Smith v. Bayer*, the Court held that an "uncertified class action cannot bind proposed class members," and the petitioner argues that under this principle a plaintiff lacks authority to stipulate to a reduction in the claims of class members. Here, the district court remanded a breach-of-contract suit to state court relying on the putative class representative's stipulation that he would not seek damages in excess of $5 million, concluding that he had "shown to a legal certainty that the aggregate damages claimed on behalf of the putative class shall in good faith not exceed the … jurisdictional limitation of $5,000,000." The Eighth Circuit denied a petition for interlocutory review.

Online legal commentators have been discussing the merits of the *amicus* **brief** filed on behalf of the National Association of Manufacturers (NAM) which argues that the wrong question is before the court. According to NAM, the parties and district court erroneously "assume that the scope of a federal court's removal jurisdiction over a class-action suit is no broader than its original jurisdiction over similar suits." NAM claims that CAFA "expressly allows class-action defendants to remove various suits to federal court even if the plaintiffs could not have filed those same suits in federal court initially." In its view, CAFA loosens "the requirements for federal courts to exercise jurisdiction over class actions" and "the statutory architecture shows how CAFA expands federal jurisdiction over class actions."

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The American Lawyer's senior writer Alison Frankel observes that the question on which certiorari was granted is "important, since class action lawyers in certain jurisdictions (most notably in the 8th Circuit) have used such stipulations to stay in state court, where they've been able to force defendants into settlements of more than $5 million in litigation before plaintiff-friendly judges." But she suggests that if the Court decides to consider NAM's perspective and adopts its position, then defendants would have the right "to remove every class action from state court as long as diversity jurisdiction exists … [and] class action lawyers would have no route to state court unless they were suing corporations headquartered in the same state as the class." *See Thomson Reuters News & Insight*, October 31, 2012.

On November 5, the Court heard argument in two cases that raise equally significant class-action questions, including if "a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis," (***Comcast Corp. v. Behrend***), and whether shareholders must provide evidence of the materiality of the defendant's alleged misstatements to win certification in a securities class action (***Amgen, Inc. v. Connecticut Retirement Plans and Trust Funds***).

Fifth Circuit Reverses Certification Ruling; Opt-In Classes Not Allowed

The Fifth Circuit Court of Appeals has reversed a class certification ruling because the putative class members, which are governmental entities, may not join the class without undertaking certain steps to obtain representation by private counsel and thus, in effect, opt into the class. ***Ackal v. Centennial Beauregard Cellular L.L.C.*, No. 12-30084 (5th Cir., decided October 26, 2012)**. The issue arose in a case alleging that cellular phone companies overcharge their customers by rounding up partial-minute telephone calls to the next full minute. Filed in 2001 in state court, the case made its way to federal court and now involves a putative class of governmental entities that contracted with the defendants for cellular telephone service.

The court first discussed case law and advisory committee notes to Federal Rule of Civil Procedure 23 to support its holding that Rule 23 does not authorize an "opt in" class. Then the court addressed the limited circumstances under which most of the governmental entities certified as class members by the lower court are able to be represented by private counsel "as prescribed by this class action." Louisiana Revised Statute section 42:263 requires local governing bodies to demonstrate "real necessity" for private representation as reflected "by a resolution thereof stating fully the reasons for the action and the compensation to be paid." That resolution then requires the attorney general's approval and publication in an official journal.

The plaintiffs argued that these requirements were simply procedural and could be addressed after class certification. The court disagreed. The law does not, according to the court, suggest "that private representation of entities subject to the statute may be undertaken *while* the entities pursue satisfaction of the statute's requirements." In fact, the court observed, "the default position of each class member is that it is *not* in the class until it successfully completes a series of actions required by law for it to participate in the suit. Requiring such affirmative acts from putative class members before they may actually participate in a Rule 23 action is contrary to the express provisions of Rule 23(c)(2)(B)."

Insufficient Evidence of Lost Profits Shown in Law Firm's Dispute with eDiscovery Vendor

A Texas appeals court has determined that a law firm failed to substantiate its claim for damages in a breach of contract counterclaim against a vendor hired to provide litigation support services involving electronic discovery. *A-Delta Overnight Legal Reproduction Servs., Corp. v. David W. Elrod, PLLC*, No. 05-11-00708-CV (Tex. App., 5th Dist., Dallas, decided October 31, 2012). According to the court, one of the firm's attorneys testified that the 65 hours required to resolve the plaintiff/vendor's alleged breach was lost revenue to the law firm. She testified that this was time she "could not spend on – on other cases and files." Her billing rate was $325, and the trial court awarded the firm $20,000 in lost profits.

Reversing, the court found "not more than a scintilla of evidence that [the law firm] suffered reasonably certain business losses resulting from [the plaintiff/vendor's] breach." The attorney did not show that she billed less that year because of the breach or "that but for the breach she would have billed more." She also failed to indicate what particular business she would have worked on had she not been "dealing with" the vendor's alleged breach. The court further found that no effort had been made to establish what expenses would have been attributable to the attorney's billable hours. In this regard the court stated, "testimony that the firm netted a profit in 2009 (and in the years before and the year after) does not constitute proof that every hour [the attorney] might have billed had she not been dealing with [the] breach would have been net profit. Finally, there was no evidence presented that [the law firm] lost any specific business or any business opportunity because of the breach."

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Putative Class Suit Against Cosmetics Maker Follows FDA Warning Letter

Less than three weeks after the Food and Drug Administration (FDA) issued a warning letter advising Avon Products that marketing claims for some of its Anew® beauty products violate the Food, Drug, and Cosmetic Act, a California resident filed a putative class action against the company claiming that class members did not get the benefit of their bargain in purchasing the products. *Trujillo v. Avon Prods., Inc.*, No. CV12-09084 (U.S. Dist. Ct., C.D. Cal., filed October 23, 2012). Additional details about FDA's letter appear in the October 25, 2012, **issue** of this *Report*.

The complaint calls the company's marketing claims "incredible," but alleges that a nationwide class and statewide subclass of consumers were misled by the statements, stating "Avon used aggressive marketing to mislead consumers into believing that the Avon Anti-Aging Products were bottled at the fountain of youth. Indeed, Avon preys upon consumers who fear the effects of aging and believe there are products that can make their skin and features youthful again, and halt or turn back the inevitable hands of time." The plaintiff refers to the FDA letter and in fact targets most of the products that FDA cited in it.

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As to the putative statewide subclass, the plaintiff alleges violation of the California Consumers Legal Remedies Act and reserves the right to claim damages in addition to injunctive relief under this statute at a later date. She also alleges violations of the California Unfair Business Practices Act and False Advertising Law. On behalf of the putative nationwide class, the plaintiff alleges breach of express warranty, negligent misrepresentation, unjust enrichment, and violation of the New York Deceptive Trade Practices Act. The plaintiff seeks compensatory damages, restitution and disgorgement, declaratory and injunctive relief including corrective advertising, attorney's fees, costs, and interest.

ALL THINGS LEGISLATIVE AND REGULATORY

OECD Launches Global Online Recall Portal

The Organization for Economic Co-operation and Development (OECD) has launched a global online recall portal that gives consumers, businesses and governments quick and easy access to the latest information on products recalled from the market in Australia, Canada, Europe, and the United States. Established on October 19, 2012, the *Global Recalls* **portal** is "the first online tool that contains regularly updated information on consumer product recalls issued by jurisdictions around the world," states OECD. "Now, users can find out about product issues in other jurisdictions presented in their own language."

Designed to promote and improve product safety, the portal will allow consumers to check whether a product they plan to buy in a store or online has been taken off the shelf in another country. Increased trade can make it difficult to ensure that

the products consumers buy are safe, and according to OECD, deaths and injuries worldwide from unsafe products are estimated to cost more than $1 trillion each year. The portal will also help businesses improve tracking of emerging hazards from around the world, allowing them to move quickly to address problems, remove products from sale and step up enforcement.

Speaking at the launch in Brussels during International Product Safety Week, OECD Deputy Secretary General Rintaro Tamaki said, "The past decade has seen a sharp increase in the number of product recalls. With ever more sophisticated and globalised supply chains in international trade, it's more vital than ever that governments co-operate and respond quickly to issues as they arise. The portal will play a key role in facilitating co-operation and information sharing."

"In our global marketplace and interconnected world, information sharing is key," said Inez Tenenbaum, Chair of the U.S. Consumer Product Safety Commission in an OECD **press release**. "Providing consumers in different jurisdictions with access to recall information from another country will empower them and advance the cause of safety." Many governments regularly publish product safety recalls on their own Websites, but the OECD portal offers a single access point and makes the information available in more than 100 languages. Other jurisdictions are encouraged to join the initiative.

"Providing consumers in different jurisdictions with access to recall information from another country will empower them and advance the cause of safety."

OECD provides a forum for governments and other stakeholders to develop and improve policies in a wide range of areas, including consumer product safety. The current work on product safety was initiated in response to concerns that emerged during the 2007 "summer of recalls." Since then, consumer product safety experts from member and non-member countries have been reviewing their product safety regimes and examining ways to enhance information exchanges on problem products and injuries within and across jurisdictions.

Nancy Nord Lambastes CPSC's Regulatory and Enforcement Practices

In an October 24, 2012, speech during the U.S. Chamber Institute for Legal Reform's 13th annual summit, Republican Commissioner Nancy Nord discussed regulatory review, cost-benefit analysis and how little of each she claims is happening at the Consumer Product Safety Commission (CPSC). "If CPSC is at all typical of what is happening at other agencies, then we all need to be concerned," Nord warned attendees.

Nord said that she has repeatedly requested that the agency conduct cost-benefit analysis on proposed regulations only to have that request voted down amidst charges that cost-benefit analysis just prolongs the process and causes "paralysis by analysis." "This means that rules get rushed out, and they may impose burdens without commensurate safety benefits," Nord said. Once CPSC's acting chair, Nord saw her term end in October, but she will continue to serve until she is replaced. She has often been at odds with fellow commissioners and has been outspoken in her criticism, often issuing individual statements opposing CPSC action.

Meanwhile, CPSC "has been pushing out regulations that burden businesses and cut down on consumer choices." In many cases, CPSC is taking actions that put small companies out of business, said Nord, pointing to the ongoing Buckyballs® case that involves magnetic adult desk products. In July, CSPC issued its first stop-sale order in 11 years, saying the magnetic toys "pose a substantial risk of injury to the public," after cases of children misusing the product and injuring themselves arose.

This rare move of filing an administrative complaint on an adult novelty item without reaching a full conclusion about its potential hazards has basically resulted in a mandatory recall of the product and is threatening to put the small, New York-based company out of business, Nord said.

She also noted that CPSC has other tools at its disposal that would have been more effective in the Buckyballs® case, including requiring warnings or changing the packaging.

"We are issuing regulations without having done the necessary work to understand the impact of our actions both on those being regulated and on the public. As a result we have imposed regulatory burdens and caused people to lose their livelihoods without a real payback in terms of safety," Nord said. *See Free Enterprise*, October 25, 2012.

Sherwin-Williams and PPG Settle FTC Charge of Misleading Consumers About Paint

As a result of a Federal Trade Commission (FTC) crackdown on companies that make misleading "green" claims, two of the nation's leading paint companies—Sherwin-Williams Co. and PPG Industries, Inc.—have agreed to stop advertising that some of their paints are free of the potentially harmful chemicals known as volatile organic compounds (VOCs).

According to an agency **press release**, the two companies have agreed to settlements "requiring them to stop making the allegedly deceptive claim that their Dutch Boy Refresh and Pure Performance interior paints, respectively contain 'zero' [VOCs]." As stated in the press release, "while the VOC-claim may be true for the uncolored "base" paints, it is not true for tinted paint, which typically has much higher levels of the compound, and which consumers usually buy."

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The proposed consent orders settling the FTC charges would "prohibit the companies from claiming that their paints contain 'zero VOCs,' unless, after tinting, they have a VOC level of zero grams per liter, or the companies have competent and reliable scientific evidence that the paint contains no more than *trace levels* of VOCs."

Alternately, the companies can advertise that their base paints are VOC free and add a "prominent disclosure that adding tints to the base paint may increase the paint's VOC level, depending on the customer's color choice," FTC said.

The orders would also prohibit the companies from authorizing independent retailers and distributors to advertise their Dutch Boy® and Pure Performance® paints as VOC free, and would require Sherwin-Williams and PPG to remove ads making those claims and place corrective stickers on paint cans with those advertisements.

"Environmental claims, like the VOC-free claims in this case, are very difficult, if not impossible, for consumers to confirm," said David Vladeck, Director of FTC's Bureau of Consumer Protection. "That's why it's so important for the FTC to give clear guidance to marketers, like the Commission's recently revised Green Guides, and to police the market to ensure that consumers actually get what they pay for."

LEGAL LITERATURE REVIEW

Lauren Handel, "Labeling of Genetically Engineered Foods: A Constitutional Analysis of California's Proposition 37," *Culinaria Monograph Series,* November 2012

University of Arkansas School of Law LL.M. Candidate Lauren Handel has considered whether food-labeling provisions, such as those that would have been required under California's Proposition 37 (Prop. 37), which voters soundly defeated this week, are vulnerable to constitutional or preemption challenges. Had it been enacted, Prop. 37 would have required most food companies to label their products with a statement indicating that they contain genetically engineered (GE) ingredients and would have prohibited the use of the term "natural" on processed food products as inherently misleading to consumers. Handel explores the First Amendment standards applied to commercial speech and concludes that the state would not have been able to justify a ban on "natural" claims, and that whether consumers' "right to know" about GE ingredients trumps food companies' commercial speech rights is debatable. She also concludes that Prop. 37's GE-labeling component would likely have been preempted by federal law to the extent it reached meat and poultry product labels.

Cassandra Burke Robertson, "The Right to Appeal, *North Carolina Law Review* (forthcoming)

Case Western Reserve University School of Law Associate Professor Cassandra Burke Robertson argues in this paper that the U.S. Supreme Court should recognize that litigants have a constitutional right to appeal in both civil and criminal cases. Because this right is not explicitly recognized, it is not universally guaranteed and could be jeopardized, she contends, by "the demands of declining state budgets." The author suggests that if appellate remedies, including the correction of legal and factual errors, the development and refinement of legal principles, and increased uniformity and standardization in the application of legal rules, are "removed from the modern procedural framework, the system as a whole would no longer provide adequate due-process protection."

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THE FINAL WORD

Buckyballs® Maker Abandons Fight with CPSC

According to a news source, the company that makes Buckyballs®, a desk toy containing small, high-powered magnets, has decided to stop making the product, evidently caving to pressure from the Consumer Product Safety Commission (CPSC), which issued a notice of proposed rulemaking in September 2012 designed to prohibit the sale of such products due to their purported risks to children who could swallow the magnets. Maxfield and Oberton, which CPSC targeted with an administrative complaint earlier this year, will apparently sell its remaining stock of Buckyballs®. The company states on its Website that it has "sadly decided to stop production of Buckyballs and Buckycubes" due to CPSC's "baseless and relentless legal badgering." Still, the company indicates that it is getting "ready for the next generation of Bucky." *See CNet.com*, October 31, 2012.

UPCOMING CONFERENCES AND SEMINARS

ABA Section of Litigation, Natick, Massachusetts – November 16, 2012 – "Current Issues in Pharmaceutical and Medical Device Litigation." Shook, Hardy & Bacon Pharmaceutical & Medical Device Litigation Practice Partner **Hildy Sastre** will join a distinguished faculty to participate in a panel discussion on "Hot Topics and Recent Developments in Medical Device Regulation and Enforcement."

Georgetown Law, McLean, Virginia – December 6-7, 2012 – "Advanced eDiscovery Institute." Joining a distinguished faculty, Shook, Hardy & Bacon Pharmaceutical and Medical Device Litigation Partner **Madeleine McDonough** will discuss "The Evolving Role of eDiscovery Counsel" during this ninth annual institute. The program will focus on advances in technology as well as new legal precedents requiring practitioners to develop sophisticated eDiscovery approaches for regulatory, civil and criminal proceedings. McDonough's panel will "present a model inventory of the tools, methods, and resources that need to be acquired and used" by eDiscovery counsel, while offering "a methodology for balancing risk management and cost containment in a collaborative team process." ■

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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 470 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).