Shook, Hardy & Bacon L.L.P.

NOVEMBER 20, 2014

PRODUCT LIABILITY LITIGATION REPORT

CONTENTS

FIRM NEWS

Shook, Hardy & Bacon Named to *U.S. News & World Report* "Best Law Firms" List

Shook, Hardy & Bacon has **received** a Tier One ranking from *U.S. News & World Report* in the "Mass Tort Litigation/Class Actions – Defendants" category as part of its "Best Law Firms" 2015 rankings. Shook's Kansas City and Philadelphia offices also received a Tier One ranking in this category. Based on client and lawyer evaluations, peer review and information, such as attorney diversity and pro bono activity, submitted by candidate firms, *U.S. News* annually compiles an overall score for each firm and compares firms regionally and nationally to rank them using a tiered approach. The firm's Kansas City, Miami and San Francisco offices received a Tier One ranking in "Product Liability Litigation – Defendants," and its Houston, Orange County, Philadelphia, and Tampa offices were recognized with a Tier Two ranking in this category.

Chambers UK 2015 Ranks Shook's Global Product Liability Practice

In its 2014 edition, *Chambers UK* has recognized Shook, Hardy & Bacon's Global Product Liability Practice with a national Band 3 rating, finding that the firm's "[i]nternational focus on product liability provides extensive practice area coverage." *Chambers UK* also noted that Shook's London office is integrated into the firm's "[w]ell regarded" and "pre-eminent" Global Product Liability Practice. London Partner **Simon Castley** earned a Band 3 rating as well because he is "known throughout the market for his strong tobacco practice." In addition, Partner **Alison Newstead** earned a Band 4 rating; clients praised her ability to "really help us stay plugged into the regulators' thinking."

Dunne, Williams & Knapp Dorell Address Mobile Medical Apps in FDLI *Update*

Shook, Hardy & Bacon Pharmaceutical & Medical Device Partner **Debra Dunne**, Associate **Wendy Williams** and Staff Attorney **Virginia Knapp Dorell** have **co-authored** an article, "Analyzing Risk in Mobile Medical Apps," appearing in the November/December 2014 Food & Drug Law Institute (FDLI) *Update* magazine. They describe the "complicated regulatory landscape with overlapping agencies eyeing the risks that these new devices could pose to users." And they outline how agencies, such as the Food and Drug Administration, Federal Trade Commission, Office of the National Coordinator for Health Information Technology, and Federal Communications Commission, are approaching app safety, consumer privacy and

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NOVEMBER 20, 2014

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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truth-in-marketing issues. Concluding that "[m]obile medical applications are a new frontier that government agencies are only just beginning to address," they caution developers to gain "a clear understanding" of applicable regulations and agency expectations to successfully navigate any potential risks in bringing these products to market.

CASE NOTES

First Circuit Confirms Jurisdiction over Canadian Company

The First Circuit Court of Appeals has determined that Massachusetts courts have long-arm jurisdiction over a Canadian company "where the parties' contacts were not first-hand and involved no physical presence in Massachusetts, but were by phone, email, and internet over an international border." ***C.W. Downer & Co. v. Bioriginal Food & Sci. Corp.*, No. 14-1327 (1st Cir., decided November 12, 2014**). The issue arose from the alleged breach of a contract between a global investment bank headquartered in Boston and a Saskatchewan-based company that produces dietary supplements.

The contracting parties never met, but the agreement was "negotiated by calls, emails, and teleconferences." The bank agreed to act as the Canadian company's exclusive financial adviser in connection with the latter's potential sale. Communications between the parties occurred remotely over the ensuing three years, but the sale never took place. The following year the bank learned that the company had been sold and requested its transaction fee and a fourth milestone payment under the contract. The Canadian company refused, and the bank sued it for, among other matters, breach of contract and violation of the state's unfair trade practices statute. The Canadian company removed the case to federal court and filed a motion to dismiss on the grounds that the court lacked personal jurisdiction over it, a forum non conveniens dismissal was appropriate in favor of a Saskatchewan court, and the statutory claim should be dismissed for failure to state a claim. The district court granted the motion for lack of jurisdiction, but did not reach the forum non conveniens issue, while denying as moot the motion to dismiss the statutory claim.

Conducting a de novo review, the First Circuit evaluated whether the Canadian company's "suit-related conduct creates the necessary minimum contacts with Massachusetts." It found "powerful" evidence of in-state contacts during the course of dealing. "Bioriginal had an ongoing connection with Massachusetts in the performance under the contract. Downer's claims arise from the alleged breach of that contract. That is enough to establish relatedness." The court also ruled that the company's in-state contacts represented "a purposeful availment of the privilege of conducting activities in the forum state, thereby invoking the benefits and protections of that state's laws and making the defendant's involuntary presence before the state's courts foreseeable."

In this regard, the First Circuit rejected the district court's conclusion that "'interstate communications by phone and mail are insufficient to demonstrate purposeful availment' absent other contacts," and relied on U.S. Supreme Court cases that have "consistently rejected" a physical contact test for personal jurisdiction, recognizing instead the "inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines."

The court further determined that Massachusetts's assertion of jurisdiction is fair and reasonable, observing that the Canadian company made no claim that the "international dimensions of the case" created "unique burdens" for it. According to the court, "[t]he parties have identified few burdens, interests, or inefficiencies that cut strongly in favor of or against jurisdiction." Given that the first two prongs of the inquiry supported the bank, the court ruled that the Canadian company had not met its burden and remanded the matter for further proceedings.

SCOTUS Says Imperfect Statement of Legal Theory Not Ground for Dismissal

In a per curiam ruling, the U.S. Supreme Court (SCOTUS) has summarily reversed the Fifth Circuit's dismissal of claims filed by Mississippi police officers under the Fourteenth Amendment for failure to invoke 42 U.S.C. § 1983 in their complaint. ***Johnson v. City of Shelby, Miss.*, No. 13-1318 (U.S., decided November 10, 2014)**. According to the Court, while the federal pleading rules require plaintiffs to plead facts sufficient to show that their claims have substantive plausibility, nothing in the rules "countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted. . . . In particular, no heightened pleading rule requires plaintiffs seeking damages for violations of constitutional rights to invoke § 1983 expressly in order to state a claim." So ruling, the Court rejected the Fifth Circuit's argument that invoking the statute is "not a mere pleading formality," but rather serves a notice function.

Still, the Court ordered that on remand, the plaintiffs be given the opportunity to amend their pleading to include the statutory citation, which at least one commentator has called a seeming contradiction of the opinion's "core contention . . . that there is no obligation to cite the particular legal authority for a claim," and another referred to as "somewhat puzzling. Why would there be any need to amend the complaint to include something that is not required?" *See Dorf on Law*, November 14, 2014; *Civil Procedure & Federal Courts Blog*, November 17, 2014.

Tenth Circuit Rules Two CAFA Exceptions Inapplicable to Employee Benefits Class Action

The Tenth Circuit Court of Appeals has determined that neither the state-action provision nor the local-controversy exception to the Class Action Fairness Act (CAFA) requires the remand to state court of a putative class action filed by New Mexico state employees against an insurance company, a state agency and a state resident who managed the agency's account with the insurance company. ***Woods v. Std. Ins. Co.*, No. 13-2160 (10th Cir., decided November 10, 2014)**.

CAFA's state-action provision excludes from federal jurisdiction cases in which the primary defendants are states and related entities. The local-controversy exception requires that federal courts decline to exercise jurisdiction where a local defendant's alleged conduct forms a significant basis for the asserted claims and from whom the plaintiffs seek significant relief. The plaintiffs here alleged in state court that they paid for insurance coverage through payroll deductions and premiums under a policy issued by the insurance company defendant, but did not receive the coverage for which they paid or were denied coverage entirely. The defendants, who removed that action to federal court, were the Oregon-based insurance company, the state agency that contracted with the insurance company and administers benefits under the policy, and a New Mexico-based insurance company employee who managed the agency's account and was allegedly responsible for providing account management and customer service to the plaintiffs.

According to the court, under a plain-language reading of CAFA, the state-action provision, which excepts from jurisdiction those class actions in which "the primary defendants are States, State officials, or other governmental entities," shows that Congress intended the provision "to preclude CAFA jurisdiction only when all of the primary defendants are states, state officials, or state entities. If Congress had intended otherwise, it could have expressly stated that federal CAFA jurisdiction shall not apply to any class action in which 'a primary defendant is' a state, state official, or state entity."

As to whether suit against the New Mexico-based insurance company employee was a defendant from whom significant relief was sought by members of the plaintiff class and whose alleged conduct formed a significant basis for the claims asserted, the court determined that her role was not enough, "standing alone, to meet the significant defendant requirement. Instead, Ms. Quintana must also be a real target of the litigation, rather than an isolated role player in the alleged scheme implemented by Standard and the Division." The plaintiffs apparently mentioned her alleged unlawful conduct in just one paragraph of the complaint. "Absent from the complaint is any allegation of conduct by Ms. Quintana illustrating she played a significant role in the Division's and Standard's alleged scheme. . . . Thus, our holistic review of the complaint reveals Plaintiffs' primary focus is the Division's and Standard's creation and implementation of a scheme to accept and retain premiums without providing the paid-for coverage." The plaintiffs also failed to seek significant relief from this defendant.

The court remanded the matter for the court to consider factual disputes as to the amount in controversy, stating that until the matter is resolved it is unable to determine whether the defendants had established jurisdiction in federal court under CAFA.

Personal Injury Suit Claims 3-Year-Old Swallowed Buckyballs® Magnets

The parents of a 3-year-old girl who was allegedly hospitalized after swallowing 37 high-power magnets from a "Buckyballs®" adult desktop toy set have reportedly filed a personal-injury lawsuit against the now-defunct company that made them, as well

as its former general manager Craig Zucker. *Bushnell v. Maxfield & Oberton Holdings, LLC*, No. n/a (Wash. Super. Ct., Clark Cnty., filed October 8, 2014). According to a news source, the parents claim that the child swallowed them because they looked like "shiny candy," and they snapped her intestines together, caused blockage, and put holes in her stomach and intestine. Surgery was allegedly required to remove each magnet. The parents claim that Zucker is the company's alter ego and that he dissolved it to avoid liability for injuries to children.

Earlier this year, Zucker settled claims filed by the U.S. Consumer Product Safety Commission (CPSC), which sought to recover the costs of recalling the products from him in his personal capacity. Information about the dispute's resolution appears in the June 5, 2014, **issue** of this *Report*. The commission has also adopted a rule banning the sale of magnet sets containing magnets that fit within CPSC's small parts cylinder and have a flux index of more than $50kG_2$ mm_2. Details about the rule are discussed in the October 23, 2014, **issue** of this *Report*. *See Courthouse News Service*, October 15, 2014.

ALL THINGS LEGISLATIVE AND REGULATORY

CPSC Proposes Safety Standard for Recreational Off-Highway Vehicles

The U.S. Consumer Product Safety Commission (CPSC) has **issued** a notice of proposed rulemaking to address the potential "unreasonable risk of injury and death associated with recreational off-highway vehicles (ROVs)." According to CPSC, staff is aware of 550 reported ROV-related incidents, including 335 reported fatalities and 506 reported injuries, occurring between January 1, 2003, and April 5, 2013. ROVs are defined as those vehicles with four or more pneumatic tires; bench or bucket seats for two or more occupants; automotive-type controls for steering, throttle and braking; rollover protection structures; seat belts; and other restraints.

The proposed rule would include (i) "lateral stability and vehicle handling requirements that specify a minimum level of rollover resistance for ROVs and require that ROVs exhibit sublimit understeer characteristics"; (ii) "occupant retention requirements that would limit the maximum speed of an ROV to no more than 15 miles per hour (mph), unless the seat belts of both the driver and front passenger, if any, are fastened, and would require ROVs to have a passive means, such as a barrier or structure, to limit further the ejection of a belted occupant in the event of a rollover"; and (iii) "information requirements." Comments are requested by February 2, 2015. *See Federal Register*, November 19, 2014.

Expected Incoming Senate Committee Chair to Seek Reduced CPSC Testing Burdens

Ranking Republican member of the Senate Committee on Commerce, Science, and Transportation John Thune (S.D.), who, when Republicans take control of the U.S. Senate in January 2015, is expected to chair the committee that oversees the U.S. Consumer Product Safety Commission (CPSC) and National Highway Traffic Safety

Administration, will reportedly focus on reducing the burdens on manufacturers purportedly posed by CPSC's third-party testing requirements. During confirmation hearings for current CPSC Chair Elliot Kaye (D) and Commissioner Joseph Mohorovic (R), Thune apparently sought their plans to reduce third-party testing costs.

Among their proposals was the recognition of international toy standards so companies can avoid duplicative third-party testing to comply with international standards and the ASTM F963-11 toy standard, as well as a "de minimis" third-party testing exemption for children's products containing less than 10 mg of a material required to be tested. A senior Republican committee aide reportedly indicated that Thune was interested in the proposals and that, when the senator spoke with Kaye on November 12, he indicated that he looked forward to working with the commission on these burden-reduction plans. *See Bloomberg BNA, Product Safety & Liability Reporter™*, November 13, 2014.

CPSC Responds to Zen Magnets' Motion to Dismiss

The U.S. Consumer Product Safety Commission (CPSC) has **urged** an administrative law judge (ALJ) to deny the motion to dismiss filed by Zen Magnets, LLC in a proceeding that CPSC complaint counsel initiated "to determine whether small, high-powered rare earth magnets sold by Respondent as Zen Magnets and Neoballs (Subject Products) are a 'substantial product hazard' pursuant to CPSA Section 15." According to CPSC's response, the matter is not ripe for review, the ALJ lacks jurisdiction to determine the Commissioners' qualification to act as an appellate body, Zen Magnets has been afforded full due process, and "no prejudgment has occurred." Zen Magnets had argued that due process issues may arise if the ALJ does not rule in its favor and it appeals to the Commission, which acts as an appellate court, contending that four of the five the commissioners have prejudged the issues in the case.

LEGAL LITERATURE REVIEW

Aaron-Andrew Bruhl, "Following Lower-Court Precedent," *The University of Chicago Law Review*, 2014

University of Houston Law Center Associate Professor Aaron-Andrew Bruhl explores the U.S. Supreme Court's inconsistent treatment of lower-court precedent—sometimes ignoring it, other times either rejecting or embracing it—and notes the differences among sitting justices, some of whom "outright" shun it, while others "appear to accord the lower courts a measure of deference." While the Court is certainly not bound by lower court rulings, Bruhl contrasts the way lower courts endeavor to avoid inter-circuit conflict in the overall interest of promoting national uniformity and the equal treatment of similarly situated parties, facilitating the operations of multistate actors and fostering predictability—a model of horizontal coordination—with the high Court's approach of "mostly chart[ing] its own course."

He suggests that "when the lower courts have decisively and for a long time embraced a particular view of the law, particularly on matters of common law and statutory interpretation, and especially when there has been reliance," the case for deference is particularly strong. Where a "settled view" has yet to develop, however, or a case involves constitutional questions of great importance, "there is no reason to think that the lower courts' decisions should have had any authoritative value."

Bruhl believes that the system of horizontal coordination and high Court independence can work fairly well "to maintain systemic stability," but that "[t]rouble can enter the system from either end," for example, where the Supreme Court fails to defer to lower-court consensus despite good reasons to do so and where the Court "unnecessarily disrupt[s] the system by granting certiorari when it should not." At the other end, trouble occurs when lower courts "mistake the Supreme Court's blank slate approach for the approach that *they* should take. When a lower court breaks from its peers for the sake of pursuing a 'better' interpretation—often, these days, in the name of textualism—that can upset the whole system." The author suggests that much can be learned by studying how methodological choices made at different levels of the judicial system do and should differ and how those choices interact.

James Hackney Jr., "Guido Calabresi and the Construction of Contemporary American Legal Theory," *Law & Contemporary Problems*, 2014

Northeastern University School of Law Professor James Hackney Jr. traces the theoretical underpinnings to Guido Calabresi's evolution in thinking about legal theory, particularly concerning tort law and strict liability. He provides context for this evolution by summarizing Calabresi's seminal work *The Costs of Accidents* and outlining the "larger intellectual relief" informing changes in legal traditions that played out during the 20th century. Calabresi, Hackney notes, later sought ways to "navigate the shoals between rights theory, Chicago-school law and economics, and critical legal studies." He ultimately settled into "what some have referred to as the 'new pragmatism,'" which is "reflected in his creative use of economic analysis with realist insights." The article concludes that the most recent work in the law-and-economics field "is a decided trend towards a more behavioral approach, . . . taking into account some of the 'sociological' aspects of economic phenomena. This turn owes much to Guido's original contributions to the field, his subsequent development, and the general trajectory of American legal theory."

LAW BLOG ROUNDUP

Circuit Splits Generate Commentary—Part I

"I have been critical of [Sixth Circuit] Judge [Jeffrey] Sutton for creating a Circuit split on the SSM [single-sex marriage] cases. Specifically, I have been critical of the good judge for giving insufficient weight to the thoughts of his colleagues on the four Courts of Appeal that had previously gone the other way." Senior U.S. District

Court Judge Richard Kopf, blogging about Aaron-Andrew Bruhls' article, discussed elsewhere in this *Report*, which poses the question "If all the Courts of Appeals have gone one way, but they were all wrong (from your perspective), what weight (say predictability) should the Circuit Judge considering the new case give to those previous cases from other Circuits?" Kopf expresses the hope that Judge Sutton "thought hard" about this question.

HerculesandtheUmpire.com, November 15, 2014.

Circuit Splits Generate Commentary—Part II

"Beginning with a simple question—what can one say about the Supreme Court's on-again/off-again relationship with lower court precedent—Bruhl finds a surprisingly rich collection of answers that illuminate much about the institutional federal judiciary." Northwestern Law Professor James Pfander, reviewing Aaron-Andrew Bruhl's article about when and why the U.S. Supreme Court might invoke lower court precedent when deciding the cases it chooses to review, based on a database of decisions from a recent three-year period. Pfander notes, "He finds some evidence that the Court more likely follows the direction indicated in a one-sided circuit split, but the evidence is far from conclusive. Indeed, he finds a number of situations in which the Court came out on the other side of a one-sided split." According to Pfander, "We learn much about the institutional judicial from such a story. Accuracy in strictly legal terms may be a driving force in legal decisions, but it is not the only force."

Courtslaw.Jotwell.com, November 14, 2014.

THE FINAL WORD

Is SCOTUS a Court? Are the Justices Judges?

Eric Segall, who authored *Supreme Myths: Why the Supreme Court Is not a Court and Its Justices are Not Judges*," continues to press his point in the November 14, 2014, issue of *Slate.com*. Citing recent commentary by others, he observes, "I am glad to report that a few of our most prominent scholars, court commentators, and even judges are coming around to my way of thinking about the court." Former *New York Times* U.S. Supreme Court (SCOTUS) correspondent Linda Greenhouse, for example, responded to the Court's decision to hear a statutory challenge that presented an issue over which there is no circuit court of appeals split by stating, "In decades of court-watching, I have struggled—and sometimes it has seemed against all odds—to maintain the belief that the Supreme Court really is a court and not just a collection of politicians in robes. This past week, I've found myself struggling against the impulse to say two words: I surrender." Segall has contended that the Court is composed of "unelected, life-tenured politicians masquerading as judges, making important decisions that affect us all" and calls for reconsidering life tenure, asking the justices "to perform their jobs with much more humility," placing cameras in the courtroom, and instituting "a nomination process in which senators demanded real answers to hard questions."

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PRODUCT LIABILITY LITIGATION REPORT

NOVEMBER 20, 2014

UPCOMING CONFERENCES AND SEMINARS

ACI, Washington, D.C. – January 15-16, 2015 – "15th Annual Advanced Global Legal & Compliance Forum on Cyber Security & Data Privacy." Shook, Hardy & Bacon Data Security & Data Privacy Practice Co-Chair Al Saikali will serve as co-moderator of the opening session, titled "Federal Regulatory, Legislative, and Enforcement Landscape: Changes on the Horizon and Integrating New and Anticipated Initiatives Into Your Privacy and Compliance Program." The session panel includes Federal Trade Commission, Department of Justice and Federal Bureau of Investigation representatives.

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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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2014 GLOBAL PRODUCT LIABILITY LAW FIRM OF THE YEAR WHO'S WHO LEGAL