Shook, Hardy & Bacon L.L.P.

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PRODUCT LIABILITY LITIGATION REPORT

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FIRM NEWS

AmLaw Honors SHB as Product Liability Litigation Department of the Year

The American Lawyer has **named** Shook, Hardy & Bacon its 2012 Product Liability Litigation Department of the Year, marking the third consecutive honor SHB has received in this biennial competition for the nation's 200 largest law firms. The firm was named winner and finalist in the same competition in 2008 and 2010, respectively.

"A deep bench of first-chair trial lawyers has given Shook, Hardy the ability to try multiple product liability cases around the country simultaneously and in a variety of fields, from tobacco to pharmaceuticals," *The American Lawyer* reported in its January 2012 issue. "Given that track record, it's not surprising that Shook has been a regular in the product liability section of the Litigation Department of the Year contest."

The American Lawyer noted that the depth of talent in SHB's product liability practice, paired with a flexible and efficient staffing strategy, allows the firm's lawyers to "try cases wherever they're needed."

"On a single day in October, the firm achieved defense verdicts for client Philip Morris USA Inc. in two separate cases in Florida, while also representing the tobacco company at trial in an Alaska town that is only accessible by boat or plane," *The American Lawyer* reported. "And on the same October day, the firm was preparing for trial in New Jersey for Tyco International Ltd., another longtime client."

"What separated Shook from the pack this year, and helped it take top honors again, was the additional trial load represented by the string of cases in Florida against cigarette manufacturers," *The American Lawyer* added, referencing SHB's lead role in the *Engle*-progeny litigation. "More of those trials—22—have been defended by Shook than any other firm."

Murray Garnick, Associate General Counsel at Altria Group Inc., praised the firm for its results in the litigation. "These cases command a lot of case management attention because there are so many of them, but since we are trying them, they also require trial skills," Garnick said. "Shook has delivered for us on both fronts."

The American Lawyer evaluated firms for its Product Liability Litigation Department of the Year contest based on results achieved from January 1, 2010, through July 31, 2011. In addition to citing SHB's work in the *Engle*-progeny litigation, *The American*

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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Lawyer commended the firm for its successful representation of clients such as Akzo Nobel, Mylan, Inc., Pfizer, Inc., Tyco International, General Dynamics Corp., and Lockheed Martin Corp.

SHB Partner Assumes Sedona Conference® Leadership Position

Shook, Hardy, & Bacon eDiscovery, Data & Document Management Partner **Amor Esteban** has been named by The Sedona Conference® as the new chair of Working Group 6, its think-tank on the legal challenges related to "International Electronic Information Management, Discovery and Disclosure."

According to founder Richard Braman, The Sedona Conference® conducts a Working Group Series "to move the law forward in a reasoned and just way." Each of the Working Groups focuses on a specific area of the law "that may have a dearth of guidance" or is "otherwise at a 'tipping point.'"

Esteban previously served on the Steering Committee of Working Group 6 and as its editor-in-chief, guiding to conclusion the Working Group's most recent publication, "**The Sedona Conference® International Principles on Discovery, Disclosure & Data Protection: Best Practices, Recommendations & Principles for Addressing the Preservation & Discovery of Protected Data in U.S. Litigation.**" Esteban, who is also a member of the board of The Sedona Conference®, was thanked by Ken Withers, Director of Judicial Education for The Sedona Conference®, for his continued leadership helping to produce the *International Principles*.

The *International Principles* endorse a three-pronged approach to cross-border processing and transfer of foreign data for purposes of U.S. litigation, where U.S. discovery rules are often at odds with foreign data protection laws. Esteban and Working Group 6 authored the *International Principles* after years of study and input from data privacy experts, regulators, lawyers, judges, and academicians from around the globe, to provide practical solutions and best practices for dealing with these complications.

Publication of the *International Principles* will be the focus of the Fourth Annual Sedona Conference International Programme on Cross-Border E-Discovery & Data Privacy, to be held June 20-21, 2012, in Toronto.

Amicus Brief Urges Missouri Supreme Court to Uphold Tort Reform Law

Shook, Hardy & Bacon Public Policy Partner **Mark Behrens** and Of Counsel **Cary Silverman** have prepared an ***amicus* brief** filed in the Missouri Supreme Court on behalf of insurance and business interests, asking the court to uphold the statutory upper limit on noneconomic damage awards in medical liability actions.

Filed in *Watts v. Lester E. Cox Medical Centers*, No. SC91867, the December 30, 2011, brief contends that the trial court did not err in upholding the law's validity and notes that such limits "are an important element of a well-functioning health care system." The

brief also argues that the trial court did not err in establishing a payment schedule under § 538.220, RSMO, which is similarly "a valid exercise of legislative authority."

The issues arose after a jury awarded $3.371 million in economic damages and $1.45 million in noneconomic damages for injuries a baby allegedly sustained as a result of medical negligence. Applying the statutory cap, the trial court reduced the noneconomic damages to $350,000 and allowed the defendants to pay the damages award on a periodic basis.

CASE NOTES

Federal Judge Orders Chinese Citizen's Spouse to Produce Documents and Other Discovery

The husband of a woman killed in an airline crash in New York has been ordered to produce additional discoverable information, including materials located in China. *In re: Air Crash Near Clarence Ctr., N.Y. on Feb. 12, 2009*, MDL No. 2085 (U.S. Dist. Ct., W.D.N.Y., decided December 20, 2011). When the accident occurred, the decedent and her husband, both Chinese citizens, had been working for about two years in the United States under non-immigrant work visas, while their child remained, for the most part, in China with the decedent's parents.

Among other matters, the plaintiff was ordered to produce his wife's medical, employment, financial, and education records since 2004, as well as his and his wife's electronic communications since 2004, including "social media accounts, emails, text messages, and instant messages" relating to the question of the decedent's domicile and loss of support claims. The domicile issue was contested and will be dispositive of the law applied in the case. According to the court, that some documents were in China did not make the discovery request unduly burdensome, "particularly because Plaintiff is a Chinese citizen and members of [decedent's] family currently live in China."

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Third Circuit Rejects Rule That Each Class Member Must Have Viable Claim

A divided *en banc* Third Circuit Court of Appeals has upheld an order certifying two nationwide settlement classes, and, so ruling, held that the predominance inquiry for certification of a settlement class under Federal Rule of Civil Procedure 23 does not require uniformity in state law claims or that each class member possess a viable claim or "some colorable legal claim." ***Sullivan v. DB Invs. Inc.*, Nos. 08-2784/2785/2798/2799/2818/2819/2831/2881 (3d Cir., decided December 20, 2011)**.

The matter arose in the context of litigation alleging that De Beers "exploited its market dominance to artificially inflate the prices of rough diamonds" thus causing "reseller and consumer purchasers of diamonds and diamond-infused products to pay an unwarranted premium for such products." The parties agreed to settle their

antitrust and consumer protection claims after De Beers, which contested personal jurisdiction and made no appearance, was subjected to a series of default judgments; a district court certified direct and indirect purchaser settlement classes, while also approving a $295-million settlement.

Rejecting the arguments of a number of objectors that common questions did not predominate over individual ones given vast differences among states' antitrust and consumer protection laws, the district court determined, among other matters, that "at the class certification stage, the Court need not concern itself with whether Plaintiffs can prove their allegations" so long as they "'make a threshold showing that the elements of impact will predominantly involve generalized issues of proof, rather than questions which are particular to each member of the plaintiff class.'"

The lower court emphasized that all class members shared a common jurisdictional question in light of De Beers' refusal to submit to the jurisdiction of U.S. courts and "the potential burden of confirming domestic contacts for purposes of establishing personal jurisdiction." The district court also stressed "the expense, complexity, and imprecision of weighing the relative strengths of different state law claims, the policy interest in an expedient resolution to the disparate claims of the Direct and Indirect Purchasers and De Beers' insistence upon a release of all potential damage claims in all fifty states."

On appeal, a divided Third Circuit panel reversed, focusing on state law differences that meant many class members either had no cause of action or faced varying burdens of proof and suggesting that the lower court's approach would "invite collusive settlements." The case was then re-argued *en banc*.

Vacating the panel's decision, the majority addressed the panel ruling at length to refute its and the dissenting jurists' view that differences among state antitrust, consumer protection and unjust enrichment laws preclude a finding of predominance in that those differences make it impossible for all class members to assert at least one "uniform" claim. According to the majority, "[i]n our view, this requirement would result in a radical departure from what Rule 23 envisions and what our precedent demands, and it founders for many reasons."

The court also rejected a requirement that individual class members must individually state a valid claim for relief to certify a class for settlement purposes. In this regard, the court stated, "The question is not what valid claims can plaintiffs assert; rather, it is simply whether common issues of fact or law predominate. Contrary to what the dissent and objectors principally contend, there is no 'claims' or 'merits' litmus test incorporated into the predominance inquiry beyond what is necessary to determine preliminarily whether certain elements will necessitate individual or common proof. . . . An analysis into the legal viability of asserted claims is properly considered through a motion to dismiss under Rule 12(b) or summary judgment pursuant to Rule 56, not as part of a Rule 23 certification process."

The court also rejected a requirement that individual class members must individually state a valid claim for relief to certify a class for settlement purposes.

The majority articulated "three guideposts" distilled from prior case law on the certification of settlement classes: "that commonality is informed by the defendant's conduct as to all class members and any resulting injuries common to all class members"; "variations in state law do not necessarily defeat predominance"; and "concerns regarding variations in state law largely dissipate when a court is considering the certification of a settlement class."

JPML Consolidates Toning Shoe Lawsuits

The Judicial Panel on Multidistrict Litigation (JPML) has issued an order transferring to the Western District of Kentucky 12 actions filed in nine federal district courts against the company that makes "Shape-Ups" toning shoes. ***In re: Skechers Toning Shoe Prods. Liab. Litig.*, MDL No. 2308 (J.P.M.L., order entered December 19, 2011)**. The plaintiffs allege that the shoes do not provide the benefits the company promises and that the company fails to warn of serious risks associated with their use. According to the court, the actions "involve common questions of fact[, and] centralization will serve the convenience of the parties and witnesses and promote the just and efficient conduct of this litigation." The matters, along with any other tag-along actions, will be returned to the courts from which they originated following consolidated pre-trial proceedings.

MDL Court Denies Class Certification in Missouri BPA Litigation

A multidistrict litigation (MDL) court in Missouri has denied plaintiffs' motions to certify three classes of Missouri consumers or a nationwide class for the resolution of specific common questions pertaining to products claims filed against companies that made baby bottles and toddler's sippy cups containing bisphenol A (BPA). *In re: Bisphenol-A (BPA) Polycarbonate Plastic Prods. Liab. Litig.*, MDL No. 1697 (U.S. Dist. Ct., W.D. Mo., W. Div., order entered December 22, 2011). The court determined that many putative class members lacked standing because they knew the products contained BPA and about the scientific controversy over whether the chemical causes harm, but purchased them anyway. The court also found that many consumers made full use of the products and thus, cannot claim any economic injury.

The court determined that many putative class members lacked standing because they knew the products contained BPA and about the scientific controversy over whether the chemical causes harm, but purchased them anyway.

As to whether common questions predominate over individual ones, the court observed, "the principal common issues under Missouri law for Plaintiffs' claims are the nature and content of any particular Defendants' disclosures and the fact that Defendants' products contained BPA. These common issues do not predominate over the individual issues of fact, which principally consist of whether Plaintiffs purchased the relevant products, the content of the scientific controversy that Plaintiffs allege should have been disclosed and Defendants' awareness of it, and damages."

As to the purportedly undisclosed scientific studies that individual consumers would have deemed material to their purchasing decisions, the court said, "Assuming Plaintiffs can prove that a reasonable consumer would consider a 2006 study showing

BPA's effect on the endocrine systems of Prosobranch snails to be material, that would not be probative of Defendants' liability in 2002. And just because materiality is an objective inquiry does not mean it is to be determined in a vacuum, especially when the undisclosed fact is a scientific debate or controversy. A reasonable consumer may be less likely to consider a scientific study from 1997 significant after that consumer learns that federal agencies over the years—FDA [Food and Drug Administration] in particular—considered that or a similar study, or conducted their own studies, and nevertheless concluded BPA could be safely used to make baby products."

Court Questions Reliability of Cat Waste Sniff Tests, Enjoins TV Litter Ads Claiming Superior Odor Control

A federal court in New York has issued a preliminary injunction ordering Clorox Co. to stop airing TV commercials which claim, on the basis of lab tests, that its cat litter product, containing carbon, outperforms products containing baking soda, which are sold by the plaintiff. *Church & Dwight Co., Inc. v. The Clorox Co.*, No. 11 Civ. 1865 (U.S. Dist. Ct., S.D.N.Y., decided January 4, 2012). The ads began airing in February 2011, after Clorox agreed to stop running previous ads claiming that cats prefer litter boxes with its product to litter boxes filled with plaintiff's product. Apparently the plaintiff proved in lab tests that these ads were literally false.

The new ads claimed that sensory lab tests showed litter with carbon "is more effective at absorbing odors than baking soda." In a lawsuit filed under the Lanham Act, the plaintiff alleged that the new commercial falsely claimed that "cat litter products made with baking soda do not eliminate odors well and that cat litter products made with baking soda are less effective at eliminating odors than Clorox's Fresh Step cat litter." Clorox apparently based its product comparison claims on an in-house test referred to as the "jar test," in which trained sniffers smelled jars with cat feces and urine, some of which were treated with carbon and some of which were treated with baking soda.

The court agreed with the plaintiff that the test could not support Clorox's claims and that the panelists' findings were so uniform as to be suspicious. Discussing the ways that a jar test's unrealistic conditions "say little, if anything, about how carbon performs in cat litter in circumstances highly relevant to a reasonable consumer," the court determined that the "implication of Clorox's commercials is literally false." As to the uniformity issue, the court "agrees with [plaintiff's] expert that it is highly implausible that eleven panelists would stick their noses in jars of excrement and report forty-four independent times that they smelled nothing unpleasant. Accordingly, the Court concludes that the results of the Jar Test are 'not sufficiently reliable to permit one to conclude with reasonable certainty that they established the proposition for which they were cited' in Clorox's commercial."

The court agreed with the plaintiff that the test could not support Clorox's claims and that the panelists' findings were so uniform as to be suspicious.

Because the reference to a baking soda-based cat litter product would evoke the plaintiff's product and because the new commercials referred to cats' intelligence and cleverness much like the old ones which specifically mentioned the plaintiff's products, the court determined that the plaintiff proved a likelihood of irreparable harm if the ads remained on the air.

LEGISLATIVE AND REGULATORY DEVELOPMENTS

CPSC Reopens Comment Period to Consider Exemption from Lead Content Rule

The Consumer Product Safety Commission (CPSC) has **reopened** the comment period for a petitioner who requested an exemption to the agency's lead content rule. Additional information about CPSC's vote to require children's products sold in the United States to adhere to a 100 parts per million (ppm) lead-content limit appears in the **July 28, 2011, issue** of this *Report*.

In September, a manufacturer of "die-cast, ride-on pedal tractors" for children ages 3-10 petitioned the commission for an exemption to the rule because it was "unable to meet consistently the 100 ppm lead content limits, due to alloys used in the aluminum die-cast process." Part of the petition, however, was inadvertently omitted from the public docket. Making the entire petition available for public view, CPSC has reopened the comment period until February 6, 2012. *See Federal Register,* January 5, 2012.

CPSC Plans Rule to Address Gel Fuels, Firepot Safety

The Consumer Product Safety Commission (CPSC) has **issued** an advance notice of proposed rulemaking (ANPR) aimed at improving the safety of gel fuels and firepots. Noting that 76 incidents involving these products have resulted in two deaths and a number of serious injuries between April 3, 2010, and September 1, 2011, CPSC said "it has reason to believe that firepots and gel fuel used together may present an unreasonable risk of injury." Comments are requested by February 27, 2012.

A majority of the accidents occurred when a consumer refueled a firepot that had recently been in use, causing an explosion.

According to the ANPR, firepots are portable, decorative lighting accents designed to be used with alcohol-based gel fuel, which is commonly sold separately. A majority of the accidents occurred when a consumer refueled a firepot that had recently been in use, causing an explosion.

CPSC seeks comments on a variety of issues, including (i) risks associated with these products; (ii) existing standards that could be issued as a proposed regulation; (iii) regulatory alternatives such as a mandatory or voluntary standard, mandatory labeling rule, or ban; and (iv) other possible alternatives that address risks. "The process gives manufacturers a chance to present evidence to show they have set up their own effective industry standards," CPSC notes in a December 19, 2011, press release. *See Federal Register,* December 27, 2011.

Review Board to Discuss Ethics of Research Using Human Subjects

The Environmental Protection Agency (EPA) has **announced** a public meeting of the Human Studies Review Board to discuss scientific and ethical reviews of research using human subjects.

The January 26, 2012, meeting in Arlington, Virginia, may be of "particular interest to persons who conduct or assess human studies, especially studies on substances

regulated by the EPA, or to persons who are, or may be required to conduct testing of chemical substances under the Federal Food, Drug, and Cosmetic Act or the Federal Insecticide, Fungicide, and Rodenticide Act."

Topics to be discussed include (i) "[a] new scenario design and associated protocol from the Agricultural Handler Exposure Task Force describing proposed research to measure dermal and inhalation exposure to workers who mix, load, and apply liquid pesticides with powered handgun equipment" and (ii) the "scientific soundness" of research by the Antimicrobial Exposure Assessment Task Force II and its "appropriateness for use in estimating the exposure of professional janitorial workers who apply liquid antimicrobial pesticide products to indoor surfaces using pressurized aerosol cans." EPA requests comments by January 19. *See Federal Register,* December 27, 2011.

EPA Proposes New-Use Rules for 17 Chemicals Including Nanoscale Compounds

The Environmental Protection Agency (EPA) has **issued** proposed significant new use rules (SNURs) for 17 chemicals, some of which are used to manufacture such products as electronics, batteries, rubber, plastics, inks, and lubricants. Noting that many of the chemicals may pose risks to human health or the environment, EPA's plan would impose recordkeeping requirements and require a 90-day notification by those who intend to manufacture, import or process any of the chemicals for a designated significant new use so that the agency can evaluate the intended use and, if necessary, prohibit or limit the use. EPA requests comments by January 27, 2012.

The SNURs stipulate that manufacturers or users of these chemicals that do not comply with protective measures outlined in consent orders or premanufacture notices would be considered a new use requiring EPA notification. The proposed rule includes 15 substances already determined to present an unreasonable risk of injury to human health or the environment if manufacture, import, processing, distribution in commerce, use, and disposal are uncontrolled. They are subject to "risk-based" consent orders under the Toxic Substances Control Act.

More than a dozen of the 17 chemicals involve nanoscale components; they include "nanotubes" or "fullerene" in their chemical names. EPA's plan identifies toxicity concerns for each chemical or group of chemicals, specific worker-protection equipment or other protections, and recommended health and safety tests. *See Federal Register,* December 28, 2011; *BNA Product Safety & Liability Reporter,* December 30, 2011.

LEGAL LITERATURE REVIEW

William Crampton, Harvey Kaplan & Marc Shelley, "Class Action Developments Overseas," *PLI Product Liability Litigation: Current Law, Strategies and Best Practices,* November 2011

Shook, Hardy & Bacon Global Product Liability Partners **William Crampton** and **Marc Shelley**, and Pharmaceutical & Medical Device Litigation Partner **Harvey Kaplan** have updated Chapter 7, "Class Action Developments Overseas," in the

Practicing Law Institute's treatise *Product Liability Litigation: Current Law, Strategies and Best Practices.* Observing that the class action device is becoming increasingly popular in many countries, the authors eschew providing a comprehensive review of class action laws outside the United States, opting instead to "examine common themes and trends observed in class action law and debates around the world." They highlight developments in the most active jurisdictions and discuss the intersection of new class action rules with product liability claims. The article notes how different countries address the types of lawsuits that may be brought as class actions, which litigants have standing to pursue them, whether the rules follow an opt-in or opt-out model, and how certification procedures are handled.

Mark Cowing, Sarah Croft & Denise Talbert, "E-discovery obligations in US product liability litigation, *The In-House Lawyer*, December 2011/January 2012

In this article, Shook, Hardy & Bacon eDiscovery, Data & Document Management Partners **Mark Cowing** and **Denise Talbert**, and International Litigation & Dispute Resolution Partner **Sarah Croft** provide document management and electronic discovery tips for international manufacturers that may find themselves the target of litigation in the United States. Among other matters, the authors note that significant sanctions can be imposed on those companies failing to comply with preservation obligations and also suggest ways that the costs of producing and reviewing litigation-related documents can be controlled.

LAW BLOG ROUNDUP

Academic Questions Soundness of Third Circuit Decision Upholding Settlement Class Certification

"The federal judiciary has no business overseeing conduct that does not involve a claim upon which relief can be granted. And it is hard to see how a federal court could have evaluated the fairness of a settlement that involved parties with no colorable claim to settle." University of Richmond School of Law Assistant Professor Kevin Walsh, blogging about the Third Circuit's ruling in the De Beers' diamond antitrust litigation.

WalshsLaw.com, December 21, 2011.

THE FINAL WORD

Pilot Project in Southern District of New York Seeks to Improve Complex Case Management

A federal court in New York has reportedly launched an 18-month pilot program involving the application of rules and procedures affecting the management of cases designated as complex from inception to resolution. U.S. District Judge Shira Scheindlin, who was apparently instrumental in the program's development, noted

that the goal is to reduce costs and time by requiring "more 'hands on' management" by the court. The new rules limit the length of some filings, encourage promptness and provide case management checklists, among other matters. *See The Third Branch*, December 2011.

UPCOMING CONFERENCES AND SEMINARS

ABA, Hollywood, Florida – January 19-21, 2012 – "Environmental, Mass Torts and Products Liability Litigation Committees' Joint CLE Seminar. Shook, Hardy & Bacon Public Policy Partner **Mark Behrens** will serve on a panel making a plenary presentation titled "Where to Draw the Line—When Can the Government Hire Private Lawyers to Prosecute Actions?" He will share the podium with, among others, a representative of the Pennsylvania Governor's Office of General Counsel. Designed for in-house and outside counsel, the seminar also features presentations on mass torts, multidistrict litigation and bellwether trials. ■

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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).