Shook, Hardy & Bacon L.L.P.

JANUARY 16, 2014

PRODUCT LIABILITY LITIGATION REPORT

CONTENTS

FIRM NEWS

Silverman Pens Article on Litigation Abuses Under State Consumer Protection Laws

Shook, Hardy & Bacon Pubic Policy Partner **Cary Silverman** has authored an **article** published on January 7, 2014, by *Law360*. Titled "State Consumer Protection Laws Run Rampant Without Reform," the article discusses how the plaintiffs' bar has made use of state consumer protection laws in recent years as "an alternative to product liability and wrongful death claims" and "a tool for implementing a political agenda through the courts."

Silverman contends that the laws, which provide for a private right of action, have led to a significant increase in consumer litigation by allowing no-injury lawsuits and giving plaintiffs' lawyers the opportunity to create new rights to sue, generate lawsuits through cookie-cutter complaints and change public policy in ways unobtainable through the legislative or regulatory process. Noting that the American Tort Reform Association has recommended ways that courts and legislatures can restore the original purpose of these statutes, i.e., "providing an effective remedy to those who are misled in purchasing consumer products and services," Silverman suggests that state legislatures can be expected do so.

Croft Discusses 2013 European Product Liability Litigation Developments

Shook, Hardy & Bacon Global Product Liability Partner **Sarah Croft** has authored an **article** appearing in the February 2014 issue of *The In-House Lawyer*. Titled "Product liability developments in 2013: what they mean for your business," the article analyzes rulings in cases from the United Kingdom, Germany, the Netherlands, and France involving construction equipment, medical devices and breast implants. Croft also considers calls for improving the traceability of medical devices in light of the scandal affecting hundreds of women implanted with defective breast implants, new EU product-safety surveillance reforms and the consequences of product manufacturer bankruptcies for plaintiffs seeking compensation.

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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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CASE NOTES

High Court Rules *Parens Patriae* Actions Not Removable Under CAFA

In a unanimous ruling, the U.S. Supreme Court has determined that a lawsuit filed by a state as the sole plaintiff to recover restitution for the state's citizens is not a "mass action" under the Class Action Fairness Act (CAFA) and thus cannot be removed to federal court. ***Mississippi ex rel. Hood v. AU Optronics Corp.*, No. 12-1036 (U.S., decided January 14, 2014)**. So ruling, the court reversed the Fifth Circuit's decision allowing the case to remain in federal court and remanded with instructions to return the matter to state court. Additional details about the lawsuit appear in the **November 7, 2013, issue** of this *Report*.

The question arose in the context of claims that the defendants "had engaged in price fixing of liquid crystal display (LCD) panels." Writing for the Court, Justice Sonia Sotomayor explained how Congress fashioned CAFA to allow cases of national importance to be considered in federal courts. Here, Mississippi sued companies that make LCDs, alleging that they "had formed an international cartel to restrict competition and raise prices in the LCD market." The state alleged violations of two state statutes and sought injunctive relief and civil penalties under them. "It also sought restitution for its own purchases 'of LCD products and the purchases of its citizens.'"

The defendants removed the case to federal court, arguing that it was removable under CAFA as either a "class action" or "mass action." The district court agreed that the lawsuit was a mass action, because it involved 100 or more persons whose monetary relief claims, raising common questions of law and fact, were proposed to be tried jointly. Still, the court remanded the matter to state court, finding that CAFA's general public exception excluded from the "mass action" definition actions asserted on behalf of the general public under a state statute specifically authorizing the action. The Fifth Circuit reversed, finding the exception inapplicable.

According to the Court, Congress, aware of existing law when it enacted CAFA, deliberately used the term "plaintiffs" twice in the mass action provision and thus did not intend that it include unnamed parties in interest. The Court's greatest concern appeared to be that if the term encompassed unnamed plaintiffs, it would make determining whether the jurisdictional threshold of $75,000 has been met "an administrative nightmare." The term "plaintiff," said the Court, "is among the most commonly understood of legal terms of art: It means a 'party who brings a civil suit in a court of law.' … [I]nterpreting 'plaintiffs' in accordance with its usual meaning—to refer to the actual named parties who bring an action—leads to a straightforward, easy to administer rule under which a court would examine whether the plaintiffs have pleaded in good faith the requisite amount."

SCOTUS Turns Aside Request to Review Cigarette Lighter Burn Ruling

The U.S. Supreme Court (SCOTUS) has denied a petition for review filed by the conservator of a 3-year-old boy seriously injured when a cigarette lighter he was using to loosen a button on his shirt ignited. *Cummins v. BIC USA, Inc.*, No. 13-574 (U.S., *cert. denied*, January 13, 2014). Additional details about the Sixth Circuit's ruling upholding the trial court's evidentiary determinations appear in the **August 22, 2013, issue** of this *Report*. The petitioner had argued that the trial court erred in admitting evidence that the Consumer Product Safety Commission had not investigated, expressed concern about, taken any enforcement action with respect to, or found this cigarette lighter model out of compliance with the 16 C.F.R. § 1210.3(b)(4) deactivation or override requirement. His theory at trial was that the two-piece guard, which the boy's father had removed before the accident, did not comply with this requirement because it was too easily removable. The jury's verdict for the manufacturer will stand.

Eighth Circuit Finds No Error in Jaw Disease Verdict

While the Eighth Circuit Court of Appeals has affirmed a $225,000 jury award to the estate of a woman who developed osteonecrosis of the jaw (ONJ) allegedly as a result of taking two drugs prescribed by her physician, it remanded the matter for re-calculation of the costs awarded because they were associated with depositions taken for use in more than 650 cases consolidated in a multidistrict litigation (MDL). ***Winter v. Novartis Pharms. Corp.*, Nos. 12-3121, -3409 (8th Cir., decided January 9, 2014)**.

The injured woman's physician prescribed one of the drugs before ONJ warnings were included in the package inserts. Because he testified that he did not read package inserts before prescribing drugs, the defendant argued that his failure to do so constituted an intervening, independent and sole proximate cause of the plaintiff's injuries. The court disagreed, finding that the evidence showed other ways that information about the ONJ risk could have reached the physician.

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The court also rejected the defendant's claim that New Jersey's punitive damages law should have been applied to the matter, because it is headquartered there. Although the jury did not award punitive damages, the company claimed that punitive damages evidence, permitted under Missouri law, "impermissibly tainted the jury's consideration of liability and compensatory damages." The court determined that the district court did not err in holding that Missouri had the "most significant relationship" to the punitive damages claim, because the injury occurred in that

state, and "Missouri is where Novartis's sales representatives failed to warn Baldwin's doctor, making it also, at least in part, the state of the conduct causing the injury."

The court agreed with the defendant that the district court erred in awarding litigation-wide costs of more than $88,000 to an individual plaintiff. In this regard, the court stated, "Where litigation costs are incurred in connection with more than one proceeding, the district court should allocate the costs." Here, the plaintiff sought transcription costs for 18 depositions that were used throughout the consolidated MDL proceedings.

Seventh Circuit Declines Request to Keep Settlement Amount Secret in Personal-Injury Suit

In his role as motions judge, Seventh Circuit Court of Appeals Judge Richard Posner has issued an order denying the request of a plaintiff's law firm to maintain under seal documents that disclose settlement amounts and the attorney's costs and fees that a trial court adjusted in approving the settlement of a personal-injury suit involving a minor. ***Appeal of Williams, Bax & Saltzman, P.C.*, No. 13-2423 (7th Cir., decided December 26, 2013)**. The firm filed its motion in the context of its appeal of the judge's fee-award modification. The only reason provided to the motions court for maintaining secrecy as to the settlement amount was that the information was subject to a confidentiality agreement between the parties.

Judge Posner began with the presumption that documents affecting the disposition of federal litigation should be open to public view, because, in the words of Justice Oliver Wendell Holmes, "it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed." He also considered exceptions to the presumption and explored the differences between court-approved settlements and settlements reached without court approval. Here, with a minor involved, the settlement had to be submitted for judicial approval.

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After outlining the competing "upside" and "downside" considerations to disclosing the sizes of settlements, the court concluded that these issues may ultimately be "of little importance." Noting that it was difficult "to imagine what arguments or evidence parties wanting to conceal the amount or other terms of their settlement could present to rebut the presumption of public access to judicial records," Posner said that because the parties had given no reason at all "that concealment of the information would serve some social purpose," he had no reason to grant the request.

Court Tentatively Approves Settlement of False-Ad Suit over Footwear

A federal court in California has given preliminary approval to a $5.3-million settlement in a putative nationwide class action alleging that Fitflop USA falsely advertised its footwear products by claiming they were effective in strengthening, toning, burning calories, or assisting in weight loss; will result in a quantified percentage or amount of muscle toning; and will reduce cellulite or provide relief from heel spurs, chronic back pain, sciatica, osteoarthritis, lower limb edema, or degenerative disc disease. *Arnold v. Fitflop USA, LLC*, No. 11-0973 (U.S. Dist. Ct., S.D. Cal., order entered December 19, 2013). A fairness hearing has been scheduled for April 28, 2014.

Without admitting liability, the company has agreed to create a $5.3-million settlement fund and cease making health benefit representations about its products for five years unless it "possesses and relies upon competent and reliable scientific evidence that substantiates that such representations are true and non-misleading." If found to be fair and reasonable, the settlement fund will be used to pay notice and claim administration expenses, plaintiffs' counsel attorney fees and expenses, and eligible class member claims. Any funds not claimed will be distributed under the *cy pres* doctrine to Consumers Union and Consumer Watchdog.

ALL THINGS LEGISLATIVE AND REGULATORY

Bedside Sleeper Safety Standards Finalized

The U.S. Consumer Product Safety Commission (CPSC) has **adopted** a final rule establishing safety standards for bedside sleepers intended for use with infants 5-months-old and younger. Affected products are often "multi-mode" and convert to play yards and bassinets. Effective on July 15, 2014, the new rule was approved during a January 8 meeting by a unanimous vote. It incorporates by reference voluntary standard ASTM F2906-12, "Standard Consumer Safety Specification for Bedside Sleeper," "with certain changes to provisions in the voluntary standard to strengthen the ASTM standard." The rule requires bedside sleepers to be tested to 16 C.F.R. part 1218—the safety standard for bassinets and cradles. *See Federal Register,* January 15, 2014.

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CPSC Staff Summarizes Data on Nursery Product-Related Injuries and Deaths

The U.S. Consumer Product Safety Commission (CPSC) staff has **issued** a report titled "Injuries and Deaths Associated with Nursery Products Among Children Younger than Age Five." Summarizing emergency department-treated injuries and fatalities from 2012 and comparing them with the immediately preceding five-year period, CPSC staff failed to observe a "statistically significant trend" over 2008-2012.

According to the report, nearly 78,000 children younger than age 5 were treated in 2012 in emergency rooms for injuries "associated with, but not necessarily caused by, nursery products" such as cribs/mattresses, high chairs, infant carriers/car seat carriers, and strollers/carriages. Approximately the same number of injuries have occurred annually since 2008. For the three-year period 2008-2010, 333 fatalities were reported to be associated with nursery products in this age group. "Causes of death included positional asphyxia, strangulation, and drowning, among others. In some instances, the fatalities were attributed to the product; while in other cases, the fatalities resulted from a hazardous environment in or around the product."

Comments Sought on Crib Information Collection Time and Expense Burdens

The U.S. Consumer Product Safety Commission (CPSC) has **requested** comments on the time and cost burdens that it estimates for companies making full-size and non-full-size baby cribs to create and update safety labels, as part of its request that the Office of Management and Budget extend a safety-standard information-collection approval set to expire February 28, 2014. CPSC specifically seeks comments on whether the estimates are accurate, the information collected could be improved and whether the use of information technology could minimize the estimated burdens. Comments are requested by February 24. *See Federal Register*, December 24, 2013.

DOT Seeks OMB Review of Final Proposed Rule on Improving Vehicle Rear Visibility

According to a news source, the U.S. Department of Transportation (DOT) has sent to the Office of Management and Budget (OMB) a proposed final rule that would require automobile and truck manufacturers to improve rear visibility in new vehicles by installing rearview cameras or similar technology. OMB, which gives final approval to new rules after reviewing their costs and benefits, reportedly received the proposed rule on December 25, 2013; the last time a similar rule was submitted for OMB review it languished for 19 months before DOT withdrew it.

A court reportedly ordered DOT to respond to a citizen petition seeking regulatory action in light of legislation directing the agency to adopt a final rule improving rear visibility by February 2011. Filed in September 2013 by auto safety advocates and parents represented by Public Citizen, the petition appears to have spurred the agency to act; it responded just before filing its new rule with OMB. Safety organizations contend that backovers kill nearly 300 people each year and injure an additional 18,000—most are children younger than age 5, senior citizens older than 75 or individuals with disabilities. Automakers claim that earlier versions of the rule would have imposed costly requirements and implementation challenges. *See The Detroit News*, January 2, 2014; *CL&PBlog* and *Law360*, January 3, 2014.

A court reportedly ordered DOT to respond to a citizen petition seeking regulatory action in light of legislation directing the agency to adopt a final rule improving rear visibility by February 2011.

LEGAL LITERATURE REVIEW

David Bernstein, "The Misbegotten Judicial Resistance to the *Daubert* Revolution," *Notre Dame Law Review*, 2013

George Mason University Foundation Professor of Law David Bernstein addresses the efforts of some federal courts to ignore the limitations imposed on the admissibility of expert testimony since Federal Rule of Evidence 702 was amended to reflect the "*Daubert* trilogy of opinions—*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, *General Electric Co. v. Joiner,* and *Kumho Tire Co. v. Carmichael*—each of which tightened the [admissibility] standards." He contends that some, most notably the First Circuit, have done so by "relying on precedents from a bygone era." Bernstein calls on the U.S. Supreme Court to intervene, "not just because lower courts are defying Rule 702, but because Rule 702 is substantively correct."

Nils Jansen, "The Idea of Legal Responsibility," *Oxford Journal of Legal Studies* (forthcoming 2014)

University of Muenster Law Professor Nils Jansen considers in this comparative analysis of tort law how early concepts of restitution, based on the Christian doctrine of penitence, gave rise to natural law theory underlying "a comprehensive system of non-contractual obligations." Following tort law's development in common and civil law systems, Jansen observes that it shifted over time to allow some citizens "to expose others to greater risk or loss than they themselves have to expect," particularly in instances of necessity and dangerous activities. Contending that corrective justice and prior individual rights "are difficult to translate into the inherited conceptual framework of wrongs and fault," Jansen suggests that "strict responsibility"—that is, requiring "citizens to assume responsibility not only for the consequences of their fault, but also for the consequences of actions that non-reciprocally endanger the rights of other citizens"—is "an intellectually coherent concept and may often be appropriate."

LAW BLOG ROUNDUP

What Happens if Autonomous Vehicles Fail?

"Yes, you may cue the creepy music at this point." Thomas Jefferson School of Law Professor Deven Desai, blogging about what could happen when driverless or autonomous vehicles encounter situations beyond their capabilities and vehicle occupants lack the skills or experience to take over when systems fail. Desai suggests that car makers have groups of drone operators at the ready "for outlier problems. If a car fails, a signal is sent. A video game junkie, err [sic] drone expert, takes over to handle the vehicle by remote."

ConcurringOpinions.com, January 8, 2014.

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PRODUCT LIABILITY LITIGATION REPORT

JANUARY 16, 2014

A Wrong Turn in Tort Law?

"[A]s he sees it, tort theory in both the common law and civilian systems took a wrong turn when it (the tort doctrine) became single-mindedly fixed around fault and negligence, leaving trespass and strict liability as either anachronisms or riddles to be resolved through even more clever fault-based explanations." Benjamin N. Cardozo School of Law Professor Anthony Sebok, discussing Professor Nils Jansen's article on legal responsibility, summarized elsewhere in this *Report*. According to Sebok, "Jansen's main rebuttal to the advocates of fault is that they excise so much of tort law (in both the common law and civilian systems) that their accouns fit neither the law nor our moral intuitions."

Jotwell: Torts, January 10, 2014.

THE FINAL WORD

Chief Justice Focuses on Budget in Year-End Report

With references to "Scrooge's ghosts and George Bailey's guardian angel," Chief Justice of the United States John Roberts focused on the budget in his "2013 Year-End Report on the Federal Judiciary." Claiming that the budget "remains the single most important issue facing the courts," Roberts acknowledges the demands of fiscal responsibility. Still, the report reflects on the cost-containment efforts that have been ongoing for nearly a decade in the courts and how little is left to cut in a government branch that has no "discretionary programs" to eliminate or postpone "in response to budget cuts." Roberts defends the Judicial Conference's request for $7.04 billion for the judiciary in fiscal year 2014. Without it, he claims that1,000 court staff will have to be laid off and "greater delays in resolving civil and criminal cases" would ensue. An appendix provides data on the federal courts' caseload. ■

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