Shook, Hardy & Bacon L.L.P.

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PRODUCT LIABILITY LITIGATION REPORT

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FIRM NEWS

California Supreme Court Refuses to Expand Strict Liability in Asbestos Case

Shook, Hardy & Bacon Public Policy Partner **Mark Behrens** filed an *amicus* brief on behalf of a number of business and industry interests to support the dismissal of an asbestos plaintiff's negligence claims against a company that made a product to which asbestos-containing components were added post-sale. On January 12, 2012, the California Supreme Court unanimously agreed with *amici* and the defendants that "a product manufacturer may not be held liable in strict liability or negligence for harm caused by another manufacturer's product unless the defendant's own product contributed substantially to the harm, or the defendant participated substantially in creating a harmful combined use of the products." ***O'Neil v. Crane Co.*, No. S177401 (Cal., decided Jan. 12, 2012**).

Discussing the ruling's implications, Behrens was quoted in a *Daily Journal* article stating, "Wherever the plaintiff may try to export this theory, now they're going to have a challenge in doing so." He noted that the Washington Supreme Court has also rejected expanded liability under these circumstances. Behrens added that he had called on the justices not to feel "compelled to take tort law in an unsound direction simply because you're afraid these people will get nothing." *See Daily Journal*, January 13, 2012.

CASE NOTES

Seventh Circuit Clarifies Class Certification Standards on *Daubert* Challenges to Expert Testimony and Predominance Requirement

In the context of antitrust litigation, the Seventh Circuit Court of Appeals has determined that courts must subject expert testimony critical to a class certification ruling to a *Daubert* analysis if the testimony is challenged and that requiring common answers to common questions imposes a degree of uniformity not demanded by Rule 23(b)(3)'s predominance inquiry. ***Messner v. Northshore Univ. Healthsystem*, No. 10-2514 (7th Cir., decided January 13, 2012)**. The court vacated the lower court's denial of class certification and remanded for further proceedings.

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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The plaintiffs challenged a hospital merger found anticompetitive by the Federal Trade Commission, contending that it violated federal antitrust law and resulted in their paying higher prices for medical care. The district court denied the plaintiffs' motion for class certification, and, on appeal, the plaintiffs asserted that the district court failed to determine if a defense expert's report and opinions were admissible under Federal Rule of Evidence 702 before ruling on their motion and that the court incorrectly applied Rule 23(b)(3)'s predominance inquiry.

Agreeing with the plaintiffs, the Seventh Circuit found that the defense expert's opinions were "critical" to the district court's class certification ruling because those opinions were central to the defendant's opposition to the motion and the "district court obviously relied on [the expert's] reasoning when making its decision, quoting and discussing it many times." According to the court, when expert testimony is critical to class certification, a court must rule definitively on an opponent's *Daubert* motion before granting or denying class certification.

As to the predominance issue, the appeals court found that because the district court "made uniformity of nominal price increases a condition for class certification … the district court asked not only for a showing of common questions, but for a showing of common answers to those questions. Rule 23(b)(3) does not impose such a heavy burden." "In essence," said the court, "it is important not to let a quest for perfect evidence become the enemy of good evidence."

Ninth Circuit Seeks Answer to Product Liability Question from State Court in Contaminated Burger Lawsuit

The Ninth Circuit Court of Appeals has asked the Washington Supreme Court to determine whether the state's Product Liability Act "permits relief for emotional distress damages, in the absence of physical injury to the plaintiff purchaser, caused by being served and touching, but not consuming, a contaminated food product." ***Bylsma v. Burger King Corp.*, No. 10-36125 (9th Cir., order certifying question, January 11, 2012)**.

The plaintiff is a sheriff's deputy who ordered food from a Burger King restaurant drive-thru in Washington while on a break in his marked cruiser. Before consuming his hamburger, Edward Bylsma allegedly discovered, visually and via touch, that a restaurant employee had spit on the food, and later DNA testing purportedly identified the culprit. Bylsma alleges "ongoing emotional trauma from the incident, including vomiting, nausea, food anxiety, and sleeplessness" and has apparently sought mental health treatment. He filed a lawsuit in an Oregon federal court raising claims under Oregon law for product liability, negligence and vicarious liability, and Burger King sought to dismiss the claims. Deciding that Washington law applied to the litigation and that it does not allow recovery of mental distress damages in the absence of physical injury, the district court dismissed the case.

The plaintiff did not challenge the determination that Washington law applied to his claims, but asserted on appeal that it allows recovery for his emotional damages. The

Ninth Circuit found the law uncertain, and, because the answer to this unsettled question "will have far-reaching effects on those involved in the manufacture and sale of products in Washington," decided not to answer the question in the first instance. The root of the uncertainty is a 1993 case in which Washington's high court issued its only reported decision in the matter, ruling that "a physician who prescribes a drug which injures a patient does not have a cause of action to recover from the drug company for his or her own emotional pain and suffering under the [state's product liability law]." As the Ninth Circuit noted, Bylsma's claims are distinguishable because he has a direct claim that does not implicate a third party.

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The Ninth Circuit also explored the state's case law on claims for the negligent infliction of emotional distress (NIED), which played a role in the Washington Supreme Court's 1993 decision, and observed, "the applicability of the limitations in relief established in bystander NIED cases to a direct NIED claim (where the plaintiff was the direct victim of the defendant's alleged negligence) remains unresolved. We do not know whether the Washington Supreme Court would import those limitations into direct NIED claims." The state high court may address the certified question at its discretion but is not required to do so. Until it either denies the request or issues an answer, the case will remain on hold in federal court.

Third Circuit Says Defective Computer Dispute Must Go to Arbitration Despite Unavailable Forum

With one judge dissenting, a Third Circuit Court of Appeals panel has determined that a sales agreement provision requiring the arbitration of product-related disputes in a specific forum was ambiguous and thus not integral to the agreement; accordingly, the court found that the unavailability of the arbitral forum could be remedied under the Federal Arbitration Act with the court appointment of an arbitrator. ***Khan v. Dell Inc.*, No. 10-3655 (3d Cir., decided January 20, 2012)**.

The plaintiff purchased one of the defendant's computers; it allegedly overheated due to design defects that destroyed the computer's motherboard. After the third replacement, the defendant indicated that the warranty had expired and refused to issue a fourth. In June 2009, the plaintiff filed a putative class action alleging violations of New Jersey's consumer fraud statute, breach of various warranties, fraud, negligent misrepresentation, breach of implied covenants, and unjust enrichment.

When the claims were filed, the designated arbitral forum, the National Arbitration Forum (NAF), was barred under a consent judgment with the Minnesota attorney general from arbitrating consumer disputes due to NAF's alleged "deceptive practices that disadvantaged consumers." A federal district court refused the computer manufacturer's motion to compel arbitration, concluding that if the court were to appoint a substitute arbitrator, it "would improperly force the parties to 'submit to an arbitration proceeding to which they have not agreed.'"

Noting that the federal courts have split over whether virtually identical arbitration provisions are ambiguous and thus not integral to the sales agreement, the Third Circuit found that this disagreement bolstered its conclusion that the phrase "SHALL BE RESOLVED EXCLUSIVELY AND FINALLY BY BINDING ARBITRATION ADMINISTERED BY THE NATIONAL ARBITRATION FORUM" was ambiguous. Thus, given the unavailability of the arbitral forum, the court held that section 5 of the Federal Arbitration Act applied and allowed the court to appoint a substitute arbitrator.

The dissenting judge objected that the majority had given "mere lip service" to the U.S. Supreme Court's fundamental principle that arbitration is a matter of contract. This judge would also have found the contract language unambiguous due to its "aesthetic prominence," that is, it appeared in all capital letters "yet [was] surrounded by clauses written in lower case letters." She further suggested that the defendant's selection of NAF as the exclusive forum in its arbitration clauses was not "insignificant" under the circumstances and that the district court did not err in denying substitution at the defendant's behest.

LEGISLATIVE AND REGULATORY DEVELOPMENTS

CPSC to Consider Draft Proposed Rule for Infant Swing Safety Standard

The Consumer Product Safety Commission's (CPSC's) staff has recommended a **draft proposed rule** that would adopt a voluntary industry standard for infant swings, with some changes, as a mandatory federal safety standard. CPSC is scheduled to consider the proposal on February 2, 2012.

According to a staff memo, the agency is aware of 15 fatalities and 2,253 nonfatal incidents that led to 600 injuries related to the use of infant swings from January 1, 2002, through May 18, 2011. "The majority of fatalities involved infants 3 months old and younger, who were left unattended in the infant swing for a significant amount of time (from 5, 6, or 10 hours or as long as all morning and overnight.)" Four of the five "slump-over deaths" reported to CPSC involved positional asphyxia due to an infant's lack of head control, a problem that cannot be addressed with additional restraints, but rather with stronger warnings. Approximately 27 percent of the injuries were attributed to restraint or swing-design issues.

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Defined by ASTM International as "a stationary unit with a frame and powered mechanism that enables an infant to swing in a seated position," infant swings are intended for use by infants from birth until they are able to sit up unassisted. Other types are "cradle swings" for infants lying flat and "travel swings" defined as low-profile, compact swings "having a distance of 6 in. or less between the underside of the seat bottom and support surface (floor) at any point in the seat's range of motion."

The proposed rule's recommended changes to ASTM F 2088-11b (published Nov. 2011) include additional seat deflection and electrical overload requirements, modified dynamic drop test cycles, clarifications of stability testing, altered mobile and toy retention requirements, and other minor requirement clarifications. According to CPSC staff, four consumer-level recalls of infant swings have been completed since 2002; they involved 11 different models, totaling 309,000 products. Staff has estimated that the proposed rule would affect approximately 10 manufacturers, suppliers or importers and would subject all businesses to additional costs associated with third-party testing and certification requirements.

CPSC to Hold Teleconference and Public Meeting on Phthalates, Phthalate Substitutes

The Consumer Product Safety Commission (CPSC) has **announced** a teleconference and seventh public meeting of the Chronic Hazard Advisory Panel (CHAP) on phthalates and phthalate substitutes. Appointed by CPSC in April 2010 to study the potential risks of phthalates and their alternatives on children's health, CHAP will discuss its progress toward completing a final report during a February 1, 2012, teleconference and a February 15-17 public meeting in Bethesda, Maryland. No opportunity for public participation will be provided during the teleconference or meeting.

Found in children's toys and child care articles, phthalates and phthalate substitutes are a group of industrial chemicals primarily used to make plastics like polyvinyl chloride more flexible. The Consumer Product Safety Improvement Act of 2008 prohibits the sale of any "children's toy or child care article" that contains more than 0.1 percent of each of three specified phthalates—Di-(2-ethylhexyl) phthalate (DEHP), dibutyl phthalate (DBP) and benzyl butyl phthalate (BBP)—or on an interim basis more than 0.1 percent of each of three additional specified phthalates—diisononyl phthalate (DINP), diisodecyl phthalate (DIDP) and di-n-octyl phthalate (DnOP)—used in any "child care article" or "children's toy that can be placed in a child's mouth."

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CHAP has been charged with, among other matters, (i) examining all potential health effects "of the full range of phthalates"; (ii) considering potential health effects of each phthalate in isolation and in combination with other phthalates; (iii) considering the cumulative effect of total exposure to phthalates from children's products and other sources; (iv) reviewing all relevant data; (v) considering at which level there is a reasonable certainty of no harm to children, pregnant women, or other susceptible individuals; and (vi) considering possible similar health effects of phthalate alternatives used in children's products. *See Federal Register,* January 17, 2012.

Transportation Research Board Issues Report on Safety Challenges of Automotive Electronics

The National Research Council of the National Academies' Transportation Research Board has released a report calling for the National Highway Traffic Safety Administration (NHTSA) to "address explicitly and proactively" the increasing role electronic systems play in automobile safety. Titled "The Safety Promise and Challenge of Automotive Electronics: Insights from Unintended Acceleration," the report notes that NHTSA "will need to become more familiar with how manufacturers design safety and security into electronic systems, identify and investigate system faults that may leave no physical trace, and respond convincingly when concerns arise about system safety."

Based on concerns that faulty electronic systems may have been to blame for sudden acceleration problems that occurred in 2009 and 2010, the report recommends, among other things, that NHTSA (i) establish "a standing technical advisory panel of individuals with background central to the design, development, and safety assurance of automotive electronics systems"; (ii) design "a strategic planning process" to fulfill its safety responsibilities "as cars become more technologically complex"; and (iii) conduct a "comprehensive review" to determine specific capabilities needed to "monitor and investigate flaws in electronics-intensive vehicles."

"It's unrealistic to expect NHTSA to hire and maintain personnel who have all of the specialized technical and design knowledge relevant to this constantly evolving field," said New Jersey Institute of Technology Research Professor Louis Lanzerotti, who chaired the committee that authored the report. "A standing advisory committee is one way NHTSA can interact with industry and with technical experts in electronics to keep abreast of these technologies and oversee their safety." *See National Academies Press Release*, January 18, 2012.

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LEGAL LITERATURE REVIEW

Tim Congrove, David Northrip & Dana Strueby, "Keep Talking, but Know the Law: Ongoing Considerations Regarding Communications with Potential Class Members," DRI's *The Business Suit*, January 11, 2012

SHB Global Product Liability Partner Tim Congrove and Associates David Northrip and Dana Strueby update their July 2008 article that addressed the legal and ethical considerations involved when defendants contact potential class members. The authors discuss recent cases to assess how defense counsel should proceed when considering such communications and conclude that while these contacts can provide valuable insights and help shape a defense strategy, counsel must follow certain guidelines and practices to ensure consistency with "what the law permits."

Anthony Bellia Jr. & Bradford Clark, "The Alien Tort Statute and the Law of Nations," *University of Chicago Law Review*, 2011

Notre Dame Law School Professor Anthony Bellia Jr. and George Washington University Law School Professor Bradford Clark explore what the First Congress intended in1789 when it enacted the Alien Tort Statute and explain that current interpretations may be misapplying the law. According to their article, given its historical context, the law "was originally enacted to enable the United States to remedy a specific, but important, law of nations violation—the intentional infliction of harm by a US citizen upon the person or personal property of an alien. In the parlance of the time, such harms constituted 'torts' 'in violation of the law of nations.'"

They suggest that narrowing the law's application to a narrow handful of "international" torts as the U.S. Supreme Court has done misperceives the issue Congress addressed, that is, "to give an alien the right to sue a US citizen in federal court for any intentional tort … because any such tort—if perpetrated by an American against an alien—would have violated the law of nations and required the United States to redress the harm." They also suggest that some lower courts have erred by assuming that the law allows suits between aliens only, noting, "The United States had no clear obligation to provide redress in such cases, and adjudication of such disputes itself could violate the territorial sovereignty of foreign states under the law of nations."

Daniel Klerman, "Personal Jurisdiction and Products Liability: An Economic Analysis," January 17, 2012

Observing how the U.S. Supreme Court has struggled recently with personal jurisdiction issues in product liability cases, USC Law School Professor Daniel Klerman suggests that economic theory and real world consequences should decide the issue. According to Klerman, focusing on a manufacturer's contacts or intentions to decide whether a court has jurisdiction over a dispute ignores how companies make decisions about the location of their distributors, the safety of products and prices, and could affect litigation costs.

He concludes, "a rule that allows the plaintiff to sue where she purchased the product is likely to lead to the best results. It would not allow manufacturers to strategically structure their activities … to compel plaintiffs to sue where product liability law and adjudicative institutions are most favorable to manufacturers.… [And] it would not lead to excessively pro-plaintiff liability law, because manufacturers retain the ability to vary the price of products depending on the law in the state where the product was sold." Thus, "states would have an incentive to choose efficient product liability and procedural law, because in-state residents would both get the benefits of such laws and pay prices which reflected the cost of the resulting liability."

Klerman also opines that his economic analysis has implications for the enforcement of arbitration and forum selection clauses in consumer actions, noting the U.S. Supreme Court's aggressive enforcement of such clauses. "The analysis here suggests that approach may be a mistake. Because consumers are unlikely to read and understand the implications of such clauses, manufacturers have incentives to draft such clauses in a way that favor themselves and which undermine incentives to make safe or desirable products."

LAW BLOG ROUNDUP

State Attorneys General as Replacements for Class Action Counsel?

"If *parens patriae* lawsuits take on the role once served by class actions, one big question involves what should happen at the back-end of these big settlements. What happens to the settlement proceeds?" St. John's University School of Law Assistant Professor Adam Zimmerman, blogging about a forthcoming law review article which will propose that with class actions now "on the ropes" after the U.S. Supreme Court "broadly validated arbitration provisions containing class action waivers," state attorneys general have the opportunity to protect consumer interests by bringing *parens patriae* lawsuits not subject to waiver provisions. Zimmerman addresses how various procedural safeguards that exist in class actions are not generally applicable to attorney general lawsuits.

PrawfsBlawg, January 20, 2012.

THE FINAL WORD

Civil Case Filings in Federal District Courts Up 2 Percent in 2011

According to the January 2012 issue of *The Third Branch*, a publication of the Administrative Office of the U.S. Courts Office of Public Affairs, civil filings in federal trial courts grew 2 percent in 2011 to nearly 290,000 cases. Most of the increased caseload in the U.S. district courts was attributed to matters raising federal questions (that is, actions involving the U.S. Constitution, laws or treaties in which the federal government is not a party) and involving civil rights, consumer credit and intellectual property rights. U.S. appellate courts reportedly saw fewer filings in 2011; they dropped 1.5 percent to 55,126 cases.

UPCOMING CONFERENCES AND SEMINARS

ABA, Phoenix, Arizona – March 28-30, 2012 – "2012 Emerging Issues in Motor Vehicle Products Liability Litigation." Shook, Hardy & Bacon Tort Partners Robert Adams and H. Grant Law join a distinguished faculty discussing an array of topics relating to

motor vehicle litigation and products liability law during this 22nd annual national CLE program. Adams will present on "Communicating with the Modern Juror at Trial," and Law will serve as co-moderator of a panel addressing the topic, "An Automobile Is Only as Good as the Sum of Its Parts: The Component Parts Panel."

Shook, Hardy & Bacon Tort Associate **Amir Nassihi**, who is serving as conference co-chair, will join several panels to discuss "The Rise and Fall of the Consumer Expectations Test" and "The Blockbuster Developments in Class Action Litigation." He will also participate as co-moderator of a panel discussion addressing "Managing and Developing the Corporate Counsel Relationship: The Inside View on Diversity, Retention and Client Expectations." Shook, Hardy & Bacon is a conference co-sponsor. ■

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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).