Shook, Hardy & Bacon L.L.P.

FEBRUARY 14, 2013

PRODUCT LIABILITY LITIGATION REPORT

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LAW FIRM NEWS

Wajert Named to *Law360* Product Liability Editorial Advisory Board

Shook, Hardy & Bacon Global Product Liability Partner **Sean Wajert** has been named to this year's *Law360* product liability editorial advisory board, which provides feedback on the publication's coverage and makes recommendations "on how best to shape future coverage." Wajert focuses primarily on complex commercial and products liability litigation. An elected member of the American Law Institute, he once chaired DRI's Mass Torts and Class Actions Subcommittee. Wajert authors the Mass Tort Defense **blog** to discuss "legal issues relating to defense of mass tort cases and large-scale product liability claims." *See Law360*, February 11, 2013.

SHB Attorneys Address Competitor Liability Issues Raised by Alabama Supreme Court

Shook, Hardy & Bacon Public Policy Attorneys **Victor Schwartz, Phil Goldberg** and **Cary Silverman** have co-authored a ***Washington Legal Foundation Legal Opinion Letter***. Titled "Warning: Alabama Court's Blame-Shifting Pharma Decision Will Have Serious Side Effects," the February 8, 2013, letter details a recent Alabama Supreme Court decision, *Wyeth, Inc. v. Weeks*, in which the court ruled that a "manufacturer of a brand-name prescription drug can be subject to liability even when a plaintiff alleges that he or she was harmed by a generic drug" from a competitor.

The authors consider the decision's shortcomings, including the "overwhelming case law to the contrary" and the appearance that the decision was "driven by a search for pockets for paying claims." They highlight the decisions of more than 70 courts which have ruled that "a manufacturer cannot be subject to liability for a product it did not make." The letter concludes that the *Wyeth* decision has allowed the "'genie' of blaming one company for products made by a competitor out of a tightly sealed tort bottle" and advises defendants in Alabama now subject to "previously unforeseen liability" to turn "to state elected officials for relief."

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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.

For additional information on SHB's Global Product Liability capabilities, please contact

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CASE NOTES

Criminal Charges Filed Against Children's Toy Importers

The U.S. Department of Justice (DOJ) has reportedly charged five individuals living in Queens, New York, and their closely held companies in a 24-count indictment alleging that they imported hazardous children's toys from China into the United States for nearly eight years. Three of the individuals, Chenglan Hu, Hua Fei Zhang and Xiu Lan Zhang are Chinese nationals; the other two, Guan Jun Zhang and Jun Wu Zhang, are naturalized citizens. According to the indictment, U.S. Customs and Border Protection seized their companies' toys from shipping containers on 33 separate occasions between 2005 and 2013. Seventeen of the seizures involved toys prohibited from import into and distribution in the United States due to "excessive lead content, excessive phthalate levels, small parts that presented choking, aspiration or ingestion hazards, and easily accessible battery compartments." The remaining products were apparently seized for copyright and trademark infringement.

The defendants allegedly sold the toys at wholesale and retail from several New York locations. The number and volume of seizures allegedly prompted the defendants to shift their use of the companies and alternate formal roles to continue importing the toys, according to DOJ. "Each time the number of seizures accumulated for one company, the individual defendants allegedly formed a new toy company to continue importing the violative and infringing toys," DOJ said. Consumer Product Safety Commission (CPSC) Chair Inez Tenenbaum was quoted as saying, "Today's action highlights the unprecedented level and cooperation and coordination among federal regulatory and law enforcement partners to keep U.S. consumers safe. The United States has some of the strongest toy standards and lowest lead limits in the world, and CPSC is committed to enforcing these child safety requirements at the ports and in the marketplace." In addition to seeking a money judgment, the government has asked for the forfeiture of seized luxury vehicles, including a Porsche and Lexus, bank accounts and restrained properties. *See U.S. Attorney's Office, Eastern District New York Press Release*, February 6, 2013.

Settlement Reached in Beauty Product Class Action

A joint motion for preliminary approval of a class settlement has been filed in a federal court in New Jersey over claims that Hydroxatone deceived consumers by offering beauty products with risk-free trial offers and auto-shipment programs that, in fact, consisted of customer-service practices that failed to credit product returns or to cancel membership in the auto-shipment programs. *Sabol v. Hydroxatone, LLC*, No. 11-4586 (U.S. Dist. Ct., D.N.J., motion filed February 7, 2013). Under the proposed settlement, the defendants have agreed to change how they market their products, pay $3 million into a common settlement fund and provide up to an additional $4 million in non-cash benefits consisting of a selection of products. If approved, the agreement would provide class counsel with one-third of the cash fund to reimburse their expenses and fees; any remaining funds would be paid to *cy pres* recipient, the Electronic Frontier Foundation.

Putative Class Targets Advertising Claims for Pet Chews

While alleging that soft-chew dog treats have harmed pets all over the United States, a plaintiff who alleges just economic harm from purchasing the product seeks to represent a class of claimants in a federal court in Illinois. *Duran v. Sergeant's Pet Care Products, Inc.*, No. 1:2013cv00782 (U.S. Dist. Ct., N.D. Ill., filed January 30, 2013). According to the complaint, the defendant advertises its products as "nutritious" and claims that they provide for "the health, well-being and happiness of your pet." The plaintiff claims, to the contrary, that the company's Pur Luv® pet chews "are not wholesome and healthy for dogs. The treats can cause serious injury, illness, and even death in dogs. Specifically, certain parts of the treat tend not to dissolve or otherwise break down after dogs ingest them, but instead persist as rock-hard chunks which can cause bowel obstructions and other serious injuries." Alleging violations of consumer protection laws, he reportedly seeks injunctive relief, restitution and damages. *See Courthouse News Service*, February 1, 2013.

Personal Injury Suit Claims High-Power Magnets Injured Girl

The parents of a girl who allegedly swallowed 15 Buckyballs®, powerful rare-earth magnets sold as desk toys and labeled for "Ages 13+," have reportedly sued their manufacturer and distributor in a South Carolina state court. *Turner v. Wonder Works*, No. n/a (Charleston Cnty. Ct., S.C., unknown filing date). According to a news source, the magnets were purchased for an older daughter, and some two years later, after the Consumer Product Safety Commission (CPSC) had announced their recall, the plaintiffs' younger girl ingested them. "After ingesting the Buckyballs, [their younger daughter] suffered extreme stomach pains that caused her to become completely immobilized and unable to participate in family and school activities," the complaint said. A colonoscopy allegedly revealed "something metallic and magnetic blocking [her] upper GI tract." A surgeon then purportedly removed 15 Buckyballs® from her abdomen.

Alleging negligence, negligent hiring, breach of warranty, product liability, and unfair trade practices, the parents apparently seek compensatory and punitive damages. They claim that distributor Maxfield & Oberton, which has ceased operations, waged a public campaign to discredit government warnings about the product's dangers. The complaint alleges, "Defendant Maxfield has publicly and repeatedly voiced contempt for safety … and the CPSC by making statements such as, 'You don't have kids' and 'don't need the government to tell you not to swallow magnets' and urging the public 'To stick it to the CPSC' in its advertisements." *See Courthouse News Service*, February 1, 2013.

The complaint alleges, "Defendant Maxfield has publicly and repeatedly voiced contempt for safety … and the CPSC by making statements such as, 'You don't have kids' and 'don't need the government to tell you not to swallow magnets' and urging the public 'To stick it to the CPSC' in its advertisements."

ALL THINGS LEGISLATIVE AND REGULATORY

Periodic Testing and Certification Rule for Children's Products Takes Effect

The U.S. Consumer Product Safety Commission's (CPSC's) rule requiring the periodic testing and certification of children's products under the Consumer Product Safety Improvement Act (CPSIA) became effective on February 8, 2013, according to Commissioner Nancy Nord's **blog**. She reminded readers that "this rule is not my ideal rule," but cautioned, "make no mistake: It is the law. Companies must heed it even where they disagree with it, and violators should expect a visit from our compliance staff."

In a related development, CPSC was expected to consider, during a February 13 meeting, whether to adopt a final **rule** pertaining to the section 1112/1118 requirements for third-party conformity assessment bodies that test children's products for certification under the CPSIA. If approved, it will take effect 90 days after publication in the *Federal Register* and apply to products manufactured on or after that date. *See Conversations with Consumers* and *Federal Register*, February 8, 2013.

ALJ Establishes Scheduling Order in Nap Nanny® Administrative Enforcement Action

A U.S. Consumer Product Safety Commission (CPSC) administrative law judge (ALJ) has issued a final pre-hearing order in an enforcement action over the Nap Nanny® portable baby recliner made by Baby Matters, LLC. Under the order, a hearing has been scheduled for May 20, 2013. Claiming that the products are defective and create a substantial risk of injury to children, CPSC seeks an order requiring the company to cease any remaining distribution of the product, notify all those in the chain of distribution to cease distribution, notify state and local public health officials, provide prompt public and individual notice of the defects, refund consumers, reimburse retailers, and submit a satisfactory corrective action program.

Meanwhile, parents who filed a wrongful death lawsuit against the company in a federal court in Michigan over the death of their infant have filed a motion to intervene in the administrative action, and CPSC responded by asking for the request to be denied. According to CPSC, allowing them to intervene could broaden the issues and delay the ALJ proceedings. The commission took no position on whether the couple could participate as a non-party and indicated that they need not be granted intervenor status to provide, as they have offered, evidence gathered in their independent lawsuit.

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CPSC Could Lose Quorum

According to a news source, due to current and impending vacancies, the U.S. Consumer Product Safety Commission (CPSC) could lose its quorum. Under current

law, three commissioners of any party constitute a quorum, and two commissioners who are not affiliated with the same political party can constitute a quorum. But, when Republican Commissioner Nancy Nord's term and holdover year expire in October 2013, CPSC will be left with three empty seats and two Democratic commissioners, Chair Inez Tenenbaum and Robert Adler. Under the Consumer Product Safety Improvement Act, the two commissioners could operate as a quorum for six months, but after that, any CPSC action requiring a vote, such as rulemaking and mandatory recalls, could halt.

Democrat Marietta Robinson's nomination to fill former Commissioner Thomas Moore's seat was reportedly resurrected on January 24 after a previous nomination died in the 112th Congress. Her nomination is now pending before the Senate Commerce, Science and Transportation Committee. No Republican nominee to fill the currently remaining vacancy has apparently been named. *See Bloomberg BNA Product Safety & Liability Reporter,* February 11, 2013.

Status Report Shows NHTSA Behind Schedule on Significant Rules

According to a monthly U.S. Department of Transportation (DOT) status **report**, the National Highway Traffic Safety Administration (NHTSA) is behind schedule in finalizing 11 out of 15 significant rules and regulations.

The monthly report provides a summary and the status for all significant rulemakings that the DOT currently has pending or has issued recently. The status of the rules is coded in the report as red, yellow or green. Among the NHTSA rules coded red, for lagging behind schedule, are (i) rearview visibility, (ii) seatbelts on motor coaches, (iii) heavy-vehicle speed limits, (iv) sound for hybrid and electric vehicles, (v) novelty [motorcycle] helmets enforcement, and (vi) side-impact test procedures for child restraint systems.

A pending NHTSA rule coded yellow, which indicates that the deadline might be met, is an amendment to the definition of "motorcycle." According to the report, this rulemaking would change the regulatory definition of motorcycle to exclude three-wheeled vehicles configured like passenger cars. The three rules coded green relate to electronic stability control on truck tractors, uniform procedures for state highway safety programs and new requirements for lamps and reflective devices on agricultural equipment. According to the report, most of the delays can be attributed to the need for "additional coordination,""additional research and data analysis" or a "lack of resources."

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California Considers New Fire Safety Rules for Upholstered Furniture

California's Bureau of Electronic and Appliance Repair, Home Furnishings and Thermal Insulation (BEARHFTI) has proposed new fire safety **rules** that aim to reduce the use of chemical flame retardants in upholstered furniture and decrease the fire potential

of what is apparently the primary ignition source—cover fabrics. Determining that "the current standard does not adequately address the flammability performance of upholstery cover fabric and its interactions with underlying fillings materials upon ignition, whether by an open flame or a smoldering source," BEARHFTI concluded, "the new standard should address the predominant source of upholstered furniture fire deaths, which are smoldering materials."

The bureau found that furniture makers meet the current open-flame testing standard by treating foam with flame retardants and that, in a fire, upholstery fabric is the first to ignite; once the cover fabric burns, the foam quickly ignites. The proposed rules, if approved, would require furniture materials labeled as fire-resistant to meet smolder resistance standards and comply with specific testing methods for cover fabrics, barrier materials and resilient filling materials, essentially resulting in the use of barrier materials to prevent ignition.

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Supporters of legislative proposals that would limit the use of flame retardants are evidently pleased with the proposed new standard. Arlene Blum, executive director of the Green Science Policy Institute was reportedly optimistic that the proposal could lead to a new federal rule. "The final solution will be a uniform federal standard," said Blum. "Once California does this, it will ease the way for the Consumer Products Safety Commission to enact [its] standard."

A public comment period will run through March 26, 2013, and, if the new rule is adopted, manufacturers will have to start meeting the new smolder-test standard by July 1, 2014. *See Bloomberg BNA Product Safety & Liability Reporter*, February 11, 2013.

LEGAL LITERATURE REVIEW

Mark Behrens & Cary Silverman, "Litigation Tourism in Pennsylvania: Is Venue Reform Needed?," *Widener Law Journal* (2013)

Shook, Hardy & Bacon Public Policy Attorneys **Mark Behrens** and **Cary Silverman** discuss how Philadelphia became a magnet for mass tort litigation thus earning it a "Judicial Hellhole" designation from the American Tort Reform Association in 2010 and 2011. They report that certain reforms to court procedures have helped stem the tide of filings by plaintiffs with no connection to the jurisdiction. Still, they recommend that the state expand the venue rules adopted for medical malpractice cases to all personal injury cases. This would mean that plaintiffs would be required to litigate their claims in the county where their cause of action arose. Alternatively, they recommend that tort actions not involving medical liability be brought in the county where (i) "the plaintiff resides," (ii) "all or a predominant part of the cause of action arose," or (iii) "the defendant resides if the defendant is an individual, or where the defendant has its principal place of business if the defendant is a corporation or similar entity."

Luke Meier, "Probability, Confidence and *Matsushita*: The Misunderstood Summary Judgment Revolution," Working Paper Series, January 2013

Baylor Law School Associate Law Professor Luke Meier reinterprets *Matsushita Electric Industrial Co. v. Zenith Radio Corp.* 475 U.S. 574 (1986), in this article as a narrow decision that did "not alter the relationship between judge and jury" and should not be seen as requiring "an aggressive use of summary judgment by trial judges." Meier contends that its basis was a "confidence analysis" and not a "probability analysis"; with this understanding, he claims that the U.S. Supreme Court's "plausibility" pleading requirement is readily comprehended. Thus, "[b]y requiring that more evidence be assembled before the case is submitted to a jury, the margin of error associated with any jury conclusion decreases and a sufficient degree of confidence can be had in the conclusion actually reached by the jury."

Joanna Shepherd, "Products Liability and Economic Activity: An Empirical Analysis of Tort Reform's Impact on Businesses, Employment, and Production," *Vanderbilt Law Review*, January 28, 2013

Emory University School of Law Associate Professor Joanna Shepherd purports to provide empirical evidence to address the argument between those who support expanding product liability and those who support tort reform. She contends that the costs of the products liability system continue to grow but that certain reforms have had a "significant impact on economic activity." According to Shepherd, statutes of repose, comparative negligence reforms that reduce damage awards and the elimination of strict liability for non-manufacturer product sellers are "associated with statistically significant increases in economic activity." Other reforms, such as caps on noneconomic damages and reforms to the traditional collateral source rule are apparently weakly associated with such increases, while punitive damages caps and the elimination of joint and several liability "are weakly associated with decreases in certain measures of economic activity."

She contends that the costs of the products liability system continue to grow but that certain reforms have had a "significant impact on economic activity."

LAW BLOG ROUNDUP

British Are Not Coming to Indiana

"Once again, the British are *not* coming to the state otherwise known as the 'Crossroads of America'—at least when it comes to the British rule known as 'loser pays.'" Consumer activist Joe Consumer, blogging about the withdrawal of Senate Bill 88 from the Indiana Legislature after its sponsor heard from other legislators concerned that it would not work because determining the "loser" can be difficult. The example cited was a jury award of $30,000 to a plaintiff who had sought $40,000 against a defendant willing to settle for $20,000—the plaintiff got more than she was offered, and the defendant paid less than the original demand.

The Pop Tort, February 1, 2013.

THE FINAL WORD

Philadelphia Court Reforms Cut Mass Tort Filings 70 Percent

After the number of court filings under the mass torts program of the Philadelphia Court of Common Pleas swelled to more than 2,500 in 2011, new protocols were written, and they have apparently reduced the filings by 70 percent, with just 816 new cases added to the court docket in 2012. Still, out-of-state plaintiffs reportedly continue to predominate. Intended to "add structure and predictability to the mass tort program and to begin to manage what we viewed then as a crisis in the number of filings," the new rules, according to John Herron, administrative judge of the trial division, "have had an exceptional result where we have now greatly reduced the filings to a much more manageable number." The increased filings that occurred in 2011 reportedly correlated with President Judge Pamela Pryor Dembe's remarks inviting more mass tort filings to help the court address a budget crisis and add to local attorneys' books of business. *See The Legal Intelligencer*, January 31, 2013.

UPCOMING CONFERENCES AND SEMINARS

ABA Tort Trial & Insurance Practice Section, Phoenix, Arizona – April 3-5, 2013 – "2013 Emerging Issues in Motor Vehicle Product Liability Litigation." Shook, Hardy & Bacon Tort Partner **H. Grant Law** is an event co-chair, and Class Actions & Complex Litigation Associate **Amir Nassihi** serves as program chair for this annual CLE on motor vehicle litigation. Nassihi will also serve as a co-moderator for a panel discussion titled "The Blockbuster Development in Class Action Litigation"; Shook, Hardy & Bacon Global Product Liability Partner **Holly Smith** is scheduled to participate as a member of the panel. Nassihi and Tort Partner **Frank Kelly** will co-moderate a panel discussion on "Managing the Corporate Counsel Relationship: The Inside View on Diversity, Retention and Client Expectations." The distinguished faculty includes senior in-house counsel for major automobile makers and experienced trial and appellate counsel. Program sessions will address class action developments, litigating brake pad asbestos cases, regulatory developments, and issues unique to component parts manufacturers. Shook, Hardy & Bacon is a conference co-sponsor.

ABA Toxic Torts and Environmental Law and Corporate Counsel Committees, Phoenix, Arizona – April 4-6, 2013 -- "Fuel, Food, Fibers and More: Blazing New Trails in the Desert Sun." During this 22nd annual spring CLE meeting, Shook, Hardy & Bacon Agribusiness & Food Safety Co-Chair **Madeleine McDonough** will participate in a panel discussion on "Food Safety: Will What We (Don't) Know About Our Food and Its Packaging Hurt Us?"

DRI, New York, New York – May 16-17, 2013 – "29th Annual Drug and Medical Device Seminar." Shook, Hardy & Bacon Pharmaceutical & Medical Device Litigation Partner **Scott Sayler** will deliver opening remarks in his role as current chair of DRI's Drug and Medical Device Committee. Co-sponsored by SHB, the event will feature

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presentations by judges, in-house and outside counsel, and other professionals on cutting-edge topics such as (i) "How to use your advocacy skills to persuade the toughest audience," (ii) "The latest on consolidated drug and device proceedings in Philadelphia," (iii) "What jurors are thinking about the FDA," (iv) "How to help a jury understand a state-of-the-art case," (v) "The latest on 'judicial hellholes,'" (vi) "How to try a multiple-plaintiff pharmaceutical case," and (vii) "How to take the 'junk' out of junk science." ■

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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).