Shook, Hardy & Bacon L.L.P.

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PRODUCT LIABILITY LITIGATION REPORT

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ARIZONA APPEALS COURT ALLOWS PRODUCT CLAIMS AGAINST AUSTRALIAN AIRCRAFT KIT CO.

An Arizona court of appeals panel has determined that an Australian company with U.S. distributors has sufficient contacts with the state for a decedent's survivors to sue it for strict product liability arising out of a fatal crash involving an aircraft kit that included one of the company's engines. *Van Heeswyk v. Jabiru Aircraft Pty., Ltd.*, No. 2 CA-CV 2011-0107 (Ariz. Ct. App., decided April 24, 2012). According to the court, the state employs a "'holistic approach' for determining whether personal jurisdiction exists," requiring that courts consider all of the contacts between the defendant and the forum state and ask "did the defendant engage in purposeful conduct for which it could reasonably expect to be haled into that state's court with respect to that conduct?"

Rejecting the notion that the defendant can "'close its eyes' and plead ignorance to its products being sold in Arizona as a means of avoiding personal jurisdiction," the court found sufficient evidence that the company's contacts with the state were not casual or accidental, including (i) an expired agreement with one U.S. distributor to sell the company's products in a territory including Arizona; (ii) sales of 61 company products in Arizona the same year that the decedent purchased his kit; and (iii) no evidence that the company restricted sales within Arizona. The court also determined that the lawsuit arose out of the minimum contacts the company had with the state and that it would not unduly burden the company to litigate the case in Arizona.

FIRST CIRCUIT FINDS DESIGN DEFECT CLAIMS AGAINST GENERIC DRUG MAKER NOT PREEMPTED

The First Circuit Court of Appeals has upheld a jury verdict of $21.06 million in compensatory damages awarded to a women allegedly injured by a generic drug she took for shoulder pain, finding, among other matters, that her state law-based design-defect claims were not preempted by federal law. ***Bartlett v. Mut. Pharm. Co., Inc.*, No. 10-2277 (1st Cir., decided May 2, 2012)**.

The claims arose from the plaintiff's use of generic sulindac, a known cause of toxic epidermal necrolysis. The plaintiff lost 60 to 65 percent of her body surface and spent nearly two months in a hospital burn unit and months in a medically induced coma. She was tube fed for one year and experienced two major septic shock

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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episodes. Despite 12 eye surgeries, she is almost blind and is not only seriously disfigured, but cannot eat normally because of esophageal burns nor engage in aerobic activity due to lung injuries. The core theory tried during the 14-day trial was that the generic drug's "risks outweighed its benefits making it unreasonably dangerous to consumers, despite the federal Food and Drug Administration ('FDA') having never withdrawn its statutory 'safe and effective' designation that the original manufacturer had secured and on which [the defendant] was entitled to piggyback."

Providing an overview of U.S. Supreme Court preemption rulings as to failure-to-warn claims involving branded (not preempted) and generic (preempted) prescription drugs and noting that the Court has ruled out implied preemption under the Federal Food, Drug, and Cosmetic Act, the court decided that it would be up to the high Court to decide whether design-defect claims asserted in generic drug cases are preempted under federal law, thus refusing the defendant's request that it do so here.

According to the court, while a generic drug maker cannot unilaterally change its labels, "and thus cannot comply with both federal labeling standards and state law requirements deviating from those standards," a generic drug maker "can choose not to make the drug at all." In other words, "while the generic maker has no choice as to label—the decision to make the drug and market it in New Hampshire is wholly its own. Thus, [the plaintiff] having lost her warning claim by the mere chance of her drug store's selection of a generic, the Supreme Court might be less ready to deprive [the plaintiff] of her remaining avenue of relief."

SEVENTH CIRCUIT CAN'T SHIELD SEARS FROM COPYCAT CLOTHES DRYER LITIGATION

The Seventh Circuit Court of Appeals, considering for the fourth time a case involving claims that Sears, Roebuck and Co. falsely states that its clothes dryer contains a stainless steel drum, has, on remand from the U.S. Supreme Court, decided that it cannot enjoin a copycat class action filed in a California state court by a member (Murray) of the initial class action (*Thorogood*) and then removed by Sears to federal court. ***Thorogood v. Sears, Roebuck & Co.*, Nos. 10-2407, 11-2133 (7th Cir., decided May 1, 2012)**. So ruling, the court ordered the district court to vacate the injunction that it had previously ordered the California court to impose, while refusing to change any of its criticism of the *Thorogood* claims or the attorney who represented both Thorogood and Murray.

After the Seventh Circuit issued its ruling to enjoin Murray's suit, the U.S. Supreme Court held in an unrelated case that "neither a proposed class action nor a rejected class action may bind nonparties." The Seventh Circuit had denied class certification in the initial class action filed by Thorogood before finding Murray collaterally estopped from bringing his claims. Applying the new Supreme Court decision, the Seventh Circuit states, "we think it implies that Murray never became a party to Thorogood's suit, and that being neither a party nor in privity with one, he could not be bound by the judgment in that suit."

Noting that the U.S. Supreme Court "could have changed the rule of nonparty preclusion but decided to stick with it, and instead listed alternatives to preclusion: stare decisis, comity, consolidation of overlapping suits by the Panel on Multidistrict Litigation (not—yet—available in the dryer saga, because Murray's is the only pending suit, as far as we know, and available when filed in a state court only if the suit is removed to federal court, as Murray's suit was), changes to the Federal Rules of Civil Procedure, and federal legislation," the court concluded, "Sears will have to tread one or more of these paths if it wants relief from this copycat class action and perhaps more such actions to come; we can't save it."

GUILTY PLEAS ENTERED FOR CONSPIRACY TO IMPORT CHILDREN'S PRODUCTS EXCEEDING LEAD LIMITS

A Florida resident, his wife and three associated Florida corporations have entered guilty pleas to charges arising from smuggling children's products from China into the United States over an 11-year period, knowing that the products exceeded statutory lead limits and constituted a mechanical hazard because they contained small parts. The charges also included trafficking in counterfeit goods and submitting false country-of-origin labels. The products included skateboards, toy cars and trucks, tricycles, dolls, toy musical instruments, rattles, table tennis sets, farm animal play sets, kitchen sets, toy bats, stuffed bears, Christmas lights, and a host of counterfeit goods, such as batteries, clothing and Disney toys.

The charges are apparently part of a crackdown on importers that fail to comply with safety standards announced by Consumer Product Safety Commission Chair Inez Tenenbaum earlier this year. Sentencing is scheduled for July 26; Hung Lam, who pleaded guilty to one count of conspiracy to traffic and smuggle children's products containing banned hazardous substances and one count of trafficking in counterfeit goods, apparently faces a maximum term of imprisonment of five years on the first count and 10 years on the second. He also faces a fine of up to $250,000 on each count. *See U.S. Department of Justice Press Release*, April 25, 2012; *Bloomberg BNA Product Safety & Liability Reporter*, April 30, 2012.

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NEW JUDGE, NEW JURY: UNION CARBIDE ESCAPES LIABILITY IN ASBESTOS EXPOSURE RE-TRIAL

Following a successful challenge before the Mississippi Supreme Court to the alleged partiality of the judge who presided over its first trial, which resulted in a $322-million verdict, Union Carbide has won its second trial in an asbestos exposure lawsuit. *Brown v. Union Carbide Corp.*, No. 2012-6-cv3 (Jones Cnty. Cir. Ct., judgment entered April 25, 2012). Additional details about the case appear in the **October 13, 2011**, issue of this *Report*. The replacement judge vacated the verdict in December, and the second trial ended in a complete defense verdict on April 25, 2012.

ALL THINGS LEGISLATIVE AND REGULATORY

FDA Warning Letters Bring Round of Class Actions Against Dietary Supplement Makers

According to a news source, seven of the 10 dietary supplement companies that recently received Food and Drug Administration (FDA) warnings have been sued for consumer fraud in a federal court in California. *See, e.g., Barkum v. iSatori Global Technologies, LLC*, No. 3:12-cv-01058 (U.S. Dist. Ct., C.D. Cal., filed April 30, 2012). According to the **warning letters**, the dietary supplements contain an ingredient, dimethylamylamine (DMAA), that does not meet regulatory requirements for use in the United States, and thus, supplements containing the ingredient are adulterated.

FDA warns that failure to correct the violation could result in seizure of the offending products. The agency refers to DMAA's ability to narrow blood vessels and arteries, "which increases cardiovascular resistance and frequently leads to elevated blood pressure. This rise in blood pressure may increase the work of the heart such that it could precipitate a cardiovascular event, which could range from shortness of breath to tightening of the chest and/or a possible myocardial infarction (heart attack)."

The ingredient apparently came under media scrutiny in December 2011, when the U.S. Army, concerned about the deaths of two soldiers who purportedly used products containing the ingredient, prohibited the sales of DMAA products in post exchanges. Canada reportedly classifies DMAA as a prescription drug, and the World Anti-Doping Agency added it to its list of banned substances in 2009. *See Law360*, May 2, 2012.

President Issues Executive Order on International Regulatory Cooperation

President Barack Obama (D) has issued an **executive order** establishing a framework for federal agencies to harmonize U.S. regulatory standards "involving health, safety, labor, security, environmental, and other issues" with the regulations of foreign governments. According to Executive Order 13609, "the differences between the regulatory approaches of U.S. agencies and those of their foreign counterparts might not be necessary and might impair the ability of American businesses to export and compete internationally." The order requires the Regulatory Working Group, established in 1993, to serve as a forum to carry out its goals. Federal agencies are required to summarize their "international regulatory cooperation activities that are reasonably anticipated to lead to significant regulations" in their regulatory plans and to consider "reforms to existing significant regulations that address unnecessary differences in regulatory requirements between the United States and its major trading partners." *See Federal Register*, May 4, 2012.

CDC Launches Video Contest on Community-Level Injury and Violence Prevention

The Centers for Disease Control and Prevention (CDC) has **invited** the submission of videos by students, the general public and injury and violence professionals in a competition titled "Seeing My World through a Safer Lens: What Does Injury and Violence Look Like in My Community?" The contest began May 1, 2012, and closes July 31. Winners will be notified and prizes awarded on September 10 in three categories: "Student View, General Public View, and Injury and Violence Professional View." CDC launched the contest to "raise awareness that, despite the fact that injuries and violence are serious public health issues, they are actually preventable."

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According to CDC, the videos should feature key prevention messages and "reflect positive prevention messaging and scenarios that [submitters] may face in their efforts to reduce injuries and violence where they live, work, study, or play." CDC expects the videos, no longer than 90 seconds in duration, to address violence prevention, home and recreational safety, motor vehicle safety, or traumatic brain injury, and will provide related message boxes for use in the videos, which will be judged on creativity, quality, use of key topics message boxes, and communication of positive injury and violence messages. *See Federal Register*, May 2, 2012.

California Assembly Considers Class Action Ad Warning Bill

When it met on May 8, 2012, the California State Assembly Judiciary Committee considered a bill (**A.B. 1954**) that would require any advertisement soliciting plaintiffs for a class action to include a disclosure "stating that a plaintiff in a class action may be financially liable for the attorney's fees of the defendant where the defendant is the prevailing party." Under the proposal, violations would be penalized with a $2,000 fine paid to the State Bar of California. Voting along party lines, the Assembly Judiciary Committee apparently rejected the proposal 3-6. Bill sponsor Assemblyman Brian Nestande (R-Palm Desert) reportedly said during the hearing that he was concerned about a flood of class actions in the state, calling them "an impediment for doing business in California."

California American Civil Liberties Union affiliates and several legal aid organizations reportedly submitted a letter objecting to the proposed law, stating "It is a false statement of the law whose sole apparent purpose is to deter the exercise of the First Amendment right of access to the courts and the due process right to participate in class actions." The executive director of the Impact Fund, which also opposes the bill, was quoted as saying, "In my mind, the bill is terribly flawed. We have a circumstance where a bill is requiring lawyers to post something on a website that is legally not true for 99.9 percent of a class. The consequence is it discourages people from being involved in class actions, which is at odds with California public policy that favors the use of class actions."

Other provisions would have amended the rules of professional conduct to require the inclusion of certain clarifying information in attorney ads that include claims about results in particular cases. *See Law360*, May 4 and 8, 2012.

LEGAL LITERATURE REVIEW

Kip Viscusi, "Does Product Liability Make Us Safer?," *Regulation*, Spring 2012

Vanderbilt University Professor of Law Kip Viscusi contends that while product liability can push the level of safety closer to its efficient level "by penalizing firms for a shortfall between the level of product safety provided and the efficient level of safety," excessive and unpredictable verdicts and the problems courts encounter addressing novel products and technologies can hinder the innovations that would otherwise reduce accidents. According to Viscusi, "A review of the empirical evidence and case studies on the role of product liability demonstrates that the idealized world in which the tort liability system is supposed to produce efficient levels of safety is not how product liability law actually performs." He identifies judgment biases of jurors stemming from loss aversion and hindsight bias, excessive damages due to ill-defined noneconomic injury parameters, and juror aversion to corporate risk measurement and analysis as among the problems that compromise the system.

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Kevin Lynch, "When Staying Discovery Stays Justice: Analyzing Motions to Stay Discovery When a Motion to Dismiss Is Pending," *Wake Forest Law Review*, 2012

University of Denver Sturm College of Law Environmental Law Clinic Fellow Kevin Lynch argues in this article that a blanket rule imposing a discovery stay whenever a motion to dismiss is filed can seriously compromise the otherwise beneficial aspects of discovery, particularly if the motion is ultimately denied. He proposes instead that courts take a "preliminary peek" at the merits of motions to dismiss when addressing motions to stay discovery, assess the likelihood of success and "make explicit, in writing, which tests they are applying and how they are weighing the competing interests at stake." According to Lynch, "This increase in transparency will be helpful to other judges who can rely upon the collective wisdom of their peers when exercising their discretion … [and] provide tangible benefits to parties. When parties know what standards will be applied to motions to stay discovery, they can focus their efforts on identifying the relevant facts and presenting those to the court."

Adam Steinman, "The Lay of the Land: Examining the Three Opinions in *J. Mcintyre Machinery, Ltd. v. Nicastro*, *South Carolina Law Review*, 2012

Part of a law review symposium on personal jurisdiction in the 21st century, this article, authored by Seton Hall University School of Law Professor Adam Steinman,

focuses on the U.S. Supreme Court's recent opinion in a case involving the British manufacturer of a machine that allegedly injured a New Jersey resident. Further details about the case are included in the **July 7, 2011**, issue of this *Report*. Steinman examines each of the three opinions in *J. Mcintyre Machinery, Ltd. v. Nicastro* and suggests that the case "should not be read to impose significant new restraints on jurisdiction." According to Steinman, Justice Anthony Kennedy's more restrictive plurality approach is specifically rejected by Justice Steven Breyer in his concurrence, which "has more in common with Justice Ginsberg's dissent than Justice Kennedy's plurality." He concludes that the opinions are "likely to play important roles as the debate over personal jurisdiction unfolds in this new millennium."

LAW BLOG ROUNDUP

New Beginning for Mass Tort Blogger

"We share a passion for both litigation and client service that simply cannot be found anywhere else, in my experience." New Shook, Hardy & Bacon Mass Torts and National Product Liability Lateral Partner Sean Wajert reflecting on his move to the firm on his blog.

Mass Tort Defense, May 7, 2012.

More Study for Confounding Result?

"I remain skeptical that a wealth transfer from lawyers to doctors and patients didn't have positive externalities, but I, for one, am going to stop claiming that Texas tort reform increased doctor supply without better data demonstrating that. More study is needed to explain Black/Hyman/Silver's counterintuitive result, and partisans on both sides need to be more conservative with their policy claims." Manhattan Institute Center for Legal Policy Adjunct Fellow Ted Frank, blogging about an article "that substantially undermines the empirical case for the conventional wisdom that Texas's 2003 reforms against medical malpractice lawsuits attracted more doctors to Texas."

PointofLaw.com, May 4, 2012.

THE FINAL WORD

Class Counsel Convictions Arising from Fen-Phen Representation Affirmed

The Sixth Circuit Court of Appeals has affirmed the convictions of two class action plaintiffs' lawyers who "concocted a fraudulent scheme to take from their clients almost twice [the] amount" under their retainer agreements from the settlement of claims involving the prescription weight-loss drug "fen-phen." ***United States v. Cunningham*, Nos. 09-5987/5998 (6th Cir., decided May 1, 2012)**. A jury convicted

the two men of one count of conspiracy to commit wire fraud, eight counts of wire fraud and one forfeiture count, and the court sentenced Shirley Cunningham to 240 months in prison and William Gallion to 300 months in prison. The court also ordered them to pay more than $127 million in restitution to their clients.

The Sixth Circuit details the circumstances leading to the indictments and then addresses each issue raised on appeal, including the sufficiency of the evidence, the timeliness of the indictments, constitutional violations, evidentiary rulings, the amount of restitution, and the trial court's failure to declare a mistrial due to the health problems of one of the defendant's attorneys. According to the court, none of the issues merited overturning the convictions.

UPCOMING CONFERENCES AND SEMINARS

Pincus Professional Education, Los Angeles, California – June 1, 2012 – "E-Discovery in 2012: What Attorneys Need to Know." Shook, Hardy & Bacon eDiscovery, Data & Document Management Partner Amor Esteban will join a distinguished faculty to discuss the current state of e-discovery law in California, early case assessment and rule 26(f) in federal court, modern search and review techniques, managing large projects, coordinating with in-house counsel, and ethical issues. ■

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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).