Shook, Hardy & Bacon L.L.P.

MAY 24, 2012

PRODUCT LIABILITY LITIGATION REPORT

CONTENTS

FIRM NEWS

Online Video Discussion Dissects "Hot Coffee" Claims

Shook, Hardy & Bacon Public Policy Partner **Victor Schwartz** serves as moderator of a panel discussion, available in a series of online **videocasts**, that addresses claims made in the documentary film "Hot Coffee," which was created by trial lawyers presenting information about the legal system from the perspective of product liability plaintiffs, such as the woman injured when she spilled hot coffee in her lap as she left a fast-food drive-through window. Among those participating in the discussion is Shook, Hardy & Bacon Tort Partner **Jon Gray**.

SHB Attorneys Co-Author Chapter in FDLI Book on Top Food & Drug Cases

The Food & Drug Law Institute (FDLI) has published its annual *Top 20 Cases* book, which features analysis and discussion of the most important food and drug cases of 2011. Shook, Hardy & Bacon Pharmaceutical & Medical Device Litigation Chair **Madeleine McDonough** and Associate **Jennifer Stonecipher Hill** have co-authored, with Food and Drug Administration Consumer Safety Officer Rikin Mehta, a **chapter** on the Seventh Circuit's decision in *Walton v. Bayer Corp.* At issue was the propriety of removal to federal court based on the fraudulent joinder doctrine. According to the authors, the decision was significant because it "clarifies how district courts can evaluate claims of fraudulent joinder when allegations against pharmacies and pharmaceutical manufacturers are joined in suit."

SHB-Authored Article Addresses Procedural Changes in Asbestos "Magnet" Courts

Shook, Hardy & Bacon Attorneys **Mark Behrens, Kevin Underhill, Cary Silverman, Erin Sparkuhl**, and **Christine Edwards** have co-authored an **article** in the May 16, 2012, issue of *Mealey's Litigation Report: Asbestos.* Titled "Asbestos Litigation 'Magnet' Courts Alter Procedures: More Changes on the Horizon," the article provides an overview of reforms adopted or pending in several state courts where procedures once deemed attractive to asbestos plaintiffs have in some instances been rebalanced "to better recognize the practical realities of the litigation today." The reforms include changes to calendaring procedures, the coordination of all asbestos matters before a single judge and a requirement that asbestos damage awards be offset by amounts plaintiffs receive under asbestos bankruptcy trusts.

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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

Sixth Circuit Rules Third-Party Defendants May Not Remove Cases to Federal Court

The Sixth Circuit Court of Appeals has issued a published opinion, in a case arising out of a mortgage foreclosure, to join sister circuits and hold that a third-party defendant cannot seek removal of a state-court action under the Class Action Fairness Act of 2005 (CAFA). ***In re: Mortgage Elec. Registration Sys.*, No. 12-501 (6th Cir., decided May 9, 2012)**. Most of the courts that have considered the issue have concluded that CAFA did not change the previous rule, i.e., "that counterclaim or third-party defendants do not have the right of removal." While the Sixth Circuit has apparently followed this line of authority in other cases, it had "yet to render a published opinion on this issue." The appellate court affirmed the district court's decision to remand the action, which had been removed by a third-party defendant, to state court.

NRDC Argues Standing Before Second Circuit in Suit over Anti-Bacterial Soaps

The parties to a lawsuit seeking to force the Food and Drug Administration (FDA) to regulate anti-bacterial chemicals used in soap apparently argued whether the Natural Resources Defense Council (NRDC) had standing to pursue the litigation during a May 14, 2012, hearing before the Second Circuit Court of Appeals. *NRDC v. FDA*, No. 11-422 (2d Cir.). Additional information about the case appears in the **February 3, 2011, issue** of this *Report*. According to NRDC's appeal brief, the lower court, which dismissed the matter for lack of standing, assumed "that exposure was not 'unavoidable' because members could carry around personal supplies of soap."

While the NRDC members who submitted affidavits evidently indicated that they are involuntarily exposed to the chemicals "each time they wash their hands at the clinics where they work," they also expressed concerned about the "health effects of antibiotic resistance resulting from the widespread use of triclosan and triclocarban." NRDC argued that its members could use their own soap "instead of using free soap supplied by their clinics," but would then incur a different injury, i.e., modifying their behavior and incurring a financial cost. NRDC also argued that its members' fears about "the consequences of widespread use of both triclosan and triclocarban by the general populace, which fosters the development of antibiotic-resistant strains of bacteria that may threaten their health, … provides an independent and sufficient injury in fact for purposes of standing."

FDA's counsel reportedly countered that "no actual risk has been established." *See Law360*, May 14, 2012.

Court Refuses to Rule on Distribution Chain Facts Before Trial in Faulty Juicer Lawsuit

A federal court in New York has declined, on the eve of trial, to grant summary judgment to a retailer that allegedly sold a juice extractor to a plaintiff who alleges that it broke while she was using it and injured her eye. *Aggarwal v. Pick Five Imports, Inc.*, No. CV 10-0614 (U.S. Dist. Ct., E.D.N.Y., order entered May 15, 2012). The retailer sought summary judgment on its indemnification claim against a co-defendant, the distributor from whom the retailer purchased the juicer. While the court acknowledged that the plaintiff "will likely be able to establish at trial her alleged chain of distribution," it decided to allow this fact to be established during trial, scheduled to begin June 4, 2012, given that the motion involves less than all the parties and that the issue is "important and dispositive." The court denied the motion without prejudice to its renewal at trial.

State Trial Court Sanctions Defense Counsel for Late Objection to Late-Filed Expert Report in Mesothelioma Litigation

A Delaware trial court has allowed the widow of a man, who allegedly contracted mesothelioma from workplace exposure to talc, to use at trial an expert report filed after a discovery deadline; the report purportedly links the talc in the decedent's lungs to the substance mined and processed by the defendant. *In re: Asbestos Litig. (Galliher)*, C.A. No. 10C-10-315 ASB (Del. Super. Ct., letter summarizing oral rulings, May 9, 2012). The parties had apparently agreed to allow a number of their respective experts to submit reports after the deadline, but the defendant first raised an objection to this report by way of an oral motion during the pre-trial conference, held on the last business day before trial.

After a jury was selected, the court heard further argument on the matter and then advised the parties it would continue the trial until July 16, 2012, to allow the defendant time to develop rebuttal evidence. The court also sanctioned defendant's out-of-state counsel $5,000. According to the court, without the evidence, the plaintiff had a weak case, and a defense verdict was virtually assured. With the evidence, a plaintiff's verdict was almost assured. According to the court, "[n]either is a desirable result." Thus, the court opted for the continuance, which led to the "unnecessary costs" of impaneling a jury. Given the plaintiff's "lesser culpability" and the costs incurred in traveling to trial from out of state as well as possible "additional unnecessary expense in the form of fees for late cancellation from her experts," the court concluded that sufficient sanctions had been imposed on her. As to the defendant, however, the court found that "the decision to withhold the timeliness objection to [the expert's report] was a strategic one most likely made by [the defendant's out-of-state counsel]," thus justifying a sanction against him, "which sanction is not to be recouped from Defendant or its insurance carrier."

The court cautioned, however, that its ruling allowing late identification of experts "is limited to the peculiar facts now before the court.… Indeed, the court views this case as a rare exception to the rule that late-identified experts will be precluded."

ALL THINGS LEGISLATIVE AND REGULATORY

FDA Delays Compliance Dates for Sunscreen Regulations

The Food and Drug Administration (FDA) has **delayed** compliance dates for sunscreen regulations to give the industry more time to implement the mandated changes. Previously scheduled to take effect in summer 2012, the regulations now allow major sunscreen makers until December 17 and smaller companies until December 17, 2013, to comply with new sunscreen testing and labeling standards. Released last summer, the regulations were discussed in the **June 23, 2011, issue** of this *Report*.

FDA's new rules were designed to help consumers make better informed decisions about sunscreens to help reduce skin cancer and early skin-aging risks. Reacting with disappointment to the implementation delay, a group of U.S. senators headed by Jack Reed (D-RI) wrote a **letter** to FDA Commissioner Margaret Hamburg on May 17, 2012, urging her to reverse FDA's decision as summer approaches. "Americans will continue to think they are truly protected from the sun, that a product is 'water proof' and 'sweatproof,' and provides 'all day protection,' when that isn't likely the case," the letter states.

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FTC Settles False Ad Claims Against Skechers for $40 Million

The Federal Trade Commission (FTC) has settled false advertising allegations filed against a company that claimed its athletic shoes effectively strengthen muscles, cause weight loss or have other health benefits. *FTC v. Skechers U.S.A., Inc.*, No. 1:12-cv-01214 (U.S. Dist. Ct., N.D. Ohio, E. Div., stipulated final judgment filed May 16, 2012). While the company admits no wrongdoing, it promises not to use such claims in its advertising without sufficient relevant and reliable scientific evidence. It also agrees to pay $40 million into an escrow account to be used for "consumer redress and attendant expenses." Any unused funds from the escrow account will be paid into the U.S. Treasury as disgorgement.

According to FTC, the settlement "is part of a broader agreement [that resolves] a multi-state investigation, which was led by the Tennessee and Ohio Attorneys General Offices and included attorneys general from 42 other states and the District of Columbia." FTC Bureau of Consumer Protection Director David Vladeck said, "Skechers' unfounded claims went beyond stronger and more toned muscles. The company even made claims about weight loss and cardiovascular health. The FTC's message, for Skechers and other national advertisers, is to shape up your substantiation or tone down your claims." *See FTC News Release*, May 16, 2012.

AGs Support Leahy Bill to Overturn *PLIVA v. Mensing*

Attorneys general (AGs) from 36 states, Washington, D.C., American Samoa, Guam, the Northern Mariana Islands, and Puerto Rico have written to Senators Patrick Leahy

(D-Vt.) and Al Franken (D-Minn.) in support of legislation (S. 2295) that would overturn *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567 (2011), which found state-law inadequate-labeling claims against the makers of generic drugs preempted by federal law. Introduced by Leahy, the bill would allow these manufacturers to correct their labels in the same manner as brand-name manufacturers. According to the May 11, 2012, letter, "The [*PLIVA*] preemption holding produces arbitrary and unfair results…. Consumers whose prescriptions happen to be filled with the brand-name version of a drug are protected by state law from inadequate warnings, but consumers whose pharmacists fill their prescriptions with the generic version are now denied this protection."

CPSC Urged to More Actively Participate in Voluntary Standard-Setting Activity

The Government Accountability Office (GAO) has issued a **report** titled "A More Active Role in Voluntary Standards Development Should Be Considered," in which GAO recommended that the Consumer Product Safety Commission (CPSC) review its policies on participation in the development of voluntary product-safety standards and consider "assuming a more active, engaged role." While CPSC apparently devotes some time and resources to standards development and monitoring activities, agency regulations prohibit "staff from voting on final standards or from participating in any meeting that excludes other groups, such as media or consumers."

Federal agencies have discretion about their level of participation in this arena and can serve in leadership positions and vote on standards; accordingly, GAO called on CPSC to participate earlier and take a more active role, particularly given the value accorded the agency's participation by consumer groups and product safety experts. "These actions could enhance CPSC's oversight and may strengthen voluntary standards," GAO concluded. Voluntary standards developed in the private sector are not binding on industry, but they can be, and often are, adopted as mandatory standards by federal agencies. The rationale for federal agencies embracing voluntary standards is that regulated parties participate in their development and are thus more likely to comply with regulations based on them.

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The GAO report also notes that CPSC's operating plan for fiscal year 2012 includes 10 activities related to nanotechnology in consumer products. "These activities will identify the potential release of nanoparticles from selected consumer products and determine the potential health effects from such exposure, which may lead to CPSC participation in voluntary standards development, according to CPSC officials." *See GAO News Release*, May 21, 2012.

OSHA Plans to Establish Whistleblower Protection Advisory Committee

The U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) has **announced** plans to establish a Whistleblower Protection Advisory Committee to improve the "efficiency, effectiveness and transparency" of the agency's whistleblower protection activities.

OSHA enforces whistleblower provisions of the Occupation Safety and Health Act and "20 other statutes protecting employees who report violations of various workplace, airline, commercial motor carrier, consumer product, environmental, financial reform, food safety, health care reform, nuclear, pipeline, public transportation agency, railroad, maritime, and securities laws." The committee will advise OSHA on how to provide better customer service to workers and employers, improve investigative and enforcement processes, better train OSHA investigators, enhance regulations governing OSHA investigations, and improve cooperative activities with federal agencies responsible for areas also covered by OSHA's whistleblower statutes.

David Michaels, assistant secretary of labor for occupational safety and health, noted that a federal advisory committee can strengthen whistleblower protections. "Workers who expose securities and financial fraud, adulterated foods, air and water pollution and workplace safety hazards have a legal right to speak out without fear of retaliation, and the laws that protect these whistleblowers also protect the health, safety and well-being of all Americans," he said. *See OSHA Press Release*, May 17, 2012.

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NHTSA Proposes Electronic Stability Control Systems for Heavy Trucks and Buses

Predicting that nearly 2,500 accidents involving up to 858 injuries and 60 fatalities could be prevented annually, the National Highway Traffic Safety Administration (NHTSA) has **proposed** requiring electronic stability control systems on truck tractors and certain buses weighing greater than 26,000 pounds. According to NHTSA, such systems "reduce untripped rollovers and mitigate severe understeer or oversteer conditions that lead to loss of control by using automatic computer-controlled braking and reducing engine torque output." The agency will provide a 90-day comment period following publication in the *Federal Register*.

Lawmakers Urge OMB Not to Require Public Disclosure of New Chemicals' Identities

Congressional lawmakers have called on the Office of Management and Budget (OMB) to "further evaluate the significant adverse economic impact" that could result if a proposed rule is implemented to require that U.S. chemical manufacturers publicly disclose the identities of new chemicals not yet manufactured or available on the market. Although the proposed rule has not been released because it is under OMB review, it would apparently amend the pre-manufacture regulations under the Toxic Substances Control Act by allowing disclosure of confidential business information relating to the identity of chemicals used in health and safety studies.

In a May 11, 2012, **letter** to Cass Sunstein, administrator of OMB's Office of Information and Regulatory Affairs, the lawmakers state that the Environmental Protection Agency "already receives the specific chemical identities used in studies

and intended to be used in products. We write to strongly urge that these specific chemical identities, which EPA can already use to evaluate the safety of these chemicals and products, not be disclosed publicly due to the substantial negative impact such disclosure could have on the competitiveness of the chemical industry in the United States."

Signed by Representative Robert Goodlatte (R-Va.), chair of the House Judiciary Subcommittee on Intellectual Property, Competition, and the Internet, and eight other members, most of whom serve on the subcommittee, the letter also noted, "[n]ew chemicals and new uses and mixtures of existing chemicals usually take million of dollars. In the chemical industry, trade secret chemical identities are among the most valuable intellectual property, yet they often cannot be patented.… Structurally-descriptive generic names can provide sufficient information to make studies useful while still protecting trade secret identities."

LEGAL LITERATURE REVIEW

Michael Pardo, "The Nature and Purpose of Evidence Theory," *Vanderbilt Law Review* (forthcoming 2013)

University of Alabama School of Law Professor Michael Pardo explains in this article why an over-arching theory on evidence is needed and how one should be developed. Pardo contends that a great deal of legal scholarship on evidence in recent years has been narrowly focused on important issues such as types of evidence, legal rules and doctrine, the reasoning processes of facfinders, and the structure of proof. Pardo starts from the premise that at the foundation of the law of evidence are factual accuracy and allocating the risk of factual errors.

He proposes the theoretical criteria for evaluating any theory of the evidentiary proof process and shows the practical significance of having an evidentiary theory; for example, "any determination or evaluation of whether an item of evidence is relevant or not will depend on some conception or understanding of what it means for evidence to be 'relevant' in the first place." As well, "applications in the proof process—which are designed to enforce the rights, duties, and obligations flowing from constitutional, tort, contract, property, criminal, and all other substantive areas—may be principled, coherent, and justified or they may be left to the subjective whims of individual decisionmakers." While these "untheorized" trial practices "may ultimately turn out to be good ones, … evidence theory nevertheless makes explicit what is implicit in these practices, so that we can better examine, evaluate, critique, and perhaps improve them."

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Robert Bone, "Party Rulemaking: Making Procedural Rules Through Party Choice," *Texas Law Review*, 2012

University of Texas School of Law Professor Robert Bone explores the implications of efforts that parties undertake to define, in advance of litigation, the rules and procedures that will apply to adjudicate their disputes. Part of his analysis includes a dissection of the arguments made in support of and against party rulemaking; Bone contends that each side is "insufficiently theorized," and may be based on flawed assumptions. "For example, it might seem that contractual limits on discovery will reduce the social costs of litigation, but in fact, they might increase costs if the lower discovery burden reduces the gains from settlement and makes trial more attractive." And at a more fundamental level, the author observes that party rulemaking has the potential to affect adjudicative legitimacy, and he argues that while this source of procedural rulemaking is perfectly legitimate, "parties should not be allowed to alter procedures that are central to the reasoning process."

LAW BLOG ROUNDUP

Promises, Promises

"Columnist Debra Saunders quotes me on the Federal Trade Commission's extraction of $40 million from a shoe maker for hyping its sneakers in its ads." Cato Institute Senior Fellow Walter Olson, blogging about his response to the FTC's settlement with Skechers, discussed elsewhere in this *Report*. Olson apparently told Saunders, "It's one thing if you sell someone a washing machine and it breaks," but Skechers ads are like beer commercials showing "pretty women swimming around the beer drinker, which seldom happens in real life."

Overlawyered.com, May 18, 2012.

Football Players and Head Injuries

"Obviously football players knew that they could get seriously hurt. But does it matter that they did not know that they could get hurt in the way that, say, Dave Duerson was?" Indiana University Robert H. McKinney School of Law Professor Gerard Magliocca, referring to the former professional football player who committed suicide allegedly as a result of brain injuries from repeated blows to the head. Magliocca also discusses other potential legal issues raised by litigation recently filed by players against the National Football League. Other lawsuits have been filed against the companies that make football helmets.

Concurring Opinions, May 15, 2012.

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THE FINAL WORD

Epidemiologists Call for Child-Resistant Battery Compartments in Electronics Products and Toys

Using data from the National Electronic Injury Surveillance System, epidemiologists have concluded that the number of children injured by inserting batteries in their mouths, ears and noses more than doubled from 1990 to 2009. Samantha Sharpe, et al., "Pediatric Battery-Related Emergency Department Visits in the United States, 1990-2009," *Pediatrics*, May 14, 2012. The greatest risk was for children younger than 5, and button batteries were implicated in 83 percent of emergency room visits caused by a known battery type. The researchers reportedly recommended that "passive prevention strategies," such as child-resistant battery compartments for household electronics and toys, be designed given the "limited effectiveness of medical interventions once tissue damage has occurred." *See Bloomberg BNA Product Safety & Liability Reporter.*

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.

Perrin Conferences, Chicago, Illinois – June 27, 2012 – "National Complex Litigation Conference: A Symposium on Current & Emerging Issues." Shook, Hardy & Bacon Global Product Liability Partner John Sherk will serve as a panelist during a session titled "Class Actions, New Risks and New Defenses" to discuss recent U.S. Supreme Court rulings and other product liability, consumer fraud and employment cases. The panel will also consider the role of experts at the class certification stage as well as the risks and benefits of class action litigation as an effective means to resolve conflict. ■

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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).