Shook, Hardy & Bacon L.L.P.

JUNE 19, 2014

PRODUCT LIABILITY LITIGATION REPORT

CONTENTS

FIRM NEWS

SHB Named Product Liability Defense Firm of the Year

Who's Who Legal: The International Who's Who of Business Lawyers has named Shook, Hardy & Bacon its 2014 Product Liability Defense Law Firm of the Year, an honor the firm has received every year since the award's inception 10 years ago.

Who's Who Legal has recognized 24 SHB partners as leading product liability defense attorneys, including Rob Adams, Tony Andrade, Mark Behrens, Simon Castley, Walt Cofer, Sarah Croft, Greg Fowler, Michelle Fujimoto, William Geraghty, Harvey Kaplan, Matthew Keenan, Frank Kelly, Madeleine McDonough, Ed Moss, Paul Reid, Ken Reilly, Frank Rothrock, Bill Sampson, Scott Sayler, Victor Schwartz, Andrew See, Marc Shelley, Sean Wajert, and Marie Woodbury.

The complete listing will be published in the 2014 edition of *Who's Who Legal: The International Who's Who of Product Liability Defence Lawyers*, as well as the 2015 edition of *The International Who's Who of Business Lawyers*, which covers 32 practice areas in more than 100 countries.

CASE NOTES

Federal Court Approves Consent Decree with Toy Importers

A federal court in California has approved consent decrees of permanent injunction against four toy and children's product importers and six individual company officers following U.S. Consumer Product Safety Commission (CPSC) charges that they knowingly imported hazardous children's products, including those with excessive levels of phthalates, lead and lead paint or that posed choking or suffocation hazards due to small parts. *United States v. Toys Distrib., Inc.*, No. 14-1364 (U.S. Dist. Ct., C.D. Cal., decided June 10, 2014).

Under the agreement, the companies are enjoined from violating consumer product safety laws and will create product safety programs, conduct product audits, retain an accredited third party conformity assessment body, comply with third-party testing requirements, issue to CPSC on request certificates of conformity, and otherwise establish systems to conduct recalls and investigate consumer incidents,

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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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injuries or complaints. Any violations of material parts of the decree will require a liquidated damages payment of $1,000 for each day of non-compliance.

According to CPSC, the agency collected and tested dozens of samples of the companies' products "as they attempted to enter the Port of Los Angeles/Long Beach between 2008 and 2013" and issued repeated non-compliance notices. While one of the cases apparently culminated in a recall of toy cars with lead paint in January 2009, "[m]ost of the other products stopped at import were not distributed to consumers." *See CPSC News Release*, June 13, 2014.

Off-Label Suture Suit Against Anulex Dismissed as Preempted Under FDCA

A North Carolina federal court has dismissed an unfair and deceptive trade practices lawsuit against medical device maker Anulex Technologies, Inc. stemming from Anulex's alleged promotion of its X-close devices for off-label use. *Evans v. Rich*, No. 5:13-cv-868 (U.S. Dist. Ct., E.D.N.C., order entered June 4, 2014).

The court granted Anulex's motion to dismiss the state law-based claim for unfair trade practices based on *Buckman Co. v. Plaintiff's Legal Committee*, in which the U.S. Supreme Court held that claims which exist "solely by virtue of the requirements of the [Food, Drug, and Cosmetic Act (FDCA)]" are "impliedly preempted" because the FDCA did not create a private right of action. Further, "where private litigants are effectively suing for a violation of the FDCA under the guise of state law, their claims are impliedly preempted." The court held that plaintiff Bennie Evans' claim was preempted, but granted his motion for leave to file an amended complaint.

New York's Highest Court Clarifies Disclosure Requirements in Lead-Based Paint Cases

In a 6-1 decision, the New York Court of Appeals, the state's highest court, has interpreted a state rule about the disclosure of medical reports in personal injury cases to mean that plaintiffs are not obligated to hire a medical provider to examine them and create a report solely for litigation. ***Hamilton v. Miller*, Nos. 113 & 114 (N.Y., order entered June 12, 2014)**.

The plaintiffs in both cases before the court had allegedly been injured after exposure to lead-based paint used in the defendants' rental units that the plaintiffs had lived in many years ago as children. The defendants had each filed motions to compel the plaintiffs to produce medical reports detailing the diagnoses of the purported injuries under 11 NYCRR 202.17(b)(1), which requires disclosure of "copies of the medical reports of those medical providers who have previously treated or examined the party seeking recovery," or to preclude the plaintiffs from offering evidence of their injuries at trial.

The plaintiffs argued that the rule did not "obligate them to hire a medical provider to examine them and create a report solely for the purposes of the litigations," and the court agreed, citing the prohibitive costs such a requirement could unfairly impose on plaintiffs.

The plaintiffs argued that the rule did not "obligate them to hire a medical provider to examine them and create a report solely for the purposes of the litigations," and

the court agreed, citing the prohibitive costs such a requirement could unfairly impose on plaintiffs. The court also found, however, that requiring only the production of already-existing reports was too limited, as this would allow plaintiffs to avoid disclosure merely because their medical providers had not drafted any such reports. Instead, "[i]f plaintiffs' medical reports do not contain the information required by the rule, then plaintiffs must have the medical providers draft reports setting forth that information." The court held that the trial courts had abused their discretion by compelling the plaintiffs to produce medical evidence for each alleged injury and remanded the cases for further proceedings.

Mississippi Supreme Court Returns Punitive Damages in Asbestos Litigation for Re-Trial

The Mississippi Supreme Court has affirmed the compensatory damages awarded to a man diagnosed with mesothelioma allegedly caused by workplace exposure to asbestos products, but remanded for a new trial as to punitive damages because the trial court may have made remarks to the jury that affected the award. ***Union Carbide Corp. v. Nix*, No. 2012-CA-01380-SCT (Miss., decided June 5, 2014)**. Among other matters, the court determined that compliance with an Occupational Safety and Health Administration label warnings standard was not dispositive on whether the warnings were adequate, and it was plausible that the jury decided that the warnings were noncompliant given the subjective nature of the standard—that is, "printed in letters of sufficient size and contrast as to be readily visible and legible." The ruling upholds a $250,000 compensatory damages verdict against Union Carbide, vacates a $500,000 punitive damages award and the attorney's fee award, allowing it to be reconsidered if punitive damages are again awarded. The court also refused to disturb the trial court's imposition of an 8-percent post-judgment interest rate.

THE INTERNATIONAL BEAT

Revised Consumer Protection Law Poses Liability Issues in China

With revisions to China's consumer rights protection law taking effect earlier this year, questions have apparently been raised about the celebrities who have endorsed food, cosmetics, pharmaceuticals, and personal care products that may not deliver the promised results. Microblog marketing has reportedly become the tool of choice for a number of well-known entertainers, who extol product virtues without necessarily indicating that these are paid endorsements; product quality is also apparently in question given outsourced manufacturing, according to a news source. Under the new law, those who endorse goods and services can be held liable for false advertising if consumers have cause to question the claims. *See WantChinaTimes.com*, May 31, 2014.

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ALL THINGS LEGISLATIVE AND REGULATORY

CPSC Commissioner Nominations Await Final Action

During a June 11, 2014, hearing before the U.S. Senate Committee on Commerce, Science and Transportation, Consumer Product Safety Commission (CPSC) Acting Chair Robert Adler, facing renomination, was **criticized** by ranking member John Thune (R-S.D.) for the agency's failure to take action to reduce third-party testing burdens under a law passed in 2011 and for its apparent overreach in seeking to hold the owner of the company that made high-power magnetic desk toys responsible for the costs of recalling the product. Additional details about the settlement reached with Buckyballs® seller Maxfield & Oberton Holdings and its former CEO Craig Zucker appear in the **June 5, 2014**, issue of this *Report*.

Adler reportedly testified that the agency had "dedicated the necessary resources" to reduce the burdens of third-party testing, required for the makers of children's products under the Consumer Product Safety Improvement Act of 2008, but said that it was difficult to do that while also ensuring compliance with existing rules and regulations. Two other CPSC nominees were expected to be favorably reported out of committee the same day as Adler's hearing, but a quorum was lacking. Waiting for confirmation are Elliot Kaye as CPSC chair and Joe Mohorovic as CPSC commissioner. *See Bloomberg BNA Product Safety & Liability Reporter™*, June 12, 2014.

CPSC Begins Responding to FOIA Requests on Buckyballs® Actions

The U.S. Consumer Product Safety Commission (CPSC) has reportedly started to produce documents to non-profit organization Cause of Action, which sued the agency in April 2014 to force the release of records it had sought under the Freedom of Information Act (FOIA) pertaining to the agency's actions against the company that made Buckyballs®, high-power magnetic desk toys, and its CEO Craig Zucker.

According to Cause of Action, its lawsuit "involves a FOIA request related to CPSC's efforts, through heavy-handed regulatory overreach, to shut down a number of successful and responsible businesses, including one that was operated by Mr. Craig Zucker."

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Cause of Action has alleged that CPSC abruptly issued a preliminary determination that the company's products were defective "without warning or evidence of a statistically significant number of injuries" and further asserted that the agency forced the company out of business. The organization's attorney was quoted as saying, "Cause of Action is a transparency and accountability organization," and its "set of questions and concerns about the Zucker litigation relate to the commission's determination that it was appropriate to sue him individually. From a policy standpoint, an accountability standpoint, a transparency standpoint, we believe the circumstances of that determination are worth looking at." *See Bloomberg BNA Product Safety & Liability Reporter™*, June 10, 2014.

NHTSA Reopens Comment Period for Child-Restraint Systems NPR

The U.S. National Highway Traffic Safety Administration (NHTSA) has **reopened** the comment period for a notice of proposed rulemaking (NPR) to amend Federal Motor Vehicle Safety Standard No. 213, "Child restraint systems," to adopt side-impact performance requirements for all child restraint systems designed to seat children up to 40 pounds. NHTSA extended the comment period following a request from the Juvenile Products Manufacturers Association which claimed that the original three-month deadline was too short to "thoroughly evaluate the potential implications" of the proposed rule and that availability of the side impact test dummy was "limited."

To ensure that child restraint systems "provide a minimum level of protection in side impacts by effectively restraining the child, preventing harmful head contact with an intruding vehicle door or child restraint structure, and by attenuating crash forces to the child's head and chest," the agency hopes to fulfill the statutory requirement of the "Moving Ahead for Progress in the 21st Century Act" of July 6, 2012, requiring that NHTSA issue new rules to protect children during side-impact crashes. Comments will be accepted until October 2, 2014. *See Federal Register,* June 4, 2014.

FDA Plans to Finalize Generic Drug Labeling Rule by December 2014

According to the Department of Health and Human Services' semiannual agenda, the U.S. Food and Drug Administration (FDA) **plans** to issue a final rule that would allow generic drug makers to follow the same process as branded drug manufacturers in updating safety information on product labeling. Proposed on November 13, 2013, the rule would "enable ANDA [abbreviated new drug application] holders to update product labeling promptly to reflect certain types of newly acquired information related to drug safety, irrespective of whether the revised labeling differs from that of the RLD [reference listed drug]." *See Federal Register*, June 13, 2014.

Vermont Governor Signs Bill Regulating Chemicals in Children's Products

Gov. Peter Shumlin (D-Montpelier) has signed into law a bill (**S. 239**) to regulate the use of toxic chemicals in children's products. Called the "Toxic-Free Families Act," the law will allow state regulators to restrict the use of toxic chemicals considered to be hazardous in products designed for children. The measure will adopt a list of 66 chemicals of "high concern" identified by other states and the European Union and provide authority for chemicals to be added or removed through rule-making. It will also establish a working group including governor-appointed scientists, health experts, industry representatives, and other stakeholders to advise the state health commissioner on possible additions to the list.

Under the new law, manufacturers must report a list of chemicals used in their products to the state beginning July 1, 2016.

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products to the state beginning July 1, 2016. To date, Vermont has restricted the use of bisphenol A, some phthalates, some polybrominated diphenyl ether flame retardants, and some chlorinated phosphate flame retardants in children's products and a limited number of consumer products. *See Gov. Shumlin News Release*, June 10, 2014.

LEGAL LITERATURE REVIEW

Charles Rhodes IV & Cassandra Burke Robertson, "Toward a New Equilibrium in Personal Jurisdiction," *U.C. Davis Law Review*, 2014 (Forthcoming)

South Texas College of Law Professor Charles Rhodes IV and Case Western Reserve University School of Law Professor Cassandra Burke Robertson argue that the 2014 U.S. Supreme Court decisions in *Daimler AG v. Bauman* and *Walden v. Fiore* will shift the balance of litigation power to defendants by limiting where plaintiffs may file lawsuits to the point that determining a forum where multiple defendants may be sued together might become impossible. They discuss the effects that those decisions may have on future litigation by identifying areas where disputes may become more prominent: (i) "the 'connectedness' requirement of specific jurisdiction"; (ii) "the availability of personal jurisdiction over pendent claims that form part of a single case or controversy"; (iii) "the future availability of personal jurisdiction over a defendant whose out-of-state conduct has caused effects within the forum state"; and (iv) "the availability of 'consent jurisdiction' based on the appointment of a registered agent for service of process."

The article further proposes a two-tier system based on *International Shoe v. Washington* to balance the power when determining specific jurisdiction by using that case's "continuous and systematic" and "single or occasional" acts distinction. In a case falling within the "continuous and systematic" category, they argue, "the balance of individual and state interests should tilt toward authorizing jurisdiction as long as some loose connection exists between the forum and the actions that give rise to the litigation," resulting in a relaxed relatedness requirement. In cases of adjudicatory jurisdiction with only "single or occasional" acts, the authors argue that the state should retain more control over its regulatory interests. According to Rhodes and Robertson, this framework would then balance defendants' liberty interests as protected by *Bauman* and *Walden* with states' sovereign interests in protecting their citizens.

LAW BLOG ROUNDUP

The Apparent Power of Daughters

"A new study found that judges who have daughters are more likely to rule in favor of women's rights than those who don't." *Wall Street Journal* Law Blog lead writer Jacob Gershman, posting about a recent study, discussed elsewhere in this *Report*, finding that the gender-issue rulings of U.S. court of appeals judges appear to be affected by whether they have daughters.

WSJ Law Blog, June 17, 2014.

The "Scientifically Ignorant Blogger" Wreaking Havoc on Food and Beverage Industries

"David Gorski at Science-Based Medicine and Trevor Butterworth at Forbes take a dim view of Food Babe, 'a young, telegenic, clever but scientifically ignorant blogger' who's turned her campaign sights from Subway to beer makers." Cato Institute senior fellow Walter Olson, blogging about the woman who revealed that Subway used a "yoga-mat chemical" in its sandwich breads and is now apparently focusing on the genetically modified organisms and chemicals in beer. According to Gorski, Food Babe Vani Hari "has a talent and penchant for making her utter ignorance of chemistry and science work for her as a powerful P.R. tool that has catapulted her from an obscure food blogger to a guest on television shows." He claims that she used her Website and blog to gather signatures in a successful campaign to convince Subway to stop using the chemical azodicarbonamide, despite "no good evidence" that it is harmful.

"A new study found that judges who have daughters are more likely to rule in favor of women's rights than those who don't."

Overlawyered.com, June 17, 2014.

THE FINAL WORD

Liptak Reports Findings on Leanings of Judges with Daughters

In the context of a 2003 high court ruling in which Chief Justice William Rehnquist "suddenly turned into a feminist, denouncing 'stereotypes about women's domestic roles,'" *New York Times* U.S. Supreme Court correspondent Adam Liptak recently discussed a **study** appearing in the *American Journal of Political Science* on the effect that having daughters has had on the federal judges that consider cases involving women's issues.

Conducted by researchers at the University of Rochester and Harvard, the study considered approximately 2,500 votes involving 224 federal appeals court judges. It concluded, "Having at least one daughter corresponds to a 7 percent increase in the proportion of cases in which a judge will vote in a feminist direction." This effect is apparently more pronounced if the daughter is an only child—"Having one daughter as opposed to one son is linked to an even higher 16 percent increase in the proportion of gender-related cases decided in a feminist direction." The researchers analyzed the same judges' votes in an additional set of 3,000 randomly selected cases and found no relationship between having daughters and "liberal" votes.

"Having at least one daughter corresponds to a 7 percent increase in the proportion of cases in which a judge will vote in a feminist direction."

They suggest that the most likely explanation for the phenomenon was offered by Justice Ruth Bader Ginsburg: "By having at least one daughter, judges learn about what it's like to be a woman, perhaps a young woman, who might have to deal with issues like equity in terms of pay, university admissions or taking care of children." In their view, "empathy may indeed be a component in how judges decide cases." Ginsburg, who was delighted with Rehnquist's 2003 opinion, felt that his life experience had played a role in his shifting point of view—one of his daughters had apparently recently divorced and combined single parenting with a demanding job. When he authored the opinion, just a few years before he died, he had reportedly been leaving work early to pick up his granddaughters from school. *See The New York Times*, June 16, 2014.

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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 440 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).

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2014 GLOBAL PRODUCT LIABILITY LAW FIRM OF THE YEAR WHO'S WHO LEGAL