Shook, Hardy & Bacon L.L.P.

JUNE 28, 2012

PRODUCT LIABILITY LITIGATION REPORT

CONTENTS

FIRM NEWS

Wajert Considers Legal Duties for Makers of Caffeinated Alcoholic Beverages

Shook, Hardy & Bacon Global Product Liability Partner **Sean Wajert** has authored an **article** on the failure of a duty to warn claim in a case involving a caffeinated alcoholic beverage and a fatal motorcycle accident. Titled "No Duty to Warn for 'Nonconventional' Alcohol Beverage," the article appeared in the June 27, 2012, issue of *Law360*. Wajert discusses the court's dismissal of such claims in *Cook v. MillerCoors LLC*, and explains why "the court was reluctant to make an exception to the rule" that "the dangers inherent in alcohol consumption are well-known to the public." With "hundreds of alcohol-containing products that are not 'conventional' in one way or another, by taste, ingredients, color, manufacturing process, advertising …. To shift responsibility from the person who over-consumes one of these and then drives impaired is to send the absolutely wrong policy message."

CASE NOTES

U.S. Supreme Court Grants *Cert.* to Consider Class Certification Question

In the context of antitrust claims involving a cable service provider, the U.S. Supreme Court has decided to review "[w]hether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis." ***Comcast Corp. v. Behrend*, No. 11-864 (U.S., petition for certiorari granted June 25, 2012)**. The Third Circuit Court of Appeals affirmed the district court's decision to certify the class, agreeing that "the class has met its burden to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members, and that there is a common methodology available to measure and quantify damages on a class-wide basis."

A dissenting Third Circuit judge parted ways with the majority "entirely … when it comes to class-wide proof of damages." According to this jurist, the expert testimony "is incapable of identifying any damages caused by reduced overbuilding in the Philadelphia DMA [designated market area]. Consequently, his testimony is irrelevant and should be inadmissible at trial, pursuant to Federal Rule of Evidence 702 and

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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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Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), as lacking fit. Thus, it cannot constitute common evidence of damages."

Seventh Circuit Decides Comity Has No Preclusive Effect on Class Certification Rulings

In the context of class action claims filed by Cook County, Illinois, jail inmates alleging Eighth Amendment and due process violations in connection with the dental care they are provided, the Seventh Circuit Court of Appeals has determined that comity between federal district judges' rulings on class certification is not preclusive; thus, a district court did not err in granting class status to the inmates' claims despite the previous refusal of sister courts to grant certification in nearly identical lawsuits. ***Smentek v. Dart*, No. 11-3261 (7th Cir., decided June 19, 2012)**.

Under the comity doctrine, courts may defer to the rulings of other courts. The U.S. Supreme Court recently invoked the comity principle when suggesting that copycat class action litigation could be limited by other means, while holding in *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011), that "neither a proposed class action nor a rejected class action may bind nonparties." In this regard the Court stated that "we would expect federal courts to apply principles of comity to each other's class certification decisions when addressing a common dispute." Because *Smith* involved parallel federal and state court proceedings, the Seventh Circuit analyzed whether the principle would also apply to the decisions of sister federal courts.

According to the court, while "the effect of the doctrine of comity, when it is successfully invoked, is preclusive,… unlike res judicata, it is a doctrine that does not require but merely permits preclusion…. The mandatory comity for which the defendants in our case contend is just another name for collateral estoppel. The defendants are wrong to think comity a synonym for collateral estoppel." If given a preclusive effect, said the court, the doctrine would have "greater force between two judges of the same court than between two nations each jealous of its sovereign authority and demanding respect from other nations."

Fifth Circuit Affirms Sanctions Against Law Firm for Violating Protective Order in Tire Suit

The Fifth Circuit Court of Appeals has upheld an award of sanctions in favor of a tire manufacturer whose trade secrets and confidential information, subject to a protective order, were inadvertently distributed to other plaintiffs' lawyers by the law firm representing a family that filed a products liability suit against the company. ***Smith & Fuller, P.A. v. Cooper Tire & Rubber Co.*, No. 11-20557 (5th Cir., decided June 21, 2012)**. Thus, the court affirmed an award of nearly $30,000 in fees and expenses that the tire company incurred to identify the violation and enforce the protective order.

While the law firm had not willfully violated the protective order, the district court determined that sanctions were justified because the law firm "understood the importance of complying with the order inasmuch as Cooper's production of confidential documents was made in reliance upon the protections given by the court;

yet, Smith allowed dissemination of the protected information to personal injury lawyers who sue Cooper and other tire manufacturers." The firm had also apparently been sanctioned previously for "willfully violating a protective order in another case against Cooper by providing confidential material to an attorney in Arizona."

The Fifth Circuit found that the district court did not abuse its discretion in imposing sanctions and that the amount imposed was reasonable. The court further rejected the law firm's argument that the district court's remedial powers were limited to the protective order's "Inadvertent Disclosure" provision. According to the court, Federal Rule of Civil Procedure 37(b) gives courts the authority to impose sanctions for failures to obey discovery orders, and lesser sanctions may be imposed when willfulness or bad faith is lacking. Because the district court imposed "one of the least severe sanctions under its authority," and because "significant authority" supports "the imposition of Rule 37(b) sanctions for violation of Rule 26(c) protective orders," the Fifth Circuit determined that there was no basis for vacating the lower court's decision. The appeals court also determined that the protective order in this case was an "order to provide or permit discovery" under Rule 37(b)(2), thus making its terms applicable.

Eleventh Circuit Agrees That Portable Heater Warnings Were Adequate

The Eleventh Circuit Court of Appeals has determined that under Florida law, where product safety warnings are objectively accurate, clear and unambiguous, a court may decide that the warnings are adequate as a matter of law, thus affirming a district court's grant of the defendants' motion for summary judgment. ***Farias v. Mr. Heater, Inc.*, No. 11-10405 (11th Cir., decided June 21, 2012)**. The plaintiff, who claimed the defendants failed to warn her that indoor use of propane gas-fired infra-red portable heaters could be dangerous and allegedly sustained $300,000 in damages from a fire after she used the heaters inside her home, contended that the issue was for a jury to decide.

According to the plaintiff, the adequacy of the warnings must be determined by a jury because the English-language written warnings and graphic depictions were "inherently contradictory, inaccurate and ambiguous" and the circumstances surrounding the marketing of these heaters to Miami's Hispanic community are similar to another case "which left the question of the adequacy of the English-only warnings on a consumer product to the jury." The Eleventh Circuit disagreed, finding that "the totality of the written warnings and graphic depictions … adequately notified consumers of the 'apparent potential harmful consequences' of the indoor use of the Mr. Heater propane gas heater, including the risk of fire."

The Eleventh Circuit disagreed, finding that "the totality of the written warnings and graphic depictions … adequately notified consumers of the 'apparent potential harmful consequences' of the indoor use of the Mr. Heater propane gas heater, including the risk of fire."

The court was also unpersuaded that the facts were similar to those in the other case where the pervasiveness of product advertising in the Hispanic media led the court there to leave to the jury "whether a warning, to be adequate, must contain language other than English or pictorial warning symbols." Apparently, the plaintiff

produced no evidence that the defendants "marketed Mr. Heater in any way to Spanish-speaking customers through the use of Hispanic media. That Home Depot has recently instituted an internal policy for all of its vendors to use bilingual packaging is not evidence of a targeted marketing campaign of the Mr. Heater to Miami's Hispanic community through predominantly Hispanic media outlets."

Court Dismisses Most Claims Against Football Helmet Manufacturers

A federal court in Florida has dismissed without prejudice a number of putative class action claims filed by the father of boys who play high-school football against companies that make football helmets alleging that the companies misrepresented the ability of the helmets to prevent concussions. *Enriquez v. Easton-Bell Sports, Inc.*, No. 12-cv-20613-PCH (U.S. Dist. Ct., S.D. Fla., order entered June 15, 2012). The court apparently agreed with the defendants that the complaint lacked substance as to claims alleging breach of contract and violation of Florida and California consumer protection laws. Still, the court allowed the plaintiff until July 2, 2012, to file a second amended complaint and refused to strike the class action allegations, finding the motion premature.

Class Claims Dietary Supplements with DMAA Are Dangerous, Alleges Consumer Fraud

Seeking to certify a nationwide class and statewide subclass of consumers, an Illinois resident has filed a lawsuit against the companies that make and sell dietary supplements intended for weight loss, alleging that they contain dangerous stimulants, including an illegal synthetic compound referred to as DMAA, as well as "large amounts of caffeine, synephrine, and yohimbine." *Ibarolla v. Nutrex Research, Inc.*, No. 1:2012cv04848 (U.S. Dist. Ct., N.D. Ill., E. Div., filed June 18, 2012). Claiming economic loss, i.e., a loss of substantial money purchasing products she would not have otherwise purchased, and an increased risk of health problems from use of the products without warning of their potential danger, the plaintiff alleges violation of state consumer protection statutes, negligence, common-law fraud, breach of express and implied warranties, unjust enrichment, and violation of the Illinois Consumer Fraud and Deceptive Business Practices Act. She seeks injunctive relief; compensatory, consequential, special, statutory, and punitive damages; restitution; delay damages; attorney's fees; costs; and interest.

ALL THINGS LEGISLATIVE AND REGULATORY

CPSC Explores Regulatory Priorities Including Reforms to Product Recalls

The Consumer Product Safety Commission (CPSC) is reportedly considering changes to improve and streamline its product-recall system. During a June 20, 2012, **public hearing** in Bethesda, Maryland, that focused on CPSC priorities for fiscal year 2014, commissioners heard from a variety of consumer and industry representatives, some of whom expressed concern about the system's low return rate.

To that end, Ioana Rusu, regulatory counsel for Consumers Union, which publishes *Consumer Reports*, called on CPSC to develop a "multi-faceted approach" to reach consumers with better recall information. "For example, the agency could encourage retailers and manufacturers to send information through text messages, not just mail and e-mail," she said. "Many U.S. households currently do not have Internet access and rely wholly on mobile devices. In addition, retailers who offer consumers loyalty programs could use purchase records to determine which consumers should receive recall information. Some retailers already notify members and loyalty card holders, and we urge CPSC to encourage other retailers to do the same."

The three commissioners in attendance evidently shared panelists' concerns, with Anne Northup and Robert Adler suggesting that a tiered product-recall system could streamline procedures by addressing minor safety issues differently than dangerous defects. "Might there be some midpoint where we don't have equal attention to each hazard … [and] try to prioritize?" Adler reportedly said, noting that the "endless parade of recalls" is a difficult problem to solve. "I have a feeling that in another 25 years someone else will be having this discussion, because it is a constant challenge."

Other priorities the commission considered included increased CPSC participation in voluntary standard groups' activities, harmonization of product safety standards domestically and internationally, and safety concerns about certain products such as bed rails for the elderly and fire-retardant chemicals in furniture.

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Information Requirements for Makers of Baby-Bouncers and Walker-Jumpers Due for Extension

The Consumer Product Safety Commission (CPSC) **seeks** comments on a proposed extension of the Office of Management and Budget's (OMB's) approval of information-collection requirements for manufacturers and importers of children's products known as "baby-bouncers" and "walker-jumpers." OMB's most recent approval extension expires August 31, 2012; comments on the necessity and utility of the information collection, as well as its burdens, the accuracy of CPSC's burden estimates, and whether the burdens can be minimized by information technology, must be submitted by August 20.

CPSC bans these and similar products if they are "designed in such a way that exposed parts present hazards of amputations, crushing, lacerations, fractures, hematomas, bruises, or other injuries to children's fingers, toes, or other parts of the body." Under specified conditions, however, CPSC has established criteria exempting these products from the banning rule. The information collection required by the exemption is at issue in this request for comments.

According to the agency, the exemption requires product labeling that identifies the name and address of the manufacturer or distributor, and the model number of the product. It also requires the three-year retention of records that relate to product testing, inspection, sales, and distribution. "If a manufacturer or importer distributes products that violate the banning rule, the records . . . can be used by the manufacturer or importer and the CPSC: (i) [t]o identify specific models of products that fail to comply with applicable requirements, and (ii) to notify distributors and retailers if the products are subject to recall." *See Federal Register,* June 20, 2012.

NHTSA Issues NPRM on Auto Window Glazing Materials

The National Highway Traffic Safety Administration (NHTSA) has issued a **notice of proposed rulemaking** (NPRM) that would change the federal motor vehicle safety standard on glazing materials to harmonize it with international standards "by modernizing the test procedures for tempered glass, laminated glass, and glass-plastic glazing used in front and rear windshields and side windows."

According to NHTSA, the NPRM "would constitute minor amendments" because many of the tests in a global technical regulation (GTR) currently under development among industrialized nations "are substantially similar to tests currently included in Federal Motor Vehicle Safety Standard No. 205." The most significant improvements proposed in the GTR, according to the agency, "include an upgraded fragmentation test designed to better test the tempering of curved tempered glass, and a new procedure for testing an optical property of the windshield at the angle of installation, to better reflect real world driving conditions than the current procedure in Standard No. 205."

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Comments "on whether these and the other provisions of the GTR are suited for adoption into the Federal glazing standard" are requested by August 20, 2012. *See Federal Register*, June 21, 2012.

CPSC Proposes Revoking Parts of Cap-Gun Rules

The Consumer Product Safety Commission (CPSC) has issued a **notice of proposed rulemaking** that would revoke "existing banning regulations pertaining to caps intended for use with toy guns and toy guns not intended for use with caps because they are obsolete and have been superseded by the requirements of ASTM F 963." One existing regulation precludes the use of caps that "produce impulse-type sound at a peak pressure level at or above 138 decibels," although exemptions from the classification of a banned toy for toy caps with a sound level from 138 decibels up to a maximum decibel level of 158 are also provided. According to CPSC, no manufacturers are participating in the program that would allow them to exceed 138 decibels, so it has proposed revoking this exemption.

Another regulation "provides the test method for determining the sound pressure level produced by toy caps and toy guns," specifying the use of testing equipment and methods that existed more than 40 years ago. Thus, CPSC also proposes revoking 16 CFR 1500.47, given the more updated ASTM standard that provides tests that better protect consumers. Comments are requested by August 24, 2012. *See Federal Register*, June 25, 2012.

Comments Sought on Petition for Rulemaking on Crib Bumpers

The Juvenile Products Manufacturers Association has submitted a petition to the Consumer Product Safety Commission (CPSC) seeking a rulemaking that would "distinguish and regulate 'hazardous pillow-like' crib bumpers from 'non-hazardous traditional' crib bumpers under sections 7 and 9 of the Consumer Product Safety Act." Accordingly, CPSC has issued a **request for comments** on the petition to be submitted by August 24, 2012. The association contends that "despite information to the contrary regarding the safety of traditional crib bumpers, some are advocating banning bumpers altogether from the marketplace. Petitioner believes that banning traditional crib bumpers may lead to caregivers adding unsafe soft bedding to cribs to serve as a protective barrier from the tight dimensions and hard wooden surface of the crib slats." The petitioner suggests that a proposed ASTM standard sets forth "performance requirements that petitioner believes provide a reasonable basis for a mandatory crib bumper performance standard." *See Federal Register*, June 25, 2012.

LEGAL LITERATURE REVIEW

Jonathan Wolfson, "Warring Teammates: Standing to Oppose a Co-Party's Motion for Summary Judgment," *Duke Law Review*, 2012

Authored by a Fifth Circuit Court of Appeals law clerk, this article explores whether a defendant in a tort action has standing to oppose the summary judgment motion filed by a co-defendant. Arguing that party alignment is an inappropriate focal point for the analysis, Jonathan Wolfson contends that adversity of position should instead be the "operative criterion." Based on and applying principles from appellate standing and the right of intervention, the article suggests that courts should permit co-party opposition to motions. The article concludes, "The relevant question for analysis is not on which side of the case a party sits (the 'v'), but rather on which side of an issue the party stands. Parties in opposition, or with differing interest, on an issue should have standing to make arguments against one another including opposing co-defendant motions for summary judgment."

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Robin Effron, "Letting the Perfect Become the Enemy of the Good: The Relatedness Problem in Personal Jurisdiction," *Lewis & Clark Law Review*, 2012

According to Brooklyn Law School Associate Professor Robin Effron, the U.S. Supreme Court, in *J. McIntyre Machinery v. Nicastro*, which involved the exercise of personal jurisdiction over foreign manufacturers, "has become obsessed with the general and abstract contours of the relationship between a defendant and the forum state" at the expense of "one of the most important aspects of the distinction between general and specific jurisdiction," i.e., "the relatedness between the lawsuit and the forum state." Effron contends that the result has been the Court's failure to provide a workable rule for the lower courts. Suggesting that the Court "refocus specific jurisdiction doctrine so that it produces concrete answers to the two dimensions of the relatedness problem," the author argues that Justice William Brennan's "stream of commerce position from *Asahi* remains the most viable path for specific jurisdiction analysis."

LAW BLOG ROUNDUP

Class Actions to Return to SCOTUS Docket

"For those feeling this term lacked excitement because there were not any class action cases, the Supreme Court has recently granted cert on two cases that address the question of class certification and the merits and another case considering the role of class representative." University of Connecticut School of Law Professor Alexandra Lahav, blogging about the U.S. Supreme Court's recent decision to review *Comcast v. Behrend*, discussed elsewhere in this *Report*, and an earlier grant of *certiorari* to consider in *Genesis Healthcare Corp. v. Symczyk* (No. 11-1059), whether a named class representative who, before class certification, was given a Rule 68 offer of judgment, which would fully satisfy her individual claim, has standing to represent the class.

Mass Tort Litigation Blog, June 25, 2012.

THE FINAL WORD

Disbarred Fen-Phen Attorneys Ordered to Forfeit Assets

A federal judge in Kentucky has issued an order allowing the U.S. Marshal to seize property owned by two plaintiffs' attorneys who were disbarred and ordered to pay former clients $127 million from a class action settlement involving the diet pill fen-phen. *United States v. Gallion*, Crim. No. 07-39-DCR (U.S. Dist. Ct., E.D. Ky., N. Div., Covington, order filed June 18, 2012). The proceeds from the forfeited property will be used to help pay the restitution award. William Gallion and Shirley Cunningham, convicted in 2009 on eight counts of wire fraud, were also sentenced to prison terms.

The property to be seized includes houses in Kentucky and Florida, luxury automobiles, mutual funds, and the assets of a corporation. *See Law360*, June 19, 2012.

UPCOMING CONFERENCES AND SEMINARS

ACI, New York, New York – October 2-3, 2012 – "National Forum on Pharmaceutical Pricing Litigation." Shook, Hardy & Bacon Pharmaceutical & Medical Device Partner Michael Koon will join a distinguished continuing legal education faculty to present during a panel discussion on "Preparing Defenses to Allegations of False Claims Act Violations." ■

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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).