Shook, Hardy & Bacon L.L.P.

JULY 10, 2014

PRODUCT LIABILITY LITIGATION REPORT

CONTENTS

FIRM NEWS

Silverman Authors Law360 Expert Analysis on Buckyballs Case

Shook, Hardy & Bacon Public Policy Partner **Cary Silverman** has **authored** an expert analysis appearing in the June 24, 2014, issue of *Law360*. Silverman describes how a small startup company and its chief executive were targeted by the U.S. Consumer Product Safety Commission (CPSC) in a desktop high-power magnet set safety investigation that ultimately led to an attempt to hold the CEO individually liable for any recall costs. While the matter settled, Silverman cautions consumer-product companies that "CPSC has significant tools at its disposal to pressure companies to remove products it believes are unsafe from the market."

Kaplan & Montgomery Publish U.S. Overviews on Pharma Regulation and IP Law

Shook, Hardy & Bacon Pharmaceutical & Medical Device Litigation Partner **Harvey Kaplan** and Associate **Evan Montgomery** have published two articles in the Thomson Reuters *Life Sciences Multi-Jurisdictional Guide 2014/15*. One article, titled "**Medicinal product regulation and product liability in the United States: overview**," addresses an array of regulatory issues, including manufacturing, pricing, clinical trials, marketing, data protection, and product liability. The second, titled "**Pharmaceutical IP and competition law in the United States: overview**," discusses patent, trademark and competition law matters.

McDonough & Stonecipher Hill Co-Author Chapter in Top 20 Food & Drug Cases Book

Shook, Hardy & Bacon Pharmaceutical & Medical Device Chair **Madeleine McDonough** and Associate **Jennifer Stonecipher Hill** have co-authored a chapter in the Food and Drug Law Institute's (FDLI) book, *Top 20 Food and Drug Cases, 2013 & Cases to Watch, 2014*. Along with Rikin Mehta, the senior deputy director for the Health Regulation and Licensing Administration of the D.C. Department of Health, they discuss the September 2013 ruling by a California federal court involving claims that Kiss My Face deceives consumers by labeling its personal care products as organic.

SHB offers expert, efficient and innovative representation to clients targeted by class action and complex litigation. We know that the successful resolution of products liability claims requires a comprehensive strategy developed in partnership with our clients.

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

Walt Cofer
+1-816-474-6550
wcofer@shb.com

Greg Fowler
+1-816-474-6550
gfowler@shb.com

or

Simon Castley
+44-207-332-4500
scastley@shb.com

or

Marc Shelley
+41-22-787-2000
mshelley@shb.com

According to the authors, the court's decision—finding that the Organic Foods Product Act (OFPA) did not preempt the claims because it does not apply to these products and declining to apply the primary jurisdiction doctrine—"highlights a significant gap in the regulation of cosmetics and personal care labeling." They contend that the court's ruling "exposes a need for further administrative clarification of the scope of the OFPA" and "opens the door for future claims involving cosmetics and personal care products." To view the chapter, please click here. The book may be purchased at FDLI's Website.

CASE NOTES

D.C. Circuit Dismisses Suit Against Romanian Firearms Maker

The D.C. Circuit Court of Appeals has determined that a Romanian firearms company could not be sued by the parents of a murder victim, allegedly killed in a drive-by shooting in the District of Columbia by one of its assault rifles, because the court lacked personal jurisdiction over it. ***Williams v. Romarm, SA*, No. 13-7022 (D.C. Cir., decided July 1, 2014)**.

Acknowledging the "choppy waters of the [U.S.] Supreme Court's 'stream of commerce' doctrine [that] have plagued the lower courts for years," the court relied on Justice Stephen Breyers' narrow concurrence in *J. McIntyre Machinery, Ltd. v. Nicastro*, to determine that the plaintiffs failed to show that the company had a "regular flow or regular course of sales" in the District of Columbia, "or some additional efforts directed toward the forum state." According to the evidence, the company sold its products to an American distributor in Romania, and a number of its assault rifles made their way to the District of Columbia where they are prohibited. In the court's view, *Nicastro* makes clear that a manufacturer's broad desire to target the United States through a distributor will not suffice. Rather, [plaintiffs] must allege conduct specific to the forum in some way." Here, they relied "solely on the 'mere unilateral' (and criminal) activity of others—activity that takes place after the standard chain of distribution is complete; this cannot satisfy due process."

The court declined the plaintiffs' invitation at oral argument to consider whether the company, which is owned by the Romanian government, was independent enough to be entitled to due process. Apparently, the matter had not been briefed. Under the Foreign Sovereign Immunities Act, a foreign state is not a "person" protected by the Fifth Amendment's Due Process Clause, and thus personal jurisdiction exists where the court has subject matter jurisdiction and service of process has been made. The court also cautioned litigants not to rely on Federal Rule of Appellate Procedure 28(j) as the parties here did to address the unbriefed foreign entity issue, stating, "We think it is worth noting the 28(j) process should not be employed as a second opportunity to brief an issue not raised in the initial briefs. The letters are more appropriately used to cite new authorities released after briefing is complete or after argument but before issuance of the court's opinion."

Lack of Expert Testimony Dooms Personal-Injury Suit Arising from Ladder Accident

The Eighth Circuit Court of Appeals has affirmed a ruling dismissing personal-injury claims filed against the company that makes the Little Giant Ladder®, finding that the lower court did not abuse its discretion in excluding evidence of tests conducted by the plaintiffs' expert. ***Loomis v. Wing Enters, Inc.,*** **No. 13-2332 (8th Cir., decided June 26, 2014)**.

The plaintiffs argued on appeal that exclusion of the expert's "compression tests on the ground they were not conducted under conditions substantially similar to those surrounding the accident improperly shifted the burden to them to exclude all possibilities of another cause of [the plaintiff's] injuries." Discussing how the expert's test conditions purposely "exaggerated to an extreme" the conditions that would cause the ladder's legs to shift, the Eighth Circuit agreed with the lower court that the evidence was inadmissible for lack of "a foundational showing that the tests were conducted under conditions substantially similar to those surrounding the incident at issue." Because the plaintiffs consequently had no admissible expert testimony to support their product-liability theories, the court also affirmed the lower court's grant of the defendant's summary-judgment motion.

Seventh Circuit Rules on Validity of MDL Judge Rulings in Roofing-Shingle Dispute

The Seventh Circuit Court of Appeals has determined that rulings rendered over a period of four years by a multidistrict litigation (MDL) judge to whom the Judicial Panel on Multidistrict Litigation (panel) had not transferred a number of cases in a roofing-shingle dispute were nevertheless valid. ***In re IKO Roofing Shingle Prods. Liab. Litig.,*** **No. 14-1532 (7th Cir., decided July 2, 2014)**. The issue arose from the appeal of an order refusing to certify a class. The MDL judge who rendered the order did so two weeks before the panel issued an order transferring all of the cases to this judge, after learning that the assigned judge had reassigned them. Section 1407(b) "gives the Panel exclusive power to select the judge. Its rules provide that, '[i]f for any reason the transferee judge is unable to continue those responsibilities, the Panel shall make the reassignment of a new transferee judge."

According to the Seventh Circuit, if this problem deprived the court of subject-matter jurisdiction, the appeals court would have to vacate the class-certification ruling and every other order entered during the preceding four years. Because the cases were properly in federal court and properly in the district in which the court sat, the problem is a "case-processing" issue rather than a jurisdictional one, in the court's view. Given that the litigants did not protest the judge's role, the court found that they had forfeited "the benefits of case-processing rules." Thus the court addressed the class-certification issue and determined that the district court erred in denying the motion on the ground that individual issues affecting roofing-shingle failure predominated. The Seventh Circuit found that a number of common liability issues were suited to class-wide resolution, but remanded for the district court to further develop the facts.

THE INTERNATIONAL BEAT

EC Adopts Bisphenol A Limits for Toys

The European Commission (EC) has **issued** a directive (2014/81/EU) to amend Directive 2009/48/EC by establishing limits on the bisphenol A (BPA) used in toys intended for use by children 3 years old and younger "or in other toys intended to be placed in the mouth." The migration limit—that amount of BPA which can be transferred from a toy—has been set at 0.1 mg/l and will be applied in member states by December 21, 2015. According to the EC, the European Food Safety Authority is currently evaluating the effects of BPA, and the limit will be reviewed if "relevant new scientific information becomes available in the future."

Product Safety Authorities Issue Joint Statement on Trilateral Cooperation

The consumer product safety authorities of the European Union, People's Republic of China and United States have concluded a trilateral summit by **issuing** a joint press statement setting forth points of concession and specific actions moving forward. Each organization shares the view that (i) "enhanced international regulatory cooperation contributes to the improvement of the safety of products"; (ii) the application of and cooperation in product safety controls throughout the supply chain is needed to improve product safety, build consumer trust and contribute to economic growth and international trade; and (iii) these authorities, "individually and collectively, play a vital role in working to ensure that industry places the safety of consumers first."

The action items include information exchanges, continued education for industry stakeholders, discussions to explore "the possible convergences of safety requirements," and a continued "reinforcing [of] consumer product traceability." The next trilateral meeting will take place in 2016. *See Fourth Biennial Consumer Product Safety Trilateral Summit Joint Press Statement*, June 19, 2014.

Lawyers Sued in UK for Filing "Hopeless Claim" Trying to Link Autism and Vaccines

A man who was reportedly diagnosed with autism three years after receiving a measles, mumps, rubella (MMR) vaccine has evidently sued the legal team that represented him and more than 1,000 families in legal-aid funded litigation that was dropped in 2003 after research by Andrew Wakefield purportedly linking the disorder to the vaccine was discredited. According to plaintiff Matthew McCafferty's solicitor, the group action, which cost some £15 million in legal aid, raised the hopes and expectations of the families "driven by the irresponsible media frenzy based on an unsubstantiated health scare and junk science. Not one penny in compensation was obtained for any child. The families are just now beginning to recover and take stock." He reportedly claims that the law firm handling McCafferty's claim missed the

time limit for filing it and was unjustly enriched through legal-aid funding. McCafferty seeks damages to "include compensation, distress, expense and inconvenience of engaging in hopeless litigation."

According to a news source, the London-based firm sued by McCafferty has issued a statement denying any wrongdoing, noting that when it began investigating the case "there was a strongly held belief that MMR caused autism in some children. A link between the vaccine and autism was strongly asserted by the families and Dr [Andrew] Wakefield and in view of the large number of cases and the seriousness of the condition, it was appropriate for investigations to be carried out. The legal aid board [was] happy to fund these investigations." *See The Guardian*, June 26, 2014; *The Law Society Gazette*, June 27, 2014.

ALL THINGS LEGISLATIVE AND REGULATORY

Floor Cleaner Manufacturer Agrees to Settle Product-Safety Claims

The U.S. Consumer Product Safety Commission (CPSC) has provisionally **accepted** a settlement agreement with HMI Industries, Inc., a company that made and sold some 44,000 floor cleaners which are allegedly defective "because their wiring can overheat, causing electrical arcing and melting." The company has agreed to pay a civil penalty of $725,000 over allegations that it failed to immediately inform CPSC when it began receiving reports that the product was failing and causing property damage and consumer injuries. The agreement would also require the company to maintain and enforce controls and procedures to ensure that it complies with its product-safety obligations. Public comments on the agreement must be submitted by July 23, 2014. *See Federal Register*, July 8, 2014.

CPSC Seeks Input on Agency Priorities

The U.S. Consumer Product Safety Commission (CPSC) has **slated** a July 24, 2014, public hearing for input on its agenda and priorities for fiscal years 2015 and 2016. Requests to make oral presentations must be submitted by July 10. CPSC specifically seeks comments on areas of emphasis and de-emphasis, and whether it should "consider making any changes or adjustments to the agency's education, safety standards activities, regulation, and enforcement efforts in fiscal years 2015 and/or 2016." *See Federal Register*, July 1, 2014.

CPSC Staff to Conduct Workshop on Proposed Certificates of Compliance Rule

U.S. Consumer Product Safety Commission (CPSC) staff will **hold** a workshop on September 18, 2014, to discuss certain aspects of a proposed rule on certificates of compliance. The workshop, which will be Webcast, will focus on a proposed requirement to electronically file "certificates for regulated imported consumer products with U.S. Customs and Border Protection (CBP) at the time of filing the CBP entry or

the time of filing the entry and entry summary, if both are filed together." Those wishing to participate and serve on a panel must register by August 8, and all others wishing to attend must register by September 5. Written comments are requested by October 31. *See Federal Register*, July 3, 2014.

CPSC Staff Recommends Mandatory Safety Rule for Baby Sling Carriers; July 9 Vote Scheduled

The U.S. Consumer Product Safety Commission (CPSC) was expected to consider whether to propose making a voluntary safety standard for infant slings mandatory during a July 9, 2014, meeting. CPSC staff **recommended** the action to CPSC commissioners on June 25, and concerns over the costs of third-party testing, particularly for small business owners, were reportedly raised. As proposed, the rule would be based on ASTM F2906-14a, "Standard Consumer Safety Specification for Sling Carriers," without change.

A sling carrier is defined as "a product of fabric or sewn fabric construction, which is designed to contain a child in an upright or reclined position while being supported by the caregiver's torso." Three classes of carriers have been identified: ring slings, pouch slings and wrap slings. According to staff, these types of carriers are often reused for multiple children, and just 47 suppliers to the U.S. market have been identified. CPSC is apparently aware of 122 incidents, including 16 fatalities, involving sling carriers reported between 2003 and 2013. The deaths were reportedly attributed to suffocation. Other injuries include fractures and were attributed to falls from the carrier or from the caregiver slipping, tripping or bending over. *See Bloomberg BNA Product Safety & Liability Reporter™*, June 25, 2014.

Zen Magnets Announces Voluntary Standard to Control Access to High-Power Magnets

Zen Magnets, currently targeted by the U.S. Consumer Product Safety Commission for selling high-power magnet spheres deemed to pose a hazard to children who may ingest them, has announced an expansion of its product line to retail stores with warnings that would make their sale "more strict than tobacco products, despite magnets being 100% safe if not misused." Among other matters, in addition to current warnings, the company will require that retail stores not sell the "artistic and educational magnet spheres" to consumers younger than age 18 and that retailers "verbally remind customers to keep magnets away from mouths." *See PRNewswire*, June 27, 2014.

Consumer Groups Call for FTC Investigation of CarMax over Sale of Unfixed Recalled Autos

Consumer advocacy organizations have **petitioned** the U.S. Federal Trade Commission (FTC) to take enforcement action against CarMax for alleged deceptive advertising and sales practices in the sale of used vehicles. They claim that CarMax offers the

vehicles for sale promising that they are "CarMax Quality Certified" and have undergone a rigorous, "125+ point inspection," while the company actually "fails to ensure that safety recalls are performed prior to selling used cars to consumers." The organizations, including Consumer Action, Consumers Union and the U.S. Public Interest Research Group, call on FTC to stop CarMax "from selling unsafe, recalled used cars to the public." They also urge FTC to (i) compile and publicly disseminate VIN-specific information about the safety recall status of vehicles already sold to the public by CarMax, (ii) notify owners of CarMax-sold vehicles about safety recalls pending when they were sold, and (iii) enjoin "such irresponsible and reckless practices in the future."

State Agency Finds Product Makers Switching to Unregulated Flame Retardants

The Washington Department of Ecology has **issued** a report titled "Flame Retardants in General Consumer and Children's Products" which finds that some manufacturers have replaced banned polybrominated diphenyl ethers (PBDEs) with other compounds that may be as toxic to human health and the environment. Among the products tested were seat cushions, mattresses, upholstered furniture for children, electronics, clothing, and baby carriers. The agency reportedly plans to place information from the research underlying the report on a publicly available database scheduled for launch in July 2014. Consumers will be able to find identifying information, including names, manufacturers, retailers, and findings, for all of the products tested. *See Bloomberg BNA Product Safety & Liability Reporter*™, July 2, 2014.

LEGAL LITERATURE REVIEW

Cass Sunstein & Adrian Vermeule, "Libertarian Administrative Law," June 2014

Harvard University Professor Cass Sunstein and Harvard Law School Professor Adrian Vermeule discuss recent D.C. Circuit administrative law decisions that appear to "mirror, " in the sense of presenting a reverse image, progressive rulings from that court in the 1970s showing "special solicitude for environmental interests, consumer interests, and other interests that the judges thought to be under-represented in the political process." The more recent rulings seem, in the authors' view, to assert a libertarian agenda designed to protect property rights from "pillagers" in the form of national regulatory oversight. They describe libertarian administrative law as "a second-best option for those who believe, as some of the relevant judges openly argue, that the New Deal and the modern regulatory state suffer from basic constitutional infirmities." The authors describe this approach in six contexts: nondelegation, commercial speech, rulemaking procedure, arbitrariness review, standing, and reviewability.

They contend that the rulings lack a legal foundation or attempt to resurrect doctrine expressly invalidated by the U.S. Supreme Court. Just as the high court rejected liberal efforts to reform administrative law in 1978, the authors call on

it to reject this newer libertarian "tilt." They state, "In our view, it is not enough for libertarian administrative law not to grow, or even to be scaled back. It should also be repudiated in principle, and all its works overthrown. A *Vermont Yankee II* is called for to inscribe into the law the principle that no abstract political theory, whatever its valence, may be elevated into a master-principle of administrative law."

LAW BLOG ROUNDUP

"Commonality of Damages" Not Legally Indispensible

"The district court denied class certification—in the words of the Seventh Circuit—'under the mistaken belief that "commonality of damages" is legally indispensable.' As Judge Easterbrook observed for the court of appeals, 'If this is right, then class actions about consumer products are impossible.'" Public Citizen Litigation Group Attorney Scott Michelman, blogging about a Seventh Circuit ruling, discussed elsewhere in this *Report,* involving claims that roof tiles were falsely marketed as meeting an industry standard.

CL&P Blog, July 3, 2014.

THE FINAL WORD

SCOTUS Term Ends; Legal Thinkers Reflect on Potential Impact

Politico Magazine asked 19 of the nation's best "legal thinkers" to consider, as the U.S. Supreme Court's most recent term came to a close, how the Court changed the country this term. Some, such as *New Republic* Legal Affairs Editor Jeffrey Rosen, focused on the high percentage of cases decided by a unanimous Court. Others, such as *Slate* writer on courts and the law Dahlia Lithwick emphasized that the current Court "is really, really conservative," but "not as conservative as it could be." Still others, such as George Washington University Law School Professor Orin Kerr, contended that the Court made no change to the country this year: "The story of the term was that the Court wasn't a big story." Harvard Law School Professor Martha Minow concluded, "Free speech and religious expression win; equality does less well; growing reliance on communications technologies and on government to address environmental harms informs the law; corporations and employers gain power relative to employees; tensions between branches continue, amid bold assertions of humility." University of Pennsylvania Law School Professor Kermit Roosevelt claimed that "the Roberts Court continues to show its deepest concern for the people, including corporations, who seem least in need of it." *See Politico Magazine*, July 1, 2014.

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UPCOMING CONFERENCES AND SEMINARS

Perrin Conferences, San Francisco, California – September 8-10, 2014 – "Asbestos Litigation Conference: A National Overview & Outlook." Shook, Hardy & Bacon Public Policy Partner Mark Behrens will take part in a panel discussion on "Asbestos Compensation: The Impact of Bankruptcy on the Tort System." The firm is a conference co-sponsor.

OFFICE LOCATIONS

Denver, Colorado
+1-303-285-5300
Geneva, Switzerland
+41-22-787-2000
Houston, Texas
+1-713-227-8008
Irvine, California
+1-949-475-1500
Kansas City, Missouri
+1-816-474-6550
London, England
+44-207-332-4500
Miami, Florida
+1-305-358-5171
Philadelphia, Pennsylvania
+1-267-207-3464
San Francisco, California
+1-415-544-1900
Seattle, Washington
+1-206-344-7600
Tampa, Florida
+1-813-202-7100
Washington, D.C.
+1-202-783-8400

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).