Shook, Hardy & Bacon L.L.P.

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PRODUCT LIABILITY LITIGATION REPORT

CONTENTS

LAW FIRM NEWS

Shook, Hardy & Bacon Class Actions & Complex Litigation Partners Andrew Carpenter, Scott Kaiser and Gregory Wu have launched the Missouri & Kansas Class Action Blog to provide up-to-date information about federal and state rulings in class action decisions arising in these states. New posts can be accessed by subscribing to the blog or through the authors' LinkedIn pages.

CASE NOTES

French Medical Device Manufacturer's Contacts Insufficient for Personal Jurisdiction

A federal multidistrict litigation (MDL) court in West Virginia has determined that the French manufacturer of a shaped surgical mesh product cannot be sued in a personal injury action filed in Tennessee because the company had insufficient connections to the state to allow the courts to exercise specific jurisdiction over it. *Crowell v. Analytic Biosurgical Solutions*, No. 12-6072 (U.S. Dist. Ct., S.D.W. Va., order entered July 26, 2013).

Relying for the most part on *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011), the court determined that ABISS did not purposefully avail itself of Tennessee's laws in particular and had not targeted the state to sell its products. It supplies its product to another company that independently chooses to market in the United States. According to the court, the plaintiff's "allegations do not suggest anything more than the possibility that ABISS's products might be sold in Tennessee. Furthermore, there is nothing in the record indicating the extent to which the final products were sold in Tennessee." The court also noted that the company had no input on the sale and marketing of its product after the other company took delivery of it. Thus the court granted ABISS's motion to dismiss.

Seventh Circuit Rejects Effort to Allege Attorney/Expert Joint Venture in Table-Saw Defect Trial

The Seventh Circuit Court of Appeals has determined that a table-saw manufacturer's repeated references during a jury trial to its theory that the plaintiff's attorneys and one of his witnesses, the inventor of a table-saw safety feature, had a joint venture

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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to bring product liability lawsuits to force manufacturers to license the inventor's patent and incorporate the feature into their products was prejudicial and denied the plaintiff a fair trial. ***Stollings v. Ryobi Techs., Inc.* No. 12-2984 (7th Cir., decided August 2, 2013)**. The plaintiff, who had removed the saw's safety features before he was injured, alleged that other, better safety features were available thus making the product defective. One of Ryobi's former chief engineers testified that he had ceased using the product's safety feature and installed one of the alternatives on his own saw because he believed it was safer.

In its opening statement, during the trial and in closing, Ryobi repeatedly attacked plaintiff's counsel and referred to a newspaper article, which the Seventh Circuit determined was inadmissible hearsay, about Stephen Gass, the inventor of the flesh detection technology that Ryobi had refused to license and incorporate into its product after failed negotiations. Gass had denied that the article's author quoted him about being approached by product liability lawyers, and no quotations were used in the article. Still, Ryobi's counsel asserted during closing that the article quoted Gass and that Gass had not denied the charge.

According to the Seventh Circuit, the argument was improper because it was not relevant: "The suggestion that the case was an intellectual property case 'masquerading as a personal injury case' did not bear on whether Ryobi designed and sold a defective product. How does a statement about counsel's motive help a jury decide whether there was an injury? A duty? A breach of that duty? Or causation?" It was also improper, in the court's view because no admissible evidence supported it.

While the trial court had allowed the attack on counsel because, initially it appeared to be limited to Gass's credibility and motives, the court also concluded before instructing the jury that Ryobi had gone too far. The court's remedy, however, allowing limited reference and tailoring its instructions to other table-saw injury cases, did not adequately correct the problem.

Because the Seventh Circuit reversed the judgment and remanded for a new trial, it also addressed whether the trial court had improperly excluded the testimony of plaintiff's expert John Graham, "a scholar who served from 2001 to 2006 as the director of the Office of Information and Regulatory Affairs in the federal Office of Management and Budget and is now the dean of the Indiana University School of Public and Environmental Affairs." Graham would have provided testimony about the social utility of automatic braking technology on all power saws. The court excluded the evidence on reliability grounds because Graham had assumed that the automatic braking technology was 90 percent effective at preventing injuries. According to the Seventh Circuit, the exclusion "intruded too far into the province of the jury.… Although the 90 percent figure was undoubtedly a rough estimate, it is also clear that Graham's bottom-line estimate of societal costs of saw accidents was so high that his opinion would have remained essentially the same even if the effectiveness rate were actually quite a bit lower." The court also found the testimony relevant.

As to the lower court's purportedly erroneous instructions, the Seventh Circuit upheld its instruction on unreasonably dangerous products, but rejected the "sole

proximate cause instruction" as confusing to the jury and inapplicable in a case where an outside third party was not also potentially responsible for the injury. In its discussion, the court noted that Illinois is a modified comparative fault jurisdiction, in which a plaintiff partially responsible for his injury will receive an award reduced according to the amount he was at fault as long as he was not more than 50 percent at fault. Ryobi decided before trial to abandon the comparative fault defense, thus the plaintiff would have been entitled to recover all of his damages if the company's negligence was just one proximate cause of his injury. According to the Seventh Circuit, the trial court's instruction pointing to the possibility of plaintiff's conduct as the sole proximate cause of his injury was confusing because the evidence "did not suggest that there was a sole proximate cause of [the plaintiff's] injury."

Federal Court Denies Dispositive Motion in Ladder Design Defect Suit

A federal court in Michigan has rejected, in part, the defendants' motion for summary judgment in a case seeking damages for injuries attributed to a ladder which allegedly failed during normal use due to a design defect. *Picken v. Louisville Ladder, Inc.*, No. 11-13044 (U.S. Dist. Ct., E.D. Mich., S. Div., order entered July 29, 2013). The right side of the 8-foot ladder allegedly fractured while the plaintiff was standing on the fifth step from the bottom, sanding drywall overhead in a skylight. The plaintiff's experts concluded that the failure was the result of a design defect.

According to the defendants, the experts generated a "worst-case scenario" to describe how the ladder failed—i.e., that the plaintiff would have had all of his weight on the right side of the ladder. The defendants argued that because the plaintiff was not situated solely on the right side of the ladder when it failed, the experts cannot establish that a design defect caused the injury. The court determined that this misstated the experts' theory. The experts did not apparently contend that the only way the ladder could have failed was if all of the plaintiff's weight was loaded on one side; rather, they opined that the ladder material was not intended to handle the stress placed on it during normal use. The court said, "[G]iven the facially reliable nature of the experts' opinion that design defects in the ladder caused it to fail under Plaintiff's normal use, summary judgment is not appropriate."

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The court granted the motion as to the plaintiff's breach of implied warranty claim to the extent that the defendants requested that "the jury be instructed on a single theory of negligent design, rather than design defect and breach of implied warranty."

LEGISLATIVE AND REGULATORY DEVELOPMENTS

Senate Commerce Committee Passes Rental Recall Bill

The U.S. Senate Committee on Commerce, Science, and Transportation has approved legislation (**S. 921**) that would prohibit rental car companies from selling or renting recalled vehicles. The proposal would extend the same rules to rental

car companies that auto dealers must meet. Known as the "Raechel and Jacqueline Houck Safe Rental Car Act of 2013," the bill is co-sponsored by Sens. Barbara Boxer (D-Calif.), Chuck Schumer (D-N.Y.), Lisa Murkowski (R-Alaska), and Claire McCaskill (D-Mo.). It is named for sisters who were killed in a 2004 auto accident after a rental car they were driving caught fire. The car had reportedly been subject to a recall that warned of power steering fluid leaks that could cause a fire, but evidently was not repaired. If approved, the bill would require rental car companies to ground recalled vehicles as soon as they receive a safety recall notice and prohibit them from being rented or sold until they are fixed. Similar legislation was introduced in 2011; additional details about that bill, which failed, appear in the August 11, 2011, **issue** of this *Report. See Sen. Barbara Boxer Press Release,* July 30, 2013; *santacruzsentinel,* August 1, 2013.

CPSC Seeks Comments on Petition to Eliminate Accessible Cords on Window Coverings

The U.S. Consumer Product Safety Commission (CPSC) seeks public **comments** on a petition filed by consumer groups, including the Consumer Federation of America, Consumers Union, Public Citizen, and U.S. PIRG, requesting that CPSC initiate a rulemaking for a mandatory standard that would eliminate accessible cords on window covering products. The petitioners apparently cite data indicating that "between 1985 and 2012, 324 children have been killed, and 122 have been injured by window covering cords." They claim that voluntary standards have failed "to adequately address the strangulation hazard posed by accessible cords on window coverings, despite increased international governmental and retailer pressure to address the hazard." They also contend that "substantial noncompliance with the voluntary standard is demonstrated by CPSC's 16 recalls involving blinds that purportedly complied with the voluntary standard since 2007." Comments are requested by September 13, 2013. *See Federal Register*, July 15, 2013.

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CPSC Blocks Import of 4.8-Million Hazardous Products During 2012

The U.S. Consumer Product Safety Commission (CPSC) has announced that during fiscal year 2012—October 2011 to September 2012— it stopped the import of some 4.8-million units of products that either violated U.S. safety rules or were determined to be hazardous. CPSC reported that the agency and its federal partner, U.S. Customs and Border Protection, screened more than 18,000 different imported consumer products, nearly 1,500 of which were "violative and prevented from moving into the U.S. stream of commerce."

The number of units stopped during the final quarter of the fiscal year was about 910,000, down from a high of some 2.8 million in the third quarter, but more than double the approximately 368,000 stopped in the second quarter, reported the agency. CPSC attributes the high number of units stopped in the third quarter to

shipments of fireworks imported for Memorial Day and Independence Day. Children's products that contain lead and phthalate levels in excess of federal limits and toys and other articles with small parts that present a choking hazard continued to constitute the bulk of products stopped in the fourth quarter of the year. *See CPSC News Release,* July 26, 2012.

LEGAL LITERATURE REVIEW

Thomas Cohen, "Litigating Civil Cases in State Intermediate Appellate Courts: Analyzing Decisions to Appeal Civil Trial Verdicts or Judgments and the Impact of Appellate Litigation on Trial Court Outcomes," Working Paper Series, June 2013

Authored by a social science analyst with the Administrative Office of the U.S. Courts, Office of Probation and Pretrial Services, this article attempts to fill research gaps by examining data on civil cases tried in state courts and appealed to intermediate appellate courts (IAC). Among other matters, the author found that (i) "the amount of damages awarded at trial was an important factor in the decision to appeal, but was less crucial regarding IAC decisions to reverse trial court outcomes" (i.e., large damage awards are more often challenged because the costs of filing the appeal could be outweighed by the benefit of a reduction in or elimination of a sizable damage award); (ii) "IACs were more likely to overturn trial court decisions favoring plaintiffs than pro-defendant trial court outcomes" thus "plaintiffs appealing cases to IACs are far less likely to secure a full or partial reversal compared to defendants challenging trial court decisions on appeal"; (iii) "tort and contract cases involving more serious injuries or complex legal issues were appealed to a greater extent than automobile accident cases"; (iv) "IACs [reverse] jury verdicts more frequently than bench trials"; and (v) "cases that take longer to adjudicate at the trial court level are more likely to be appealed, while cases that are lengthier to process in the appellate courts have higher reversal rates." The author advances several theories to explain the outcomes, but notes that additional, more nuanced research would be required to reach any firm conclusions.

W. Kip Viscusi & Benjamin McMichael, "Shifting the Fat-Tailed Distribution of Blockbuster Punitive Damages Awards," *Vanderbilt Law & Economics Research Paper*, July 2013

Vanderbilt University Professor of Law, Economics and Management W. Kip Viscusi and J.D. candidate Benjamin McMichael discuss how the U.S. Supreme Court's trio of rulings on punitive damages, and in particular *State Farm v. Campbell*, have made it less likely that, and easier to predict whether, extremely large punitive awards—those exceeding $100 million—will be rendered. They liken the probability of a blockbuster award to a catastrophic event, noting that the probability of such outliers to occur is best described by the "fat-tailed" or skewed distribution with a sharp bell-shaped curve, rather than a normal one. In *State Farm*, the Supreme Court stated that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." According

to the authors, based on a study of 132 "blockbuster" punitive damages awards, *State Farm* has had a negative influence on award size, effectively "thinning" the fat tail of their distributions, and the probability of exceeding a single-digit ratio.

David Freeman Engstrom, "The '*Twiqbal*' Puzzle and Empirical Study of Civil Procedure," *Stanford Law Review* (2013)

Stanford Law School Associate Professor David Freeman Engstrom examines the many empirical studies conducted in the wake of the U.S. Supreme Court's adoption of a plausibility pleading standard in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), collectively known as "*Twiqbal*," and exposes their shortcomings. Observing that this type of research is time-consuming and resource-intensive, Engstrom calls "low-grade empirical research" counterproductive, because "wildly divergent empirical findings" muddy debate and liberate "public actors from any data-based accountability at all." Among Engstrom's suggested fixes for research on the impact of any civil procedural rule change is (i) "greater methodological rigor, particularly as to data collection"; (ii) "better alignment of research questions and research design"; (iii) "more careful and user-friendly presentation of findings" to "avoid needless confusion"; (iv) consideration of "a wider menu of approaches and techniques"; and (v) resumption of larger-scale mapping exercises, "every bit as critical to understanding rule choices as more targeted studies."

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LAW BLOG ROUNDUP

Center for Class Action Fairness Wins Reduction in Class Counsel Fee Request

"Of substantial note: class counsel defended their fee request excesses by saying everyone does it." Center for Class Action Fairness President and Manhattan Institute Center for Legal Policy Adjunct Fellow Ted Frank, blogging about a district court decision to reduce class counsel fees in securities litigation, including a request to bill the document-review work of contract attorneys at about $900 per hour. These attorneys are apparently paid $25 per hour.

PointofLaw.com, August 2, 2013.

THE FINAL WORD

Nader to Build Country's First Tort Law Museum

Consumer advocate and political activist Ralph Nader reportedly plans to build a museum in a former bank building located in his hometown of Winsted, Connecticut. According to news sources, the American Museum of Tort Law, expected to be completed within two years, will celebrate the history of tort law and contain

exhibits from significant cases. Nader said that the museum may also host artifacts, including the Chevrolet Corvair featured in his 1965 book on the auto industry's safety record. Other exhibit ideas apparently include displays related to lawsuits about scalding coffee, flammable pajamas, asbestos, medical malpractice, and the pollution of the Love Canal neighborhood in Niagara Falls, New York.

Nader, who twice ran for president and still works at the nonprofit advocacy organization Public Citizen, has evidently been pursuing the idea for the museum for years after he got the idea from trial lawyers who told him they did not have a place to put exhibits after they were used in court. Expecting the museum to appeal to an audience beyond law students, Nader said that "visitors will learn from the exhibits how important and effective the American jury system is in serving citizens. I hope they and their children will see what an awesome institution it is."

Critics reportedly claim that it will be difficult to make the museum a success outside of the legal community and note that although tort law is one of the most common causes of action, many people do not really know what a tort is, creating a marketing challenge. Others, including Darren McKinney, an American Tort Reform Association spokesperson, which backs efforts to curb what it says are excessive lawsuits, said that the museum is unnecessary and wondered if Nader's opinion on tort law will change after the museum's first slip-and-fall lawsuit. *See theday.com,* July 29, 2013; *Connecticut Law Tribune,* August, 2, 2013.

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UPCOMING CONFERENCES AND SEMINARS

ACI, New York, NY – October 7-9, 2013 – "5th Annual Forum on: Sunshine Act Compliance & Aggregate Spend Reporting, HCP Reporting Risk Mitigation and Compliance Strategies for Biopharmaceutical and Medical Device Manufacturers." Shook, Hardy & Bacon Government Enforcement & Compliance Partner Carol Poindexter will join a distinguished faculty to discuss "Mastering the Challenges of Identifying and Tracking Research and Pre-clinical Related Payments." ■

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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).