Shook, Hardy & Bacon L.L.P.

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PRODUCT LIABILITY LITIGATION REPORT

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LAW FIRM NEWS

Getting the Deal Through: *Product Liability 2013* Published

Shook, Hardy & Bacon Partners **Harvey Kaplan**, **Gregory Fowler** and **Simon Castley** served as contributing editors to this year's *Getting the Deal Through* overview of the product liability laws and practice in 31 jurisdictions. Kaplan's "Global Overview" highlights developments since the last report issued, including clarifications to South Africa's class action regime, amendments to China's Civil Procedure Law and the launch of the Organisation for Economic Cooperation and Development's new global online consumer product recall portal. Castley and his colleague Jon Hudson authored the "England & Wales" chapter. Among the trends they highlight are changes to civil justice costs and funding and the government's intent to adopt the requirements of the EU Consumer Rights Directive.

Fowler and Partner **Marc Shelley** authored the "United States" chapter. They report that the U.S. Supreme Court's *Kiobel v. Royal Dutch Petroleum Co.* ruling should stem the tide of claims alleging "crimes against humanity" under the Alien Tort Statute against multinational corporations for conduct occurring abroad on the ground that claims based on federal common law cannot overcome a presumption against the extraterritorial application of U.S. law. They also note that challenges to the Consumer Product Safety Commission's online product safety portal have validated many of the concerns over inaccurate reporting voiced by product manufacturers.

CASE NOTES

Sixth Circuit Affirms Verdict Favoring Manufacturer in Defective Cigarette Lighter Suit

The Sixth Circuit Court of Appeals has determined that a trial court applied the correct standard when admitting evidence of Consumer Product Safety Commission (CPSC) inaction on a safety feature during a jury trial in a personal injury suit involving a purportedly defective cigarette lighter. ***Cummins v. BIC USA, Inc.*, No. 12-5635 (6th Cir., decided August 14, 2013)**. The alleged victim was a 3-year-old boy who used a cigarette lighter he found on the floor of a pickup truck in which he was riding to loosen a button on his shirt. His father had apparently removed

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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the child safety guard before the child found it and set himself on fire. The plaintiff's theory was that the two-piece guard did not comply with the federal consumer product safety requirement because it was too easily removable. The jury rendered a verdict in favor of the defendant.

On appeal, the plaintiff argued that the trial court erred in admitting evidence that CPSC had not investigated, expressed concern about, taken any enforcement action with respect to, or found this cigarette lighter model out of compliance with the 16 C.F.R. § 1210.3(b)(4) deactivation or override requirement. The plaintiff argued that this testimony was barred by federal law which provides that CPSC's failure "to take any action or commence a proceeding with respect to the safety of a consumer product shall not be admissible in evidence in litigation at common law or under state statutory law relating to such consumer product." The Sixth Circuit had previously ruled that this prohibition bars evidence only that CPSC had "completely failed to act, as opposed to those instances where the CPSC engaged in activity that ultimately led to a decision not to regulate." Finding that the contested evidence fit into the latter category, the trial court admitted the testimony of a former CPSC employee as to certain action the agency had taken in relation to the cigarette lighter, which it ultimately found did not violate any safety rule.

While the plaintiff acknowledged the rule, he argued that this case was distinguishable. According to the plaintiff, the testimony here "did not refer to a report or statement of reasons explaining the CPSC's decision not to take action specifically in relation to the two-piece guard." The Sixth Circuit held that this is not a precondition to admissibility. The rule is "intended to exclude those instances where the CPSC has completely failed to act, as opposed to those instances where the CPSC engaged in activity that ultimately led to a decision not to regulate." According to the court, the evidence "is fairly characterized as evidence of 'CPSC activity that led to a decision not to regulate.'"

Third Circuit Interprets CAFA's Home State & Local Controversy Exceptions

The Third Circuit Court of Appeals has remanded to state court under the Class Action Fairness Act's (CAFA's) "local controversy" exception a contract dispute involving oil and gas leases in Pennsylvania. ***Vodenichar v. Halcón Energy Props., Inc.*, No. 13-2812 (3d Cir., decided August 16, 2013)**.

The Third Circuit rejected the district court's determination that the "home state" exception to federal jurisdiction applied on the basis of the lower court's finding that the two Pennsylvania-based defendants were the only primary defendants. Under this exception, all of the primary defendants must be citizens of the state in which the action was originally filed. According to the Third Circuit, CAFA does not define "primary," but legislative statements indicate that a primary defendant must have direct versus secondary liability, and courts have looked to the allegations "to identify the defendants expected to sustain the greatest loss if liability were found" and whether these "defendants have substantial exposure to significant portions of the proposed class."

"[C]ourts must assume liability will be established," the appeals court said, and thus "the District Court's reliance on Halcón's denial of liability was misplaced." Halcón, which was not a citizen of Pennsylvania, was the third defendant and would be directly liable to the plaintiffs who "appear to apportion liability equally among the defendants, and seek similar relief from all defendants. … Thus, Halcón is a 'primary defendant.'" The court also determined that because Congress used the word "the" instead of "a" before the words "primary defendants," "the statute requires remand under the home state exception only if all primary defendants are citizens of Pennsylvania." With Halcón a primary defendant not from the same state as the Pennsylvania class members, the Third Circuit ruled that "remand based upon this exception is not warranted."

The court also rejected the district court's determination that the local controversy exception did not apply in light of another class action that had been filed arising from the same facts and asserting similar claims. According to the Third Circuit, "'no other class action' had been filed as contemplated under CAFA, and therefore remand of this case pursuant to the local controversy exception is appropriate." Here, the plaintiffs filed their first lawsuit against Halcón in federal court, but Halcón indicated during a case management conference that it intended to add as necessary parties the leasing agents involved in the transaction. Because the leasing agents were based in Pennsylvania and the plaintiffs knew that adding these parties to the complaint would destroy diversity jurisdiction, they filed a motion to dismiss the first action without prejudice, with the intent of pursuing their claims against all defendants in state court. Halcón agreed that these parties should be joined but asserted that the case should proceed in federal court, given the discovery already produced and ongoing alternative dispute resolution (ADR) activities.

The district court granted the motion to voluntarily dismiss the first action without prejudice, but ordered the parties to complete the ADR process and directed them to retain the discovery produced to facilitate the ADR process and assist in the state litigation. The plaintiffs filed a state court class action against all three defendants; the claims were identical to the first filed complaint except for the addition of the two in-state defendants, several facts to support additional causes of action against them and a few exhibits. Halcón removed the second action to federal court, and it was assigned to the same judge as the first action.

According to the Third Circuit, while CAFA's local controversy exception requires that "no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons" in the preceding three years, the first-filed suit here did not constitute an "other class action." Rather it was "the same case, albeit enlarged." "In practical terms," the court said, "Plaintiffs' actions were no different from a situation where a party amends a pleading to join parties to an existing case." It did not raise the specter of the types of copycat suits in multiple forums that Congress sought to remedy with CAFA, which "seeks to control the impact of multiple class actions filed by different members of the same class against a defendant by providing a single forum to resolve similar claims."

Thus, the court concluded, "the local controversy exception to CAFA jurisdiction mandates remand of this truly local case involving Pennsylvania landowners and their land."

Briefing Ongoing Before SCOTUS on *Cy Pres* Issues in Class Action Settlements

Objectors to the settlement of class claims charging that Facebook violated members' privacy rights by gathering and publicly disseminating information about their online activities without permission have sought U.S. Supreme Court review of a Ninth Circuit Court of Appeals ruling upholding the settlement; a response is due August 30, 2013. *Marek v. Lane*, No. 13-136 (U.S., cert. petition filed July 26, 2013).

The issue on appeal, whether the *cy pres* remedy is fair, generated strong dissenting opinions and has drawn significant online commentary. Under the settlement, class members take nothing, the plaintiffs' lawyers will be paid some $2.3 million and Facebook will provide approximately $6.5 million to fund a new foundation that it would, in part, control. Apparently, Facebook's director of public policy would have a seat on the foundation's board of directors. Finding this structure "an unremarkable result of the parties' give-and-take negotiations," the Ninth Circuit also observed that *cy pres* funds need not be distributed to an already-existing organization to survive a fairness review.

Quoting the foundation's mission statement, the Ninth Circuit jurist who dissented from the decision not to rehear the matter en banc, opined, "That the DTF [Digital Trust Foundation] is committed to funding 'programs' regarding 'critical issues' says *absolutely nothing* about whether class members will truly benefit from this settlement; it simply promises that DTF will do some 'stuff' regarding some more 'critical stuff.' If fashioning an open-ended, one-sentence mission statement is all it takes to earn cy pres settlement approval in our court, we have completely eviscerated the meaning of our previously controlling case law."

He further stated, in relation to claims brought under laws "preventing the *unauthorized* access or disclosure of private information, … [that] the DTF's sole stated purpose is to 'educate users, regulators[,] and enterprises' on how to protect Internet privacy 'through *user control*.' Plaintiffs' claims, however, have nothing to with users' lack of 'education' or 'control.' Instead, they relate to *misconduct* by Internet companies that wrongfully expose private information in ways that even educated users cannot anticipate, prevent, or direct."

Renowned Plaintiffs' Counsel Files Cert. Petition to Review Mail Fraud Conviction

Richard "Dickie" Scruggs has asked the U.S. Supreme Court to review a Fifth Circuit Court of Appeals decision affirming a lower court's dismissal of his petition for post-conviction relief filed after the Court decided in *Skilling v. United States*, 130 S. Ct. 2896 (2010), that certain "creative uses" of the "honest services fraud" statute violate due process. *Scruggs v. United States*, No. 13-206 (U.S., cert. petition filed August 12, 2013).

Scruggs made a name for himself as a trial lawyer representing asbestos and tobacco litigants and was convicted of wire fraud after successfully representing plaintiffs suing to recover damages in the wake of Hurricane Katrina.

According to his petition for a writ of certiorari, Scruggs pleaded guilty to wire fraud, admitting that he had used a personal friend of a state court judge to have *ex parte* conversations with the judge concerning a pending case in which Scruggs was a party and over which the judge presided. "Petitioner also endorsed the judge for a federal judgeship to a United States Senator." The government charged Scruggs with depriving the citizens of Mississippi of their "intangible right of honest services" from the state court judge. Scruggs was fined and sentenced to a seven-year term of imprisonment. He argues that the endorsement involved no bribery or kickbacks and constituted core political speech protected under the First Amendment. He suggests that the First Amendment issue arose after *Skilling* and that the case should be heard to resolve a circuit split "on whether district courts have jurisdiction to punish when the charging documents aver no facts that constitute a federal crime."

ALL THINGS LEGISLATIVE AND REGULATORY

CPSC Unanimously Adopts Play Yard Safety Standard Amendments

The Consumer Product Safety Commission (CPSC) has adopted a final **rule** amending the play yard mandatory standard "to incorporate by reference the most recent version of ASTM's play yard standard, ASTM F406-13." Effective February 19, 2014, the amendments address the purported hazards associated with misassembly of play yard bassinet accessories. All five CPSC commissioners approved the amendment. *See Federal Register*, August 19, 2013.

CPSC Seeks Comments on the Consumer Product Safety Information Database

The Consumer Product Safety Commission (CPSC) has requested **comments** on estimated time and expense burdens of collecting information for the Consumer Product Safety Information Database—www.saferproducts.gov. The Office of Management and Budget's approval of the information collection is set to expire January 31, 2014, and CPSC seeks to extend that approval. Based on the number of incidents reported in 2012, CPSC estimates that annual costs for those reporting harm and the manufacturers responding to the reports are about $1.086 million. Annual agency costs associated with its database responsibilities are estimated at $1.028 million. Comments will be accepted until October 15, 2013. *See Federal Register,* August 15, 2013.

CPSIA Revived a Flagging Agency in Wake of Lead-Tainted Toy Imports

According to a news source, the Consumer Product Safety Improvement Act (CPSIA) of 2008 marked a watershed for the Consumer Product Safety Commission (CPSC) which has seen its staff increase by 50 percent and its budget nearly double to

$114 million since it was enacted. CPSC has reportedly taken some 100 new actions mandated under the law, leading businesses to focus on compliance issues. CPSC spokesperson Scott Wolfson said, "The CPSIA saved CPSC. We reached a point in 2007 and 2008 where we had less than 380 staff, and a budget that did not allow us to truly meet our mission. … [now] we are a bigger, stronger and more impactful regulatory agency." Wolfson claims that the law's focus on lead in children's toys has contributed to an 80-percent decrease in lead content-related toy recalls during the past five years. Consumer advocates are reportedly pleased with the improvements, while small businesses have apparently found it increasingly difficult to keep up with what they deem to be aggressive regulation and enforcement. *See Law360*, August 14, 2013.

Supply Chain Pilot Program Launched for Drug Imports

The Food and Drug Administration (FDA) has started a pilot **program** intended to focus agency resources on imported drugs that do not meet its criteria and thus may pose potential risks of adulteration and misbranding. The Secure Supply Chain Pilot Program will allow successful applicants—foreign manufacturers of finished drug products and active pharmaceutical ingredients—to expedite entry of their products into the United States. Under the pilot, no more than 100 qualified applicants, with no more than 5 drug products per applicant, will be allowed to participate. Those given a "may proceed" designation can increase the likelihood of product entry without human review or examination. *See Federal Register*, August 20, 2013.

FDA Publishes Guidance on Wireless Technology in Medical Devices

The Food and Drug Administration (FDA) has **published** guidance titled "Radio Frequency Wireless Technology in Medical Devices; Guidance for Industry and Food and Drug Administration Staff." The document seeks to minimize the risks associated with medical devices that use the technology in an environment where many sources of radio frequency (RF) energy are found and RF wireless emissions from one product could potentially affect the function of another. The guidance addresses safety and effectiveness issues such as (i) the selection of wireless technology, (ii) the quality of service, (iii) coexistence, (iv) security, and (v) electromagnetic compatibility. It also provides recommendations for information to be included in FDA premarket submissions for these devices. *See Federal Register,* August 14, 2013.

Judicial Conference Seeks Testimony and Comments on Civil Rules Change Proposals

The Judicial Conference of the United States has solicited testimony and comments on proposed **changes** to Federal Rules of Civil Procedure 1, 4, 6, 16, 26, 30, 31, 33, 34, 36, 37, 55, 84, and Appendix of Forms. Hearings will be held on November 7, 2013, in Washington, D.C.; on January 9, 2014, in Phoenix, Arizona; and on February 7 in Dallas, Texas. Those wishing to testify must notify the committee secretary at least 30 days before the relevant hearing, and comments may be submitted until February 15, 2014.

A number of proposed changes involve case-management issues and are intended to streamline the procedures, including shortening times for service of pleadings and the court's issuance of a scheduling order. Rule 26(b) would be amended to require that discovery be "proportional to the needs of the case considering the amount in controversy, the importance of the issues at stake in the action, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Other proposed changes would reduce presumptive numerical limits on depositions and their duration.

LEGAL LITERATURE REVIEW

Pamela Corley, et al., "The Influence of *Amicus Curiae* Briefs on U.S. Supreme Court Opinion Content," APSA 2013 *Annual Meeting Paper*, 2013

Southern Methodist University Assistant Political Scientist Professor Pamela Corley and other Texas university professors have made this paper available online; it will be delivered during the American Political Science Association (APSA) annual meeting in Chicago, August 29-September 1, 2013. Using plagiarism detection software, the authors find that "the justices incorporate language from amicus briefs into their opinions based primarily on the extent to which amicus briefs contribute to their ability to make effective law and policy." They also find that cognitive clarity and the use of plain language in higher quality amicus briefs increase the rate at which the justices incorporate passages in their opinions. U.S. solicitor general content is used 367 percent more often in comparison to other amici.

Scott Hershovitz, "Tort as a Substitute for Revenge," *Philosophical Foundations of the Law of Torts* (forthcoming 2014)

University of Michigan Professor of Law and Philosophy Scott Hershovitz explores whether tort litigation can be viewed as a substitute for individuals taking revenge for the wrongs done them and suggests that if injury and revenge are viewed as messages, or symbolic communications, then tort law, by providing corrective justice, shares "expressive aims" similar to revenge. He cautions that courts must not only have the tools to send the right messages but that they must also care enough to use them. Hershovitz concludes, "if revenge is not an option, then tort better be, at least for any wrongdoing we think worth taking seriously. Otherwise, victims won't have revenge or an adequate substitute, and they will be left without corrective justice."

LAW BLOG ROUNDUP

Viable Alternative to Overturning *Cy Pres* Class Settlements?

"In my own work, I've suggested that *cy pres* settlements are not necessarily bad, but that certainly doesn't mean they are always good. Class members should just be polled in determining where *cy pres* settlements should go." University of

Connecticut School of Law Professor Alexandra Lahav, blogging about the petition for review filed in the U.S. Supreme Court by objectors to a class settlement with Facebook, discussed elsewhere in this *Report*, challenging the propriety of the *cy pres* distribution.

Mass Tort Litigation Blog, August 13, 2013.

Circuits Divided over *Cy Pres* Class Action Settlements

"Most appeals courts have agreed that *cy pres* raises distinctive issues that call for judicial oversight, yet the various federal circuits have marched off in different directions as to the appropriate nature and extent of such oversight, leading to inconsistency at least, and perhaps also to forum-shopping by lawyers seeking lenient standards." Cato Senior Fellow Walter Olson, writing about controversies engendered by *cy pres* settlements, "in which part or all of a settlement fund goes to charities, universities, advocacy groups, or other unrelated institutions as opposed to actual victims of the sued-over conduct." Olson notes that the Center for Class Action Fairness is part of the team petitioning the U.S. Supreme Court to consider the fairness of the *cy pres* settlement involving Facebook users concerned about their privacy and a foundation that will be controlled in part by Facebook and, according to Olson, one of the plaintiff's lawyers.

Overlawyered, August 19, 2013.

THE FINAL WORD

Study Finds Chemicals of Concern in Picnic Supplies

A recent **study** of chemical hazards in picnic products reportedly found that out of 58 products tested, almost all of them (96 percent) contained "at least one or more" purportedly toxic chemicals, such as phthalates, mercury, lead, and arsenic, and more than one third (36 percent) contained three or more chemicals of concern. Conducted by environmental advocacy group the Ecology Center, the study examined tablecloths, placemats, picnic baskets, coolers, water toys, folding chairs, and umbrellas purchased from eight of the nation's top 10 retailers. The products were tested for chemicals based on their "toxicity or tendency to build up in people and the environment."

Of particular concern were the levels of phthalates—chemicals used to soften pvc products—found in vinyl tablecloths, vinyl-coated fabric chairs, water toys, and hoses and which purportedly contain endocrine-disrupting properties. "While indoor exposure to phthalates is the most critical source of exposure, outdoor products can release phthalates when stored indoors and increase overall phthalate release in the environment," said Ecology Center lead researcher Jeff Gearhart. "These chemicals have become ubiquitous environmental contaminants and have been associated with a number of adverse health effects." The Ecology Center has partnered with the Safer Chemicals, Healthy Families, a national coalition of individuals, health professionals, environmentalists, businesses, and reproductive health

advocates to persuade retailers to remove toxic-chemical containing products from stores. *See Ecology Center News Release,* August 8, 2013.

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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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).