Shook, Hardy & Bacon L.L.P.

NOVEMBER 27, 2013

PRODUCT LIABILITY LITIGATION REPORT

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FIRM NEWS

Barkett Selected As ACCTM Fellow

Shook, Hardy & Bacon Arbitration & ADR Partner **John Barkett** has been chosen as a Fellow of the American College of Civil Trial Mediators (ACCTM). College fellow selection is based on experience, skill, reputation, ethical standards, and commitment to the alternative dispute resolution process. According to ACCTM, the College "accepts members who have clearly demonstrated years of working in the field at the highest level of achievement." Barkett has served as a neutral in more than 50 matters involving in the aggregate more than $400 million.

Silverman Authors ATRA Report on State Consumer-Protection Laws

Shook, Hardy & Bacon Public Policy Partner **Cary Silverman** has authored a new American Tort Reform Association (ATRA) **report**, "State Consumer Protection Laws Unhinged," which was distributed at the association's annual meeting. The report documents several types of consumer-lawsuit abuse, including the theory's use by plaintiffs' lawyers (i) as an alternative to product-liability and personal-injury claims; (ii) to create a right of action under other state laws where the legislature provided for government enforcement; (iii) to bring no-injury class actions that primarily benefit lawyers, not their purported clients; and (iv) to impose an advocacy group's extreme public-policy agenda, i.e. "regulation through litigation," where such results could not be obtained through politically accountable legislatures and government agencies. The report discusses recent litigation, including class actions against food companies, "economic loss" claims against auto and pharmaceutical makers, and personal-injury claims disguised as unfair-/deceptive-practice violations. It concludes by offering 10 recommendations for action to legislatures and courts.

Schwartz & Appel Address Intersection of Comparative Fault and Punitive Damages

Shook, Hardy & Bacon Public Policy Attorneys **Victor Schwartz** and **Christopher Appel** have co-authored an **article** published in the most recent volume of the *Missouri Law Review*. Titled "Two Wrongs Do Not Make a Right: Reconsidering the Application of Comparative Fault to Punitive Damage Awards," the article calls for courts and legislatures to rectify an oversight that occurred when many states

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

transitioned from contributory- to comparative-fault regimes in awarding compensatory damages and extend comparative-fault analyses to punitive-damage awards. They present the public-policy arguments involved and propose "practical methods of incorporating comparative fault principles into awards of punitive damages to provide more just awards."

Stanford Animal Law Journal Publishes Goldberg Article on Damages

Shook, Hardy & Bacon Public Policy Partner **Phil Goldberg** has authored an **article** appearing in a recently released volume of the *Stanford Journal of Animal Law and Policy*. Titled "Courts and Legislatures Have Kept the Proper Leash on Pet Injury Lawsuits: Why Rejecting Emotion-Based Damages Promotes the Rule of Law, Modern Values, and Animal Welfare," the article describes the efforts of animal-rights groups to significantly expand the recoveries that have traditionally been available to those whose pets are killed or injured by the negligence of another. Goldberg explains why courts and legislatures should continue to reject emotion-based damages in animal-injury cases, primarily to avoid driving up the costs of veterinary care and other pet-related services and products.

CASE NOTES

Alito Questions Class Counsel Race and Gender Requirements in Dissent to Cert. Denial

In a statement accompanying a U.S. Supreme Court denial of review in the certification of a class alleging antitrust-law violations arising from the merger of satellite digital audio radio services, Justice Samuel Alito opined that the district court's apparent practice of requiring class counsel, under Federal Rule of Civil Procedure 23(g)(1)(B), to "fairly reflect the class composition in terms of relevant race and gender metrics" is indefensible and would not likely survive a constitutional challenge. *Martin v. Blessing*, No. 13-169 (U.S., certiorari denied November 18, 2013). Because the Second Circuit decided an objector's appeal of the class settlement on standing grounds and because the U.S. Supreme Court is "not a court of error correction," Alito did not dissent from the refusal to grant review. He stressed, however, that the denial "does not constitute an expression of any opinion on the merits," and "[i]f the challenged appointment practice continues and is not addressed by the Court of Appeals, future review may be warranted."

Fourth Circuit Issues Ruling in Taser Death Suit

A divided Fourth Circuit Court of Appeals panel has upheld a jury's determination that Taser International, Inc. was liable for the death of a young man who experienced cardiac arrest after an employment dispute escalated and police used a taser to subdue him, but remanded the matter to the trial court for a new trial on damages. ***Fontenot v. Taser Int'l, Inc.*, No. 12-1617 (4th Cir., decided November 22, 2013)**.

The court found that the trial court properly barred the company's contributory negligence defense, ruling that under North Carolina law it is the claimant's alleged negligent use of a product that allows the doctrine to apply. Here, the police, and not the decedent, used the taser, and the court noted that if the company's interpretation of the law were correct, anyone injured in a taser incident in the state would have no remedy, because tasers are generally not used unless a suspect is resisting arrest. The court also ruled that the evidence was sufficient to show that if the company had provided an adequate warning about the risk of cardiac arrest, the police would have heeded the warning and not deployed the taser as it did in this case.

As for the company's warning that the taser not be discharged in a "prolonged" or "continuous" manner at the risk of impaired breathing, the court found these terms vague without further clarification and that the company failed to warn about the risk which harmed the plaintiff's decedent—cardiac arrest.

The court agreed with the company that the $5.5-million damage award was excessive, determining that the plaintiff, who was the decedent's mother, "failed to present any evidence showing that [the decedent's] services, care, and companionship had a value approaching $1000-$2000 per week per parent." A dissenting judge would have applied North Carolina's contributory-negligence statute, finding that it was not limited to those cases in which the claimant uses the purportedly defective product.

Court Finds No Error in Remedy for Inconsistent Jury Verdict in Drug-Warning Case

Rejecting the defendant's claim that a new trial should have been ordered when the jury initially returned an inconsistent verdict, a federal court in Florida has confirmed a jury's $1.3-million verdict for a woman claiming that use of the defendant's drug caused her osteonecrosis of the jaw (ONJ). *Guenther v. Novartis Pharm. Corp.*, No. 08-456 (U.S. Dist. Ct., M.D. Fla., Orlando Div., order entered November 14, 2013).

The jury answered two liability questions: the first asked if the company "negligently failed to provide an adequate warning," and the second asked whether the drug "was defective in that it was marketed . . . with inadequate warning or instruction regarding ONJ?" The jury answered the first "yes" and the second "no" and awarded $1.3 million damages. Novartis objected to the verdict as inconsistent, and plaintiffs' counsel agreed. The court proposed telling the jury that their answers to the two questions must be consistent, the parties agreed and the jury was so instructed. Ten minutes later the jury returned with an amended verdict, answering both questions "yes." In its motion for a new trial, the company said that the court should instead have ordered a new trial. Federal Rule of Civil Procedure 49(b) requires courts, where a jury returns inconsistent answers, to "direct the jury to further consider its answers and verdict, or . . . order a new trial."

While acknowledging juror confusion by the separation of the two theories into separate questions, the court said that the confusion was remedied by the court's subsequent charge, and the jury's amended verdict was consistent with the initial award. The court said, "The mere fact that the jury's confusion was rectified quickly does not, as Novartis suggests, imply any impropriety on the jury's part." The court also recommended that courts facing a similar circumstance in the future consider compressing the two theories into a single question for the jury.

Buckyballs® GM Sues CPSC; Counsel Seeks Rulemaking Records Under FOIA

Represented by Cause of Action, Inc., described as a government accountability organization, Craig Zucker, who formerly served as the general manager (GM) of the company that made Buckyballs®, desk toys containing small, high-power magnetic balls, has sued the U.S. Consumer Product Safety Commission (CPSC), seeking a declaration that it exceeded its authority by naming him personally in an administrative action against the now-defunct company to force a product recall. ***Zucker v. CPSC*, No. 13-3355 (U.S. Dist. Ct., D. Md., filed November 12, 2013)**. The complaint outlines the efforts the company took, in partnership with CPSC for several years, to ensure that its products would not be used by children.

According to Zucker, CPSC abruptly changed course in July 2012, issuing a preliminary determination that the products were defective and the company's safety program would not work. Thereafter, he alleges, "CPSC initiated an all-out effort to shut down [the company]," including filing an administrative complaint against the company and initiating a proceeding to order that product sales cease and that the company conduct a recall of all products already sold. The complaint contends that this is an on-going administrative proceeding in which "the very question of whether [the company's] products are defective or hazardous is being adjudicated." Zucker also contends that CPSC launched a negative media campaign and pressured retailers to stop selling the products, resulting in the company's demise.

CPSC then allegedly amended its complaint in the administrative proceeding to add Zucker personally as a respondent, which would mean, if successful, that CPSC could require him to personally conduct a full recall of the company's products, "at an estimated cost of $57 million." Zucker claims that most of the purported infractions are related to his "interactions with and protected political speech regarding CPSC and with Congress and the public about CPSC's abuse of its power." Zucker alleges that the agency has no adjudicative authority over individual officers or employees and has improperly cited the "responsible corporate officer doctrine" (the *Park* doctrine) to hold him personally liable, an "extraordinary and unprecedented expansion" of the doctrine beyond its criminal-conduct origins, in Zucker's view.

Claiming that he has exhausted his administrative remedies in seeking to remove himself from the administrative proceeding and that CPSC has violated his First and Fifth Amendment rights and acted in excess of statutory authority, Zucker requests

that the court enjoin the defendants "from asserting or exercising adjudicative authority over Mr. Zucker in his individual capacity."

Cause of Action, filing as a "news media" party or in the public interest, has also filed a Freedom of Information Act (FOIA) **request**, seeking records relating to CPSC's estimate that small, high-powered magnet sets were associated with 1,700 emergency room-treated injuries between 2009 and 2011, as well as records relating to CPSC's Buckyballs® recall press release, communications discussing the matter and any records "referencing or concerning Mr. Craig Zucker."

ALL THINGS LEGISLATIVE AND REGULATORY

CPSC Proposes Guidelines for Voluntary Recall Press Releases

The U.S. Consumer Product Safety Commission (CPSC) has **issued** a notice of proposed rulemaking (NPR) to "set forth principles and guidelines for the content and form of voluntary recall notices that firms provide as part of corrective action plans under Section 15 of the Consumer Product Safety Act (CPSA)." Among other things, the proposed NPR, amended from staff's initial proposal by the Democratic commissioners, would make any corrective action plans in a recall agreement legally binding, a move that some legal experts say is likely to increase attorney involvement in recalls and keep potentially dangerous products on shelves and in homes longer. More detailed information about the proposed rule appears in the **October 3, 2013, issue** of this *Report*.

According to a news source, Commissioner Robert Adler described the change as a "minor tweak," that most companies "would see and yawn and move on with." Consumer-product regulatory attorneys, however, evidently expect that the agency will be inundated with comments from companies opposing the rule.

Calling it an unnecessary change to a system that has been effective for 30 years, industry insiders are apparently concerned that the proposed plan could lead to a more adversarial relationship between the CPSC and businesses, resulting in unintended drawbacks for the agency as well. One insider noted that under the proposed change companies (i) could refuse to take product-safety actions not included in the agreement, even if new information calls for it; or (ii) keep CPSC out of product recalls, providing the agency with statutorily required information only. Comments will be accepted until February 4, 2014. *See Law360*, November 15, 2013; *Federal Register,* November 21, 2013.

CPSC Issues Final Rule Revoking Certain Sound-Related and Testing Requirements Specific to Toy Guns and Caps

The U.S. Consumer Product Safety Commission (CPSC) has **issued** a final rule, effective December 9, 2013, revoking certain requirements under the *Code of Federal Regulations* relating to caps intended for use with toy guns and toy guns not intended for use with caps where these guns exceed certain peak sound levels.

CPSC notes that the existing regulations have become "obsolete and have been superseded by the requirements of ASTM F963," which applies more broadly to sound-producing toys and allows for the use of more precise and readily available test equipment for measuring sound. CPSC observes as well that the ASTM standard requires fewer measurements and would increase testing efficiencies by using more automated equipment. CPSC also revoked an exemption provision, noting that no manufacturers currently participate in the program. *See Federal Register,* November 7, 2013.

NHTSA Finalizes Rule Requiring Passenger Restraints in New Buses

The U.S. National Highway Traffic Safety Administration (NHTSA) has issued a final **rule** that requires "lap/shoulder seat belts for each passenger seating position in all new over-the-road buses, and in new buses other than over-the-road buses with a gross vehicle weight rating (GVWR) greater than 11,793 kilograms (KG) (26,000 pounds), with certain exclusions." The rule takes effect November 28, 2016, but optional early compliance is permitted. Petitions for reconsideration must be filed by January 9, 2014. *See Federal Register*, November 25, 2013.

NHTSA Proposes Side-Impact Crash Test to Protect Children

The U.S. National Highway Traffic Safety Administration (NHTSA) has **issued** a notice of proposed rulemaking (NPR) to amend its regulations to add specifications and qualification requirements for an anthropomorphic test device representing a 3-year-old child, called the "Q3s" side-impact test dummy. The agency plans to use the Q3s to test child-restraint systems under new side-impact performance requirements that NHTSA said it will propose in a separate NPR. The "Moving Ahead for Progress in the 21st Century Act" of July 6, 2012, requires that NHTSA issue new rules to protect children during side-impact crashes. Comments will be accepted until January 21, 2014. *See Federal Register,* November 21, 2013.

NHTSA Launches Auto Safety Initiative

The U.S. Department of Transportation's National Highway Traffic Safety Administration (NHTSA) has announced its "Significant and Seamless" auto-safety initiative that calls for the agency and the automotive industry to "aggressively accelerate achievable technological advances" to significantly improve auto safety. With an aim to address highway safety matters that the agency considers the most promising, the initiative is focused on advanced seat-belt interlocks, alcohol-detection systems and front-collision warning systems. These technologies were also selected because they purportedly have great lifesaving potential, and their combined effect could have an impact on decreasing the death toll, NTHSA said.

Although the agency has not yet proposed regulations that would mandate these features, it hopes to urge automakers to speed up safety innovations that "address safety issues that have plagued this nation for decades, including failure to use seat

belts, drunk driving and driver error." On November 14, 2013, NHTSA released its 2012 Fatality Analysis Reporting System data, which indicated an increase of 1,082 highway deaths compared to 2011. *See NHTSA News Release* and *DetroitNews.com*, November 14, 2013; *Law360*, November 15, 2013.

FDA Seeks to Create Labeling Parity for Generic Drug Makers

The U.S. Food and Drug Administration (FDA) has issued a proposed **rule** that would speed the dissemination of new safety information about generic drugs to health professionals and patients by allowing generic drug makers to use the same process that brand-name drug manufacturers use to update product label safety information; they would be permitted to update product labeling with newly acquired safety information before FDA reviews the change. The rule would also require generic manufacturers to inform the brand-name manufacturers about the change. Under the new rule, "brand and generic drug products would ultimately have the same FDA-approved prescribing information." Comments are requested by January 13, 2014. *See Federal Register*, November 13, 2013.

LEGAL LITERATURE REVIEW

Linda Mullenix, "Personal Jurisdiction Stops Here: Cabining the Extraterritorial Reach of American Courts," *University of Toledo Law Review* (forthcoming 2014)

University of Texas School of Law Professor Linda Mullenix outlines the arguments presented this term to the U.S. Supreme Court in cases requiring it to consider how far American courts may reach, particularly when faced with foreign defendants sued by foreign plaintiffs for activity occurring on foreign soil. While noting that the Alien Tort Statute claims are no longer viable in one of the cases on the Court's docket, Mullenix discusses in some detail how the parties have addressed the personal-jurisdiction issues and shaped their arguments to appeal to the conservative and liberal wings of the Court. In this regard, she states, "The plaintiffs' argument here, based on a sovereignty theory of personal jurisdiction—and undoubtedly pitched to the Court's conservative wing—if successful would result in opening access to courts for plaintiffs such as the Argentinians in this case. Correlatively, a corporate defendant and its fellow-traveler *amici* are the primary proponents of the due process/fairness theory of personal jurisdiction—making *their* pitch to the Court's liberal sympathizers—which if successful would foreclose plaintiffs' access to the courts." As Mullenix observes, "[i]rony abounds."

Nora Freeman Engstrom, "3-D Printing and Product Liability: Identifying the Obstacles," *University of Pennsylvania Law Review Online*, 2013

Stanford Law School Associate Professor Nora Freeman Engstrom considers whether anyone involved in the production of an object using a 3-D printer, from the person who writes the code for use in printing an allegedly defective product to the company that makes the printer and the hobbyist who "prints" the object at home,

can be held liable in a product-liability action. She contends that it is possible none of them can be held liable under current principles, but suggests that "courts may well, in typical common law fashion, end up softening lines and blurring boundaries in order to impose strict liability on hobbyist 3-D inventors and digital designers, especially if uncompensated injuries mount." She cautions that this would unsettle "product liability law's traditional theoretical foundation."

LAW BLOG ROUNDUP

The Case for Examining Interdependencies Among Litigation Stages to Inform Procedural Standards

"The decision to allow a case to continue (e.g., by denying a motion to dismiss) might hinge on predictions about what will happen at the next stage (e.g., discovery) and how events at that stage will influence application of later screening standards (e.g., summary judgment). These interdependencies suggest that a rulemaker choosing between a relatively strict or lenient standard for termination/continuation decisions cannot focus solely on the supposedly essential characteristics of a particular litigation stage. Instead, whether a screening rule should be strict or lenient depends in part on the strictness or leniency of prior and subsequent screening rules." University of Minnesota Law School Associate Professor Allan Erbsen, blogging about a *Harvard Law Review* article authored by Louis Kaplow. A summary of that article, "Multistage Adjudication," appears in the **October 11, 2012, issue** of this *Report*.

Jotwell: Courts Law, November 20, 2013.

THE FINAL WORD

More Court Opinions Added to GPO Federal Digital System

Opinions from more than 60 federal courts are now available free of charge on the Government Printing Office's (GPO's) Federal Digital System. It currently contains in excess of 750,000 opinions from eight appellate courts, 20 district courts and 35 bankruptcy courts, some dating back to 2004. The database is text-searchable and allows embedded animation and audio. The publishing project, approved by the Judicial Conference, started with opinions from just 29 courts. *See Third Branch News*, November 13, 2013.

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UPCOMING CONFERENCES AND SEMINARS

Shook, Hardy & Bacon eDiscovery, Data & Document Management Attorney Thérèse Miller will present during a Lorman CLE Webinar titled "Drafting Document Retention Policies" on December 5 and December 19, 2013. Among other things, Miller will discuss (i) drafting and implementing a records and information management policy and supporting program, and (ii) current best practices for records management. She will also discuss related issues pertaining to cloud computing, social media and mobile devices.

OFFICE LOCATIONS

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

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).