Shook, Hardy & Bacon L.L.P.

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PRODUCT LIABILITY LITIGATION REPORT

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LAW FIRM NEWS

Wajert's Noteworthy 2012 Product Liability Decisions, Part 2, Published

The **second part** of a two-part summary of notable 2012 product liability decisions authored by Shook, Hardy & Bacon Global Product Liability Partner **Sean Wajert** appeared in the January 15, 2013, issue of *Law360*.

Among the cases are (i) the Pennsylvania Supreme Court's decision to reject the "any-exposure" testimony of a plaintiff's expert witness in an asbestos exposure lawsuit, thus affirming the importance of dose-response in toxic product cases, (ii) the successful company Doe lawsuit filed against the Consumer Product Safety Commission to block publication of a product incident report on the agency's public consumer products safety information database, and (iii) the South Carolina Supreme Court's rejection of computer experts' opinions as to the cause of a baby monitor's alleged failure to sound an alarm when a baby died from sudden infant death syndrome. The experts had dismissed alternative theories of failure other than software error despite sufficient evidence of other error for which they failed to account.

CASE NOTES

SCOTUS Declines Review; Claims to Proceed Against Taiwanese Wheelchair Part Maker

The U.S. Supreme Court has let stand an Oregon Supreme Court determination that courts in that state have jurisdiction over a Taiwan-based company in a wrongful death lawsuit involving a purportedly defective wheelchair battery charger. *China Terminal & Elec. Corp. v. Willemsen*, No. 12-525 (U.S., cert. denied January 22, 2013). Additional information about the case appears in the August 9, 2012, **issue** of this *Report*.

The case was before the Oregon high court for reconsideration in light of *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011), a decision that fractured the U.S. Supreme Court, which was called on to reconsider its "stream of commerce" theory of personal jurisdiction in deciding whether a state court could hear claims involving a foreign manufacturer. The Oregon court focused on the number of

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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wheelchairs equipped with the Taiwanese company's battery chargers sold in the United States—more than 1,000 of which made their way to Oregon—to distinguish *J. McIntyre*, which involved a manufacturer that had sold no more than a few of the company's metal-cutting machines in New Jersey.

Without Expert Testimony, Plaintiff Cannot Proceed in Automatic Door Defect Suit

A federal court in South Carolina has dismissed strict liability and negligence claims filed by a woman who alleged that she was injured by an automatic door at the entrance to a retail store; the court excluded her expert's testimony for failure to submit a report that complied with the federal rules, as well as a number of exhibits purporting to support her claim of manufacturing defect. *Morris v. Dorma Automatics Inc.*, No. 09-3267 (U.S. Dist. Ct., D.S.C., Charleston Div., decided January 18, 2013). Among the exhibits were repair work orders or invoices for problems other than the defect cited by the plaintiff or for work done after the accident, which must be excluded under the "subsequent repairs doctrine" of Federal Rule of Evidence 407.

As to the plaintiff's strict liability claim, the court found that the "admissible evidence in this case leaves Morris with insufficient proof that her alleged injuries occurred because the automatic doors were in an unreasonably dangerous condition due to a manufacturing defect in the Superscan on the interior side of the left entrance door. In addition, Morris has not provided sufficient evidence that the product, at the time of the accident, was in essentially the same condition as when it left the hands of defendants, especially as it pertains to Dorma Automatics. The admissible documentary evidence is weak and does not point to the specific defect alleged, and Morris did not offer expert testimony to support her view." Noting that negligence imposed a burden on the plaintiff in addition to the requisite elements of a strict products liability claim, the court found that her admissible evidence was similarly insufficient to prove this claim.

Class Certification Denied in False Claims Suit Against Beauty Product Manufacturer

A federal court in California has denied a motion for class certification in a suit alleging that Neutrogena Corp. misled consumers by advertising its beauty products as "clinically proven" to prevent and repair facial wrinkles, fine lines and other indicia of aging, thus making users appear younger. *Chow v. Neutrogena Corp.*, No. 12-4624 (U.S. Dist. Ct., C.D. Cal., W. Div., decided January 22, 2013). Among other matters, the named plaintiff alleged breach of express warranty and violation of the Consumers Legal Remedies Act.

In the court's view, "[t]here are significant doubts as to Plaintiff's ability to meet the threshold requirements of commonality, typicality and adequacy" under Federal Rule of Civil Procedure 23(a), and "individual issues predominate over common questions of law and fact" under Rule 23(b)(3), thus making "the class action device

… not appropriate." According to the court, because "money damages are the true purpose of this action," the plaintiff's request for certification under Rule 23(b)(2) was also inappropriate.

The court found "significant individualized questions as to whether the product worked as advertised for each individual class member," questions that "would necessitate consulting each class member individually to determine if they experienced the advertised result." The court also determined that the alleged misrepresentations were not subject to an inference of class-wide reliance "because, among other reasons, a significant portion of consumers who purchased the product were repeat purchasers. Plaintiff has not provided significant proof to distinguish between mere favorability toward products bearing the Neutrogena brand name, for example, and reliance upon specific advertised benefits of the products in this case."

ALL THINGS LEGISLATIVE AND REGULATORY

CPSC Approves FY 2013 Operating Plan; Phthalates, Lead and Bed Rails on the Agenda

According to a news source, the Consumer Product Safety Commission (CPSC) unanimously approved an amended Fiscal Year (FY) 2013 operating plan by ballot on January 18, 2013. While the **draft** circulated by staff in December 2012 contains most of the items approved, the commissioners also decided to include initiatives that would reduce third-party testing burdens involving phthalates and lead and address adult bed rail safety. The plan includes information about the voluntary standards CPSC will support in the coming year and the mandatory standards that are either ongoing or will be addressed. *See Bloomberg BNA Product Safety & Liability Reporter*, January 28, 2013.

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CPSC's Plans Ambitious 2013 Regulatory Agenda

According to news sources, high-ranking items on the Consumer Product Safety Commission's (CPSC's) 2013 agenda include (i) eliminating the use of flame-retardant chemicals in upholstered furniture, (ii) addressing carbon monoxide (CO) poisonings, (iii) assessing brain injuries related to playing sports, (iv) developing more comprehensive safety standards for recreational off-highway vehicles, and (v) monitoring window blind safety. The agency also reportedly plans to increase enforcement efforts and port surveillance as well as complete outstanding Consumer Product Safety Improvement Act (CPSIA) matters, including the "104 Rules" for durable infant products and a phthalates study.

CPSC Chair Inez Tenenbaum has reportedly indicated that the agency also plans to engage in additional collaborative processes as it did with the University of Alabama and National Institute of Standards and Technology in 2012 on a study showing that existing technology can increase escape time from CO emissions. "Our future is to be proactive, to work with academia, or federal and state agencies to do research, present it to the voluntary standards committee, and see a change in the standard that would be more helpful," Tenenbaum said. Other issues the commission plans to examine in 2013 include introducing table saw safety, gel fuels and fuel pots proposals. *See Bloomberg BNA Product Safety & Liability Reporter*, January 28, 2013.

ALJ Denies Baby Matters' Request to Sanction CPSC in Nap Nanny® Enforcement Action

A Consumer Product Safety Commission (CPSC) administrative law judge (ALJ) has denied a request by the company that makes the Nap Nanny® portable baby recliner subject to a CPSC enforcement action to order the commission to "correct and retract an allegedly false and misleading statement it made in a December 27, 2012, press release." *In re Baby Matters, LLC*, No. 13-1 (CPSC, decided January 22, 2013). The ALJ also denied the request of Baby Matters LLC that the complaint be dismissed as a sanction for CPSC's alleged failure to sufficiently correct the statement. According to the ALJ, a retraction request must be made to the CPSC secretary. Because the commission's decision constitutes final agency action, review may be sought before a federal district court. Additional details about the dispute appear in the January 17, 2013, **issue** of this *Report*.

The ALJ also denied the request of Baby Matters LLC that the complaint be dismissed as a sanction for CPSC's alleged failure to sufficiently correct the statement.

Bon-Ton Stores Agrees to CPSC Settlement

The Consumer Product Safety Commission (CPSC) has provisionally **accepted** a settlement with The Bon-Ton Stores, Inc., requiring the company to pay $450,000 in civil penalties for allegedly failing to promptly notify the commission that its upper outerwear garments with drawstrings failed to comply with the commission's *Guidelines for Drawstrings on Children's Upper Outwear*, which recommend that "there be no hood and neck drawstrings in children's upper outerwear sized 2T to12."

The company agreed to the settlement without admitting liability, and CPSC requests that those opposed to it or otherwise wishing to comment file a written request by February 1, 2013.

According to the guidelines, which were incorporated into a voluntary standard adopted in 1997, manufacturers, importers and retailers of children's upper outerwear should be aware of the hazards these items present and be sure that garments they sell conform to the standard. Apparently, CPSC reminded Bon-Ton in 2007 about the need to be compliant, and, in 2010, the company was identified as a retailer of potentially hazardous garments in press releases announcing three product

recalls. According to CPSC's allegations, Bon-Ton "had presumed and actual knowledge that garments [it] distributed posed a strangulation hazard and presented a substantial risk of injury to children under FHSA section 15(c)(1), 15 U.S.C. 1274(c)(1)… and knowingly failed to inform the Commission about the garments as required." *See Federal Register,* January 17, 2013.

NHTSA Report Reveals Fewer Defect Recalls, More Compliance Recalls

The National Highway Traffic Safety Administration (NHTSA) has issued a **report** that shows an increase in overall auto industry recalls in 2012 (664) compared with recalls in 2011 (654), but attributes the increase to compliance-related recalls, which increased slightly, rather than to defect-related recalls, which decreased. The data include recalls involving vehicles, tires, equipment, and child seats, and the 2012 recalls evidently affected more than 17.8 million of these products. While consumer complaints often drive recalls, what NHTSA refers to as "influenced" recalls, the number of consumer complaints has been falling since 2010 when 65,765 complaints were registered. In 2012, NHTSA received 41,912 consumer complaints. *See NHTSA Press Release*, January 17, 2013.

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LEGAL LITERATURE REVIEW

Stewart Sterk, "Personal Jurisdiction and Choice of Law," *Iowa Law Review* (forthcoming 2013)

Benjamin N. Cardozo School of Law Professor Stewart Sterk considers the real interests at stake when a court asserts personal jurisdiction over a foreign defendant; he suggests that choice of law principles would protect those interests with greater clarity than the U.S. Supreme Court's "conceptually muddled" ruling in *J. McIntyre Machinery, Ltd. v. Nicastro.* According to Sterk, "personal jurisdiction's concern with sovereignty should focus on whether the forum state's assertion of jurisdiction impermissibly interferes with the interests of some other state." Doing so, he asserts, would also shed "light on the liberty interest emphasized in the *J. McIntyre* opinion." The article concludes, "When a business engages in multistate or multinational activity certain to expose it to the legal systems of multiple states, no purpose is served by asking whether the business had 'minimum contacts' with any particular state. Instead, the question should be whether a defendant's contacts with so many states displaced any plausible argument that the defendant relied on the law of its home state or any reasonable basis for that home state to provide a 'safe haven' for the defendant."

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Daniel Klerman, "Personal Jurisdiction and Product Liability," *Southern California Law Review* (forthcoming 2013)

Based on a sustained economic analysis of personal jurisdiction, University of Southern California Law School Professor Daniel Klerman argues that "plaintiffs should be able to sue where they purchased a product which caused injury." This approach, which focuses on consequences rather than on the defendant's contacts or intentions, was inspired by a "deadlocked" U.S. Supreme Court on the "stream of commerce theory of personal jurisdiction." Klerman concludes that "allowing suit where the plaintiff purchased the products is superior from both an ex ante and an ex post perspective." The latter perspective "focuses on the effect of jurisdictional rules on pre-litigation behavior," including product design, "the manufacturer's choice of distributor, pricing, and incentives for state legislators and judges to formulate fair and efficient legal rules."

According to Klerman, this approach "would not allow manufacturers to strategically structure their activities … to compel plaintiffs to sue where product liability law and adjudicative institutions are most favorable to manufacturers" nor would it "lead to excessively pro-plaintiff liability law, because manufacturers retain the ability to vary the price of products depending on the law in the state where the product was sold. As a result, states would have an incentive to choose efficient product liability and procedural law, because in-state residents would both get the benefit of such laws and pay prices which reflected the cost of the resulting liability." The approach would also help "ensure that in-state residents bear the cost of courts which are excessively pro-plaintiff or biased."

Neal Devins & Saikrishna Prakash, "Reverse Advisory Opinions," *University of Chicago Law Review* (forthcoming 2013)

Law Professors Neal Devins and Saikrishna Prakash question the practice among federal circuit courts and the U.S. Supreme Court to order or request legal advice from representatives of other branches of government. They note the increasing frequency with which the Court "calls for the views of the solicitor general [CVSGs] on whether the Court should grant certiorari in cases in which the government is not a party" or solicits merits briefs from the solicitor general.

According to the authors, Article III does not grant this authority, and the practice damages the "Constitution's system of independent and coequal branches." They conclude, "Our critique of federal judicial requests for legal advice means that CVSGs are beyond the scope of the judicial power conveyed by Article III. Put another way, unless and until Congress authorizes such requests, CVSGs are unconstitutional. While CVSGs are a staple of recent practice, no one, not even the Supreme Court, has ever explained the source of the authority to request the legal opinions of nonparties." They call for the courts to justify their demands "by reference to Article

Ill or some statute." The "judicial hubris" of treating coequal branches like law clerks, the authors claim, "is a function of the Supreme Court's eagerness to declare legal principles rather than merely to resolve disputes."

LAW BLOG ROUNDUP

Personal Jurisdiction Doctrine as Legal Fiction, Formalism and "Factoritis"

"Here is a practical problem: Where should a person who was harmed by a product be able to sue the manufacturer of that product? Here is a complex judicial answer to that problem: Combine ½ cup state sovereignty and ½ cup due process, cook over low simmer and stir with circular reasoning, adding three or four new factors every twenty years." University of Connecticut School of Law Professor Alexandra Lahav, blogging about a new law review article titled "Personal Jurisdiction and Product Liability" that applies an economic analysis to personal jurisdiction doctrine, which Lahav believes has been "suffering from a mixture of legal fictions, formalism, and factoritis." The law review article is summarized elsewhere in this *Report*.

Jotwell: Courts Law, January 21, 2013.

THE FINAL WORD

More States Consider Regulating Chemicals in Consumer Products

Safer States, a national coalition of state-based environmental health organizations, has released an **analysis** which indicates that some 26 states will consider policies to address concerns over toxic chemicals in consumer products in 2013. According to the coalition, 19 states have adopted more than 93 chemical safety policies during the past decade and, the coalition expects that number to increase as more people realize that "federal handling of toxic chemicals is so flawed."

The Toxic Substances Control Act (TSCA)—the law that "oversees" toxic chemical regulation on the federal level—is now 37 years old and does not, according to the coalition, "even require basic health and safety data on chemicals before they are used in products." In 2011, Sen. Frank Lautenberg (D-N.J.) introduced legislation that would have overhauled TSCA, but the bill did not pass. The coalition expects that it will be reintroduced in 2013.

Safer States National Director Sarah Doll stated, "With more studies showing increased exposure to toxic or untested chemicals in our homes, citizens are demanding action at the state level. Stronger state laws not only benefit public health, but the marketplace, too, by restoring consumer's confidence that products in stores are safe. We urge state legislators across the country to continue leading on these critical public health protections."

Some of the legislation and policy changes that Safer States reports will be considered include (i) restricting or labeling the use of bisphenol A (BPA) in cash register receipts, children's products and food packaging; (ii) requiring removal of certain toxic flame retardants, including the purported carcinogen "Tris," from children's products, home furnishings and building materials; (iii) changing disclosure rules to give concerned consumers a way to identify chemicals in products; (iv) encouraging manufacturers to substitute potentially toxic chemicals with safer alternatives; (v) banning cadmium, an allegedly dangerous metal often found in inexpensive children's jewelry; (vi) banning formaldehyde from cosmetics and children's products; and (vii) promoting the use of green cleaning products in schools.

UPCOMING CONFERENCES AND SEMINARS

ACI, Philadelphia, Pennsylvania – January 31 – February 1, 2013 – "13th Annual Advanced Forum on Asbestos Claims & Litigation." Shook, Hardy & Bacon Public Policy Partner **Mark Behrens** joins a distinguished faculty to participate in a panel discussion on the "Year in Review: Examining Hot Jurisdictions, Emerging Trends, and What to Expect in 2013 After the Presidential and Congressional Elections."

GMA, Miami, Florida – February 19-21, 2013 – "Litigation Conference." Shook, Hardy & Bacon Agribusiness & Food Safety Co-Chair **Madeleine McDonough** joins a distinguished faculty and, during a general session, will discuss "Food Is NOT the Next Tobacco." Other speakers focusing on recent food and beverage litigation developments will include in-house counsel for major food corporations. Shook, Hardy & Bacon is a conference co-sponsor.

ABA Tort Trial & Insurance Practice Section, Phoenix, Arizona – April 3-5, 2013 – "2013 Emerging Issues in Motor Vehicle Product Liability Litigation." Shook, Hardy & Bacon Tort Partner **H. Grant Law** is an event co-chair, and Class Actions & Complex Litigation Associate **Amir Nassihi** serves as program chair for this annual CLE on motor vehicle litigation. Nassihi will also serve as a co-moderator for a panel discussion titled "The Blockbuster Development in Class Action Litigation"; Shook, Hardy & Bacon Global Product Liability Partner **Holly Smith** is scheduled to participate as a member of the panel. Nassihi and Tort Partner **Frank Kelly** will co-moderate a panel discussion on "Managing the Corporate Counsel Relationship: The Inside View on Diversity, Retention and Client Expectations." The distinguished faculty includes senior in-house counsel for major automobile makers and experienced trial and appellate counsel. Program sessions will address class action developments, litigating brake pad asbestos cases, regulatory developments, and issues unique to component parts manufacturers. Shook, Hardy & Bacon is a conference co-sponsor

ABA Toxic Torts and Environmental Law and Corporate Counsel Committees, Phoenix, Arizona – April 4-6, 2013 -- "Fuel, Food, Fibers and More: Blazing New Trails in the Desert Sun." During this 22nd annual spring CLE meeting, Shook, Hardy &

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Bacon Agribusiness & Food Safety Co-Chair **Madeleine McDonough** will participate in a panel discussion on "Food Safety: Will What We (Don't) Know About Our Food and Its Packaging Hurt Us?"

DRI, New York, New York – May 16-17, 2013 – "29th Annual Drug and Medical Device Seminar." Shook, Hardy & Bacon Pharmaceutical & Medical Device Litigation Partner **Scott Sayler** will deliver opening remarks in his role as current chair of DRI's Drug and Medical Device Committee. Co-sponsored by SHB, the event will feature presentations by judges, in-house and outside counsel, and other professionals on cutting-edge topics such as (i) "How to use your advocacy skills to persuade the toughest audience," (ii) "The latest on consolidated drug and device proceedings in Philadelphia," (iii) "What jurors are thinking about the FDA," (iv) "How to help a jury understand a state-of-the-art case," (v) "The latest on 'judicial hellholes,'" (vi) "How to try a multiple-plaintiff pharmaceutical case," and (vii) "How to take the 'junk' out of junk science." ■

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ABOUT SHB

Shook, Hardy & Bacon is widely recognized as a premier litigation firm in the United States and abroad. For more than a century, the firm has defended clients in some of the most substantial national and international product liability and mass tort litigations.

Shook attorneys have unparalleled experience in organizing defense strategies, developing defense themes and trying high-profile cases. The firm is enormously proud of its track record for achieving favorable results for clients under the most contentious circumstances in both federal and state courts.

The firm's clients include many large multinational companies in the tobacco, pharmaceutical, medical device, automotive, chemical, food and beverage, oil and gas, telecommunications, agricultural, and retail industries.

With 95 percent of our more than 470 lawyers focused on litigation, Shook has the highest concentration of litigation attorneys among those firms listed on the *AmLaw* ***100,*** *The American Lawyer's* list of the largest firms in the United States (by revenue).