Shook, Hardy & Bacon L.L.P.

FEBRUARY 20, 2014

PRODUCT LIABILITY LITIGATION REPORT

CONTENTS

CASE NOTES

Posner Concurrence Calls for Abolition of Excited Utterance Exception

In the context of a criminal-conviction appeal, Seventh Circuit Court of Appeals Judge Richard Posner has authored a concurring opinion that questions the ongoing validity of hearsay rule exceptions that allow into evidence "present sense impression" or "excited utterance" statements made outside of court. ***United States v. Boyce*, No. 13-1087 (7th Cir., decided February 13, 2014)**.

The "present sense impression" exception applies to "a statement describing or explaining an event or condition, made while or immediately after the declarant perceived it." According to Posner, immediacy does not guarantee truthfulness: "It's not true that people can't make up a lie in a short period of time. Most lies in fact are spontaneous." The "excited utterance" exception allows into evidence "a statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused." In Posner's view, this exception, which assumes that an unreflective utterance is reliable, "rests on no firmer ground than judicial habit, in turn reflecting judicial incuriosity and reluctance to reconsider ancient dogmas." He argues that "hearsay evidence should be admissible when it is reliable, when the jury can understand its strengths and limitations, and when it will materially enhance the likelihood of a correct outcome."

CPSC and Former CEO of Buckyballs Co. Spar over Access to Financial Records

In response to a motion for protective order filed by former Maxfield & Oberton Holdings CEO Craig Zucker, who has been sued in his individual capacity by the U.S. Consumer Product Safety Commission (CPSC) in litigation over the purported hazards of Buckyballs, the high-power magnet desk toys the company once sold, CPSC reportedly argues that "Mr. Zucker's oft-repeated but unsupported claim that the financial discovery is irrelevant and 'totally unrelated to this proceeding's narrow scope' ignores the dual nature of the issue before this court and artificially decouples the substantial product hazard determination from the remedy that would necessarily accompany such a determination." *In re Maxfield & Oberton Holdings, LLC*, CPSC Docket Nos. 12-1, 12-2, 13-2 (CPSC, response filed February 10, 2014).

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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Zucker claims that allowing discovery of what he characterizes as "non-relevant information," "will prolong this proceeding, cause and impose an undue burden and expense on all of the parties as well as non-parties, and may cause annoyance, embarrassment and oppression." CPSC contends that discovery of the defendants' finances is required to demonstrate that Zucker is a responsible corporate officer, a finding that a court will require to hold him liable under the Consumer Product Safety Act. *See Law360*, February 13, 2014.

ALL THINGS LEGISLATIVE AND REGULATORY

OMB Proposes Changes to Rules on Government Use of Voluntary Standards

The White House Office of Management and Budget (OMB) has **issued** for public comment proposed revisions to Circular A-119 "in light of changes that have taken place in the world of regulation, standards, and conformity assessment since the Circular was last revised in 1998." Comments are requested by May 12, 2014.

The more significant changes would emphasize a preference for incorporating into federal rulemaking and keeping references current to the performance-based standards developed by voluntary consensus standards-development organizations, and harmonizing U.S. regulations with international requirements to avoid running afoul of international trade obligations.

The proposed **revisions** would include (i) more specific guidance on "how Federal representatives should participate in standards development activities"; (ii) guidance to enhance transparency about implementing the circular in rulemakings and alerting the public when agencies consider whether to participate in standards-development activities, as well as "factors for agencies to consider when incorporating standards by reference in regulation"; and (iii) directions to agencies to consult with the U.S. trade representative "on how to comply with international obligations with regard to standards and conformity assessment." Among other matters, the revisions would address IP issues, both where standards require the use of patented technologies and whether the text of copyright-protected standards incorporated into federal regulations may be provided to the public. *See Federal Register*, February 11, 2014.

CPSC to Seek Public Comment on Proposed Public Disclosure Rule Changes

The U.S. Consumer Product Safety Commission (CPSC) has approved a proposal that would amend a regulation that implements Section 6(b) of the Consumer Product Safety Act, governing CPSC's disclosure of product information to the public. Additional details about the proposal appear in the February 6, 2014, **issue** of this *Report*. During its February 12, 2014, meeting, the commission approved the proposal by

a 2-1 vote along party lines after rejecting several amendments proposed by the minority commissioners. Republican Commissioner Ann Marie Buerkle reportedly argued during the hearing that CPSC lacks the authority to change Section 6(b) and claimed that the proposal does so.

According to Acting Chair Robert Adler, approved amendments clarify that (i) the agency may not disseminate unfair or inaccurate information, despite exemptions for "publicly available information" from Section 6(b)'s scope; (ii) the "reasonable person" standard used to determine whether product-related information falls under Section 6(b) errs in favor of providing public notice; (iii) the scope of information "obtained by CPSC" under Section 6(b) has not been narrowed; and (iv) requiring manufacturers to justify a request to withhold their comments reflects an interest in balance. *See Bloomberg BNA Product Safety & Liability Reporter*™ and *Law360*, February 12, 2014.

Annual KID Report on Product Recalls Highlights Ineffectiveness

Consumer advocacy organization Kids in Danger (KID) has **issued** its annual report on 2013 children's product recalls and concludes that, while "the number of reported incidents, injuries and deaths prior to a recall are a noted step in the right direction, these numbers are still too high," and "[o]nly 10% of 2012 recalled children's products were successfully corrected, replaced or returned. When manufacturers still have control of a recalled product, in their warehouses or with a retailer, the success rate is higher. But once a product is in consumer hands the success rate plummets." KID calls for the U.S. Consumer Product Safety Commission and manufacturers to improve the effectiveness of children's product recalls and suggests that greater use of social media to broadcast recalls could reach "many more affected consumers." The parents of a 16-month-old child who died in 1998 from the collapse of a recalled portable crib founded KID.

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Final Rule Revises Definition of "Strong Sensitizer"

The U.S. Consumer Product Safety Commission (CPSC) has **issued** a final rule to amend regulations defining "strong sensitizer" under the Federal Hazardous Substances Act. The revision takes effect March 17, 2014. According to CPSC, "[t]he revised definition of 'strong sensitizer' eliminates redundancy, removes certain subjective factors, incorporates new and anticipated technology, places criteria for classification of strong sensitizers in the order of importance, defines criteria for 'severity of reaction,' and provides for the use of a weight-of-the evidence approach to determine whether a substance is a strong sensitizer." *See Federal Register*, February 14, 2014.

CPSC Estimates Costs and Burdens of Consumer Focus Groups

The U.S. Consumer Product Safety Commission (CPSC) has **requested** comments on the estimated costs and burdens of collecting information from voluntary participants in consumer focus groups. CPSC will consider the comments before requesting an extension of this information collection from the Office of Budget and Management. The focus groups provide CPSC with information about the use of specific consumer products, including recall effectiveness, product use, and safety-issue perceptions. According to the agency, "staff has used focus groups to assess consumers' behavior related to product recalls, pool and spa safety, the Consumer Product Safety Risk Management System, recreational off-road vehicle restraint systems, and cpsc.gov Web site redesign." The estimated 20 focus groups convened during the next three years would cost some $140,000 and involve 1,100 participant hours. Comments are requested by April 14, 2014. *See Federal Register*, February 11, 2014.

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NHTSA Requests Comments on Technical Air Bag Effectiveness Report

The U.S. National Highway Traffic Safety Administration (NHTSA) has **issued** a technical report "evaluating the fatality-reducing effectiveness of curtain and side air bags in the front seats of passenger cars and LTVs [light trucks and vans]." Titled "Updated Estimates of Fatality Reduction by Curtain and Side Air Bags in Side Impacts and Preliminary Analyses of Rollover Curtains," the report updates the agency's 2007 preliminary evaluation of curtain and side air bags. Comments are requested by June 10, 2014. *See Federal Register*, February 10, 2014.

Advisory Committee on Rules of Evidence to Meet

The Advisory Committee on Rules of Evidence of the U.S. Judicial Conference will conduct an open **meeting** April 4, 2014, at the University of Maine School of Law in Portland, Maine. While the meeting will be open to public observation, participation will not be allowed. *See Federal Register*, February 10, 2014.

LEGAL LITERATURE REVIEW

William Janssen, "The Odd State of *Twiqbal* Plausibility in Pleading Affirmative Defenses," *Washington & Lee Law Review*, 2013

Charleston School of Law Professor William Janssen considers how the federal district courts have handled the question whether the plausibility pleading standard adopted by the U.S. Supreme Court in *Bell Atlantic Crop. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)—often referred to as *Twiqbal,* applies to affirmative-defense pleading. Finding an "incoherence" among the courts,

Janssen observes that the majority has determined that the standard does not apply. Still, a "persistent minority," which was the majority "just a few years back," holds that *Twiqbal* applies. The article closes with "the three litigation options available to those who must plead affirmative defenses, and concludes that none is safe, reliable, or certain." An appendix cites the 230 cases Janssen surveyed to the date of publication, providing a guide to practitioners who will be pleading affirmative defenses in particular federal court jurisdictions.

Sheila Sheuerman, "Mass Tort Ethics: What Can We Learn from the Case Against Stanley Chesley?," *Widener Law Journal*, 2013

In an article appearing in a mass-tort symposium issue of this journal, Charleston School of Law Professor Sheila Scheuerman sets forth the "baseline lessons for all mass tort lawyers" derived from public sources pertaining to the disbarment proceedings brought against mass-torts bar "titan" Stanley Chesley. They are (i) "in a non-class action mass tort, the plaintiffs' attorney has an attorney-client relationship, and corresponding duty, to each individual client"; (ii) "[a] mass tort should not be treated as a class action"; and (iii) "[a]ssuming joint responsibility for representation with co-counsel means that each attorney can be held liable for the other's acts or omissions."

LAW BLOG ROUNDUP

The Litigation Funding Problem

"Since many controversial legal relationships are designed primarily to solve the litigation funding problem—from class actions to patent trolls—the proper legal framework for third-party litigation funding is a topic with implications for several areas of the law." Boston University School of Law Professor Keith Hylton, commenting on a law review **article**, summarized in the November 7, 2013, issue of this *Report*, that examined the rise in third-party litigation funding, the potential risks for contracting parties and ways the law can address them.

Jotwell: Torts, February 11, 2014.

Concerns About Proposed Limitations on Discovery

"Corporations are less likely to be held accountable for their misdeeds if these changes are made. That cost alone renders the current litigation reform proposals unjustified." As the comment period ends for proposed discovery-related changes to the Federal Rules of Civil Procedure, Seattle University School of Law Associate Professor Brooke Coleman questions the data on which their proponents rely to

support new limitations. Coleman contends that "discovery costs are generally not too high in comparison to the stakes parties have in litigation" and "the argument that the proposed restrictions on discovery are justified undervalues the benefit of civil litigation." According to Coleman, "The proposed discovery rules incentivize producing parties to hold back information that is necessary to get to the truth, and they further burden requesting parties with proving that they need materials before they can even know what that information is."

ACSblog, February 14, 2014

THE FINAL WORD

Coalition Launches Ad Campaign to Open SCOTUS to Cameras

The Coalition for Court Transparency has created an ad campaign calling for the U.S. Supreme Court (SCOTUS) to open its doors to cameras. A 30-second TV ad will air on major cable networks, claiming that more than three-fourths of Americans support cameras in the Court and stating "The Supreme Court's decision impact the lives of Americans everywhere. But only a privileged few get to witness history and see justice in action.… It's time for a more open judiciary. It's time for cameras in the Supreme Court." Formed by media, public interest and open-government organizations, the **coalition**, which is also calling for people to sign a petition to Chief Justice John Roberts, reportedly grew out of frustration with the Court's resistance to televising its proceedings and the belief that it would benefit from greater public exposure. According to Constitutional Accountability Center founder Doug Kendall, "There's nothing the government does that's more impressive than the high-quality debates that take place before the Supreme Court." *See The National Law Journal*, February 18, 2014.

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UPCOMING CONFERENCES AND SEMINARS

ABA, South San Francisco, California – February 27, 2014 – "Life Sciences Legal Summit." Shook, Hardy & Bacon Life Sciences & Biotechnology Partner **Debra Dunne** will join a distinguished faculty during this continuing legal education program focusing on legal and regulatory issues of concern to the life sciences industry. Dunne will discuss "Regulatory Strategies for Life Science Companies." Also presenting during the summit are the firm's Pharmaceutical & Medical Device Litigation Chair **Madeleine McDonough**, "What's on the Horizon? Emerging Legal Trends," Life Sciences & Biotechnology Partner **Alicia Donahue**, "Managing the Corporate Counsel Relationship: The Inside View on Diversity, Retention, and Client Expectations," and Intellectual Property & Technology Litigation Associate **Jamie Kitano**, "Emerging Intellectual Property Issues."

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ABA, Phoenix, Arizona – April 2-4, 2014 – "2014 Emerging Issues in Motor Vehicle Product Liability Litigation." Shook, Hardy & Bacon Tort Associate Amir Nassihi serves as event coordinator for this 24th annual continuing legal education program and will participate in a panel discussion with Global Product Liability Partner Holly Smith to present "Hot Topics in Class Action Litigation. Firm Tort Partner H. Grant Law, who co-chairs the American Bar Association's (ABA's) Tort Trial & Insurance Practice Section Products Liability Committee, will provide a welcome and introduction to the program. Shook, Hardy & Bacon Tort Partner Robert Adams will present "Effective Trial Communication: A Master Class," and Global Product Liability Partner Frank Kelly will join a panel to discuss "Effectively Packaging and Presenting Complex Accident Reconstruction Concepts." ■

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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).