Shook, Hardy & Bacon L.L.P.

JUNE 13, 2013

PRODUCT LIABILITY LITIGATION REPORT

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LAW FIRM NEWS

Behrens Provides Testimony Before ABA Asbestos Task Force

Shook, Hardy & Bacon Public Policy Partner **Mark Behrens** participated in a June 5-6, 2013, hearing before the American Bar Association's (ABA's) Task Force on Asbestos Litigation and the Bankruptcy Trusts to highlight the importance of transparency requirements that can curb fraud in asbestos litigation. According to his written **testimony**, "'Sunshine' requirements that improve bankruptcy trust transparency provide tort defendants a tool to (1) identify fraudulent or exaggerated exposure claims; (2) establish that a debtor company was partly or entirely responsible for the plaintiff's harm; and (3) allow judgment defendants to obtain set-off credits for trust claim payments received by the plaintiff." Such benefits, in Behrens's view, would accrue from revealing "inconsistent filings to trusts and the courts." Outlining a recent trend to adopt asbestos litigation reforms, Behrens concluded by calling for the task force to recommend the adoption of trust transparency requirements.

CASE NOTES

SCOTUS Grants Cert. on Lanham Act Standing for False Advertising Claims

The U.S. Supreme Court has decided to review whether an entity may bring a claim for false advertising under the Lanham Act against a defendant that is not its competitor. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, No. 12-873 (U.S., cert. granted June 3, 2013). The Third, Fifth, Eighth, and Eleventh Circuits allow parties that are not actually competitors to bring such claims, if they satisfy the factors set forth in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983) (addressing standing for those seeking damages under the Clayton Act for harm arising from violation of antitrust laws). The Seventh, Ninth and Tenth Circuits have adopted a categorical test under which only an actual competitor may bring such litigation. The Second and Sixth Circuits apply their own variations of a more expansive "reasonable interest" test.

The issue arises in the context of copyright and patent infringement claims brought by Lexmark against Static Control involving the latter's purported manufacture and sale of microchips that remanufacturers use when making toner cartridges for

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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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Lexmark's laser printers. Static Control counterclaimed for false advertisement under the Lanham Act, alleging that Lexmark falsely told Static's customers that Static's products infringed Lexmark's intellectual property. The Sixth Circuit agreed that Static Control had standing to bring the claim even though it did not make laser printers and was thus not a direct competitor.

A number of consumer-fraud actions brought in recent years against product manufacturers have included false advertising claims under the Lanham Act, which claims have been dismissed for lack of standing because consumers are not the manufacturers' competitors. A U.S. Supreme Court ruling on the issue could affect whether consumers may bring Lanham Act claims.

Third Circuit Affirms Asbestos Suit Dismissals with Prejudice

The Third Circuit Court of Appeals has dismissed with prejudice the injury claims of 12 individual plaintiffs whose proceedings are part of an asbestos multidistrict (MDL) litigation pending before a federal court in Pennsylvania. ***In re Asbestos Prods. Liab. Litig. (No. VI),* Nos. 12-2061, -2063, -2064, -2065, -2066, -2067, -2068, -2069, -2070, -2071, -2072, -3082 (3d Cir., decided May 31, 2013)**. The appeals court determined, in the context of the defendants' motions to dismiss, that the MDL court did not abuse its discretion in finding that these plaintiffs had failed to comply with an amended administrative order that has controlled the litigation since 2009. The MDL court interpreted the order as requiring plaintiffs to submit complete exposure histories and, because these 12 plaintiffs either did not do so or failed to show an asbestos-related disease, dismissed their complaints with prejudice after a full briefing of the issues.

Among other matters, the plaintiffs claimed that the MDL court did not properly consider the six factors required to support dismissal. According to the Third Circuit, district courts analyze these factors both when they dismiss cases *sua sponte* and "in cases like this, where the plaintiffs were put on notice by a motion that dismissal was being sought, and given the opportunity to oppose the motion." But because "[t]he concerns that are present when a district court dismisses a case *sua sponte* without giving the plaintiff an opportunity to present arguments against dismissal are lessened when dismissal is a result of a fully briefed motion," the Third Circuit decided that dismissals following a contested motion may be treated "somewhat differently.… In the context of a massive multidistrict litigation, our ability to satisfy ourselves that the district court did not act arbitrarily, and did consider the relevant factors, is made easier when the dismissal resulted from the defendant's motion and was challenged by the plaintiff before the district court ruled."

Oklahoma Supreme Court Rules Tort Reforms Unconstitutional

Finding that the bill adopting tort reforms in the state violated the constitution's single-subject rule, the Oklahoma Supreme Court has determined that H.B. 1603,

the Comprehensive Lawsuit Reform Act (CLRA) of 2009, is "void in its entirety." *Douglas v. Cox Retirement Props., Inc.*, No. 110270 (Okla., decided June 4, 2013). The defendant in a wrongful death action sought to dismiss the case due to the plaintiff's purported failure to comply with section 19 of the CLRA. In response, the plaintiff contended that the CLRA "was unconstitutional logrolling in violation of the single-subject rule of Article 5, § 57 of the Oklahoma Constitution." While the trial court granted the motion to dismiss, it certified its order for immediate review.

Agreeing with the plaintiff and reversing the lower court's dismissal order, the state high court noted, "H.B. 1603 contains 90 sections, encompassing a variety of subjects that do not reflect a common, closely akin theme or purpose. The first 24 sections of H.B. 1603 amend and create new laws within our civil procedure code found in Title 12. Many of these provisions have nothing in common. For example, Section 3 purports to give a trial court the authority to transfer a case to another state. Section 10 creates a law that assists the Oklahoma Healthcare Authority in collecting refunds for the Medicaid program. In Section 13, the Legislature adopts a portion of the federal civil procedure code to control a state court action."

The court further observed, "Of the remaining 66 sections of H.B. 1603, 45 sections create entirely new Acts, which have nothing in common with each other, including The Uniform Emergency Volunteer Health Practitioners Act, The Common Sense Consumption Act, The Asbestos and Silica Claims Priorities Act, The Innocent Successor Asbestos-Related Liability Fairness Act, and The School Protection Act.… Other dissimilar sections of H.B. 1603 amend the Mandatory Seat Belt Use Act and the Oklahoma Livestock Activities Liability Limitation Act, limit the liability of firearm manufacturers, and amend existing laws regarding school discipline." Finding that severance was not an option because the law "encompasses so many different subjects," the court determined that it was compelled to invalidate the entire bill.

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Two dissenting justices opined, "the legislature and the public understood the common themes and purposes embodied in the legislation; it was tort reform." They would have found the single-subject rule not violated and upheld the law.

Sentences Imposed for Smuggling Hazardous Children's Products from China

A federal court has sentenced two Florida residents and three companies on charges that they smuggled into the United States from China children's products with banned hazardous substances, such as lead and small parts, and counterfeit goods. Hung Lam pleaded guilty to one count of conspiracy to violate smuggling and counterfeit laws and was sentenced to 22 months in prison, a $10,000 fine, three years of supervised release, and a $200 special assessment. Co-defendant Isabella Kit Yeung pleaded guilty to one misdemeanor count of submitting a false country-of-origin label. She was sentenced to one year of probation, a $1,000 fine

and $25 special assessment. The court also entered a forfeiture judgment and order of $862,500 against all of the defendants. *See Southern District of Florida U.S. Attorney Press Release*, May 31, 2013.

Falsely Diagnosed Silicosis Claimants Bring Malpractice Claims Against Law Firm

More than 150 plaintiffs have reportedly claimed in a legal malpractice suit filed in a Harrison County, Mississippi, state court that a law firm had them falsely diagnosed with silicosis "to extort global settlements" of millions of dollars from companies that manufacture and distribute silica-containing products and materials. Among other matters, the plaintiffs allege that John M. O'Quinn & Associates, PLLC, knowingly and deceitfully led "Plaintiffs on to believe that they had been diagnosed with a fatal disease all in an effort to create a mass-silicosis docket and generate millions of dollars in fees and expenses and keep themselves, and the experts and screening companies that they retained, gainfully employed for roughly a decade."

They also claim that the firm and individual attorneys "were able to generate approximately $30 million in attorneys' fees and hundreds of thousands of dollars" for the medical screening companies. The plaintiffs allege financial and mental injuries "in that they lived their lives believing they had been diagnosed with the incurable disease of silicosis while Mr. O'Quinn, the Firm and its attorneys and the referring lawyers reaped the profits of any false diagnosis, which was a product of their own making." *See Courthouse News Service*, June 5, 2013.

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ALL THINGS LEGISLATIVE AND REGULATORY

Buckyballs® Co. CEO Seeks to Appeal Defendant Status in Administrative Proceeding

With the support of manufacturing and retail interests, the former chief executive officer (CEO) of the company that made Buckyballs® and Buckycubes®, high-power magnetic desk toys subject to a recall enforcement action by the Consumer Product Safety Commission (CPSC), has filed a motion requesting an immediate appeal of an administrative ruling allowing CPSC to amend its complaint by adding him as a respondent. *In re Maxfield & Oberton Holdings, LLC*, CPSC Docket 12-1. The presiding officer apparently relied on the responsible corporate officer doctrine to allow the amendment, and CEO Craig Zucker characterizes this ruling as presenting "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."

Zucker contends that "whether individual officers or directors may be held liable under Section 15 for the conduct of corporate manufacturers, and hence may be held personally responsible for carrying out recall orders, implicates significant issues of CPSC policy. The Commission itself has never adopted a policy of holding

individuals personally responsible for carrying out recall orders involving the corporation that manufactured or imported the subject products. A decision to permit such liability could have broad (and unpredictable) effects on CPSC enforcement policy and practices, and on the corporate governance procedures and policies of the entities the CPSC regulates."

According to briefing filed by the National Association of Manufacturers, Retail Industry Leaders Association and National Retail Federation, "The decision has far-reaching, negative policy implications to large and small businesses alike which, if allowed to stand, will substantially change and degrade established Commission practice and federal product safety policy." The trade associations further contend, "Individual officers and employees of corporations have not for decades been included as, or considered to be, responsible parties to the various Section 15 obligations."

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In a responsive pleading, CPSC cites a 1976 proceeding in which it named "individual corporate officers as respondents in a case under Section 15 alleging that refrigerators manufactured by a corporation presented a substantial product hazard. The Presiding Officer held the corporation's officers to be individually responsible following extensive analysis under *Park* and *Dotterweich*." Zucker argues that *United States v. Park*, 421 U.S. 658 (1975), and *United States v. Dotterweich*, 320 U.S. 277 (1943), were based on the wording of the applicable statute and that the Consumer Product Safety Act "applies only to persons who act as manufacturers, distributors or retailers." According to Zucker, the statutes at issue in *Park* and *Dotterweich* "made 'any person' violating the law subject to criminal sanctions.'" If Zucker's motion is granted, the CPSC commissioners will consider the matter.

CPSC Will Initiate Rulemaking on Crib Bumper Pads

The Consumer Product Safety Commission (CPSC) has granted a petition from the Juvenile Products Manufacturers Association (JPMA) asking that it begin a rulemaking to address the purported hazards posed by crib bumpers. Although JPMA's petition reportedly requested only that CPSC distinguish between hazardous "soft" pillow-like crib bumper pads and traditional crib bumpers, CPSC called JPMA's framework "too narrow" in scope and indicated that it would assess other types of bumpers in addition to the two types specified by JPMA.

"Because we—and, more importantly, families with babies—desperately need clarity, we directed our staff to commence rulemaking on crib bumpers, but in a broader, more comprehensive—and, I believe, more effective—fashion than the Petitioner requested," said CPSC Chair Inez Tenenbaum. Calling for a two-part approach, Tenenbaum indicated that CPSC staff will (i) explore available regulatory options, including a staff assessment of the effectiveness of any related voluntary consumer product safety standards, as well as an assessment of whether a more

stringent standard would further reduce the risk of injury associated with crib bumpers; and (ii) develop performance requirements and test methods that identify which types of crib bumpers have characteristics that present safety hazards. *See Inez Tenenbaum Statement,* June 3, 2013.

Petition Seeks CPSC Rulemaking on Adult Portable Bed Rails

Consumer advocacy organizations have filed a **petition** with the Consumer Product Safety Commission (CPSC) requesting that it "initiate proceedings under section 8 of the Consumer Product Safety Act (CPSA) to determine that adult portable bed rails pose an unreasonable risk of injury and initiate related rulemaking under section 9 of the CPSA." According to the petitioners, "adult bed rails currently on the market are responsible for numerous injuries and deaths among users, particularly the elderly and frail."

In support of their request, the petitioners cite an October 11, 2012, CPSC memorandum, "Adult Portable Bed Rail-Related Deaths, Injuries, and Potential Injuries: January 2003 to September 2012," that details 155 fatalities, most of which were purportedly related to rail entrapment. The petition calls for a ban on all adult bedrails because "the product presents an unreasonable risk of injury and no feasible consumer product safety standard would adequately protect the public from these products." CPSC will accept comments on the petition until August 5, 2013. *See Federal Register,* June 4, 2013.

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CPSC Settles Product Hazard Claims Against Nap Nanny® Infant Recliner Maker

Without admitting any liability, now-defunct Baby Matters, LLC has entered a consent agreement with the Consumer Product Safety Commission (CPSC) requiring the company to implement a voluntary corrective action plan as to its Nap Nanny® infant recliner products. Among other matters, the company must put $13,000 into an escrow account to publicize a product recall to consumers, maintain a Website including the recall press release for five years and announce the recall through all social media accounts that it maintains, including its Facebook page. Neither the company nor its owner may manufacture, market, distribute, or sell these products or their component parts in the United States or any other country. An administrative law judge accepted the agreement and dismissed CPSC's enforcement action with prejudice. Additional details about the action appear in the December 13, 2012, **issue** of this *Report*.

CPSC to Hold Safety Meeting

The Consumer Product Safety Commission (CPSC) has scheduled a one-day **Safety Academy** for September 18, 2013, in Seattle, Washington. According to CPSC, the meeting aims to bring CPSC staff, stakeholders, manufacturers, consumer advocates, academic researchers, and others together to "disseminate and share information about testing and certification of children's products, the mandatory toy standard,

navigating compliance issues, and the fast track recall program." While those wishing to serve as panelists had a June 10 notification deadline, those wishing to attend must register by September 9. *See Federal Register,* June 5, 2013.

NHTSA Releases Policy on Automated Vehicle Development

The U.S. Department of Transportation's National Highway Traffic Safety Administration (NHTSA) has issued a policy **statement** concerning automated, or self-driving vehicles, including its planned research on related safety issues and recommendations for states related to the testing, licensing and regulation of such vehicles.

"Whether we're talking about automated features in cars today or fully automated vehicles of the future, our top priority is to ensure these vehicles—and their occupants—are safe," said U.S. Transportation Secretary Ray LaHood. Accordingly, the new policy includes (i) an overview of different areas of "vehicle innovation," (ii) a summary of NHTSA's research plan for automated vehicles, and (iii) recommendations to states that have authorized the vehicles' operation. Several states, including California, Florida and Nevada, have reportedly adopted legislation to permit the operation of self-driving vehicles. According to NHTSA, these experimental vehicles are at the highest end of a wide range of automation that begins with safety features already in some vehicles, such as electronic stability control.

"We're encouraged by the new automated vehicle technologies being developed and implemented today, but want to ensure that motor vehicle safety is considered in the development of these advances," said NHTSA Administrator David Strickland. "As additional states consider similar legislation, our recommendations provide lawmakers with the tools they need to encourage the safe development and implementation of automated vehicle technology." *See NHTSA News Release,* May 30, 3013.

Florida Governor Signs Law Imposing Stricter Standards for Expert Testimony

Florida Governor Rick Scott (R) has signed into law a bill (**H.B. 7015**) that replaces the state's "general acceptance" *Frye* standard for the admissibility of expert testimony with the more rigorous federal *Daubert* standard. According to Scott, "These are reasonable standards, yet they weren't practiced in Florida. In fact, Florida was the only state in the South that did not use this common sense method for determining who is an expert. By signing H.B. 7015 into law, we will create a fairer system for Florida families."

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Critics called the reform unnecessary, and Florida Justice Association Executive Director Debra Henley said, "The bill the governor signed this morning will make it difficult and, in many cases, cost-prohibitive to introduce critical expert witness testimony in a case. As a result, trials will be won not on the grounds of who has the

strongest case, but rather who has the largest bank account." According to a news source, Henley also claims that the new law could be challenged on the ground that the state legislature lacks the authority to prescribe rules for the state court system. *See Law360* and *Florida Gov. Rick Scott News Release*, June 5, 2013.

LEGAL LITERATURE REVIEW

Janet Cooper Alexander, "To Skin a Cat: Qui Tam Actions as a State Legislative Response to *Concepcion*," *University of Michigan Journal of Law Reform* (2013)

Stanford Law School Professor Janet Cooper Alexander suggests in this article that "statutory *qui tam* actions to enforce civil penalties for violations of state consumer protection laws" could be an acceptable way to sidestep *AT&T Mobility v. Concepcion* in which the U.S. Supreme Court determined that federal law preempted a state contract law deeming class-action waivers in arbitration agreements unenforceable. Noting that "*Concepcion* makes it possible for corporations to avoid being sued in class actions for any claim arising out of a transaction involving a standard-form contract—that is to say, for almost all consumer and employment claims," she believes that state legislation, which is "more politically feasible" than federal legislation, "offers an unorthodox but possibly fruitful alternative to achieving the deterrent effect of class proceedings" and that *qui tam* actions "may partially fill the deterrence gap that *Concepcion* is widely expected to create."

Joanna Shepherd, "Justice at Risk: An Empirical Analysis of Campaign Contributions and Judicial Decisions," American Constitution Society for Law and Policy, June 11, 2013

Emory University School of Law Associate Professor Joanna Shepherd reports in this study of more than 2,000 business-related state supreme court opinions published from 2010-2012 and more than 175,000 judicial campaign contribution records that "[t]he data confirm a significant relationship between business group contributions to state supreme court justices and the voting of those justices in cases involving business matters. The more campaign contributions from business interests justices receive, the more likely they are to vote for business litigants appearing before them in court." The data also apparently "show that there is a stronger relationship between business contributions and justices' voting among justices affiliated with the Democratic Party than among justices affiliated with the Republican Party. Because Republican justices tend to be more ideologically predisposed to favor business interests, additional business contributions may not have as large of an influence on them as they do on Democratic justices." According to Shepherd, the findings are critical to the current debate over how justices are selected. Noting that "[e]lected judges decide the overwhelming majority of cases in our nation," Shepherd characterizes the role of money in judicial elections as "destructive."

LAW BLOG ROUNDUP

Lessons from James Madison's Failed Effort to Establish Council of Revision

"The judiciary was the superego to the legislature's id." University of Miami School of Law Associate Professor Sergio Campos, discussing a law review article that explores the lessons from James Madison's failed attempt to include in the U.S. Constitution a body composed of judges, the Council of Revision, that would have been given a qualified veto over every bill approved by Congress. According to Campos, "The biggest lesson is that we should not equate democracy with majoritarian rule. Madison's proposed Council of Revision, which would have been able to veto legislation on policy grounds, demonstrates that Madison did not view the judiciary as providing an antidemocratic check. Instead, he viewed the judiciary as performing a crucial democratic function by introducing deliberation and rationality to lawmaking, separated from the passions that drive normal politics."

Courtslaw.jotwell, May 31, 2013.

THE FINAL WORD

Tension Between Private AG Law and Mandatory Arbitration Heats Up in California

American Lawyer senior writer Alison Frankel reports on a recent California appellate court ruling that "just made a high-stakes debate at the state Supreme Court over mandatory arbitration and California's Private Attorney General [AG] Act more interesting than ever." According to Frankel, an intermediate appellate court determined that a mandatory arbitration clause in an employment agreement "does not bar a suit under the California private AG law because private agreements can't waive the state's rights." Currently pending before California's high court, and apparently attracting a flood of amicus briefs, is a case asking whether employers can avoid litigation under the private AG Act by means of mandatory arbitration clauses.

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California employers have evidently been adopting these clauses to bar their employees from litigating representative actions following the U.S. Supreme Court's 2011 ruling in *AT&T Mobility v. Concepcion*, which held that the Federal Arbitration Act preempted a state contract law deeming class-action waivers in arbitration agreements unenforceable. Courts throughout the country have apparently split over whether *Concepcion* precludes private AG actions brought by employees who signed mandatory arbitration agreements. Frankel opines, "The California Supreme Court's ruling could also affect the future of private state AG or qui tam actions on behalf of the state as an alternative way to hold defendants accountable to groups of employees or consumers who would otherwise be permitted only to arbitrate individual claims." *See Thomson Reuters News & Insights*, June 5, 2013.

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Upcoming Conferences and Seminars

ACI, Chicago, Illinois – June 26-27, 2013 – "Consumer Products Regulation & Litigation." Shook, Hardy & Bacon Pharmaceutical & Medical Device Litigation Partner Harley Ratliff will join a panel of speakers discussing "Total Recalls: Counsel Perspective on Processes for Streamlining the Response to Product Issues and Effectively Working with the CPSC." Designed to provide consumer product manufacturers with a "safety net" in balancing regulatory compliance and litigation risks, this conference brings together a distinguished faculty of judges, regulators and in-house and outside counsel "to give consumer products professionals the most up-to-date, expert tested advice possible on navigating this terse terrain."

DRI, Washington, D.C. – July 25-26, 2013 – "2013 DRI Class Actions Conference." Shook, Hardy & Bacon Class Actions & Complex Litigation Partners Tim Congrove and Jim Muehlberger will participate in this event. Congrove, who is also serving as program vice-chair, will moderate a panel of distinguished in-house counsel discussing "Inside and Out: A Wide-Ranging Discussion of Class Actions from the Client's Perspective." Muehlberger "will discuss the current state of issue classes, techniques for addressing them, and his experience in trying a case involving a Rule 23(c)(4) class" during a presentation titled "Making an Issue Out of It: The Trial of a 23(c)(4) Class." SHB is a conference co-sponsor. ■

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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).