Shook, Hardy & Bacon L.L.P.

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PRODUCT LIABILITY LITIGATION REPORT

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SCOTUS AGREES TO REVIEW CASE PRESENTING JURISDICTIONAL QUESTION UNDER CAFA

The U.S. Supreme Court has agreed to hear argument in a case involving whether a named plaintiff in a putative class action may defeat federal jurisdiction under the Class Action Fairness Act (CAFA) by stipulating that damages for the class, including those for absent putative class members, are less than the $5-million threshold. ***The Standard Fire Ins. Co. v. Knowles,*** **No. 11-1450 (U.S., cert. granted, August 31, 2012)**. The issue arises in the context of a breach of contract claim alleging that the defendant insurance company underpaid claims for loss or damage to real property brought under homeowners insurance policies.

The defendant insurance company contends that the named plaintiff cannot impose a binding limitation on the amount potentially recoverable by absent putative class members simply to deprive a defendant of its removal rights under CAFA. According to the defendant, "[t]he Eighth Circuit erred in upholding this tactic. The Constitution, CAFA, and basic principles of class action law do not allow a plaintiff to represent absent putative class members without any court authorization." The defendant framed its issue in light of a case decided last year, in which the Court held that "the mere proposal of a class … could not bind persons who were not parties." *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011).

FIFTH CIRCUIT ADOPTS FLEXIBLE STANDARD FOR FOREIGN SERVICE OF PROCESS IN AUTO ACCIDENT CASE

The Fifth Circuit Court of Appeals has determined that, while the 120-day limit on service of process under the Federal Rules of Civil Procedure does not apply to defendants who are foreign nationals, a district court may limit the time needed to serve such defendants under a flexible due-diligence standard. ***Lozano v. Bosdet,*** **No. 11-60736 (5th Cir., decided Aug. 31, 2012)**. Thus, the court rejected the Second Circuit's approach, which allows plaintiffs to avoid the 120-day limit if they "attempt to serve the defendant in the foreign country" within that time, and the Ninth Circuit's approach, which allows an unlimited time to effect service.

The plaintiff, a Mississippi resident, sued the driver of a rental car, her passengers and the company that rented the car for damages allegedly resulting from a traffic

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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.

For additional information on SHB's Global Product Liability capabilities, please contact

Gary Long
+1-816-474-6550
glong@shb.com

Greg Fowler
+1-816-474-6550
gfowler@shb.com

or

Simon Castley
+44-207-332-4500
scastley@shb.com

accident. The defendants are all apparently foreign nationals and believed to reside in Great Britain, although the passengers own a bed-and-breakfast facility in Mississippi. The suit was filed just within the three-year period of limitations. The car rental company was dismissed from the suit because its contract was with one of the passengers and not with the woman who drove the car; she had not apparently been designated as an authorized driver. Within 120 days of filing the complaint, the plaintiff communicated with the manager of the passengers' business, and service was attempted by restricted mail delivery to an address in Canada, identified as the driver's residence in the police accident report.

Thereafter, the plaintiff was given several extensions of time in which to effect service during which she undertook efforts to serve the defendants in Great Britain under the Hague Convention. The district court dismissed the case without prejudice for failure to effect service, which effectively ended the proceedings given the applicable statute of limitations. The Fifth Circuit concluded that Rule 4(m) plainly indicates that the 120-day limitation does not apply to service in a foreign country. Still, given the need of district courts to control their dockets, the court ruled that dismissal is appropriate where "the plaintiff has not demonstrated reasonable diligence in attempting service," i.e., "[g]ood faith and reasonable dispatch are the proper yardsticks."

Because the lawsuit would be barred under the statute of limitations and because the plaintiff "demonstrated signs of good faith in her escalating efforts to serve," the court found no evidence of intentional delay or actual prejudice. The court also cited evidence showing that the defendants all had notice of the suit despite the repeated failure of service. Accordingly, the court concluded that "a litigation-ending dismissal with prejudice at this time is not in the interest of justice." It reversed the lower court's order of dismissal and remanded "subject to that court's oversight and ultimate determination of whether or when to dismiss the case for failure to accomplish service."

CALIFORNIA HIGH COURT ABANDONS COMMON LAW RELEASE RULE IN MEDMAL SUIT

The California Supreme Court has determined that settlement with one joint tortfeasor does not bar a plaintiff from recovering economic damages from a non-settling defendant; thus, the court abandoned the "common law release rule." *Leung v. Verdugo Hills Hosp.*, No. S192768 (Cal., decided August 23, 2012). The court considered the matter within the context of injuries sustained by a newborn—irreversible brain damage—from unaddressed jaundice in the days following his birth and the alleged negligence of his pediatrician and the hospital where he was born.

The claim against the pediatrician was settled for $1 million, the limit of his malpractice insurance; the parties agreed that he would participate as a defendant at trial, and the plaintiff released him from all claims. The trial court refused to limit the pediatrician's liability to the amount of the settlement, finding it "'grossly disproportionate to the

amount a reasonable person would estimate' the pediatrician's share of liability would be." A jury found both the pediatrician and hospital negligent and awarded the plaintiff $250,000 in noneconomic damages, $78,375 for past medical costs, $82.78 million for future medical costs, and $13.3 million for loss of future earnings. The jury also found the pediatrician 55 percent negligent, the hospital 40 percent negligent and the mother and father each responsible for 2.5 percent of the harm. "The judgment stated that, subject to a setoff of $1 million, representing the amount of settlement with the pediatrician, the hospital was jointly and severally liable for 95 percent of all economic damages awarded."

An intermediate appeals court agreed with the hospital that under the common law release rule, the plaintiff's settlement with and release of the liability claims against the pediatrician also released the hospital from liability for the plaintiff's economic harms. The court apparently did so reluctantly, but was compelled to apply a still viable rule. Finding that the rule's rationale was supported by an unjustified assumption, that is, that the amount paid in settlement in return for releasing one joint tortfeasor provides full compensation to the plaintiff, the high court reversed and specifically held that the rule was no longer to be followed in California.

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The court also determined that, where the settlement is not made in good faith—as determined here by the trial court—the apportionment approach to be taken is the "setoff-with-contribution" approach under which "nonsettling joint tortfeasors remain jointly and severally liable, the amount paid in settlement is credited against any damages awarded against the nonsettling tortfeasors, and the nonsettling tortfeasors are entitled to contribution from the settling tortfeasor for amounts paid in excess of their equitable shares of liability." The court also determined that the evidence was sufficient to prove that the hospital's negligence was a legal cause of the plaintiff's injuries, disagreeing that hospitals cannot be held liable for failing to provide non-negligent medical advice. The case was remanded for the intermediate appellate court to consider issues it had not addressed.

CLAIMS IN CAT LITTER FALSE-ADVERTISING DISPUTE NARROWED

A federal court in California, considering consolidated consumer fraud claims against the company that makes Fresh Step® cat litter, has granted in part Clorox's motion to dismiss and denied its motion to strike the class allegations. *In re Clorox Consumer Litig.*, No. 12-00280 (U.S. Dist. Ct., N.D. Cal., order entered August 24, 2012). The consolidated claims involve seven individual named plaintiffs from five different states, seeking to represent nationwide or statewide classes of cat litter purchasers and alleging violations of California false advertising and unfair competition laws. The case filed by a New York resident is summarized in the February 9, 2012, **issue** of this *Report*.

These complaints followed lawsuits filed by a Clorox competitor which conducted laboratory tests to determine that product preferences and odor claims made in Clorox commercials could not be substantiated. The putative class actions are based, in part, on the test results asserted in the competitor's Lanham Act lawsuits. Additional information about the suit that resulted in a preliminary injunction against Clorox appears in the January 12, 2012, **issue** of this *Report*.

The court dismissed with prejudice claims based on Clorox's advertising assertions that cats "like" or "are smart enough to choose Fresh Step," finding them non-actionable puffery and not, as plaintiffs' claimed, statements that amount to measurable claims about cats' litter preferences. The court also dismissed, without prejudice, the plaintiffs' claim for breach of express warranty to the extent that it is based on product labels or other statements not expressly identified in the complaint. The plaintiffs were given 30 days to amend this claim "so as to specifically identify the exact terms of the warranties upon which the claim is based."

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The court denied Clorox's motion to dismiss the statutory claims on the ground that they are predicated on non-cognizable allegations that the company's marketing campaign conveyed factual statements that lacked substantiation. While the court agreed that private plaintiffs may not make substantiation demands under California law, it found that the gravamen of the allegations is not that the advertising claims are unsubstantiated, but that they are provably false. The court also found that the statutory claims did not fail due to a purported failure to satisfy the heightened pleading requirements for fraud, finding the allegations sufficient to place Clorox on notice of the basis of the claims.

As to the motion to strike the class allegations, the court found the record insufficiently developed to rule on this motion. Clorox had not "explained how differences in the various states' consumer protection laws would materially affect the adjudication of Plaintiffs' claims or otherwise explained why foreign laws should apply." The court also rejected Clorox's argument that the out-of-state plaintiffs lacked standing to sue under California law because the plaintiffs had "sufficiently pled that Clorox's conduct originated in or had strong connections to California."

COURT DISMISSES PUTATIVE CLASS ACTION CHALLENGING ODOR-CONTROL ADS FOR HUNTING CLOTHES

A federal court in Minnesota has dismissed with prejudice the remaining claims in a putative class action that sought to recover damages for allegedly misleading advertisements promoting hunting clothing. *Buetow v. A.L.S. Enters., Inc.*, No. 07-3970 (RHK/JJK) (U.S. Dist. Ct., D. Minn., decided August 17, 2012). Information about the Eighth Circuit's order vacating an injunction barring the manufacturers from

claiming that their products are made with "odor eliminating technology" appears in the August 25, 2011, **issue** of this *Report*.

According to the court, the plaintiffs could not show that their claims would benefit the public, a prerequisite for a private cause of action filed under the Minnesota Private Attorney General statute. Because injunctive relief was no longer possible in the case and the plaintiffs were left with claims for nominal damages, the court concluded that "whatever public benefit may have existed when this case was first filed, no longer exists. While this action once sought injunctive relief altering the nature of Defendants' advertisements, such claims are no more, having been dismissed by the Eighth Circuit. Plaintiffs' attempts at class certification also have failed." The court further indicated that it would likely have dismissed the claims as not actionable given the Eighth Circuit's strong suggestion that the advertisements were "nonactionable puffery."

NEW BALANCE AGREES TO SETTLE CONSUMER FRAUD ACTION OVER HEALTH-BENEFIT CLAIMS FOR SHOES

A company that claimed its athletic shoes strengthened and toned muscles and helped burn calories has entered a **settlement agreement** with plaintiffs who filed their consumer-fraud class action in a Massachusetts federal court. *Carey v. New Balance Athletic Shoe, Inc.,* No. 11-cv-10001-LTS (U.S. Dist. Ct., D. Mass., preliminary approval order filed, August 22, 2012). If the agreement is finally approved, it will resolve similar claims filed by plaintiffs in California and Arkansas. One of the Arkansas cases was summarized in the April 28, 2011, **issue** of this *Report*. Under the agreement, New Balance does not admit any liability, and the settlement fund is capped at $2.3 million. Any funds remaining will be donated to the Diabetes Research & Wellness Foundation, American Cancer Society and American Heart Association. Without the support of a clinical study, the company will not be able to advertise that its toning shoes strengthen muscles.

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NINTH CIRCUIT UPHOLDS ORDER ENJOINING SAN FRANCISCO ORDINANCE ON CELL PHONE WARNINGS

The Ninth Circuit Court of Appeals has upheld in part a lower court's grant of a preliminary injunction against a San Francisco ordinance that would have required companies selling cell phones to make certain disclosures to consumers about radiofrequency energy emissions from the products. *CTIA – The Wireless Ass'n v. City & County of San Francisco*, Nos. 11-17707 and -17773 (9th Cir., decided September 10, 2012) (unpublished). The Ninth Circuit found that the lower court's order modifying the injunction to allow the city to compel distribution of a revised fact sheet was error, because it "could prove to be interpreted by consumers as expressing San

Francisco's opinion that using cell phones is dangerous. The FCC, however, has established limits of radiofrequency energy exposure, within which it has concluded using cell phones is safe." Because the facts sheets were no longer "purely factual and uncontroversial," government cannot compel their distribution. Additional details about the case appear in the November 10, 2011, **issue** of this *Report*.

ALL THINGS LEGISLATIVE AND REGULATORY

FDA Warns Lancôme About Drug-Effect Claims for Cosmetics

The Food and Drug Administration (FDA) has issued a **warning** to the president of Lancôme USA about claims made for some of its cosmetic products, noting that they are being promoted "for uses that cause these products to be drugs under section 201(g)(1)(C) of the Federal Food, Drug, and Cosmetic Act. The claims on your web site indicate that these products are intended to affect the structure or any function of the human body, rendering them drugs under the Act."

Among the claims that FDA targets are (i) for Génifique Youth Activating products, "[B]oosts the activity of genes and stimulates the production of youth proteins"; (ii) for Absolute Precious Cells Advanced Regenerating and Reconstructing Cream SPF 15 Sunscreen, "A powerful combination of unique ingredients – Reconstruction Complex and Pro-Xylane™, a patented scientific innovation – has been shown to improve the condition around the stem cells and stimulate cell regeneration to reconstruct skin to a denser quality"; and (iii) for Rénergie Microlift Eye R.A.R.E.™ Intense Repositioning Eye Lifter, "Immediate lifting, lasting repositioning. Inspired by eye-lifting surgical techniques … helps recreate a younger, lifted look in the delicate eye area" and "[U]nique R.A.R.E. oligopeptide helps to re-bundle collagen."

According to the agency, "[y]our products are not generally recognized among qualified experts as safe and effective for the above referenced uses and, therefore, the products are new drugs as defined in section 201(p) of the Act. … [A] new drug may not be legally marketed in the U.S. without prior approval from FDA in the form of an approved New Drug Application." Unless the company addresses and corrects these issues, FDA warns that it may take enforcement action without further notice, including "injunctions against manufacturers and distributors of illegal products and seizure of such products."

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CPSC Cites Risk to Children in Proposed Ban on Magnet Sets

The Consumer Product Safety Commission (CPSC) has **issued** a notice of proposed rulemaking (NPR) that would prohibit desk toys containing small, high-powered magnets. Noting that emergency rooms have purportedly treated 1,700 cases of magnet ingestion between January 1, 2009, and December 31, 2011, CPSC has

made a preliminary finding that desk toy magnet sets present "an unreasonable risk of injury" to children. "In contrast to ingesting other small parts, when a child ingests a magnet, the magnetic properties of the object can cause serious, life-threatening injuries," states CPSC in its September 4, 2012, *Federal Register* notice. "When children ingest two or more of the magnets, the magnetic forces pull the magnets together, and the magnets pinch or trap the intestinal walls or other digestive tissue between them, resulting in acute and long-term health consequences."

In particular, the NPR covers "aggregations of separable, permanent, magnetic objects intended or marketed by the manufacturer primarily as a manipulative or construction desk toy for general entertainment, such as puzzle working, sculpture building, mental stimulation, or stress relief." It would require the magnets from these sets, if they fit "within the CPSC's small parts cylinder," to have a flux index of 50 or less as "determined by the method described in ASTM F963-11, Standard Consumer Safety Specification for Toy Safety."

As it considers the evidence to date, the Commission has also requested written comments by November 19, 2012, addressing (i) "the risks of injury associated with these magnet sets," (ii) "the regulatory alternatives discussed in this NPR," (iii) "other possible ways to address these risks," and (iv) "the economic impacts of the various regulatory alternatives." Although CPSC reportedly voted unanimously to publish the NPR, Commissioner Nancy Nord has since issued a **statement** expressing concern that the measure may be "overly broad" as written.

"My vote was not without reservations, however, because I am not convinced that the proposal before us—which amounts to a ban on all magnet sets sold today—best reduces or eliminates the hazard while minimizing disruption to manufacturing and commerce as required under our statute," said Nord. "Overinclusive [sic] rules needlessly strangle commerce and innovation, and should be avoided. I hope that the comments in response to this NPR will help resolve these concerns, particularly by proposing less-burdensome alternatives and by providing data that sheds light on how best to address the different hazard patterns before us." *See CPSC Press Release,* August 27, 2012.

CSPC Announces ATV Safety Summit

The Consumer Product Safety Commission (CPSC) has **announced** an All Terrain Vehicle (ATV) Safety Summit to be held October 11-12, 2012, in Bethesda, Maryland. According to CPSC, which in 2006 issued a notice of proposed rulemaking (NPR) on new ATV standards, several requirements in the 2006 NPR differ from those currently governing the safety of three- or four-wheeled recreational vehicles designed for off-road use. With an eye toward resolving these issues, the Commission has asked stakeholders to participate in a summit featuring a series of panels on both rule-making and non-rulemaking topics. In particular, these sessions will cover subjects pertaining to (i) vehicle characteristics, (ii) consumer awareness, (iii) state legislation, (iv) ATV training, (v) public awareness and education, and (vi) technology innovations.

CSPC has requested that individuals interested in serving as panelists register for the summit by September 14, 2012, while all others should register by October 5. The agency will also accept written comments on or before November 14. *See Federal Register,* August 27, 2012.

CPSC Addresses Play Yard Safety

The Consumer Product Safety Commission (CPSC) has **issued** a final rule establishing a safety standard for play yards in response to the Consumer Product Safety Improvement Act of 2008, which requires the Commission to promulgate rules for durable infant or toddler products that are "substantially the same as" or more stringent than applicable voluntary standards. Effective February 23, 2013, the final rule adopts the provisions set forth in ASTM F406-12a, including the following mandatory requirements: (i) "a stability test to prevent the play yard from tipping over"; (ii) "latch and lock mechanisms to keep the play yard from folding on a child when it is being used"; (iii) "entrapment tests for attachments so a child's head does not get trapped while a bassinet or other accessory is attached"; (iii) "floor strength tests to ensure structural integrity and to prevent children from getting trapped by the play yard floor"; (iv) "minimum side height requirements to prevent children from getting out of the play yard on their own"; and (v) "a test to prevent play yards whose top rails fold downward from using a hinge that creates a V- or diamond shape when folded to prevent head or neck entrapments."

Under the final rule, manufacturers must certify that their play yards meet these safety standards "based on testing conducted by a CPSC-accepted third party conformity testing body." Once the Commission releases a final notice of requirements (NOR) pertaining to certification and testing, third-party conformity assessment bodies can apply to the agency for the proper accreditation to test play yards. *See CPSC Press Release,* July 29, 2012; *Federal Register,* August 29, 2012.

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Meanwhile, CPSC has **published** a notice of proposed rulemaking (NPR) that covers one additional requirement not present in ASTM F406-12a and which addresses "the hazards associated with the use of play yard bassinet accessories that can be assembled with missing key structural elements." Referred to as the "bassinet misassembly requirement," the provision proposed in the NPR seeks to prevent infant suffocation deaths by ensuring that key structural elements cannot be removed without resulting in the visible "catastrophic failure" of the bassinet.

In particular, CPSC would offer two ways for manufacturers to comply with the new requirements. "The first way to comply prevents misassembly by requiring that all key structural elements be attached permanently to the bassinet shell," states the agency in its August 29, 2012, *Federal Register* notice. "The second method of compliance is designed to alert consumers if a key structural element is missing by requiring that the removal of even one key structural element results in a catastrophic failure of the bassinet."

During its assessment of the "bassinet misassembly requirement," CPSC has requested feedback that discusses, among other things, whether the "catastrophic failure test" "is necessary, or if manufacturers should be required to attach all key structural elements permanently," as well as alternatives to the proposed measures. The Commission will accept comments on the NPR until November 13, 2012.

Senator Schumer Seeks Safety Caps and Warning Labels on Detergent Gel Pods

U.S. Senator Charles Schumer (D-N.Y.) has proposed, in a **letter** to Consumer Product Safety Commission (CPSC) Chair Inez Tenenbaum that the Commission "increase safety requirements for dishwashing and laundry detergent pods after the skyrocketing number of cases of children consuming these pods." According to Schumer, the products are sold highly concentrated in colorful packets that make them attractive to children. When consumed by children, who purportedly mistake them for candy, the products induce vomiting, drowsiness and respiratory problems requiring hospital treatment in severe cases. Nearly 3,000 children younger than 5 in the United States have reportedly been sickened by swallowing the pods. Schumer suggests that child-resistant packaging and more prominent warning labels be considered to address the issue. *See Senator Charles Schumer Press Release*, September 10, 2012.

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Comments Sought on Petition to Revise Test Procedures for Glazing Materials in Architectural Products

The Consumer Product Safety Commission (CPSC) has **received** a petition asking the agency "to replace the testing procedures for glazing materials in certain architectural products set forth in [its] regulations, with those testing procedures contained in ANSI Z97.1, 'American National Standard for Safety Glazing Materials Used in Building—Safety Performance Specifications and Methods of Test.'"

Counsel for the Safety Glazing Certification Council apparently submitted a June 29, 2012, petition asserting that "consumers and the glazing industry would be better served" by replacing the current impact and environment durability tests for certain architectural products with ANSI Z97.1's "purportedly more efficient and more modern procedures." The petitioner has also claimed that recent revisions to the voluntary American National Standards Institute (ANSI) standard have "resulted in different testing methods and qualifying procedures that has created confusion in the industry regarding which test methodology must be used in what circumstance."

CPSC requests written comments on the request by October 29. The architectural products subject to these testing methods and procedures include storm doors or combination doors, doors, bathtub doors and enclosures, shower doors and enclosures, and sliding glass doors. *See Federal Register*, August 30, 2012.

NHTSA Seeks to Amend Early Warning Reporting Rules

The U.S. Department of Transportation's National Highway Traffic Safety Administration (NHTSA) has proposed amendments "to certain provisions of the early warning reporting (EWR) rule and regulations governing motor vehicle and equipment safety recalls." According to NHTSA's notice of proposed rulemaking (NPR), the EWR rule amendments would require light vehicle manufacturers "to specify the vehicle type and the fuel and/or propulsion system type in their reports" as well as "add new component categories of stability control systems for light vehicles, buses, emergency vehicles, and medium-heavy vehicle manufacturers, and forward collision avoidance, lane departure prevention, and backover prevention for light vehicle manufacturers." These changes would also compel manufacturers "to report their annual list of substantially similar vehicles via the Internet."

Under the revised safety recall regulations, NHTSA would ask certain manufacturers "to submit vehicle identification numbers (VIN) for recalled vehicles and to daily report changes in recall remedy status for those vehicles." The agency would also not only require the online submissions of recall reports but would make alterations to the content of owner notification letters issued to the owners and purchasers of recalled vehicles and equipments. NHSTA has requested comments on the NPR by November 9, 2012. *See Federal Register,* September 10, 2012.

Industry Trade Group Sends Revised Voluntary Standard for Corded Window Coverings to ANSI

The Window Covering Manufacturers Association (WMCA) has reportedly submitted a revised voluntary standard for corded window coverings to the American National Standards Institute (ANSI), which will review the submission before publication. The announcement followed a recent recall issued by the Consumer Product Safety Commission (CPSC) after a corded vertical-blind product was purportedly implicated in the 2009 strangulation death of a 2-year-old child. *See CPSC Press Release,* September 6, 2012.

According to media sources, WMCA has been revising the standard since 2010 despite differences with consumer advocates who have purportedly questioned the transparency of the standard-setting process. "The industry is hopeful that ANSI will approve these latest standards by the end of September, which would compel manufacturers to be in compliance by spring 2013," a spokesperson for several WMCA members was quoted as saying. *See Bloomberg BNA's Product Safety & Liability Reporter,* September 10, 2012.

LEGAL LITERATURE REVIEW

Elizabeth Chamblee Burch, "Disaggregating," *Washington University Law Review* (forthcoming 2012)

University of Georgia School of Law Associate Professor Elizabeth Chamblee Burch suggests an approach to mass-tort litigation that would allow courts to resolve common issues and concerns and then disaggregate the class into "smaller, cohesive groups whose members' claims could be resolved collectively through public, judicial means, such as trials or dispositive motions." According to Chamblee Burch, this would address the hurdles faced by mass-tort claimants whose common questions do not predominate and thus whose disputes can be resolved on an aggregate basis only through private settlement, which raises the potential for attorney overreaching. She claims that "[d]isaggregating helps to protect litigants' substantive rights and furthers the public's faith in a legitimate judicial system. Disaggregating promotes adjudication's principal purpose, which is to produce outcomes that reflect parties' substantive entitlements as defined by applicable state laws, but does so in a way that is procedurally fair and psychologically satisfying."

D. Theodore Rave, "Governing the Anticommons in Aggregate Litigation," *NYU School of Law, Public Law Research Paper No. 12-42* (August 2012)

New York University School of Law Furman Fellow D. Theodore Rave explores how to address the unrecognized "anticommons" problem that occurs in aggregate litigation "when too many owners' consent is needed to use a resource at its most efficient scale." The issue can arise where a defendant offers a larger settlement if 100 percent of the claimants agree to participate. "Because the rights to control those claims are dispersed among the individual plaintiffs, transaction costs and strategic holdouts can make aggregation difficult, particularly in cases where class actions are impractical." What often results is that less than all of the plaintiffs agree to settle, leaving millions on the table. Rave suggests that borrowing governance strategies from other areas that also involve anticommons problems, such as the splintered property rights at stake in eminent domain, admiralty, bankruptcy, oil and gas unitization, intellectual property, and sovereign debt restructuring, could provide a path to "a more comprehensive approach that would allow groups of clients with *different* lawyers to agree to be bound by a collective decision on settlement."

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LAW BLOG ROUNDUP

Call for Data on Business Perceptions of State Lawsuit Climates

"ILR says that 70% of survey respondents consider litigation environment in choosing where to do business, but I'd be curious if economic numbers bear that

out: *ceteris paribus* [other things being equal], do poor showings in the IRL survey predict relatively poor economic growth, as ILR claims in an advertisement?" Manhattan Institute Center for Legal Policy Adjunct Fellow Ted Frank, blogging about the recently released report from the U.S. Chamber Institute for Legal Reform (ILR) ranking the states based on business executives' perceptions of litigation system fairness.

PointofLaw.com, September 11, 2012.

Coupons for Everyone

"Texas has a unique solution to the problem of coupon settlements: if the lawyers settle for coupons or non-cash relief, they have to be paid in coupons or non-cash relief. [Tex. CP. Code Ann. § 26.003(b)]." Ted Frank *redux*, discussing lawsuits in Texas in which courts have applied the law in shareholder derivative strike suit settlements.

PointofLaw.com, September 11, 2012.

Measurable Results of Safety Regulations

"The National Highway Traffic Safety Administration estimates that safety belts saved 280,374 lives from 1975-2010, and airbags saved 30,469 lives from 1987-2010. Thank federal regulation." OMB Watch Regulatory Policy Director Randy Rabinowitz, celebrating the anniversary of highway and motor vehicle safety laws that have reduced annual highway deaths since their enactment in 1966 from five per 100-million vehicle-miles traveled in 1960 to 1.11 in 2010.

OMBWatch, September 10, 2012.

THE FINAL WORD

U.S. Chamber Institute for Legal Reform Releases "Lawsuit Climate" Report

The most recent U.S. Chamber Institute for Legal Reform state liability system **survey** identifies those jurisdictions deemed the worst from the perspective of a corporate litigant, including Illinois, California, Mississippi, Louisiana, and West Virginia. The ranking study's participants included "a national sample of 1,125 in-house general counsel, senior litigators or attorneys, and other senior executives who indicated that they are knowledgeable about litigation matters at companies with at least $100 million in annual revenues." Some 70 percent of respondents apparently indicated that a state's litigation environment "is likely to impact important business decisions," such as where to locate and do business.

UPCOMING CONFERENCES AND SEMINARS

Legal Hold Pro, Portland, Oregon – September 27-28, 2012 – "2012 Conference on Preservation Excellence" (PREX12). Shook, Hardy & Bacon eDiscovery, Data & Document Management Practice Co-Chair Denise Talbert will address data preservation requirements at what has been billed as "the first legal conference focused exclusively on improving [the] legal preservation process." PREX12 will offer participants "real-world techniques for navigating the challenges of preservation and meet the standards of care demanded by the courts—while minimizing the burden in terms of both costs and labor." Talbert will serve on two panels, "Determining the Scope of Preservation and Documentation" and "When Preservation is a Real Challenge."

ACI, New York, New York – October 2-3, 2012 – "National Forum on Pharmaceutical Pricing Litigation." Shook, Hardy & Bacon Pharmaceutical & Medical Device Partner Michael Koon will join a distinguished continuing legal education faculty to present during a panel discussion on "Preparing Defenses to Allegations of False Claims Act Violations."

ACI, Chicago, Illinois – October 3-4, 2012 – "FDA & USDA Compliance Boot Camp: An In-Depth and Comprehensive Course on Regulatory Requirements for the Food and Beverage Industry." Shook, Hardy & Bacon Agribusiness & Food Safety Practice Co-Chair Madeleine McDonough will address "Preemption Fundamentals: Overview of Recent Case Decisions and How to Successfully Assert Federal Preemption."

ACI, Philadelphia, Pennsylvania – October 22-24, 2012 – "Drug Safety, Pharmacovigilance and Risk Management Forum." Shook, Hardy & Bacon Pharmaceutical & Medical Device Litigation Partner Hildy Sastre will serve on a panel with Food and Drug Administration Associate Chief Counsel Carla Cartwright to discuss "Assuaging Agency Concerns About Safety: Developing a REMS Strategy and Successfully Negotiating with the FDA."

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 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).