Shook, Hardy & Bacon L.L.P.

OCTOBER 23, 2014

PRODUCT LIABILITY LITIGATION REPORT

CONTENTS

FIRM NEWS

Shook Recognized as BTI Product Liability Litigation and Class Action Standout

BTI Consulting Group has **listed** Shook, Hardy & Bacon as a standout in two categories, Product Liability Litigation and Class Actions, in *BTI Litigation Outlook 2015*. To compile its report, BTI interviews corporate counsel at *Fortune* 1000 companies and analyzes best practices, market opportunities and client relationships to provide a comprehensive picture of the litigation market. According to BTI, clients are settling more cases than ever before and have embraced early case assessment and settlement strategies as they attempt to trim legal budgets. Law firms successfully securing new work, BTI said, are helping clients "meet their goals."

Shook Authors Discuss U.S. Regulatory and Litigation Landmines in Products Newsletter

Shook, Hardy & Bacon Global Product Liability Partners **Gregory Fowler** and **Marc Shelley** have co-authored an article titled "Food and beverage labelling and advertising in the United States: Regulatory and litigation landmines," appearing in the September 2014 issue of the International Bar Association's *Product Law and Advertising Newsletter*. The article considers the public and private challenges facing U.S. food and beverage companies that promote their products as beneficial to health, "natural" or "all natural," or include in their products genetically modified ingredients, high-fructose corn syrup or "evaporated cane juice." The authors address trends in consumer-fraud lawsuits and settlements, competitor litigation and suits brought by morality and decency watchdogs. The article concludes by recommending the inclusion of a legal team in marketing strategies to enhance the likelihood that companies will successfully navigate these risks while distinguishing themselves in the marketplace.

Behrens, Knapp Dorell Call for Application of Majority Tort Rule in New York

Shook, Hardy & Bacon Public Policy Partner **Mark Behrens** and Staff Attorney **Virginia Knapp Dorell** have **co-authored** an article titled "New York High Court Should Keep 'Stream of Commerce' Tort Rule" for the Washington Legal Foundation's October 10, 2014, *Legal Opinion Letter*. Behrens and Knapp Dorell call for the New York Court of Appeals to apply the "stream-of-commerce" doctrine in deciding *Dummitt v. Crane Co*. Under the doctrine, "a manufacturer can only be held liable for a harm caused by an injurious defective product made or sold by a third party when the manufacturer: (1) controlled the production of the injury-producing product,

SHB offers expert, efficient and innovative representation to clients targeted by class action and complex litigation. We know that the successful resolution of products liability claims requires a comprehensive strategy developed in partnership with our clients.

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

Walt Cofer
+1-816-474-6550
wcofer@shb.com

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

or

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

or

Marc Shelley
+41-22-787-2000
mshelley@shb.com

(2) derived a benefit from the sale of the injury-producing product; or (3) placed the injury-producing product into the stream of commerce." According to the authors, the doctrine's use in asbestos cases in New York has been "uneven, at best," so they argue that New York's highest court has the opportunity to clarify its proper application in *Dummitt*.

CASE NOTES

CAFA Pleading Issue Argued Before SCOTUS

The U.S. Supreme Court has heard argument in a class action alleging that Dart Cherokee Basin Operating Co. failed to pay royalties to owners of interest in oil wells. *Dart Cherokee Basin Operating Co. LLC v. Owens,* No. 13-719 (U.S., argued October 7, 2014). A royalty owner brought the suit in Kansas state court, and Dart filed a notice of removal to a federal district court under the Class Action Fairness Act (CAFA), claiming that the amount in controversy is more than $8.2 million. The court granted the plaintiffs' motion to remand, finding that Dart did not provide enough evidence to support the removal, and the Tenth Circuit Court of Appeals upheld the ruling.

Dart sought U.S. Supreme Court review and argued that other circuit courts have decided that a notice of removal to federal court need only satisfy a notice-pleading standard—that is, a "short and plain statement of the grounds for removal." During argument, the justices apparently appeared to side with Dart—"actually, most of us agree with you on the merits," Justice Elena Kagan reportedly told Dart—but they asked more questions about whether they have jurisdiction over the case. "We can't override [the Tenth Circuit's] judgment not to take it unless there is something unlawful about that judgment," Justice Antonin Scalia reportedly said. *See Law360*, October 7, 2014.

Medical Device Claims Centralized Before Indiana Federal Court

The Judicial Panel on Multidistrict Litigation (J.P.M.L.) has ordered the centralization of 27 actions alleging defects in Cook Medical's inferior vena cava (IVC) filters before the Southern District of Indiana, where the company is headquartered. *In re Cook Med., Inc., IVC Filters Mktg., Sales Practices & Prods. Liab. Litig.*, MDL No. 2570 (J.P.M.L., decided October 15, 2014). According to J.P.M.L., centralization will "serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation. The subject actions share factual issues arising from allegations that defects in the design of Cook's [IVC] filters make them more likely to fracture, migrate, tilt, or perforate the inferior vena cava, causing injury." So ruling, the panel rejected Cook's claims that individual issues predominate, the actions involve different medical device models and allege different injuries, alternatives to centralization exist, and the "creation of a [multidistrict litigation] will encourage the proliferation of meritless claims against Cook."

Alaska Supreme Court Allows Defective Seat-Belt Claim Against Car Dealer to Proceed

Clarifying and reaffirming the state's summary-judgment standard, the Alaska Supreme Court has reversed a lower court's dismissal of alleged malfunctioning seat-belt claims filed against a car dealership. ***Christensen v. Alaska Sales & Serv. Inc.***, No. S-14963 (Alaska, order entered October 10, 2014). The plaintiff purchased a new Buick in 2004, then hit two moose while driving it in 2008. Later, an MRI spectroscopy revealed evidence of an injury that she and her co-plaintiff assert was the result of her hitting her head on something inside the car due to a defective seat belt that did not lock when pulled abruptly. They sued Alaska Sales & Service for her ongoing speech, short-term memory and mobility problems, and the district court granted summary judgment for the dealership, concluding that "no reasonable jury could find that the plaintiffs have proven that the seat belt . . . was defective."

The supreme court disagreed with the lower court's ruling, finding that genuine issues of material fact exist based on the evidence presented despite that the seat belts have since been replaced and the plaintiffs were unable to provide the previous belts as evidence. The court discussed at some length the development of the state's summary-judgment standard and its refusal to embrace a change the U.S. Supreme Court adopted when applying the federal summary-judgment standard in 1986, requiring the federal courts to incorporate "the substantive evidentiary burdens applicable at trial into the summary judgment determination." According to the court, the state standard is "lenient" and "does not allow trial courts, on the limited evidence presented at the summary judgment stage, to make trial-like credibility determinations, conduct trial-like evidence weighing, or decide whether a non-moving party has proved its case."

Thus, the state's summary-judgment rule requires only "a showing that a genuine issue of material fact exists to be litigated, and not a showing that a party will ultimately prevail" during trial. Here, because the plaintiffs presented evidence that "goes well beyond assumption and speculation, is not too incredible to be believed, and relates directly to the material issues in the case" and taking all reasonable inferences from the evidence in their favor, the court reversed the summary-judgment ruling and remanded the case for further proceedings.

ALL THINGS LEGISLATIVE AND REGULATORY

GAO Report Focuses on Timeliness of CPSC's Emerging-Risk Responses

The U.S. Government Accountability Office (GAO) has **issued** a report titled "Consumer Product Safety Commission: Challenges and Options for Responding to New and Emerging Risks." While GAO makes no recommendations about improving the Consumer Product Safety Commission's (CPSC's) ability to address new and emerging product safety risks, it discusses various options that have been suggested for doing so. Among them are (i) premarket approval of consumer products, (ii)

expedited rulemaking authority, (iii) statutory authority to prevent hazardous imports from entering the country, and (iv) increased funding to enhance data analysis capabilities. The report notes the potential benefits and drawbacks of these and other options. GAO suggests that tradeoffs may be required for CPSC to timely address new risks raised by the expansion of international trade, an increasingly global supply chain and technological advances that "have increased the spectrum of consumer products available to U.S. consumers" and "increased the challenges of overseeing and regulating thousands of product types and the potential for new and emerging hazards in the marketplace."

CPSC Seeks Information on Passenger Use of ATVs

The U.S. Consumer Product Safety Commission (CPSC) has **issued** a request for information "on the prevalence of carrying passengers on all-terrain vehicles (ATVs) and the feasibility of a performance requirement that would prevent passengers from being carried on ATVs." Comments are requested by November 24, 2014.

According to the agency, staff has conducted a pilot study on the characteristics of passenger-involved fatality incidents and determined that "passengers ride in various locations on the ATV, e.g., cargo rack and seat, and in front of and behind the operator." The study also showed that "of 502 reported incidents with more than one rider on the ATV, more than 80 percent involved two riders: a driver and a passenger. Of those, about half involved both riders on the seat of the ATV, and the driver was more likely to be fatally injured than the passenger. . . . When two or more passengers were involved, a passenger was more likely to be fatally injured." Among other questions CPSC has posed to commenters is whether ATVs could be modified to prevent passengers. The agency also seeks detailed characteristics of incidents involving passengers, including "the disposition of drivers and passengers, interactions between driver and passenger in incidents, weight of driver and passengers, helmet use of drivers and passengers, age/gender of the driver and passengers, and sequence of events in incidents with passengers." *See Federal Register*, September 23, 2014.

Rule Banning High-Powered Magnet Sets Finalized

The U.S. Consumer Product Safety Commission (CPSC) has **issued** a final rule that will impose restrictions on high-powered magnet sets, essentially prohibiting the types of adult desk sets targeted by the agency in actions against the maker of Buckyballs and Buckycubes, seeking recalls of such products. Additional information about the rule appears in the September 18, 2014, **issue** of this *Report*. As of April 1, 2015, "if a magnet set contains a magnet that fits within the CPSC's small parts cylinder, each magnet in the set must have a flux index of 50 kG_2 mm_2 or less. An individual magnet that is marketed or intended for use as part of a magnet set also must meet these requirements." The rule would apply to "aggregations of separable magnetic objects that are marketed or commonly used as a manipulative or construction item for entertainment, such as puzzle working, sculpture building, mental stimulation, or stress relief." *See Federal Register*, October 3, 2014.

CPSC Grants Petition Seeking Rulemaking on Window-Covering Cords

The U.S. Consumer Product Safety Commission (CPSC) has unanimously granted a petition seeking the development of mandatory safety standards for window-covering cords that pose a strangulation and asphyxiation hazard to children. Submitted in May 2013 by consumer advocacy organizations including the Consumer Federation of America, Public Citizen and U.S. PIRG, the petition cited apparent shortcomings in voluntary standards development activities and ongoing injuries and fatalities purportedly associated with window-covering cord loops. According to a news source, the commissioners have directed staff to develop and advance a notice of proposed rulemaking to address the risk. Staff had **recommended** that the commissioners grant the petition, based on estimates that some 11 fatal strangulations purportedly involving these cords are reported annually among children younger than age 5. The petitioners argued that cordless products and cord coverings that reduce accessibility have been commercially available for several decades. *See Bloomberg BNA Product Safety & Liability Reporter™*, October 9, 2014.

California Governor Signs Bill on Flame-Retardant Chemical Disclosures

California Gov. Jerry Brown (D) has signed a bill (S.B. 1019) that will require upholstered-furniture makers to disclose on product tags whether the furniture contains added flame-retardant chemicals. Details about the measure appear in the September 18, 2014, **issue** of this *Report*. State Sen. Mark Leno (D-San Francisco), who authored the legislation, said, "Today's action by the Governor is a huge victory for California consumers who have long demanded the right to know what chemicals are in the furniture they purchase for their homes and families. While California, under the direction of Governor Brown, ruled last year that upholstered furniture can be manufactured without toxic flame retardant chemicals and still be equally fire safe, there has been no established method for communicating this to customers. SB 1019 provides consumers with this missing information so they can make informed decisions." *See Sen. Mark Leno News Release*, September 30, 2014.

LEGAL LITERATURE REVIEW

Elizabeth Chamblee Burch, "Remanding Multidistrict Litigation," *Louisiana Law Review* (forthcoming 2014)

Noting that barely 3 percent of multidistrict litigation (MDL) cases were remanded to their original district courts in 2013, University of Georgia School of Law Associate Professor Elizabeth Chamblee Burch argues that such failures to remand, in the hope of forcing a global settlement, ignore Congress's intent in limiting the MDL device to pretrial proceedings as well as the federalism concerns stemming from muddying "states' laws through settlement." Chamblee Burch contends, "All-encompassing settlements may water down state-law variations to make it easier to administer claims, which can allow plaintiffs with weak or invalid claims under their states' laws

to receive compensation at others' expense." Believing that jury trials are "meant to bring a community's diverse perspectives and norms to bear on fact finding," the author suggests that the Judicial Panel on Multidistrict Litigation "seriously consider parties' remand requests even when the transferee judge does not support them" and that transferee judges "routinely entertain a suggestion for remand by a party or initiate them *sua sponte* as soon as discovery on common issues concludes and only case-specific issues remain."

The author opines, "In cases founded on state laws, like consumer protection and products liability, transferee judges should be more willing to remand so that transferor judges might decide whether defendants' conduct can be best addressed—and deterred—through state-specific class actions or trial. Otherwise, multidistrict litigation will serve chiefly as settlement's handmaiden and trial's death knell."

Mark Geistfeld, "Risk Distribution and the Law of Torts: Carrying Calabrese Further," *Law and Contemporary Problems* (2014)

New York University School of Law Professor Mark Geistfeld discusses the economic analysis of tort law that has been routinely associated with Guido Calabrese and explains how it has not adequately accounted for Calabrese's risk distribution conception—"the attainment of normatively desirable distributive outcomes"—that he invoked "as being of decisive importance." Geistfeld sets forth a distributive economic analysis "to show how the tort system can be conceptualized as a compensatory mechanism" and notes that "[b]y expanding the feasible set of fully compensatory outcomes that can be attained under existing social conditions, the tort system enables individuals to engage in new risky activities while adequately compensating those who are disadvantaged by the risky behavior." The author concludes that "rigorous specification of a compensatory tort right shows why the distribution of risk can fully satisfy the compensatory demands of the right holder without an entitlement to compensatory damages in all cases of accidental injury."

LAW BLOG ROUNDUP

Depreciating Precedents

"Supreme Court precedents don't have an especially long shelf life: they depreciate by about 80% between years one and twenty." Washington University in St. Louis Law Professor Lee Epstein, blogging about recent research confirming an earlier study showing that the rates at which U.S. Supreme Court rulings are subsequently cited inevitably decrease over time and finding that none of the hypothesized factors as to why depreciation rates vary among cases, such as "ideological distance between the deciding and sitting Court," holds any water. Epstein concludes, "What are we to make of these findings? . . . Precedent (almost always) depreciates, period [and] because of its 'here today, gone tomorrow' quality, law professors and lawyers

might (re)consider carefully the cases they emphasize in class and in the courtroom. If currency is a virtue for at least some judges, maybe it should be for them too."

Jotwell, Courts Law, October 14, 2014.

THE FINAL WORD

Disbarred Lawyer Who Stole Fen-Phen Settlement Funds Sentenced to 20 Years

In the ongoing fallout from resolution of the Fen-Phen diet drug litigation, a 35-year-old Lexington, Kentucky-based disbarred attorney has reportedly been sentenced to 20 years in prison, in part, for his role in siphoning money owed to plaintiffs in litigation against other lawyers, including William Gallion, Shirley Cunningham and Melbourne Mills Jr., who had allegedly defrauded their class action Fen-Phen clients when settling their claims. According to a Department of Justice (DOJ) news release, Seth Johnston, who was responsible for collecting money for the plaintiffs from the attorneys' garnished assets, diverted nearly $15,000 for his own use. He also allegedly defrauded residual heirs of an estate he represented, participated in a drug conspiracy and underreported his taxable income to the Internal Revenue Service. *See DOJ News Release*, September 22, 2014.

UPCOMING CONFERENCES AND SEMINARS

ABA, Chicago, Illinois – November 5-7, 2014 – "The Women of the Section of Litigation: Leading, Litigating, and Connecting." Shook, Hardy & Bacon Global Product Liability Partner Rebecca Schwartz will participate in a panel discussion during this American Bar Association (ABA) continuing legal education conference. In "Spoliation in Complex Litigation: Lessons Learned," Schwartz will discuss recent spoliation rulings and approaches that companies can take to prevent spoliation issues from arising.

OFFICE LOCATIONS
Denver, Colorado
+1-303-285-5300
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
Seattle, Washington
+1-206-344-7600
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.