Shook, Hardy & Bacon L.L.P.

NOVEMBER 7, 2013

PRODUCT LIABILITY LITIGATION REPORT

CONTENTS

FIRM NEWS

Schwartz's Legal Reform Efforts Recognized by U.S. Chamber's ILR

Shook, Hardy & Bacon Public Policy Practice Chair **Victor Schwartz** received the 2013 Individual Achievement Award during the U.S. Chamber of Commerce Institute for Legal Reform's (ILR's) 14th Annual Legal Reform Summit in Washington, D.C. The prestigious honor recognizes individuals and organizations whose work has contributed to reforming America's civil justice system.

"Victor's long-term leadership has made many lasting contributions to the legal reform movement," said ILR President Lisa Rickard.

In particular, ILR recognized Schwartz's influence in shaping legal reform strategy by authoring numerous legislative reform proposals; testifying before state and federal lawmakers; bringing an important perspective to academia through *Prosser, Wade and Schwartz's Torts*, a widely used U.S. torts casebook that he co-authored; and serving as a trusted advisor to ILR. Before entering the full-time practice of law, Schwartz was a professor and dean at the University of Cincinnati College of Law.

In March 2013, *The National Law Journal* named him one of the 100 most influential lawyers in the United States.

Schwartz and Silverman Prepare ILR Report on Litigation Ecosystem

Shook, Hardy & Bacon Public Policy Attorneys **Victor Schwartz** and **Cary Silverman** have prepared an October 2013 **report** for the U.S. Chamber of Commerce Institute of Legal Reform (ILR) focusing on "the areas of litigation abuse of most concern to the business community." Titled *The New Lawsuit Ecosystem: Trends, Targets and Players,* the report examines the six core areas of the lawsuit industry—class actions, mass torts, asbestos, securities and mergers and acquisitions, false claims act, and wage and hours litigation—in addition to identifying new areas of the law "where entrepreneurial plaintiffs' lawyers have been prospecting for new liability."

Featuring insights from a number of legal practitioners, the report includes individual chapters by Schwartz on "'No Injury' Theories of Liability" and Silverman on "Food Class Action Litigation" and "The Growing State Attorneys General Alliance with Plaintiffs' Lawyers." SHB Partners **Mark Behrens** and **Phil Goldberg** also contributed sections on "Asbestos Litigation" and "Innovator Liability," respectively.

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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

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

CASE NOTES

SCOTUS Hears Argument on Removability of *Parens Patriae* Actions Under CAFA

The U.S. Supreme Court (SCOTUS) has heard **argument** on whether "a state's *parens patriae* action is removable as a 'mass action' under the Class Action Fairness Act [CAFA] when the state is the sole plaintiff, the claims arise under state law, and the state attorney general possesses statutory and common-law authority to assert all claims in the complaint." *Miss. v. AU Optronics Corp.*, No. 12-1036 (U.S., argued November 6, 2013). Mississippi's attorney general (AG) filed the request for Supreme Court review, arguing that the Fifth Circuit stands alone among the courts of appeals in ruling that such proceedings are removable from state to federal court.

According to the AG, "Nothing in CAFA supports such an invasion into state sovereign prerogatives." The underlying litigation involves claims that the defendants "had engaged in price fixing of liquid crystal display (LCD) panels." Similar lawsuits against the same defendants have apparently been filed by the AGs of 12 other states. In those suits alleging state law violations only, the federal courts remanded the matters to state court, finding CAFA jurisdiction lacking. Mississippi's AG said, "In each case, *except for this one*, the circuit court upheld the district court's remand, agreeing that CAFA jurisdiction was lacking." A ruling is expected before the Court's term concludes in June 2014.

Chief Justice Raises *Cy Pres* Issues Needing Court's Attention

In a statement accompanying the U.S. Supreme Court's denial of *certiorari* in a case raising questions about *cy pres* provisions in the settlement of claims that Facebook violated federal and state privacy laws, Chief Justice John Roberts agrees that the Court should not review the matter, but explains that "in a suitable case," the "Court may need to clarify the limits on the use of such remedies." *Marek v. Lane*, No. 13-136 (U.S., cert. denied November 4, 2013). Among the broader, more fundamental issues raised by *cy pres* distributions that Roberts would consider addressing are (i) "when, if ever, such relief should be considered"; (ii) "how to assess its fairness as a general matter"; (iii) "whether new entities may be established as part of such relief [and] if not, how existing entities should be selected"; (iv) "what the respective roles of the judge and parties are in shaping a *cy pres* remedy"; and (v) "how closely the goals of any enlisted organization must correspond to the interests of the class."

Posner Calls for Courts and Lawyers to Lose Fear of Science and Technology

Affirming a lower court's dismissal of cruel-and-unusual-punishment claims filed by an Illinois prison inmate against a nurse practitioner and correctional counselor, the Seventh Circuit Court of Appeals has criticized lawyers and judges for their reluctance to engage with scientific and technical issues. ***Jackson v. Pollion*, No. 12-2682 (7th Cir., decided October 28, 2013)**. Writing for the appeals court panel, Judge Richard Posner said that "this plainly meritless lawsuit" was litigated for four years

and that "a stronger judicial hand on the tiller could have saved a good deal of time, effort, and paper."

According to Posner, the plaintiff contended that a three-week interruption in the administration of his blood pressure medication led to symptoms that could have resulted in stroke or death. The district court apparently agreed that "the plaintiff 'suffered from an objectively serious medical condition'" and could have presented evidence at trial permitting "a reasonable inference" that his need for medication was objectively serious. Noting that the lawyers and judges made no reference to any medical literature, Posner said that neither medical evidence in the record nor the medical literature supported the plaintiff's "edifice of alarm" from the transient medication interruption. Posner suggested that the court could have appointed a neutral expert under Federal Rule of Evidence 706 or insisted "that the plaintiff's lawyer obtain an expert's affidavit, or just consult[ed] a reputable medical treatise. The legal profession must get over its fear and loathing of science."

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A concurring judge would have ended the opinion where it affirmed the grant of summary judgment. According to this jurist, "I was one of those who chose law as opposed to medicine," among those described by Posner as deciding "against medical school because of lack of interest in the clinical aspects of medicine or a deeper interest in the less scientific aspects of law."

Fourth Circuit Considers If Groups May Open Record in Product Safety Database Dispute

According to a news source, a Fourth Circuit Court of Appeals panel, hearing argument over whether consumer groups, whose intervention was revoked by a federal district court in litigation involving the posting of an incident report on the Consumer Product Safety Commission's (CPSC) product safety database, expressed concern about the groups usurping CPSC's role in the dispute now that the agency has abandoned its appeal. *Co. Doe v. Public Citizen*, No. 12-2209 (4th Cir., argued October 31, 2013). A federal court in Maryland ruled that the report should not be published because it was materially inaccurate and kept most of the case under seal, including maintaining the product maker's anonymity. Additional information about the case appears in the December 13, 2012, **issue** of this *Report*.

The consumer groups reportedly argued that while CPSC may have decided not to pursue the appeal on the merits, the organizations sought the sealed information under the First Amendment. They are not apparently seeking to overturn the lower court's decision to prohibit the posting of the product safety incident report on the database, but claim instead to be upholding the public's right to know what occurs in federal court. The Fourth Circuit reportedly observed that publication on the database and the unsealing of a complaint filed in court was "a distinction without a difference."

The groups further argued that courts do not allow companies to remain anonymous on the ground that revealing their names would harm professional reputation.

The court asked counsel for the product maker how long the record should remain sealed, and he reportedly responded that the seal should remain in place indefinitely because the Consumer Product Safety Improvement Act envisioned this outcome by governing whether materially inaccurate material can be posted. Further questioning revealed the court's skepticism that a statute could govern "whether a federal district court can seal a public record." The consumer groups' standing has been challenged and could affect the outcome of the appeal. Their intervenor status before the district court was revoked after the appeal was filed, with the lower court noting, "it is the Fourth Circuit's purview to decide whether and … to what extent the consumer groups should be able to prosecute their appeal." *See Law360*, November 5, 2013.

Federal Court Allows Products Claims Against "Nap Nanny" Company Owner

A federal court in Michigan has allowed the parents of a 4-month-old who allegedly died in a "Nap Nanny" portable recliner to amend their wrongful death and product liability complaint to add claims against the product maker's owner. *Thiel v. Baby Matters, LLC*, No. 11-15112 (U.S. Dist. Ct., E.D. Mich., S. Div., order entered October 31, 2013). According to the court, the amended claims were timely because the statute of limitations has not run and adequate time remains to complete discovery. The court also determined that under Michigan law a limited liability company member or manager who is personally involved in the commission of a tort is not shielded from liability and thus the plaintiffs' claims against "Gudel-Kemm individually are not futile." The court noted that the plaintiffs sought to add the owner "due to the insurance issues that have come to light and the fact that Baby Matters has gone out of business."

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Kentucky High Court Dismisses Legal Malpractice Claims Against Fen-Phen Lawyers

The Kentucky Supreme Court, in a 5-2 ruling, has determined that the state's one-year statute of limitations applies to claims that two law firms and another attorney failed to disburse all of the settlement money due to users of the diet drug fen-phen and thus that their claims, filed one year and 15 days after they knew they had been short-changed, were time-barred. ***Abel v. Austin,* No. 2010-SC-000426 (Ky., decided October 24, 2013)**. The court determined that the transfer of settlement funds to a Kentucky attorney for disbursal to Kentucky plaintiffs in this multi-state litigation fell within the statute of limitations applicable to acts or omissions "in rendering, or failing to render, professional services for others."

The dissenting judges would have found Kentucky's general five-year statute of limitations applicable, concluding that the majority failed to ask "exactly what professional services" the attorney rendered. According to the dissenters, his actions consisted solely of handling the disbursement of funds to which the plaintiffs "were already legally entitled. Under these circumstances, [his] actions should not be protected by a statute of limitations that applies to professional services.… The action of disbursing money alone cannot be considered a professional service; otherwise, this Court would be forced to apply the one-year limitation of KRS 413.245 to occupations such as bank tellers."

Class Claims Baby Carrier Maker Hides Need for Added Costs to Accommodate Newborns

A California resident has filed a putative statewide class action against the company that makes the Ergo Baby Carrier®, alleging that the defendant deceives consumers into believing that the product is usable with newborns, when it actually requires the additional purchase of an insert for infants weighing less than 12 pounds. *Lloyd v. The Ergo Baby Carrier, Inc.*, No. BC525894 (Cal. Super. Ct., Los Angeles Cnty., filed October 28, 2013).

According to the plaintiff, "the true cost of her Baby Carrier included the cost of the Infant Insert purchase and that by hiding the necessity of this additional product, the Defendant's actions: are unfair, fraudulent, deceptive, and unlawful under *California Business & Professions Code* § 17200, et seq.; are untrue or misleading advertisements under *California Business & Professions Code* § 17500, et seq.; are unlawful acts as defined by *California Consumers Legal Remedies Act* § 1770(a)(2); (a)(5); and (a)(9)." She seeks injunctive relief, restitution, disgorgement, interest, costs, and attorney's fees.

ALL THINGS LEGISLATIVE AND REGULATORY

Senate Subcommittee Hears Testimony on Limiting Scope of Civil Discovery

The U.S. Senate Committee on the Judiciary's Subcommittee on Bankruptcy and the Courts conducted a November 5, 2013, **hearing** to consider "Changing the Rules: Will limiting the scope of civil discovery diminish accountability and leave Americans without access to justice?" Among those testifying were New York University School of Law Professor Arthur Miller and NAACP Legal Defense and Educational Fund, Inc. President and Director-Counsel Sherrilyn Ifill. They discussed proposed Federal Rules of Civil Procedure changes that would, among other matters, limit discovery by adding a proportionality requirement, that is, a litigant would be able to refuse to provide requested discovery if it determines that the request is not "proportional" to the needs of the case. Miller testified that his opinion has changed since he served as reporter to the civil rules advisory committee and that now he believes "the proposed diminutions on discovery lack justification."

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CPSC Extends Deadline for Comments on the Consumer Product Safety Information Database

The Consumer Product Safety Commission (CPSC) has **requested** comments on a proposed extension of approval of an information collection for the Consumer Product Safety Information Database. The Office of Management and Budget's approval of the information collection is set to expire January 31, 2014, and CPSC seeks to extend that approval. Comments on the estimated reporting burdens of populating the database with reports of harm and preparing manufacturer responses will be accepted until December 2, 2013.

CPSC notes that a comment received in response to an August 15 notice on the proposed extension called for improving the database with links to "any corrective action, fine, recall or safety alert involving a reported product." According to CPSC, these links "would add value to the Database. However, incorporating new features would require resources that are not currently available." CPSC will take the suggestion under advisement "and consider such modifications if and when resources for modifications are available." *See Federal Register,* October 31, 2013.

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Mixed Industry Response to CPSC Proposal Allowing Staff Voting/Leadership on Voluntary Standards Development Committees

With the public comment period now closed on a proposal that would allow Consumer Product Safety Commission (CPSC) staff to increase their level of participation in voluntary standard setting organizations by assuming leadership positions and exercising voting rights, a review of the comments submitted reportedly shows that industry has divided in its opposition to the proposal, while consumer organizations and one standards developer approve it. Some opponents object to the entire proposal; others object to the leadership part, and still others object to the voting part.

The proposal stemmed from a Government Accountability Office report recommending that CPSC review the restrictions imposed on staff participation in voluntary standards development activities. Details about CPSC's proposal appear in the September 19, 2013, **issue** of this *Report*. CPSC's draft operating plan indicates that a final rule is targeted for release in fiscal year 2014.

Commenters were apparently concerned that a staffer's vote could be interpreted as a commission position on an issue, and the plaintiffs' bar might use a negative CPSC vote in product liability cases to support an assertion that a particular voluntary standard was not appropriately protective. They were also concerned that voting rights could compromise the agency's objectivity. The proposed leadership provision elicited concerns about "de facto rulemaking," untethered from the notice-and-comment requirements of the Administrative Procedure Act. One commenter also said that with a CPSC staffer at the helm, a voluntary standards developer

would be transformed into a federal advisory committee subject to the provisions of the Federal Advisory Committee Act. Opponents also apparently pointed to limited agency resources, as well as the recent government shutdown, to say that a furlough could jeopardize a standards committee's progress. *See Bloomberg BNA Product Safety & Liability Reporter*, October 31, 2013.

NHTSA Seeks Public Comment on Air Bag Safety Report

The National Highway Traffic Safety Administration (NHTSA) has **requested** public comments on its technical report, "Evaluation of the Certified-Advanced Air Bags," which examines the changes and redesigns of frontal air bags and their effect on occupant protection in frontal crashes. Specifically, the report addresses frontal crash mortality rates between vehicles certified to a temporary option in Federal Motor Vehicle Safety Standard (FMVSS) No. 208, "Occupant crash protection," which permitted unbelted certification through a sled test (sled-certified air bags), and to the "advanced" air bag requirements in FMVSS No. 208 (certified-advanced air bags). The report follows a 2010 Insurance Institute for Highway Safety paper that apparently showed higher mortality rates for drivers with certified-advanced air bags compared to sled-certified air bags. According to NHTSA, new crash data show no evidence that certified-advanced air bags result in higher fatality risk to front-seat occupants in frontal crashes than sled-certified air bags. Comments will be accepted until February 28, 2014. *See Federal Register,* October 31, 2013.

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National Academies Call for More Research on Helmet Design and Concussions

A National Academies **report**, prepared by the Institute of Medicine and National Research Council, has made a number of recommendations for additional research into sports-related concussions in youth, finding existing research inadequate as to "the extent of concussions in youth; how to diagnose, manage, and prevent concussions; and the short- and long-term consequences of concussions as well as repetitive head impacts that do not result in concussion symptoms."

The committee that prepared the report also considered research on equipment design, finding "limited evidence that current helmet designs reduce the risk of sports-related concussions." Further research in this area is also recommended. The report further addresses the "culture of sports," noting that it negatively influences self-reporting of concussion and adherence to return-to-play guidance. The committee calls for the youth sports community to "adopt the belief that concussions are serious injuries and emphasize care for players with concussions until they are fully recovered" to foster a safer sports environment.

LEGAL LITERATURE REVIEW

Anthony Sebok & W. Bradley Wendel, "Duty in the Litigation Investment Agreement: The Choice between Tort and Contract Norms when the Deal Breaks Down," *Vanderbilt Law Review* (forthcoming 2013)

Cardozo Law School Professor Anthony Sebok and Cornell Law School Professor W. Bradley Wendel address issues relating to the risks of litigation investment, assuming at the outset that third-party litigation finance will become widespread in the United States. Suggesting that careful contract drafting can only minimize the risks, the authors focus on tort and contract "as [potential] resources for legal doctrine to provide guidance to lawyers and judges." They conclude that contract law is "better suited than regulation or tort liability to minimize both parties' risks inherent in litigation investment." The authors, who have provided legal advice to the litigation-investment industry, distinguish between consumer and commercial market sectors and focus on the latter in addressing risks and tools to manage them.

LAW BLOG ROUNDUP

Tort Law as Public Policy or Revenge?

"Hershovitz's core claim is that a tort suit enables a form of victim response that, like an act of revenge, conveys the right message. To obtain damages from a tortfeasor is to re-assert and re-establish one's moral standing in the face of an act that threatens to undermine it. Against corrective justice theorists who maintain that tort law holds wrongdoers to a duty to repair losses that they cause, Hershovitz offers a very different notion of correction. Tort law is about corrective justice, but corrective justice is about *getting even*." Harvard Law Professor John Goldberg, responding to Scott Hershovitz's premise in "Tort as a Substitute for Revenge" that "tort law has an important connection to revenge and that, as such, it is to be credited with delivering a kind of justice." A summary of and link to Hershovitz's article are included in the August 22, 2013, **issue** of this *Report*.

Jotwell: Torts, October 28, 2013.

Legal Scholars Should Stop Focusing on *Twiqbal*

"[C]ivil procedure empiricists are spending too much time on the *Twiqbal* problem. That's not the same as saying that *Twiqbal* is an unimportant set of cases.… I mean to say merely this: the amount of attention paid to *Twiqbal* is exceeding its importance to litigants." Temple University Beasley School of Law Professor David Hoffman, blogging about topics that are more worthy of discussion than the U.S. Supreme Court's decisions adopting a plausibility pleading standard. Among the topics Hoffman suggests legal scholars should

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be addressing are "How well do choice of law clauses work in state court?," "When do attorneys matter?," "What are the determinants of summary judgment grant rates in state courts?," and "Is there a way to get a handle on which cases are being 'diverted' to arbitration or 'carved-[back]-in'?"

Concurring Opinions, November 1, 2013.

THE FINAL WORD

Inventory Reports Increase in Consumer Nanotech Products

The recently re-launched Nanotechnology Consumer Products Inventory at the Woodrow Wilson International Center for Scholars has been updated to include 1,628 nanotech material-containing products that have been introduced to the market since 2005—a 24-percent increase since the inventory was last updated in 2010. The inventory, which tracks consumer products purported to contain nano-materials, was updated to incorporate new products introduced to the market and to address scientific uncertainty by allowing contributions from parties involved in the production, use and analysis of nanomaterials. The update also adds qualitative and quantitative descriptors, such as size, concentration and potential exposure routes for the nanomaterials contained in consumer products. *See Woodrow Wilson International Center for Scholars News Release,* October 28, 2013.

UPCOMING CONFERENCES AND SEMINARS

Shook, Hardy & Bacon eDiscovery, Data & Document Management Attorney Thérèse Miller will present during a Lorman CLE Webinar titled "Drafting Document Retention Policies" on December 5 and December 19, 2013. Among other things, Miller will discuss (i) drafting and implementing a records and information management policy and supporting program, and (ii) current best practices for records management. She will also discuss related issues pertaining to cloud computing, social media and mobile devices. ■

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 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).