Shook, Hardy & Bacon L.L.P.

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PRODUCT LIABILITY LITIGATION REPORT

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FIRM NEWS

Behrens & Knapp Dorell Address Proposed Discovery Rule Changes

SHB Public Policy Partner **Mark Behrens** and Staff Attorney **Virginia Knapp Dorell** have co-authored an **article** for *Corporate LiveWire,* a U.K.-based legal Webpage. Titled "New Rules Under Consideration in U.S. to Lessen Costs and Burdens of Litigation," the article discusses proposed changes to the discovery requirements of the Federal Rules of Civil Procedure, explaining how they would benefit litigants by injecting proportionality into the scope of discovery in federal courts. They urge companies doing business in the United States to file comments supporting the proposed changes and continue monitoring the amendment process.

CASE NOTES

U.S. Supreme Court Declines Review of Air Crash Claims Raising Venue Issues

The U.S. Supreme Court has denied a request that it review an Eleventh Circuit Court of Appeals ruling that affirmed the order of a Florida federal court refusing to vacate its November 2007 dismissal of a wrongful-death and strict-liability suit on inconvenient forum grounds. *Bapte v. West Caribbean Airways*, No. 13-429 (U.S., cert. denied December 9, 2013). The suit arose from a 2005 airline crash in Venezuela during a flight from Panama to Martinique.

After the Florida court dismissed the suit, finding that the French Caribbean island Martinique was a better forum, the plaintiffs—representatives or heirs of passengers who died in the crash—brought actions against separate defendants in Martinique, but challenged the French courts' jurisdiction under the Montreal Convention. France's highest court ultimately agreed, ruling that the French courts had no jurisdiction under the Montreal Convention once the plaintiffs selected South Florida as their preferred forum. They returned to the U.S. courts seeking to vacate the district court's *forum non conveniens* ruling now that Martinique was no longer an available forum, relying on Federal Rule of Civil Procedure 60(b), which provides relief from a judgment or order on grounds of mistake, newly discovered evidence or fraud, or other reasons justifying such relief.

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

According to the Eleventh Circuit, the district court did not abuse its discretion in finding that the French Court of Cassation's ruling did not warrant Rule 60(b) relief because the plaintiffs failed to argue the unavailability of an alternative forum before the lower court granted the defendant's motion to dismiss based on *forum non conveniens*. "Thus, the Baptes' motion to vacate appears to be nothing more than an effort to raise arguments in opposition to the *forum non conveniens* dismissal which they failed to raise initially in their opposition to Defendants' motion to dismiss." The court further noted that the plaintiffs' success in arguing to the Court of Cassation that "a plaintiff's initial choice of forum under the Montreal Convention precludes other available forums from exercising jurisdiction over the same claims does not constitute 'sufficiently extraordinary' circumstances to warrant" relief under rule 60(b).

Ninth Circuit Splits over Jurisdiction Question Involving Commercial Activity

In an 8-3 ruling, the Ninth Circuit Court of Appeals en banc has determined that a lower court erred in dismissing personal-injury claims filed against a foreign-state common carrier that sold tickets in the United States through a subagent. ***Sachs v. Republic of Austria*, No. 11-15458 (9th Cir., decided December 6, 2013)**.

According to the court majority, because the case fit within the commercial-activity exception to the Foreign Sovereign Immunities Act (FSIA) and the claims were "based upon" the defendant's commercial activity in the United States, the U.S. courts have subject-matter jurisdiction over the matter. The litigation involved an injury that a California resident sustained in Austria while boarding a train owned by OBB Personenverkehr AG, which is wholly owned by Austria. To board the train, the plaintiff used a Eurail pass she had purchased online through the Website of a Massachusetts-based company that sold such passes on behalf of the Eurail Group of which OBB was a member.

The majority concluded that the first clause of FSIA's commercial-activity exception "encompasses situations in which a foreign state carries on commerce through the acts of an independent agent in the United States." The dissenting judges disagreed, finding this interpretation too broad and would have affirmed the lower court's dismissal on this basis. The majority found that the Massachusetts' company's (RPE's) authority to sell Eurail passes derived "from the original authority that OBB granted to Eurail Group to market and sell passes for transportation on its rail lines.… If RPE had impermissibly sold the Eurail pass to Sachs, OBB would have had no duty to honor the pass. But it did." The majority also found that because the sale of the Eurail pass in the United States formed the basis of an element of the plaintiff's claims for negligence, strict liability and breach of implied warranty the claims were based on the defendant's commercial activity in the United States.

While three dissenting jurists further opined that the ticket sale would have given rise to the common carrier's duty to the plaintiff under her negligence theory, they disagreed that the sale was a necessary element of the other claims. Chief Judge Alex Kozinski, writing his own dissent, said that the claim arose from events that

transpired entirely in Austria and thus the suit was not "based upon" commercial activity carried on in the United States.

Compliance with Federal Safety Standard Does Not Preclude Defective Dress Claims

A federal court in Minnesota, relying on state product-liability law, has determined that the mother of a 4-year-old girl, seriously burned when her dress caught fire from an unattended votive candle, may bring strict-liability claims against the company that designed and sold the dress even though the fabric complied with federal flammability standards. *J.D.O. v. The Gymboree Corp.*, No. 12-71 (U.S. Dist. Ct. D. Minn., order entered November 27, 2013).

In this regard, the court quoted the state's high court, which determined in another case, "the CS 191-53 test was not a valid indicator of the flammable characteristics of fabrics and did not take into account the uses to which the fabric would be put in determining its safety … It was shown that newspaper passed the CS 191-53 test with a 48-percent margin of safety … Furthermore, there was evidence that the test was adopted as a result of industry influence and, therefore, served to protect the textile industry rather than the public." According to the court, the fabric used, as well as the open and flowing design of the garment, the lightweight quality of the cotton, and potentially safer alternative designs, could lead a reasonable jury to conclude that the dress was unreasonably dangerous. Thus, the court refused to grant the defendant summary judgment on this issue.

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The court also found that genuine issues of material fact exist regarding whether (i) the dress was unreasonably dangerous for its intended use, (ii) the alleged defect was the proximate cause of the child's injuries, (iii) the defendant had reason to know of the dress's rapid ignition and flame spread characteristics, and (iv) the warning "Not Intended for Sleepwear" adequately advised buyers and users that the garment could be flammable. The court granted the defendant's motion for summary judgment as to failure to test as an independent cause of action and as to breach of implied warranty of merchantability, finding that the plaintiff's strict-liability claims subsume the latter.

Final Judgment Clears Bumbo in Injury from Baby-Seat Spill

A federal court in Texas recently granted summary judgment to Bumbo International on a failure-to-warn claim filed by the parents of an 8-month-old girl who allegedly injured her skull when she fell out of the company's baby seat to the floor from the kitchen table where it had been placed by her mother; a jury then returned a verdict in favor of the defendants on all remaining claims. ***Blythe v. Bumbo Int'l Trust F/K/A Jonibach Mgmt. Trust,* No. 12-36 (U.S. Dist. Ct., S.D. Tex., Victoria Div., order entered on motion for summary judgment November 26, 2013)**.

Noting that the plaintiffs owned a Bumbo seat that was sold after the product was recalled and included a new warning on the seat itself that said "Prevent Falls: Never use on any elevated surface," the court rejected their effort to create an issue of fact by introducing an "expert report" purporting to observe that consumers could fail to heed this new warning. In this regard, the court stated, "Just as courts do not allow experts to invade the province of the jury, courts refuse to permit experts to invade the role of the judge in making legal determinations.… The Blythes' argument that their expert's opinion precludes the Court from making a legal determination on a set of undisputed facts is akin to arguing that an expert's opinion that a contract contains an ambiguity overrides a judge's duty to interpret a contract, or that an expert's opinion that an employer engaged in discrimination supersedes the legal framework for deciding when circumstantial evidence is sufficient to get to a jury in an employment case."

The adequacy of the warning was, in the court's view, an issue that did not require specialized knowledge. The court also stated that the marketing-defect claim would fail as well for lack of causation because "the Blythes did not read any warnings—the ones on the box, in the instruction leaflets, or on the seat." The court allowed the design-defect and neligence claims to proceed to a jury, and, according to the court, "[i]llustrating a point sometimes lost on defense lawyers who too often view summary judgment as the 'be-all and end-all' of a case, the jury viewed the evidence in favor of the Defendants and rejected Plaintiffs' design defect and negligence claims."

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Plaintiffs' Attorneys Seek Reargument in Pa. *Restatement* Dispute Arising from House Fire

In a case pending before the Pennsylvania Supreme Court, *amicus curiae* Pennsylvania Association for Justice (PAJ) has requested that the court allow additional argument "regarding whether this Court should replace the strict liability analysis of Section 402A of the Second Restatement with the analysis of the Third Restarement." *Tincher v. Omega Flex, Inc.*, No. 17 MAP 2013 (Pa., application filed November 25, 2013). Additional details about the case, involving a house fire allegedly caused by a defective gas pipe, appear in the April 11, 2013, **Issue** of this *Report*.

According to *amicus* PAJ's application, the plaintiffs' counsel organization decided not to seek a separate right to argue before the court, relying on conversations with the home owners' counsel that "he would assert the continuing validity of *Azzarello* [*v. Black Brothers* 480 Pa. 547, 391 A.2d 1020 (1978)], as well as the continued application of Section 402A of the Restatement Second of Torts." PAJ suggests that this position was actually adverse to the interests of some of counsel's clients and positions taken in other cases, but that it was nonetheless reassured that the argument would proceed as briefed. The organization subsequently learned that "[t]he position urged at argument by counsel for the [home owners] represents a dramatic

shift in the position of any plaintiff suing for damages in a products liability case and is certainly inconsistent with the position taken by *Amicus Curiae* PAJ."

Noting that the interest of injured consumers in product liability cases "deserves vigorous representation before this Court," PAJ requests the opportunity to schedule additional argument. According to PAJ, "The impact of a court decision reversing *Azzarello* or abandoning the Restatement (Second) Section 402A is so significant that it should not be determined based upon a subrogation case essentially 'owned' by [an] insurance company and argued by one who is not committed to consumer protection policies."

ALL THINGS LEGISLATIVE AND REGULATORY

CPSC Issues Final Rule for Hand-Held Infant Carriers

The U.S. Consumer Product Safety Commission (CPSC) has **issued** a final rule, effective June 6, 2014, to "improve the safety" of hand-held infant carriers. The regulation incorporates ASTM F2050-13a, "Standard Consumer Safety Specification for Hand-Held Infant Carriers," with one modification which clarifies that semi-rigid, hand-held bassinet/cradles, such as Moses Baskets, are within the standard's scope. The rule was revised on July 1 to include modified warning labels to "better address suffocation and restraint-related hazards" and September 1 to specify new carry handle auto-locking performance requirements. *See Federal Register,* December 6, 2013.

Final Revisions to Safety Standards for Infant and Toddler Products Issued

The U.S. Consumer Product Safety Commission (CPSC) has **issued** a direct final rule to revise safety standards for infant bath seats, toddler beds and full-size baby cribs to incorporate by reference relevant updated ASTM safety standards. The rule takes effect March 24, 2014, unless CPSC receives significant adverse comment by January 8, in which case it will withdraw the final rule before its effective date. The updated references have been made to 16 C.F.R. parts 1215, 1217 and 1219. *See Federal Register* December 9, 2013.

CPSC Seeks Comments on Time and Cost Burdens for Complying with Infant Bath-Seat Safety Standards

The Consumer Product Safety Commission (CPSC) has **requested** comments on a proposed extension of approval of an information collection for the safety standard for infant bath seats, including modifications to warning labels affixed to the seats. Noting that it did not receive any comments to its August 30, 2013, notice seeking an extension of approval of a collection of information for infant bath-seat safety standards, CPSC has submitted a request for extension of approval of that same information collection to the Office of Management and Budget. Incorporated by reference is ASTM F1967-11a. Comments on the estimated cost and time burdens of preparing the product safety labels and instructions for use will be accepted until January 6, 2014. *See Federal Register,* December 6, 2013.

CPSC Estimates Time and Cost Burdens for Mattress Flammability Standard Information Collection

The U.S. Consumer Product Safety Commission (CPSC) has **requested** comments on a proposed extension of approval of an information collection from manufacturers and importers of mattresses and mattress pads regarding flammability standards. Noting that the Standard for the Flammability of Mattresses and Mattress Pads, 16 C.F.R. part 1632, and the Standard for the Flammability (Open Flame) of Mattress Sets, 16 C.F.R. part 1633, both relate to reducing fire hazards associated with mattresses and mattress pads, CPSC has requested an extension of approval for the collection of information for both standards under a single control number, 3041–0014. Comments on the costs and time burden estimates involved in the information collection will be accepted until February 4, 2014. *See Federal Register,* December 6, 2013.

NHTSA Requests Comments on Small Business Impacts of Motor Vehicle Safety

The U.S. National Highway Traffic Safety Administration (NHTSA) **seeks** comments on its review of motor vehicle safety rules that could have a significant economic impact on a substantial number of small business entities. The group of rules at issue in the current review involve 49 C.F.R. parts 529 through 578, except parts 571 and 575. NHTSA will evaluate whether a specific rule should be revised or revoked to lessen its impact on small entities. Comments are requested by February 18, 2014. *See Federal Register*, December 17, 2013.

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Rules Committees Schedule Sessions in Arizona

The U.S. Judicial Conference Committee on Rules of Practice and Procedure has **scheduled** a meeting in Phoenix, Arizona, for January 9-10, 2014. While the meeting will be open to public observation, the public is not invited to participate. On January 9, the U.S. Judicial Conference Advisory Committee on Rules of Civil Procedure will **hold** a public hearing in Phoenix, Arizona, on the proposed amendments to Civil Rules 1, 4, 6, 16, 26, 30, 31, 33, 34, 36, 37, 55, 84, and the Appendix of Forms. Among the proposed amendments are changes to the discovery rules currently dividing the defense and plaintiffs' bars. *See Federal Register*, December 16, 2013.

LEGAL LITERATURE REVIEW

Allison Orr Larsen, "Factual Precedents," *University of Pennsylvania Law Review*, 2013

College of William and Mary School of Law Associate Professor Allison Orr Larsen questions the wisdom of lower courts relying on U.S. Supreme Court factfinding and citing its opinions as authority on factual subjects. Arguing that "Supreme Court statements of fact should not receive any authoritative force separate from

the force that attaches to whatever legal conclusions they contributed to originally," Orr Larsen describes how legal research has changed with the availability of "key word," "'Google-search' mode" searching that ignores context, reasoning, theory, and policy. She also observes that U.S. Supreme Court opinions are longer, include an increasing number of citations to "nonlegal" sources and rely on empirical support, thus leading to imported, strategic, aftermath, and historical factual precedents, as well as "premise facts."

To illustrate what she means by imported factual precedents, Orr Larsen refers to "data on brain development originally cited in a Supreme Court case discussing juvenile offenders and subsequently used to justify striking down an overbroad speech restriction by a university"; "statistics on mild cases of carpal tunnel syndrome originally collected by Justice O'Connor in an Americans with Disabilities Act case and subsequently used to justify a ruling for the defense under a different statute"; and "information about GPS tracking technology from Justice Alito's concurrence in *United States v. Jones*, which was later used by a trial court to suppress evidence gained from a different technology that enables police to see the basic geographic location where cell phone calls are made."

She calls for courts to refrain from using U.S. Supreme Court cases as factual precedents and instead relying on the evidence from the case record, because "[f]acts change over time," and, "unlike legal precedents, one cannot be certain that factual statements from the Supreme Court are carefully deliberated and carry the force of law."

LAW BLOG ROUNDUP

Judge-Written Opinions Preferable to Clerk-Drafted?

"Posner not only describes pitfalls in the decision process for appeals, but also explains some of what he does (and thinks other judges should do) to avoid or minimize them. One theme running through these counsels is the importance of candor. Within his office (no archaically termed 'chambers' for him), Posner insists that clerks call him by first name because he wants them to be entirely candid and direct, 'brutally so if they want.' Appellate judges should write their own opinions, Posner contends, as clerk-drafted products tend toward obfuscatory formalism. And these opinions should identify and discuss all the considerations (not just the formal legal considerations) that the judge is conscious of influencing the judge's decision." Richmond School of Law Associate Professor Kevin Walsh, reviewing *Reflections on Judging*, the most recent book published by Seventh Circuit Court of Appeals Judge Richard Posner.

Jotwell: Courts Law, December 10, 2013.

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THE FINAL WORD

Florida Attorneys Sue Bar over Lawyer Advertising Rule Amendments Affecting Social Media

Claiming that lawyer-advertising rule amendments subjecting Websites and social media to all of the rules' restrictions "would have subjected Abraham Lincoln to discipline for stating, in an 1852 newspaper advertisement, that his firm handled business with 'promptness and fidelity'—two words that are no more 'objectively verifiable' than those the Bar concludes violate its ethics rules here," Florida attorneys have sued the state bar under the First Amendment, seeking to enjoin the rules' enforcement. *Searcy v. The Fla. Bar*, No. 13-664 (U.S. Dist. Ct., N.D. Fla., filed December 11, 2013).

The plaintiffs' law firm bringing the action contends that the Florida Bar has cited it for expressing opinions on issues of public concern on its Website and blog, including stating that "the days 'when we could trust big corporations … are over,' that '[g]overnment regulation of consumer safety has been lackadaisical at best,' and that 'when it comes to "tort reform" there is a single winner: the insurance industry.'" The Florida Bar also allegedly "found garden-variety statements about the firm's services and past cases to be 'inherently misleading' because the statements do not include all 'pertinent' facts of each case, while at the same time refusing the firm's requests to clarify what facts the Bar considers pertinent." The firm further contends that the Florida Bar "concluded that the firm's pages on the social-media site LinkedIn.com violate several of the rules' provisions because—among other things—LinkedIn automatically lists the firm's 'specialties' and includes an unsolicited review posted by a former client."

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Alleging violation of the First Amendment free-speech protections and that requiring all statements to be "objectively verifiable" is void for vagueness, the plaintiffs seek declaratory and injunctive relief, costs and attorney's fees. ■

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).