Shook, Hardy & Bacon L.L.P.

JUNE 14, 2012

PRODUCT LIABILITY LITIGATION REPORT

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LAW FIRM NEWS

Law College Establishes Chair in Tort Law to Honor SHB Partner Victor Schwartz

The University of Cincinnati College of Law has **established** the Victor E. Schwartz Chair in Tort Law to honor Shook, Hardy & Bacon Partner **Victor Schwartz**, who served as a professor and the dean of the law school until becoming chair of SHB's Public Policy Practice in 2001.

"Victor was a powerful presence at the College, revered for his passion for teaching, for legal scholarship, and for the well-being of his students," said Dean and Law Professor Louis Bilionis. "It is only fitting that we establish a chair in his name that recognizes faculty excellence in the field of torts." The university hopes to raise $2 million for the endowed faculty position; Schwartz was joined by colleagues and former law students as initial contributors to the endowment.

Among other distinguished accomplishments, Schwartz is co-author of the most widely used torts casebook in the nation, *Prosser, Wade and Schwartz's Torts* (12th ed. 2010). He has authored more than 150 law review articles and the textbook *Comparative Negligence* (5th ed. 2010).

McDonough & Stonecipher Hill Co-Author Chapter in FDLI Top Cases Book

Shook, Hardy & Bacon Pharmaceutical & Medical Device Litigation Chair **Madeleine McDonough** and Associate **Jennifer Stonecipher Hill** have co-authored a **chapter** in the 2012 annual *Top 20 Cases* book published by the Food & Drug Law Institute (FDLI). The book features analysis and discussion of the most important food and drug cases of 2011 and cases to watch in 2012. With Food and Drug Administration Consumer Safety Officer Rikin Mehta, McDonough and Stonecipher Hill discuss the Seventh Circuit's decision in *Walton v. Bayer Corp.* At issue was the propriety of removal to federal court based on the fraudulent joinder doctrine. According to the authors, the decision was significant because it "clarifies how district courts can evaluate claims of fraudulent joinder when allegations against pharmacies and pharmaceutical manufacturers are joined in suit."

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

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Newstead Authors Second Article in Series on Product Recalls

Shook, Hardy & Bacon Global Product Liability Partner **Alison Newstead** has published an article in the June 2012 issue of *The In-House Lawyer* titled "**Product recall: how well have you prepared?**" Among other matters, Newstead recommends that product manufacturers review their recall policies and plans, establish an incident management team, train personnel, ensure that supply chain contracts adequately address recall risks, and assess the adequacy of product traceability systems. She concludes "Once a recall is underway, speed is of the essence. In such a dynamic environment with many players, the potential for chaos is huge, but risks can be minimised with a robust and effective recall plan, and forward planning."

Behrens Publishes on Need for Venue Reform in Pennsylvania Courts

Shook, Hardy & Bacon Public Policy Partner **Mark Behrens** has authored a **white paper** published in May 2012 by the Federalist Society for Law and Public Policy Studies. Titled "Philadelphia Tort Litigation: Forum Shopping and Venue Reform," the white paper explores how the Philadelphia courts became a "magnet" for plaintiffs who evidently believed that the state's venue rules gave them a litigation advantage. Noting how medical malpractice reforms adopted by the state legislature significantly reduced the number of such claims brought in Pennsylvania, Behrens suggests that venue reforms adopted by lawmakers or court rule could go a long way toward "refocusing Pennsylvania litigation on Pennsylvania citizens and helping ensure that claims are heard in the county with the most logical connection to the case."

Behrens authored a related **opinion piece** appearing in the June 3, 2012, edition of *The Philadelphia Inquirer*, to suggest that Pennsylvania adopt additional reforms "to address Philadelphia's reputation as a magnet for lawsuits." According to court statistics, 47 percent of new mass tort actions filed in Philadelphia's Complex Litigation Center in 2011 were from out of state. Characterizing this trend as "unnatural," Behrens recommends the adoption of venue reforms to "refocus litigation on the commonwealth's citizens and relieve them of the burden of serving on juries in cases that belong elsewhere." He reports that reforms adopted for medical malpractice cases have more evenly dispersed such litigation throughout Pennsylvania, thus demonstrating the value of venue reform.

CASE NOTES

Third Circuit De-Certifies Class in Defective Auto Case

The Third Circuit Court of Appeals has determined that the named plaintiffs in a case involving claims pertaining to an allegedly defective automobile sunroof design were not adequate representatives of a putative class alleging both past and future damages and dividing the settlement fund accordingly. ***Dewey v. Volkswagen Aktiengesellschaft*, Nos. 10-3618, -3651, -3652, & -3798 (3d Cir., decided May 31, 2012)**.

The district court had certified a class with subcategories, based on automobile models and model years; the dividing line to establish the reimbursement and residual groups of claimants depended on the history of damage claims pertaining to the specific models and model years. The named plaintiffs were all part of the reimbursement group, which was composed of consumers that had sustained a "leakage" in the past. The residual group was unrepresented by any named plaintiff and had yet to experience damage. Part of the settlement agreement created an $8-million reimbursement fund that would first satisfy all claims made by members of the reimbursement group for reimbursable repairs. Any remaining funds would be used to satisfy "goodwill" claims consisting in part of the reimbursement claims made by members of the residual group. Members of the residual group challenged the certification asserting intra-class conflict.

The Third Circuit agreed that a fundamental intra-class conflict exists because "[a]ny dividing line on the spectrum of claims rates … would produce the same result—those above the line would, in general, have higher claims rates than those below the line. The problem with dividing the class without having any representation from one of the groups becomes clearly untenable in this case because of who drew the line." The lawyers for the representative plaintiffs drew the line and could not "adequately represent the interests of the class members in the residual group."

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The court reversed the certification order and remanded the matter suggesting that the plaintiffs could satisfy Rule 23(a)(4) in either of two ways: by doing away with the distinction between the two groups or dividing the groups into subclasses—with representative plaintiffs—that would be certified separately.

Fifth Circuit Upholds Fraud Verdict and Damages Against Asbestos Plaintiffs' Counsel

A divided Fifth Circuit Court of Appeals panel has affirmed a judgment against two lawyers on claims of fraud and breach of the duty of good faith and fair dealing; their alleged misrepresentations purportedly induced the plaintiff to settle asbestos exposure claims filed by its former employees. ***Ill. Cent. R.R. Co. v. Guy*, Nos. 10-61006 and 11-60122 (5th Cir., decided May 29, 2012)**.

The attorneys contended that the district court lacked subject matter jurisdiction under the *Rooker-Feldman* doctrine and, alternatively, that the court should have abstained from considering the case under *Burford v. Sun Oil Co.* They also argued that they had established their statute-of-limitations and waiver defenses as a matter of law.

The attorneys allegedly provided information about asbestos claimants to Illinois Central Railroad as part of an agreement to settle the claims without trial. The agreement established a process to ensure that the claims had merit, that is, the claimants had worked for the company, had been diagnosed with an asbestos-related disease

and had filed suit within the three-year limitations period. Disagreements arose over the time the company was taking to process unsettled claims and concerns that the attorneys were not meeting their good-faith obligation to ensure that information collected from their clients was accurate. Illinois Central prevailed in its fraud and bad faith claims against the attorneys and was awarded $210,000 in compensatory damages and $210,000 in punitive damages.

While the underlying asbestos litigation had occurred in state court and the Mississippi Supreme Court was called on to decide whether the trial court should have relieved Illinois Central from its obligations under the settlement agreements, the court held that the *Rooker-Feldman* doctrine, which bars federal courts from exercising appellate jurisdiction over final state-court judgments, did not apply. According to the court, "adjudicating Illinois Central's [fraud] claims did not require the district court to review any final judgment rendered by a state court."

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As for *Burford* abstention, which protects "complex state administrative processes from undue federal interference," the court determined that limits on that doctrine applied here because it was an action for damages. The U.S. Supreme Court has ruled that abstention does not allow district courts to dismiss or remand actions that seek damages only. The court also found that just two out of five *Burford* factors would possibly apply to the case to favor abstention.

The court further determined that Illinois Central had introduced sufficient evidence of affirmative acts of concealment to toll the applicable statute of limitations. Finally, the court rejected the attorneys' contention that Illinois Central waived its fraud claims by failing to rescind the settlement agreements that were purportedly based on inaccurate or incomplete information. While the company did not repudiate the settlement agreements, "there is no evidence it did anything to ratify them after February 13, 2004." The company sought relief in a separate action, "but that does not show that Illinois Central was somehow able to speculate on the value of the releases" of the claims.

A dissenting judge would have reversed, finding that the company failed to exercise due diligence in investigating the fraud, despite obtaining evidence of the attorneys' potentially fraudulent conduct.

Ninth Circuit Splits over Interplay of Standing and *Forum Non Conveniens*

In response to a petition for rehearing *en banc* before the Ninth Circuit Court of Appeals in a dispute over the adequacy of Peru as an alternative forum in a case involving claims by indigenous people that a U.S. oil company discharged pollutants into the waterways they used for drinking, fishing and bathing, dissenting and concurring opinions reveal a split on whether the court had jurisdiction to decide the *forum non conveniens* question if one of the plaintiffs, the only domestic plaintiff, lacked standing. ***Carijano v. Occidental Petroleum Corp.*, No. 08-56187 (9th Cir., decided May 31, 2012)**.

In June 2011, a Ninth Circuit panel determined that while the district court "correctly assumed" that the domestic plaintiff, a non-profit that works with indigenous people and helped make a documentary about the alleged pollution, had standing, the court failed to properly consider all relevant inconvenient forum factors in dismissing the suit and thus remanded the case for further proceedings. The panel and *en banc* Ninth Circuit majority refused to reconsider the matter.

Ninth Circuit Chief Judge Alex Kozinski, joined by four other jurists, forcefully argued that Article III standing is a threshold matter central to subject matter jurisdiction and faulted the panel for resurrecting "hypothetical jurisdiction" to reach the *forum non conveniens* issue. According to the dissenters, by "assuming jurisdiction, the panel gives itself license to write a precedential opinion on a difficult *forum non conveniens* question, based on the hypothesis that Amazon Watch has standing and its interests can be weighed in the *forum non* analysis. Federal courts have no authority to opine on other issues when their jurisdiction has been seriously called into question; their obligation is to remain silent on those other issues until the jurisdictional issue has been put to rest. That the district court may eventually dismiss Amazon Watch for lack of standing will not undo the precedent written by the panel based on its incorrect assumption that Amazon Watch has standing."

Three concurring judges started their opinion with "Whoa!!! The Chief has put the proverbial cart before the horse." They contend that the Ninth Circuit panel simply concluded that the "district court abused its discretion when it dismissed this action under the *forum non conveniens* doctrine. This was, by definition, 'a non-merits ground for dismissal.' Occidental is free, on remand, to renew its motion to dismiss on the ground that Amazon Watch may not have standing to asserts its claim under California's Unfair Competition Law, and, should the district court dismiss Amazon Watch, Occidental may once again seek to dismiss the case on *forum non conveniens* grounds." According to the concurring opinion, standing cannot be resolved on the bare pleadings, "which is all we have before us given the procedural posture of this appeal." The concurrence also notes that under U.S. Supreme Court precedent a "'district court has discretion to respond at once to a defendant's *forum non conveniens* pleas, and need not take up first any other threshold question,' including jurisdiction."

According to the concurring opinion, standing cannot be resolved on the bare pleadings, "which is all we have before us given the procedural posture of this appeal."

Federal Court Dismisses Auto Defect Class Action on Timeliness Ground

A federal court in Florida has dismissed claims in a putative class action seeking to recover damages for a purportedly defective paint job on a 2003 Honda Accord. *Matthews v. Am. Honda Motor Co., Inc.*, No. 12-cv-60630 (U.S. Dist. Ct., S.D. Fla., decided June 6, 2012). The court agreed with the defendant that under Florida law the plaintiff could not prevail on her unjust enrichment claim because, as an equitable remedy, it is available only when a plaintiff lacks an adequate remedy at law. Because the plaintiff also sought damages under the Florida Unfair and Deceptive Trade Practices Act, the court found that she had an adequate remedy at law. The

court also determined that her claims, filed in 2012, were untimely under the Act because her claim accrued when she purchased the car in 2003 and not when she discovered the defect in 2010. The court dismissed the complaint without prejudice, giving the plaintiff the opportunity to attempt to cure its deficiencies, despite skepticism that her "timeliness theory can be squared with Florida law."

Recipients Argue That FDA Warning Letters Are Final Agency Action

In a recently released petition seeking U.S. Supreme Court review, a trade association and companies warned that their products violated the Food, Drug, and Cosmetic Act by marketing ear candles without obtaining Food and Drug Administration (FDA) approval argue that such warning letters constitute final agency action that can be challenged in court. *Holistic Candlers & Consumers Ass'n v. FDA*, No. 11-5118 (U.S., petition for certiorari filed April 2, 2012). The petitioners seek review of a D.C. Circuit Court of Appeals decision affirming a district court's dismissal of their challenge to FDA's action on the ground that "the warning letters did not constitute 'final agency action' subject to judicial review under the Administrative Procedure Act."

According to the petition, "The Warning Letters sent to Petitioners state the FDA's position immediately and offer no opportunity to discuss it, only the opportunity to discuss how the Petitioners might conform to that position." At a later meeting, they contend, FDA officials made clear that its position on whether ear candles are medical devices "was not subject to change nor open to discussion." The petitioners claim that, if allowed to stand, the agency action will permit federal agencies "to inform citizens that they are acting in violation of the law and subject to enforcement should the agency initiate action while ignoring citizens' requests to challenge the factual findings of that agency and be protected from postponed judicial review."

ALL THINGS LEGISLATIVE AND REGULATORY

Chemistry Council Calls for Scientific Peer Review of Styrene and Formaldehyde

The American Chemistry Council is seeking to delay the National Toxicology Program's upcoming 13th Report on Carcinogens (RoC) until a scientific peer review completes a safety assessment of styrene and formaldehyde. In a May 24, 2012, **letter**, the council's president and chief executive officer, Cal Dooley, urged U.S. Department of Health and Human Services Secretary Kathleen Sebelius to expedite a contract with the National Academy of Sciences (NAS) for the peer review.

Issued last June, the 12th RoC reportedly concluded that styrene is "reasonably anticipated to be a human carcinogen" and that formaldehyde was a known carcinogen. Congress passed a law in December requiring NAS peer review of those findings, but no contract has yet to be executed, Dooley claims, noting that such a review would "necessitate examination of the underlying scientific evaluation policies and practices" used in the RoC.

"The finding and recommendations of this NAS review will be informative not only for styrene and formaldehyde, but importantly, for future RoC listing substances," Dooley wrote. "Flawed assessments create public confusion, unwarranted alarm, unnecessary product de-selection and litigation, all of which can put jobs at risk without sound scientific basis. Moreover, these shortcomings may have significant unwarranted economic impacts, because risk management decisions throughout the federal government, as well as state governments, routinely draw upon determinations reached in the RoC." *See Bloomberg BNA Product Safety & Liability Reporter*, June 8, 2012.

House Subcommittee Votes to Maintain Last Year's CPSC Funding

The House of Representative's Financial Services and General Government Subcommittee has approved a fiscal year (FY) 2013 financial services **appropriations bill**, which includes maintaining the Consumer Product Safety Commission's (CPSC's) $114.5-million FY 2012 budget. Slated to go before the full committee, the bill includes changes to the Virginia Graeme Baker Pool and Spa Safety Act and specifies that $500,000 of CPSC's budget help implement the Act's grant program.

The bill would also require a benefit and cost analysis of the Consumer Product Safety Improvement Act and mandate that CPSC report on (i) "increasing public participation in the rulemaking process and reducing uncertainty"; (ii) "improving coordination with other Federal agencies to eliminate redundant, inconsistent, and overlapping regulations"; and (iii) "identifying existing regulations that have been reviewed and determined to be outmoded, ineffective, or excessively burdensome."

Report Examines Effectiveness of Bumper Changes to Light Trucks, SUVs

The National Highway Traffic Safety Administration (NHTSA) has **released** a report reviewing and evaluating the effectiveness of its 2003 voluntary measure to reduce fatalities involving occupied passenger cars by changing the bumper heights in pickup trucks and SUVs to match those of cars. The agency requests comments by October 1, 2012, on the **report** titled "Evaluation of the Enhancing Vehicle-to-Vehicle Crash Compatibility Agreement: Effectiveness of the Primary and Secondary Energy-Absorbing Structures on Pickup Trucks and SUVs."

Based on FARS (Fatality Analysis Reporting System) and Polk data from 2002 to 2010, NHTSA statistically compared car-occupant fatality risk in crashes with pickup trucks and SUVs built just before and just after self-certification to the compatibility agreement. NHTSA found that although the bumper changes reduced fatalities, the agreement is "not sufficiently strong to permit an unequivocal conclusion that it has been effective in reducing fatality risk to car occupants."

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"Overall, there was a statistically significant 8-percent reduction in car-occupant fatalities of passenger cars after light trucks self-certified to the agreement," the report states. "However, for pickup trucks and SUVs separately, the effectiveness is inconsistent. Pickup trucks experienced a non-significant increase of 5-percent likelihood of occupant fatalities of passenger cars, while SUVs were associated with a significant 17-percent reduction. Furthermore, a supplementary non-parametric analysis does not show fatality reduction for significantly more than 50 percent of the makes and models." The report could not explain the discrepancy between pickup trucks and SUVs, but suggested one factor could be the difference in body frames. *See Federal Register*, June 1, 2012.

EPA to Review Chemicals Found in Flame Retardants and Fragrances

EPA has **released** a list of 18 chemicals, slated for risk assessments in 2013 and 2014, that are found in various commercial products. The agency requests comments by August 31, 2012, on five chlorinated hydrocarbons, three flame retardants, four fragrance chemicals, and six other chemicals.

According to EPA, the **18 chemicals** were drawn from an initial list of 83 candidates the agency released in March for potential risk assessments. The latest chemicals were selected for review because they are "associated with specific hazards such as potential carcinogenicity or reproductive or developmental toxicity"; present "persistent, bioaccumulative, and toxic potential"; and are "found in biomonitoring or reported in consumer products."

"If an assessment indicates no significant risk, EPA will conclude its current work on that chemical," the agency said. "Over time, additional chemicals will be added to the work plan as more data are developed and more chemicals screened."

EPA plans to use issue draft risk assessments on the chemicals for public review and comment later this year and pursue appropriate risk-reduction actions if needed. "If an assessment indicates no significant risk, EPA will conclude its current work on that chemical," the agency said. "Over time, additional chemicals will be added to the work plan as more data are developed and more chemicals screened."

LEGAL LITERATURE REVIEW

Omri Ben-Shahar & Kyle Logue, "Outsourcing Regulation: How Insurance Reduces Moral Hazard," Chicago Institute for Law and Economics Working Paper (April 2012)

University of Chicago Law School Professor Omri Ben-Shahar and University of Michigan Law School Professor Kyle Logue explore in this paper the benefits of relying on insurance as a substitute for governmental standard-setting and safety-monitoring functions. They contend that "in some areas, the private insurance sector has technological advantages in collecting and administering the information relevant to setting standards, and could outperform the government in creating incentives for optimal behavior." According to the authors, insurance performs risk

reduction and management functions, gives incentives to actors to reduce risks and, by specializing in risk management, i.e., "assembling large actuarial databases and using the both ex ante in underwriting (that is, classifying and pricing) the risks they insure and ex post in verifying claims by separating valid from frivolous ones," insurers may be better at "reducing moral hazard."

LAW BLOG ROUNDUP

U.S. Supreme Court Ratings Go South

"The rating is a 'fresh indication that the Court's standing with the public has slipped significantly in the past quarter-century.'" Justice Department Reporter Mike Scarcella, blogging about a *New York Times*/CBS News poll showing that just 44 percent of Americans approve of the job the U.S. Supreme Court is doing.

The BLT: The Blog of Legal Times, June 8, 2012.

Academic Angst

"When our work is cited, but somehow questioned for its accuracy, merit, or value, is that better than not being cited at all?" Creighton University Director of Communications & Diversity Kelly Anders, applying the public relations maxim that "all press is good press" to legal academia.

PrawfsBlawg, June 12, 2012.

THE FINAL WORD

Regulators, Retailers and Manufacturers Concerned About Pace of Product Recalls

According to a news source, more than 2,300 consumer products, pharmaceuticals, medical devices, and food, at a pace of some 6.5 each day, were recalled in 2011. This represents a reported increase of 14 percent over recalls in 2010 and compares to about 1,500 recalls in 2007. Regulators, retailers and manufacturers are apparently concerned that the surge in product recalls will produce a recall "fatigue" that means consumers could ignore or miss a recall which puts them at risk. A Rutgers study from 2009 found that 12 percent of Americans eat food they know has been recalled and 40 percent admit never looking for recalled products in their homes.

Some retailers, such as Costco, that have mechanisms to automatically notify members who have purchased recalled products, have opined that the national recall system would be more effective if a single, uniform network were in place instead of the varying recall systems used by individual agencies, such as the Consumer Product Safety Commission, U.S. Department of Agriculture (USDA)

and Food and Drug Administration. USDA Secretary Tom Vilsack, pointing to the vast numbers of products made, sold or consumed every day, reportedly sought to downplay the number of announced recalls. Still, he was quoted as saying, "I think people want to know and need to know and have a right to know if there is a problem with a particular product. We're going to look at ways in which we [communicate] and constantly improve how we communicate but we're not going to stop communicating." *See USA Today*, June 8, 2012.

UPCOMING CONFERENCES AND SEMINARS

Perrin Conferences, Chicago, Illinois – June 27, 2012 – "National Complex Litigation Conference: A Symposium on Current & Emerging Issues." Shook, Hardy & Bacon Global Product Liability Partner John Sherk will serve as a panelist during a session titled "Class Actions, New Risks and New Defenses" to discuss recent U.S. Supreme Court rulings and other product liability, consumer fraud and employment cases. The panel will also consider the role of experts at the class certification stage as well as the risks and benefits of class action litigation as an effective means to resolve conflict. ■

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ABOUT SHB

Shook, Hardy & Bacon is widely recognized as a premier litigation firm in the United States and abroad. For more than a century, the firm has defended clients in some of the most substantial national and international product liability and mass tort litigations.

Shook attorneys have unparalleled experience in organizing defense strategies, developing defense themes and trying high-profile cases. The firm is enormously proud of its track record for achieving favorable results for clients under the most contentious circumstances in both federal and state courts.

The firm's clients include many large multinational companies in the tobacco, pharmaceutical, medical device, automotive, chemical, food and beverage, oil and gas, telecommunications, agricultural, and retail industries.

With 95 percent of our more than 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).