Shook, Hardy & Bacon L.L.P.

FEBRUARY 12, 2008

PRODUCT LIABILITY LITIGATION REPORT

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ATTEMPT TO EXEMPT EXISTING INVENTORY FROM PHTHALATE PROHIBITION RUNS AGROUND

A federal district court has ruled that the Consumer Product Safety Commission (CPSC) lacked the authority to exempt existing inventory from the implementation of a prohibition imposed by the Consumer Product Safety Improvement Act of 2008 (CPSIA) on the manufacture, sale or distribution of any child's toy or child care product containing more than 0.1 percent of certain chemicals known as phthalates. *Natural Resources Defense Council, Inc. v. CPSC*, No. 08-10507 (U.S. Dist. Ct., S.D.N.Y. order entered February 5, 2009).

In response to a November 13, 2008, letter from a law firm asking the CPSC to consider not applying the phthalate restrictions in the new law to inventory existing on the date the prohibition took effect (February 10, 2009), the agency issued an advisory opinion four days later stating that while the lead restrictions in the law did not exempt products made before the implementation date, the phthalate prohibitions would not apply to products made before February 10, 2009.

The CPSC's position provoked a storm of criticism, and the Natural Resources Defense Council (NRDC) filed a petition with the agency seeking a revocation of the opinion letter. NRDC also sought a court order declaring the opinion letter to be in violation of the Administrative Procedure Act and the Consumer Product Safety Act as amended. The court agreed with NRDC that the CPSIA unambiguously prohibits the sale of existing inventory containing phthalates beginning February 10 and that the CPSC's opinion letter was not entitled to deference, essentially because it did not reflect a thorough consideration of the issues or a well-reasoned analysis of the statute. The court observed that if the CPSC were to prevail, an enormous existing inventory of prohibited products would continue to be sold indefinitely; thus, the court found the agency's interpretation contrary to the language and structure of the CPSIA and not in accordance with the law.

CPSC has issued a **press release** announcing its intention to comply with the court's ruling, and provides a link to the court's opinion.

According to the February 6, 2009, announcement, the agency "will be issuing further guidance information next week."

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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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COURT REFUSES TO ENFORCE CLASS ACTION WAIVER IN ARBITRATION AGREEMENT

The Second Circuit Court of Appeals has found unenforceable a class-action waiver that was part of a mandatory arbitration clause in a commercial contract. ***In re: Am. Express Merchs. Litig.*, No. 06-1871 (2d Cir., decided January 30, 2009)**. While the decision applies to a contract between a credit card company and the merchants that accept its charge cards and is limited to those cases where the plaintiffs can show they would lack any remedy under federal law if the waiver were enforced, it should be noted that product sellers are increasingly relying on contracts with similar provisions to control the product-related litigation their buyers might consider undertaking.

Noting that the issue was a matter of first impression in the circuit, the court acknowledged the ongoing debate among courts, scholars and interest groups as to whether class action waivers can or should be enforced. The court specifically declined to rule whether these provisions are "either void or enforceable *per se*," concluding instead that "on the record before us, the plaintiffs have adequately demonstrated that the class action waiver provision at issue should not be enforced because enforcement of the clause would effectively preclude any action seeking to vindicate the statutory rights asserted by the plaintiffs."

According to the court, even if individual plaintiffs could treble their damage claims for purported violations of federal antitrust law, the most that even the largest volume plaintiff could recover would be $38,500. An affidavit submitted by a professional economist on plaintiffs' behalf concluded that individual arbitration or litigation would not be worthwhile in light of such potential recoveries because the costs of expert economic study and services alone "would be at least several hundred thousand dollars, and might exceed $1 million." The affidavit detailed the types of studies an economist would have to undertake in a complex antitrust lawsuit, and the court determined that it provided abundant support for "plaintiffs' argument that they would incur prohibitive costs if compelled to arbitrate under the class action waiver."

Rejecting the card company's argument that some individual plaintiffs' fees could be recovered, the court noted that expert fees are capped under federal law and the parties' agreement did not allow the disclosure of information related to arbitration proceedings, thus precluding individual plaintiffs from sharing expert witness services. Finding that waiver provisions must be analyzed on a case-by-case basis, the court concluded, "the class action waiver in the Card Acceptance Agreement cannot be enforced in this case because to do so would grant Amex de facto immunity from antitrust liability by removing the plaintiffs' only reasonably feasible means of recovery." Remanding the case, the appeals court instructed the district court to allow Amex the opportunity to withdraw its motion to compel arbitration.

FEDERAL LAW TO GOVERN SPOLIATION OF EVIDENCE RULINGS, NOT STATE LAW

The Sixth Circuit Court of Appeals has overturned prior rulings and, joining other federal circuit courts, decided that when federal courts decide whether to impose sanctions for the spoliation of evidence in cases arising under their federal question jurisdiction, they will no longer be governed by state law. ***Adkins v. Wolever,* No. 07-1421 (6th Cir., decided February 4, 2009)**. The issue arose in the context of a state prisoner's suit under federal law against a corrections official for an alleged assault.

Video footage of the area where the alleged assault occurred and color photographs of the prisoner's purported injuries disappeared before trial, and the prisoner asked the court to instruct the jury that it could presume the missing evidence would support his claims. The federal district court conducting the trial denied the request because state law required the party seeking spoliation sanctions to show that the missing evidence was under the opposing party's control. When the evidence in this case disappeared, it was not under the corrections officer's control.

An appeals court panel affirmed the district court, relying on prior cases in the circuit, and the case was subsequently re-argued before the circuit court, sitting en banc. Deciding that its earlier opinions were in error, the court determined that federal law must be applied for spoliation sanctions because (i) "the authority to impose sanctions for spoliated evidence arises not from substantive law but, rather, 'from a court's inherent power to control the judicial process'"; and (ii) "a spoliation ruling is evidentiary in nature and federal courts generally apply their own evidentiary rules in both federal question and diversity matters." Remanding to the district court for a determination of the appropriate sanctions to impose, the court noted that they will depend on the culpability of the party responsible for the spoliation and could range from case dismissal to the grant of summary judgment or a jury instruction that "it may infer a fact based on lost or destroyed evidence."

Deciding that its earlier opinions were in error, the court determined that federal law must be applied for spoliation sanctions because (i) "the authority to impose sanctions for spoliated evidence arises not from substantive law but, rather, 'from a court's inherent power to control the judicial process'"; and (ii) "a spoliation ruling is evidentiary in nature and federal courts generally apply their own evidentiary rules in both federal question and diversity matters."

DRUG MAKER SEEKS TO DISQUALIFY CONTINGENCY FEE LAWYERS SUING ON STATE'S BEHALF

A pharmaceutical company that is the target of a lawsuit in Pennsylvania brought by the state to recover its costs under Medicaid and Pharmaceutical Assistance Contract for the Elderly programs for an antipsychotic prescription drug allegedly marketed for off-label uses has filed a motion before the Pennsylvania Supreme Court, seeking to disqualify the private contingency-fee attorneys who are representing the state. *Commonwealth v. Janssen Pharmaceutica, Inc.*, No. n/a (Pa., filed January 6, 2009). According to the application for relief under the court's "King's

Bench," i.e., extraordinary, powers, the contingency fee arrangement was not approved by the state legislature as required under the state constitution, and the arrangement violates the drug maker's due process rights.

The company argues that constitutional requirements of neutrality and impartiality on the part of those exercising the government's powers in adjudicative proceedings are violated when private counsel have a financial stake in the outcome of the proceedings they are pursuing on the government's behalf. The company contends that the agreement will provide the private attorneys with fees as much as 15 percent "of the actual recovery" if the state wins or settles the claims.

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The application for relief acknowledges that similar claims have been turned aside in other states where asbestos and tobacco-related litigation was pursued by private contingency-fee counsel on behalf of the state government. But the drug maker argues that those cases involved special statutes authorizing such representation or a showing that government staff retained significant control over the litigation.

The company distinguishes its situation by noting that the state's "contingent fee contract with Bailey Perrin does not reserve control and management of the case to the OGC [office of general counsel]; it merely sets forth a duty of 'consultation' in which Bailey Perrin is obliged in some respects to treat the OCG like a client." The company also notes that the contract restricts the OGC's ability to consent to a settlement by providing "OGC shall agree to no settlement of the Litigation that provides for non-monetary relief unless the settlement also provides reasonably for the compensation of the law firm by [Janssen] for the services provided by the law firm under this Contract."

OHIO AG DISMISSES LEAD PAINT LAWSUIT

According to a news source, Ohio's attorney general has voluntarily dismissed the lawsuit his predecessor filed against 10 paint manufacturers in 2007 seeking the abatement of lead paint throughout the state. Attorney General Richard Cordray was quoted as saying, "I understand and strongly agree that exposure to lead paint is a very real problem. But I also know that not every problem can be solved by a lawsuit." Cordray apparently concluded that because these claims were not being sustained in other jurisdictions, the state's citizens would best be served by finding ways to create public/private partnerships to address existing problems. *See Ohio Attorney General Press Release*, February 6, 2009.

"I understand and strongly agree that exposure to lead paint is a very real problem. But I also know that not every problem can be solved by a lawsuit."

THINKING GLOBALLY

Florida Home Builder Sues German and Chinese Companies for Defective Drywall

A Florida-based home builder has filed product defect claims against numerous defendants, including German and Chinese companies that manufactured the drywall the builder installed in dozens of new homes, claiming that gas emissions are destroying air conditioner coils and other electrical equipment in the homes. *Lennar Homes, LLC v. Knauf Gips KG*, No. 09-17901CA23 (11th Judicial Circuit, Miami-Dade County, Florida, filed January 30, 2009). The complaint alleges that the court has jurisdiction over the foreign defendants because they are "engaged in substantial and not isolated activity within the state," and "at the time of the injury, products, materials, or things manufactured by Knauf Gips, Knauf Tianjin, and Taishan were used and consumed within the State of Florida in the ordinary course of commerce, trade, or use."

Lennar apparently found that an unusual number of problems arose in the heating, ventilation and air-conditioning (HVAC) systems in the homes it built and retained expert consultants to investigate. They purportedly discovered that "certain gypsum drywall installed in a small percentage of Lennar's homes in the State of Florida is latently defective." Gases emitted from the drywall allegedly interacted with and corroded the copper surface of the HVAC coils, showing up as a black surface accumulation and causing them to fail. According to the complaint, the emissions have not apparently resulted in "any adverse human health effects." Lennar brings more than 50 counts against the defendants in a 105-page complaint and seeks unspecified damages, attorney's fees and costs.

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ALL THINGS LEGISLATIVE AND REGULATORY

CPSC Issues Stay in Enforcement of Certain Lead-Testing and Certification Requirements

The Consumer Product Safety Commission (CPSC) has **voted** unanimously to stay for one year a requirement in the Consumer Product Safety Improvement Act (CPSIA) that manufacturers and importers of regulated products, including those for children, comply with the new law's certification and testing provisions. Small business owners throughout the country, as well as children's libraries and thrift stores were reportedly planning to remove children's products, books and clothes from their shelves, out of concern that they would be unable to comply with the lead testing requirements by February 10, 2009, the date the law begins banning lead in products intended for children younger than age 12.

Yet, the stay of enforcement will not "address thrift and second hand stores and small retailers because they are not required to test and certify products under the CPSIA. The products they sell, including those in inventory on February 10, 2009, must not contain more than 600 ppm lead in any accessible part." The CPSC offers guidance to these companies to help them determine if the products they sell comply with the lead standard. The stay does apply to "crafters, children's garment manufacturers and toy makers," who will be subject to the testing and certification required under the CPSIA, but they will be required to ensure that their products conform to the lead and phthalate provisions of the law.

According to the CPSC, the stay does not apply to third-party testing and certification of certain children's products made after December 21, 2008; the standards for full-size and non full-size cribs and pacifiers effective for products made after January 20, 2009; the ban on small parts effective for products made after February 15, 2009; and the limits on lead content of metal components of children's jewelry effective for products made after March 23, 2009. The stay "provides some temporary, limited relief to the crafters, children's garment manufacturers and toy makers who had been subject to the testing and certification required under the CPSIA. These businesses will not need to issue certificates based on the testing of their products until additional decisions are issued by the Commission."

Because the CPSIA allows state attorneys general to bring enforcement actions under the law, the CPSC calls for them to "respect the Commission's judgment that it is necessary to stay certain testing and certification requirements and will focus their own enforcement efforts on other provisions of the law, e.g. the sale of recalled products."

At least one commentator opines that the stay provides no relief at all because small businesses are still liable under the law if they sell goods exceeding the lead limits after February 10. And the stay was issued just days before the law's implementation date, so many companies apparently discarded inventory in anticipation of its enforcement. One member of Congress has responded to retailers' concerns by introducing a bill (S. 389) that would reportedly give the CPSC the discretion to delay enacting the lead and phthalate standards altogether. According to Senator Robert Bennett (R-Utah), who introduced the measure, "You have a situation where the agency is not enforcing the standard by requiring testing and certification while at the same time the companies that have products in their inventory that exceed the lead standard are subject to both criminal and civil penalties." *See CPSC Press Release*, February 6, 2009; *Product Liability Law 360*, February 6, 2009; *Las Vegas Review-Journal*, February 8, 2009.

"You have a situation where the agency is not enforcing the standard by requiring testing and certification while at the same time the companies that have products in their inventory that exceed the lead standard are subject to both criminal and civil penalties."

LEGAL LITERATURE REVIEW

Mark Behrens & William Anderson, "The 'Any Exposure' Theory: An Unsound Basis for Asbestos Causation and Expert Testimony," *Southwestern University Law Review* (2008)

SHB Public Policy Partner **Mark Behrens** has co-authored an article as part of a law review symposium on asbestos; the article opens by noting how asbestos litigation has spawned its own set of rules and standards, including the "any fiber theory" which "contends that because asbestos disease is a cumulative, dose-response process, each and every exposure to asbestos during a person's lifetime, no matter how small or trivial, substantially contributes to the ultimate disease." Behrens takes issue with this theory and calls for the courts to begin applying standard tort principles and causation rules to asbestos cases. He suggests that it is unacceptable for courts to let juries decide expert witness disputes over the level of exposure required to cause injury.

James Henderson Jr., "Sellers of Safe Products Should Not Be Required to Rescue Users from Risks Presented by Other, More Dangerous Products," *Southwestern University Law Review* (2008)

Cornell Law School Professor James Henderson, who provided significant input into the *Restatement (Third) of Torts: Products Liability* as a Reporter, authored this symposium article which argues that "imposing liability on distributors merely because their products are subsequently used with asbestos-containing products made by others" goes too far. Henderson provides an overview of how the issue can arise and explains "how courts should be handling these product-interaction, rescue-by-warning claims." According to the article, "courts in a wide variety of contexts have traditionally refused to require one group of actors to perform 'watchdog' functions over the risky conduct of a second group in order to rescue victims of the second group from harm." Henderson explores the policy reasons why it is inappropriate to require the sellers of safe, non-defective component parts to provide warnings about the potential risks of their interaction with other component parts manufactured by others. He notes that no court to date has allowed plaintiffs to proceed with such claims and concludes the most judges understand "that hanging liability on such a slender thread does not promote the efficient allocation of resources, nor does it achieve justice among the parties involved."

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Frank Vandall, "The Criminalization of Products Liability: An Invitation to Political Abuse, Preemption, and Non-Enforcement," *Catholic University Law Review* (2008)

Noting that Senator Arlen Specter (R-Pa.) called a hearing in 2006 to consider a proposal that would criminalize products liability for the manufacture of intentionally lethal goods, this article posits that such action "is neither necessary, nor desirable." Authored by Emory University School of Law Professor Frank Vandall, the article discusses the history, economics and system of product design and manufacture and considers fundamental cause-in-fact and proximate cause concepts to show why products liability should not be criminalized. He concludes, "[i]n order to have a full range of effective and affordable products, we must realize that some products will be manufactured that are known to kill or cause serious bodily injury. Products liability civil suits function efficiently to weed out invalid suits from those involving defective products. . . With a strong civil litigation system in place, there is no present need for Senator Specter's proposal."

Products liability civil suits function efficiently to weed out invalid suits from those involving defective products.

LAW BLOG ROUNDUP

$125,000 in Attorney's Fees Paid in Women's Apparel Gift Cards

"Fineman will be paid his fee in '12,500 ten-dollar Windsor Fashions gift cards.'" Civil Justice Association of California Director of Communications and Research Cynthia Lambert, blogging about plaintiffs' lawyer Neil Fineman who brought a class action lawsuit against a women's apparel store for violations of a credit card law. The class members received $10 gift cards under the settlement, and Fineman was to receive $125,000 in fees. The court decided that Fineman should instead be paid like the class members; he has already received 3,500 of the cards and will receive 750 more on the third day of each month through January 2010.

The California Civil Justice Blog, January 23, 2009.

Alabama AG Serious About Federalism

"Troy King, the Alabama attorney general, believes deeply—very deeply, it seems—in the concept of federalism. How do we know this? Because he recently sent us a letter, in response to an earlier post, in which he explained his rationale for writing an amicus brief in the *Massey Coal* case pending before the U.S. Supreme Court." Journalist Ashby Jones, writing about the latest amicus brief filed in a lawsuit that asks the U.S. Supreme Court to decide whether a West Virginia justice should have recused himself from hearing an appeal involving a coal company whose owner contributed more than $3 million to his election. The coal company succeeded

in overturning an adverse $50 million jury verdict courtesy of the West Virginia Supreme Court, but Alabama's attorney general apparently does not believe that supporting someone's election raises real or perceived bias, and, in any event, the matter should be left to the states to decide.

WSJ Law Blog, January 30, 2009.

THE FINAL WORD

Tainted Peanut Butter Spawns Lawsuits and Criminal Investigation; Recalled Products Linked to Georgia Facility That Met Safety Compliance Audits

Food litigator William Marler has reportedly filed an amended complaint on behalf of a Vermont couple whose son was allegedly sickened and hospitalized following ingestion of a product containing *Salmonella*-tainted peanut butter. *Meunier v. Peanut Corp. of Am.*, No. 1:09-CV-12 (U.S. Dist. Ct., MD. Ga., Albany Div., first amended complaint filed January 28, 2009). The plaintiffs are now seeking punitive damages for "willful concealment of known defects." The amendment follows the release of a Food and Drug Administration (FDA) inspection report showing that the Peanut Corp. of America (PCA) shipped products that tested positive for *Salmonella* after the company had the products re-tested and received negative test results.

The plaintiffs are now seeking punitive damages for "willful concealment of known defects."

Marler was quoted as saying, "In 15 years of litigating food cases, this is one of the worst examples of corporate irresponsibility I have ever seen. Not only does the plant appear to have atrocious practices, but the product that seems to have repeatedly tested positive for *Salmonella* was shipped to hospitals, nursing homes and schools regardless." *See Product Liability Law 360*, January 30, 2009.

Meanwhile, FDA officials have reportedly confirmed that a criminal investigation of PCA has been launched in coordination with the Department of Justice. No other details have apparently been released, but PCA posted a statement on its Web site claiming that it "uses only two highly reputable labs for product testing," and "categorically denies any allegations that the Company sought favorable results from any lab in order to ship its products." *See CQ Healthbeat News*, January 30, 2009.

In a related development, PCA's insurer has reportedly filed a lawsuit in a Virginia federal court seeking a ruling on whether the policy requires it to defend or indemnify the company. *Hartford Cas. Ins. Co. v. Peanut Corp. of Am.*, No. n/a (U.S. Dist. Ct., W.D. Va., filed February 3, 2009). According to Hartford spokesperson David Snowden, "We are seeking a declaratory judgment from the court to determine the extent of our obligation to Peanut Corp. of America. We believe this will help clarify the claims process." The insurance company has asked the court to examine

"exclusions and limitations" in its policy with PCA and decide whether they "exclude or nullify coverage … for one or more of the *Salmonella* claims." *See The Atlanta Journal-Constitution*, February 5, 2009.

Echoing PCA statements that its Georgia plant was regularly inspected and found to "meet or exceed" audit expectations, Kellogg is reportedly reviewing how it qualifies its independent auditors after the food-safety auditor it hired gave "superior" ratings to PCA's Georgia facility during inspections in 2007 and 2008. Kellogg apparently requires that its ingredient suppliers undergo audits, which check for compliance with good manufacturing, sanitation and other practices. Kellogg has been named as a defendant in the *Meunier* litigation. A company spokesperson reportedly said in an e-mail, "had we known of the issues cited (by the FDA), we would have discontinued the relationship with PCA." *See USA Today*, February 5, 2009.

News accounts have quoted PCA employees who spoke of sanitation, maintenance and infestation issues. According to one cook at the Georgia plant, "I never ate the peanut butter, and I wouldn't allow my kids to eat it." The employees reported wet conditions inside after it rained, as well as regular sightings of rodents and cockroaches. Texas officials have reportedly discovered that PCA owned and operated a plant in that state, and while it conducted business uninspected and unlicensed for four years, no *Salmonella* contamination has been found on the premises. *See Chicago Tribune* and *Houston Chronicle*, February 3, 2009.

According to one cook at the Georgia plant, "I never ate the peanut butter, and I wouldn't allow my kids to eat it."

During a hearing on the outbreak before the Senate Agriculture Committee, Senator Patrick Leahy (D-Vt.) reportedly called for "some people to go to jail," observing that fines do not appear to be working. The U.S. Department of Agriculture (USDA) has, in the meantime, suspended PCA from participating in government contract programs for at least one year, and new Secretary of Agriculture Tom Vilsack has apparently removed PCA President Stewart Parnell from the USDA's Peanut Standards Board. *See Seattle Post-Intelligencer*, February 5, 2009.

UPCOMING CONFERENCES AND SEMINARS

Grocery Manufacturers Association, Rancho Mirage, California – February 24-26, 2009 – "2009 Food Claims & Litigation Conference." The conference will address emerging issues in food-related litigation, including (i) recent developments in product liability cases; (ii) pre-litigation risk management for consumer products; and (iii) non-traditional discovery methods. Shook, Hardy & Bacon Pharmaceutical

and Medical Device Litigation Partners **Frank Rothrock** and **Paul La Scala** will address "Country-of-Origin-Labeling: A Legal Mandate for Some, a Marketing Opportunity for Others, and a Litigation Risk for All"; Shook, Hardy & Bacon Pharmaceutical and Medical Device Litigation Partner **Madeleine McDonough** will present on "Pre-Litigation Risk Management for Consumer Products Companies."

American Bar Association, Phoenix, Arizona – April 2-3, 2009 – "2009 Emerging Issues in Motor Vehicle Product Liability Litigation." Shook, Hardy & Bacon Tort Partner **Frank Kelly** joins a distinguished faculty to serve on a panel discussing "The Science Behind the Sentiment: Understanding Punitive Damages in an Era of Anti-Corporate Bias." CLE credit is available for this program, which is presented by the ABA's Tort Trial & Insurance Practice Section; Products, General Liability and Consumer Law Committee and Automobile Law Committee.

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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 93 percent of our more than 500 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).