Shook, Hardy & Bacon L.L.P.

OCTOBER 8, 2009

PRODUCT LIABILITY LITIGATION REPORT

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SOUTH DAKOTA SUPREME COURT AFFIRMS NEW-TRIAL RULING WHERE JUROR ACCESSED INTERNET IN FAULTY SEATBELT CASE

The South Dakota Supreme Court has determined that Internet research conducted by a juror in a wrongful death case could have prejudiced the verdict and that the trial court did not err in granting the plaintiffs' motion for a new trial. ***Russo v. Takata Corp.*, No. 2009 SD 83 (S.D. Sup. Ct., decided September 16, 2009)**. The issue arose in a case involving an automobile accident and allegations of faulty seatbelts. A prospective juror conducted Internet research about the seatbelt manufacturer after receiving his summons and failed to indicate he had done so during voir dire.

While the jury was deliberating, this juror revealed to several other jurors that his research did not reveal any other lawsuits filed against the seatbelt manufacturer. The issue of other instances of alleged seatbelt failures had been raised during trial, and the jury was instructed that "evidence of other lawsuits and complaints was 'only for the purpose of establishing whether Takata had notice of the alleged defect.'" The jury returned a defense verdict, and plaintiffs thereafter filed a motion for new trial alleging juror misconduct. The trial court found that (i) the juror's actions and comments violated his oath, the court's admonishments and the jury instructions; (ii) the information he provided "was inconsistent with the evidence introduced at trial and was provided at a time during the deliberations that was crucial to Plaintiffs' case"; and (iii) the juror's misconduct prejudiced the outcome of the case.

While the supreme court upheld the trial court's ruling, it admitted that the question was a "close" one, and refused to adopt a "hard and fast rule that all such types of internet research by a juror prior to trial without notice to the court and counsel automatically doom a jury's verdict." The state high court deferred to the trial court, "which had the distinct advantage of being present throughout the nineteen-day trial" and "was in the best position to determine whether material was extrinsic to the issues before the jury, or whether the extraneous material prejudiced the jury."

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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 Product Liability capabilities, please contact

Gary Long
+1-816-474-6550
glong@shb.com

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

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

or

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

THIRD CIRCUIT SAYS TRANSFEREE COURT LACKS AUTHORITY TO VACATE TRANSFEROR COURT'S ORDER IN MDL LITIGATION

The Third Circuit Court of Appeals, addressing an issue arising in antitrust litigation involving pharmaceutical services, has determined that a transferee court erred, under the law-of-the-case doctrine, by vacating a transferor court's order compelling arbitration. ***In re: Pharmacy Benefit Managers Antitrust Litig.*, No. 07-1151, MDL No. 1782 (3d Cir., decided September 24, 2009)**.

Six similar antitrust actions, filed to challenge the practices of prescription benefits managers, were transferred to the Eastern District of Pennsylvania for coordinated proceedings. The *Bellevue* action was subject to an order compelling arbitration and a stay before it was transferred to the multidistrict litigation (MDL) court, which subsequently vacated the transferee court's order. According to the Third Circuit, the MDL court mistakenly relied on the *Manual for Complex Litigation* (4th ed. 2004) and *In re Upjohn Co. Antibiotic Cleocin Products Liability Litigation*, 644 F.2d 114 (6th Cir. 1981), to support its authority to "vacate or modify any order of a transferor court."

Under the law of the case, "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case," unless "extraordinary circumstances" demonstrate that "the initial decision was clearly erroneous and would make a manifest injustice." Among the extraordinary circumstances allowing reconsideration of a prior ruling are the availability of new evidence or the announcement of a supervening new law. According to the appeals court, the transferee court failed to find any extraordinary circumstance that would have justified vacating the order compelling arbitration.

The Third Circuit found that the *Manual* does not have the force of law and clearly misinterpreted *Upjohn*, which applies only to protective orders required to "harmonize … discovery." The court noted, "*Upjohn* does not carve an exception out of the law of the case doctrine that gobbles up the limitations inherent in that doctrine." The court also stated, "given the havoc and potential delay and confusion that … a broad proposition could visit on parties involved in multidistrict litigation, it is not surprising that the *Upjohn* court cautioned: 'The rule of the law of the case … is particularly applicable to multidistrict litigation in which the presence of a large number of diverse parties might otherwise result in constant relitigation of the same legal issue.'"

BUS COMPANY'S VOLUNTARY PAYMENT TO ACCIDENT VICTIMS CANNOT BE RECOVERED FROM TIRE COMPANY

A federal court in Alabama has determined that voluntary payments Greyhound Lines, Inc. made to passengers injured during a bus accident cannot be recovered in litigation the bus company filed against the manufacturer of the tire allegedly

responsible for the accident. *Greyhound Lines, Inc. v. The Goodyear Tire & Rubber Co.,* No. 3:08cv00516 (U.S. Dist. Ct., M.D. Ala., E. Div., decided September 23, 2009). According to the court, Greyhound "made these voluntary payments without notifying Goodyear of the accident, the injuries, or the settlement agreements." Rejecting Greyhound's theories of assignment, contractual subrogation, "release," breach of warranty, and implied contractual and noncontractual indemnity, the court found that Goodyear was not liable to Greyhound for the passenger payments under the voluntary-payment doctrine.

MONTANA HIGH COURT DECIDES RELEVANCE OF COMPLIANCE WITH CHILD SAFETY SEAT STANDARDS

The Montana Supreme Court has determined that a trial court correctly barred the introduction of evidence that a child safety seat complied with government testing standards for purposes of determining liability for compensatory damages, but found error in the court's refusal to allow a jury to hear such evidence when considering punitive damages. *Malcolm v. Evenflo Co., Inc.,* No. 2009 MT 285 (Mont. Sup. Ct., decided September 14, 2009). The case involved an alleged defect in the 207 model of Evenflo's "On My Way" (OMW) child safety seat, which broke during a rollover accident that resulted in the death of a 4-month-old baby. A jury awarded his parents nearly $6.7 million in compensatory damages and $3.7 million in punitive damages.

In a split decision, the supreme court majority declined to adopt the *Restatement (Third) of Torts: Products Liability* § 4 (1998) and ruled that, under state strict liability law, compliance with government safety standards is irrelevant as to whether a product has a defect. Thus, it determined that the trial court did not abuse its discretion in barring evidence that the 207 model had passed government, low-speed "head-on" collision testing, described as establishing a minimum safety standard. The court also found this testing irrelevant as to an alleged defect that manifested during a rollover accident.

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The majority determined that the trial court did not err in allowing the plaintiffs to introduce evidence pertaining to the company's 206 OMW child safety seat model, which apparently failed government tests and was subject to a recall in 1995. According to the court, the models were similar enough that this evidence was relevant and pertained not only to product defect but also to proving punitive damages, as "the existence of similar injuries tends to demonstrate the manufacturer's knowledge of the 'high probability of injury.'"

The majority reversed the punitive damages award, however, finding that the trial court erred in prohibiting Evenflo from introducing evidence that the 207 model complied with a government testing standard "for the purposes of considering the appropriateness of punitive damages." The court acknowledged that its ruling posed a

dilemma, that is, how the trial court can ensure that a jury would refrain from considering such evidence for purposes of compensatory damages while then relying on it when evaluating whether the company acted with actual fraud or actual malice for purposes of punitive damages. Still, the court said, "We must trust that the jury will heed the court's instructions as to how to evaluate the evidence presented."

The court remanded the case for a new trial limited to the issue of punitive damages. One justice would have reversed as to both the compensatory and punitive awards, and two justices would have upheld the trial court's judgment, stating, "The tragedy of the Court's decision today is that Chad and Jessica are stripped of their well-deserved and legally-sound award of punitive damages in the name of 'fairness' to a corporation that demonstrated actual malice, actual fraud, and utter contempt for the safety of the consuming public."

CALIFORNIA APPEALS COURT ALLOWS CELL PHONE FRAUD CLAIMS TO PROCEED

A California court of appeal has determined that plaintiffs pleading fraud under the state's unfair competition law are not held to the same standards of specificity as those alleging common law fraud and has reversed the dismissal of a consumer class action against AT&T involving the marketing and sale of its premium cell phones. *Morgan v. AT&T Wireless Servs., Inc.*, No. B206788 (Cal. Ct. App., decided September 23, 2009).

According to the court, plaintiffs sufficiently stated a claim for relief under the fraudulent business practices prong of the Unfair Competition Law by alleging that (i) AT&T marketed and sold expensive phones that could be operated only on a particular network, in conjunction with multi-year service plans, and touted improvements it was making to the network; (ii) the improvements AT&T made to the network degraded the portion of the network on which the phone operated; and (iii) AT&T knew when it sold the expensive phones that the network improvements it would be making would soon render them essentially useless.

PHARMACEUTICAL CO. SUES FDA, CLAIMS OFF-LABEL COMMUNICATIONS BAN VIOLATES FIRST AMENDMENT

The company that makes Botox® has filed a complaint against the Food and Drug Administration (FDA), claiming that the agency's expansive definition of "labeling," as applied to direct, truthful communications to medical professionals about the off-label uses of prescription drugs, violates the First Amendment's protection of free speech. *Allergan, Inc. v. United States*, No. n/a (U.S. Dist. Ct., D.D.C., filed October 1, 2009). The plaintiff seeks a declaration that certain statutory and regulatory provisions are invalid as applied or are facially unconstitutional, and also seeks preliminary and permanent injunctions to stop the agency from enforcing these provisions against the company while the litigation is pending.

According to the plaintiff, its drug has been approved for a variety of uses, including crossed eyes, eyelid spasm, involuntary neck muscle contractions, and the improvement of moderate to severe frown lines between the eyebrows. The company alleges that health care professionals also use Botox® to treat off-label conditions, including spasticity associated with strokes in adults and cerebral palsy in pediatric patients. The company has sought approval for these uses from the FDA, and these uses are apparently approved in other countries. While the FDA has approved some labeling changes and health care provider communications to reflect these uses, the company would like to provide more detailed information to physicians "to achieve the desired effect while reducing the risk of adverse events and improving the overall risk-benefit profile."

The complaint alleges that the company would like to provide information "about the significant clinical safety data Allergan has gathered through its monitoring of adverse events and clinical trials relating to the dosing of Botox" through office visits, printed and electronic communications, formal presentations, and academic lectures. If the company does so, however, its "planned truthful, non-misleading scientific speech to physicians … would lead to criminal prosecution and severe criminal penalties." According to the company, FDA's interpretation of the applicable statutes and regulations "comprehensively prohibits a manufacturer from speaking truthfully to health care professionals about how to improve the risk-benefit profile associated with off-label uses of prescription drugs."

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FEMA TRAILER TRIAL ENDS IN DEFENSE VERDICT, PLAINTIFFS PLAN APPEAL

The first of thousands of lawsuits alleging injury from exposure to high levels of formaldehyde in the trailers provided as temporary housing to refugees of Hurricanes Katrina and Rita has ended in a verdict for the companies that made, installed and maintained the trailers. The plaintiff was the mother of an asthmatic boy whose symptoms allegedly worsened during the two years they lived in one of the trailers.

According to news sources, evidence during the nine-day trial showed that the government failed to inform residents that the high formaldehyde levels found through testing could increase their risks of developing cancer. While the government is a defendant in many of the lawsuits, it was not a part of this litigation. The plaintiff's lawyers have reportedly indicated that they plan to appeal the verdict and will argue that the court erred in going to trial after defendants struck five African-Americans from the jury panel through peremptory challenges. *See Courthouse News Service,* September 22, 23 & 25, 2009; *Mealey's Emerging Toxic Torts*, September 25, 2009.

PLAINTIFFS' GROUPS STRIVE TO UNDO U.S. SUPREME COURT'S *IQBAL* RULING

The U.S. Supreme Court's May 18, 2009, *Iqbal* decision, which made it easier for corporate defendants to get civil cases dismissed before discovery, reportedly has civil rights groups, consumer groups and trial lawyers fighting back. On September 14, 2009, they met in Washington, D.C., to plan an anti-*Iqbal* campaign directed toward Congress and the federal court rulemaking process. House and Senate hearings are planned soon.

"This [*Iqbal*] ruling has threatened to upend the way we have been doing things for a very long time," John Payton of the NAACP Legal Defense and Educational Fund was quoted as saying. "The alarm is quite real." Other challengers include the Center for Constitutional Litigation, Public Citizen, Sierra Club, National Employment Lawyers Association, and Committee to Support the Antitrust Laws.

Ashcroft v. Iqbal, expanding the Court's 2007 *Bell Atlantic Corp. v. Twombly* decision to all civil litigation, basically says, "plaintiffs must include in their initial pleadings substantial, not 'threadbare,' factual assertions that give 'facial plausibility' to their claims, a major shift from the tradition of 'notice pleading,' which required only a simple statement of the case against the defendant." "*Iqbal* motions" to dismiss have apparently become commonplace in federal courts, producing more than 1,500 district court and 100 appellate court decisions. Evidently, many more are pending.

Business advocates assert that *Iqbal* weeds out weak or frivolous lawsuits and reduces federal court caseloads. Civil rights advocates contend that most plaintiffs at the pleading stage in employment and other discrimination cases have no access to the facts found in personnel files and company documents that could prove discrimination. Lisa Bornstein, senior counsel at the Leadership Conference on Civil Rights, reportedly said that under *Iqbal,* "the person filing the suit has to get inside the head of the employer," and described the ruling as a "padlock on the courthouse door." *See Law.com,* September 21, 2009.

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ARTIFICIAL SWEETENERS, HOUSEHOLD PRODUCTS INCLUDED AS POTENTIAL MASS TORT TARGETS

According to a news source, odds are that corporate defendants are not likely to ever again see another mass tort like asbestos, which, somewhat ironically, is derived from a Greek word meaning "inextinguishable." With asbestos-related symptoms taking 30 or more years to manifest, ensuing litigation, which has already bankrupted a number of corporations, is expected to last until mid-century. More than 700,000 claims are reportedly pending against 8,000-plus defendants, and estimated costs exceed $250 billion.

"Many plaintiffs' attorneys and consultants say the pace of mass tort and class-action filings is waning, in part because court decisions have made it harder to secure class-action status and easier to remove state cases to federal courts, whose life-tenured judges are less beholden to interest groups and campaign contributions," according to an article in the September 28, 2009, issue of *Crain's Chicago Business*. But recent developments could apparently re-ignite demand, including the "beefing-up of the Food and Drug Administration and Consumer Product Safety Commission and rulings by the U.S. Supreme Court expanding the jurisdiction of state attorneys general."

Worrisome post-asbestos areas for defense attorneys and their corporate clients evidently include (i) environmental contamination inside the home and in commonly used household products, (ii) nutritional supplements and artificial sweeteners, (iii) children's products and pharmaceuticals, and (iv) climate change with its potential for allegedly causing such havoc as disappearing glacier islands, rising sea levels or altered agricultural seasons.

ALL THINGS LEGISLATIVE AND REGULATORY

CPSC Fines Target $600,000 over Lead-Tainted Toys

While denying liability, Target Corp. has reportedly agreed to pay a $600,000 penalty to settle claims by the Consumer Product Safety Commission (CPSC) that the retailer imported and sold toys it knew contained lead levels well above the legal limit. The company issued a joint recall of the toys with the commission before the settlement. The toys include Kool Toyz®, Anima Bamboo Collection Games®, Happy Giddy Gardening Tools®, and Sunny Patch Chairs®.

CPSC Chair Inez Tenenbaum was quoted as saying that the recall was among "many that helped spur action last year to impose even stricter limits on lead paint in toys. This penalty should remind importers and retailers that they have always had the same obligation to meet the strict lead limits as the manufacturers."

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Toy manufacturers involved in recent recalls include Mattel Inc. and its subsidiary Fisher-Price Inc., which allegedly sold more than 95 types of children's products that contained more than 0.06 percent lead, the current federal limit. The companies were fined a $2.3 million civil penalty, said to be the highest ever levied by the CPSC for a product violation.

Mattel officials said the company addressed the compliance issue promptly. In December 2008, Mattel and Fisher Price reportedly entered a consent agreement with 39 states that called for tougher limits on lead in toys and provided $12 million to be divided among those states. In addition, Mattel agreed to keep at least four years of source record and screening tests for its subcontractors. *See Product Liability Law 360,* October 1, 2009.

LEGAL LITERATURE REVIEW

Scholarly Articles on *Twombly* and *Iqbal* Pleading Standards Proliferate

Edward Hartnett, "Taming *Twombly*," *University of Pennsylvania Law Review* (forthcoming 2009)

Robert Bone, "Plausibility Pleading Revisited and Revised: A Comment on *Ashcroft v. Iqbal*," *Notre Dame Law Review*, (Vol. 85, No. 4, 2010)

A number of articles are beginning to appear in the legal literature analyzing and critiquing the U.S. Supreme Court's recent rulings affecting the "notice pleading" standards of the Federal Rules of Civil Procedure. The articles by Seton Hall University School of Law Professor Edward Hartnett and Boston University School of Law Professor Robert Bone are just two examples. Hartnett suggests that *Twombly* and *Iqbal* should not be viewed as departures from prior case law and contends that they can be "tamed" by understanding their "plausibility standard" as (i) equivalent to the traditional insistence that a factual inference be reasonable; (ii) "an invitation to present information and argument designed to dislodge a judge's baseline assumptions about what is natural"; and (iii) not prohibiting discovery while a *Twombly/Iqbal* motion to dismiss is pending.

Bone views the cases as marking a significant change in pleading practice and calls *Iqbal's* two-pronged analysis "incoherent." According to Bone, analyzing the sufficiency of a pleading's factual allegations involves a single prong: "the judge must determine whether the complaint, interpreted as a coherent whole, plausibly supports each element of the legal claim." He also argues that *Iqbal* imposes a more aggressive screening approach than *Twombly* "that aims to screen weak as well as meritless suits." Contending that the U.S. Supreme Court "is simply not the right institution" to be making decisions about pleading standards, he calls for the Advisory Committee on Civil Rules "to take action on the issue."

Richard Cupp, "Preemption's Rise (and Bit of a Fall) as Products Liability Reform: *Wyeth, Riegel, Altria,* and the *Restatement (Third)*'s Prescription Product Design Defect Standard," *Brooklyn Law Review* (Vol. 74, No. 3, 2009)

Pepperdine University School of Law Professor Richard Culp explores significant preemption rulings over the past 20 years in this article. He analyzes how they may have effected the same contraction in liability for prescription product defects that the drafters of the *Restatement (Third) of Torts: Products Liability* seemed to champion in section 6(c). This section provides that "with regard to design defect claims, a prescription product manufacturer may not be liable unless no reasonable health care provider would have prescribed the product to any class of persons." Culp early characterized the *Restatement* approach as a "near-immunity" standard, and others in the academic community apparently agreed that it was "too pro-manufacturer" and inconsistent with case law.

He concludes, "Maybe section 6(c) missed the song's words but heard its tune when developing a standard with a tone of deference to federal regulation in prescription product design defect claims that is in line with courts' evolution, even though the section's explicit standard is not. Section 6(c) has increasingly seemed to capture the courts' general pulse on prescription design defects despite failing to attain traction with its doctrinal analysis."

Joni Hersch & W. Kip Viscusi, "Saving Lives Through Punitive Damages," *Southern California Law Review* (Vol. 83, No. 2, 2010)

Vanderbilt University Professors of Law and Economics Joni Hersch and W. Kip Viscusi propose a methodology to calculate punitive damages in bodily injury cases "that will enable punitive damages to fulfill their proper deterrence role." Their methodology is based on "the value of statistical life," which "measures the tradeoff between fatality risk and money for small changes in risk." Critical of the U.S. Supreme Court's ratio of compensatory to punitive damages approach, the authors contend that total damages amount should be the focus. They would apply the following formula in wrongful death cases: "the total value of punitive damages plus compensatory damages should equal the value of statistical life."

LAW BLOG ROUNDUP

Overcoming New Plausible Fact-Pleading Standard Could Be Tricky

"[T]hose pro-plaintiff groups seeking to overturn *Twombly* and *Iqbal* would be well advised to proceed simultaneously on both tracks. And to do so quickly." Cornell Law Professor Michael Dorf, explaining that Congress may be reluctant to overturn the U.S. Supreme Court rulings in *Ashcroft v. Iqbal* and *Bell Atlantic v. Twombly*, "which together made it easier for federal district courts to dismiss civil lawsuits." And if it fails to do so, "that failure will surely be invoked in the Rules Advisory process as a reason for no action." Going to the rules committee first could avoid "this pitfall but risks squandering precious time," according to Dorf who is a critic of these decisions.

Dorf on Law, September 22, 2009.

Historic Shift in Civil Justice?

"The unique focus of the book will be, first, to argue that civil justice no longer rests on historic foundations, such as, fairness and impartiality, but has shifted to power and influence. Reform in the law, both legislative and judicial, is today driven by financial interests, not precedent and not a neutral desire for fairness or to 'make it better.'" Emory University School of Law Professor Frank Vandall, guest-blogging about his forthcoming book.

Torts Prof Blog, October 5, 2009.

THE FINAL WORD

Cornell Law School Professor Challenges U.S. Chamber of Commerce Tort Reform Data

Theodore Eisenberg claims, in an article to be published in Cornell's *Journal of Empirical Legal Studies*, that the U.S. Chamber of Commerce improperly ranks states according to the purported favorability of their "lawsuit climate." According to Eisenberg, (i) the Chamber's survey "incorrectly characterizes state law"; (ii) "respondents provide less than 10% correct answers for objectively verifiable responses"; (iii) the survey "is internally inconsistent; a state threatened with judicial hellhole status ranked first in the survey while venues not on the list ranked lower"; and (iv) "[t]he absence of correlation between survey rankings and observable activity suggests that other factors drive the rankings." Among other matters, Eisenberg calls for corporate interests to spend less time and money seeking tort reform and more on improving their products.

UPCOMING CONFERENCES AND SEMINARS

American Conference Institute, Chicago, Illinois – October 26-27, 2009 – "Food-Borne Illness Litigation, Advance Strategies for Assessing, Managing & Defending Food Contamination Claims." Shook, Hardy & Bacon Pharmaceutical & Medical Device Litigation Partner Madeleine McDonough, originally scheduled to participate in a discussion on "Global Food Safety: Factoring in New Threats Associated with Foreign Food Product Imports," will be replaced by Shook, Hardy & Bacon Pharmaceutical & Medical Device Litigation Partner Paul La Scala.

Kansas Law Review Offers Symposium on Aggregate Litigation

The Kansas Law Review is offering a symposium titled "Aggregate Justice: Perspectives Ten Years After *Amchem*" on October 30, 2009, at the University of Kansas School of Law, Lawrence, Kansas. Featured speakers well-known in the field of aggregate litigation include Tom Willlging, senior researcher at the Federal Justice Center, and Linda Mullenix, who holds the Rita and Morris Atlas Chair in Advocacy at the University of Texas School of Law.

The symposium will use *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), as a springboard to explore present and future aggregate litigation. No reservations are required to attend the free symposium.

American Conference Institute, New York, New York – December 8-10, 2009 – "14th Annual Drug and Medical Device Litigation Conference." Co-sponsored by Shook, Hardy & Bacon, this conference features a distinguished faculty from the bench, bar and industry offering practical insights and strategies for successfully meeting the litigation challenges facing the drug and medical device industry.

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Shook, Hardy & Bacon Pharmaceutical and Medical Device Litigation Partner Michelle Mangrum will serve on a panel discussing "Successfully Asserting a Preemption Defense and Managing Industry/FDA Relationships in a Post-*Levine* and Post-*Riegel* World." Shook, Hardy & Bacon Pharmaceutical and Medical Device Litigation Partner Eric Anielak joins a panel addressing "Procedural Strategies for Winning Cases." ■

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

San Francisco, California
+1-415-544-1900

Tampa, Florida
+1-813-202-7100

Washington, D.C.
+1-202-783-8400

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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).