Shook, Hardy & Bacon L.L.P.

FEBRUARY 17, 2011

PRODUCT LIABILITY LITIGATION REPORT

CONTENTS

SUA SPONTE DISMISSAL OF COMPLAINT IN BRAZILIAN AIR-CRASH DISASTER OVERTURNED

While upholding a lower court's dismissal, on inconvenient forum grounds, of a number of complaints arising out of an airline disaster that killed more than 200 people in Brazil, the Eleventh Circuit Court of Appeals has determined that the court erred in dismissing, on its own motion, the complaint filed by a Brazilian mother who had not yet served a summons and her complaint on the defendant manufacturers. ***Tazoe v. Airbus S.A.S.*, Nos. 09-14847, 08-23434, 07-21941 (11th Cir., decided February 1, 2011)**.

According to the court, the matter raised an issue of first impression, that is, whether a court can *sua sponte* dismiss, for reasons of an inconvenient forum, a complaint that has not been served and has not been subject to a motion to dismiss. The mother filed her complaint six months after the manufacturers moved to dismiss the associated complaints of many of the family members of others killed in the accident. The lower court consolidated her complaint with the others and then dismissed them all after determining that Brazil would provide a more convenient forum, given the location of witnesses and evidence.

The appeals court acknowledged that the Brazilian mother's complaint may not ultimately survive an inconvenient forum challenge, but ruled that she was denied due process because her complaint was dismissed before it had been served and before the manufacturers had moved to dismiss it. She had no notice of the court's intent to dismiss the complaint and no opportunity to respond. The court remanded her case for further proceedings.

INSURANCE COVERAGE DISPUTE DISMISSED, ONE CENT SHORT OF JURISDICTIONAL MINIMUM

The Sixth Circuit Court of Appeals has vacated a lower court's dismissal of claims that were improperly removed from state court because the potential damages at issue were "one penny short of our jurisdictional minimum." ***Freeland v. Liberty Mut. Fire Ins. Co.*, No. 10-3038 (6th Cir., decided February 4, 2011)**.

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

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

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

or

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

The matter involved insurance coverage for an uninsured motorist who was killed after running a red light in a minivan and striking a police cruiser at an intersection. The insurance company offered the minivan's owners, who were the decedent's parents, the $25,000 limit of their uninsured motorist coverage. The owners sued the insurer in state court, alleging that their uninsured motorist coverage violated state law because the form they signed lacked certain required disclosures. They claimed that their election of this coverage was invalid and that, by operation of law, they had acquired uninsured motorist coverage in an amount equal to their policy's bodily injury coverage, or $100,000 per accident.

The insurer removed the case to federal court, alleging diversity jurisdiction. According to the insurer, the amount in controversy was $100,000, and the parties were completely diverse. Neither party challenged the district court's jurisdiction, and that court granted the insurer's motion for summary judgment. According to the appeals court, the amount in controversy is not $100,000, but is instead "$75,000 exactly—one penny short of the jurisdictional bar that Congress has set." Because the amount in controversy "is measured by the value of the object of the litigation," and is "not necessarily the money judgment sought or recovered, but rather the value of the consequences which may result from the litigation," the court determined that the money consequences that would result from a victory for the minivan owners is the difference between $100,000 and $25,000—or $75,000.

Under 28 U.S.C. § 1332, federal courts have jurisdiction when "the matter in controversy" must "exceed[] the sum or value of $75,000." The court opined that while "[t]he penny is easily the most neglected piece of U.S. currency [tending] to sit at the bottom of change jars or vanish into the cracks between couch cushions," in this case, "the penny gets a rare moment in the spotlight." Without addressing the claim's merits, the appeals court vacated the district court's summary judgment ruling and remanded with instructions to return it to state court.

FEDERAL CIRCUIT ESTABLISHES ATTORNEY-FEE STANDARD IN VACCINE CASES

The Federal Circuit Court of Appeals has determined that calculating the "reasonable hourly rate" for attorneys handling claims under the federal vaccine compensation program does not require the courts to accept an enhanced rate as prima facie evidence of the "going rate" for Vaccine Act attorneys. ***Rodriguez v. Sec'y of Health & Human Servs.*, No. 2010-5093 (Fed. Cir., decided February 9, 2011)**. The enhanced rate, referred to as the Laffey Matrix, is "a schedule of rates maintained by the Department of Justice to compensate attorneys prevailing in 'complex federal litigation.'"

The father of an infant who purportedly died as a result of receiving a vaccination filed a petition for compensation in 2006, and the parties negotiated a settlement in 2007. Initial applications for attorney's fees were amended and supplemented to include a total request of more than $94,000 for a solo practitioner in New York City.

A special master significantly reduced the hourly rate, and, on appeal, the petitioner argued that attorney's fees under the Vaccine Act should be determined using the Laffey Matrix. The court noted how Vaccine Act cases differ from those in which the matrix is applied, emphasizing that Vaccine Act proceedings involve no discovery disputes, do not apply the rules of evidence and are tried informally. As well, claimants do not have to prevail to secure an award of fees.

According to the court, "it is appropriate to take account of the fact that Vaccine Act attorneys are practically assured of compensation in *every* case, regardless of whether they win or lose and of the skill with which they have presented their clients' cases.... The attorneys' fees provisions of the Vaccine Act 'were not designed as a form of economic relief to improve the financial lot of lawyers.'" The court affirmed the special master's calculation.

$1 MILLION IN COSTS AND FEES ASSESSED AS SANCTION FOR SPOLIATION

A federal magistrate judge in Maryland has determined that the plaintiffs in a case involving alleged patent and copyright violations incurred $1.05 million in reasonable costs and attorney's fees for discovery "that would not have been undertaken but for Defendants' spoliation, as well as the briefings and hearings regarding Plaintiff's Motion for Sanctions." *Victor Stanley, Inc. v. Creative Pipe, Inc.*, No. 06-2662 (U.S. Dist. Ct., D. Md., order entered January 24, 2011). Additional information about the case appears in the **September 30, 2010, Issue** of this *Report*.

The court declined the defendants' request to limit the fees to activity occurring after the spoliation was discovered, finding that "the effects of spoliation are not limited to a party's efforts to discover and to prove the spoliation and its scope. Rather, the willful loss or destruction of relevant evidence taints the entire discovery and motions practice." The court had already found that the spoliation began with the onset of litigation, thus, it found that "Defendants' misconduct affected the entire discovery progress since the commencement of this case."

According to the court, the sanctions were imposed to punish the defendants' contempt in failing to comply with multiple court orders compelling the preservation and production of electronically stored information in response to discovery requests, as well as the defendants' "overall behavior" including spoliation of evidence and the failure of the defendant company's president "to tell the truth under oath during court hearings regarding the spoliation." The court characterized the contempt as conduct that "unnecessarily but voraciously consumed the Court's time and resources, and assuredly burdened Plaintiff and its counsel to an even greater extent."

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COURT DENIES CLASS CERTIFICATION IN SUIT AGAINST CHILDREN'S CLOTHING MAKER

A federal court in California has denied the plaintiffs' motion for class certification in litigation alleging that companies making and selling clothing for infants and children knew that the ink used on new tagless labels could cause adverse skin reactions but failed to inform the public of that risk. *Webb v. Carter's, Inc.*, No. 08-7367 (U.S. Dist. Ct., C.D. Cal., order entered February 2, 2011). According to the court, the members of the proposed class do not have Article III standing. So ruling, it rejected the plaintiffs' argument that all members of the proposed classes, including those whose children did not experience an adverse reaction, had suffered an injury in that they "paid good money for garments that were defective and not fit for market."

Noting that "the overwhelming majority of children who wore the garments suffered no adverse effects and Plaintiffs have failed to show that the levels of chemicals in the clothes exceeded standards established by law," the court refused to recognize a "paid good money" injury theory to support standing. The court said in this regard, "[F]or babies without sensitive skin, the families have enjoyed the full benefit of the clothes and do not face a constant risk that the defect might cause some harm." The court also discussed the requirements of Federal Rule of Civil Procedure 23 and determined how the plaintiffs failed to meet its elements as to predominance of common issues and the superiority of the class action device to adjudicate the claims.

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As to the latter requirement, the court noted, "a class action is not superior because Carter's is already offering the very relief that Plaintiffs seek: it allows consumers to obtain refunds for the garments, even without a receipt, and reimburses consumers for out-of-pocket medical costs for treating skin irritation resulting from the tagless labels. As noted, Carter's will pay up to $250 for medical expenses without requiring any documentation."

ILLINOIS HIGH COURT RULES COMPUTER MAKER CANNOT COMPEL ARBITRATION

The Supreme Court of Illinois has determined that an arbitration agreement that designated an arbitral forum which no longer accepts consumer arbitrations is not valid. ***Carr v. Gateway, Inc.*, No. 109485 (Ill., decided February 3, 2011)**. The issue arose in a case involving allegations that a computer manufacturer misrepresented the speed of its product's processor. The company sought to dismiss the suit and compel arbitration according to the terms of the sales contract, but a trial court and intermediate appellate court ruled that no valid arbitration agreement bound the parties. The state supreme court accepted the case to decide whether the Federal Arbitration Act applies to permit the trial court to appoint a substitute arbitrator.

The trial court refused to compel arbitration because it found that the agreement with the arbitration clause was not part of the sales contract, and if it were, the clause could not be enforced because it was unconscionable. The intermediate appellate court refused to overturn the lower court's ruling because, while the case was pending, the designated arbitral forum stopped accepting consumer arbitrations. According to the intermediate appellate court, assuming there was a valid arbitral agreement, the designation was an integral part of the arbitration clause and the federal law could not be used to reform the arbitration provision.

The supreme court agreed. Noting that the arbitration agreement contains no provision for naming a substitute arbitral service or arbitrator, the court also observed that the courts have split over whether the federal arbitration law allows the trial court to name a replacement. Because the court found that the arbitration clause, which imposed penalties on a party filing a claim with an arbitral service other than the one designated, was "so central to the agreement to arbitrate," that it was paramount, the unavailability of the designated arbitrator "brought the agreement to an end." Thus, the court ruled that "section 5 of the Arbitration Act may not be utilized to select a substitute arbitrator."

BABYSITTER, INFANT-SEAT RETAILER AND MANUFACTURER SUED IN CHILD'S DEATH

The administrator of the estate of a deceased infant has filed a lawsuit against the maker and seller of a purportedly defective infant seat, claiming that it caused the child's death while she was in the care of a babysitter, who was also named as a defendant. *Goldstein v. Graco Children's Prods., Inc.*, No. 1100142P-03 (Newport News Cir. Ct., Virginia, filed February 1, 2011). Alleging negligence, breach of warranty, misrepresentation, and willful wanton or gross negligence, the plaintiff seeks $500 million in compensatory damages and $500 million in punitive damages, costs, attorney's fees, and interest.

ALL THINGS LEGISLATIVE AND REGULATORY

CPSC Extends Stay of Enforcement for Testing, Certification of Lead Content in Children's Products

The Consumer Product Safety Commission (CPSC) has **announced** that it has extended its stay of enforcement for testing and certification of total lead content in children's products until the end of 2011. Responding to requests from businesses for more time to test the lead content of component parts, CPSC's action represents the third time that the agency has extended the stay, which does not apply to metal components of children's jewelry.

"Starting on December 31, 2011, manufacturers and importers of children's products that are subject to the lead content limit must have the appropriate certificates that indicate that their products have been tested by a CPSC-approved third party laboratory, in order for their products to be sold in the United States," according to a CPSC news release.

Commissioner Anne Northup said that extending the stay for an additional 11 months "is an important step toward fulfilling the [c]ommission's commitment to allow component parts testing and certification to become a viable compliance alternative for manufacturers *before* third- party testing and certification for lead content in most children's products becomes mandatory." Noting that "third-party testing imposes a financial burden that many manufacturers, and particularly small ones, may never be able to bear," Northup said "it is essential that the stay not be lifted before there is at least an opportunity for certified component parts to form the basis for the final product certifications of small manufacturers."

Despite the stay, CPSC noted that manufacturers, importers and retailers of children's products must continue to comply with the federal restrictions for total lead content of no more than 300 parts per million (ppm). "The lead content limit will drop to 100 ppm on August 14, 2011, unless CPSC determines that it is not technologically feasible to establish this lower limit for a product or product category" the commission said. "The stay of enforcement does not apply to the 90 ppm limit on lead in paint and surface coatings or to the current 300 ppm limit on lead content in metal components of children's jewelry. Certification based on third party testing is currently required for children's products in these categories." *See CPSC Press Release*, February 2, 2011; *Federal Register*, February 8, 2011.

CPSC Issues Stay of Enforcement for Third-Party Testing of Youth All-Terrain Vehicles

The Consumer Product Safety Commission (CPSC) has issued a **stay of enforcement** regarding third-body testing and certification of all-terrain vehicles (ATVs) for children ages 12 and younger. Effective February 1, 2011, the stay will remain, subject to conditions, until November 27.

Testing and certification to assess conformity with safety standards is required under the Consumer Product Safety Improvement Act of 2008, with CPSC responsible for implementing the law. The commission received more than 400 comments from industry representatives and consumers asking for the stay because of a lack of accredited third-party testing labs available by the previous January 25, 2011, deadline. Noting that "there are still no accredited third party testing bodies for youth ATVS at this time," CPSC said that commission staff would do compliance testing. "If there is evidence of noncompliance with the requirements of the

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mandatory standard by the manufacturers that have action plans approved by the [c]ommission, we will take appropriate enforcement action," CPSC said. *See Federal Register,* February 1, 2011.

EPA Extends Comment Deadline on Antimicrobial Chemical

EPA has announced a 60-day **extension** period for public comments on triclosan, an antimicrobial substance used in pesticide products, hand sanitizers, toothpaste, and other consumer products. Responding to an extension request by the consumer watchdogs Beyond Pesticides and Food & Water Watch, EPA now requests comments by April 8, 2011.

Claiming that the "pervasive and widespread use" of triclosan poses significant risks to human health and the environment, the watchdog groups have petitioned EPA to "cancel and suspend the registration of pesticides containing triclosan" under several federal statutes. The petitioners also claim that EPA "failed to address the impacts posed by triclosan's degradation products on human health and the environment, failed to conduct separate assessments for triclosan residues in contaminated drinking water and food, and is complacent in seriously addressing concerns related to antibacterial resistance and endocrine disruption." *See Federal Register*, February 2, 2011.

Nine States Establish Clearinghouse to Reduce Toxic Chemicals in Products

Nine states have launched an umbrella organization that aims to reduce the use of toxic chemicals in consumer products. The Interstate Chemicals Clearinghouse (IC2) includes California, Connecticut, Massachusetts, Michigan, Minnesota, New Jersey, New York, Oregon, and Washington.

Sponsored by the Northeast Waste Management Officials' Association, IC2's goals are to (i) "avoid duplication and enhance efficiency and effectiveness of state, local, and tribal initiatives on chemicals through collaboration and coordination"; (ii) "build agency capacity to identify and promote safer chemicals and products"; and (iii) "ensure that state, local, and tribal agencies, businesses, and the public have ready access to high quality and authoritative chemicals data, information, and assessment methods," according to an IC2 press release.

"For several years many state and local environmental agencies have been working aggressively to reduce toxic chemicals in consumer products as part of a larger effort to reduce toxics in the environment and protect human health," said Ted Sturdevant, director of the Washington Department of Ecology. "In the absence of an effective national system for securing and sharing data on toxic chemicals, states are working together to share information and make the most of limited resources." *See IC2 Press Release,* January 26, 2011.

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South Carolina House Lawmakers Approve Lawsuit Abuse Reform Bill

South Carolina's House of Representatives has passed a tort reform bill (**H. 3375**) intended to protect businesses from purported unfair lawsuit abuse. Co-sponsored by House Speaker Bobby Harrell (R-Charleston), the bill would cap punitive damages at $350,000, or three times the amount of actual damages awarded, whichever is greater.

The cap, however, would not apply to cases in which the defendant (i) "pursued an intentional course of conduct that the defendant knew would cause injury or damage," (ii) "pleads guilty to or is convicted of a felony arising out of the same act or conduct complained of by the plaintiff," or (iii) "acted or failed to act while under the influence of alcohol, drugs, other than lawfully prescribed drugs." The bill also caps, on a sliding scale, the fees that private lawyers can receive if they are hired by the state's attorney general or prosecutors.

"Businesses in South Carolina—especially small businesses—are too often one frivolous lawsuit away from being put out of business," Harrell said. "Our goal with this tort reform bill is to bring fair balance to our system, lower the cost of doing business and make our state more competitive while still protecting our citizens from wrongdoing."

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Noting that South Carolina's House passed a tort reform bill last year, "but the legislative session ended before it became law," Harrell said that the House has acted quickly this year "on this key economic issue to give this measure plenty of time to become law this session." A state Senate subcommittee is reportedly considering a similar bill. *See Representative Bobby Harrell Press Release*, *Product Liability Law 360,* February 9, 2011.

LEGAL LITERATURE REVIEW

Matt Keenan & Julia Walker, "When to Push for a Determination Under *Riegel*," *Product Liability Law 360*, February 7, 2011

Shook, Hardy & Bacon Pharmaceutical & Medical Device Litigation Partner **Matt Keenan** and Associate **Julia Walker** address the strategic considerations that medical device manufacturers should consider in deciding when to raise as a defense the U.S. Supreme Court's ruling in *Riegel v. Medtronic, Inc.*, which clearly established the preemptive effect of federal law over common-law safety and effectiveness claims. While noting that taking the earliest opportunity to raise the defense is generally the default option, the authors suggest that some finesse may be required before state judges who dislike motions to dismiss. The article also observes that at the very least, defense counsel may have the opportunity to seek bifurcated discovery, "so that preemption can be addressed first."

Lori McGroder, "Nano-Cosmetics: Beyond Skin Deep," *Law 360,* February 15, 2011

Shook, Hardy & Bacon Pharmaceutical & Medical Device Litigation Partner **Lori McGroder** has authored an article discussing the most recent scientific research and regulatory initiatives in the United States and European Union to regulate the safety of products incorporating nanoscale materials. McGroder cautions that while consumers are not generally aware that nanoparticles are used in cosmetics and that litigation involving cosmetics employing this technology has not yet been reported, manufacturers should not take a "wait and see" approach, but instead should stay informed and comply with applicable standards.

Shay Lavie, "Reverse Sampling: Holding Lotteries to Allocate the Proceeds of Small-Claims Class Actions," *George Washington Law Review* (forthcoming 2011)

Harvard Law School SJD Candidate Shay Lavie proposes that courts consider using a random selection and lottery process in small-claims class actions to distribute the proceeds of any award or settlement. The author examines how the per-claim administrative costs involved in locating and notifying potential class claimants can reduce the smallest recoveries to nearly nothing and still leave significant unclaimed sums that require distribution. *Cy pres* distribution to charities, escheat to the government and reversion to the defendant are all dissatisfactory for a number of reasons, and Lavie persuasively demonstrates how "reverse sampling" is superior to these devices. Contending that the method is available under existing equitable powers, Lavie also shows how the use of lotteries "is not unknown to the judicial system."

LAW BLOG ROUNDUP

Removal Deadline Fractures Fourth Circuit

"[W]hat later-served defendants are actually losing under the Fourth Circuit approach is 'an opportunity to persuade earlier-served defendants to join a notice of removal.'" Seton Hall University School of Law Professor Adam Steinman, blogging about a recent Fourth Circuit Court of Appeals 7-5 ruling on the application of federal removal requirements when defendants are served on different days. Under the majority's interpretation of 28 U.S.C. § 1446(b), the notice of removal must be served within the first-served defendant's 30-day window, and later-served defendants have 30 days from the date they were served to join the notice of removal. Other circuits and the dissenting judges would have applied the Last-Served Defendant Rule, under which each defendant has 30 days to file a notice of removal.

Civil Procedure & Federal Courts Blog, February 8, 2011.

Bipartisan Lawmakers Launch Civil Justice Caucus

"Conservative lawmakers are organizing in a more formal way to promote an array of changes to the civil justice system, including proposals related to medical malpractice reform, venue and federal pleading standards." *BLT* Capitol Hill Reporter David Ingram, discussing the new congressional caucus that critics say is less concerned about addressing "frivolous litigation" than protecting corporations from liability. A Public Citizen spokesperson said, "I'm not sure they're interested in civil justice. I think they may just be interested in shielding corporations from the only place they can be held accountable, the courts." The president of the U.S. Chamber of Commerce's Institute for Legal Reform supported the caucus, calling it a "welcome new voice" on Capitol Hill.

The Blog of LegalTimes, February 10, 2011.

THE FINAL WORD

DOJ Asked to Indict Peanut Company Executive for *Salmonella* Outbreak

According to a news source, the families of those who died or became ill from consuming *Salmonella*-tainted peanut products scheduled a February 11, 2011, press conference to call for the Department of Justice (DOJ) to bring criminal charges against the man who headed the bankrupt Peanut Corp. of America, to which the contamination was allegedly traced. More than 700 people were said to have experienced ill effects in 2008-2009 from the outbreak and at least nine died. Former Peanut Corp. CEO Stewart Parnell invoked the Fifth Amendment when called to testify before Congress, and, despite a two-year investigation by the U.S. attorney's office, no charges have yet been filed.

The press conference coincided with a food safety seminar at the American University Washington College of Law at which some of the family members were scheduled to speak along with plaintiffs' lawyer William Marler, who has represented a number of those affected by the tainted peanut butter. Oregon resident Karen Andrew, who claims that the ill effects she experienced lingered for a year, was quoted as saying, "Something should be done. [Parnell] hasn't paid a price." Parnell's lawyer said he and Parnell, who now works as an industry consultant, hoped the government would agree that "there's no basis for prosecution." *See Oregon Live*, February 10, 2011.

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UPCOMING CONFERENCES AND SEMINARS

GMA, Scottsdale, Arizona – February 22-24, 2011 – "2011 Food Claims & Litigation Conference: Emerging Issues in Food-Related Litigation." Shook, Hardy & Bacon Agribusiness & Food Safety Partner Paul LaScala will participate in a panel addressing "Standards and Expectations of Corporate Social Responsibility: The Retailer's Perspective." Business Litigation Partner Jim Eiszner and Global Product Liability Partner Kevin Underhill will share a podium to discuss "Labels Certainly Serve Some Purpose—But What Legal Effect Do They Have?" Shook, Hardy & Bacon is a conference co-sponsor.

KCMBA, Kansas City, Missouri – March 11, 2011 – "Civil Jury Trial Demonstration." Shook, Hardy & Bacon Tort Partner Michael Kleffner will represent the defendant in a session on "Direct and Cross-Examination of Plaintiff's Non-Expert Witness" during this CLE program co-sponsored by the Young Lawyers Section of the Kansas City Metropolitan Bar Association and the UMKC School of Law. ■

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

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).