Shook, Hardy & Bacon L.L.P.

JUNE 23, 2011

PRODUCT LIABILITY LITIGATION REPORT

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COURT REJECTS PLAINTIFFS' EFFORT TO DEFEAT FOREIGN JURISDICTION IN AIRLINE CRASH SUIT

A federal court in California has, for a second time, dismissed on *forum non conveniens* grounds the claims of plaintiffs seeking to impose liability for the crash of an Air France flight. *In re: Air Crash over the Mid-Atlantic on June 1, 2009*, No. 10-02144 (U.S. Dist. Ct., N.D. Cal., decided June 15, 2011). In October 2010, the court ruled that France was an available alternative forum for resolution of the claims, which were filed by foreign plaintiffs against defendants from a number of countries, including France. Most of the same plaintiffs, non-French foreigners, re-filed the lawsuit, but omitted all of the French defendants. Seeking reconsideration of the court's prior order, the plaintiffs claimed that a French court would not exercise jurisdiction over a case involving non-French plaintiffs suing non-French defendants.

American component parts manufacturers sought to dismiss the re-filed suits on inconvenient forum grounds, arguing that "a party cannot purposefully defeat the availability of a foreign forum and then assert unavailability as a basis to defeat *forum non conveniens* dismissal" and that "a party subject to a *forum non conveniens* dismissal order (as Plaintiffs are) must litigate in the foreign forum in good faith and cannot contrive to defeat the foreign court's jurisdiction." The court agreed, noting that the plaintiffs "'purposefully opted' not to re-file their dismissed pleadings in France, instead choosing to re-file actions here designed to defeat *forum non conveniens* dismissal."

According to the court, the plaintiffs "cannot render France unavailable through unilateral jurisdiction pleading, at least where, as here (1) a fair reading of those pleadings and common sense shows that French entities are proper Defendants; (2) Plaintiffs already sued French parties and dropped them only after a *forum non conveniens* dismissal; and (3) the Court has not been presented with any new facts that developed after the original dismissal but before the filing of the new actions that plausibly provide a reason for why Plaintiffs removed the French Defendants, other than a desire to defeat the Court's original *forum non conveniens* Order and render France an unavailable forum for the new actions."

The plaintiffs also asked the court, should it rule against them, to impose additional conditions on the *forum non conveniens* dismissal, and the Brazilian plaintiffs asked the court to amend the original order to provide for dismissal of their claims to Brazil. The court refused both requests.

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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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FEDERAL APPEALS COURT REJECTS CHALLENGE TO FDA DELAY IN BPA RULEMAKING FOR LACK OF JURISDICTION

The D.C. Circuit Court of Appeals has determined that it lacks jurisdiction to hear the Natural Resources Defense Council's (NRDC's) request that the court order the Food and Drug Administration (FDA) to issue a final decision on NRDC's citizen petition asking the agency to prohibit the use of bisphenol A (BPA) in human food. ***In re: NRDC,* No. 10-1142 (D.C. Cir., decided June 17, 2011)**. The chemical is used in plastic and metal food containers as well as in thermal paper and carbonless copy paper and has been found in the urine of 95 percent of adults sampled in the United States.

According to the court, because NRDC could not show that jurisdiction over the citizen petition lies exclusively in the court of appeals or that all final FDA action on NRDC's petition would be directly and exclusively reviewable in the court of appeals, NRDC's request must be heard by a federal district court. Had NRDC submitted a "food additive" petition and submitted new data to amend or repeal a food additive regulation, the court of appeals would have had jurisdiction. According to the court, NRDC did not do so.

NRDC submitted a citizen petition to FDA in October 2008 asking the agency to "establish a regulation prohibiting the use of BPA … in human food and [to] revoke all regulations permitting the use of a food additive that results in BPA becoming a component of food." The petition sought a change in the regulations based on new data, citing studies showing that BPA leaches from baby bottles heated with water and that BPA exposure is associated with female and male reproductive toxicity, cancer and diseases such as diabetes, cardiovascular disease and obesity. FDA acknowledged receipt of the petition, and, in response to an NRDC query about it five months later, provided a tentative decision noting that a final decision was not possible because of the "limited availability of resources and other agency priorities." FDA made no other response to the petition, so NRDC asked the court in June 2010 to establish "an enforceable deadline" by which FDA must respond, either denying the petition or conducting a responsive rulemaking.

Because NRDC denominated its agency request as a citizen petition and did not apparently comply with the more rigorous food additive petition requirements, the court determined that the rules pertaining to court review of FDA action on food additive petitions did not apply.

TEXAS SUPREME COURT AGAIN REVERSES $3 MILLION VERDICT IN DEFECTIVE LIGHTER LITIGATION

The Texas Supreme Court has determined that the mother of a 6-year-old girl, who was severely injured when her 5-year-old brother set her dress on fire while playing with a BIC lighter, did not introduce sufficient evidence that a manufacturing defect caused the injury to support a jury verdict in her favor. ***BIC Pen Corp. v. Carter*, No.**

09-0039 (Tex., decided June 17, 2011). The ruling follows a previous decision finding that the design defect claims in the case were preempted by federal law. On remand, the court of appeals affirmed the verdict based on the jury's manufacturing defect findings.

In its second appeal, BIC argued that manufacturing defects are also preempted by federal law. The supreme court disagreed, but determined that the evidence did not show that the two force-related child safety features, which did not allegedly meet design parameters approved by the Consumer Product Safety Commission (CPSC), were overcome by the 5-year-old, who apparently had developmental issues that could have prevented him from overcoming the three cognitive-related safety features. The court also noted, "Even more important than the statistics referenced above is the fact that even a lighter that meets CPSC child-resistant specifications is not intended to be completely inoperable by children, whether they are under or over five years of age. The specifications contemplate that some children less than five years old will be able to operate a lighter certified as child resistant."

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PRELIMINARY APPROVAL EXTENDED TO SETTLEMENT OF DISPOSABLE DIAPER CLAIMS

A federal court in Ohio has reportedly given preliminary approval to a settlement reached in a multidistrict litigation (MDL) alleging that a new type of disposable diaper caused severe diaper rash in some children. *In re: Dry Max Pampers Litig.*, No. 10-00301 (U.S. Dist. Ct., S.D. Ohio, W. Div., order entered June 7, 2011). A final approval hearing has apparently been scheduled for September 28, 2011.

Under the proposed settlement, which would resolve 12 lawsuits consolidated in an MDL in June 2010, a nationwide class of consumers would be certified and Procter & Gamble would include on its product labels and Website information about treating diaper rash. The company has also agreed to fund "a pediatric resident training program at leading children's health centers in the area of skin health" at $150,000 per year for two years. The company would also sponsor a skin health program with the American Academy of Pediatrics in the amount of $50,000 per year for two years. The company has further agreed to reinstate its money-back guarantee program for consumers who purchased certain of its diaper brands. Class members will not be precluded from bringing individual lawsuits for personal injury or actual damages. Attorney's fees up to $2.73 million would be included in the settlement, and $1,000 per child will be awarded to representative plaintiffs, if the settlement is finally approved.

The Consumer Product Safety Commission was unable to link the use of Pampers diapers with Dry Max™ to diaper rash. Additional information about its findings appears in the September 16, 2010, issue of this *Report*. Still, the agency reportedly

received more than 4,500 incident reports related to the products between April and August 2010. *See BNA Product Safety & Liability Reporter*, June 20, 2011.

CLASS CERTIFICATION SOUGHT FOR CLAIMS THAT FREEZERS WERE NOT AS ENERGY-EFFICIENT AS ADVERTISED

A California resident, seeking to represent a nationwide class of consumers, has filed suit against the companies selling freezers that allegedly exceed legal limits on energy use in the United States. *Collins v. Haier Am. Trading, LLC*, No. 11-02911 (U.S. Dist. Ct., N.D. Cal., filed June 14, 2011). The complaint cites testing undertaken by *Consumer Reports* magazine showing that a freezer which defendants labeled as consuming no more than 279 kilowatt-hours per year actually consumed 442 kilowatt-hours per year.

The named plaintiff claims that his damages include the cost of the freezer he purchased and what he will pay in excess energy costs over its estimated 18-year life. He claims that the putative class will exceed 100 claimants and that total damages will exceed $5 million. Alleging unjust enrichment, intentional misrepresentation, fraudulent concealment/nondisclosure, negligent misrepresentation, violation of California's unfair competition and false advertising laws, and violation of the Consumer Legal Remedies Act, the plaintiff seeks declaratory relief; compensatory, treble and punitive damages; prejudgment interest; restitution; attorney's fees; and costs.

NON-PROFIT SEEKS TO ENJOIN SALE OF "ORGANIC" PERSONAL CARE PRODUCTS ALLEGEDLY VIOLATING STATE REQUIREMENTS

The Center for Environmental Health has filed a complaint for injunctive relief in a California state court against a number of companies that apparently sell personal care products as organic despite their failure to include at least 70 percent organic ingredients by weight as required under state law. *Ctr. for Envtl. Health v. Advantage Research Labs., Inc.*, No. n/a (Cal. Super. Ct., Alameda County, filed June 16, 2011). The complaint alleges that some of the products at issue, including hair conditioners, moisturizing lotions, facial cleansers, body washes, shampoos, and deodorants, contain no or few organic ingredients, while being prominently labeled as organic.

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Noting that more than 70 percent of U.S. households now use some organic products each year and that one of the fastest growing markets is for organic personal care products, the center contends that consumers are willing to pay more for these products and that the defendants have taken advantage of this segment of the market "by labeling the Products as organic when in fact such Products contain significant amounts of non-organic ingredients." Alleging violations of the California

Organic Products Act of 2003, the center seeks an order enjoining the defendants from violating the law, requiring the defendants to correct past violations and granting the non-profit reasonable attorney's fees and the costs of suit.

ALL THINGS LEGISLATIVE AND REGULATORY

CPSC Refuses to Delay Implementation of New Crib Rules for Manufacturers and Retailers

Voting 3-2, the Consumer Product Safety Commission (CPSC) has rejected a proposal to extend beyond the June 28, 2011, compliance deadline new federal rules applicable to crib manufacturers and retailers. The commission will, however, allow short-term crib-rental companies until December 28, 2012, to update their inventory to comply with the new mandatory standards for full-size and non-full-size baby cribs. Child-care facilities and places of public accommodation, such as hotels and motels, already have that extension.

Crib retailers concerned about non-complying inventory apparently sought an extension in letters to CPSC commissioners. But in statements supporting their June 16 vote refusing to grant the extension, CPSC Chair **Inez Tenenbaum**, and Commissioners **Thomas Moore** and **Robert Adler** revealed that other retailers had asked the commission to leave the compliance date alone. "They had gone out of their way, suffering great expense, to liquidate their non-compliant merchandise so they would have only compliant cribs in stock by the end of June," according to Adler. "These small retailers expressed great fear that if their competition were allowed to sell non-compliant merchandise after June 28, at what was sure to be a deep discount, it would put many of these small companies out of business."

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Approved December 15, 2010, CPSC's mandatory standards are designed to (i) "stop the manufacture and sale of dangerous, traditional drop-side cribs"; (ii) "make mattress supports stronger"; (iii) "improve slat strength"; (iv) "make crib hardware more durable"; and (v) "make safety testing more rigorous." *See CPSC News Release*, June 17, 2011.

FDA Announces Initiatives Offering Consumers More Information About Sunscreens

The Food and Drug Administration (FDA) has announced new rules and proposals to help consumers make more informed decisions about sunscreens. Intended to help reduce skin cancer and early skin-aging risks, the changes include a final rule, rulemaking proposals and draft industry guidance.

To strengthen labeling standards, the **final rule** prohibits sunscreen manufacturers from labeling their products with "broad spectrum" claims unless the products protect against both ultraviolet A (UVA) and ultraviolet B (UVB) sunlight. Effective June 18, 2012,

the rule will allow manufacturers to market "broad spectrum" sunscreens with SPF values of 15 or higher as products that "if used regularly, as directed, and in combination with other sun protection measures will help prevent sunburn, reduce the risk of skin cancer, and reduce the risk of early skin aging."

"Any product that is not broad spectrum, or that is broad spectrum but has an SPF between 2 and 14, will be required to have a warning stating that the product has not been shown to help prevent skin cancer or early skin aging," and can be labeled to help prevent sunburn only, according to FDA. Manufacturers with annual sales less than $25,000 will have two years to comply with the new regulations, which also prohibit claims that sunscreens are waterproof. Water-resistance label claims must describe how long the product will be effective while swimming or sweating.

FDA's **proposed rule** "would limit the maximum SPF value on sunscreen labels to '50+,'" due to insufficient data showing that products with higher values provide greater protection than products with SPF values at 50. The agency requests comments and data to support adding higher SPF values in the final rule by September 15, 2011.

FDA's advance notice of proposed rulemaking (**ANPR**) will "allow the public a period of time to submit requested data addressing the effectiveness and the safety of sunscreen sprays and to comment on possible directions and warnings for sprays that FDA may pursue in the future." Comments are requested by September 15.

The **draft guidance** for industry "outlines information to help sunscreen product manufacturers understand how to label and test their products in light of the new final rule and other regulatory initiatives," according to FDA. FDA requests comments by August 16, 2011. *See Federal Register,* June 17, 2011.

Tort Reforms Sweep Through Three States

The governors of South Carolina, Tennessee and Alabama have recently signed tort reform bills designed to benefit existing businesses and attract new ones to their respective states.

South Carolina Governor Nikki Haley (R) signed the "South Carolina Fairness in Justice Act of 2011" (**H. 3375**). Effective January 1, 2012, the bill includes limits on punitive damages modeled after Florida's cap; requires disclosure of insurance policy limits for personal auto policies in accident cases; mandates that circuit solicitors obtain the attorney general's approval before hiring outside counsel to file a civil action or filing a civil action; revises the statute of repose for construction cases; and caps appeal bonds at $25 million for businesses with 50 or more employees and gross revenue of more than $5 million, while imposing a $1 million limit for all other entities or individuals.

"Tort reform is a top priority to further protect our state's businesses from the threat of unjustified, debilitating lawsuits while preserving everyone's access to our legal system," said bill co-sponsor Representative Bobby Harrell (R-Charleston). *See S.C. Rep. Bobby Harrell Press Release,* June 1, 2011.

Tennessee Governor Bill Haslam (R) signed the "Tennessee Civil Justice Act" (**H.B. 2008/S.B. 1522**). The bill (i) "clarifies and defines the venue where a business can be sued"; (ii) "places a $750,000 cap on non-economic damages, except in instances of intentional misconduct, records destruction, or conduct under the influence of drugs or alcohol"; (iii) "raises the cap to $1 million on non-economic damages for catastrophic losses resulting in paraplegia, quadriplegia, amputation, substantial burns or wrongful death of a parent leaving minor children"; and (iv) "places a cap on damages of two times the compensatory damages or $500,000, whichever is greater, except in instances of intentional misconduct, records destruction, or conduct under the influence of drugs or alcohol," according to Haslam.

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"This tort reform legislation will help us attract and retain jobs by offering businesses more predictability and a way to quantify risk," Haslam said. *See Tenn. Gov. Bill Haslam Press Release,* June 16, 2011.

Alabama Governor Robert Bentley (R) signed into law five measures aimed at improving "the court system" in the state, according to Senator Cam Ward (R-Alabaster), a key tort reform player. Ward said that the "Alabama Small Business Protection Act" (**S.B. 184**) "will prohibit product liability actions against sellers if they are not the manufacturer and did not cause any defect in the product."

Other legislation (**S.B. 187**) "updates the standard for admissibility of expert testimony in certain civil cases and major criminal cases to reflect the standard used in the federal court system."

Another bill (**S.B. 207**) will lower post-judgment interest from 12 percent to 7.5 percent, the "current Southeast average." Another measure (**S.B. 212**) "will prohibit 'forum shopping' of wrongful death actions by requiring that a suit can be brought only in the county where the decedent could have filed suit." And another bill (**S.B. 59**) "lessens the statute of repose such that an architect, engineer or builder may not be sued if alleged damages occur over 7 years after their work is completed." *See Ala. Sen. Cam Ward Press Release,* June 9, 2011.

GAO Recommends Improvements to NHTSA Motor-Vehicle Recall Process

The Government Accountability Office (GAO) has issued a **report** titled "NHTSA Has Options to Improve the Safety Defect Recall Process" in response to congressional queries about the sufficiency of the National Highway Traffic Safety Administration's (NHTSA's) oversight authority and "whether vehicle owners are being effectively motivated to comply with recalls." While industry stakeholders are apparently

satisfied with the safety defect recall process, a few challenges apparently affect recall completion rates, "and thus, the number of defective vehicles that are removed from the road." Among other matters, GAO recommends modifications to notification letters, enhancements to and publicity for NHTSA's Website where all recalls are announced, better use of manufacturers' data, and additional authority from Congress to notify potential used car buyers about recalls.

New York City Bar Approves Third-Party Funding for Litigation

The New York City Bar Association has reportedly issued an opinion that would allow outside investors to fund litigation. To forestall any ethical issues, the opinion also apparently states that a lawyer should not allow the outside funder to control the case without client consent. Lawyers may also not disclose privileged information, which third-party funders may demand to assess case value, without client consent. According to a news source, the American Bar Association (ABA) is currently considering whether to adopt the practice. Plaintiffs' lawyers have evidently been calling for the ABA to support third-party funding, which the legal reform group of the U.S. Chamber of Commerce opposes. *See Thomson Reuters News & Insight*, June 20, 2011.

LEGAL LITERATURE REVIEW

Victor Schwartz & Christopher Appel, "Reshaping the Traditional Limits of Affirmative Duties Under the *Third Restatement of Torts*," *The John Marshall Law Review*, 2011

Shook, Hardy & Bacon Public Policy Attorneys Victor Schwartz and Christopher Appel discuss the American Law Institute's *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* in this article and warn that two key sections of Chapter 7, if adopted, could "invite courts down a new path of broad liability expansion." The article claims that these new sections depart from the "objective and neutral voice" of the Restatement projects and risk pushing "the traditional boundaries of affirmative duties into new and uncharted territory." In particular, Chapter 7's restatement of affirmative duties—while not implicating "the most sacrosanct and uniform rules"—could "dramatically alter where and how affirmative tort duties are recognized under state common law" as well as give judges "broad authority to circumvent precedent and create new duties in tort law."

According to the co-authors, civil defendants would be "at serious risk of substantial and unexpected liability in jurisdictions that choose to forsake the comparative consistency, predictability, and balance of the Second Restatement's approach to affirmative duties and adopt this part of the new Restatement."

According to the co-authors, civil defendants would be "at serious risk of substantial and unexpected liability in jurisdictions that choose to forsake the comparative consistency, predictability, and balance of the Second Restatement's approach to affirmative duties and adopt this part of the new Restatement." The article thus urges state high courts to reject these provisions and "maintain the common law's traditional balance and fairness."

Mark Behrens & Cary Silverman, "Punitive Damages in Asbestos Personal Injury Litigation: The Basis for Deferral Remains Sound," *Rutgers Journal of Law & Public Policy*, 2011

Co-authored by Shook, Hardy & Bacon Public Policy Attorneys **Mark Behrens** and **Cary Silverman**, this article examines the origin and public policy underlying the deferral practices in the federal asbestos multidistrict litigation docket (MDL 875), along with state court asbestos dockets in Philadelphia and New York City. The article also responds to some of the potential rationales for permitting punitive damages awards in asbestos cases, finding that they no longer serve a purpose because the exposures occurred long in the past, the economic players today are "quite different from those who made the risk decisions decades ago" and the "message of deterrence, both specific and general, has been heard loud and clear in asbestos cases." The article concludes that continuing to defer punitive damages claims and suspending the claims of the presently uninjured in asbestos cases will best preserve "the resources needed by future claimants with asbestos-related malignancies."

Robert Burns, "What Will We Lose If the Trial Vanishes?," *Northwestern Public Law Research Paper*, 2011

According to Northwestern University School of Law Professor Robert Burns, "[t]he trial seems to be the only part of the legal system that is shrinking. There were more statutes, more regulations, more case law, more cases, more lawyers, more judges and a higher percentage of GDP going to legal matters. And so it is shocking that even the absolute numbers of federal civil trials is decreasing, from about twelve thousand in 1985 to about 3200 in 2009." Answering the question "So what?," Burns contends that the vanishing trial "poses a major crisis for the legal profession today." Among other matters, the author claims that the death of the trial would deprive citizens of a forum where they can tell their own story in public and offer the evidence to make it effective, "[i]t would destroy a space where serious attention is paid to simple factual truth," and "it would transfer power to political and technical elites."

LAW BLOG ROUNDUP

Disbarment Order Leaves Chesley with Significant Amount of Fees

"The order includes a requirement to disgorge $7.6 million—which means Chesley will still have made $12.4 million from his unethical behavior. Nice work if you can get it." Manhattan Institute Center for Legal Policy's adjunct fellow Ted Frank, reporting that the Kentucky Bar disbarred plaintiff's lawyer Stanley Chesley for misconduct allegedly occurring during his representation of plaintiffs in litigation over the diet drug fen-phen.

PointofLaw, June 15, 2011.

U.S. Continues to Rank Low on Global Access to Civil Justice List

"[I]magine how excited we were when the World Justice Project released their 2011 Report found **here** and we weren't last anymore!" A Center for Justice & Democracy consumer advocate, blogging about the U.S. ranking in a report assessing the ability of various countries' citizens to access the civil justice system. Last year's report apparently ranked the United States last, but this year's report has moved it up a few notches because it has added other countries to the list, including Poland and Croatia, which evidently score worse on factors such as "People are aware of available remedies"; "People can access and afford legal advice and representation"; and "Civil justice is not subject to unreasonable delays."

ThePopTort, June 14, 2011.

Proposed Budget Would De-Fund CPSC Incident Reporting Database

"Consumer product safety risks would be concealed and influence peddling in government contracting would remain out of public view under the provisions of the fiscal year (FY) 2012 spending bill approved today by the House Financial Services and General Government appropriations subcommittee." Federal information policy analyst Gavin Baker, discussing proposed legislation that would (i) prohibit the Consumer Product Safety Commission (CPSC) from spending any money on its database where consumers can report product safety incidents and (ii) prohibit agencies from spending any money to implement an Obama administration executive order requiring potential federal contractors and vendors to disclose their political contributions as a condition of bidding on a federal contract.

OMB Watch, June 16, 2011.

THE FINAL WORD

Litigants Seek Millions from Attorneys Who Won Their Lawsuit by Allegedly Bribing Judge

The families of individuals who died in a helicopter crash have filed a lawsuit against the attorneys who successfully represented them, seeking to recover the fees paid out of the settlement as well as punitive and treble damages. *Sanchez v. Rosenthal & Watson, P.C.*, No. 11-001733 (Tex. Dist. Ct., Travis County, filed June 9, 2011). Citing federal investigations that apparently resulted in bribery indictments, the plaintiffs allege that the attorneys bribed the judge who presided over their case to secure favorable rulings. While the plaintiffs do not indicate how much they recovered, they do allege that the defendants were paid $5.2 million and took about $408,000 in costs from the final settlement.

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PRODUCT LIABILITY LITIGATION REPORT

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UPCOMING CONFERENCES AND SEMINARS

Strafford CLE Webinar – June 29, 2011 – "E-Discovery Strategies in FLSA and State Collective and Class Actions." Shook, Hardy & Bacon National Employment Litigation & Policy Partner William Martucci will serve on a panel that will address common electronic discovery challenges facing employers in wage-and-hour disputes litigated as collective and class actions. The distinguished faculty will help employment counsel with strategies to efficiently identify, preserve and produce relevant information. ■

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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).