Shook, Hardy & Bacon L.L.P.

OCTOBER 28, 2010

PRODUCT LIABILITY LITIGATION REPORT

CONTENTS

TEXAS SUPREME COURT UPENDS LAW LIMITING CERTAIN ASBESTOS CLAIMS

The Texas Supreme Court has determined that a law retroactively affecting the common-law liability of a defendant in a pending asbestos lawsuit is unconstitutional. *Robinson v. Crown Cork & Seal Co.*, No. 06-0714 (Tex., decided October 22, 2010). While the decision generated one dissenting and two concurring opinions, the majority had sufficient votes to establish a new test for determining whether retroactive legislation is valid under the constitution. The touchstone for the court's analysis is the constitution's protection of settled expectations and prevention of legislative power abuses.

The case involved the claims of a man who was occupationally exposed to asbestos for many years. He and his wife sued a number of defendants in 2002, alleging that he had contracted mesothelioma as a result of the exposure. He died several days after the trial court determined that defendant Crown Cork & Seal Co. could not be sued because of a tort reform measure that the state legislature adopted in 2003, while the lawsuit was pending. Referred to as Chapter 149, the law limits the asbestos liability of successor corporations "to the fair market value of the total gross assets of the transferor determined as of the time of the merger or consolidation," where the merger occurred before May 1968 and the successor did not continue in the asbestos business after the merger. The law expressly applied the provision to lawsuits pending when it was enacted.

According to the court, the legislative history for Chapter 149, a provision added on the House floor during debate, was sparse, but when it was before the Senate Committee on State Affairs, a legislator stated, "This, members, is the Crown Cork and Seal asbestos issue. What we have put in this bill is what I understand to be an agreed arrangement between all of the parties in this matter." In effect, the provision applied to Crown Cork & Seal only and to no other company in the state.

Crown Cork & Seal was a successor to the corporation that made some of the asbestos to which the plaintiff had been exposed. That corporation was acquired by a New York company, Crown's predecessor, for about $7 million in 1963. Crown's predecessor was reincorporated in Pennsylvania in 1989. Under the laws of New York and Pennsylvania, successor corporations assume their predecessor's liabilities, and, thus, in the absence of Chapter 149, Crown Cork & Seal could be held liable for the plaintiff's injuries. Because Crown Cork & Seal had already paid more than $413 million

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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in asbestos settlements by 2003 and estimated its future liability at $239 million or more when the Texas Legislature enacted Chapter 149, it had already paid far in excess of the limitation imposed by the new law.

The majority expressed dissatisfaction with prior tests for constitutionality that relied on determining whether a right affected by retroactive legislation had "vested." Under the vested rights test, the two dissenting justices opined that a right does not vest until judgment, and because the case had not gone to judgment before the law was enacted, the provision did not impair a vested right and was, accordingly, constitutional. The majority rejected that approach, stating "What constitutes an impairment of vested rights is too much in the eye of the beholder to serve as a test for unconstitutional retroactivity," and noting, the test "thus comes down to this: a law is unconstitutionally retroactive if it takes away what should not be taken away."

Instead, the court held that, when determining whether a statute violates the constitutional prohibition against retroactive laws, "courts must consider three factors in light of the prohibition's dual objectives: the strength of the public interest served by the statute as evidenced by the Legislature's factual findings; the nature of the prior right impaired by the statute; and the extent of the impairment." The court also indicated that only a "compelling public interest" can "overcome the heavy presumption against retroactive laws." The court then found that the plaintiffs' common-law cause of action was substantial and that Chapter 149 was enacted to help only Crown and no one else, thus precluding a finding that it serves a substantial public interest. Without a compelling reason for this retroactive law, the court found that "the constitution prohibits it."

ELEVENTH CIRCUIT CHANGES ITS INTERPRETATION OF CLASS ACTION FAIRNESS ACT

The Eleventh Circuit Court of Appeals has determined on rehearing that it erred by interpreting the Class Action Fairness Act of 2005 (CAFA) as requiring at least one plaintiff in a class action to meet the amount-in-controversy requirement for diversity jurisdiction. ***Cappuccitti v. DirecTV, Inc.*, No. 09-14107 (11th Cir., decided October 15, 2010)**. The matter arose in a case challenging the $420 early cancellation fee charged by a satellite TV provider. The plaintiff brought the suit in federal court on behalf of a putative class of DirecTV subscribers in Georgia. The California-based company sought to compel arbitration under its customer agreement or to dismiss two of the claims because the named plaintiff had not paid the cancellation fee. The trial court denied the motion to compel arbitration and granted the motion to dismiss the claims seeking to recover the fee. DirecTV appealed the part of the order denying arbitration.

In July 2010, the Eleventh Circuit issued an opinion in which it ruled that the district court lacked subject matter jurisdiction to consider the matter. In response to the parties' petitions for rehearing en banc, the court vacated its earlier opinion and replaced it with the current opinion.

According to the court, "There is no requirement in a class action brought originally or on removal under CAFA that any individual plaintiff's claim exceed $75,000." CAFA simply requires that district courts "shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which (A) any member of a class of plaintiffs is a citizen of a State different from any defendant." The putative class must also contain at least 100 members. "To determine whether the amount in controversy requirement is met '[i]n any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000.000, exclusive of interest and costs.'"

According to the court, "There is no requirement in a class action brought originally or on removal under CAFA that any individual plaintiff's claim exceed $75,000."

Because the matter came within these parameters, the appeals court held that it was properly before the federal court under CAFA and ruled on the merits of the dispute over arbitration. According to the appeals court, the district court erred by concluding that the plaintiff would not be able to recover his attorney's fees and costs if he prevailed individually in arbitration. Apparently, that was a remedy available under Georgia law when the plaintiff filed his suit, even though he did not plead a cause of action providing that remedy. The court reversed the order denying arbitration and remanded the case for further proceedings.

FIRST CIRCUIT UPHOLDS $48 MILLION AWARD FOR DECEPTIVE INFOMERCIALS PROMOTING DIETARY SUPPLEMENTS

The First Circuit Court of Appeals has affirmed a multi-million dollar award in the Federal Trade Commission's (FTC's) lawsuit against the producer and distributor of infomercials for dietary supplements that could purportedly cure everything from cancer, obesity and Parkinson's disease to multiple sclerosis, heart disease and lupus. ***FTC v. Direct Mktg. Concepts, Inc.*, No. 09-2172 (1st Cir., decided October 21, 2010)**. Infomercials for "Coral Calcium" apparently generated sales of more than $54 million, and infomercials for "Supreme Greens" generated nearly $15 million in sales.

FTC filed suit against the companies in 2004, seeking injunctive relief and monetary equitable relief to "redress customers who had purchased Coral Calcium or Supreme Greens in reliance on the Defendants' allegedly deceptive infomercials." The district court granted FTC's motion for summary judgment, finding the infomercials misleading as a matter of law and entered judgment against the defendants, permanently enjoining them from running the deceptive infomercials and ordering disgorgement of $48.2 million from all defendants and $.5 million from one defendant.

Among other matters, defendants argued on appeal that "the record contained issues of fact as to whether they possessed sufficient substantiation for the claims asserted in the infomercials," and "the claims made in the infomercials were mere

puffery and were mollified by disclaimers, and therefore were not actionable." The appeals court agreed with the district court's disposition in every respect, noting "Despite the volume of the Defendants' arguments, we find no more substance in them than the district court found in their infomercials."

THIRD CIRCUIT RULES CELL PHONE RADIO WAVE LITIGATION PREEMPTED BY FEDERAL LAW

The Third Circuit Court of Appeals has affirmed the dismissal of class action claims against cell phone manufacturers and retailers of wireless handheld telephones alleging they are unsafe to use without headsets because holding the antennas next to the head purportedly exposes the user to dangerous levels of radio frequency (RF) radiation. ***Farina v. Nokia, Inc.,* No. 08-4034 (3d Cir., decided October 22, 2010)**.

According to the court, the Federal Communications Commission (FCC) has regulated human exposure to RF emissions since 1985 and first limited such emissions from cell phones in 1996 under a law that expressly expanded the FCC's authority to preempt certain state and local regulations of these emissions. The court found that "allowing suits like Farina's to continue is to permit juries to second-guess the FCC's balance of competing objectives. The FCC is in a better position to monitor and assess the science behind RF radiation than juries in individual cases."

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The court addressed jurisdictional issues at the outset of its opinion, reciting a convoluted procedural path the case had taken involving three amended complaints, one state court, two federal district courts, and the Judicial Panel on Multidistrict Litigation. The court determined that under the Class Action Fairness Act of 2005 (CAFA), it agreed with those circuit courts applying relation-back rules to at least some complaint amendments in the context of deciding when the lawsuit was commenced. In this regard, the Third Circuit rejected the Ninth Circuit's approach, which "ignores amendments and looks only to the filing of the original complaint for commencement."

The court determined that the plaintiff's second amended complaint commenced a new action by adding new defendants unrelated to any of the named defendants. Because the complaint was filed after CAFA was enacted, the court determined that it was subject to CAFA's provisions. Thus, the removal motion filed by a new defendant was timely, and the district court had no authority to remand because the plaintiff's motion to remand was filed more than 30 days after the notice of removal. Accordingly, the Third Circuit concluded that it had jurisdiction to decide whether the district court properly dismissed the claims on preemption grounds.

SETTLEMENT REACHED IN CLASS ACTION OVER BPA IN ALUMINUM SPORTS BOTTLES

Plaintiffs alleging economic losses from the purchase of aluminum sports bottles containing bisphenol A (BPA) have reportedly agreed to settle their claims in exchange for replacement of the products and $723,000 in attorney's fees. *Smith v. Gaiam, Inc.*, No. 09-2545 (U.S. Dist. Ct., D. Colo., joint stipulation of settlement filed October 13, 2010). According to a news source, the settlement will address class actions filed in California and Colorado; they were consolidated before the Colorado court in March 2010.

No physical injury was alleged in these product liability actions, and the defendant has denied that it misled consumers. The company contends that "when Plaintiffs brought their concerns to the Company's attention, Gaiam acted promptly and responsibly. And to ensure that every customer who purchased one of Gaiam's Aluminum Water Bottles is completely satisfied, the Company is entering into this Stipulation."

The putative settlement class has about 930,000 members. They will be eligible for free shipping and handling to exchange their first generation bottles for replacement bottles made from stainless steel or "next generation aluminum." Those members who no longer possess their water bottles will be able to receive a replacement if they can document the purchase. The agreement must undergo court approval following a fairness hearing; if approved, the claims will be dismissed with prejudice according to the stipulation's terms. *See Mealey's Emerging Toxic Torts*, October 19, 2010.

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BPA is a chemical widely used in food packaging and reusable food and beverage containers. It has come under scrutiny in recent years with some studies claiming that is has reproductive and endocrine-disrupting effects on lab animals. Government agencies worldwide are divided over whether BPA should be banned in consumer products; the U.S. Food and Drug Administration, which is currently reassessing its position on the chemical's safety, has expressed some reservations about its use in products intended for use by infants.

DEFECTIVE DRYWALL DEFENDANTS LAUNCH PILOT REMEDIATION PROJECT

The company whose Chinese-manufactured drywall is at issue in thousands of lawsuits consolidated before a multidistrict litigation (MDL) court in Louisiana will reportedly repair 300 homes in southeastern United States as part of a pilot project to remove the allegedly defective product and replace wiring and fixtures damaged by sulfur gases the drywall emitted. *In re: Chinese-Manufactured Prods. Liab. Litig.*, MDL No. 2047 (U.S. Dist. Ct., E.D. La.). According to a news source, Knauf Plasterboard

Tianjin Co. Ltd. will undertake the project with several suppliers and insurance companies to establish a model for the global resolution of a drywall problem that purportedly affected thousands of homeowners who turned to imported drywall in the wake of widespread hurricane-related destruction in Alabama, Florida, Louisiana, and Mississippi.

Homeowners involved in the project will reportedly be compensated for accommodation costs during remediation and for moving and storage costs. Each homeowner will also be paid $8.50 per square foot for additional expenses incurred. Environmental engineers will apparently certify that the repaired homes are free of drywall odors and contamination as part of the settlement. The project was proposed following a $164,000 judgment imposed in a bellwether case involving repairs to the home of one Louisiana family. The court reportedly assisted the parties in working out the details of the pilot project. *See Product Liability Law 360*, October 14, 2010.

ALL THINGS LEGISLATIVE AND REGULATORY

CPSC Issues Guidance on CPSIA "Children's Product" Determination Factors

The Consumer Product Safety Commission (CPSC) has issued a **final interpretive rule** that explains the specified statutory factors "that are to be taken into consideration when making a determination about 'whether a consumer product is primarily intended for a child 12 years of age or younger,'" and thus fits the definition of "children's product" under the Consumer Product Safety Improvement Act of 2008 (CPSIA).

Starting from the premise that this determination must be made on a case-by-case basis, CPSC created a new *Code of Federal Regulations* section to elaborate the statutory factors considered. Those factors are (i) "A statement by the manufacturer about the intended use of such product, including a label on such product if such statement is reasonable"; (ii) "Whether the product is represented in its packaging, display, promotion, or advertising as appropriate for use by children 12 years of age or younger"; (iii) "Whether the product is commonly recognized by consumers as being intended for use by a child 12 years of age or younger"; and (iv) "The Age Determination Guidelines issued by the Commission staff in September 2002 and any successor to such guidelines."

The rule, which became effective October 14, 2010, provides illustrative examples of the types of products that constitute children's products under the law, as well as those that do not, explaining that the latter are not subject to the CPSIA's lead limits, tracking label requirement and third-party testing and certification provisions. CPSC commissioners divided 3-2 in approving the rule and prepared separate statements in support of their positions. *See Federal Register*, October 14, 2010.

Senator Inquires About FDA Action on Medical-Device Conflicts

U.S. Senator Charles Grassley (R-Iowa) has sent a **letter** to the Food and Drug Administration (FDA) to determine if the agency monitors medical-device companies' payments to physicians involved in the companies' clinical studies. The October 22, 2010, letter to FDA Commissioner Margaret Hamburg asks whether there are "financial interests that the FDA would consider too significant a conflict to be appropriate for a clinical investigator to be involved in the study."

Grassley, a ranking member of the Senate's finance committee, has also asked for specifics about how FDA determines if financial interests reported to the agency adversely affect "the rights and welfare of human subjects" and "the integrity and reliability of the clinical studies submitted by manufacturers in support of the approval of their drugs, biologics and devices." He further seeks details about whether FDA advises manufacturers "on specific steps that should be taken to minimize potential bias" and actions the agency expects companies to take to manage potential conflicts of interest.

CPSC Proposes New "Public Accommodations Facility" Definition for Pools, Spas

The Consumer Product Safety Commission (CPSC) has issued a new **proposed interpretive rule** that defines "public accommodations facility" under the Virginia Graeme Baker Pool and Spa Safety Act. The 2007 legislation was enacted to prevent life-threatening injuries and drowning by drain entrapment.

According to a *Federal Register* notice, the proposal defines a public accommodations facility as "an inn, hotel, motel, or other place of lodging, including but not limited to, rental units rented on a bi-weekly or weekly basis." In issuing the new plan, CPSC withdrew a March 15, 2010, proposed definition that would have excluded owner-occupied facilities containing "not more than five rooms for rent or hire." CPSC rejected that plan after determining that the exclusion was "inappropriate in the context of pool and spa safety because the number of units for rent or hire has no bearing on the safety of the pool." CPSC also wanted to clarify that a "residential facility may become a place of lodging" if it offered a "significant number of short term stays." CPSC requests comments by December 21, 2010. *See Federal Register*, October 22, 2010.

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CPSC Urges Action on Cadmium Testing, Approval Standards

The Consumer Product Safety Commission (CPSC) has written letters to two ASTM International subcommittees encouraging new national consensus safety standards that address "the potential hazard of cadmium" in children's **toys** and **jewelry**.

The October 19, 2010, letters accompany CPSC's latest cadmium reports, which recommend a "migration approach" to testing that calls for measuring chemical

solubility after 24 hours instead of the current two hours to determine whether chemicals can migrate from small items if swallowed. "This conclusion is based on the results of testing hundreds of jewelry and metal alloy samples, as well as information about the length of time an ingested foreign object could be present in the digestive tract of a child," the letters state.

According to published reports, the standards would be voluntary for children's jewelry and mandatory for toys, which are currently regulated under the ASTM F-963 toy safety standard that CPSC wants the subcommittee to revise. CPSC spokesperson Scott Wolfson reportedly said that the Consumer Product Safety Act mandates that CPSC work with voluntary standards before issuing mandatory guidelines. "All options are still on the table," Wolfson said.

Don Mays, senior director for product safety and technical policy for Consumers Union and a subcommittee member, was quoted as saying that CPSC's action was "a good first step toward removing dangerous cadmium from children's products. Cadmium is a toxin that, if ingested or inhaled, can damage kidneys and soften bones, yet it is pervasive in many consumer products." Cadmium has, in recent months, been found in children's products, generating a number of recalls and significant public attention. *See Product Safety & Liability Reporter, Product Liability Law 360*, October 20, 2010.

LEGAL LITERATURE REVIEW

Malcolm Myers, Mark Behrens and Cary Silverman, "CA Case to Decide Whether the Duty to Warn Covers Hazards Posed by Products of Others," LJN's *Product Liability Law & Strategy*, October 2010

Shook, Hardy & Bacon Public Policy Attorneys **Mark Behrens** and **Cary Silverman** have co-authored "CA Case to Decide Whether the Duty to Warn Covers Hazards Posed by Products of Others." The article discusses the efforts of plaintiffs' counsel in asbestos litigation to sue solvent manufacturers "for harms caused by products they never made, sold, installed, or profited from." These manufacturers made non-defective component parts used post-sale with products containing asbestos. Because most asbestos manufacturers have declared bankruptcy, plaintiffs have tried, for the most part unsuccessfully, to pursue a new "third-party duty-to-warn theory."

The article discusses the efforts of plaintiffs' counsel in asbestos litigation to sue solvent manufacturers "for harms caused by products they never made, sold, installed, or profited from."

According to the article, California's high court will soon decide whether to join the majority of courts that have rejected the theory. The authors contend that if the court adopts it, the new duty rule could require the makers of jam or bread to issue warnings about peanut allergies, and door and drywall manufacturers could be held liable for failure to warn about the dangers of lead paint made by others and applied to their products after sale.

Michael Risch, "A Failure of Uniform Laws?," *University of Pennsylvania Law Review, PENNumbra*, 2010

Villanova University School of Law Associate Professor Michael Risch contends that state adoption of uniform laws may not have had the expected salutary effect of reducing forum shopping and promoting "a consistent set of rules to provide settled expectations for interstate activities." Examining West Virginia's experience with the Uniform Trade Secrets Act, Risch finds that, particularly where a state does not have published opinions interpreting and applying a uniform law, the courts do not necessarily look to the experience of other states addressing issues under the uniform law, but instead consult common law precedents. Thus, inconsistent and variable principles can be expected to develop among different states applying the same uniform laws. Risch suggests that additional study be undertaken to determine if this effect is universal or limited to just one state's experience in one legal discipline. He is apparently involved in an ongoing research project that will extend this study's findings about the trade secrets law by categorizing opinions from all states that have adopted it.

LAW BLOG ROUNDUP

Tort Reform's Effect on Access to Justice?

"In every single one of these categories, U.S. civil justice was worse (e.g., more biased, harder for victims to access the courts and legal counsel) than in countries in Western Europe and North America as a whole, and other 'high income' nations throughout the world. In fact, overall, the U.S. ranks last (7 out of 7) in the region, and last (11 out of 11) among high-income nations. That's right. LAST!" A Center for Justice & Democracy consumer advocate, blogging about a new **report** from the World Justice Project that ranks 35 countries on various criteria relating to "access to civil justice."

The factors examined in ranking a country's "access to civil justice" were (i) "People are aware of available remedies"; (ii) "People can access and afford legal counsel in civil disputes"; (iii) "People can access and afford civil courts"; (iv) "Civil justice is impartial"; (v) "Civil justice is free of improper influence"; (vi) "Civil justice is free of unreasonable delays"; (vii) "Civil justice if effectively enforced"; and (viii) "ADR systems are accessible, impartial, and effective." This blog contends that tort reform and the "disgraceful demise of legal service programs in this country" have contributed to the U.S. ranking.

The PopTort, October 14, 2010.

THE FINAL WORD

E-Discovery Issues in the News: Forum Shopping & In-House Counsel Preparedness Survey

According to a recent article, the way state ethics boards address inadvertently disclosed data could have an impact on where lawsuits are filed. Forum-shopping plaintiffs may be drawn to jurisdictions such as Maryland and New York City, where lawyers are permitted to examine hidden metadata in electronic documents provided by opposing counsel. If metadata are viewed as an important litigation issue, plaintiffs would likely prefer to litigate in such venues. Pepperdine University School of Law Professor Donald Childress was quoted as saying, "To the extent there are little to no [uniform] rules about this, it really provides for gamesmanship." Attorneys are advised to provide the text in electronic material, such as e-mail, text messages or social media, in a PDF format. *See* (California) *Daily Journal*, October 20, 2010.

Forum-shopping plaintiffs may be drawn to jurisdictions such as Maryland and New York City, where lawyers are permitted to examine hidden metadata in electronic documents provided by opposing counsel.

Meanwhile, a company that provides technology and consulting services has released its "Fourth Annual ESI Trends Report," which surveys in-house counsel about their management of electronically stored information (ESI) in the context of preparation and response to litigation, regulatory matters and internal investigations. According to the Kroll Ontrack® report, while more companies have an ESI discovery strategy, relatively few have tested their policies to assess whether they are defensible. Companies have also failed to take advantage of early case assessment technology despite its ability to save time and costs. The survey further showed a decline in the number of companies that have updated their ESI discovery policies to include social networking sites and use. The report recommends that corporate IT and legal departments share responsibility for discovery preparation and response.

UPCOMING CONFERENCES AND SEMINARS

SHB, London, England – December 8, 2010 – "Product Recall, The Inside Track: Practical guidance on product recall law and related risk management." Shook, Hardy & Bacon is presenting this seminar which "brings together a range of experts from government, retail, manufacturing, corporate communications and the legal profession" to address issues such as the current product recall regulatory framework, key product recall risks and risk management procedures, and brand and reputation implications. Shook, Hardy & Bacon Tort Partner Mark Tyler will discuss "The legal environment for product recalls in the EU," and Shook, Hardy & Bacon Tort Associate Alison Newstead will discuss "Risk management concerns: FOI requests, Product liability claims, Directors liabilities and corporate manslaughter."

Shook, Hardy & Bacon L.L.P.

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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. ■

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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).