Shook, Hardy & Bacon L.L.P.

DECEMBER 17, 2009

PRODUCT LIABILITY LITIGATION REPORT

CONTENTS

U.S. SUPREME COURT ISSUES RULING ON APPEALS FROM ATTORNEY-CLIENT PRIVILEGE ORDERS

The U.S. Supreme Court has determined that a party ordered to disclose information protected by the attorney-client privilege does not have an immediate right of appeal under the collateral order rule, which allows interlocutory appeals from non-final court orders that, among other matters, are effectively unreviewable on appeal from a final judgment. ***Mohawk Indus., Inc. v. Carpenter*, No. 08-678 (U.S., decided December 8, 2009)**.

The issue arose in a case involving alleged wrongful termination of employment. The plaintiff sought information that the district court agreed was protected by attorney-client privilege but ordered disclosed, finding that the company had waived the privilege through representations it had made in another lawsuit. The district court refused to certify its ruling for interlocutory appeal, and the court of appeals dismissed the company's appeal for lack of jurisdiction.

Noting that the issue has produced inconsistent rulings in the courts of appeals, Justice Sonia Sotamayor, writing for the majority, explained why collateral appeals in the attorney-client privilege context are not needed to protect the confidentiality of attorney-client communications. According to the Court, "Appellate courts can remedy the improper disclosure of privileged material in the same way they remedy a host of other erroneous evidentiary rulings: by vacating an adverse judgment and remanding for a new trial in which the protected material and its fruits are excluded from evidence."

The Court also noted that other avenues are available to protect privileged information, including (i) a request for certification of the issue, in instances raising a new legal question or matters of special consequence; (ii) a petition for writ of mandamus to address possible judicial usurpation of power or a clear abuse of discretion; (iii) defiance of a disclosure order and the imposition of court-imposed sanctions, which can be reviewed through the post-judgment appeal process; and (iv) an immediate appeal from an order holding a noncomplying party in contempt. The Court suggested that "protective orders are available to limit the spillover effects of disclosing sensitive information."

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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Given the alternatives, the Court found that the interests at stake were effectively reviewable on appeal from a final judgment and that its holding would avoid the "successive, piecemeal appeals of all adverse attorney-client rulings [that] would unduly delay the resolution of district court litigation and needlessly burden the Courts of Appeals."

U.S. SUPREME COURT REJECTS APPEAL OF PUNITIVE DAMAGES AWARD IN AUTO DEFECT CASE

The U.S. Supreme Court has reportedly declined to hear Ford Motor Co.'s challenge to a portion of an $82.6 million award to Benetta Buell-Wilson, a California woman paralyzed in January 2002 after her Ford Explorer rolled over and its roof partially collapsed. Ford's lawyers had argued that the punitive damages were unfair and unconstitutional because the Explorer's design met all applicable government and industry safety standards. The original verdict exceeded $360 million, but it was reduced on appeal to $27.6 million in compensatory damages and $55 million in punitive damages. The company challenged the punitive damages only; the Court's ruling lets stand "the largest punitive damages award affirmed on appeal in California history." *See Los Angeles Times,* November 30, 2009.

FOURTH CIRCUIT REFUSES TO IMPOSE FEES ON LAWYERS FOR ERRONEOUS REMOVAL

The Fourth Circuit Court of Appeals has determined that a statute which allows a court to "require payment of … attorneys' fees … incurred as a result of [an erroneous] removal" from state to federal court imposes liability on parties and not on their counsel. ***In re: Crescent City Estates, LLC,* No. 08-2367 (4th Cir., decided December 7, 2009)**. According to the court, it is the first court of appeals to address an issue that has "badly divided" the district courts. The party that sought to impose fees on its opponent and counsel for the improper removal of shareholder derivative litigation to a federal bankruptcy court argued that because the statute "does not explicitly prohibit a fee award against counsel, it thereby permits it."

The court rejected this characterization of the applicable presumption, which it enunciated as "when a fee-shifting statute does not explicitly permit a fee award against counsel, it prohibits it. In short, silence does not equal consent." The court addressed the issue in the context of the "American Rule," which presupposes that parties bear their own legal fees and that parties bear legal fees. The court refused to dramatically deviate from "the American Rule's presumption that parties rather than attorneys are liable for attorneys' fees," because the statute "makes no explicit mention of counsel," and "the legislative history here makes no express mention of attorney liability."

According to the court, a contrary result would (i) generate more collateral litigation; (ii) force the courts "to decide, without legislative guidance, when an attorney should be held solely liable, when an attorney should be held jointly and severally liable with a client, or whether fees should be apportioned between lawyer and client (or lawyers and clients, as the case may be) based on some yet unknown formula"; (iii) promote the law's use as a "disruptive litigation tactic" that would pit counsel against client; (iv) chill the right of removal by causing attorneys to err on the side of caution and exercise the right of removal only where obvious. Egregious cases, said the court, can be dealt with under Federal Rule of Civil Procedure 11 or under the courts' inherent powers to sanction lawyers "whose actions compromise standards of professional integrity and competence."

FIFTH CIRCUIT DISMISSES U.K. LITIGANTS FROM VIOXX® LITIGATION

The Fifth Circuit Court of Appeals has affirmed the dismissal, on *forum non conveniens* grounds, of claims brought by plaintiffs living in England, Scotland, Wales, and Northern Ireland against the maker of a prescription anti-inflammatory drug that allegedly increased the risk of cardiovascular thrombotic events. ***Adams v. Merck & Co., Inc.* No. 09-30260 (5th Cir., decided November 30, 2009) (unpublished)**. The court determined that the plaintiffs did not sufficiently present or brief their contention that some British jurisdictions do not allow loss of consortium claims, and thus, that the district court was entitled to presume the adequacy of the alternative forums.

The court also rejected the plaintiffs' claim that the court abused its discretion in refusing to grant conditions on the dismissal in addition to those requiring the defendant to submit to the foreign forums, satisfy any final judgment rendered by a foreign forum, agree not to include the pendency of U.S. proceedings in raising any statute of limitations defense, and agree not to prevent plaintiffs from returning to the district court if the foreign forums refused to accept jurisdiction.

Among the additional conditions the plaintiffs sought were (i) trial by jury, (ii) discovery under the Federal Rules of Civil Procedure, and (iii) the use of depositions at trial. According to the court, these conditions "go to the heart of the policy differences between the United States and the foreign fora when it comes to the appropriate mechanisms for resolving civil disputes." Because the "requested conditions seek to replicate an American trial in a foreign forum," the court determined that the district court did not abuse its discretion in considering "the foreign fora adequate despite the absence of these factors" and in declining "to attach conditions replicating these factors to the dismissal under *forum non conveniens*."

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TEXAS SUPREME COURT FINDS EXPERT OPINION UNRELIABLE IN DEFECTIVE DRYER CASE

The Texas Supreme Court has entered judgment in favor of a manufacturer held liable by a jury for a fatal fire allegedly caused by a defective clothes dryer. ***Whirlpool Corp. v. Camacho*, No. 08-0175 (Tex., decided December 11, 2009)**. The court determined that the trial court and court of appeals failed to scrutinize the testimony of plaintiffs' expert under the appropriate test for reliability.

Applying that test, the court found the testimony unreliable because the plaintiffs' expert did not conduct the testing needed to support his theory that burning lint embers entered the drying chamber and ignited the clothing. The court also found that the Consumer Product Safety Commission's lint-ignition test on which the expert relied differed significantly in both the type of equipment and size of lint tested. The court further found that the expert's theory was developed for the litigation in this case, had not been published in any scientific journal or treatise and had not been accepted as valid by the scientific or expert community at large.

The court concluded, "When all the evidence is considered, as it must be in a proper legal sufficiency review, we conclude that the data on which [the expert] relied does not support his opinions. His opinions are subjective, conclusory, and are not entitled to probative weight. Because his testimony is the only evidence that the alleged design defect—a corrugated lint transport tube—caused the fire, there is no evidence to support the finding that a design defect in the dryer caused the trailer fire."

WASHINGTON SUPREME COURT ENTERS $8 MILLION DEFAULT JUDGMENT IN AUTO DEFECT CASE FOR DISCOVERY VIOLATIONS

To sanction an auto manufacturer's "willful efforts to frustrate and undermine truthful pretrial discovery efforts," the Washington Supreme Court, with two justices dissenting, has stricken the company's pleadings and rendered an $8 million default judgment and attorney's fees against it. ***Magaña v. Hyundai Motor Am.*, No. 80922-4 (Wash., decided November 25, 2009)**. The litigation involved a purportedly defective passenger seat that collapsed during an accident in which the passenger was thrown out the rear window and rendered a paraplegic.

Before the case was tried in 2002 to an $8 million jury verdict, the plaintiff requested information during discovery relating to complaints, lawsuits or other incidents involving the seat in question and whether that seat was used in other vehicle models. Hyundai considered the requests overly broad, and, without seeking a protective order, responded that (i) there were no other claims in connection with the seat or seat back of the vehicle model involved in the accident, and (ii) no other model used a seat of the same or a substantially similar design.

On appeal, the verdict was overturned, and the case was remanded for a new trial on the issue of liability, but not damages, due to an erroneous evidentiary ruling. Several months before retrial, which was scheduled for January 2006, plaintiff requested that Hyundai update its responses to the previous discovery requests. Hyundai again limited its response in terms of time, but found two claims relating to seat back failure and acknowledged that the seat was used in another vehicle model. Plaintiff sought a motion to compel production of documents relating to its original discovery requests, and Hyundai opposed the motion, claiming it was too burdensome and would not lead to the discovery of admissible evidence. Again, Hyundai did not request a protective order to narrow the scope of discovery.

The trial court ordered the production of information "involving allegations of seat back failure on all Hyundai vehicles with single recliner mechanisms regardless of incident date and regardless of model year." The company then produced numerous documents relating to complaints of seat back failure. The plaintiff sought a default judgment, contending that he could not prepare a proper case with the similar incidents just produced and also claiming that evidence had been lost due to the delay. Following an evidentiary hearing, the trial court imposed a default judgment as a sanction for willful discovery violations. The court of appeals reversed and remanded for a new trial, and plaintiff appealed.

The supreme court, reviewing the trial court's discovery sanctions for abuse of discretion, found sufficient support in the record for a finding that Hyundai willfully violated the discovery rules, a conclusion also reached by the court of appeals and the dissenting justices. The sanction imposed, however, was based on whether the violation caused the plaintiff "substantial prejudice" in preparing for his second trial, an issue about which the justices disagreed. According to the majority, the late production substantially prejudiced the plaintiff because "most of the evidence had gone stale," other complainants could not be located, and some of the evidence and/or records involving other incidents had been destroyed.

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The majority also determined that the trial court properly considered and rejected lesser sanctions for "Hyundai's atrocious behavior in failing to respond to discovery requests throughout the lawsuit." The dissenting justices, citing the plaintiff's delay in moving to compel responses to his discovery requests and concerned about "the right to a jury trial . . . enshrined in our state constitution," would have remanded for a second trial. According to the dissenters, lesser sanctions, such as a continuance, monetary sanctions and admitting even stale evidence would have appropriately deterred and punished the company for its conduct.

ALL THINGS LEGISLATIVE AND REGULATORY

GAO Calls for Additional Actions to Improve FDA's Oversight of Postmarket Drug Safety

The Government Accountability Office (GAO) has issued a **report** acknowledging that the Food and Drug Administration (FDA) faces remaining challenges as it begins to address its "previously identified weaknesses" in postmarket drug safety oversight. Those weaknesses have been "a long-standing concern, with various groups reporting problems for more than 30 years," the report stated.

The November 2009 report was prepared in response to a request by Senator Charles Grassley (R-Iowa) that the GAO follow up its 2006 report examining the roles of the Office of New Drugs (OND) and the Office of Surveillance and Epidemiology (OSE) in postmarket drug monitoring.

According to the new report, FDA plans to transfer additional authorities from OND to OSE, but does not have a time frame for the transfer. FDA said OSE needs increased staff and experience, but high turnover at OSE made it difficult for managers to gain experience. FDA also said OSE may need to more than double its current staff of 193 by fiscal year 2011 to be able to assume the new authorities, but faced hiring challenges such as competition from the private sector.

"FDA is also revising its program for resolving scientific disputes, but these changes have not increased its independence, as GAO recommended [in 2006]," the report stated.

CPSC Finds Drywall Linked to Elevated Hydrogen Sulfide Levels, Metal Corrosion

The Consumer Product Safety Commission (CSPC) has released an indoor air study and two preliminary studies that link **Chinese drywall** with elevated hydrogen sulfide levels and metal corrosion in dozens of homes. According to CPSC, an Inter-agency Task Force compared possible associations between drywall and reported health symptoms in 41 "complaint" homes in Florida, Louisiana, Virginia, Alabama, and Mississippi with 10 "noncomplaint" homes built around the same time and in the same area as the complaint homes.

Findings in the 51-home study conclude that hydrogen sulfide gas "is the essential component that causes coppery and silver sulfide corrosion found in the complaint homes." Other factors such as air exchange rates, formaldehyde and other air contaminants contributed to reported problems with Chinese drywall, which was widely used in home reconstruction after hurricanes in 2004 and 2005 led to North American-made drywall shortages. CPSC noted that how hydrogen sulfide gas is being created in homes with the Chinese drywall has yet to be determined.

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"We now have the science that enables the task force to move ahead to the next phase—to develop both a screening process and effective remediation methods," CPSC Chair Inez Tenenbaum was quoted as saying. "Ongoing studies will examine health and safety effects, but we are now ready to get to work fixing this problem." *See CPSC Press Release,* November 23, 2009.

In a related development, Housing and Urban Development Secretary Shaun Donovan apparently plans to issue guidelines that will allow the use of federal community block grants to provide assistance to homeowners with Chinese drywall problems. According to Donovan, "The guidance will provide details about the eligible activities relating to drywall remediation, and the ways in which [Commuunity Development Block Grant] funds can be used to benefit families with various income levels. It is my expectation that this guidance will be valuable in helping affected communities and homeowners determine how best to respond to this set of issues." *See* [Florida] *Sun-Sentinel*, December 11, 2009.

DTSC Urges Industry to Supply More Detailed Carbon Nanotube Data

According to a news source, California's Department of Toxic Substances Control (DTSC) is not satisfied with initial responses supplied by California manufacturers about carbon nanotubes in their products and will be pressing for more detailed information by a January 2010 deadline when it plans to post the responses verbatim on its Web site. Industry representatives, however, reportedly maintain that posting information about environmental and worker safety impacts of carbon nanotubes could expose trade secrets and other confidential business information.

Earlier in 2009, DTSC formally requested persons and businesses that produce carbon nanotubes in California or import nanotubes into California for sale to supply information on analytical test methods, fate and transport in the environment and other relevant information. The nanotechnology "data call-in" mandate could apparently serve as a model for future Environmental Protection Agency actions pertaining to environmental impacts of nanomaterials. It is reportedly being closely watched by industry, federal regulators, environmentalists, and other stakeholders who see the effort as another example of California taking action before federal officials to address emerging environmental issues. *See Inside CAL/EPA,* December 11, 2009.

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New Time Computations Under Federal Rules Now Effective

Federal procedural rules have been **amended**, effective December 1, 2009, to adopt a "days-are-days" approach to computing all deadlines "to make the method of computing time consistent, simpler, and clearer." Practitioners will no longer omit intermediate weekends and holidays when computing certain time periods, and most deadlines less than 30 days have been changed to multiples of seven days "so that deadlines will usually fall on weekdays."

In a related development, the requirement that appeals of certain jurisdictional rulings under the Class Action Fairness Act of 2005 be filed "not less than 7 days" after the district court's order, has been amended to require that the appeals be brought "not more than 10 days" after the order. This change also went into effect December 1. The original version of the law led the circuit courts of appeals to rewrite the statute and impose a seven-day deadline to avoid an interpretation that would allow filing at any time after a seven-day waiting period. *See Civil Procedure & Federal Courts Blog*, December 1, 2009.

Senate Committee Conducts Hearing on Federal Pleading Standard

The Senate Judiciary Committee recently held a **hearing** titled "Has the Supreme Court Limited Americans' Access to Courts?," to consider the effect of the U.S. Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal* on lawsuits filed in the federal courts. According to Senator Arlen Specter (D-Pa.), writing in *The Wall Street Journal* about the hearing and the bill he introduced that would overturn these rulings, the U.S. Supreme Court "upset the longstanding interpretations" of the federal pleading rule adopted in 1938 that requires plaintiffs to include a "short and plain statement" in their complaints showing their entitlement to relief. Under the standard enunciated by the Court, federal judges must now insist upon some specificity in pleading with allegations plausibly suggesting liability. *See The Wall Street Journal*, December 6, 2009.

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LEGAL LITERATURE REVIEW

Richard Nagareda, "Embedded Aggregation in Civil Litigation," *Cornell Law Review* (forthcoming 2010)

Vanderbilt University Law School Professor Richard Nagareda explores in this article how courts might go about binding nonparties in individual litigation where the nature of the claims calls for it and yet the class-action device is unavailable. Nagareda refers to situations where "the right of action asserted, the remedy sought, and the wrong on the merits that the litigation concerns … extend[] beyond the plaintiff in an individual lawsuit," as "embedded aggregation."

As an example, Nagareda points to a U.S. Supreme Court determination that "constitutional due process forbids the judgment entered in one [Freedom of Information Act] requester's losing effort to compel disclosure from exerting a preclusive effect upon a subsequent requester of the same record, at least absent agreement or collusion between the two seriatim requesters." According to the article, "To hold otherwise—as some lower courts had attempted to do by developing a doctrine of 'virtual representation'—would be to enable courts to 'create *de facto* class actions at will,' outside the strictures of Rule 23 of the Federal Rules of Civil Procedure."

According to Nagareda, such situations could be addressed with a "hybridization," or the "combination of individual actions with some manner of centralizing mechanism" that could provide the binding force that will more effectively resolve disputes arising in a global marketplace.

Samuel Issacharoff & Robert Klonoff, "The Public Value of Settlement," *Fordham Law Review* (forthcoming)

This article is part of a symposium honoring the 25th anniversary of a work, *Against Settlement,* that characterized settlement as the "defeat of the weak by the powerful, the poor by the rich, the injured by the wrongdoers." The co-authors challenge this premise while acknowledging that its concerns may be legitimate in the context of "a small and diminishing subset of the claims in the legal system," which "channels mass claims into routinized forms of settlement" According to the authors, developed settlement structures, both public and private, "that allow for the relatively efficient and effective compensation of those harmed in mass society will likely appear to the victims as a virtue rather than a vice."

Searle Civil Justice Institute, "State Consumer Protection Acts: An Empirical Investigation of Private Litigation," December 2009

This report, prepared by the Searle Civil Justice Institute at Northwestern University School of Law, presents preliminary findings about litigation filed under state consumer protections acts (CPAs), which are intended to protect consumers from "unfair or deceptive acts or practices." The report identifies key trends and the factors that may contribute to how much CPA litigation will be pursued in a jurisdiction; it also compares CPA claims with Federal Trade Commission (FTC) enforcement standards.

The report's key findings are that (i) "Litigation under CPAs has increased dramatically since 2000"; (ii) "Vague statutory definitions of prohibited conduct are a major driver of CPA litigation"; (iii) "CPAs are becoming more favorable and generous to consumer litigants"; (iv) "States with CPAs that are more favorable to consumers have more CPA litigation"; (v) "Most CPA claims would not constitute illegal conduct under FTC consumer protection standards"; and (vi) "Almost 40% of CPA claims where the consumer plaintiff prevailed at trial would not constitute illegal conduct under FTC consumer protection standards."

"Litigation under CPAs has increased dramatically since 2000."

Among the research materials cited in the report is an article authored by Shook, Hardy & Bacon Public Policy attorneys **Victor Schwartz** and **Cary Silverman**.

LAW BLOG ROUNDUP

Tell Us What You Really Think

"The Supreme Court did not 'clarify the standards for courts to assess complaints upon motions to dismiss' in its recent pleading decisions. It changed them. It did so, moreover, through a process that was illegitimate and inadequate given the statutory requirements of the Rules Enabling Act, 28 U.S.C. § 2072 (2006), the stakes, and the Court's woeful lack of both information and experience regarding the important issues of public policy implicated." University of Pennsylvania Law School Professor Stephen Burbank, participating in an online debate about the U.S. Supreme Court's adoption of a plausibility pleading standard. Burbank testified on December 2, 2009, before the Senate Judiciary Committee in support of legislation that would "restore the status quo," allowing "time to consider change in a thoughtful and deliberate way through the more democratic processes of rulemaking and legislation."

PENNumbra.com, December 2009.

Tense Exchanges in the Senate?

"Democratic senators have for months accused the U.S. Supreme Court of stifling civil lawsuits. They've cited, most recently, the Court's 5-4 decision in *Ashcroft v. Iqbal*, which added a new plausibility requirement for lawsuits. Today, in sometimes tense exchanges, those senators went head-to-head with Gregory Garre, the former solicitor general who argued and won the case almost exactly a year ago." Capitol Hill reporter David Ingram, blogging about the Senate committee hearing on legislation to overturn *Iqbal*. According to Ingram, Garre, who claims that current research is insufficient to conclude that the *Iqbal* decision is unfairly restricting plaintiffs, had only one supporter in the room, Senator Jeff Sessions (R-Ala.), and was otherwise interrupted, criticized and challenged while he testified.

The BLT: The Blog of Legal Times, December 2, 2009.

Newest Justice Illogical?

"To my mind, a key portion of Justice [Sonia] Sotomayor's opinion is illogical. She makes a great deal out of the fact that the collateral order doctrine is not the sole means of obtaining review before final judgment … If the possibility of discretionary review under some other mechanism or of review via contempt were sufficient to defeat this claim under the collateral order rule, then it would be sufficient to defeat every claim under the collateral order rule." Cornell Law Professor Michael Dorf, criticizing the first written decision of the U.S. Supreme Court's newest justice, refusing to allow a right of appeal under the collateral order rule of district court decisions ordering the disclosure of material protected by the attorney-client privilege.

Dorf on Law, December 11, 2009.

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THE FINAL WORD

Rand Institute Publishes Report on Silica Litigation and Abuse of Medical Diagnostic Practices

The Rand Institute for Civil Justice has published a report, *The Abuse of Medical Diagnostic Practices in Mass Litigation: The Case of Silica*, that explores the explosive rise and sudden collapse of litigation alleging personal injury from exposure to silica dust. According to the report, a multidistrict litigation judge's findings that the plaintiffs' medical screenings and diagnoses were questionable and that "a substantial fraction of the plaintiffs in the silica multidistrict litigation (MDL) had earlier filed claims for asbestos-related litigation," "were undoubtedly a driving factor in the end of silica as a mass tort." Rand issued the report, which was supported by the National Industrial Sand Association, the U.S. Chamber of Commerce Institute for Legal Reform, and the Coalition for Litigation Justice, to generate "discussions among stakeholders on how to improve the tort system."

Among other matters, the report suggests (i) consideration of more serious sanctions against attorneys who pursue cases based on grossly inadequate diagnoses and (ii) paying closer attention to the defense bar's performance to better deter practices that enable litigation based on inadequate diagnostic practices. Among the references cited is an article co-authored by Shook, Hardy & Bacon Public Policy attorneys Mark Behrens and Phil Goldberg.

UPCOMING CONFERENCES AND SEMINARS

GMA, Washington, D.C. – April 7-9, 2010 – "Consumer Complaints Conference." Shook, Hardy & Bacon Pharmaceutical & Medical Device Litigation Partner Madeleine McDonough will discuss "Pre-Litigation Risk Management Strategies," for an audience of food industry staff working in the areas of consumer affairs, call center management, consumer complaints, product liability claims, and quality assurance.

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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).