Shook, Hardy & Bacon L.L.P.

Product Liability Litigation Report

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FEDERAL JUDGES EXPLAIN THEIR DECISION NOT TO RECUSE DESPITE MEMBERSHIP IN CLASS

Two Second Circuit Court of Appeals judges have issued an opinion explaining why they chose to reject a conduct committee's conclusion that they should recuse themselves from deciding a class-action dispute despite their potential interest in the case as members of the class. ***In re: Literary Works in Elec. Databases Copyright Litig.*, Nos. 05-5943, 06-0223 (2d Cir., decided November 29, 2007)**. The case involved allegations that electronic databases were reproducing the works of freelance authors without their express consent. Class members were notified about the lawsuit and its proposed settlement beginning in April 2005, and the time for submitting claims of proof expired September 30. The district court approved the settlement on September 27, and several class members filed an appeal October 21.

More than a year later, on March 6, 2007, after extensive pre-argument preparation, two judges on the Second Circuit panel assigned to hear the appeal realized "there was a high probability that [they] held copyrights in works, such as law review articles and speeches, reproduced on defendants' databases." The next day, at oral argument, they "publicly stated in open court that [they] would forego any financial interest in the settlement that [they] could possibly have now or in the future." They also noted that the parties failed to bring to their attention that, "because the claims period had expired without either of [them] asserting a claim, [they] were at that point ineligible to recover anything in the class action in any event." The judges sought an opinion as to whether they should continue to preside over the dispute from the Committee on Codes of Conduct of the Judicial Conference of the United States, which concluded that they should recuse themselves because they were parties to the proceeding. The judges rejected the committee's opinion and participated in the decision vacating the district court's disposition, finding that the court lacked jurisdiction to certify class claims involving, for the most part, copyrights that had not been registered.

The judges who were class members construed several statutory recusal provisions and discussed the public policy issues at stake when jurists have an interest in the litigation over which they preside. They concluded, "a judge who learns that he is a party to a class action lawsuit by virtue of his

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possession of a small financial interest in one of the parties or in the subject matter of the lawsuit, and who has devoted substantial time to consideration of that case, but who promptly divests himself of the otherwise disqualifying financial interest, need not recuse himself from continued participation in the disposition of that case."

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COURT EXCLUDES TESTIMONY THAT PAIN MEDICATION CAUSES ADVERSE HEALTH EFFECTS AT LOW DOSE

A federal multi-district litigation judge in California has granted Pfizer, Inc.'s motion seeking to exclude expert testimony to the effect that its pain medication Celebrex® can cause a heart attack or stroke when ingested at 200 milligrams a day. *In re: Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig.*, MDL No. 1699 (U.S. Dist. Ct., N.D. Cal., decided November 19, 2007). Setting forth the factors that courts must consider when faced with a challenge to expert testimony under *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the court provides a detailed overview of the types of epidemiology studies relied on by experts to prove general causation in personal injury cases and concludes that the only experts in the case who found an association between a low dose of the drug and adverse health effects were either not qualified to render their opinions or cherry-picked the data on which they relied. The court rejected motions to exclude testimony that Celebrex® is capable of causing a heart attack or stroke at 400 milligrams a day, of causing strokes, of causing heart attacks or strokes only after 33 months of continuous use, and of causing an individual plaintiff's heart attack or stroke absent a relative risk exceeding 2.0. As to the latter ruling, the court noted that it did not have evidence before it as to any specific plaintiff for purposes of its ruling.

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FIFTH CIRCUIT FINDS NO ERROR IN JURY INSTRUCTION ON COMPLIANCE WITH AUTO SAFETY STANDARD

The Fifth Circuit Court of Appeals has affirmed a defense verdict in an auto defect case involving a pedestrian death, finding that the trial court properly instructed the jury to rebuttably presume that a product manufacturer is not liable for injury for a design defect where it establishes that the design complied with mandatory safety standards or federal regulations. ***Wright v. Ford Motor Co., No. 05-41723 (5th Cir., decided November 15, 2007)***. Decedent's parents argued that (i) the federal standard did not apply because it regulated rear-view mirrors and not a rear-sensing system, which was at issue because they claimed the vehicle should have been, but was not, equipped with such a system; and (ii) a rebuttable presumption should not be conveyed to the jury once a plaintiff produces evidence rebutting it.

According to the court, the risk at issue was the vehicle's rear blind spot, and the relevant safety standard addressed that risk. Thus, because it applied to the case and the defendant established that the vehicle complied with the standard, the trial court did not err in giving the jury instruction. The

court further ruled that the state statute creating the presumption requires plaintiffs to "establish" that applicable federal standards are inadequate to rebut the presumption. Because the plaintiffs failed to raise this issue before the trial court and simply introduced *some* supporting evidence in rebuttal, the court refused to find trial court error under a plain error review standard.

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FEDERAL SAFETY-GLASS STANDARD DOES NOT PREEMPT DESIGN DEFECT CLAIMS IN AUTO ROLLOVER CASE

Deciding an issue of first impression, the Fifth Circuit Court of Appeals has determined that a federal standard for the glass used in motor vehicle windows does not preempt state law claims alleging strict liability for the defective design of a vehicle's side windows.

Deciding an issue of first impression, the Fifth Circuit Court of Appeals has determined that a federal standard for the glass used in motor vehicle windows does not preempt state law claims alleging strict liability for the defective design of a vehicle's side windows. ***O'Hara v. General Motors Corp.*, No. 06-10498 (5th Cir., decided November 20, 2007)**. The issue arose in a case involving a rollover accident in which a child was partially ejected from the passenger side window and sustained serious arm injuries. The trial court granted the car manufacturer's motion for summary judgment, finding the suit preempted by Federal Motor Vehicle Safety Standard 205. Concluding that the standard was a minimum safety standard and that the National Highway Traffic Safety Administration's rationale for withdrawing a proposed rule on advanced glazing in side windows did nothing to undermine that conclusion, the appeals court reversed and allowed plaintiffs to pursue their common law negligence, strict liability, marketing, and failure-to-warn claims.

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CALIFORNIA AG SUES COMPANIES OVER LEAD IN RECALLED TOY PRODUCTS

California Attorney General (AG) Edmund "Jerry" Brown (D) has filed a lawsuit against 20 companies for the manufacture and sale of toys with "unlawful quantities of lead." ***California v. Mattel, Inc.*, No. n/a (Cal. Super. Ct., Alameda County, filed November 19, 2007)**. The suit was brought under the state's Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65), which requires product warnings about exposures to chemicals known to the state to cause cancer or reproductive toxicity. According to the complaint, (i) the defendants "manufactured, distributed, or sold toys made with components that contain lead or lead compounds for sale or use" in the state; (ii) those handling or using the toys can ingest the lead in the toys; and (iii) lead has been listed as a reproductive toxicant and a chemical known to the state to cause cancer. Because the defendants allegedly knew that some of their toys contain lead, they "knowingly and intentionally exposed individuals to lead or lead compounds" without providing "clear and reasonable warnings." The AG alleges violation of Proposition 65 and the unlawful business practices statute and seeks injunctive relief, civil penalties and the costs of suit.

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"AGS GONE WILD," *THE WALL STREET JOURNAL*, NOVEMBER 13, 2007

According to this editorial, business interests concerned about increasing numbers of lawsuits filed by state attorneys general (AGs) "assailing long-standing business practices, often driven by a political agenda," have proposed that the AGs adopt an ethics manual governing their conduct. The op-ed discusses lead paint and pharmaceutical lawsuits pursued by the AGs of Rhode Island and West Virginia and raises questions about political ambition, favors to AG friends and lack of oversight of settlement fund distributions.

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The U.S. Chamber Institute for Legal Reform released the **manual** discussed in the editorial, citing a state AG survey which found that of those responding (i) most lack standards governing whether to launch an investigation, (ii) all had participated in one or more multi-state litigation matters, (iii) about half had hired outside counsel on a contingency fee basis to bring litigation against private parties, and (iv) the majority, in at least some cases, peremptorily decided how to distribute funds recovered in such litigation. The manual addresses issues ranging from the provision of notice to potential defendants before litigation is instituted, restrictions on public communication and avoidance of conflicts of interest to public scrutiny over the hiring of outside counsel, bans on contingency fee arrangements and limitations on the distribution of settlements, fines and awards.

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DOCKET OF FEDERAL JUDGE DRAWS SCRUTINY FOR RELATED TOBACCO, FIREARM CASES

A federal judge in New York has reportedly attracted the scrutiny of colleagues, defense attorneys and legal experts since his docket became a magnet for billion-dollar cases involving firearms, tobacco, asbestos, and pharmaceuticals. The court system has assigned nearly 20 lawsuits against the tobacco and firearm industries to Judge Jack Weinstein, an 86-year-old jurist known for his purported "willingness to shepherd class actions built on novel legal theories toward trial." Although the court usually distributes lawsuits on a random basis, plaintiffs' lawyers have apparently exploited a rule that allows related cases to be heard by the same judge. This rule aims to streamline the legal process when multiple cases rely on overlapping evidence and procedure, but at least one defense attorney has described Weinstein's docket as a "misuse of the assignment process" and asked the judge to recuse himself from an ongoing firearm suit. Weinstein himself has reassigned some cases and has referred motions for his recusal to fellow judges, one of whom failed to find "overwhelming or inescapable evidence" that the plaintiffs engaged in judge-shopping. Nevertheless, as one recent article in *The New York Sun* concluded, "[i]f there is some disagreement on how plaintiffs have actually fared before Judge Weinstein, there is little dispute that the related case rule has given a single judge an outsize influence in lawsuits against the tobacco and firearm industries." *See The New York Sun,* December 3, 2007.

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CORPORATIONS UNPREPARED FOR E-DISCOVERY ONE YEAR AFTER REVISED FRCP

A recent survey conducted by LexisNexis® has reported that 44 percent of corporate counsel attorneys believed their companies were not prepared when the revised Federal Rules of Civil Procedure (FRCP) for electronic discovery took effect on December 1, 2006. Conducted during the Association of Corporate Counsel's October 2007 meeting, the survey selected 76 verified corporate counsel to answer 14 questions aimed at gauging their company's understanding, preparedness and compliance with the FRCP. The survey ultimately concluded that corporate counsel have taken fundamental steps to prepare for e-discovery, despite a perception that the revised FRCP has significantly amplified the discovery workload for American corporations. For example, 73 percent of survey respondents estimated an increase of up to 20 percent in discovery workload as a result of the new rules, which have classified all e-mail and electronic records as potentially discoverable. Corporate counsel also reported that their top challenges include: (i) "communicating with IT departments (27 percent)"; (ii) "finding budget to put systems and tools into place (25 percent)"; (iii) "getting buy-in from upper management on the importance of litigation preparedness (21 percent)"; and (iv) "finding e-discovery staff with a good mix of IT and legal expertise (9 percent)."

After the first year, however, 82 percent of companies have a document retention policy and two-thirds have implemented a formal legal holds process. "The future of e-discovery will become increasingly complicated, and corporations should anticipate challenges ahead," said Courtney Barton, vice president of industry relations at LexisNexis® Applied Discovery®. "Challenges reflect the need for corporate counsel to have access to the right tools and expertise that will help them remain compliant, understand implications and successfully navigate through this increasingly evolving area of the law." *See LexisNexis® Press Release,* November 29, 2007.

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Meanwhile, a separate survey by e-mail archiving provider Fortiva has reported that of the businesses interviewed, one-fifth have settled a lawsuit to avoid the cost and complications of electronic discovery. In addition, Fortiva concluded that 47 percent of respondents did not believe their legal team could review archived e-mail within 99 days, the time allocated by the FCRP for civil action parties to meet and confer about document production. *See IDM.Net,* November 28, 2007.

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ALL THINGS LEGISLATIVE AND REGULATORY

House Approves Bill Prohibiting DOJ from Pressuring Companies to Waive Privilege

According to a news source, the U.S. House of Representatives has approved legislation (H.R. 3013) that would prohibit the Department of Justice (DOJ) from using a promise of lenient treatment in criminal cases against corporations to pressure them into waiving attorney-client privilege. Approved by a two-thirds voice vote, the measure has a companion (S. 186) pending in the Senate Judiciary Committee. With broad bipartisan support, the proposals

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would overturn a DOJ policy that some refer to as a "culture of waiver" that has forced companies to give up their attorney-client and work-product privileges to gain a "cooperation credit." Representative Bobby Scott (D-Va.) reportedly stated on the House floor that DOJ's practice, "exposes corporations to increased risk of prosecution if they claim the privilege." It is apparently unknown when the Senate will take action on the legislation. *See U.S. Law Week*, November 20, 2007.

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Trial Lawyers Quietly Pursue Legislation to Limit Federal Preemption

U.S. trial lawyers have joined with advocacy groups and lobbyists to back legislation that would "limit the use of arbitration in consumer-rights disputes, preserve state regulations opposed by companies and make it easier to sue Chinese manufacturers," according to a recent article appearing on *Bloomberg.com.* In an attempt to restrict federal preemption, the trial bar has successfully urged lawmakers to insert language into more than a dozen bills that would prevent national laws from overriding state regulations. For example, the American Association for Justice (AAJ) recently persuaded legislators to include a provision in a Food and Drug Administration bill that would protect the right of consumers to sue pharmaceutical companies in state courts. In addition, AAJ has initiated a campaign to stop the Department of Homeland Security "from superseding state regulation of chemical plants, arguing that the federal supervision would be too weak." Other provisions have focused on personal-injury cases involving train accident victims, a car-roof safety proposal, mattress-flammability rules, and the elimination of mandatory arbitration contracts. "They're going for the field goals rather than the full-on touchdown," a spokesperson for the U.S. Chamber of Commerce said about AAJ's strategy. "But we can still lose by field goals."

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The article also notes that the trial bar, with the aid of "lawyer-friendly Democrats," derailed an earlier plan to curb litigation that "might have resulted in savings of tens of billions of dollars in damages, court costs and legal fees." Since 1994, lawyers and law firms have reportedly contributed $565 million to Democratic campaigns, compared with $209 million in Republican donations. Shook, Hardy & Bacon Public Policy Partner **Victor Schwartz** has also described the provisions as "trial-lawyer earmarks." "This is trial lawyers working to enhance their revenue," he was quoted as saying. *See Bloomberg.com,* November 29, 2007.

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LEGAL LITERATURE REVIEW

Catherine Sharkey, "The Roberts Court Wades into Products Liability Preemption Waters: *Riegel v. Medtronic, Inc.*," & Jack Park, "Attorneys' Fees in Class Actions: The Problem Remains," *Engage*, October 2007

These articles, appearing in the Federalist Society's *Engage* magazine, address current legal issues from a conservative perspective. NYU Law Professor Catherine Sharkey discusses a federal preemption case scheduled for argument before the U.S. Supreme Court on December 4, 2007. *Riegel v. Medtronic, Inc.*

(06-179). The Court will decide "whether the preemption provision of the Medical Device Amendments to the Food, Drug, and Cosmetic Act preempts state-law claims seeking damages for injuries caused by medical devices that received premarket approval from the Food and Drug Administration." According to Sharkey, *Riegel* will allow the Court "to begin to fashion a framework for preemption jurisprudence that reconciles the often competing demands of the presumption against preemption and deference to agency interpretations." She acknowledges how the deference part of the equation was complicated when the Food and Drug Administration reversed a long-standing view of its authority vis-à-vis state regulation and adopted an "aggressive pro-preemption stance."

A former state assistant attorney general, Jack Park, describes his personal experience objecting to attorney's fees in a class action in which he participated as an unnamed plaintiff class member. While unsuccessful in challenging the 25 percent contingency fee awarded to class counsel from an $80 million settlement fund, Park contends that such objections constitute "the only game in town." Park believes that class counsel and class representatives are inclined to settle when "the reward in hand exceeds the likely results down the road." Defendants, likewise, have "little incentive" to oppose settlement, because "they want to bind as many potential plaintiffs as possible." He also contends that courts are amenable to class settlements because they are interested in clearing their dockets. He recommends that lawyers who are members of plaintiff classes "should consider objecting to awards that appear excessive." Park concludes, "By becoming the squeaky wheel, objectors may help to put limits on the operations of a class action system that needs them to further interests that are not theirs."

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Kathryn Spier, "Product Safety, Buybacks and the Post-Sale Duty to Warn," *Harvard Law & Economics Discussion Paper*, October 2007

This paper explores the relative merits to consumers and product manufacturers of product buybacks, recalls and post-sale warnings within the context of strict liability and negligence liability schemes, when a manufacturer discovers after its product has been sold that it is defective and poses a potential safety hazard. According to the author, buybacks can be profitable to manufacturers under a strict liability regime when the buyback price is smaller than the expected future liability because they can "avoid future liability associated with product injuries." Simply buying the defective product, however, will not be socially optimal since the price offered will likely be too low and "the manufacturer will not recall the product often enough." When strict liability is coupled with a warning defense, the manufacturer can shift product risks to consumers by contacting them and issuing a warning. Social utility, says the author, is advanced only to the extent that consumer behavior changes in response to the warning. From an economic and social efficiency viewpoint, she finds problems with a negligence-based "duty to warn" that holds manufacturers negligent only when they fail to issue a "cost-justified" warning. Too many variables apparently make this option difficult to implement in practice.

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Neil Vidmar & Matthew Wolfe, "Fairness Through Guidance: Jury Instruction on Punitive Damages After *Philip Morris v. Williams*, *Charleston Law Review* (forthcoming)

Duke University School of Law Professors Neil Vidmar and Matthew Wolfe propose model jury instructions on punitive damages in an effort to provide clarity and guidance in the wake of the U.S. Supreme Court's recent pronouncements on the subject in cases such as *Philip Morris v. Williams*. Their recommended instructions would advise juries of the purpose for punitive damages, the evidentiary burdens required to justify their award, the factors jurors may and may not consider in determining whether the defendant's conduct was sufficiently reprehensible, and general principles of fairness in terms of the defendant's wealth and the relationship of the harm to the defendant's behavior. They conclude, "our proposed jury instructions will help crystallize the debate over the doctrine itself. They are the perfect vehicle for scholars and judges to debate precisely when a punitive damages award is procedurally and substantively fair."

Samuel Issacharoff & Richard Nagareda, "Class Action Settlements Under Attack," *University of Pennsylvania Law Review* (forthcoming)

This article identifies an unsettled area of class-action jurisprudence, collateral judicial review of class action settlements, and suggests how such review should be conducted to preserve their preclusive effect. Simply put, the authors' framework for collateral review involves a limited assessment of the "where," "what" and "how" issues, i.e., the forum in which the settlement was obtained, whether adequate representation was provided, and the review's proper scope. While they acknowledge that many former class-action abuses have been resolved by the Class Action Fairness Act of 2005, the authors fear that "expansive notions of collateral challenge" will "emerge as a backdoor invitation for the reassertion of power by anomalous courts once again." Law professors Issacharoff and Nagareda conclude that "class actions have emerged as a necessary evolutionary response to the problems of mass society," and they "need to be litigated or settled with finality, just as does every other sort of legal proceeding."

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LAW BLOG ROUNDUP

Federalist Society Hosts Tort Litigation Panel

"The topic was tort reform and no, [Democratic presidential candidate] John Edwards was not outside the Mayflower Hotel working the crowd for votes." Nathan Carlile, *Legal Times* legal business reporter, blogging about the Federalist Society's recent tort-reform panel discussion which included claims that class actions have not increased over the last 20 years and a rebuttal from

Shook, Hardy & Bacon Public Policy Partner **Victor Schwartz**, who apparently called such statistics "data rape." The **video**, "Is Overlawyering Overtaking Democracy?," is available online.

The BLT: The Blog of the Legal Times, November 16, 2007.

What to Do with the Class-Action Settlement Leftovers

"What happens to *those* leftovers? It's a fascinating question…. In most cases, judges dole them out to charities like hospitals and legal-aid societies." *Wall Street* writer Peter Lattman, discussing recent attention paid by the media to the unclaimed funds from class-action settlements. Lattman quotes NYU Law Professor Samuel Issacharoff, who was "shocked" to learn about the practice. Another take on the issue is provided by Stephen Gardner, an attorney who litigates on behalf of the Center for Science in the Public Interest and opines, "refusing to consider cy pres [charitable payments of leftover class-action funds] just because Prof. Issacharoff and a few folks at the American Institute don't like cy pres much is too much restriction on the judge's duty to watch out for class members' interests." Gardner contends that cy pres is preferable to giving the money back to the defendant or to the public, or setting up a second distribution to class members who already received their settlement shares.

WSJ Law Blog, November 26, 2007; and Consumer Law & Policy Blog, November 28, 2007.

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Objective Evidence of Pain?

"While we're a long way from having technologies ready for the courtroom, it's only a matter of time before courts are confronted with new neurotechnologies purporting to demonstrate the presence, absence, or intensity of pain symptoms." University of San Diego Associate Law Professor Adam Kolber, reporting that scientific studies have found correlations between brain wave measurements and pain intensity.

Concurring Opinions, November 28, 2007.

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THE FINAL WORD

YouTube Video Explores Product Safety via Popular Dolls

The nonprofit Campaign for America's Future (CAF) has produced a **video** about lead in toys and posted it on YouTube. Titled "Toxic Toys: A Poisonous Affair," the video features a rendezvous between Mattel's Ken and Barbie dolls and their phone conversation a week later, when Barbie reveals over a cell phone made in China that she has contracted lead poisoning. A message that concludes the video criticizes the Consumer Product Safety Commission (CPSC), which has failed to prevent the importation of millions

of lead-tainted toys, and calls for the resignation of Acting Chair Nancy Nord, who, according to CAF, is resisting congressional efforts to provide the agency with more resources. As of this writing, more than 75,000 had viewed the video to the apparent annoyance of the commission. A CPSC spokesperson was quoted as saying, "I'm not going to dignify the video with any kind of response other than to say it's riddled with inaccuracies." *See The Kansas City Star*, November 29, 2007.

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UPCOMING CONFERENCES AND SEMINARS

American Conference Institute, New York City, New York – December 12-14, 2007 – "12th Annual Drug and Medical Device Litigation" conference. Shook, Hardy & Bacon Pharmaceutical & Medical Device Litigation Partner **Harvey Kaplan** will serve on a panel that will discuss "Jury Communication: Changing Perceptions of the Industry/FDA and Putting Adverse Events and the Approval Process in Context."

Southwestern Law School, Los Angeles, California – January 18, 2008 – "Law Review Symposium: Perspectives on Asbestos Litigation," Shook, Hardy & Bacon Public Policy Partner **Mark Behrens** will be among those presenting.

GMA, The Association of Food, Beverage and Consumer Products Companies, New Orleans, Louisiana – February 19-21, 2008 – "2008 Food Claims & Litigation Conference: Emerging Issues in Food-Related Litigation." Shook, Hardy & Bacon Product Liability Litigation Partner **Laura Clark Fey** and Pharmaceutical & Medical Device Litigation Partner **Paul La Scala** will discuss "Product Liability When There Is No Injury: The Deceptive Trade Practices Class Action. Shook, Hardy & Bacon is co-sponsoring this event.

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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 its nearly 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).

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