Shook, Hardy & Bacon L.L.P.®

Product Liability Litigation Report

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FEDERAL COURT FINDS LACK OF EXPERT TESTIMONY NOT FATAL TO PRODUCTS LIABILITY CLAIMS

The Eighth Circuit Court of Appeals has reversed a summary judgment entered in favor of a scissors lift manufacturer, ruling that the exclusion of plaintiffs' expert witnesses was not fatal to their claims and that there was, in any event, further error in the exclusion of their testimony. ***Sappington v. Skyjack, Inc.*, No. 06-3855 (8th Cir., decided January 4, 2008)**. The lift's manufacturer had not incorporated an available design that enhances stability when such lifts are driven into a depression or pothole. Plaintiffs' decedent fell from the lift after its rear wheels dropped off the edge of a walkway, became unstable and tipped over. The trial court excluded the plaintiffs' expert witnesses finding their testimony neither relevant nor reliable and then granted defendants' motion for summary judgment finding that plaintiffs could not prove their claims without expert testimony. According to the appeals court, Missouri plaintiffs can base a strict products liability claim solely on circumstantial evidence. Because the plaintiffs had offered evidence tending to show that the stability technology existed when the lift was manufactured and that such technology would have prevented the accident, the court could not say "there is no conceivable way for plaintiffs to convince a jury the lift was unreasonably dangerous." The court further determined that the trial court abused its discretion in excluding the expert evidence.

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STATE HIGH COURTS SPLIT OVER VIABILITY OF TORT REFORM MEASURES

In December 2007, the high courts of two states reached opposite conclusions when considering whether certain tort-reform provisions were valid under their respective state constitutions. The Ohio Supreme Court ruled that caps on noneconomic damages and punitive damages do not offend constitutional protections, ***Arbino v. Johnson & Johnson*, Slip Op. No. 2007-Ohio-6948 (Ohio, decided December 27, 2007)**, while the Oregon Supreme Court determined that a state law precluding suit against individual state employees but substituting the state as a defendant in their stead and a law limiting damages against the state to a fraction of the losses at issue, were unconstitutional as

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applied to a case involving at least $12 million in economic damages for medical negligence. ***Clarke v. Ore. Health Sci. Univ.*, No. S053868 (Oregon, decided December 28, 2007)**.

The Ohio court issued its 5-2 decision on questions certified to it by a federal court in litigation involving injuries allegedly caused by a hormonal birth-control medication. The noneconomic damages cap limits recovery to the greater of $250,000 or three times the economic damages up to a maximum of $350,000, or $500,000 per single occurrence. These limits do not apply in instances of permanent injury. Plaintiff argued that this cap violated the right to trial by jury, to open courts and to a remedy, and further contended that the cap violated due process of law and equal protection, as well as the separation of powers and the single-subject rule, which requires each bill to contain no more than one subject, clearly expressed in its title. The court rejected each challenge, finding this cap constitutional on its face. Likewise, the court turned aside similar challenges to the punitive damages cap, which is "the lesser of two times the amount of the compensatory damages awarded to the plaintiff from the defendant or ten percent of the employer's or individual's net worth where the tort was committed," up to a maximum of $350,000.

The court had previously found such caps unconstitutional, but noted that the legislature's most recent tort-reform enactments adequately addressed all constitutional infirmities. In a footnote, the court cites the decisions in those states that have also upheld tort reforms adopted by their legislatures, observing that its ruling "places Ohio firmly with the growing number of states that have found such reforms to be constitutional." Among the *amicus curiae* briefs was a submission supporting the respondent pharmaceutical company filed by Shook, Hardy & Bacon Public Policy Partners **Victor Schwartz** and **Mark Behrens**, and staff attorney **Christopher Appel**, on behalf of business interests, including the National Federation of Independent Business Legal Foundation, Chamber of Commerce of the United States and the National Association of Manufacturers.

Oregon's high court, faced with substantial damages involving an infant's permanent brain injury, first rejected the plaintiffs' claim that the defendant, a public body substituted as the sole defendant in place of individual employees and agents, was not entitled to sovereign immunity as an instrument of the state. Accordingly, the court ruled that the legislature may limit damages recoverable in cases involving a public body to any amount it chooses. Nevertheless, because the law eliminated a cause of action against individual public employees or agents, who could be held liable under common law, the constitution's Remedy Clause was violated "because the substituted remedy [$100,000] against the public body … is an emasculated version of the remedy that was available at common law."

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LAWYERS AND EXPERTS DISQUALIFIED IN ROLLOVER SUIT FOR MISHANDLING PRIVILEGED DOCUMENTS

The California Supreme Court has ruled that an attorney who receives privileged documents through inadvertence may read them no more closely than is necessary to ascertain that they are privileged and then "must immediately

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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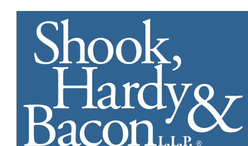

notify opposing counsel and try to resolve the situation." Because counsel for the plaintiffs had failed to do so and had, in fact, shared privileged material with their experts, the court affirmed a lower court order disqualifying plaintiffs' counsel and experts. ***Rico v. Mitsubishi Motors Corp.*, No. S123808 (Cal., decided December 13, 2007)**. The suit involved a rollover accident on a freeway, and the document at issue contained annotated, transcribed notes from a strategy meeting of defendants' representatives, lawyers and designated experts. It was prepared at the direction of counsel and focused on matters he felt were most important to the defendants' strategy. The notes, which were dated but not labeled as "confidential" or "work product," had apparently been obtained by plaintiffs' counsel during a lengthy deposition at their offices when defendants' lawyers were out of the room.

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Plaintiffs' attorney admitted that he knew within a few moments that the document related to the defendants' case, that it was not intended to be produced and that it would be "a powerful impeachment document." He copied, annotated and shared it with co-counsel and his experts. He then used the document during the deposition of a defense expert defended by an attorney who was not familiar with it. Defense counsel nonetheless objected to the "whole line of inquiry with respect to an unknown document" and stated he did not "know where this exhibit came from." When defendants' lawyers realized the document was a copy of the strategy session notes, they contacted plaintiffs' counsel and demanded its return. They further moved to disqualify plaintiffs' legal team and their experts, calling use of the document unethical.

Because the document's "very existence is owed to the lawyer's thought process," reflecting a paralegal's summary along with counsel's thoughts and impressions about the case, the court found that the notes were covered by the absolute work product doctrine. Citing an appellate court ruling that also addressed an attorney's ethical obligation when she receives materials that are obviously subject to attorney-client privilege or otherwise appear to be confidential and it is apparent that they were made available through inadvertence, the state supreme court found it fair and reasonable to require the lawyer receiving such material to refrain from examining it further and to immediately notify the sender that she possesses material that appears to be privileged. The court further upheld the sanctions imposed because of the "unmitigatable damage" caused by the plaintiffs' dissemination and use of the document.

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TEXAS SUPREME COURT CLARIFIES MANUFACTURING DEFECT INSTRUCTION

The Texas Supreme Court has reversed a judgment for the plaintiff in a motor vehicle defect case, finding that the trial court erred by providing the state's pattern charge to the jury. ***Ford Motor Co. v. Ledesma*, No. 05-0895 (Texas, decided December 21, 2007)**. The plaintiff claimed that he lost control of his new Ford pickup truck and struck two parked cars on the side of the street because of a defect in the truck's rear leaf spring and axle assembly. The jury found in his favor and awarded him more than $215,000.

Reviewing the instructions the trial court gave to the jury, the state's high court found reversible error because the trial court did not tell the jury it had to find that the product deviated, in its construction or quality, from its specifications or planned output in a manner that rendered it unreasonably dangerous. While this essential design defect element had been adopted in previous state supreme court opinions, it had not apparently been incorporated into the pattern instructions. The trial court also improperly instructed the jury on "producing cause." The trial court had again followed the pattern instructions, but the high court ruled the definition was incomplete and should have included the statement that a producing cause is one "that is a substantial factor that brings about injury and without which the injury would not have occurred." The court remanded the case for a new trial.

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TRIAL COURT EXCLUDES PLAINTIFFS' CAUSATION EXPERTS IN AUTISM LITIGATION

A trial court in Baltimore, Maryland, has excluded the testimony of plaintiffs' experts, ruling that they were either not qualified to render an opinion on whether the thimerosal in vaccines can cause autism or lacked a reliable basis within the relevant scientific field to conclude that there is such a link. ***Blackwell v. Sigma Aldrich, Inc.*, No. 24-C-04-004829 (Baltimore City Circuit Court, Maryland, decided December 21, 2007)**. The issue arose in a case involving a child whose autism was allegedly caused by the thimerosal preservative in the vaccines he received in the mid 1980s. Maryland applies the *Frye* test to determine the admissibility of expert testimony. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). Under that test, "the proponent of an expert witness bears the burden of proving the basis of the witness' opinion is generally accepted as reliable within the relevant scientific field." In a detailed memorandum opinion, the court found that a number of respected scientific institutions have conclusively determined that thimerosal does not cause autism and further found that the analyses undertaken by one of the plaintiffs' experts were fundamentally flawed. According to the opinion, the court's findings followed a 10-day evidentiary hearing on the parties' motions to exclude each other's expert witnesses. The plaintiffs' motion to exclude defendants' experts was denied.

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PLAINTIFFS' LAWYERS CONTEST PROVISION IN VIOXX® SETTLEMENT AGREEMENT

Lawyers representing 2,600 plaintiffs in Vioxx® litigation have reportedly filed a motion contesting the $4.85 billion settlement deal brokered by Merck & Co. and several law firms to resolve more than 50,000 outstanding claims. The motion specifically asks U.S. District Judge Eldon Fallon to declare unenforceable a provision that prohibits lawyers from recommending the settlement to some eligible clients but not others. The Merck deal, which would pay the average claimant $100,000 before attorney's fees, stipulates that a lawyer who advises a plaintiff to participate in the settlement must extend the offer to all clients and decline to represent those who refuse the terms of the agreement.

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The plaintiffs' lawyers argue that the settlement, "which allows Merck to dictate the advice a lawyer will offer, is improper in all states" and would expose counsel to potential client lawsuits, according to the motion. In addition, some of these lawyers have sought settlement fund reimbursement for performing "common benefit" work. Fallon has set a January 16, 2008, motion hearing, although claimants have until January 15 to enroll in the settlement deal, which will take effect if 85 percent of all plaintiffs and 85 percent of plaintiffs who took Vioxx® for more than one year agree to participate.

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Merck, however, has countered that the contested provision is necessary to prevent attorneys from withholding some cases for trial while settling weaker ones. Moreover, the plaintiffs' firms that agreed to the deal have noted that going to trial will not benefit the majority of plaintiffs. Merck's litigation team has won most of the 18 suits filed in state and federal court, as well as successfully dismissed 4,600 claims before reaching trial. "We knew this was a key component, a primary component of the settlement," one plaintiffs' lawyer was quoted as saying. "It had to be a case where lawyers were not cherry picking." *See Product Liability Law 360,* January 4, 2008; *The New York Times* and *Reuters,* December 21, 2007.

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ATRA NAMES 2007 JUDICIAL HELLHOLES®

The American Tort Reform Association (ATRA) has published its sixth annual report, ***Judicial Hellholes® 2007***, that names "six areas of the country that have developed a reputation for uneven justice." ATRA distinguishes South Florida as the year's top "judicial hellhole," which has cultivated "a reputation for high awards and plaintiff-friendly rulings that make it a launching point for class actions, dubious claims and novel theories of recovery." The report singles out South Florida in part because of a $60 million award against an automobile manufacturer that was later overturned by an appellate court. The jurisdiction was also the home of a famous trial lawyer sent to prison for stealing $13.5 million from thousands of clients.

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Other places named by ATRA include the Rio Grande Valley and Gulf Coast, Texas; Cook County, Illinois; West Virginia; Clark County, Nevada; and Atlantic County, New Jersey. In addition, the ATRA report advocates several reforms to alleviate these unbalanced judicial systems, such as (i) "stopping 'litigation tourism'"; (ii) "enforcing consequences for bring frivolous lawsuits"; (iii) "stemming the abuse of consumer laws"; (iv) "providing safeguards to ensure that pain and suffering awards serve a compensatory purpose"; (v) "strengthening rules to promote sound science"; (vi) "addressing medical liability issues to protect access to health care"; and (vii) "prioritizing the claims of those who are actually sick in asbestos and silica cases." "[B]eing cited as a judicial hellhole is nothing to celebrate," concludes ATRA. "Litigation abuse ultimately hurts the people living in these jurisdictions."

Meanwhile, the Center for Justice & Democracy has faulted the report for "perpetuating myths that ATRA itself creates," alleging that the group "hates" a system "where judges and juries cannot be wined, dined and bought off by corporate lobbyists like them." Adam Liptak of *The New York Times* has likewise

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lambasted *Judicial Hellholes® 2007* as "a collection of anecdotes based largely on newspaper accounts" lacking in methodology. The U.S. Chamber Institute for Legal Reform, however, has hailed the publication as "further evidence that lawsuit abuse remains a serious problem in some jurisdictions." ATRA, which has stated that *Judicial Hellholes® 2007* does not represent an empirical study, has nevertheless argued that "one of the most effective ways to improve the litigation environments … is to bring the abuses to light so everyone can see them." *See Product Liability Law 360,* December 18, 2007; *The Wall Street Journal,* December 24, 2007.

In related news, the *ABA Journal* has noted in a separate article that Minnesota, due to its long statute of limitations, has become a hotbed of "litigation tourism" for out-of-state plaintiffs filing personal injury or product liability claims. The article's author, Mark Hansen, maintains that Minnesota's unique choice-of-law jurisprudence has allowed out-of-state residents "to pursue a lawsuit against an out-of-state company in what would be a time-barred claim in the plaintiff's home state." Since the state legislature last attempted to rectify the legal loophole in 2004, more than 9,000 out-of-state plaintiffs have filed personal injury or product liability suits against out-of-state defendants in Minnesota, according to Hansen. Moreover, out-of-state plaintiffs have constituted approximately 93 percent of the drug and medical device cases filed in all Minnesota courts since May 2004, with the pace of filing increasing from 500 in 2004 to 6,891 in 2006. Although plaintiffs' lawyers have attempted to cast these tactics as legitimate legal recourse, many claimants have openly admitted to filing in Minnesota only because the statute of limitations had expired in other states. "I think there's something wrong with a system that not only allows plaintiffs to forum shop but to boast about it in their complaint," one defense attorney was quoted as saying. *See ABA Journal,* December 2007.

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ALL THINGS LEGISLATIVE AND REGULATORY

Legislators Propose Improvements to Consumer Product Safety Laws

The U.S. House of Representatives has unanimously approved a bipartisan bill to strengthen the Consumer Product Safety Commission (CPSC) after more than 500 products, including 20 million toys, were recalled in 2007 for high lead content and other hazards. The Consumer Product Safety Modernization Act would boost CPSC funding and expand the scope of its authority, in addition to increasing the number of commissioners from two to five, augmenting the depleted staff and allocating resources to update laboratory equipment. Supported by a number of consumer groups, the act would also partially protect manufacturers, importers and retailers from criminal prosecution for reporting issues to the CPSC. "This legislation is a common-sense solution to our national consumer-safety crisis," Representative John Dingell (D-Mich.), who sponsored the bill, was quoted as saying. "The American people, and especially American parents, are demanding swift action to protect children from imports and contaminated toys."

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Meanwhile, Senators Mark Pryor (D-Ark.) and Richard Durbin (D-Ill.) have introduced a competing bill that offers less protection to manufacturers and distributors, proposing stricter pre-market inspection and certification requirements, fewer confidentiality safeguards and stiffer penalties for violations. Refuted by many Republicans, the Senate bill has gained the backing of the consumer watchdog Public Citizen, which has reportedly denounced the House version as "weak." Other groups, including the Consumers Union and the U.S. Public Interest Research Group, have stated that they will "work with both the House and Senate to get a strong final CPSC reform bill to the president as soon next year as possible." Congress has already approved $80 million more in CPSC funding for this fiscal year, an amount that exceeded the White House's request by $16 million. *See The Wall Street Journal,* December 20, 2007; *Detroit Free Press,* December 26, 2007.

In a related development, *New York Times* writers Louise Story and David Barboza recently reported on the fate of recalled toys returned to manufacturers or retailers. "In the past, recalls have brought back 18 percent of products, on average, but low-priced toys and trinkets are returned at even lower rates – often less than five percent," according to Story and Barboza, who note that manufacturers and retailers face unique challenges in disposing of tainted or flawed products. For example, the Environmental Protection Agency stipulates that companies must take precautions to protect the environment when disposing of merchandise that contains an aggregate lead level in excess of 5 parts per million. In addition, Story and Barboza claim that some recalled toys have appeared on auction Web sites or other sites selling products in bulk to businesses, but that manufacturers are currently accountable only for the products recouped after a recall. "The other products left out there – and in many cases, that is more than 80 percent – fall out of their purview, a crack in the recall system that consumer advocates say leaves a giant question mark over the trail of recalled toys," the authors conclude. *See The New York Times,* December 22, 2007.

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LEGAL LITERATURE REVIEW

Symeon Symeonides, "Choice of Law in the American Courts in 2007: Twenty-First Annual Survey," *American Journal of Comparative Law* (forthcoming)

Compiled by Williamette University College of Law Dean and Law Professor Symeon Symeonides, this survey covers nearly 4,000 cases from state and federal courts decided in 2007 that involved choice-of-law issues. Two sections are devoted to products liability and class action litigation, with Symeonides calling a New Jersey decision of most significance as its high court appeared to have second thoughts about applying its pro-plaintiff laws to actions brought by out-of-state plaintiffs against in-state manufacturers. The focus of the class action section is on cases in which plaintiffs overcame the significant choice-of-law hurdle that they generally face in multistate class actions.

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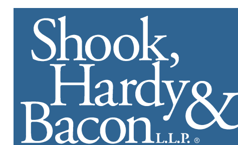

Theodore Eisenberg & Geoffrey Miller, "Reversal, Dissent, and Variability in State Supreme Courts: The Centrality of Jurisdictional Source," *NYU Law School Public Law Research Paper Series* (forthcoming)

Cornell and New York University law professors have analyzed more than 7,000 state supreme court decisions from 2003 to explore the relation between outcomes and the jurisdictional source of the litigation. Much like the U.S. Supreme Court, state high courts are given both mandatory and discretionary authority to assume jurisdiction over a case. According to this article, while interstate variations can mean reversal rates in discretionary jurisdiction cases ranging from 88 percent in Texas to 31 percent in Ohio, aggregated across the states, about one-half of discretionary jurisdiction cases are reversed compared to less than one-third of mandatory cases. The authors also found that discretionary opinions are generally shorter than mandatory case opinions. The courts overall reverse discretionary products liability cases 61.5 percent of the time and reverse 37.5 percent of their mandatory products cases.

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LAW BLOG ROUNDUP

Vioxx® Settlement Spurs Blog Exchange

"I've been criticized for using the phrase 'legalized extortion,' but what *do* you call it when a batch of trial attorneys says 'Lovely business you have here developing life-saving drugs. It'd be a real shame if you'd have to spend $8 billion litigating tens of thousands of meritless cases'?" Ted Frank, attorney and director, American Enterprise Institute Liability Project, sparking a lengthy online exchange over the merits of the Vioxx® settlement, including comments from plaintiff's lawyer Mark Lanier and plaintiffs angry about the billions that will be paid to their lawyers.

"I've been criticized for using the phrase 'legalized extortion,' but what do you call it when a batch of trial attorneys says 'Lovely business you have here developing life-saving drugs. It'd be a real shame if you'd have to spend $8 billion litigating tens of thousands of meritless cases'?"

Overlawyered.com, January 5, 2008.

Poking Under the Judicial Hellhole® Hood?

"I've long been suspicious of the American Tort Reform Association's *Judicial Hellholes* report – its presentation, and now-routine coverage of it by the press, suggests a PR game more than anything else – but I never took the time to get under the hood and poke around." Syracuse University Magazine Journalism and Media Law Associate Professor Mark Obbie, blogging about ATRA's recent report and Adam Liptak's *New York Times* critique. Obbie continues, "Plaintiffs' lawyers and corporate lawyers alike have [judicial hellholes] and hold them dear (even if the honest ones must hold their noses while exploiting the hellhole-court advantage)."

The Carnegie Legal Reporting Program @ Newhouse blog, December 24, 2007.

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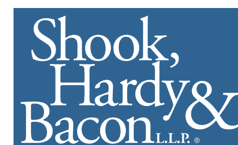

THE FINAL WORD

Product Liability Filings Decrease in 2007

New product liability filings sharply decreased in 2007 from a 2006 peak. According to a news source, there were 45 percent fewer filings in 2007, although the trend is still up 38 percent over 2005 and 9 percent over 2004. The largest decreases reportedly came in the area of personal injury suits, which decreased 61 percent from 2006, a year that saw waves of asbestos, drug and medical device filings. The rate of new claims involving property damage, marine products and motor vehicles was generally unchanged. *See Product Liability Law 360*, January 2, 2008.

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UPCOMING CONFERENCES AND SEMINARS

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 participate in a panel discussion about "Judicial and Practical Perspectives."

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.

DRI, New Orleans, Louisiana – May 1-2, 2008 – "Drug and Medical Device Seminar," Shook, Hardy & Bacon Pharmaceutical & Medical Device Partner **Scott Sayler** will chair the program, and Pharmaceutical & Medical Device Litigation Partner **Marie Woodbury** will present a session titled "Crossing Borders and Seas – International Regulatory Events and Their Impact on United States-Based Litigations and Trials."

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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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