Shook, Hardy & Bacon L.L.P.

Product Liability Litigation Report

A PUBLICATION OF SHOOK, HARDY & BACON L.L.P. NOVEMBER 8, 2007

FIFTH CIRCUIT CLARIFIES STANDARD APPLIED TO TRANSFER-OF-VENUE MOTION IN AUTO DEFECT SUIT

The Fifth Circuit Court of Appeals has determined that a party seeking to transfer a case from one district court to another under 28 U.S.C. § 1404(a), "for the convenience of parties and witnesses," need only show "good cause" to effect the transfer. ***In re: Volkswagen of Am., Inc.*, No. 07-40058 (5th Cir., decided October 24, 2007)**. The case involved injuries sustained in an automobile collision that occurred in Dallas, Texas, which is located in the U.S. District Court's Northern District of Texas.

Plaintiffs filed their lawsuit in the U.S. District Court for the Eastern District of Texas, and Volkswagen sought to transfer venue to the Northern District because (i) the vehicle was purchased in Dallas County, Texas; (ii) the accident took place on a Dallas freeway; (iii) Dallas residents witnessed the accident; (iv) Dallas police and paramedics responded and took action; (v) a Dallas physician performed the autopsy; (vi) the third-party defendant, who drove the vehicle that hit the plaintiffs lived in Dallas County; (vii) none of the witnesses, known parties or significant non-party witnesses lived in the Eastern District; and (viii) none of the facts giving rise to the suit occurred in the Eastern District.

Finding that Volkswagen did not satisfy its burden of showing that the balance of convenience and justice weighed substantially in favor of transfer, the district court denied the company's motion to transfer. Seeking a writ of mandamus ordering the district court to transfer venue, Volkswagen argued to the appeals court that the lower court abused its discretion by requiring the company to show that the balance of convenience and justice *substantially* weighs in favor of transfer, which is the standard applied to an inconvenient forum, or forum non conveniens, dismissal.

After examining a number of circuit decisions from the preceding 40 years, the appeals court agreed. According to the court, section 1404(a) "liberalized and extended the doctrine of forum non conveniens." While plaintiff's choice of forum is entitled to deference, "[w]hen the transferee forum is clearly more convenient, a transfer should be ordered," stated the court. Because its precedents "have not been the model of clarity," however, the appeals court did not fault the district court for applying the wrong standard; instead the court found that it abused its discretion by failing to meaningfully analyze and weigh the private and public interest factors that are considered in a transfer analysis.

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Among the factors the court discussed were the relative ease of access to sources of proof, the availability of compulsory process to secure the attendance of witnesses, the cost of attendance for willing witnesses, and the local interest in having localized interests decided at home. As to the latter, the appeals court rejected the district court's determination that Eastern District citizens have an interest in this product liability case because the product is available in their district. According to the appeals court, "that a product is available within a given jurisdiction is insufficient to neutralize the legitimate local interest in adjudicating local disputes."

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ELEVENTH CIRCUIT EXERCISES JURISDICTION OVER AIR CRASH LITIGATION; REVERSES STAY ORDER

The Eleventh Circuit Court of Appeals has determined that it had jurisdiction over an appeal from a stay order entered in a case where related proceedings were in progress in a foreign jurisdiction, finding that the stay effectively put the plaintiff out of court because it could involve a protracted and indefinite period of delay. ***King v. Cessna Aircraft Co.*, No. 06-10519 (11th Cir., decided October 24, 2007)**. The case involved a 2001 airline crash that occurred in Milan, Italy. Litigation was filed in Italian courts and in a federal court in Florida.

The Florida litigation involved several consolidated lawsuits brought by a group of European plaintiffs and an American, who represented the estate of his deceased daughter, also an American citizen. The trial court granted the aircraft manufacturer's motion to dismiss on inconvenient forum grounds as to all of the European plaintiffs and denied the motion as to the American plaintiff, but stayed proceedings in the latter case pending resolution "by Italian courts of Italian law issues relating to Cessna's liability and any damages the company might owe the plaintiffs." While the trial court had initially denied the motions as to all parties, it found that, because the focus of the litigation changed as the litigation proceeded, Italy became "an increasingly attractive forum for resolution of the disputes." It was unwilling to dismiss the American plaintiff's suit outright, however, because he was entitled to a presumption in favor of his chosen forum and much of the evidence relating to his claims had already been discovered in the United States or was likely to be found there.

The appeals court first determined that it had jurisdiction over an appeal from a stay, finding that it "fits within the 'effectively out of court' exception to the final judgment rule." Plaintiff has "been put out of court indefinitely while litigation whose nature, extent, and duration are unknown is pending in Italy," and "[t]he stay order does have the legal effect of preventing [plaintiff] from proceeding with his claims in federal court for an indefinite period of time, potentially for years." The court also determined that it had subject-matter jurisdiction, finding that the decedent, who had maintained minimal ties with her home state of California, did not intend to live abroad permanently. Cessna had argued that diversity of citizenship was lacking because the decedent was "stateless," i.e., she was not domiciled in any U.S. state when she died.

The court then ruled that the trial court erred in granting the stay request because "minimal evidence" as to the scope of the litigation in Italy and "no assurance at all that the Italian proceedings will directly relate to the issues in this lawsuit" existed. Nor was there any indication whether the American plaintiff would have "a meaningful opportunity to participate in those proceedings." The court, remanding the case for further proceedings, also vacated the lower court's dismissal order as to the European plaintiffs because it had relied in part on its stay and its "nudging" of the foreign plaintiffs toward litigation in Italy to reason that dismissing them "could avoid wasteful and duplicative litigation." As dual proceedings would not now be avoided, the court remanded the entire case so the district court could decide if its inconvenient forum ruling as to the European plaintiffs remained valid.

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FEDERAL COURT REDUCES AMOUNT OF BOND TO APPEAL CLASS-ACTION SETTLEMENT

The Fifth Circuit Court of Appeals has ordered a trial court to reduce the bond required of a class member who sought to challenge the settlement of a class-action lawsuit involving claims that odometers in certain of defendant's vehicles overstate actual mileage. ***Vaughn v. Am. Honda Motor Co., Inc.*, No. 07-41056 (5th Cir., decided October 31, 2007)**. The district court required any objector to post a $150,000 bond under Federal Rule of Appellate Procedure 7 for costs on appeal, having concluded in its memorandum opinion approving the settlement that any appeal would be summarily denied and that the appeals court would award attorney's fees. Reducing the bond amount to $1,000, the appeals court found that the trial court lacked the authority to "erect a barrier" to appeal "in the form of a $150,000 bond for costs on appeal."

According to the court, "There is no provision in the rules of procedure for a district court to predict than an appellate court will find an appeal frivolous and to set a bond for costs on appeal based on an estimate of what 'just damages' and costs the appellate court *might* award." The court further found no evidence in the record supporting the district court's assessment of potential damages in the amount of $150,000. While the district court alluded to the costs of delay to the class, the appeals court was "persuaded" that such costs were "adequately captured by the settlement," because it made no provision for the payment of prejudgment interest on the benefits defendant agreed to pay and did not become effective until any appeals were concluded. "The parties to the settlement thus agreed that the financial time-value of the benefits to be paid under the settlement is not to be awarded to the plaintiffs."

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PUNITIVE DAMAGES AGAINST EXXON MOBIL CORP. AT ISSUE IN STATE AND FEDERAL COURTS

In a decision that generated six separate opinions, the Alabama Supreme Court has reversed a $3.5 billion punitive damages award against Exxon Mobil Corp., finding that no fraud was proven in the case, which involved

allegations that the oil company had breached certain oil and gas leases with the state. *Exxon Mobil Corp. v. Ala. Dept. of Conservation & Natural Res.*, No. 1031167 (Ala., decided November 1, 2007). The court upheld $51.9 million of a compensatory award in excess of $100 million, and the lone dissenting justice agreed with that aspect of the majority opinion. According to the chief justice, who authored the dissenting opinion, the court substituted itself for the jury and did so "for the purpose of holding blameless a practice that everyone acknowledges was deceitful and based on a rationale designed to maximize corporate profits by underpaying the agreed-upon price for the resources of the State of Alabama."

Meanwhile, the U.S. Supreme Court has agreed to review a Ninth Circuit ruling affirming a $2.5 billion punitive damages award against Exxon Mobil Corp. for the 1989 Exxon Valdez oil spill in Alaska's Prince William Sound. *Exxon Shipping Co. v. Baker*, No. 07-219 (U.S., cert. granted October 29, 2007). The Court has limited its review to maritime law issues and will not consider whether the award was excessive under the Due Process Clause. A cross-appeal that sought to reinstate the original $5 billion punitive damages verdict will not be heard. *See scotusblog.com*, October 29, 2007.

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MDL JUDGE DISMISSES WELDING FUME CLAIMS AGAINST CATERPILLAR, INC.

The federal judge presiding over 1,775 cases involving claims that welding fumes caused permanent neurological and other injuries, has dismissed claims filed against heavy-equipment manufacturer Caterpillar, Inc. *In re: Welding Fume Prods. Liab. Litig.*, MDL No. 1535 (U.S. Dist. Ct., N.D. Ohio, Eastern Div., decided October 30, 2007). Plaintiffs alleged that Caterpillar conspired with welding rod manufacturers to conceal and misrepresent information about the purported health risks of manganese, which is emitted in welding fumes. Caterpillar uses large quantities of welding rods and employs many welders; because no plaintiff identified the company as a manufacturer or distributor of a welding product the plaintiff had used or as an employer, the court determined the company could not be held liable under a product liability theory.

The court further dismissed all the negligence-based claims against Caterpillar "because the plaintiffs do not identify any relevant duty owed to them by Caterpillar, much less a duty that Caterpillar breached." The plaintiffs based these claims on Caterpillar's membership and participation in a trade association that for many years published articles in welding trade magazines about health and safety issues. Devoting a lengthy footnote to those cases where plaintiffs sought to hold trade associations liable for their safety standards, codes and recommendations, the court said that the law does not recognize the existence of a duty between trade association members and trade product users. If it did, suggested the court, other trade association members, including government agencies and academics, would also have to be held liable.

As to the plaintiffs' conspiracy claims, the court found that "the *most* that can be said about Caterpillar is that it was present when other defendants decided to engage in tortious acts, and Caterpillar failed to object. There is no

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evidence that would allow a jury to conclude that Caterpillar actually joined any conspiracy by agreeing to cooperate with other defendants, intending to help them achieve the objective of hiding the hazards of manganese in welding fumes."

According to the court, Caterpillar knew, as an employer, of the dangers of welding fumes. "If the plaintiffs in this MDL were bringing suit against Caterpillar in its role as their employer, and Caterpillar were seeking judgment on a claim for intentional tort, the Court might well deny the motion. But no plaintiff-welder in this MDL is suing Caterpillar on the basis that Caterpillar was his employer, 'required [him] to continue working in an unusually dangerous situation,' and 'possessed actual or constructive knowledge of the situation.'" As to presently pending claims against Caterpillar, the court granted its motion for summary judgment, but cautioned that if an MDL plaintiff "asserts a claim against Caterpillar in its role as employer, then the Court will assess that claim in due course."

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RESEARCH COMPANY LOSES BID TO THROW OUT PRODUCT LIABILITY SUIT

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U.S. District Judge Gene Pratter of the Eastern District of Pennsylvania recently refused to grant summary judgment in a product liability suit brought against research company Statprobe Inc. for allegedly scheming with a drug maker to deceive federal regulators. Filed on behalf of Eileen Wawrzyneck, the lawsuit claims that Statprobe and Gliatech Inc., which manufactured the anti-scarring drug ADCON-L, colluded to mask clinical trial outcomes suggesting that the drug was ineffective and potentially dangerous. Wawryneck received ADCON-L during lumbar surgery to prevent scar-tissue formation, but the use of the drug allegedly necessitated a second surgery resulting in permanent damage to her spinal column. The lawsuit accuses Statprobe of revising its final report on ADCON-L to support Gliatech's assertion that the tests yielded favorable results, despite previous evidence showing that the drug was not effective. In 2002, Gliatech pled guilty to federal criminal charges for "failing to inform the FDA of adverse event reports, failing to maintain accurate files, and submitting a false or misleading report to the FDA," according to *Product Liability Law 360°.*

Pratter stated in the order that, "Statprobe had not proven that its conduct was so remote that the court must conclude, as a matter of law, that it cannot be held liable for the harm that subsequently occurred." Pratter also determined, contrary to Statprobe's claims, that the statute of limitations had not expired on the case and that federal law did not preempt the plaintiff's fraud allegations. She determined that the lawsuit was an exception to a 2001 U.S. Supreme Court ruling that blocked claims of fraud on the Food and Drug Administration, unless the FDA discovered that a manufacturer had committed fraud and removed the product from the market prior to any state litigation. "While it is true that it was Gliatech, not Statprobe, that pleaded guilty to misconduct, and that Statprobe never has admitted to, pleaded guilty to, or been found guilty of any misconduct … the court sees no legal theory or compelling policy reason to allow Statprobe to use Gliatech and its wrongdoing as a shield," Pratter concluded. *See Product Liability Law 360°,* November 2, 2007.

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UCLA LAW SCHOOL AND RAND CORP. FORM ALLIANCE TO STUDY JUDICIAL SECRECY

The University of California-Los Angeles Law School and the Rand Corp. have reportedly formed an alliance to "improve public policy through the marriage of rigorous public policy analysis and outstanding legal scholarship," according to a Rand press release. The groups initiated the partnership with a November 2, 2007, conference titled "Transparency in the Civil Justice System," which featured a panel composed of leading academics, top attorneys, insurance-industry representatives, and other experts in the civil-justice system. The conference specifically addressed the role of alternative dispute resolution and confidentiality agreements in reducing transparency and whether the consequent benefits, i.e., "reduction in litigation costs and less congestion in the courts – outweigh the move toward less public scrutiny." Panelists also discussed "how transparency in the civil justice system affects mass settlements" and "whether public policies should increase transparency of the system."

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"If the system is more opaque, it makes policy analysis more difficult and makes the system more susceptible to ideology," contended Michael Rich, Rand's executive vice president, in expressing concern that fewer trials are being held and more private judges are operating outside the court system. U.S. District Judge Terry Hatter Jr. also worried that private mediation could create a "two-tier system" in which wealthy litigants could bypass the court in favor of private judging. Other speakers, however, disagreed that arbitration has threatened the legitimacy of trials. Kenneth Feinberg, who served as the special master of the federal September 11 Victims Fund, argued that private mediation would never replace the civil-justice system. California Supreme Court Chief Justice Ronald George further observed in his keynote address that "courts increasingly have recognized that secrecy should be kept to a minimum," adding that the state Judicial Council adopted rules that "expressly presume that the press and the public are entitled to court records." *See The Los Angeles Times,* November 3, 2007.

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ALL THINGS LEGISLATIVE AND REGULATORY

Elizabeth Williamson, "Industries Paid for Top Regulators' Travel," *Washington Post,* **November 2, 2007**

This article investigates claims that Nancy Nord, acting chair of the Consumer Product Safety Commission (CPSC), and her predecessor Hal Stratton accepted approximately $60,000 in airfare, hotels and meals from industry groups regulated by the agency. *Washington Post* staff writer Elizabeth Williamson reports that, based on internal documents obtained by the paper, Nord and Stratton traveled to several destinations, including Spain, San Francisco, New Orleans, and South Carolina, at the behest of industry groups and attorneys that arranged for the regulators' attendance. Williamson specifically notes that Stratton accepted an $11,000 trip funded by the American Fireworks Standards Laboratory and that Nord received $2,000 to attend a Defense Research Institute conference in 2007. Critics have contended that

This article investigates claims that Nancy Nord, acting chair of the Consumer Product Safety Commission (CPSC), and her predecessor Hal Stratton accepted approximately $60,000 in airfare, hotels and meals from industry groups regulated by the agency.

such industry-sponsored trips violate the federal government's ethical standards, which caution that agencies should not accept travel money from non-federal sources if the payments "would cause a reasonable person … to question the integrity of agency programs or operations." CPSC officials under the Bush administration "differ from those in the Clinton era," Williamson further contends, comparing Nord and Stratton to Ann Brown, who served as chair from 1994 to 2001 and "traveled only at the expense of the agency or of media organizations that sponsored appearances where she announced product recalls."

CPSC has reportedly countered that its ethics officers conducted "a full conflict-of-interest analysis" of all travel expenses to ensure that corporate sponsors did not have business pending before the agency. In addition, CPSC officials have defended industry-paid trips as a way to connect with the manufacturing sector without relying on limited federal funds. "My view was we needed to engage industries and not only tell them what we expected but also to learn what they were thinking … You can't do that sitting in the ivory tower at the CPSC," Stratton was quoted as saying.

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Meanwhile, Nord has asked Congress to reject legislation intended to strengthen CSPC by doubling its budget, expanding its regulatory authority and increasing its staff. Sponsored by Senator Daniel Inouye (D-Hawaii), the bill would raise the agency budget to $141 million over the next seven years; raise the cap on maximum penalties, currently set at $1.8 million, to $100 million; and increase staffing levels by 20 percent. Nord, however, has opposed many of these provisions as unnecessarily burdensome to companies. She has instead proposed an alternative measure that includes a maximum penalty of $10 million, improved incentives for companies to enforce recalls and government authority to seize the assets of a company found in violation of criminal laws. Nord has also objected to offering protection to whistleblowers, arguing that enforcement would "dramatically drain the limited resources of the commission, to the direct detriment of public safety." Several Democrats have since responded by calling on Nord to relinquish her position. "It is long past time for [CPSC] Chair Nancy Nord's resignation," stated U.S. Representative Rosa DeLauro (D-Conn.) in a recent press release. "Her dismissal of efforts to strengthen the agency she leads demonstrates her disinterest in protecting consumers. This is about the health and well-being of our children." *See The New York Times* and *DeLauro Press Release,* October 30, 2007.

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LEGAL LITERATURE REVIEW

Irma Russell, "The Logic of Legal Remedies and the Relative Weight of Norms: Assessing the Public Interest in the Tort Reform Debate," *U. of Tulsa Legal Studies Research Paper,* October 2007

Pace Law School Visiting Professor Irma Russell discusses the importance of consistency and proportionality to civil litigation and the weight accorded various interests that deserve legal protection in the law of remedies. Stating that "[t]he policy judgment that animates tort doctrine is that the norms that maximize due care and minimize negligent conduct serve the public's interest,"

she is critical of tort reform, which she characterizes as "an adjustment of the scales of justice with a thumb on the scale for a defendant's interests." Russell contends that "[t]ort law provides incentives to encourage safe practices and discourage negligent conduct.… The net result may be greater costs for actors in the world but lower costs to society as a whole, by virtue of the costs saved in terms of the injuries and pain and suffering avoided by enhanced safety." She argues that those debating tort reform must consider the historical uses of tort law and compare competing interests, concluding, "Tort law creates a system of liability for conduct deemed negligent or culpable. It encourages due care by imposing liability for harm that results from a defendant's creation of unreasonable risk of harm to others. The tort system includes a deliberate assessment of the strengths of the norms involved in legal doctrine for comparing individual and group interests in an even-handed manner."

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Herbert Kritzer, "The Arts of Persuasion in Science and Law: Conflicting Norms in the Courtroom," *Law & Contemporary Problems* (forthcoming)

This article focuses on differences between scientific and legal inquiry and persuasion and how those differences play out in the courtroom. William Mitchell College of Law Professor Herbert Kritzer compares the scientist's approach – which values systematic, replicable inquiry; critical use of evidence; doubt and skepticism; and moving away from falsity by eliminating what is not true – with the lawyer's, which relies on experience and specific events as data sources, partisan use of evidence, certainty, and moving toward truth by assuming there is a single truth that will be revealed through the adversary process. Because these approaches are fundamentally different, the author shows how even "junk science" can persuade a factfinder if the proponent tells a good story and makes the strongest possible case for her opinion. Kritzer contends that to understand the tension between science and the courts, "one must take into account the differences in the norms governing persuasion and how they come to be reflected in judgments about credibility."

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LAW BLOG ROUNDUP

Fundamental Questions About Industry-Funded Travel

"Does she think it's a good idea for the Chair of the CPSC to be flown around the world by the toy and appliance industries? Give me a break." Brian Wolfman, Director, Public Citizen Litigation Group, commenting that it took a *Washington Post* article about industry-backed travel of the Consumer Product Safety Commission's acting chair to prompt her to call for an ethics review of the agency's travel policy.

Consumer Law & Policy Blog, November 3, 2007.

"Does she think it's a good idea for the Chair of the CPSC to be flown around the world by the toy and appliance industries? Give me a break."

"Toxic Terrorists" Running Loose

"What scientist wants to subject him or herself to personal attack for simply stating common sense and basic scientific facts? Easier to retreat to the laboratory and classroom – and leave center stage to the 'toxic terrorists' who want us to believe there is a carcinogen on every plate, a toxin in every drop of water we drink, poison in every bit of air we breathe." Elizabeth Whelan, founder and president of the American Council on Science and Health, blogging about why scientists do not speak up when science is distorted and the media sensationalize the "scares du jour."

Huffington Post, October 23, 2007.

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THE FINAL WORD

Outsider Funds Add Political Edge to Judicial Races

Judicial races have become increasingly political due to an infusion of corporate and special interest funding, argues *Washington Post* staff writer Robert Barnes in a recent article about rising campaign costs in the 21 states that hold direct and nonpartisan elections for the high court. Barnes notes that the November 6, 2007, Pennsylvania Supreme Court election has elicited $5 million in campaign contributions, following the example of other judicial contests that have set records for spending, negative advertisements and special-interest involvement. In addition, an "Illinois Supreme Court race in 2004 cost more than 18 of the 34 U.S. Senate contests that year, and candidates for chief justice of the Alabama Supreme Court last year raised a total of $8.2 million," according to Barnes. He also cites the National Institute on Money in State Politics, which found that 44 percent of the money raised for races in 2005 and 2006 came from business interests that contributed approximately "twice as much as was given by lawyers, who had traditionally funded the campaigns."

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Experts have reportedly attributed these changes to pro-business groups and trial lawyers who want to bring tort reform to the state level and partisan groups seeking greater influence with judges. In 2002, the U.S. Supreme Court ruled that some state restrictions on judicial candidates' speech were unconstitutional, thus encouraging several campaigners to advertise their political leanings and accept partisan support. While proponents of the current system have argued that it avoids the elitist trap of a merit-based selection process, critics have expressed concern that high-stakes elections require judges to be "Huey Long on the campaign trail and Solomon in the courtroom and not miss a beat," as the Justice at Stake executive director was quoted as saying. "The heightened spending and increasingly aggressive tone of the contests have alarmed nonpartisan groups and judges around the country," concludes Barnes, adding that electoral retaliation also threatens judges who issue opinions unpopular with voters. *See Washington Post,* October 28, 2007.

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UPCOMING CONFERENCES AND SEMINARS

Nörr Stiefenhofer Lutz, Munich, Germany – November 16, 2007 – Compliance Day. Shook, Hardy & Bacon Tort Partner **John Barkett** will address corporate compliance issues, antitrust and product liability during his presentation titled "Cartels and Corruptions in the USA."

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."

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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GLOBAL PRODUCT LIABILITY LAW FIRM OF THE YEAR 2005|2006|2007 WHO'S WHO LEGAL

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