Shook, Hardy & Bacon L.L.P.

DECEMBER 9, 2010

# PRODUCT LIABILITY LITIGATION REPORT

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## NINTH CIRCUIT ALLOWS PERUVIAN TOXIC EXPOSURE CLAIMS TO PROCEED IN U.S. COURTS

The Ninth Circuit Court of Appeals has determined that an oil company failed to meet its burden of proving that Peru would be an adequate alternative forum in litigation by indigenous people claiming injury from the company's operations in their country. ***Carijano v. Occidental Petroleum Corp.*, No. 08-56187 (9th Cir., decided December 6, 2010)**.

The plaintiffs are 25 members of the Achuar indigenous group and Amazon Watch, a California nonprofit corporation added to the complaint after the case was removed to federal court. The nonprofit began working with the Achuar communities in 2001, years after oil drilling, refining and processing began in the region in which they lived, and helped produce a documentary film about alleged environmental contamination and its purported effects on the communities.

The plaintiffs brought claims for common law negligence, strict liability, battery, medical monitoring, wrongful death, fraud and misrepresentation, public and private nuisance, trespass, and intentional infliction of emotional distress; they sought damages, injunctive and declaratory relief, restitution, and disgorgement of profits on behalf of individual plaintiffs and two proposed classes. The district court granted the company's motion to dismiss on *forum non conveniens* grounds and apparently did so without conducting oral argument and while denying the plaintiffs the opportunity to conduct limited discovery on the adequacy of Peru as an alternative forum. According to the district court, Peru is an adequate alternative forum and the public and private interest factors sufficiently overcome the strong presumption of a domestic plaintiff's choice of forum.

A divided Ninth Circuit panel determined that the district court abused its discretion "in finding that under the unique circumstances of this case Peru provides an adequate alternative forum for Plaintiffs to pursue their claims against Occidental arising from business operations in Peru that ended 7 years previously." The court questioned whether Occidental would be subject to jurisdiction in Peru without waiving the statute of limitations and whether the plaintiffs' legal theories were available under Peruvian law. The court also found that the district court overlooked "important evidence related to corruption" in the Peruvian courts.

*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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Weighing the public and private interest factors involved in the litigation, the Ninth Circuit found that California-based evidence was critical to the litigation, which turned on the "mental state of the Occidental managers who actually made the business decisions that allegedly resulted in the injury," more than on the alleged injury's physical location. The court further faulted the district court for failing to consider whether a judgment against Occidental could be enforced in Peru. Overall, the court determined that the factors fail to "establish … oppressiveness and vexation to a defendant … out of all proportion to plaintiff's convenience," and that they "fail to outweigh the deference owed to Amazon Watch's chosen forum." The court remanded the case for the district court to consider the question of the nonprofit's standing and for further proceedings.

The dissenting appeals court judge would have deferred to the district court's determination, unpersuaded that the lower court made a clear error of judgment. She would have remanded for the district court to consider whether dismissal of the case should be conditioned on the defendant agreeing to accept service, submit to jurisdiction, waive the statute of limitations, comply with discovery, and submit to the enforcement of any Peruvian judgment in the United States. The dissenting judge was also concerned that Amazon Watch was only one plaintiff on one out of the 12 causes of action and had been added to the litigation "only after the Peruvian plaintiffs learned that Occidental was going to move for dismissal based on *forum non conveniens*."

## WEST VIRGINIA HIGH COURT RULES FDA WARNING LETTERS DO NOT PROVE DRUG MAKER WRONGDOING

The West Virginia Supreme Court of Appeals has reversed an order granting the plaintiff's partial summary judgment motion in a case involving alleged false and misleading communications by a drug maker to health care providers, finding that the lower court erred in giving preclusive effect to Food and Drug Administration (FDA) warning letters. ***W. Va. ex rel. McGraw v. Johnson & Johnson,* No. 35500 (W. Va., decided November 18, 2010)**. The state attorney general sued the drug maker and its parent for communications provided to state health care providers about two drugs, alleging that the information was false and misleading.

FDA had previously warned the company that these communications either failed to disclose material information about new product-label warnings as to potential risks or made false or misleading claims about abuse potential. The company disputed FDA's assertions, and after corrective letters were prepared to FDA's satisfaction, the matters were closed. The attorney general's allegations were based on the same company statements and omissions cited in FDA's warning letters. A West Virginia trial court found, on the basis of FDA's determinations, that the company had, as a matter of law, made false and misleading statements in violation of state consumer protection law and entered a civil penalty of $4.475 million against it.

On appeal, the state high court rejected the trial court's conclusion that FDA had issued an official determination about the matter. According to the court, warning letters are not quasi-judicial determinations by the agency and, as such, "are not subject to collateral estoppel under West Virginia law." The court characterized the letters as "informal and advisory notifications" expressing FDA's "belief" that the company's communications violated federal law. The company had no opportunity to challenge and fully litigate the merits of the FDA letters, because they did not constitute final action of the FDA commissioner. The court remanded the case so the parties could litigate whether the company's statements or omissions in fact violated the law.

## NINTH CIRCUIT ADOPTS CRITERIA FOR GRANTING DISCRETIONARY REVIEW UNDER CAFA

In the context of an employment law dispute, the Ninth Circuit Court of Appeals has established the criteria it will consider in determining whether to grant an appeal of an order remanding a putative class action to state court under the Class Action Fairness Act (CAFA). ***Coleman v. Estes Express Lines, Inc.*, No. 10-80152 (9th Cir., decided November 30, 2010)**.

The defendant called on the district court to look beyond the pleadings to decide if the federal courts had jurisdiction over the matter or whether the case involved a local controversy only and should be decided in state court. The district court decided that CAFA precluded it from considering extrinsic evidence but, even without that evidence, determined that the local controversy exception applied. The defendant sought leave to appeal the order remanding the case to state court.

The Ninth Circuit had not previously addressed under CAFA either (i) how it would evaluate applications for leave to appeal, or (ii) whether extrinsic evidence can be considered in ruling on federal-court jurisdiction. Looking to the First and Tenth Circuits, the court adopted the following factors (not as "a series of bright-line rules") to guide its discretion in granting leave to appeal: "the presence of an important CAFA-related question" that is unsettled, incorrectly decided by the lower court or fairly debatable; the significance of the CAFA-related question to the case; and "whether the record is sufficiently developed and the order sufficiently final to permit 'intelligent review.'" According to the court, the potential detriment to the respective parties must also be balanced.

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Applying these factors, the court found that the case presented an important and unsettled question of CAFA law that could be dispositive on whether the case should be heard in state or federal court. The Ninth Circuit did not determine whether the lower court had correctly decided the issue of extrinsic evidence, but because courts have differed over the matter, it was "fairly debatable" and "appellate

review would be useful." The court also found that the matter had been fully briefed, "so the case is well-positioned for review." As to a balancing of the equities, the court ruled that the only harm to the putative class was delay, while the defendant "will lose almost any chance of litigating this case in a federal forum if it is not allowed to appeal the remand order." Thus, the court granted the defendant's application for leave to appeal.

## RUSTY CLOTHES DRYER CASE ELICITS FOURTH WRITTEN ORDER IN SEVENTH CIRCUIT

The Seventh Circuit Court of Appeals has issued a sharp rebuke to the attorney who sought rehearing of a panel ruling that ordered a district court to enjoin copycat litigation under the All Writs Act in a case involving allegations that Sears, Roebuck & Co. misled consumers by claiming that a certain model clothes dryer had a stainless steel drum. ***Thorogood v. Sears, Roebuck & Co.*, No. 10-2407 (7th Cir., decided December 2, 2010)**. Additional information about the panel ruling appears in the **November 11, 2010, issue** of this *Report*. Denying the petition for panel rehearing and rehearing en banc, the court addressed the attorney's "over the top" accusations and suggested that he "may wish to moderate his fury."

According to the court, counsel did not discuss any of the panel ruling's legal merits, instead focusing on "language in our opinion that he regards as ad hominem" and his contention that "the opinion unjustifiably portrays the case as meritless, lawyer-driven litigation." Counsel apparently argued that the opinion "must be corrected because it runs afoul of the Code of Conduct for United States Judges" and claimed that the court's "clearly prejudiced opinion" "reads more like a posting in its author's well-known blog (www.becker-posner-blog.com), declaring its view of class actions, mischaracterizing class counsel as being inherently corrupted by the inducement to sell out its clients' small claims for its own fees obtained through collusive settlement." The attorney also apparently alleged that "the Panel's role as the self-assured Simon Cowell of the Circuits demeans not just us, but the Court as well." The court explains that Cowell was "the cantankerous judge on 'American Idol.'"

In response, the court reiterates the soundness of its legal ruling and cites numerous authorities that have explained how class actions can have a coercive effect on defendants to settle and can lead to lawyers' "sweetheart deals" that sacrifice the interests of class members. The court concludes, "Neither the judges on this panel nor other federal judges so far as we are aware have denied that the class action is a worthwhile device, and indeed is indispensable for the litigation of many meritorious claims. But like many other good things it is subject to abuse. It has been abused in the stainless steel clothes dryer litigation."

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## ALL THINGS LEGISLATIVE AND REGULATORY

### CPSC Finalizes Product Safety Information Database Rule

The Consumer Product Safety Commission (CPSC) has finalized the **rule** that creates a consumer product safety information database as required under the Consumer Product Safety Improvement Act of 2008. The rule will be effective 30 days after publication in the *Federal Register*, and the database is apparently expected to be accessible to the public at SaferProducts.gov in March 2011. The CPSC commissioners divided 3-2 along party lines in approving the rule.

The database will consist of reports of harm allegedly caused by consumer products under CPSC's jurisdiction; the reports may be submitted by consumers, government agencies, health care professionals, child care providers, and public safety entities. The rule requires specific information that must be submitted in the reports, including a product description, the manufacturer or labeler's identity, an incident narrative, and when the incident happened. Verification procedures are also specified. Certain information will be redacted or otherwise treated as confidential, and manufacturers will have their own portal for submitting comments on the reports.

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CPSC will provide certain information from the incident reports to manufacturers within five days of receipt "to the extent practicable," and manufacturers may comment on the information contained in the reports. Anyone involved in the process of submitting or commenting on incident reports may request that the report and/or manufacturer comment be excluded from the database or corrected "because it contains materially inaccurate information."

Those requesting exclusion or correction bear the burden of proving with relevant evidence that "the designated information is materially inaccurate." If such a request is made before the incident report is published, "the Commission cannot withhold the report of harm from publication in the Database until it makes a determination. Absent a determination, the Commission will publish reports of harm on the tenth business day after transmitting a report of harm to the manufacturer or private labeler."

Where CPSC finds that information in a report or comment is materially inaccurate before publication on the database, the agency must decline to add the information to the database, correct the information and then publish, or add information correcting the inaccurate information and then publish. Material already published on the database can be removed or corrected if determined to be materially inaccurate after publication. The database will include a prominent notice that CPSC "does not guarantee the accuracy, completeness, or adequacy" of information on the database submitted by those outside the agency.

The Republican commissioners, who do not support the rule, are reportedly concerned that too many persons or entities may file reports, making it too easy for plaintiffs' lawyers and competitors to post bogus information. They also apparently contend that adverse information will be posted too quickly and will not give manufacturers sufficient protection from inaccurate postings. According to a news source, before the commissioners approved the final rule, the Republicans blocked a final vote and posted an alternative proposal on the agency's Website that would have, among other matters, restricted those who could file a report. *See The New York Times*, November 23, 2010.

### EPA Seeks Public Input on Phthalates Research

The Environmental Protection Agency (EPA) **held** a December 8-9, 2010, workshop under the auspices of an independent panel of experts that reviewed risks associated with exposure to cumulative mixtures of six selected phthalates.

The National Academy of Sciences has recommended that EPA "group chemicals that cause common adverse outcomes and not focus exclusively on structural similarity or on similar mechanisms of action" and that "phthalates and other agents that cause androgen insufficiency or block androgen-receptor signaling, and are thus capable of inducing effects that characterize components of the phthalate syndrome, should be considered in a cumulative risk assessment."

In response, EPA is researching (i) "whether prenatal exposures to phthalates are associated with adverse effects in male and female offspring"; (ii) "how phthalates interact in mixtures with other phthalates, toxic substances, and pesticides to induce adverse effects, in particular disruption of reproductive development in males and females"; and (iii) "approaches to integrate new data on multiple phthalates into a cumulative mixtures assessment." EPA will accept comments until January 4, 2011. *See Federal Register,* November 15, 2010.

### CPSC Provides Criteria for Accepting Accreditation of Third Parties Assessing Children's Sleepwear

The Consumer Product Safety Commission (CPSC) has issued a **notice** that "provides the criteria and process" for its acceptance of accreditation of third-party conformity assessment bodies that test the flammability of children's sleepwear. These third-party conformity assessment bodies certify that children's sleepwear conforms to federal law. Sleepwear sizes 0 through 6X and 7 through 14 manufactured after February 17, 2011, cannot be "imported for consumption or warehousing or distributed in commerce" unless the manufacturers and importers (i) have "samples of any such product, or samples that are identical in all material respects to such product, tested by a third party conformity assessment body accredited to do so" and (ii) issue a certificate that the sleepwear complies with the applicable compliance standards based on testing. *See Federal Register,* November 19, 2010.

*These third-party conformity assessment bodies certify that children's sleepwear conforms to federal law.*

### White House Seeks Comments on Nanotech-Related Research

The White House Office of Science and Technology Policy has published a **notice** requesting public comment on the National Nanotechnology Initiative's draft "Strategy for Nanotechnology-Related Environmental, Health, and Safety Research." Comments are requested by January 6, 2011.

The **draft** describes the research that 25 federal agencies believe is needed to adequately assess the environmental, human health and safety aspects of nanomaterials, and includes information about the state of the science and an analysis of the gaps and barriers to achieving the necessary research. The core research areas involved are nanomaterial measurement, human exposure assessment, human health, the environment, and risk assessment and risk management methods.

### *AP* Study Claims Lead, Cadmium in Collectible Glasses Exceed Federal Limits

Recent testing commissioned by the *Associated Press* (*AP*) has reportedly found that lead on collectible drinking glasses depicting comic book characters exceeds the 0.03 percent federal limit for children's products "up to 1,000 times." According to the November 22, 2010, *AP* article, decorative enamel on Superman, Wonder Woman and "The Wizard of Oz" glasses made in China and purchased at a Warner Brothers Studios store in Burbank, California, contained 16 to 30.2 percent lead. Relatively high cadmium levels were also reportedly found on the glasses.

In response to the *AP* report, Consumer Product Safety Commission (CPSC) spokesperson Scott Wolfson told a news source that the commission would conduct its own tests that will focus on "how much of the metal could come off of the cup and onto a child's skin and into their mouths." Federal regulators will reportedly determine whether the glasses are children's products and, therefore, subject to strict lead limits. If the commission deems them outside that definition, the lead levels would evidently be legal.

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*AP*'s specially commissioned laboratory apparently studied 13 new glasses and 22 old ones, which dated from the late 1960s to 2007. Spokespersons for the importer of the drinking glasses and Warner Brothers were quoted as saying that they considered the products targeted to adult collectors. *See AP* and *Product Liability Law 360,* November 22, 2010.

### FTC Proposes Privacy Browser Setting for Consumers' Online Use

The Federal Trade Commission (FTC) has issued a preliminary staff **report** that proposes a framework for businesses and policymakers to protect the privacy of consumers using the Internet. FTC staff seeks stakeholder comments on the proposed framework until January 31, 2011, and a final report will follow.

The report coincides with a recent congressional hearing during which FTC officials testified that a "persistent" browser setting could allow consumers to choose whether companies can collect data about their online searching and browsing. According to an agency press release, although online tracking can help targeted advertising efforts, FTC "supports giving consumers a 'Do Not Track' option because the practice is largely invisible to consumers, and they should have a simple, easy way to control it." The option could be accomplished through legislation or "potentially through robust, enforceable self-regulation," FTC said. "The advantage of industry doing something themselves is that they can move much more quickly than lawmakers," FTC Chair Jon Leibowitz told news sources.

If Congress chooses to enact legislation, FTC urged it to consider such issues as (i) the benefits that online "behavioral" advertising provides consumers; (ii) "an option that lets consumers choose to opt out completely or choose certain types of advertising they wish to receive or data they are willing to have collected about them"; and (iii) new FTC authority to fine violators to "provide a strong incentive for companies to comply with any legal requirements, helping to deter future violations." *See Legal Times,* December 1, 2010; *FTC Press Release,* December 2, 2010.

### Canada Announces "Tough" Lead Regulations

Canada recently announced stringent new rules that will regulate the amount of lead in children's toys and certain products. Government officials have set lead limits in toys for children younger than age 3 at 0.009 per cent, down from 0.06 percent. The regulations, which will apparently be published before the end of 2010 under the existing Hazardous Products Act, will also apply to products that children younger than 3 put into their mouths, such as baby bottles, "soothers," beverage straws, and baby bibs. The rules will not apply to kitchen utensils.

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"The health and safety of our children is a top priority," Heath Minister Leona Aglukkaq said in a November 29, 2010, Health Canada press release. "As a mom, I'm proud that our new, tough regulations will make Canada a world leader in strict lead reduction in consumer products, especially toys." Health Canada is also reportedly amending regulations to significantly reduce the total lead allowed in consumer paints and surface coatings of certain products, including those applied to children's toys and furniture. It is unknown what, if any, impact the new children's product regulations may have on U.S. lead limits. *See Health Canada Press Release; Postmedia News*, November 29, 2010.

### Civil and Appellate Procedure Rule Revisions Take Effect

Among the federal rules changes that took effect December 1, 2010, are changes to Civil Rule 26, shielding draft reports by testifying expert witnesses with work-product protection, and Appellate Rule 29, requiring amicus briefs to identify

whether "a party's counsel authored the brief in whole or in part," "a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief," and "a person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief and, if so, identifies such person." *See The Third Branch*, November 2010.

## LEGAL LITERATURE REVIEW

**Lori McGroder & Devin Ross, "*Tilzer*, Rule 1.8(g), & The End of Mass Tort Settlement As We Know It," *Mealey's Emerging Toxic Torts*, November 16, 2010**

Shook, Hardy & Bacon Pharmaceutical and Medical Device Litigation Attorneys **Lori McGroder** and **Devin Ross** have co-authored an article that analyzes a Kansas Supreme Court decision which, if adopted by other courts, could affect the ability of counsel to reach global settlements in non-class mass actions. According to the authors, the court defined "aggregate settlement" so broadly that it subjects "virtually all" such settlements to the disclosure requirements of Model Professional Conduct Rule 1.8(g). They urge other courts to adopt a more narrow interpretation to avoid undue obstacles to the efficient resolution of mass tort litigation

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**Robert Hardaway, Dustin Berger & Andrea DeField, "E-Discovery's Threat to Civil Litigation: Reevaulating Rule 26 for the Digital Age," *Rutgers Law Review* (forthcoming)**

University of Denver Sturm College of Law Professor Robert Hardaway discusses how the Federal Rules of Civil Procedure have failed to control discovery costs in litigation involving electronically stored information and describes in detail what makes some emerging technology so difficult to search effectively. Critical of the federal courts' "producer-pays presumption," Hardaway instead opines that mandatory cost-sharing successfully motivates parties to control the costs and scale of e-discovery. He concludes, with his student co-authors, "Our civil justice system is on an unsustainable trajectory. Equal cost sharing is the kind of fundamental reform that can truly stem the ever-expanding cost, scope, and duration of discovery, thereby ensuring that the courts are indeed open to everyone and will decide cases on their merits rather than on who can impose the highest discovery costs on their litigation opponents."

**Kevin Clermont, "Class Certification's Preclusive Effects," *PENNumbra* (forthcoming, March 2011)**

Cornell University Law Professor Kevin Clermont discusses the issues surrounding litigation currently before the U.S. Supreme Court, presenting the question whether an absentee class member, subsequent to denial of class certification, is precluded

from seeking to certify another class action on a similar claim. Clermont contends that by analogizing this class-action question to the "jurisdiction-to-determine-no-jurisdiction doctrine," the answer to the question is yes and provides a "path to preclusion that avoids the natural judicial reluctance to augment the categories of privies. It reaches the result of preclusion on certification denial, a result suggested by policy and accepted by the weight of precedent. Almost as importantly, the analogy brings with it all the limits on preclusion associated with the jurisdiction-to-determine-no-jurisdiction doctrine."

## LAW BLOG ROUNDUP

### Did Washington Supreme Court Abrogate Economic Loss Doctrine?

"The Washington Supreme Court opens a product liability can of worms by abandoning a traditional doctrine that prescribes that when there was a contract between the parties, remedies for purely economic loss blamed on product defectiveness must be based on principles of contract law, not tort law." Blog Editor and Cato Institute Legal Fellow Walter Olson, referring to a recent state court ruling, *Eastwood v. Horse Harbor Foundation, Inc.*, No. 81977-7 (Wash., decided November 4, 2010), that purportedly rewrote Washington law on the economic loss doctrine. According to the court, "[e]conomic losses are sometimes recoverable in tort, even if they arise from contractual relationships." The litigation did not involve product-liability claims or issues.

Overlawyered.com, December 2, 2010.

### The Highly Dangerous Toilet-Paper Dispenser

"When we think of the kinds of bodily harm that could come to us while patronizing a Texas Roadhouse restaurant, we envision perhaps some type of blocked artery from the Full Slab of Fall-Off-the-Bone Ribs or maybe an alcohol-related disaster tied to one of the Legendary Margaritas. It didn't really cross our mind that a toilet-paper dispenser could inflict pain and suffering that is lawsuit worthy." *Wall Street Journal* Reporter Dionne Searcey, blogging about a Michigan Supreme Court ruling allowing a plaintiff to sue a restaurateur for injuries allegedly caused by an unlatched plastic toilet-paper dispenser in the rest room.

*WSJ* Law Blog, December 6, 2010.

## THE FINAL WORD

### Report to Chief Justice on Civil Litigation Procedures Released

The U.S. Judicial Conference Advisory Committee on Civil Rules and the Committee on Rules of Practice and Procedure have submitted a **report** to Chief Justice John

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# PRODUCT LIABILITY LITIGATION REPORT

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Roberts summarizing the discussions of judges, lawyers and academics at Duke University School of Law in May 2010, on ways to improve federal civil litigation. Among other matters, the report concludes that meaningful improvements cannot come from revising the Federal Rules of Civil Procedure alone, particularly in light of disagreements over how to improve them. According to the report, the rules are only as effective as they are implemented, and to that end, what is also needed is "judicial education, legal education, and support provided by the development of materials to facilitate implementing more efficient and effective procedures." The report recommends "sustained, hands-on judicial case management."

The rules committees have identified as priorities for further attention "discovery in complex or highly contested cases, including preservation and spoliation of electronically stored information," as well as a "review of pleading standards in light of the recent Supreme Court cases." The report notes that the "Advisory Committee has initiated work in these areas" and that rules committees have begun addressing the issues.

## UPCOMING CONFERENCES AND SEMINARS

GMA, Scottsdale, Arizona – February 22-24, 2011 – "2011 Food Claims & Litigation Conference: Emerging Issues in Food-Related Litigation." Shook, Hardy & Bacon Agribusiness & Food Safety Partner Paul LaScala will participate in a panel addressing "Standards and Expectations of Corporate Social Responsibility: The Retailer's Perspective." Business Litigation Partner Jim Eiszner and Global Product Liability Partner Kevin Underhill will share a podium to discuss "Labels Certainly Serve Some Purpose—But What Legal Effect Do They Have?" Shook, Hardy & Bacon is a conference co-sponsor. ■


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## ABOUT SHB

Shook, Hardy & Bacon is widely recognized as a premier litigation firm in the United States and abroad. For more than a century, the firm has defended clients in some of the most substantial national and international product liability and mass tort litigations.

Shook attorneys have unparalleled experience in organizing defense strategies, developing defense themes and trying high-profile cases. The firm is enormously proud of its track record for achieving favorable results for clients under the most contentious circumstances in both federal and state courts.

The firm's clients include many large multinational companies in the tobacco, pharmaceutical, medical device, automotive, chemical, food and beverage, oil and gas, telecommunications, agricultural, and retail industries.

With 93 percent of our more than 500 lawyers focused on litigation, Shook has the highest concentration of litigation attorneys among those firms listed on the *AmLaw* ***100,*** *The American Lawyer's* list of the largest firms in the United States (by revenue).