Shook, Hardy & Bacon L.L.P.

NOVEMBER 29, 2012

PRODUCT LIABILITY LITIGATION REPORT

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FIFTH CIRCUIT RULES AG ACTION OVER LCD PANELS IS REMOVABLE TO FEDERAL COURT

The Fifth Circuit Court of Appeals has determined that a Mississippi attorney general (AG) antitrust action against companies that sell liquid crystal display (LCD) panels may be removed to federal court under the Class Action Fairness Act (CAFA), because the suit fulfills the law's requirements as a "mass action." ***Mississippi v. AU Optronics Corp.*, No. 12-60704 (5th Cir., decided November 21, 2012)**. While agreeing with the district court that the case was not a class action under CAFA, the appeals court reversed its remand order, finding that the suit involves the claims of "100 or more persons" and thus that removal was proper.

A concurring judge objected to the Fifth Circuit's use of a claim-by-claim approach to determine the real parties in interest, although this judge acknowledged that the approach "leads to the conclusion that Mississippi consumers are the real parties in interest with respect to the state's restitution claim." According to the concurrence, "almost every court that has independently considered [the Fifth Circuit's] claim-by-claim approach has either questioned or disagreed with it," particularly in the context of a suit brought by the state as *parens patriae*. Other courts assess a complaint "on its face" to decide the interests at stake in an action removed to federal court under CAFA.

NINTH CIRCUIT REVERSES ASBESTOS JUDGMENT; DISTRICT COURT FAILED TO CONDUCT *DAUBERT* HEARING

The Ninth Circuit Court of Appeals has determined that a district court abused its discretion by failing to conduct a *Daubert* hearing when asked to reconsider the credentials of plaintiffs' expert witness and thus reversed a $9.37-million jury award for injury allegedly caused by occupational exposure to asbestos. ***Barabin v. AstenJohnson, Inc.*, Nos. 10-36142, 11-35020 (9th Cir., decided November 16, 2012)**. The court remanded the case for a new trial, despite the recommendation of a concurring judge who called for the remand to be limited to a *Daubert* hearing and to allow the original judgment to be re-entered if the expert testimony were found reliable.

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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The Ninth Circuit noted that under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), courts gauge whether expert testimony complies with Federal Rule of Evidence 702 by determining if the proffered testimony is reliable and trustworthy, that is, whether it is based on "scientific validity." The district court initially excluded the testimony of one expert, explaining that his credentials were dubious and he lacked expertise with the specific asbestos-containing products at issue. But then during a pre-trial conference, the lower court reversed its decision without further assessing the reliability of the testimony, finding that the plaintiffs' response to the motions *in limine* clarified his credentials, "including that he had testified in other cases."

According to the Ninth Circuit, "[o]nce presented with the additional information in the [plaintiffs'] response to the motion *in limine*, at a minimum the district court was required to assess the scientific reliability of the proffered expert testimony." Instead, the district court "left it to the jury to determine the relevance and reliability of the proffered expert testimony in the first instance."

PENNSYLVANIA SUPREME COURT REQUIRES PRODUCTS DEFENDANT TO PLEAD AND PROVE HIGHLY RECKLESS CONDUCT AS AFFIRMATIVE DEFENSE

In a matter of first impression, a divided Pennsylvania Supreme Court has determined that a products liability defendant must plead and prove as an affirmative defense that an injured plaintiff's alleged "highly reckless conduct" was the sole or superseding cause of her injuries. ***Reott v. Asia Trend, Inc.*, No. J-100A-D-2011 (Pa., decided November 26, 2012)**.

The issue arose in a personal injury suit involving the locking strap on a hunter's tree stand that allegedly broke during use. The plaintiffs alleged that it was defective because it "had been only glued, rather than like a seatbelt, which is glued and stitched." The defendants were permitted to present evidence of highly reckless conduct, i.e., the self-taught manner by which the injured plaintiff "set" the tree stand after climbing a tree, to rebut evidence of causation. The plaintiffs contended that they were improperly left with the sole burden of proof.

The court majority recognized the parallels between product misuse, assumption of the risk and highly reckless conduct, noting that they "involve a plaintiff's unforeseeable, outrageous, and extraordinary use of a product." It also noted that under Pennsylvania's products liability scheme, "evidence of highly reckless conduct has the potential to erroneously and unnecessarily blend concepts of comparative/contributory negligence with affirmative proof that a plaintiff's assumption of the risk, product misuse, or, as styled herein, highly reckless conduct was the cause of the injury. Indeed, without some further criteria, highly reckless conduct allegations

by defendants could become vehicles through which to eviscerate a [*Restatement (Second) of Torts*] Section 402A action by demonstrating a plaintiff's comparative or contributory negligence."

Accordingly, the court held that "to prevent the impermissible blending of negligence and strict liability concepts, should such an affirmative defense be pursued, the burden of proof is on the defendant to show that the highly reckless conduct was the sole or superseding cause of the injuries sustained." So ruling, the court rejected the dissent's reliance on a 1975 plurality decision in which the court stated that abnormal use may not be submitted as a separate defense. The five-justice majority held that this statement was not binding. Thus, the court affirmed the superior court's order directing judgment for the plaintiffs and remanding for a new trial limited to a damages determination.

ALABAMA JURY FINDS NO SEATBELT DEFECT IN ACCIDENT EJECTION SUIT

A state jury in Alabama has determined that a seatbelt manufacturer was not liable for the injuries sustained by a pregnant driver who was ejected from her minivan during an accident despite wearing a seatbelt. *Harmon v. Chrysler, LLC*, No. CV-2008-901193.00 (Ala. Cir. Ct., Mobile Cnty., verdict reached November 8, 2012). The plaintiff claimed that a product defect caused her quadriplegia and resulted in the premature birth of her son who also allegedly sustained severe and permanent injuries. The minivan apparently flipped three times in the accident, and the plaintiff alleged that the seatbelt system was defective because it "permitted inertial unlatching during this foreseeable rollover event." According to a company spokesperson, federal safety standards require a buckle to be accessible and such accessibility allowed inadvertent contact in this multiple rollover accident. *See Law360*, November 9, 2012.

COURT ALLOWS PLAINTIFFS IN TIRE DEFECT SUIT TO INSPECT MANUFACTURING FACILITY

A federal court in New York has determined that plaintiffs in two separate cases allegedly injured when the rear tires on their motorcycles suddenly deflated during operation may inspect the defendant's manufacturing facility and that the inspection will not be precluded by or subject to a protective order. *Blundon v. Goodyear Dunlop Tires N. Am., Ltd.*, No. 11CV990S (U.S. Dist. Ct., W.D.N.Y., order entered November 9, 2012). According to the court, the plaintiffs established that the plant inspection was relevant "and necessary to explore their contention that defects in the plant or its operation may have caused the particular alleged defect in the tire at issue."

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The court also granted the defendant's motion to inspect the plaintiffs' tires and rims at its expert's facility in Ohio, assured by the company's assertion that the testing and examination would be non-destructive and non-invasive. "Failure to return the tires and rims as they were sent to defendant," the court cautioned, "may result in an adverse instruction that the missing or destroyed tires or rims were as plaintiffs described them." The court denied the plaintiffs' request to be present during the examination. As for the defendant's request for a protective order to limit access to its proprietary documents and trade secrets, the court granted the request and limited sharing of any data beyond "those necessary for the prosecution of this case."

UNIVERSITY SEEKS TO BLOCK FOIA REQUEST BY ANIMAL RIGHTS GROUP

According to a news source, a Michigan university has claimed that it is exempt from responding to a request under the Freedom of Information Act (FOIA) about its use of dogs in medical research because the last time it did so, its researchers were threatened by "animal rights extremists" with "torture and death." Wayne State University (WSU) has apparently sued the Physicians Committee for Responsible Medicine (PCRM) in state court to claim a privacy exemption under the state's FOIA.

The suit reportedly claims that when the university released records in 2011, "PCRM launched a public attack against WSU, falsely accusing it of 'inhumane' and 'cruel' treatment of dogs in research," and that "[a]nimal rights extremists quickly seized upon PCRM's inflammatory accusations and began a campaign of harassment and intimidation against [one scientist], his family, WSU students and officials, including threats of injury, torture and death. One such extremist was subjected to a personal protection order by this court. The order was repeatedly violated, leading to citations for contempt and felony charges, including one for aggravated stalking."

The university apparently uses dogs to conduct cardiovascular research. A U.S. Department of Agriculture inspection, instituted after the 2011 records release to PCRM, apparently exonerated the university of the inhumane treatment of animals. But PCRM allegedly persisted in making such claims on its Website, according to WSU's complaint. *See Courthouse News Service*, November 27, 2012.

HOMEOWNERS ALLEGE SPRAY FOAM INSULATION ENDANGERS HEALTH

Pennsylvania residents have filed a putative class action against companies that made and installed spray foam insulation (SPF) in their homes, claiming that its application "causes property damage and health hazards to occupants of installed homes such that the only remedy is the complete removal of SPF." *Slemmer v. NCFI Polyurethanes*, No. 2:2012cv06542 (U.S. Dist. Ct., E.D. Pa., filed November 20, 2012).

The plaintiffs claim that the product is known in the industry to be "unstable and prone to failure as installation is difficult and complicated." If not installed properly, the product, which is allegedly created by the chemical reaction of two sets of purportedly toxic compounds, does not, as intended, become inert and non-toxic. Instead, it allegedly off gasses "irritants that cause headaches and other neurological issues, and eye, nose and throat irritations as well as respiratory issues."

The plaintiffs seek to certify a nationwide class of consumers as to the manufacturing defendant and a statewide subclass as to the installer. They assert claims of negligence, negligent supervision, strict liability, breach of express and/or implied warranties, unjust enrichment, violation of consumer protection laws, and equitable and injunctive relief and medical monitoring. Seeking a trial by jury, the plaintiffs ask for actual, compensatory, statutory, and punitive damages; interest; injunctive relief; attorney's fees; and costs.

ALL THINGS LEGISLATIVE AND REGULATORY

CPSC Final Infant Swing Rule Takes Effect in May 2013

The Consumer Product Safety Commission (CPSC) has approved a **final safety standard** for infant swings based on voluntary standard ASTM F2088-12a. Among other matters, the new rule, which will apply to products manufactured on or after May 7, 2013, requires a strengthened warning to prevent slump-over deaths; tests to prevent tip-overs and unintentional folding; restraint system tests; and shoulder strap restraints for swings with seats at greater than a 50-degree angle. According to the agency, "[b]etween May 2011 and May 2012, CPSC received reports of 351 infant swing-related incidents, two of which resulted in fatalities." The commissioners unanimously approved the noncontroversial rule in October. *See Federal Register*, November 7, 2012; *CPSC News Release*, November 13, 2012.

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CPSC Approves Child-Resistant Packaging for Certain Decongestants

Manufacturers of decongestant products containing imidazolines will get a one-year stay of enforcement from the Consumer Product Safety Commission's (CPSC's) new **rule** requiring child-resistant (CR) packaging for any over-the-counter or prescription product that contains the equivalent of 0.08 milligrams or more of an imidazoline in a single package. The Commission approved the rule on November 20, 2012, and it takes effect one year from the date of publication in the *Federal Register*.

Although topical and nasal administration of imidazolines evidently result in little absorption by the general circulation system of the human body, if they are ingested orally, imidazolines are absorbed, which can lead to severe life-threatening consequences, such as central nervous system depression and adverse cardiovascular effects. CSPC has determined that availability of 0.08 milligrams or more of

an imidazoline in a single package, by reason of its packaging, is such that special packaging must be used to protect children younger than 5 from serious personal injury or illness due to handling or ingestion.

CPSC states that it received five comments with none opposing the proposed rule. Several requested more time to package products in CR packaging while two sought a stay of enforcement 12 months beyond the proposed 1-year effective date of a final rule. *See CPSC Staff Briefing Package and Draft Rule*, November 8, 2012.

NHTSA Requests Economic Information Impact of Regulations on Small Business

The National Highway Traffic Safety Administration (NHTSA) has **requested** public comment on 13 existing rules as part of its 2012 economic regulatory assessment to "identify rules that may have a significant economic impact on a substantial number of small entities." The regulations under review at this time include those pertaining to controls and displays; windshield defrosting and defogging systems; hydraulic and electric brake systems; lamps, reflective devices and associated equipment; light vehicle brake systems; tire pressure monitoring systems; and new pneumatic radial tires for light vehicles.

Specifically requested are comments from small entities such as small businesses, not-for-profit organizations and governmental jurisdictions with populations less than 50,000. They are asked to "explain how and to what degree these rules affect you, the extent of the economic impact on your business or organization, and why you believe the economic impact is significant." If NHTSA determines that the rules have a significant economic impact on small entities, "it will ask for comment in a subsequent notice during the Review Year on how these impacts could be reduced without reducing safety." Comments must be submitted by January 22, 2013. *See Federal Register*, November 20, 2012.

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NIST Seeks Input on Revising Fire Safety Codes and Standards

The National Institute of Standards and Technology (NIST) has published a **list** of National Fire Protection Association (NFPA) standards and guides and their corresponding deadlines for public input in an effort to increase public participation in the amendment and development of NFPA fire safety codes. The closing dates for public input begin January 4, 2013, and end July 8, 2013. The affected standards and codes include those applicable to smoke-control systems, smoke and heat venting, sprinkler system installation, automotive fire apparatus, fixed aerosol fire-extinguishing systems, hazardous materials, and professional qualifications for fire and life safety educators. *See Federal Register*, November 13, 2012.

Lead-Contaminated Toys Seized in Florida Port

U.S. Customs and Border Protection (CBP) officers and Consumer Product Safety Commission (CPSC) investigators reportedly seized shipments of nearly 24,000 toys on November 14, 2012, at a Jacksonville, Florida, port. According to a CBP news **release**, the toys contained levels of lead that exceed legal limits and had an estimated domestic value of almost $220,000. The toy shipments also evidently contained counterfeit products.

CBP Assistant Commissioner for International Trade Allen Gina said, "Ensuring the safety of imported merchandise is a top priority for CBP. The concerted targeting efforts of the Commercial Analysis and Targeting Center and the vigilance of CBP officers at our ports of entry ensure that toys are safe for children and their families." According to Carol Cave, CPSC director of import surveillance, "We actively target hazardous children's products throughout the year. Cutting edge joint programs, now in place with CBP, can give U.S. consumers more confidence that products on our shelves are safe."

FDA Shutters Peanut Butter Plant Implicated in *Salmonella* Outbreak

The Food and Drug Administration (FDA) has suspended operations at nut and seed spread manufacturer Sunland Inc.'s New Mexico plant after investigators reportedly discovered *Salmonella*-tainted peanut butter linked to an outbreak that has allegedly sickened 41 people in 20 states this year. According to FDA, "the fact that peanut butter made by the company has been linked to an outbreak … coupled with Sunland's history of violations led [the agency] to make the decision to suspend the company's registration."

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According to news sources, this marked FDA's first use of its registration suspension authority under the 2011 Food Safety Modernization Act, which gives the agency the authority to take such action when food manufactured, processed, packed, received, or held by a facility has a reasonable probability of causing serious adverse health consequences or death to humans or animals, and other conditions are met.

In a November 26, 2012, **letter** to Sunland's president, FDA Commissioner Margaret Hamburg said that evidence the agency collected in response to the outbreak demonstrated that "[n]ut butter and nut products manufactured, processed, packed, and held by your facility are contaminated with salmonella, or are at risk for contamination with salmonella, based on the conditions in your facility. Your facility's testing records over the past 3 years include multiple positive salmonella results throughout your facility and in finished product. Due to this contamination and/or risk for contamination, FDA has determined that these products have a reasonable probability of causing serious adverse health consequences or death to humans."

Further FDA review of Sunland's product testing records showed that "11 product lots of nut butter revealed the presence of salmonella between June 2009 and September 2012. Between March 2010 and September 2012, at least a portion of 8 product lots of nut butter that Sunland Inc.'s own testing program identified as containing Salmonella was distributed by the company to consumers." During September and October 2012 plant inspections, FDA also found *Salmonella* in 28 environmental samples (from surfaces in production or manufacturing areas) and in 13 nut butter product samples and one product sample of raw peanuts.

The suspension order offers the company an opportunity to request an informal hearing on certain issues related to the order. If, after providing this opportunity, FDA determines that the suspension remains necessary, it will require Sunland to submit a corrective action plan to address the immediate problems and to implement a sustainable solution to those problems in a sound scientific manner. The FDA will reinstate the company's registration only when the agency determines that the company has implemented procedures to produce safe products. *See Agri-Pulse*, November 26, 2012.

Maryland Bans Crib Bumpers

Effective June 21, 2013, the sale of baby crib bumper pads will be prohibited in Maryland, making it the first state to issue such a ban. The ban comes amid heightened concern about bumpers, which have purportedly been found to suffocate and strangle babies, and follows an 18-month investigation into the safety of these products by Maryland health officials. According to the Maryland Department of Health and Mental Hygiene (DHMH), baby crib bumper pads "offer no meaningful benefit and pose a potentially serious risk to infant health." The department apparently concluded that current industry standards did not provide sufficient protection.

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DHMH Secretary Joshua Sharfstein said the department's **message** is that "babies sleep best alone, on their back, and in a crib, … [and that b]aby bumper pads are not part of this picture." The Maryland chapter of the American Academy of Pediatrics, Med Chi and numerous safety experts reportedly agreed with this conclusion. The regulation banning the sale of baby bumper pads is a component of a larger effort to promote safe sleep in infants.

Meanwhile, manufacturers argue that if used correctly, crib bumpers are safe. In a recent news article, the Juvenile Products Manufacturers Association (JPMA) said that "when used properly, crib bumper pads can help prevent limb entrapment and head injuries." The group said it was disappointed in the state's decision and thinks a ban is unnecessary. "At JPMA, child safety is paramount. Our members work every day to provide parents innovation, quality and choices in the products they use to care for their baby," the association said in a statement.

Under the state ban, retailers, including Internet sellers, will receive a warning for a first violation and a $500 fine for each baby bumper sold after that. The ban applies to baby bumper pads that are made of a non-mesh type material resting directly above the mattress, running along the length of the each of the interior sides of the crib, and are intended to be used until the age that an infant pulls to stand. It does not apply to vertical bumpers that wrap tightly around each individual crib rail or to mesh crib liners. *See The Baltimore Sun*, November 16, 2012.

Texas Supreme Court Issues Proposed "Loser Pay" Rules

The Texas Supreme Court has proposed **new rules** that would implement the "loser-pays" provisions included in tort reform measures adopted in 2011 by the state legislature. Titled "Rules for Dismissals and Expedited Actions," the proposed rules would, among other matters, (i) allow defendants to file motions to dismiss "baseless causes of action," (ii) require more accurate definition of what monetary relief is sought by a litigant, and (iii) impose a mandatory expedited process on lawsuits seeking less than $100,000 in damages. Public comment on the proposal is requested by February 1, 2013.

LEGAL LITERATURE REVIEW

Tammy Webb & Ina Chang, "Drawing the Line Between Class Action and Quasi-Class Action," ABA Section of Litigation *Mass Torts*, November 13, 2012

Shook, Hardy & Bacon Class Actions & Complex Litigation Attorneys **Tammy Webb** and **Ina Chang** explain why Congress created the Judicial Panel on Multidistrict Litigation and how some of the courts assigned to consider pretrial matters in consolidated litigation involving thousands of plaintiffs have expanded their role in the interest of filling the parties' need for global settlements. The co-authors discuss the Zyprexa, Vioxx and Implantable Defibrillators multidistrict litigation proceedings, which have come to be referred to as "quasi-class actions," and the criticisms of some jurists concerned that the device will be used to allow courts to assert jurisdiction over plaintiffs not before them.

LAW BLOG ROUNDUP

CAFA Mass Action Ruling Splits Federal Circuits

"Ladies and gentlemen, the next great circuit split is upon us. On Wednesday, a three-judge panel of the 5th Circuit Court of Appeals ruled that the Mississippi attorney general's antitrust case against a gaggle of liquid crystal display makers is a mass action that, under the Class Action Fairness Act [CAFA], must be litigated in federal court. As Judge Jennifer Elrod noted in a concurrence, that decision puts

the 5th Circuit at odds with the 4th, 7th and 9th Circuits, which have all held in the last two years that AG parens patriae suits are not mass actions and belong in state court." *American Lawyer* Senior Writer Alison Frankel, discussing a circuit split that could ultimately require U.S. Supreme Court resolution. The Fifth Circuit ruling is discussed elsewhere in this *Report*.

Alison Frankel's On the Case, November 26, 2012.

Evidence of Founder's Support for Federal Tort Reform Slim?

"Those interested in federalism and tort reform should read Paul Clement's paper, and also Rob Natelson's "The Roots of American Judicial Federalism." Georgetown Law Professor Randy Barnett, commenting on the latest debate over the constitutional viability of federal tort reform. Clement apparently bases his position favoring federal tort reform on single statements by Alexander Hamilton and James Madison in the *Federalist Papers* and the assertion that the Commerce Clause was inserted to enable Congress "to remove state-law obstacles to interstate commerce … and to invigorate our foreign commerce." Natelson, who supports tort reform at the state level, reportedly contends that Clement has taken the statements out of context and that the Commerce Clause was adopted not only to facilitate commerce but to obstruct it as well (e.g., to restrict Indian trade and institute prohibitory tariffs to limit foreign imports).

The Volokh Conspiracy, November 23, 2012.

THE FINAL WORD

ABA Considers Model Ethics Rule Allowing Foreign Attorneys to Practice in U.S. Courts

The American Bar Association (ABA) Commission on Ethics 20/20 has reportedly filed final proposals for updating the model rules to account for technological advances and international legal practice. The proposals will be posted on its **Website**. According to a news source, the commission's recommendations, if adopted, would allow lawyers licensed in other countries to work as in-house counsel for their employers from a U.S.-based office, add foreign-licensed lawyers to the Model Rule for Registration of In-House Counsel and update pro hac vice admission rules to give foreign lawyers limited authority to appear in litigation in the United States. The proposals will be considered in February 2013 by the ABA's House of Delegates during its midyear meeting in Dallas. *See Bloomberg BNA The United States Law Week*, November 27, 2012.

Shook, Hardy & Bacon L.L.P.

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NOVEMBER 29, 2012

UPCOMING CONFERENCES AND SEMINARS

ACI, New York, New York – December 3-5, 2012 – "17th Annual Drug and Medical Device Litigation Conference." Shook, Hardy & Bacon Pharmaceutical & Medical Device Litigation Partner Debbie Moeller will serve as moderator for an in-house counsel panel that will discuss "Managing Litigation in a Tough Economy: Containing Litigation Costs with a Restricted Budget." Shook, Hardy & Bacon Pharmaceutical & Medical Device Litigation Partner Marie Woodbury will moderate a panel session titled "Implementing Best Practices for Bellwether Trial Selection in Mass Tort Litigation." Shook, Hardy & Bacon is a lead sponsor for this event.

Georgetown Law, McLean, Virginia – December 6-7, 2012 – "Advanced eDiscovery Institute." Joining a distinguished faculty, Shook, Hardy & Bacon Pharmaceutical & Medical Device Litigation Partner Madeleine McDonough will discuss "The Evolving Role of eDiscovery Counsel" during this ninth annual institute. The program will focus on advances in technology as well as new legal precedents requiring practitioners to develop sophisticated eDiscovery approaches for regulatory, civil and criminal proceedings. McDonough's panel will "present a model inventory of the tools, methods, and resources that need to be acquired and used" by eDiscovery counsel, while offering "a methodology for balancing risk management and cost containment in a collaborative team process." ■

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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 95 percent of our more than 470 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).