Shook, Hardy & Bacon L.L.P.

MARCH 18, 2010

PRODUCT LIABILITY LITIGATION REPORT

CONTENTS

U.S. SUPREME COURT TO HEAR APPEAL IN VACCINE DESIGN DEFECT CASE

The U.S. Supreme Court has agreed to review a Third Circuit Court of Appeals ruling that vaccine defect claims were preempted by the National Childhood Vaccine Injury Act. *Bruesewitz v. Wyeth, Inc.*, No. 09-152 (U.S., certiorari granted March 8, 2010). The question raised is whether the Act preempts all vaccine design defect claims, regardless of whether the vaccine's side effects were unavoidable. The statute provides that "[n]o vaccine manufacturer shall be liable in a civil action for damages arising from a vaccine-related injury or death associated with the administration of a vaccine . . . if the injury or death resulted from side effects that were unavoidable even though the vaccine was properly prepared and was accompanied by proper directions and warnings."

The litigation involves a "non-verbal" and "non-communicative" 18-year-old who allegedly experienced seizures two hours after she received her diphtheria, tetanus and pertussis vaccination in 1992 at age 6 months. Claiming that the vaccination resulted in severe neurological damage that now "requires 100 percent care," her family apparently sought compensation under the Act's trust fund claims mechanism, and the federal vaccine court denied the request, finding a lack of causation. One month before they filed their claim, the Department of Health and Human Resources removed "residual seizure disorder" from the list of adverse effects purportedly linked to the vaccine.

Thereafter, the family sued the vaccine manufacturer in state court alleging that the injuries were avoidable because the company could have made a safer vaccine but did not do so quickly enough and, in fact, removed the vaccine from the market in 1998. The case made its way to federal court and was appealed to the Third Circuit. According to a news source, both the family, which was again denied compensation, and the company requested that the U.S. Supreme Court hear the case. While the company won the Third Circuit appeal, the Georgia Supreme Court has ruled in a different case that the Act does not prohibit all design defect claims against vaccine manufacturers. The Obama administration has also reportedly called for the U.S. Supreme Court to uphold the Third Circuit ruling. The case is expected to be argued in October 2010. *See Pittsburgh Tribune-Review* and *Pittsburgh Post-Gazette*, March 9, 2010.

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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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VACCINE COURT AGAIN DENIES CLAIMS THAT THIMEROSAL VACCINES CAUSED CHILDREN'S AUTISM

In lengthy decisions released March 12, 2010, three special masters with the Court of Federal Claims have again denied requests for compensation under the National Vaccine Injury Compensation Program, finding that the parents did not prove their children's autism was cause by the administration of vaccines containing thimerosal. *King v. HHS*, No. 03-584V, *Dwyer v. HHS*, No. 03-1201V, *Mead v. HHS*, No. 03-215V (Fed. Cl., decided March 12, 2010). The cases were part of "the largest omnibus proceeding in the history of the Vaccine Act," involving more than 5,000 autism-related claims, and were tried as test cases on the second of two theories of causation.

In February 2009, the same three special masters rejected the first theory of causation in three other test cases. That theory, discussed more fully in the February 26, 2009, issue of this Report, was that measles-mumps-rubella vaccines combined with thimerosal-containing vaccines cause autism in children. The second theory, advanced in the test cases just decided, was that the mercury in thimerosal-containing vaccines caused neurodevelopmental injuries including autism spectrum disorders. As in the cases decided in 2009, the special masters rejected the expert testimony presented by the parents, finding the government's experts better qualified, more experienced and far more persuasive.

Because the parents alleged injuries not included in the "Vaccine Injury Table," which lists injuries for which compensation is automatically provided, they had to prove by a preponderance of the evidence (i) "a medical theory causally connecting the vaccination and the injury"; (ii) "a logical sequence of cause and effect showing that the vaccination was the reason for the injury"; and (iii) "a showing of a proximate temporal relationship between vaccination and injury." While the special masters expressed sympathy for the families, they still concluded that their evidence fell short. Anti-vaccine groups have reportedly criticized the rulings, with one quoted as saying, "The special masters appear to be following a misguided government policy that if they acknowledge a mercury-autism link, parents will stop vaccinating their children." *See Product Liability Law 360*, March 15, 2010.

CALIFORNIA HIGH COURT AGREES TO CONSIDER IMPACT OF PRIVATE HEALTH INSURANCE ON ECONOMIC DAMAGES

The California Supreme Court has decided to hear a case asking whether a personal injury plaintiff may "recover as economic damages an amount exceeding what his or her private health insurance has paid and the relevant healthcare provider has accepted as payment in full for medical services." *Howell v. Hamilton Meats & Provisions, Inc.*, S179115 (Cal., review granted March 10, 2010).

The issue arises in a case involving a motor vehicle accident plaintiff who underwent a series of medical treatments, the cost of which was paid through private health insurance. According to her petition for review, "[a] portion of her medical bills were [sic] never pursued or collected by the hospital and surgeon who provided the treatment, pursuant to contractual agreements" between the carrier and the health care providers.

The jury heard evidence about the full billed amount of the plaintiff's past medical expenses of about $190,000 and awarded her $200,000 for past damages. Defendant sought to reduce the past medical expenses award by $130,000, claiming this amount, i.e., the "excess, uncollected amount," was never collected from the health care providers, who apparently accepted $60,000 in full payment for medical services. The trial court reduced the damages award, and an intermediate appellate court reversed, allowing the plaintiff to recover the full amount of the awarded damages.

According to the defendant, the appeals court ruling creates a split in the state on this issue and "has entirely altered the concept of compensatory damages, which is meant to make plaintiff 'whole.' Under the Court of Appeal's holding, personal injury plaintiffs will now gain an additional windfall recovery, beyond what the collateral source rule has ever authorized, and allow them to be 'reimbursed' for payments that no one has made or will ever make."

FEDERAL COURT DISMISSES CLAIMS IN DEFECTIVE WII® CLASS ACTION

A federal court in Colorado has dismissed putative class claims based on Washington law filed by residents of other states against Nintendo, alleging that the company's Wii® controllers are defective because they slipped out of their hands during play and caused damage in their homes. *Elvig v. Nintendo of Am., Inc.,* No. 08-02616 (U.S. Dist. Ct., D. Colo., decided March 8, 2010). The named plaintiffs live in and sustained damages in Colorado, California and Florida. Nintendo's corporate headquarters are in Washington. The plaintiffs apparently sought to apply Washington law on account of its consumer-friendly provisions, but the court rejected that effort, finding that the Washington Consumer Protection Act is intended to protect Washington citizens and not the citizens of other states. After analyzing the claims and interests under the conflict-of-law provisions of Colorado, the forum state, the court concluded that the law where the injuries occurred should apply, observing, it is "reasonable to assume that most consumers expect to be protected by the laws applicable in the state where they live, purchase a product and use it."

The court stayed its ruling dismissing the claims to give the plaintiffs the opportunity to amend their pleadings or redesign the case. The court also denied the plaintiffs' motion to certify a class as moot.

WEST VIRGINIA SUPREME COURT REFUSES TO CHANGE OUTCOME IN RENOWNED JUDICIAL RECUSAL CASE

The West Virginia Supreme Court has reportedly declined to reconsider its previous decision in a coal-business dispute that favored a company run by a man who contributed millions to one of the justice's election campaigns. The case went to the U.S. Supreme Court, which ruled that the state justice's refusal to step off the case violated the 14th Amendment's guarantee of due process. According to the Court, West Virginia Judge Brent Benjamin's decision to hear the case of a political supporter created "a serious risk of actual bias." On remand, the West Virginia Supreme Court apparently decided 4-1 to let its earlier ruling stand. A spokesperson for the winning party, Massey Energy, was quoted as saying, "The company is pleased with this result and happy to have this matter finalized." *See Legal Newsline*, March 11, 2010.

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SOUTH CAROLINA SUPREME COURT OVERTURNS DEFECTIVE AUTO VERDICT IN SUDDEN ACCELERATION CASE

The South Carolina Supreme Court has overturned an $18 million verdict in an auto defect case involving a 1995 Ford Explorer, finding that the trial court erred in admitting certain expert testimony and in permitting the jury to hear evidence of similar incidents involving sudden acceleration. ***Watson v. Ford Motor Co.*, No. 26786 (S. Car., decided March 15, 2010)**. The plaintiffs, alleging that the cruise control system and seatbelts were defective in a rollover accident that rendered the driver a quadriplegic and killed one of the passengers, sought compensatory and punitive damages.

The supreme court determined that the plaintiffs' "cruise control diagnosis" expert was erroneously qualified as such given his lack of experience working on cruise control systems before the litigation. The court also found that plaintiffs' expert on alternative feasible designs was not qualified and that his theory about the cause of sudden acceleration failed to meet reliability requirements.

Noting that South Carolina allows evidence of similar accidents "where there is some special relation between the accidents tending to prove or disprove some fact in dispute," the court ruled that plaintiffs "failed to show that the incidents were substantially similar" because "most of the other incidents involved Explorers that were made in different years . . . and were completely different models with the driver's seat located on the right side of the vehicle." The court also determined that plaintiffs "failed to show a similarity of causation between the malfunction in this case and the malfunction in the other incidents and failed to exclude reasonable explanations for the cause of the other incidents."

PLAINTIFFS' LAWYERS ADVOCATE FOR JURISDICTION IN MASSIVE TOYOTA LITIGATION

Nearly 90 class-action lawsuits have reportedly been filed against Toyota; they could cost the Japanese automaker at least $3 billion. According to news sources, the number of Toyota owners claiming economic damages because of recalls over sudden unintended acceleration could reach six million. These class-action lawsuits "are more scary for Toyota than the cases where people actually got injured," University of Pennsylvania Law Professor Tom Baker was quoted as saying. "A super-big injury case would be $20 million. But you could have millions of individual car owners who could (each) be owed $1,000. If I were Toyota, I'd be more worried about those cases."

Some 150 plaintiffs' lawyers reportedly met in Chicago recently to discuss sharing experts and legal strategies in the litigation and apparently broke into camps based on which jurisdiction they believe should hear the multidistrict litigation and which judge should decide the cases. The Central District of California in Los Angeles, near the headquarters of Toyota Motor Sales, USA, Inc., is under consideration and is purportedly where Toyota's lawyers want all the cases to be transferred. Another possibility is the district in Kentucky where Toyota operates its largest manufacturing plant outside Japan. Other possibilities include district courts in Florida, Louisiana, New Jersey, New York, Pennsylvania, Puerto Rico, and West Virginia.

"This is going to be a feeding frenzy," a products liability attorney was quoted as saying.

The U.S. Judicial Panel on Multidistrict Litigation has apparently set a March 25, 2010, hearing in the Toyota litigation. "This is going to be a feeding frenzy," a products liability attorney was quoted as saying. *See The Associated Press*, March 9, 2010; *Law.com,* March 11, 2010.

STATE PROSECUTORS FILE CONSUMER PROTECTION LAWSUIT AGAINST TOYOTA

California state prosecutors have reportedly sued Toyota Motor Corp., alleging it engaged in fraud by concealing evidence of dangerous motor vehicle defects. Said to be the first U.S. consumer protection lawsuit against the company, the complaint apparently charges that Toyota knew about accelerator defects when it sold and leased "hundreds of thousands of cars and trucks with defects that caused sudden unexpected and uncontrollable acceleration."

According to a news source, Orange County prosecutors have hired private attorneys to assist with the suit, which seeks a permanent injunction to stop the company from purportedly continuing "unlawful, unfair, deceptive and fraudulent business practices." Orange County District Attorney Tony Rackauckas (R), who faces reelection this year, reportedly defended his office's filing of the lawsuit during a recent news conference. *See Reuters*, March 12, 2010.

Meanwhile, Connecticut Attorney General Richard Blumenthal has announced that he is investigating the company's response to three car crashes that recently happened in his state. Blumenthal said, "Public safety demands Toyota investigate whether acknowledged accelerator defects played a role in these disturbing—in one case tragically fatal—accidents. These crashes—three in two days—are deeply disquieting to consumers and state officials and raise serious and significant public safety concerns." *See Connecticut Attorney General's Office Press Release*, March 12, 2010.

ATTORNEYS FOUND GUILTY OF FRAUD IN ASBESTOS SETTLEMENT CASE

A federal jury in Natchez, Mississippi, has reportedly ruled that two attorneys will have to pay back $210,000 in settlement funds paid to their clients and $210,000 in punitive damages for alleged fraudulent claims they filed in an asbestos case that settled in 2002.

Attorneys William Guy and Thomas Brock had filed claims for two men in an asbestos suit against Illinois Central Railroad. According to published reports, however, the two men had already received compensation in a 1995 asbestos-related legal action. Had their involvement in that case been known, they would apparently have been prohibited from participating in the suit against the railroad.

"Illinois Central is pleased that a Mississippi federal jury held these plaintiffs' lawyers liable for fraud in asbestos claims against us," a spokesperson was quoted as saying in a railroad news release. "Our company will continue to aggressively pursue all suspected fraud or litigation abuses." *See The Natchez Democrat*, March 11, 2010.

ALL THINGS LEGISLATIVE AND REGULATORY

Chemical Industry Executives Favor Reforming the Toxic Substances Control Act

During a March 9, 2010, **hearing** before the Senate Subcommittee on Superfund, Toxics, and Environmental Health, several chemical industry executives testified that they favored reforming the Toxic Substances Control Act (TSCA) amid growing public awareness about exposure to chemicals through products and environmental emissions. But the executives stressed that lawmakers should not impose burdensome laws that hurt their industry or cede responsibility for setting global chemical policy.

The president of a petrochemical and refiners trade association recognized that "vigorous protection of human health or the environment is imperative and requires appropriate chemical risk management," and that there is "a fundamental need for the federal government to appropriately manage the risks of all chemicals in commerce from production to disposal." He urged the subcommittee to avoid

pursuing legislation similar to the Registration, Evaluation and Authorization of Chemicals (REACH) program in effect in the European Union, saying it would "place unnecessary burdens on industry" that would "result in significantly higher costs of doing business, inhibiting the development of products to enhance our way of life."

Chemical company executives echoed his remarks, saying, "We urge Congress to avoid presumptive bans or rigid phase-out schedules. Such actions could lead to unnecessarily disrupting markets, reduce public access to valued products and cede markets to global competitors." Other chemical industry executives testified that if a reform bill is introduced the government should base risk assessment on hazard and exposure factors. A spokesperson for the Society of Chemical Manufacturers & Affiliates called for the government to reject the REACH approach and emulate Canada's model, which relies on a "categorization and prioritization" process.

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According to a news source, Senator David Vitter (R-La.) warned that a REACH approach, which registers and regulates every chemical and product, would kill innovation in the United States. Senator James Inhofe (R-Okla.), testifying in the minority on the issue, said: "In order for me to accept changes to TSCA, the revisions must be based on risk assessment using the best available science; must include cost-benefit considerations; must protect proprietary information; and must prioritize reviews for existing chemicals." *See Product Liability Law 360*, March 9, 2010.

Florida Becomes Latest State to Introduce Anti-Cadmium Legislation

Florida lawmakers have launched legislation to ban cadmium and other unsafe metals in children's jewelry following the footsteps of several other states and the U.S. Congress. Florida's proposal (**H.B. 1285**) would impose civil fines on those who sell cadmium-containing jewelry, toys or "child care articles" meant for children younger than seven and would provide that a "knowing and intentional violation" of the act would be treated as a third-degree felony. The Florida Senate has introduced a companion bill (**S. 2120**).

California, Minnesota and New Jersey also recently introduced similar legislation as the Consumer Product Safety Commission (CPSC) formally investigates the known carcinogen. New York, Illinois and Massachusetts are among other states considering laws banning the use of toxic heavy metals in children's jewelry. Additional information about other state proposals appears in the February 4 and March 4, 2010, issues of this Report.

Congress has taken up the issue with the Safe Kids' Jewelry Act, which would block the manufacture and sale of children's jewelry containing cadmium, barium or antimony and would provide funds for enforcing the ban and studies on whether other heavy metals should be prohibited. The congressional bill would also authorize CPSC to set tough testing and certification requirements for children's jewelry

makers and establish criminal and civil penalties for companies that violate the ban.

The flurry of cadmium bills came in the aftermath of an *Associated Press* report in January 2010 that found cadmium in 103 pieces of children's jewelry purchased in California, New York, Ohio, and Texas in November and December 2009. Chinese manufacturers have reportedly substituted cadmium for lead in toys now that the United States has adopted stringent lead standards for consumer products. *See Product Liability Law 360*, March 9, 2010.

LEGAL LITERATURE REVIEW

Victor Schwartz & Cary Silverman, "CPSC Poised to Implement Online Product Hazard Database," *Product Liability Law & Strategy,* March 2010

Shook, Hardy & Bacon Public Policy Attorneys **Victor Schwartz** and **Cary Silverman** have co-authored an article discussing the online reporting system and public database of actual and potential product hazards that the Consumer Product Safety Commission (CPSC) is currently developing. They point to potential problems, including that inaccurate information could be widely disseminated on a database that that public will find particularly reliable because it is a government resource. The article recommends that the agency provide product manufacturers with a way to flag inaccurate information and that the agency "incorporate mechanisms that effectively discourage users from submitting inappropriate information," involving products not under CPSC's jurisdiction or comments expressing "general dissatisfaction or allegedly unfair or deceptive business practices," which fall under the jurisdiction of the Federal Trade Commission and state consumer protection agencies.

A. Benjamin Spencer, "*Iqbal* and the Slide Toward Restrictive Procedure," *Lewis & Clark Law Review*, 2010

Washington & Lee University School of Law Professor A. Benjamin Spencer characterizes the U.S. Supreme Court's ruling in *Ashcroft v. Iqbal*, as an erosion of the "assumption-of-truth rule that has been the cornerstone of modern federal civil pleading practice," and as "an approach to pleading that is governed by a subjective, malleable standard that permits judges to reject pleadings based on their own predilections or 'experience and common sense.'" According to Spencer, the decision, which changed federal pleading standards, marks "an important milestone in the steady slide toward restrictiveness that has characterized procedural doctrine in recent years." He suggests that civil claimants seeking to challenge the conduct of government officials, large corporations or employers will now face potentially hostile judges who have a particular worldview and perspective "as societal elites."

Howard Erichson & Benjamin Zipursky, "Consent versus Closure," *Cornell Law Review* (forthcoming 2011)

Discussing various approaches to resolving mass tort cases; the authors conclude that where plaintiffs' counsel are empowered to negotiate package deals "that effectively sidestep individual consent," or place lawyers in the position of allocating funds among bound clients, the resulting settlements are of questionable legitimacy. They argue that the need for closure advocated by lawyers participating in mass tort deals and the current approach contemplated by the American Law Institute's *Principles of the Law of Aggregate Litigation* must not trump individual consent, which they view as the touchstone of legitimacy. According to the authors, "claims belong to claimants, . . . inauthentic consent accomplishes nothing, and . . . non-class litigation differs from class actions despite powerful functional similarities."

LAW BLOG ROUNDUP

With Billions Potentially at Stake, Lawyers Seek Lead Role in Toyota Litigation

"Let the jockeying begin! Next week dozens of lawyers who have filed suit against Toyota will descend upon San Diego hoping to emerge from the scrum as one of a handful of lawyers chosen to run the nationwide litigation." *Wall Street Journal* correspondent Dionne Searcey, writing about the hearing that will be held before the Judicial Panel on Multidistrict Litigation to consolidate the dozens of lawsuits recently brought against the car maker for acceleration problems that have led to recalls of millions of vehicles. Searcey adds, "The hundreds of lawyers in the running have been building alliances through dinners, meetings and seminars. All the positioning has the air of a high-school election, according to several attorneys involved."

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WSJ Law Blog, March 15, 2010.

Questions Raised over Cause of Unintended Vehicle Accelerations

"You know those unseen and undetectable gremlins that hide in Toyota's electronic throttle controls? Turns out they have it in for elderly drivers." Manhattan Institute Senior Fellow Walter Olson, blogging about the current panic over unintended Toyota vehicle accelerations and noting that where driver age is known, the median age in "unintended acceleration" incidents is 60. According to Olson, "Whatever is causing Avalons, Highlanders, and Tundras to misbehave is largely bypassing drivers in their twenties and thirties and instead homing in on drivers old enough to remember the Eisenhower era."

National Review Online, March 15, 2010.

Questions Raised, Part II

"As I reported in *Forbes Online* on Friday, and am scheduled to discuss tomorrow on NBC's *Today Show*, the Balloon Boy in a Prius incident was baloney from beginning to end." Investigative reporter Michael Fumento, discussing a recent, highly publicized, unintended Toyota acceleration incident involving a man who contended he could not slow his Toyota Prius without emergency 911 assistance. Fumento claims that the incident will prove to be a hoax just as the case of a family that falsely reported their son was in a hot air balloon that drifted for miles and captured the nation's attention for some time.

Michael Fumento.com – Weblog, March 14, 2010.

THE FINAL WORD

Jeffrey Toobin, "After Stevens: What will the Supreme Court be like without its liberal leader?," *The New Yorker,* March 22, 2010

U.S. Supreme Court watcher, author and legal analyst Jeffrey Toobin discusses the life, career and judicial philosophy of the Court's oldest jurist, Justice John Paul Stevens, in this article. Although he was appointed by a Republican president, Stevens has been a reliable liberal voice on a bench seen to be firmly in conservative hands since the appointments of Chief Justice John Roberts and Justice Samuel Alito during the Bush administration. When Stevens selected only one new law clerk to assist him for the 2010-11 term, speculation grew that he was considering retiring. According to Toobin, Stevens, who believes President Barack Obama is capable of making successful judicial selections, said during a recent interview that he is certain to retire within the next three years.

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UPCOMING CONFERENCES AND SEMINARS

GMA, Washington, D.C. – April 7-9, 2010 – "Consumer Complaints Conference." Shook, Hardy & Bacon Pharmaceutical & Medical Device Litigation Partner **Madeleine McDonough** will discuss "Pre-Litigation Risk Management Strategies," for an audience of food industry staff working in the areas of consumer affairs, call center management, consumer complaints, product liability claims, and quality assurance.

ABA, Phoenix, Arizona – April 8-9, 2010 – "2010 Emerging Issues in Motor Vehicle Product Liability Litigation." Shook, Hardy & Bacon Tort Partner **H. Grant Law** is serving as program co-chair and will moderate a panel session involving in-house counsel from six manufacturers who will discuss "How Not to Settle Your Case: Mistakes Plaintiffs' and Defense Lawyers Make Leading up to and at Mediation."

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Shook, Hardy & Bacon Public Policy Partner **Mark Behrens** will participate on a panel addressing "Products Liability in Transition: Is There a Sea Change or Steady as She Goes?" The American Bar Association's Tort Trial & Insurance Practice Section's Products, General Liability and Consumer Law Committee and the Automobile Law Committee are presenting the program.

Pepperdine Law Review, Malibu, California – April 16, 2010 – "Does the World Still Need United States Tort Law? Or Did It Ever?" Shook, Hardy & Bacon Public Policy Partner **Victor Schwartz** will join a roster of distinguished scholars, both domestic and international, to consider a variety of tort law topics, including the current state of American tort law, damages in personal injury cases, tort law's function, international tobacco litigation, and tort law limitations.

DRI, San Francisco, California – May 20-21, 2010 – "26th Annual Drug and Medical Device Seminar." Shook, Hardy & Bacon Pharmaceutical & Medical Device Litigation Partner **Mark Hegarty** will serve on a panel discussing "Potential Civil and Criminal Liability Arising from Clinical Trials." The firm is a co-sponsor of this continuing education seminar.

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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).