Shook, Hardy & Bacon L.L.P.

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PRODUCT LIABILITY LITIGATION REPORT

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U.S. SUPREME COURT REFUSES TO ALLOW STATE CLASS-CERTIFICATION LIMITS TO TRUMP FEDERAL RULE

A deeply divided U.S. Supreme Court has determined that a state law barring certain claims from eligibility for class certification is procedural and thus, will not be applied in a federal court with diversity jurisdiction over the claims. **Shady Grove *Orthopedic Assocs. v. Allstate Ins. Co.*, No. 08-1008 (U.S., decided March 31, 2010)**.

A medical care provider brought a putative class action against an insurance company, alleging that the company had a practice of refusing to pay statutory interest that accrued on the late payment of insurance benefits. Suit was filed in a federal court in New York and invoked its diversity jurisdiction under the Class Action Fairness Act. The district court and Second Circuit Court of Appeals dismissed the suit, applying a New York law that bars this type of litigation from maintenance as a class action. According to the lower courts, the New York law affected substantive rights and for that reason must be applied despite Federal Rule of Civil Procedure 23, which allows litigation to be maintained as a class action if certain conditions are met.

Legal commentators and scholars were interested to see how the U.S. Supreme Court would handle this dispute under the *Erie* doctrine, which guides the federal courts in determining whether federal or state law will be applied in a given diversity case. The Court's more conservative members, along with its newest member and Obama-appointee Justice Sonia Sotomayor, who formed the 5-4 majority as to just two parts of Justice Antonin Scalia's opinion, interpreted the state law as procedural, thus allowing federal law to displace state limitations on class actions. Three of the more liberal Court justices, as well as conservative Justice Samuel Alito, argued that federal procedural rules cannot be used to override important state regulatory policies, here, an interest in restricting the availability of statutory damages. According to dissenting Justice Ruth Bader Ginsburg, the majority approved Shady Grove's "attempt to transform a $500 case into a $5,000,000 award, although the State creating the right to recover has proscribed this alchemy."

Supreme Court watchers have suggested that because Justice John Paul Stevens, whose vote was needed to form a majority, agreed with Justice Scalia's reasoning as to this case only, the overall impact of the decision may not be far-reaching and raises some uncertainty for federal courts facing similar issues in the future. Justice

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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Stevens also opined that federal procedural rules will not always trump a state procedural rule, stating that if a federal procedural rule "is so intertwined with a state right or remedy that it functions to define the scope of the state-created right," then the federal rule "cannot govern" in that case. His position may prevail because when the Court is deeply divided, the narrowest view supporting the outcome is generally viewed as the controlling interpretation. The part of Justice Scalia's opinion refuting Stevens's point garnered just two additional votes.

With the Court set to welcome in fall 2010 a replacement for Justice Stevens, who announced on April 9, 2010, that he would retire from the Court at the end of its current term, this issue could be revisited and refined depending on whom President Barack Obama (D) nominates and the Senate confirms for the seat. *See Civil Procedure & Federal Courts Blog, Mass Tort Litigation Blog* and *SCOTUS Blog,* March 31, 2010.

NUMEROUS *AMICI* BRIEFS FILED IN CALIFORNIA OVER GOVERNMENT'S USE OF CONTINGENCY-FEE LAWYERS IN LEAD PAINT LITIGATION

Nearly 20 *amicus* briefs have reportedly been filed in the California Supreme Court on behalf of government, industry and consumer-interest organizations taking sides in a case that challenges the use by government entities of private, contingency-fee lawyers to handle public nuisance lawsuits. *County of Santa Clara v. Superior Court (Alt. Richfield Co.),* No. S163681 (Cal., review granted July 23, 2008). The lawsuit raising the issue was filed more than 10 years ago by prosecutors in several counties seeking to force chemical manufacturers to pay for the costs of removing lead paint from public buildings. The government entities hired private counsel to pursue what was expected to be costly litigation.

The manufacturers contend that their contingency-fee agreements violate fundamental principles of impartiality and neutrality. A California appeals court disagreed, saying contingency fees are acceptable where the government lawyers retain ultimate control over the litigation. Additional details about the case appear in the August 6, 2008, issue of this Report.

Among those filing "friend of the court" briefs were the Chamber of Commerce of the United States of America and the American Tort Reform Association. Shook, Hardy & Bacon Public Policy Attorney **Cary Silverman**, who filed their brief, was quoted as saying that many around the country are watching the case because it has "become more prevalent in the past decade or so for state attorneys general to contract with private lawyers to pursue big-ticket cases." Oral argument before California's Supreme Court is scheduled for May 5, 2010. *See Law.com*, April 7, 2010.

FEDERAL APPEALS COURT SAYS ADMISSIBILITY RULING SHOULD HAVE PRECEDED CLASS CERTIFICATION IN MOTORCYCLE DEFECT CASE

The Seventh Circuit Court of Appeals has ruled that a trial court erred when it decided not to exclude plaintiff's expert testimony before certifying a product liability class action. ***Am. Honda Motor Co., Inc. v. Allen,* No. 09-8051 (7th Cir., decided April 7, 2010)**. According to the appeals court, without the expert's testimony, which both courts found of questionable reliability, the plaintiff could not show that a common defect predominated over class members' individual issues.

The ruling arose in a case involving an allegedly defective motorcycle. The plaintiff's expert had apparently developed a "wobble decay standard" for litigation in the 1980s, which standard had not been generally accepted by the engineering community and involved a test sample of one motorcycle in the current proceeding. While the trial court recognized the significance of the expert's reliability to class-certification's predominance criterion and began to undertake an admissibility analysis, it declined to exclude the expert's report "in its entirety at this early stage of the proceedings." Nor did the court reach a definitive conclusion about whether the report was reliable enough to support the class certification request.

According to the Seventh Circuit, this was an abuse of discretion. The court concluded that "exclusion is the inescapable result when the *Daubert* analysis is carried to its conclusion." Noting that trial courts "must make the necessary factual and legal inquiries and decide all relevant contested issues prior to certification," the appeals court vacated the district court's denial of the motorcycle maker's motion to strike the testimony and the court's order certifying a class.

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SEVENTH CIRCUIT FINDS INSURERS NOT REQUIRED TO DEFEND LEAD-CONTAMINATED TOY LITIGATION

The Seventh Circuit Court of Appeals has determined that under unambiguous language in commercial general liability insurance policies, an insurance company has no duty to defend a toy manufacturer in the product liability lawsuits filed against it for damages allegedly caused by exposure to lead paint. ***ACE Am. Ins. Co. v. RC2 Corp., Inc.,* No. 09-3032 (7th Cir., decided April 5, 2010)**. The toy maker had two insurance policies, one that covered domestic "occurrences" that specifically excluded damages resulting from lead paint, and one that applied internationally but excluded "occurrences" in the United States.

Arguing that the toy trains were manufactured in China and thus the "occurrences" were international, the toy maker recovered $1.6 million for defense costs in a federal district court in Illinois. The Seventh Circuit reversed, determining that Illinois

law defines the common policy coverage terms at issue, "accident" and "occurrence," to mean "a misfortune with concomitant damage to a victim, and not the negligence which eventually results in that misfortune." Thus, while the negligence may have occurred in China, the deciding factor for coverage purposes is where the "occurrence" takes place, that is, "when and where all the factors come together at once to produce the force that inflicts injury and not where some antecedent negligent act takes place."

SECOND CIRCUIT CONSIDERS WHETHER COURT IMPROPERLY CONFIRMED FACT WITH GOOGLE® SEARCH

The Second Circuit Court of Appeals has determined that a judge who consulted the Internet to confirm his intuition about an obvious fact of which he took judicial notice did not commit reversible error. ***U.S. v. Bari,* No. 09-1074-cr (2d Cir., decided March 22, 2010)**.

The issue arose in a criminal proceeding, a supervised release revocation hearing, where the Federal Rules of Evidence do not apply in full force. Still, under a "relaxed" evidentiary Rule 201, allowing courts to take judicial notice of a fact not subject to reasonable dispute because it is either generally known or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned," the Second Circuit approved resort to Internet search engines. The fact at issue in this case involved the availability of various types of rain hats in the marketplace. The trial court found that a yellow rain hat found in property owned by defendant's landlord was strong circumstantial evidence of defendant's participation in a crime where surveillance tape showed the perpetrator wearing a yellow rain hat.

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According to the appeals court, "Twenty years ago, to confirm an intuition about the variety of rain hats, a trial judge may have needed to travel to a local department store to survey the rain hats on offer. Rather than expend that time, he likely would have relied on his common sense to take judicial notice of the fact that not all rain hats are alike. Today, however, a judge need only take a few moments to confirm his intuition by conducting a basic Internet search."

The court acknowledged that more judges can be expected to confirm their intuitions by doing so, stating, "[W]e all likely confirm hunches with a brief visit to our favorite search engine that in the not-so-distant past would have gone unconfirmed." Reiterating that its determination was made in the context of a revocation hearing "where only a relaxed form of Rule 201 applies," the court affirmed the lower court's judgment revoking the defendant's supervised release from prison.

IOWA JURY AWARDS $32.8 MILLION AGAINST TIRE MAKER IN VEHICLE ROLLOVER LITIGATION

According to a news source, an Iowa jury has awarded compensatory and punitive damages totaling $32.8 million to plaintiffs injured in a rollover crash allegedly caused by a defective tire. The jury apparently decided that a problem with the tire allowed part of its steel belt to rust and led to tread separation while the van in which the plaintiffs were riding as passengers was being operated on a highway near Des Moines. The plaintiffs reportedly argued that safer alternative designs existed, but that company executives postponed updating the tire to save money. Plaintiff's counsel was quoted as saying that his clients had documents showing that the executives "openly discussed the costs of improving the design of this tire, and unfortunately they decided that saving money was more important than saving lives." *See Product Liability Law 360*, March 23, 2010.

JUDGE AWARDS DAMAGES TO SEVEN VIRGINIA FAMILIES WITH DEFECTIVE DRYWALL CLAIMS

A federal court in Louisiana has **awarded** $2.6 million in damages to seven Virginia families that sued the Chinese drywall manufacturer Taishan Gypsum Company Ltd. Questions evidently remain as to whether the plaintiffs will recover the judgment under current laws because Taishan failed to appear in court and did not answer the complaint. U.S. District Court Judge Eldon Fallon ordered the company to remove and replace all the drywall, copper plumbing, air conditioning and ventilation units, insulation, electrical wiring, and flooring in the affected homes.

According to published reports, millions of tons of Chinese drywall, or gypsum board, were imported into the United States from about 2004 through 2007, when a shortage developed after record hurricane seasons. Thousands of homeowners filed complaints with state and federal agencies alleging that the drywall emitted irritating fumes, corroded metals and broke electrical appliances. *See The Wall Street Journal,* April 9, 2010.

ALL THINGS LEGISLATIVE AND REGULATORY

Chronic Hazard Advisory Panel Investigates Phthalates on Children's Health

The Consumer Product Safety Commission's Chronic Hazard Advisory Panel (CHAP) was scheduled to hold its first public **meeting** April 14 and 15, 2010, concerning the purported effects of phthalates on children's health, and a second meeting with an opportunity for public comment and input is expected to be announced soon. CHAP was appointed to study the effects of all phthalates and phthalate alternatives used in children's toys and child care articles under section 108 of the Consumer Product Safety Improvement Act of 2008. It must make recommendations to the

commission as to whether phthalates in addition to those identified in the law should be declared banned hazardous substances.

Section 108 permanently prohibits the sale of any toy or child care article that contains more than 0.1 percent of three specified phthalates—DEHP, dibutyl phthalate (DBP) and benzyl butyl phthalate (BBP). The law also prohibits on an interim basis the sale of "toys that can be placed in a child's mouth" or "child care articles" containing more than 0.1 percent of three additional phthalates—DINP, diisodecyl phthalate (DIDP) and di-n-octyl phthalate (DNOP).

CHAP is required to (i) "examine all potential health effects (including endocrine disrupting effects) of the full range of phthalates that are used in products for children"; (ii) "consider the potential health effects of each of these phthalates both in isolation and in combination with other phthalates"; (iii) "examine the likely levels of children's, pregnant women's, and others' exposure to phthalates, based on a reasonable estimation of normal and foreseeable use and abuse of such products"; (iv) "consider the cumulative effect of total exposure to phthalates, both from children's products and from other sources, such as personal care products"; (v) "review all relevant data, including the most recent, best-available, peer-reviewed, scientific studies of these phthalates and phthalate alternatives that employ objective data collection practices or employ other objective methods"; (vi) "consider the health effects of phthalates not only from ingestion but also as a result of dermal, hand-to-mouth, or other exposure"; (vii) "consider the level at which there is a reasonable certainty of no harm to children, pregnant women or other susceptible individuals and their offspring, considering the best available science, and using sufficient safety factors to account for uncertainties regarding exposure and susceptibility of children, pregnant women and other potentially susceptible individuals"; and (viii) "consider possible similar health effects of phthalate alternatives used in children's toys and child care articles." *See Federal Register,* April 9, 2010.

CPSC Submits for OMB Approval Registration Form for Certifying Third-Party Testing Labs

The Consumer Product Safety Commission (CPSC) has **announced** that a proposed new Consumer Product Conformity Assessment Body Registration Form to be used by agency staff to accredit independent laboratories that will test children's products subject to the Consumer Product Safety Improvement Act of 2008 has been submitted to the Office of Management and Budget for review and clearance. CPSC has proposed using online Form 223 to gather information from third-party conformity assessment bodies voluntarily seeking recognition by the commission.

CPSC staff will use this information to assess (i) "a third party conformity assessment body's status as either an independent third party conformity assessment body, a government-owned or government-controlled conformity assessment body, or a firewalled conformity assessment body"; (ii) "qualifications for recognition by CPSC to test for compliance to specified children's product safety rules" and (iii) "eligibility for recognition on the CPSC Web site."

The form will have to be filed on initial registration, at least every two years as part of a regular audit process and whenever a change to accreditation or ownership information occurs. Comments must be submitted by April 26, 2010. *See Federal Register*, March 25, 2010.

Final Rule Interpreting Civil Penalty Factors for Product Safety Violations Approved

The Consumer Product Safety Commission (CPSC) has approved a **final rule** that identifies and interprets factors the agency will consider when setting civil penalties against "any person who knowingly violates" the Consumer Product Safety Act, Federal Hazardous Substances Act and the Flammable Fabrics Act. Under the Consumer Product Safety Improvement Act (CPSIA), CPSC already examines the likelihood of an injury occurring, whether any injuries actually occurred and how many defective products were distributed. Now the commission will look at such factors as the nature, circumstances and seriousness of the violation; the appropriateness of the penalty given the size of the business charged and other factors, as appropriate. CPSC said the changes are designed in part to try to prevent "undue" negative economic effects on small businesses.

Effective March 31, 2010, the rule has particular significance because CPSIA expanded the actions subject to civil penalties and increased the maximum civil penalty amounts from $8,000 to $100,000 for each knowing violation and from $1.825 million to $15 million for any related serious violations. *See Product Liability Law 360,* March 16, 2010; *Federal Register*, March 31, 2010.

Toyota May Face $16.4 Million Civil Penalty for Allegedly Hiding "Sticky Pedal" Defect

In what would reportedly be the largest penalty ever assessed against an automaker, the U.S. Department of Transportation (DOT) has proposed a $16.4 million civil penalty against Toyota Motor Corp. for allegedly hiding a "sticky pedal" defect from regulators. According to DOT records, Toyota failed its legal obligation to notify the agency's National Highway Traffic Safety Administration (NHTSA) about the possible accelerator defect by waiting four months to report it instead of the required five business days. Approximately 2.3 million vehicles in the United States were recalled in late January 2010 because of the purported defect.

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"We now have proof that Toyota failed to live up to its legal obligations," DOT Secretary Ray LaHood was quoted as saying. "Worse yet, they knowingly hid a dangerous defect for months from U.S. officials and did not take action to protect millions of drivers and their families." The fine relates to the faulty pedal complaints only. NHTSA is evidently reviewing more than 70,000 pages of Toyota documents for other potential violations. *See DOT Press Release; Product Liability Law 360*, April 5, 2010.

LEGAL LITERATURE REVIEW

Richard Nagareda, "1938 All Over Again? Pre-Trial as Trial in Complex Litigation," *DePaul Law Review* (forthcoming 2010)

Contending that "[c]ivil litigation as a process of civil settlement, in short, demands a distinctive law of civil settlement procedure," Vanderbilt University Law School Professor Richard Nagareda describes in this article how complex litigation has evolved since the last major procedural reforms were instituted in the federal courts in 1938 and how that evolution calls for a re-examination of litigation processes that were designed for a day when far more cases went to trial than settled. Nagareda notes how the scholarly literature on civil litigation has changed from a focus on procedural doctrine and "*what judges say* to an additional attentiveness to *what lawyers do* (and why they do it)."

His goal is to prepare a framework for addressing what procedural changes may be needed to allow courts, lawyers and litigants to appropriately price civil claims, understanding that the threat of trial with its attendant uncertainties and costs is no longer a particularly critical factor. With pretrial process effectively functioning as the trial in most civil lawsuits, more scholarly attention is being given, according to Nagareda, to dispositive motions at the close of pretrial discovery, rulings on the admissibility of expert testimony, class certification decisions, and, most recently, dismissals on the pleadings under a new plausibility standard before discovery has even begun. He suggests that options available for law reform will be broadened when the profession comes "to grips with litigation as a process of claim pricing via settlement" and agrees "to retool pretrial motions less as modes of disposition vis-à-vis trial and more as sources of reliable information for the settlement process."

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Lawrence Cunningham, "Traditional Versus Economic Analysis: Evidence from Cardozo and Posner Torts Opinions," *Florida Law Review*, 2010

George Washington University Law School Professor Lawrence Cunningham examines the tort law decisions of jurists Benjamin Cardozo and Richard Posner, both widely cited in student casebooks and by other judges, to determine whose approach is more persuasive and better accommodates the complexities of human decisionmaking and behavior. Justice Cardozo took a traditional legal analysis to tort law disputes, focusing on broad concepts such as reasonableness, foreseeability and duty. Judge Posner, while citing the same concepts, adjusts them "using modern economic concepts, like cost-benefit matrices, incentive effects, and least-cost avoidance models." Cunningham acknowledges that Judge Posner's approach provides better predictability in tort law, but it does so at the expense of the flexibility needed "to capture all the human experience." The author suggests that the traditional legal approach, despite its limitations, will be the more enduring because it is "a more capacious and persuasive basis of justification."

Bradley Joondeph, "The Political Dimensions of Federal Preemption in the United States Courts of Appeals," *Santa Clara University School of Law Legal Studies Research Paper Series*, March 2010

Studying the published preemption decisions of the federal courts of appeals over the past five years, Santa Clara University School of Law Professor Bradley Joondeph has discovered that, overall, Republican appointees are only slightly more likely to find state law preempted than are their Democratic counterparts, unless viewed in terms of hearing panel composition. According to Joondeph, when the judicial panel was all Republican or all Democratic, Republicans were substantially more likely than Democrats to rule in favor of preemption, and in the most contested cases involving mixed panels, "Republican appointees were more than three times as likely as Democratic appointees to vote in favor of preemption (roughly 72 percent versus 22 percent)." Joondeph concludes that understanding these proclivities "provides some insight into the policy priorities of the two major parties as they relate to judicial nominations—and the extent to which those policy goals have actually influenced judicial decision making."

LAW BLOG ROUNDUP

Toyota Litigation Finds a Venue

"Over the next several months, however, Selna's courtroom is about to become anything but the Happiest Place on Earth." *WSJ* legal correspondent Ashby Jones, blogging about the selection of federal judge James Selna, whose court is located seven miles from California's Disneyland theme park, to hear the consolidated multidistrict litigation (MDL) cases alleging both personal and economic injuries due to sudden acceleration problems in recalled Toyota vehicles. Discussing the MDL hearing conducted before the Judicial Panel on Multidistrict Litigation, Jones earlier wrote that it was the "legal equivalent of speed-dating," with some two dozen plaintiffs' lawyers vying to represent the plaintiffs in a jurisdiction of their choosing and given just two minutes each to make their case.

WSJ Law Blog, March 26 and April 9, 2010.

Avoiding the "E Word"

"The great 2009 mass retreat from 'empathy' was lamentable. Take away all the hyperbole and chest-heaving, and it's patently obvious that the ability to stand in someone else's shoes for a moment makes someone a better judge. If we can't in fact have a [U.S. Supreme Court] that looks like America, we should seek a court that feels for America." Court-watchers Dahlia Lithwick and Sonja West, writing about why retiring Justice John Paul Stevens "is the model for why empathy matters" and observing that President Barack Obama, criticized during Justice Sonia Sotomayor's confirmation hearings for his interest in nominating a jurist with empathy, has so

far avoided using the term in connection with his second Court vacancy. As they note, with only nine Justices on its bench, the Court cannot possibly represent every demographic in the nation; thus, they call for a nominee, such as Justice Stevens, "to consider the effects of his decisions on real people and to accept that the law can look quite different depending on where you're standing."

Slate.com, April 9, 2010.

The Tea Party and Tort Reform

"At first glance, you'd think that Tea Partiers would support tort reform, if for no other reason than most Democrats oppose it." Law student and legal commentator Justinian Lane, providing three reasons why people who identify themselves as part of the "Tea Party" political movement should oppose tort reform, which is an initiative pursued in state legislatures and the U.S. Congress to place restrictions on litigation and the remedies that plaintiffs can recover on the theory that such reforms will level the playing field for corporate defendants. Lane contends that tort reform (i) takes power from the people and gives it to politicians, (ii) will increase the cost of health care reform, and (iii) makes it harder to hold government accountable.

TortDeform, April 8, 2010.

THE FINAL WORD

Federal Judicial Center Report Correlates Litigation Costs with E-Discovery

In a recently published report, the Federal Judicial Center addresses how various factors are associated with litigation costs in federal court civil cases. Titled "Litigation Costs in Civil Cases: Multivariate Analysis," the report was prepared by Emery Lee III and Thomas Willging at the request of the Advisory Committee on Civil Rules. The analysis involved a national survey of plaintiffs' and defendants' attorneys whose federal court cases terminated in the last quarter of 2008. Among the factors associated with higher litigation costs were disputes over e-discovery, higher monetary stakes in the underlying litigation, longer processing time from filing to disposition, trial dispositions (both bench and jury), greater case complexity, summary judgment practice, concerns over nonmonetary stakes, and representation by larger law firms.

UPCOMING CONFERENCES AND SEMINARS

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.

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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.

ABA, Washington, D.C. – May 27, 2010 – "The Fourth Annual National Institute on E-Discovery: Practical Solutions for Dealing with Electronically Stored Information (ESI)." Shook, Hardy & Bacon Tort Partner John Barkett is serving as moderator for two panels during this American Bar Association (ABA) continuing legal education program, which features some of the federal judges, practitioners, in-house counsel, and scholars most knowledgeable about e-discovery issues today. ■

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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).