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PRODUCTS LIABILITY

Litigation News and Analysis • Legislation • Regulation • Expert Commentary

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WHAT'S INSIDE

HERBICIDE

DuPont sued over herbicide said to kill trees

REUTERS/Denis Balibouse

NEW YORK, July 15 (Reuters) – DuPont has been sued by a Michigan golf club that alleges its widely used Imprelis herbicide kills trees, reflecting a growing nationwide problem being investigated by a top U.S. regulator.

Washtenaw Acquisition LLC et al. v. E.I. du Pont de Nemours & Co., No. 11-00624, complaint filed (D. Del. July 14, 2011).

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Food flavorings litigation: Past, present and future

Mark Ter Molen and Kerry Kolodziej of Mayer Brown LLP examine how suits over exposure to food flavorings have gone from simple workplace exposure actions to widespread claims on behalf of consumers who say they have been sickened by the additives in popcorn and other foods.

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Baycol MDL judge wrong to toss state court suit, Supreme Court says

The U.S. Supreme Court has ruled that the judge presiding over multidistrict litigation over the cholesterol drug Baycol improperly blocked a West Virginia state court class action that was not identical to a federal suit for which class certification had been denied.

Smith et al. v. Bayer Corp., No. 09-1205, 131 S. Ct. 2368 (U.S. June 16, 2011).

The unanimous high court said the Anti-Injunction Act, 28 U.S.C.A. § 2283, allows a federal court to stay a state court proceeding only under rare instances.

Writing for the Supreme Court, Justice Elena Kagan said the West Virginia suit did not meet the conditions under which a federal court can act. She said the claims in the state court suit were not the same as those in the uncertified federal suit and the state court plaintiff was not a party to the federal suit.

The high court overturned a ruling by the U.S. District Court for the District of Minnesota, which had been affirmed by the 8th U.S. Circuit Court of Appeals.

The high court's decision was not a surprise to attorney **Anthony Rollo** of **McGlinchey Stafford**, who was not involved in the suit.

The court's 2008 ruling in *Taylor v. Sturgell*, 553 U.S. 880, foretold the Bayer decision, according to Rollo.

He noted that the Supreme Court cites *Taylor* in the decision when it said that "neither a proposed, nor a rejected, class action may bind nonparties."

Rollo added that he does not believe, as some have suggested, that the ruling will "open the floodgates" to more class actions. Everything that has been happening in the class-action realm will continue to happen, Rollo said.

In 2001 Bayer Corp. pulled Baycol from the market after the drug was linked to more than 30 deaths, many related to the rare muscle-wasting disease rhabdomyolysis.

Thousands of people filed sued Bayer. The cases were consolidated in Minnesota federal court under U.S. District Judge Michael Davis.

In August 2008 he denied class certification in a suit filed by West Virginia resident George McCollins, ruling that each proposed class member would have to show that the drug had not worked effectively. McCollins had sought to represent a class of West Virginia Baycol users.

Shortly after McCollins' suit was rejected, Keith Smith, another West Virginia resident, sought certification of a similar suit in state court.

Bayer asked Judge Davis to block Smith's state court suit. It argued that the suit would amount to the unlawful relitigation of the same issues raised in McCollins' earlier suit because Smith had been an absent member of McCollins' proposed class.

Judge Davis agreed and dismissed Smith's action. On appeal, the 8th Circuit affirmed the decision.

Smith filed a petition for *certiorari* with the Supreme Court. He argued that the federal judge was wrong to block his suit because McCollins' suit was never certified. Therefore, Smith said he was not an absent class member and the West Virginia state law claims had never been presented before the court.

The high court said that under the Anti-Injunction Act, two conditions must be met for a federal court to grant a stay of a state court action following a certification decision:

- The issue decided by the federal court must be the same as that presented in the state court action.
- The state court plaintiff must have been a party to the federal litigation.

Smith's suit met neither criterion, the Supreme Court concluded.

Attorney Anthony Rollo of McGlinchey Stafford said he does not believe, as some have suggested, that the ruling will "open the floodgates" to more class actions.

The court noted that the claims and the proposed classes — all Baycol users in West Virginia — are substantively similar. However, it said certification in McCollins' suit was denied based on Federal Rule of Civil Procedure 23, while Smith's was to be considered based on West Virginia's Rule 23.

Justice Kagan said the Supreme Court cannot conclude that the state court would interpret the two rules the same way. This uncertainty precludes an injunction to stay the Smith suit, the opinion said.

Additionally, Smith cannot be considered a party to McCollins' suit, the court said.

The federal court denied McCollins the opportunity to represent Smith by denying certification, the high court said, so McCollins' suit was not a proper class action.

Without certification of the class, Smith cannot be bound by the decision in McCollins' case, the high court held.

Rollo said the most significant part of the ruling is its narrowness.

He explained that while the ruling focuses on the relitigation exception to the Anti-Injunction Act, there are other situations in which a federal court can enjoin a state court proceeding that it sees as a threat to federal court jurisdiction.

As an example, Rollo said state court's notice of settlement that would conflict with a notice in the federal court falls outside the scope of relitigation and is unaffected by the ruling. WJ

Attorneys:
Petitioner: Richard A. Monahan, Marvin W. Masters and Charles M. Love IV, Masters Law Firm, Charleston, W.Va.

Respondent: Philip S. Beck, Chicago

Related Court Document:
Opinion: 131 S. Ct. 2368

Scan this code with your QR reader to see the opinion on Westlaw:

DuPont

CONTINUED FROM PAGE 1

Imprelis, conditionally approved for sale last October by the Environmental Protection Agency, is lethal to mature landscape trees including Norway and Colorado spruce, white pines, and other evergreens, according to the complaint filed in the U.S. District Court for the District of Delaware.

The plaintiffs include operators of the Polo Fields Golf & Country Club in Southfield, Mich.

In the complaint, they said Imprelis has caused "the loss of thousands, if not tens of thousands, of mature pine and spruce trees," and the nationwide damage "is mounting with no end in sight."

Kate Childress, a DuPont spokeswoman, in an emailed statement said the Wilmington, Del.-based company is evaluating the lawsuit but is confident that the case is "unfounded" and will oppose it vigorously.

She also said DuPont is investigating whether Imprelis "contributed to the observed symptoms." DuPont said it has, as a precaution, advised customers not to use Imprelis near Norway spruce and white pines.

An EPA spokesman said the agency has received reports from "numerous states" about problems with Imprelis.

He said the EPA is in the early stages of an investigation and expects to begin an expedited review to decide whether changes are needed in how Imprelis is used.

The Polo Fields lawsuit alleges negligence, consumer fraud and damage to land, among other claims, and seeks class-action status on behalf of Imprelis users in Michigan and nationwide. It seeks triple damages and other remedies.

"Had DuPont tested Imprelis appropriately before distributing it to the marketplace, it would have found that these widely used trees were susceptible to being killed," said Christopher Keller, a partner at Labaton Sucharow representing the plaintiffs. "There are certainly at least tens of millions of damages from the forestry that is being killed.

"My understanding is that this is the first lawsuit, and certainly the first seeking class-action status," he added.

400 TRIALS

On its website, DuPont calls Imprelis "the most scientifically advanced turf herbicide in over 40 years," targeting broadleaf weeds such as dandelion, clover, plantains, wild violet and ground ivy.

DuPont said the product went through more than 400 trials, is intended for use only by lawn care professionals and is approved for use in all U.S. states other than California and New York. The active ingredient is aminocyclopyrachlor.

According to the EPA approval notice, Imprelis was intended to provide "selective broadleaf weed control in cool-season and certain warm-season turfgrasses" on lawns, golf courses, parks, cemeteries, athletic fields and sod farms.

DuPont is one of the world's biggest chemical companies, with about $31 billion in net sales in 2010. WJ

(Reporting by Jonathan Stempel; editing by Richard Chang)

Related Court Document:
Complaint: 2011 WL 2739556

See Document Section A (P. 21) for the complaint.

REUTERS/Carlos Barria

TIRES (PERSONAL INJURY)

Judge closes tire defect case, tossing claims against Ford, Michelin, Wal-Mart

A man who suffered brain injuries in a Ford Ranger rollover accident has no case left after a Texas federal judge granted summary judgment to Ford Motor Co., Michelin and Wal-Mart.

Romo v. Ford Motor Co. et al., No. 10-066, case closed (S.D. Tex., Brownsville Div. July 8, 2011).

In May U.S. District Judge Hilda G. Tagle of the Southern District of Texas dismissed Ford from the suit, ruling that plaintiff Johnny Ray Romo could not prove his case without expert testimony.

In her most recent decision, the judge said tire maker Michelin North America and tire seller Wal-Mart Stores Texas LLC could not be held liable since Romo presented no evidence of causation.

The judge further held that Wal-Mart was a mere seller of the allegedly defective tire and would liable only under certain circumstances, none of which were present in this case.

According to the record, the 2008 accident left Romo with brain injuries that resulted in the loss of long- and short-term memory. He claimed he was driving his employer's Ford Ranger 2005 pickup truck when a Uniroyal tire made by Michelin blew out, causing him to lose control (see *Westlaw Journal Products Liability*, Vol. 22, Iss. 6).

In granting Ford summary judgment, Judge Tagle said Romo "has not even provided an expert to guess as to a defect but has merely asserted in his pleadings that a defect, either instability of the Ford Ranger itself or an axle malfunction, caused the vehicle to roll over."

As to Michelin and Wal-Mart, the judge said Romo presented no evidence of a defect "other than the existence of the accident itself," leaving no genuine issue of material fact on any of his claims. WJ

11th Circuit upholds dismissal of suit over SurgiWrap disintegration

A Georgia woman whose product liability lawsuit against the maker of the SurgiWrap surgical barrier was dismissed because of evidentiary issues has lost her bid to have the case reinstated.

Williams v. Mast Biosurgery USA Inc., No. 10-12578, 2011 WL 2566426 (11th Cir. June 30, 2011).

The 11th U.S. Circuit Court of Appeals agreed with a federal court judge that since the opinions of plaintiff Wanda Williams' experts were inadmissible, she had no evidence that the barrier was defective when sold.

During a 2006 gynecological surgery, Dr. David W. Adcock II implanted in Williams four pieces of SurgiWrap bioresorbable barrier made by Mast Biosurgery USA, the opinion says.

According to Mast's website, SurgiWrap is used "to support soft tissue and create a physical barrier to minimize unwanted soft-tissue attachment following surgery."

Within a month, Williams allegedly began experiencing persistent diarrhea, fever and pain in the lower left part of her abdomen.

Her surgeon readmitted her to the hospital, and a colonoscopy revealed "several stiff, hard and brittle pieces of plastic in Ms. Williams' colon, some as large as 14 to 18 millimeters," according to the appeals court opinion.

A gastroenterologist, Dr. George Yared, removed the larger pieces but could not remove other pieces embedded in the wall of her colon. He suspected the material was the SurgiWrap, the opinion says.

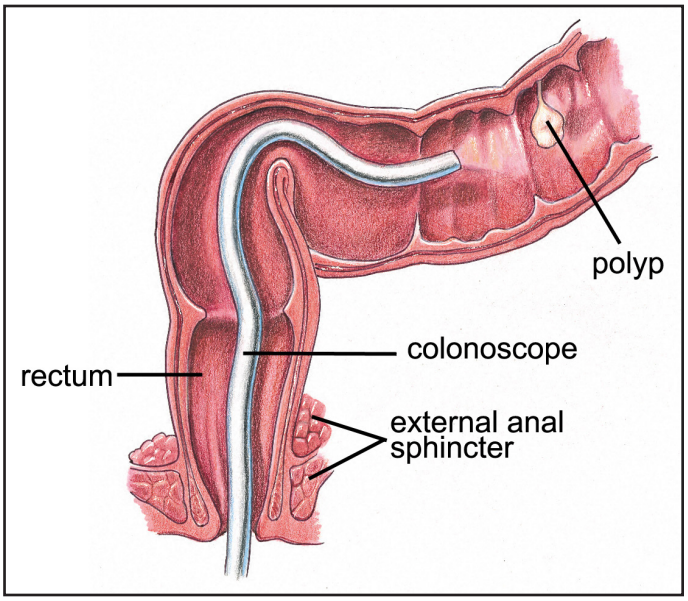
Yared sent Williams to general surgeon Dr. Robert Brown, who removed a damaged section of her colon. He also removed several small pieces of material that he said were made of a "foreign, clear, plastic-like substance," according to the opinion.

11th Circuit ruling

The presence of the material in the plaintiff's body did not establish that the product was defective.

No admissible evidence showed:

- How the surgical material was supposed to break down after placement.
- Whether the condition observed fell within the range of expected consequences of the product's placement.
- Whether the unexpected consequences of the product's placement caused the plaintiff's injury.



Courtesy of Westlaw Medical Litigator

After pieces of SurgiWrap barrier were implanted in the plaintiff, a colonoscopy revealed several pieces of plastic in her colon.

The pieces removed by both doctors were sent to pathologist Dr. Robert Nelms Jr., who described them as "stiff and thick" and identified them as SurgiWrap, the opinion says.

The pieces, however, were not subjected to any chemical or other testing to determine their identity or composition.

Williams filed suit in the U.S. District Court for the Middle District of Georgia, alleging strict product liability. She claimed that the SurgiWrap used in her procedure had a manufacturing defect that caused it to disintegrate.

Mast moved to exclude testimony by Williams' treating physicians on the ground that they were not experts under *Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. 579 (1993).

Senior U.S. District Judge Hugh Lawson said Adcock could offer lay testimony regarding Williams' condition and his treatment of her. However, he could not testify that the SurgiWrap had not dissolved as intended and instead became hardened shards of plastic.

The judge found that the conclusions were expert opinions and thus inadmissible given the surgeon's "limited experience with SurgiWrap," his admission that he had not reviewed medical literature about it or conducted any tests, and his lack of expertise in plastics generally.

Judge Lawson did allow Yared to testify that the foreign bodies he had removed from Williams' colon were the cause of her illness because the gastroenterologist had used differential diagnosis, an established methodology, to arrive at this conclusion. However, he could not testify that the material he found was SurgiWrap.

The judge determined that Brown could also offer only lay testimony, noting that the doctor admitted he "did not know what caused the perforation" in Williams' colon.

Judge Lawson also barred Nelm's testimony that the material he examined was SurgiWrap, finding his testimony unreliable because he had conducted only a visual comparison of the two specimens.

Mast moved for summary judgment, citing the plaintiff's lack of admissible expert testimony.

Because only her original surgeon, Adcock, had testified that the SurgiWrap was defective and his testimony had been limited, Judge Lawson dismissed the suit.

Williams appealed to the 11th Circuit, contending her doctors' testimony should not have been barred.

Although doctors typically base much of their testimony on personal experience, the panel said, Williams' doctors "purport[ed] to provide explanations of scientific and technical information not grounded in their own observations and technical experience."

Therefore, summary judgment was proper, the panel concluded. WJ

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Defendant: Michael J. Bonfanti, Conroy, Simberg, Ganon, Krevens, Abel, Lurvey, Morrow & Schefer, Tallahassee, Fla.

Related Court Documents:
Opinion: 2011 WL 2566426
District Court order: 2010 WL 2104955

See Document Section B (P. 28) for the opinion and Document Section C (P. 30) for the trial court order.

BISPHENOL-A PRODUCTS

Judge rejects class certification in BPA litigation

Purchasers of baby bottles and non-spill cups containing bisphenol-A have lost their bid to certify three multistate classes in multidistrict litigation against manufacturers of the items.

In re Bisphenol-A Polycarbonate Plastic Products Liability Litigation, MDL No. 1967, 2011 WL 2634248 (W.D. Mo. July 5, 2011).

U.S. District Judge Ortrie D. Smith of the Western District of Missouri, who is presiding over the MDL, said the plaintiffs' proposed groupings did not meet the federal certification requirement of "commonality."

Commonality, one of the prerequisites for class certification under Federal Rule of Civil Procedure23, exists when "there are questions of law or fact common to the class."

The plaintiffs sought to group the classes based on the claims asserted and on purported similarities in the laws of particular states as to each type of claim, the opinion says.

Judge Smith found "many problems" with the plaintiffs' certification request.

"The difficulties involved in comparing and contrasting all of the nuances of the laws of 51 jurisdictions [are] undeniably complicated," he said.

The judge said he could not be sure of the correctness of the plaintiffs' analysis of the various state laws and, in turn, the accuracy of their conclusion that certain states' laws are similar in specific legal topics.

Furthermore, although Judge Smith acknowledged that the case presented some common issues of fact, he found "many critically important individual issues," particularly issues related to damages, that predominated over common issues.

He therefore declined to grant certification of the proposed multistate classes.

The judge also dismissed the plaintiffs' alternative request to certify separate statewide classes, saying the question of single-state class certification is more appropriate for the judges who will eventually preside over the trials in the different states.

He therefore denied the request to certify statewide classes without prejudice to the plaintiffs' right to raise the issue after the cases are transferred for trial.

The Judicial Panel on Multidistrict Litigation consolidated class-action lawsuits involving baby products containing BPA in the District Court in August 2008 and assigned the MDL to Judge Smith.

The plaintiffs charged the defendants with breaching duties to consumers by failing to disclose that their products contain BPA.

BPA is a component of clear polycarbonate plastic used in a variety of items, including sports bottles and pacifiers, in addition to baby bottles and cups.

Some studies have linked BPA to hormone disruptions and cancer.

About 24 cases are left in the litigation, and six defendants remain: Handi-Craft Co., Gerber Products Co., Playtex Products Inc., Evenflow Co., Nalge Nunc International Corp. and RC2 Corp. WJ

Related Court Document:
Order: 2011 WL 2634248

See Document Section D (P. 32) for the order.

Winning plaintiff: Better seat belt design would have prevented injuries

An accident victim awarded $19 million case against Ford Motor Co. has argued in a federal appellate court brief that a safer alternative design of the Windstar minivan's seat belts would probably have prevented his paralyzing injuries.

Polston et al. v. Ford Motor Co. et al., No. 11-1402, appellee's brief filed (8th Cir. June 10, 2011).

Eric Polston tells the 8th U.S. Circuit Court of Appeals that his expert witness presented "an overwhelmingly 'scientific' (as well as common-sensical) explanation" that a passenger's hand likely struck his seat belt button, causing it to unlatch.

Polston says a finger or thumb simply could not have inadvertently unlatched a properly designed buckle and Ford's contention to that effect "is unmeritorious almost on its face."

According to his complaint filed in the U.S. District Court for the Eastern District of Arkansas, Polston was ejected and paralyzed in the crash of a 1998 Ford Windstar. The accident occurred when Polston, 18, and his fiancée, Mea Powers, were driving on a state highway in Greene County, Ark., Dec. 27, 2005.

When a dog ran in front of the Windstar, Polston swerved but lost control, causing the vehicle to roll over, the complaint said.

> "There is simply no 'causation' issue presented by this error-free record," the plaintiff says.

In a trial brief, Polston claimed the design of the seat belt buckle rendered it defective and unreasonably dangerous.

"The top of the button is located above the top of the buckle housing, permitting easier access to the button," the brief said. "The protrusion of the button renders the design of the buckle defective and unreasonably dangerous because it presents an unnecessary hazard for inadvertent release."

Ford defended the design of the restraint system, but the jury found the defendant 69 percent at fault for the accident and Polston 31 percent. It awarded the plaintiff $19 million in damages.

In its 8th Circuit brief, Ford says federal law dictates that properly designed seat belts must be capable of "easy and rapid removal."

Ford contends that even a properly designed belt would have unlatched if struck with sufficient force by a finger, thumb or object of similar size.

"Plaintiff presented no substantial evidence concerning what struck the button in this case," the automaker says.

Ford also says the trial court improperly instructed the jury that Polston could not recover damages under Arkansas law if he was found 50 percent or more at fault.

Polston calls Ford's arguments "very thin."

He says he proved at trial with expert testimony that the Windstar seat belt button was defective and unreasonably dangerous because of its raised design and that available alternative designs would most likely have prevented the unlatching.

On the jury instruction issue, Polston says the 8th Circuit held in *Lowery v. Clouse*, 348 F.2d 252 (8th Cir. 1965), that trial judges have the discretion to explain the effect of allocating percentages of fault.

Ford presents no serious reasons why the 8th Circuit should abandon its long-held position, Polston contends. WJ

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Defendant/appellant: John M. Thomas, Bryan Cave LLP, St. Louis; Edwin J. Lowther Jr., Kyle R. Wilson and Gary D. Marts Jr., Wright, Lindsey & Jennings, Little Rock, Ark.

Related Court Document:
Brief: 2011 WL 2452201

Apartment owners can't derail lead-paint case

The owners of an apartment building have failed in their appeal to dismiss a case brought by the parents of a child who suffered lead poisoning allegedly as a result of exposure while living in the apartment.

Williamson et al. v. Ringuett et al., No. 511310, 2011 WL 2377899 (N.Y. App. Div., 3d Dep't June 16, 2011).

The New York Supreme Court, Appellate Division, 3rd Department, rejected the landlords' argument that they did not have actual or constructive notice of any lead-paint hazard on their property.

Tindara Smith filed suit on behalf of her child, Tayjia Williamson, in the Ulster County Supreme Court. She seeks damages for injuries the child sustained from lead-paint exposure.

Denying the motion, the trial court ruled the defendants failed to prove they were unaware of the lead paint.

Defendants Michael Ringuett, Alan Shaffer and David Klaven, doing business as R.S.K. Associates, moved for summary judgment.

They said they did not personally maintain the apartment and hired Geoffrey Devor as property manager.

Denying the motion, the trial court ruled the defendants failed to prove they were unaware of the lead paint.

The defendants appealed.

The appeals court, citing the New York Court of Appeals' ruling in *Chapman v. Silver,* 760 N.E.2d 329 (N.Y. App. Div. 2001), said a landlord has constructive notice of a lead paint hazard if he or she:

- Retained a right of entry to the premises and assumed a duty to make repairs.
- Knew the apartment was constructed at a time before lead-paint interior paint was banned.
- Was aware that paint was peeling on the premises.
- Knew of the hazards of lead-based paint to young children.
- Knew a young child lived in the apartment.

The appeals court said the only issue to be determined is whether the defendants were aware there was peeling paint in the apartment.

The affidavit the defendants submitted claiming that the building manager was not aware of any lead paint in the apartment until the Department of Health notified him is insufficient as a matter of law to prove they were not aware of the lead paint, the panel said.

Finally, the court noted the defendants failed to refute the plaintiff's allegation that once they were notified of the presence of lead paint, they "negligently remediated the hazard."

Therefore, the panel affirmed the trial court's ruling. WJ

Related Court Document:
Opinion: 2011 WL 2377899

Filing flaw strikes out N.Y. suit, baseball bat grip maker says

A sporting goods maker has told a New York federal judge that a suit alleging a college athlete was injured because of a faulty baseball bat grip must be dismissed due to procedural flaws.

Stack v. Easton-Bell Sports Inc. No. 1:11-cv-832-NAM-RFT, dismissal motion filed (N.D.N.Y., Syracuse July 21, 2011).

California-based Easton-Bell Sports says attorneys for former Cazenovia College baseball player Gregory Stack did not follow New York law in serving process.

The company says Stack's suit was properly served through the New York secretary of state. But Easton-Bell maintains that while the plaintiff's counsel mailed it a copy of the summons and complaint, the company was never told that service had been made, as required by N.Y. Bus. Corp. Law § 307.

A hearing on the dismissal motion is scheduled for Sept. 7 before Chief U.S. District Judge Norman A. Mordue of the Northern District of New York.

> Defendant Easton-Bell says that while the plaintiff's counsel mailed it a copy of the summons and complaint, the company was never told that service had been made.

Stack's suit, filed in the Saratoga County Supreme Court and removed to the federal court based on diversity jurisdiction, says Easton's Power Pad bat grip is defectively designed and was sold with insufficient warnings.

REUTERS Rick Wilking

The plaintiff says he was hit in the face by a teammate's composite bat when its Power Pad handgrip failed, causing the bat to fly from the player's hands.

Stack says he was hit in the face by a teammate's bat during an April 2008 pregame practice at Cazenovia. The bat's Power Pad handgrip, an add-on accessory, failed, causing the bat to fly from the player's hands, the suit alleged.

The circular foam ring is designed to reduce the "sting" to a player's hands while hitting and is promoted by Easton-Bell as being able to safely fit all wooden and aluminum bats, according to the complaint.

Stack says his teammate's bat was manufactured from a composite material and broke his nose and cheekbone when it struck his face.

According to the suit, Stack's medical injuries are permanent and he will need ongoing medical care for the foreseeable future. He says he has also suffered "mental anguish and physical pain." WJ

Attorneys:
Plaintiff: Stephen A. Segar, Segar & Sciortino, Rochester, N.Y.

Defendant: Bryon L. Friedman, Littleton Joyce Ughetta Park & Kelly, Purchase, N.Y.

Related Court Documents:
Summons and complaint: 2011 WL 3273032
Dismissal memorandum: 2011 WL 3273033

Virginia federal judge OKs $10 million suit over folding shower chair

A federal judge in Newport News, Va., says a retired Navy officer can pursue his $10 million damages suit over injuries he says stemmed from being entrapped in a folding shower chair for two days.

Baker v. Patterson Medical Supply Inc. et al., No. 4:11-cv-37-RAJ-FBS, 2011 WL 2731259 (E.D. Va., Newport News Div. July 13, 2011).

U.S. District Judge Raymond A. Jackson of the Eastern District of Virginia ruled that Mark J. Baker is free to proceed in full with his negligent-design and failure-to-warn suit against medical equipment maker Patterson Medical Supply.

The judge rejected the company's claim that the last of Baker's four causes of action was an ill-defined repetition of his first three claims.

> The plaintiff says his arm required amputation because of severe tissue damage from being caught in the shower chair.

Judge Jackson said the fourth claim originally lacked definition and Baker redrew it in an amended complaint as a cause of action for breach of implied warranty.

Baker, who has multiple sclerosis and lives alone, says that because of the defective design of his folding shower chair, his arm became entrapped in the unit and he was unable to summon help for 48 hours.

He says the chair's design contains "unguarded pinch points" that increase the force against a user's body if he or she attempts extrication.

Baker says his repeated attempts to pull his arm from the folding chair in the shower's confined space only increased the chair's pressure on the blood vessels in his arm.

The suit says Baker's arm required amputation because of severe tissue damage and that the incident caused him emotional distress and "multiple system failure," including kidney damage.

Patterson Medical asked Judge Jackson to dismiss or strike the fourth count of Baker's complaint, arguing that even after amendment, it was unclear what the plaintiff was actually claiming.

Judge Jackson disagreed, saying the claim is plainly for breach of implied warranty for a particular purpose under Va. Code § 8.2-315. The judge said Patterson "has received sufficient notice of the nature of the claim" as asserted in Baker's amended complaint.

Baker also seeks recovery on causes of action for negligent design/manufacture, failure to warn, and breach of express and implied warranties.

Patterson had previously moved for judgment, arguing that any injuries suffered by Baker were due to his misuse of the chair and that he qualifies as a "sophisticated user having specific and direct knowledge as to its proper and reasonable users and any unusual hazards."

The company said any harm to Baker was not "reasonably foreseeable" to it and that the plaintiff assumed all risks related to the product's use. WJ

Attorneys:
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Defendant: Allen W. Beasley, Breeden Salb Beasley & DuVall, Norfolk, Va.

Related Court Documents:
Memorandum opinion and order: 2011 WL 2731259
Amended complaint: 2011 WL 3268937
Answer: 2011 WL 3268935

Fisher-Price says Mass. man caused injuries blamed on blown bike tire

Toy maker Fisher-Price Inc. and retailer Toys R Us have told a Massachusetts federal judge that the broken arm a man blames on a blown bicycle tire actually resulted from his misuse of the product and failure to read and follow provided warnings.

Malloy v. Toys R Us-Delaware et al., No. 1:11-cv-10892-WGY, answer filed (D. Mass., Boston May 26, 2011).

In answers filed separately in the U.S. District Court for the District of Massachusetts, the companies say plaintiff Gerald Malloy fails to state a claim upon which relief can be granted for the injuries he blames on the Fisher-Price Power Wheels Thunder MX3 motorized mini bike bought at Toys R Us.

In his negligence and breach-of-warranty action, Malloy says he was sprucing up the three-year-old mini-bike in April 2008 and had removed its rear tire to inflate it.

> The plaintiff says Fisher-Price was negligent in the design and manufacture of the mini-bike and fell short of its implied warranty that it was defect-free and fit for its foreseeable purposes.

Malloy claims he inflated the tire to the recommended pressure of 30 psi, using a tire gauge to measure the amount, and was about to remount the tire when its rim "suddenly and unexpectedly 'exploded' into his left arm."

The complaint, originally filed in Massachusetts' Middlesex County Superior Court, alleges the explosion broke Malloy's left ulna, damaged an adjacent nerve and cut his left forearm. It says the injuries have forced Malloy to incur medical expenses, lose time from his job, and avoid his usual activities.

Malloy says Fisher-Price was negligent in the design and manufacture of the battery-powered mini-bike and fell short of its implied warranty that the product was defect-free and fit for its foreseeable purposes.

WESTLAW JOURNAL Thomas Wertman

Toys R Us, Malloy says, failed in its duty to provide a defect-free product, breached its warranty that the Thunder MX3 was of "merchantable quality," and improperly sold a product that was unsafe and "negligently designed, assembled and marketed."

The defendants removed the suit to the District Court based on federal diversity jurisdiction.

In answers that are largely identical, Fisher-Price and Toys R Us deny the product was defective and say Malloy is barred from recovering damages because of his contributory negligence.

Malloy cannot verify that he inflated the tire to the proper pressure, the defendants say, adding he knew the risks but "voluntarily and unreasonably" proceeded anyway.

They say the warnings provided when Malloy bought the Thunder MX3 were "state of the art" and that neither company bears responsibility for a product that may have been altered or modified after leaving its control. WJ

Attorneys:
Plaintiff: David P. Dwork, Barron & Stadfeld, Boston

Defendants: Holly M. Polglase, Campbell, Campbell, Edwards & Conroy, Boston

Related Court Documents:
Complaint and jury claim: 2011 WL 3295665
Answer (Toys R Us): 2011 WL 3295666
Answer (Fisher-Price): 2011 WL 3295667

Food flavorings litigation: Past, present and future

By Mark R. Ter Molen, Esq., and Kerry E. Kolodziej, Esq.
Mayer Brown LLP

Despite its natural presence in everyday foods including milk, butter, coffee and wine, the chemical diacetyl has become a target of plaintiffs' lawyers for its use as an added ingredient in food flavorings, most notably, microwave popcorn butter flavoring.

Added diacetyl is also used in a wide variety of other food flavorings, including dairy flavors (such as cheese, sour cream, egg and yogurt), "brown flavors" (such as caramel, butterscotch, brown sugar, maple and coffee) and some fruit flavors (such as strawberry and banana). More recently, diacetyl has begun to be replaced by other chemicals whose safety has also recently been called into question.

The so-called food flavorings litigation primarily focuses on plaintiffs who have allegedly suffered severe respiratory injuries from exposure to diacetyl and other flavorings ingredients. In particular, "bronchiolitis obliterans," a rare condition in the small airways of the lung where the alveoli wither and ultimately die, is allegedly associated with exposure to these flavorings chemicals.

Since the inception of the food flavorings litigation a decade ago, plaintiffs have obtained verdicts ranging between $2.7 million and $32 million and received many tens of millions of dollars in settlements.

Over time, the litigation has expanded to include plaintiffs who worked at microwave popcorn and food flavorings plants and plaintiffs who allegedly became sick from eating microwave popcorn in their homes. With the primary plaintiffs' firm well funded by its successes, and other plaintiffs' lawyers motivated by the same, the food flavorings litigation may well continue and grow.

HISTORY OF THE LITIGATION

The food flavorings litigation began with the employees of a single microwave popcorn manufacturing facility in Jasper, Mo. In late 2001 a class-action lawsuit alleged that several dozen workers at that facility developed severe respiratory injuries from exposure to diacetyl or other flavorings ingredients.[1]

In January 2004 a Jasper County trial court severed the class into individual cases. During 2004 and 2005, five trials involving employees of the Jasper facility reached a verdict. The lone defendants in those cases were flavorings manufacturer International Flavors & Fragrances Inc. and subsidiary Bush Boake Allen Inc. IFF and BBA lost all but one of those trials.

Each of the four trials that the companies lost involved a single Jasper employee allegedly suffering from bronchiolitis obliterans. Two of the cases also involved a spouse. The verdicts totaled nearly $53 million.[2]

Since the inception of the food flavorings litigation, plaintiffs have obtained verdicts from $2.7 million to $32 million and received many tens of millions of dollars in settlements.

The sole victory for IFF and BBA in those trials was short-lived. It occurred in a consolidated trial of four cases involving four Jasper employees.[3] Again, all four allegedly had bronchiolitis obliterans. The defense verdict was set aside because of a juror's failure to disclose her daughter's breathing treatments. Prior to a retrial, IFF and BBA settled with the plaintiffs. The companies also settled many other cases involving Jasper employees before reaching the trial phase.

A small plaintiffs' firm based in Independence, Mo., Humphrey, Farrington & McClain, brought and tried all these cases. On the heels of its successes, it expanded the scope of the litigation by attracting plaintiffs employed by other microwave popcorn manufacturing facilities, as well as employees of flavorings manufacturing facilities.

A few cases also involved employees of a candy factory where diacetyl-containing flavorings were used. New lawsuits also began targeting a wider array of defendants that manufactured or sold diacetyl-containing flavorings.

Soon, plaintiffs' counsel, facilitated by the decisions of a few defendants to initiate third-party practice against a variety of companies in the supply chain, also routinely began suing diacetyl manufacturers and suppliers.

As news of the large verdicts spread, other plaintiffs' lawyers also began filing similar lawsuits. However, Humphrey Farrington has continued to be the most prolific and successful plaintiffs' firm in the food flavorings litigation.

Another significant expansion of the litigation occurred in 2008, when Humphrey Farrington filed the first microwave popcorn consumer lawsuit.[4] The plaintiff, Wayne Watson, allegedly developed bronchiolitis obliterans from his habit of eating two or more bags of microwave popcorn a day.

Watson's lawsuit drew media interest in the possible dangers of microwave popcorn consumption and landed him coverage on "The Today Show." The consumer litigation expanded the roster of defendants to include microwave popcorn manufacturers and retailers such as grocery stores. Watson's case settled before trial, but other consumer cases were subsequently filed.

After the initial wave of trials in 2004 and 2005, most cases were resolved through settlements. The next case to reach a verdict did not occur until 2009. This was the first trial against a defendant other than IFF and BBA.

This was also the first case to be tried in a federal court. The plaintiff worked at a microwave popcorn plant in Iowa for 26 years. Givaudan Flavors Corp., a

flavorings manufacturer, was the only remaining defendant at the time of trial. The jury awarded the plaintiff and his wife $7.6 million.[5]

The next case reaching a verdict at trial, in August 2010, was a consumer case. The plaintiff allegedly consumed two to three bags of microwave popcorn a day for 10 years. She also worked for five years at a Blockbuster movie store, where she popped microwave popcorn for customers in a back room. The jury found in favor of ConAgra Foods, a microwave popcorn manufacturer and the sole remaining defendant in the case.[6]

Therefore, under the federal *Daubert* standard, the judge struck the opinions of all the plaintiff's experts and granted summary judgment to the defendants. *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993).

This was a significant victory because Egilman and the other expert witnesses whose opinions were stricken by the judge are the same experts Humphrey Farrington routinely uses in all its food flavorings litigation.

Immediately on the heels of these two significant defense victories, the firm obtained its largest jury verdict yet in a food flavorings case.

> Diacetyl is used in a wide variety of food flavorings in addition to microwave popcorn butter flavoring, such as caramel, coffee and fruit flavors.

A month earlier, ConAgra had another significant victory in a consumer case. The plaintiff in *Newkirk v. ConAgra Foods* said he ate four to six bags of microwave popcorn a day.[7]

Taking the lead for the remaining defendants, ConAgra challenged the scientific basis of the opinion that diacetyl can cause respiratory disease in microwave popcorn consumers. Plaintiff's expert Dr. David Egilman gave the primary opinion on this issue, and his opinion was relied on by other plaintiffs' experts.

In a July 2010 decision, the court found that "Dr. Egilman relies on existing data, mostly in the form of published studies, but draws conclusions far beyond what the study authors concluded, or Dr. Egilman manipulates the data from those studies to reach misleading conclusions of his own."

The court said: "There is simply too great an analytical gap between the existing data, indicating that exposure to butter flavoring vapors in the occupational setting can cause bronchiolitis obliterans, and Dr. Egilman's opinion that a consumer of microwave popcorn is exposed to a vaporized substance equivalent to production plant butter flavoring vapors at levels sufficient to cause bronchiolitis obliterans. ... The bulk of Dr. Egilman's conclusions do not rise above 'subjective belief or unsupported speculation.'"[8]

In an August 2010 trial, a plaintiff was awarded $32 million ($30.4 million after subtracting for his own contributory negligence) by a jury in Cook County, Ill.[9] The plaintiff worked at three flavorings manufacturers in the Chicago area. The sole remaining defendant at trial was BASF Corp., a diacetyl supplier.

A number of factors may have contributed to the size of the verdict, including a confidential 1993 study conducted by a foreign affiliate of BASF on the effects of diacetyl inhalation on rats. Despite the verdict's size, like all prior verdicts, it did not include punitive damages.

In total, Humphrey Farrington's victories at trial have totaled nearly $100 million. It is likely that defendants have paid as much, and possibly significantly more, to settle cases.[10] In other words, plaintiffs' counsel have incentives and funding to continue pursuing the food flavorings litigation well into the future.

CURRENT STATUS AND FUTURE OF THE LITIGATION

While it is difficult to pinpoint the exact number of food flavorings cases currently pending, available information indicates that there are at least several hundred active claims.[11] The vast majority of pending cases continue to involve plaintiffs allegedly injured by workplace exposure at flavorings manufacturing facilities or microwave popcorn plants.

Since these have been the most successful cases to date, plaintiffs' firms are likely to continue to file these types of cases into the foreseeable future.

Despite Humphrey Farrington's difficulty with microwave popcorn consumer cases, it is likely that additional consumer claims will be filed in the future. The most significant driver for consumer cases is the vast size of the potential pool of plaintiffs.

There are also signs that plaintiffs' counsel continue to look for new ways to expand the food flavorings litigation. For example, Humphrey Farrington filed a suit in Cook County in 2009, alleging that a microwave popcorn plant worker's son was injured by exposure to butter flavoring remaining on the clothing and interior of his father's car, as well as fumes from microwave popcorn his father popped at home.[12]

Additionally, as noted above, plaintiffs' counsel have already brought several cases involving candy factory employees. It is possible that they seek to expand the litigation further by looking to other types of manufacturing facilities that use diacetyl-containing flavorings in foods, such as snack foods and baked goods.

Going forward, there are also some positive signs for defendants. First, Humphrey Farrington appears to have focused on its "best" plaintiffs for early resolution, leaving cases involving plaintiffs with less severe lung impairment outstanding and on a much slower litigation track.

Moreover, some plaintiffs have claimed that their diseases were present within weeks or months of exposure to flavorings. Thus, future plaintiffs should have a hard time arguing that respiratory illness caused by exposure to flavorings has a long latency period.

Particularly because of the severity of legitimate bronchiolitis obliterans cases, this is not the type of illness that can go undetected for a long time.

Additionally, defendants' legal successes in consumer cases should continue to make those claims more difficult for plaintiffs' counsel to pursue. In particular, the *Daubert* ruling striking Humphrey Farrington's key experts should pave the way for future challenges to those experts both in consumer and occupational exposure cases.

In fact, Dr. Egilman was apparently so concerned by the trial judge's criticism of him that he is individually appealing the decision to the 9th U.S. Circuit Court of Appeals, arguing that the judge's opinion was defamatory.[13]

One other important development significant to the future of the food flavorings litigation is the shift that many flavorings and food manufacturing companies have made away from diacetyl. In particular, some microwave popcorn companies, responding to the publicity received by this litigation, stopped using diacetyl and began advertising their popcorn as containing "no added diacetyl."

The word "added" is key because diacetyl naturally occurs in butter and thus cannot be entirely eliminated. Seizing on this issue, in 2010 Humphrey Farrington proposed a false-advertising class action related to the "no added diacetyl" claims on packages of Orville Redenbacher and Act II microwave popcorn (both ConAgra brands).

The plaintiffs there argued that consumers were deceived into believing that the popcorn contained no diacetyl. However, after the judge declined to certify the class,[14] the sole individual plaintiff in the case dismissed her claims.

> The vast majority of pending cases continue to involve plaintiffs allegedly injured by workplace exposure at flavorings manufacturing facilities or microwave popcorn plants.

It is doubtful that plaintiffs' counsel will try to argue that naturally occurring levels of diacetyl are dangerous. Obviously, decades of French chefs cooking with butter and attorneys imbibing coffee are strong evidence to the contrary.

Instead, it is likely that plaintiffs' counsel will begin targeting the chemical substitutes for diacetyl. Those substitutes include diacetyl trimer; 2,3 hexanedione; 2,3 heptanedione; and 2,3 pentanedione.

Already, the Occupational Safety and Health Administration (which initiated a rulemaking on diacetyl) is beginning question the substitutes. As time goes on, it is expected that plaintiffs' counsel will argue that these substitutes are no safer for workers and consumers than diacetyl.

Plaintiffs likely have already collected hundreds of millions of dollars through the food flavorings litigation in the decade since it began. While some changes are anticipated, this litigation shows no signs of fading away anytime soon.

NOTES

[1] *Benavides et al. v. Int'l Flavors & Fragrances et al.*, No. 01-CV-683025, *complaint filed* (Mo. Cir. Ct., Jasper County Sept. 7, 2001).

[2] *Peoples v. Int'l Flavors & Fragrances et al.*, No. 01-CV-683025-07, *verdict returned* (Mo. Cir. Ct., Jasper County Mar. 15, 2004) ($20 million); *Brand v. Int'l Flavors & Fragrances et al.*, No. 01-CV-683025-30, *verdict returned* (Mo. Cir. Ct., Jasper County Mar. 25, 2005) ($15 million); *Moenning v. Int'l Flavors & Fragrances et al.*, No. 01-CV-683025-04, *verdict returned* (Mo. Cir. Ct., Jasper County July 19, 2005) ($2.7 million); *McNeely v. Int'l Flavors & Fragrances et al.*, No. 01-CV-683025-23, *verdict returned* (Mo. Cir. Ct., Jasper County Sept. 2, 2005) ($15 million).

[3] *Standhardt et al. v. Int'l Flavors & Fragrances et al.*, Nos. 01-CV-683025-10, 01-CV-683025-13, 01-CV-683025-21 and 01-CV-683025-27, *verdict returned* (Mo. Cir. Ct., Jasper County June 28, 2004) (defense verdict).

[4] *Watson v. Dillon Cos. et al.*, No. 08-cv-00091, *complaint filed* (D. Colo. Jan. 15, 2008).

[5] *Kuiper v. Givaudan Flavors Corp.*, No. 5:06-cv-04009, *verdict returned* (N.D. Iowa Mar. 12, 2009) ($7.6 million).

[6] *Khoury v. ConAgra Foods*, No. 0816-CV31620, *verdict returned* (Mo. Cir. Ct., Jackson County Aug. 2, 2010) (defense verdict).

[7] *Newkirk v. ConAgra Foods et al.*, No. CV-08-273, 727 F. Supp. 2d 1006 (E.D. Wash. July 2, 2010), *appeal docketed*, No. 10-35643 (9th Cir. July 22, 2010).

[8] *Id.* at 1018, 1029.

[9] *Solis v. BASF Corp.*, No. 2006-L-012105, *verdict returned* (Ill. Cir. Ct., Cook County Aug. 13, 2010).

[10] Ken McClain of Humphrey, Farrington & McClain has been quoted as valuing the litigation at hundreds of millions of dollars. Marc S. Reisch, *The Problem with Butter Flavor*, Chem. & Eng'g News (Nov. 16, 2009).

[11] As of late 2009, Humphrey Farrington & McClain claimed to represent "about 500 individuals in 300 popcorn lung cases pending in U.S. courts." *Id.* One flavorings company (IFF) also reported in a Securities and Exchange Commission filing that 14 cases involving 227 plaintiffs were pending against it as of late 2010. Int'l Flavors & Fragrances, 10-Q Quarterly Report Pursuant to Section 13 or 15(D) of the Securities Exchange Act of 1934, filed Nov. 4, 2010, *available at* http://ir.iff.biz/phoenix.zhtml?c=65743&p=irol-quarterlyFinancials.

[12] *Patton v. Birds Eye Foods et al.*, No. 2009-L-010755, *complaint filed* (Ill. Cir. Ct., Cook County Sept. 11, 2009).

[13] *Egilman v. ConAgra Foods*, No. 10-35667, *appeal docketed* (9th Cir. July 30, 2010).

[14] *Fine v. ConAgra Foods*, 2010 WL 3632469 (C.D. Cal. Aug. 26, 2010).

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Courts split on contractual waiver of judicial review of arbitration awards

By John R. Schleppenbach, Esq., and Howard S. Suskin, Esq.
Jenner & Block

The affordability and expediency of arbitration have long been among its principal attractions.

Arbitration is more cost-effective than litigation in part because it limits the scope of a court's review of the final award. *See Controlotron Corp. v. Siemens Energy & Automation,* No. 09-CV-03112(GBD), 2010 WL 5422520, at *2 (S.D.N.Y. Dec. 23, 2010).

Mindful of the correlation between limited judicial review and lower costs, parties to arbitration have on occasion agreed among themselves to forgo judicial review entirely. *See, e.g., Hoeft v. MVL Group,* 343 F.3d 57, 63 (2d Cir. 2003).

Courts have split, however, as to whether the Federal Arbitration Act allows parties to an arbitration to waive judicial review in whole or in part, leaving the validity of this potential cost-saving move open to serious question. Several divergent cases have addressed this issue recently.

BACKGROUND

The Federal Arbitration Act, 9 U.S.C. § 10, provides four grounds upon which a federal district court may, upon the application of a party, vacate an arbitration award:

- The award was procured by corruption, fraud or undue means;
- There was evident partiality or corruption in the arbitrators;
- The arbitrators were guilty of misconduct in refusing to postpone the hearing or hear pertinent evidence or other misbehavior by which the rights of any party have been prejudiced; or
- Where the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.

The U.S. Supreme Court has recently recognized that the foregoing are the exclusive grounds upon which a court may review an arbitration award. The parties may not expand the scope of judicial review by agreement. *Hall Street Assocs. v. Mattel Inc.*, 128 S. Ct. 1396, 1406 (2008).

The Supreme Court has not, however, ruled on whether parties to an arbitration agreement may limit the scope of judicial review or preclude it entirely.

> The U.S. Supreme Court has not ruled on whether parties to an arbitration agreement may limit the scope of judicial review or preclude it entirely.

A SPLIT IN AUTHORITY

A variety of U.S. courts, including some recently, have found that parties may validly agree to waive judicial review of an arbitration award.

For example, in *Kim-C1 LLC v. Valent Biosciences Corp.*, 2010 WL 4944638 at *4 (E.D. Cal. Nov. 22, 2010), the parties' agreement stated that "[t]he rulings of the [arbitrator] and the allocation of fees and expenses shall be binding, non-reviewable and non-appealable and may be entered as a final judgment in any court having jurisdiction."

The District Court upheld that agreement, finding that it "clearly intend[ed] to limit the parties' ability to seek review," and the court denied a motion to vacate the arbitration award. *Id.* at *6.

Although sympathetic to concerns that enforcing waiver clauses would "turn the federal courts into mere rubber-stamps," the court concluded it had to honor the intention of the parties to preclude review where it was "clear and unequivocal." *Id.* at *4-5.

Similarly, the 3rd U.S. Circuit Court of Appeals enforced a clause stating that "[t]he decision of the arbitrators shall be final and unreviewable for error of law or legal reasoning of any kind and may be enforced in any court having jurisdiction of the parties." *Comm'cns Consultant Inc. v. Nextel Comm'cns of the Mid-Atl.,* No. 04-2750, 2005 WL 1634319, at *2 (3d Cir. July 15, 2005).

Noting that judicial review of arbitration awards under the FAA is already "extremely deferential," the court reasoned that the additional language in the parties' agreement rendered what was already a "high hurdle ... insurmountable." *Id.*

Two federal circuit courts have also stated, albeit in dicta, that parties to an arbitration can agree to waive all court review of the proceedings. *Bowen v. Amoco Pipeline Co.,* 254 F.3d 925, 931 (10th Cir. 2001); *Aerojet-Gen. Corp. v. Am. Arbitration Assn.,* 478 F.2d 248, 251 (9th Cir. 1973).

In sharp contrast, the 2nd Circuit rejected the enforceability of agreements to waive judicial review of arbitration awards in *Hoeft v. MVL Group,* 343 F.3d 57, 64 (2d Cir. 2003).

The court noted that "the freedom to contract, like any freedom, has its limits." It further reasoned that "[i]t is in part because arbitration awards are subject to minimal judicial review that federal courts voice such strong support for the arbitral process." *Id.* at 63.

Thus, allowing the parties to an arbitration to opt out of judicial review would "eviscerate" the careful balance Congress had reached

Rulings enforcing waiver clauses:

Kim-C1 LLC v. Valent Biosciences Corp., 2010 WL 4944638 (E.D. Cal. 2010)

Communications Consultant v. Nextel Communications of the Mid-Atlantic, 2005 WL 1634319 (3d Cir. 2005)

Rulings rejecting waiver clauses:

Hoeft v. MVL Group, 343 F.3d 57 (2d Cir. 2003)

Rollins Inc. v. Black, 2006 WL 355852 (11th Cir. 2006)

Optimer International v. RP Bellevue LLC, 2011 WL 116891 (Wash. 2011)

Team Scandia Inc. v. Greco, 6 F. Supp. 2d 795 (S.D. Ind. 1998)

between encouraging arbitration and monitoring its basic fairness. *Id.* at 64.

Similarly, in *Rollins Inc. v. Black*, 2006 WL 355852 at *1 (11th Cir. Feb. 17, 2006), the 11th Circuit concluded that "a 'binding, final and non-appealable' arbitral award does not mean that the award cannot be reviewed. It simply means that the parties have agreed to relinquish their right to appeal the merits of their dispute; it does not mean the parties relinquish their right to appeal an award resulting from an arbitrator's abuse of authority, bias or manifest disregard of the law."

Although the 11th Circuit ultimately disagreed with the conclusions the District Court reached when reviewing the arbitration award, it agreed that judicial review had been appropriate despite the parties' contract to the contrary. *Id.* at *2.

A variety of courts addressing the issue have reached similar conclusions. *See, e.g., Optimer Int'l v. RP Bellevue LLC*, No. 83807-1, 2011 WL 116891 at *1 (Wash. Jan. 13, 2011); *Team Scandia Inc. v. Greco*, 6 F. Supp. 2d 795 (S.D. Ind. 1998).

PRACTICAL CONSIDERATIONS

The language used in an agreement to waive judicial review of an arbitration award may make a difference in its enforceability.

For example, the language of an agreement declaring that the arbitration award was to be "non-reviewable" and "non-appealable" was held to be "clear and unequivocal" and thus enforceable. *Kim-C1 LLC*, 2010 WL 4944638 at *4-5.

The phrase "final and binding," in contrast, was held not to show a sufficiently clear intent to eliminate all judicial review. *See Aerojet*, 478 F.2d at 251-52.

Thus, the former language is preferable to the latter, although it is also clear that some courts will not uphold waivers of judicial review regardless of the language used. *See, e.g., Hoeft*, 343 F.3d at 64.

Also, parties that wish to foreclose judicial review of their arbitration awards may consider including a choice-of-law clause specifying that their agreement will be governed by the Federal Arbitration Act as interpreted by one of the jurisdictions that enforces waiver clauses.

CONCLUSION

Courts in the United States are very much divided as to the enforceability of agreements to waive judicial review of arbitration awards.

This split in authority is unlikely to be resolved absent a ruling from the Supreme Court and, thus, the enforceability of such agreements must be considered uncertain at best.

Parties that wish to waive judicial review should therefore draft their arbitration agreements with these considerations in mind. WJ

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MACY'S PAYS $750K FOR FAILING TO REPORT KIDS' CLOTHING HAZARD

The Macy's department store chain has agreed to pay a $750,000 civil penalty for failing to timely report that it sold children's outerwear that posed a strangulation hazard, the Consumer Product Safety Commission said July 11. The settlement resolves the CPSC's claims that the company knowingly neglected to tell the agency that such children's upper outwear with drawstrings near the neck had been sold. Federal law requires retailers to provide such notification within 24 hours of discovering such hazards. The agency also said Macy's knowingly sold such jackets and sweatshirts after they were recalled, violating the Consumer Product Safety Improvement Act of 2008.

HONEYWELL RECALLS 77,000 THERMOSTATS, CITING BURN HAZARD

Home products manufacturer Honeywell International is recalling 77,000 electric baseboard and fan heater thermostats following reports that they can overheat and melt. In the July 28 recall, the firm says it received 16 reports of overheating in Honeywell and Cadet-brand thermostats, which can cause them to melt and smoke. The Singapore-made thermostats were sold by home improvement stores and heating/cooling contractors for $80 to $300 between January 2000 and December 2007. Honeywell says consumers can contact it at (888) 235-7363 to see if their thermostats are among the seven models recalled and to arrange to for a free replacement.

FDA: SURGICAL MESH NO PANACEA FOR PROLAPSE

The Food and Drug Administration has warned women who are considering surgery to correct pelvic organ prolapse to think twice before having surgical mesh implanted to fix the natural abdominal problem. The agency said July 13 that a review of some 1,500 adverse-event reports from prolapse procedures between 2008 and 2010 showed that insertion of mesh to keep pelvic organs from drooping offers no greater benefit — but many more risks — than traditional stitch-based fixes. Such complications include pain, infection, bleeding and organ perforation by surgical tools used during placement. "The FDA is asking surgeons to carefully consider all other treatment options to make sure that their patients are fully informed of the potential complications from surgical mesh," William Maisel, deputy director of the FDA's Center for Devices and Radiological Health, said in a statement. "Mesh is a permanent implant — complete removal may not result in complete resolution of complications," he said.

J&J UNIT RECALLS PSYCHIATRIC DRUG OVER 'MUSTY ODOR'

Ortho-McNeil-Janssen Pharmaceuticals has voluntarily recalled 40,000 bottles of risperdone, a drug used to treat schizophrenia and bipolar mania, citing an "uncharacteristic" odor. The Johnson & Johnson subsidiary said the smell stems from the chemical preservative TBA (2,4,6 tribromoanisole) used in wood pallets where the drugs are stored. The June 20 recall involves 16,000 bottles of 3 milligram tablets sold by Ortho under the Risperdal name and 24,000 bottles of generic 2 mg risperdone tablets from Patriot Pharmaceuticals. Ortho said anyone who has a supply of the drugs at issue should contact his or her pharmacy to obtain new tablets. For more information on the recall, contact the company at (800) 634-8977.

CASE AND DOCUMENT INDEX