

In This Issue...

Featured Article

International Coordinating Counsel: The Next Evolution of Litigation Management

Contributed by: *Gregory L. Fowler and Marc E. Shelley, Shook, Hardy & Bacon L.L.P.*..... 2

Alternative Dispute Resolution

District Court Confirms Award After Declining to Expand Scope of Review..... 5

First Circuit Upholds District Court's Affirmance of Arbitral Award 6

Civil Practice & Procedure

District Court Holds South African Infant Seat Manufacturer Subject to Personal Jurisdiction in California Products Liability Lawsuit..... 7

District Court Rules Plaintiff Who Did Not Suffer Actual Injury Had Standing to Sue 9

Class Actions

Second Circuit Holds State Fraud Claims Relating to Issuance of Securities Are Removable Pursuant to CAFA..... 9

Evidence

Northern District of New York Refuses to Admit Evidence of Fee Licensing Negotiations Conducted Under Threat of Possible Litigation 11

Sixth Circuit Affirms District Court Decision to Admit Expert Testimony Where Objections Went to Accuracy and Not Reliability..... 12

Northern District of Illinois Holds Private Investigator's Testimony is Protected Under Work Product Doctrine 14

Patent Law

Infringement Action Not Barred by Claim Preclusion Because Device in Earlier Action Was Not "Essentially the Same"..... 14

Products Liability

District Court Dismisses Products Liability Class Action Related to Defective Cribs for Lack of Injury..... 15

Bloomberg News Daily Litigation Wrap Up

May 19–May 23, 2008..... 16

Bloomberg Litigation Seminar June 2008 Hot Topics in E-Discovery

Bloomberg Finance L.P. is hosting an E-Discovery Seminar on "Hot Topics in E-Discovery," co-sponsored by The CLE Institute and the New York County Lawyers' Association, at our offices at 731 Lexington Avenue and 59th Street on Thursday, June 5, 2008, between 9:00 a.m. and 12:10 p.m. Registration begins at 8:30 a.m.

There is no cost to attend the event.

The program includes a discussion on *Attorney-Client Privilege, New FRE 502, and Spoliation Sanctions* by Dan J. Capra, Philip D. Reed Professor of Law, Fordham University School of Law; Gregory P. Joseph, Gregory P. Joseph Law Offices LLC; and Jack E. Pace III, Partner, White & Case LLP.

A discussion on *Counsel's Obligation for E-discovery: Is Zubulake Right?* will be presented by Thomas Allman, Former Senior Vice President and General Counsel, BASF Corporation and David H. Levitt, Partner, Hinshaw & Culbertson LLP.

There also will be a discussion on *Getting Your Arms Around Your Data: Data Maps, Backup Tapes and Other Inaccessible Electronically Stored Information* by Robert D. Owen and Laurie A. Weiss, Partners, Fulbright & Jaworski LLP and Florinda Baldrige, Director of Practice Support, Fulbright & Jaworski LLP.

Reservations can be made by sending an email to lcohose@bloomberg.net, please include "6/5 BLAW" in subject line and include your name, company/firm name, address, phone and email address. You may also sign up through BU<GO>. For more information about the event you can contact Lisa Cohose; Sue Park at Spark59@bloomberg.net or Desiree Wise at Dwise2@bloomberg.net.

New York MCLE Credit: This course has been approved in accordance with the requirements of New York State CLE Board for a maximum of 3.5 transitional and non-transitional credits: 2 Ethics, 1.5 Skills.

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Featured Article

International Coordinating Counsel: The Next Evolution of Litigation Management

Article contributed by: Gregory L. Fowler and Marc E. Shelley

For product manufacturers, globalization is a double-edged sword. On the one hand, it provides the ability to distribute goods to markets all over the world, but it also provides entrepreneurial plaintiffs' counsel the ability to pursue claims against these goods and to share news, knowledge, documents (including any alleged "smoking gun" documents), legal theories and strategies around the world. At the same time, these counsel actively seek to export U.S.-style litigation globally. Indeed, in the last few months a great deal of buzz has been generated about the spread of the class action litigation device internationally and the entrance into Europe of prominent plaintiffs' firms such as Cohen, Milstein, Hausfield & Toll and Milberg (formerly Milberg Weiss).¹ But beyond the hype is the larger reality of consumer movements pushing for greater standardization of product safety and greater "access to justice," which is arguably what plaintiffs firms may be responding to as they develop international capabilities to take advantage of expanding litigation opportunities. Consumers all over the world are increasingly gaining and asserting new rights in ways long familiar to U.S. corporate defendants. While this trend has been afoot for some time, recently it has raised its threat profile further with the spread of specific American litigation hallmarks abroad including contingency fees, punitive damages and collective redress or class actions.

As globalization shrinks the world, it also expands and multiplies the risks associated with products liability. We say "associated with" because classic products liability litigation is only one risk that awaits manufacturers that sell their products in far-flung lands. Risk management must also include a careful consideration of different and sometimes conflicting regulatory schemes, product safety standards and the specter of criminal liability (including even corporate officer manslaughter charges arising from defective products), all of which arise within legal systems and regulatory regimes that are distinctly different from the domestic milieu. While we suggest that international coordinating counsel must be a master of the various legal systems, regulatory schemes, product safety standards, criminal liability and so forth, this article addresses the role that this counsel can and should play in coordinating and defending products liability litigation on a global scale.

With the possibility that such hallmarks of U.S. litigation will be adopted elsewhere, a new sense of urgency arises in the evolving need to coordinate litigation defense on a transnational stage. Unless a company has a large in-house counsel staff devoted to these types of claims, however, coordinating consumer cases on a global scale may quickly

become costly – if the need for such coordination arises at all. Should the calamity of large-scale international litigation not appear tomorrow or the next day, then in-house counsel must justify to the board of directors each year why a large staff is necessary. On the other hand, if transnational litigation overwhelms existing staff, then ramping up internally and externally could be quite costly. In this article, we encourage transnational manufacturers to adopt an international coordinating counsel model to achieve the flexibility needed to respond cost-effectively and quickly to litigation threats, in whatever direction the winds of the liability may blow.

I. What Is International Coordinating Counsel?

One historical challenge to litigating in multiple jurisdictions has been the ability to achieve the same unified approach to a company's defense that is applied to its business strategies. With the advent of the national mass tort litigation boom in the 1970s, many companies adopted the national counsel defense model as a more consistent and more cost-effective approach; it effectively combines economies of scale and consistency of strategy with local counsel acumen.

For most transnational manufacturers, products liability and other tort litigation has, until now, been defended on an *ad hoc* basis – if it even occurs at all. That is, in-house counsel orchestrates the company's defense with a successful, but no less insular response as each issue arises, often by relying on existing corporate counsel who may negotiate a settlement and make a few limited court appearances. This model may have worked fine if the litigation were rare, smaller in scale and isolated to just a few jurisdictions.

When operating in multiple jurisdictions, many companies already use "international" counsel for their global transactional needs. These counsel might, for example, handle mergers and acquisitions. In such instances, these lawyers provide a valuable service to their clients by knowing their business and objectives and by delivering consistent results in country after country despite variations in law and differing customs, practices and legal systems (*i.e.*, common law vs. civil law). The same is true for international *litigation* coordinating counsel, who can provide a valuable service to clients by knowing the client and knowing the litigation (from plaintiff's theories and key documents to jurisdictional idiosyncrasies and key defenses). Enlisting experienced international coordinating litigation counsel can reduce the drain of repeated start-up costs.

II. How Is International Coordinating Counsel Used and Useful?

As actual trials become increasingly rare, litigation and dispute resolution rates curiously continue to rise. From that, one can quickly conclude that counsel's ability to appear in court is only one small part of a company's defense. In fact, companies do not choose their national coordinating counsel based on where their attorneys are admitted to practice. Rather, they will hire

the best at defending corporate interests, knowing that the national counsel will either be able to secure a *pro hac vice* appearance in most jurisdictions or associate with the best local counsel to create a team that will get the job done. Part of that job is to facilitate the intersection of in-house counsel's broad perspective and business goal awareness with the national and local counsel's understanding of jurisdictional legal and cultural sensitivities. Both perspectives are essential to a successful defense.

For example, the copycat trend was a major impetus for adopting a national coordinating counsel model in the past. If a medical device or tobacco claim were filed in California, then one could guarantee that nearly verbatim pleadings and document exhibits would follow shortly thereafter in Illinois, Mississippi, Florida and everywhere else. Now, globalization suggests that a multinational company could encounter *inter-* as well as *intra-*national copycat lawsuits.²

The international coordinating counsel model adds value by providing consistent counsel and litigation support to ensure a seamless defense, even – or especially – in more limited contexts. For example, litigation could arise in jurisdictions that rely more on document discovery or expert witness testimony than others, in which case adding international team members can streamline production and preparation across multiple borders in support of the primary case in-house or local strategy team. Another targeted use to fill possible strategic gaps exists where the case is the first of its type for the jurisdiction or for the company – or both. Growing pains will inevitably occur in countries recently introducing or expanding the availability of consumer redress. International coordinating counsel can provide additional consultation on strategies when companies face risks posed by the bench and bar's lack of experience with such liability claims and a dearth of developed jurisprudence to guide the litigants. In short, the value of international coordinating counsel does not come from appearing in court, but in knowing the right national counsel to employ, having the prior experience to put in play and helping prevent early strategic missteps when defending litigation in a new jurisdiction for the company.

Still, managing the client's litigation is the job of in-house counsel, right? Right. When a company is sued in the United States or anywhere in the world, in-house counsel is asked several familiar and predictable questions by, depending on the circumstances, the general counsel or the board of directors: should we be concerned about this claim? And what will it cost to defend it in legal fees? In other words, he or she is charged with the ultimate responsibility for the successful defense of the company, measured by both outcome and its price tag.

By essentially outsourcing the litigation coordination, in-house counsel can save on legal fees otherwise generated by hiring more staff and developing new counsel in each jurisdiction from scratch. Instead, an international firm with an existing network of reliable firms can quickly assemble the necessary

knowledge from previous experience, parlay that to its existing partner counsel in a given country and have a refined and coordinated response in significantly less time.

III. How Is Adding This International Layer of Coordinating Counsel Truly More Efficient?

1. Perspective, Prediction, and Preparation

Part of the value of international coordinating counsel is their ability to reflect on and respond to litigation trends; that is, recognize copycat trends or recurring issues or documents in different countries. Naturally, there is a tremendous strategic value that derives from familiarity with both civil and common law countries. Because many of the civil codes historically relate to one another, having a relationship with counsel on several continents will tell, for example, how and why Brazilian judges are more influenced by Italian decisions or that Korean and Japanese jurists will be more influenced by German decisions than by those in neighboring countries. Coordination enables international counsel to use these tendencies as leading indicators or test markets for successful legal strategies. More fundamentally, simply knowing which jurisdictions require unusually rapid action – such as knowing which countries' courts require the filing of full answer and defense materials (including expert reports) within 20 days of service – can add value.

Moreover, much like the impetus for national coordination in the United States, the same need for a consistent/uniform defense exists internationally. Because product safety standards are harmonizing,³ and the product at issue is virtually the same in every instance, then more than likely, the same documents, experts and company witness preparation will be necessary to defend litigation around the world. Thus, preparing a transnational defense strategy includes having coordinating counsel familiar with these resources and able to work with national/local counsel, thus obviating the need for the client to re-train outside counsel to address each new claim.

A degree of prediction also goes a long way toward a successful defense. Companies that may find themselves the potential target of transnational claims should ideally consider enlisting the assistance of an international firm that has an active monitoring system. An international coordinating firm with an established network of vetted national counsel can act as a "canary in the mineshaft" for legislation and other access-to-justice initiatives that can subtly and unexpectedly tip the courtroom balance.

All of these monitoring avenues enable international counsel to assist in-house counsel with risk assessments that identify problematic jurisdictions in advance or evaluate risks in newly filed cases. These assessments take into account the primary landmines in a given jurisdiction – existing procedural and substantive concerns such as class actions, punitive damages and contingency fees, or proposed access-to-justice issues

and more intangible atmospheric accounts – which may be helpful in evaluating whether to enter a market.⁴

2. *Training, Testing and Troubleshooting*

An international coordinating firm can assist in briefing the counsel it associates with regarding the expectations of its clients and is able to attest to the quality of representation. The firm can also know and communicate to national counsel the client's history, its positions and its business goals. Consequently, international coordinating counsel can assure a measure of quality control.

Perhaps most importantly, international coordinating counsel can act as the intermediary between national counsel bent on winning the case with jurisdiction-appropriate tactics or techniques that may not stand the test of international scrutiny and standards. In other words, while prevailing in discrete litigation around the globe is national counsel's narrow focus, international coordinating counsel must have the broader perspective of defending litigation with consistent positions on key factual and philosophical issues that can be played out in many jurisdictions all over the world – not just the one at hand.

3. *Communicating, Cooperating and Case Managing*

The conversation is not just one-way to the client, but is a conduit and clearinghouse from jurisdictions all over the world. International counsel already familiar with the national counsel and the jurisdiction can more quickly distill that information into a format that allows the client to make the business decisions it faces. In-house counsel should be able to make one call to international counsel to check the status of pending cases. Otherwise, even if only a dozen or so small claims are scattered around the globe, that exercise would require a dozen or so calls by in-house counsel, coordinated to accommodate different time zones. Anyone who has engaged in this exercise knows that a simple information-gathering process can take days (or longer) to complete.

But importantly, international coordinating counsel is essentially one member in a defense team. The value of the model is its range of flexibility to respond to almost any scale of product case imaginable. It is predicated on creative and cooperative coordination with national counsel. Specifically, the model affords in-house counsel access to international counsel with a short list of quality firms available to address small, one-off filings, as well as an existing defense tree ready for larger, coordinated surprise attacks with the ability to cross-reference cases in neighboring jurisdictions.

IV. *Why Is the Need for International Coordinating Counsel Increasing?*

1. *Law Reformers Have Begun to Rebalance the Scales in the United States . . .*

The decades-long difficulties with products liability and related litigation have resulted in a concerted effort to reform tort litigation in the United States. Some have even gone so far as to suggest that the plaintiff's bar is in retreat.⁵ In an *American Lawyer* cover article, senior writer Alison Frankel opines that mass torts are waning because tort reformers have been successful at packing courts "with judges amenable to their agenda" and getting state legislatures to adopt tort reform packages which those judges are reluctant to overturn. And given tipping-point decisions that have revealed alleged fraud in silica and asbestos cases, there is an understandable and welcomed chilling effect on such litigation abuse.

2. *. . . But Are the Scales of Justice Becoming Unbalanced Elsewhere?*

On March 12, 2007, the European Commissioner for Consumer Protection, Meglena Kuneva, made a statement at the annual meeting of Trans-Atlantic Consumer Dialogue urging the adoption of "plans for collective redress" by 2012.⁶ To achieve the consumer protection objectives articulated, she outlined three action areas: better regulation, better enforcement of those regulations and a strengthened role for consumer organizations. One example Kuneva gave was the consideration of "collective redress, both for competition infringements and, for example, small claims."⁷ Further, she committed to encouraging a strong consumer movement on the national level and strong trans-Atlantic cooperation between the EU and the United States, such as the agreements already forged with the U.S. Consumer Product Safety Commission to exchange information on product defects, as well as other regulatory agencies.⁸ Kuneva reiterated these points in a June 29, 2007, speech in Leuven, during a "brainstorming" session on collective redress. She observed the number of Member States that have or are currently introducing collective redress mechanisms "to better ensure the enforcement of consumer rights," but was quick to add that "both judicial and non judicial [collective redress], could be an effective means to address this problem."⁹

Indeed, a great deal of activity is already taking place on the national level in Europe to adopt or expand class actions.¹⁰ As just one example, in the last few years, Italy's Parliament has considered nearly a dozen class action models, several of which proposed using class actions in mass torts and permitting claims under contract, tort and strict liability. A few of these bills also discussed contingency fee arrangements, which are now permitted generally under the 2006 Bersani Decree. Then, in mid-December 2007, a class action proposal was adopted into the country's Consumer's Code. This new two-stage model will apply to standard form contract disputes or as a consequence of tort liability, unfair trade practices or anti-competitive behavior. The new law will go into effect at the end of June 2008.

This movement to aid consumers is manifesting in cries for greater "access to justice" outside the EU as well. In Australia, the Victorian Law Reform Commission's report, soliciting public response, raised the question of implementing not

only class actions, but permitting third-party litigation funders, contingency fees and the loser-pays rule. In Latin America, Brazil has seen several proposals to expand class-action standing, and Argentina just recently enacted amendments to the Consumer Protection Act that introduce class actions and permit recovery of punitive damages of up to \$1.7 million per plaintiff. The bill became effective April 7, 2008.

V. “In Times of Change Learners Inherit the Earth, While the Learned Find Themselves Beautifully Equipped to Deal with a World that No Longer Exists.”¹¹

A successful defense requires the anticipation of risk, preemptive fortification and flexible strategies. When new litigation arises in previously quiet jurisdictions, in-house counsel must make a quick decision to interview counsel and hope that the selection – based on a few telephone calls, possibly a face-to-face visit and recommendations from colleagues – works out. Depending on the stakes of the lawsuit and the likelihood of recognition and enforcement of any judgment, that degree of familiarity with the company’s defenders may not quell the unease in anyone’s gut. Given this, a quick discussion with an international firm that has a network of vetted counsel in nearly all countries where litigation is likely to arise can go a long way toward putting one’s mind at ease.

International coordinating counsel, like its national analogue, can provide efficiency of scope and economies of scale through:

- maintaining a deep appreciation not only for the client’s litigation but also the client’s business to deliver the level of service and reporting necessary to meet the client’s business needs;
- developing and employing a thorough understanding of common law and civil law traditions (and the variations in both) to adapt winning litigation strategies and arguments to the case and country at hand;
- hiring and training products liability attorneys in all jurisdictions, resulting in a vetted network of counsel around the globe;
- achieving the proper cost-effective flexibility to respond quickly to whichever direction the litigation threat heads;
- ensuring a consistent line of defense against copycat allegations and evidence; and
- monitoring major law reform movements and litigation trends.

With the anticipated spread of consumer and mass tort litigation beyond U.S. borders, the international coordinating counsel model can assist companies build upon prior

experiences and adapt them to new challenges, thus achieving the same unified approach to the defense of litigation claims that applies to their global business strategies.

¹ Alexia Garamfalvi, *U.S. Firms Prepare for European Class Actions*, Legal Times, June 25, 2007; see also Peter Geier, *A Wary Europe Moves a Step Closer to Class Actions*, The National Law Journal, December 5, 2006; *If you can’t beat them, join them; class actions*, The Economist, February 17, 2007; Lisa Rickard, *A Gift from America to Europe: Class Action Lawyers and their Costly Lawsuits*, February 29, 2008, available at: http://www.instituteforlegalreform.com/about/presidentscorner_20080219.cfm (visited May 5, 2008).

² For further discussion of cross-border litigation trends, see Laura Fey and Harley Ratliff, “A Brave New World: The Dawn of Hyper-Complex Litigation” (forthcoming).

³ For further discussion, see Gregory L. Fowler and Simon J. Castley, “Global Trade and Regulatory Oversight: Are Uniform Product Safety Standards on the Horizon?,” International Bar Association’s *Product Law and Advertising Newsletter* (May 2008), and Gregory L. Fowler and Simon J. Castley, “Product Manufacturers, Take Heed: International Markets Bring International Regulatory Oversight, Safety Standards and Liability Concerns,” 2 *Bloomberg Corporate Law Journal* 83, 92–93 (Winter 2007).

⁴ To see how these assessments can be a helpful guide, consider the general jurisdiction assessments found in Gregory L. Fowler, *International Product Liability Law – A Worldwide Desk Reference*, Aspatore Books (2004).

⁵ *The American Lawyer*, December 1, 2006.

⁶ Annual Meeting of Trans-Atlantic Consumer Dialogue, available at: http://ec.europa.eu/commission_barroso/kuneva/speeches/ann_meet_tacd_speech12032007_en.pdf.

⁷ *Id.*

⁸ See Fowler and Castley, *supra* note 3, “Product Manufacturers, Take Heed,” at 84–85.

⁹ June 29, 2007 Speech and the seminar on collective redress, Leuven, available at: http://ec.europa.eu/commission_barroso/kuneva/speeches/speech_leuven_29062007_en.pdf.

¹⁰ Laurel J. Harbour and Marc E. Shelley, “The Emerging European Class Action: Expanding Multi-Party Litigation To A Shrinking World,” *The Practical Litigator* (July 2007), available at http://www.shb.com/FileUploads/plit0707-harbour-shelley_1880.pdf.

¹¹ Eric Hoffer

Alternative Dispute Resolution

Vacatur

District Court Confirms Award After Declining to Expand Scope of Review

Ascension Orthopedics, Inc. v. Curasan, AG, No. 07-cv-04033, No. 08-cv-00038, 2008 BL 102301 (S.D. Tex. May 14, 2008)

On May 14, 2008, the U.S. District Court for the Southern District of Texas confirmed an arbitral award and denied the parties’ motions seeking vacatur of the award.

Factual Background

Plaintiff Ascension Orthopedics, Inc. entered into an International Distribution and Marketing Agreement (the Agreement) with defendant Curasan, AG in June 2004. Under the terms of the Agreement, Ascension was the exclusive U.S. distributor of Curasan's products and was obligated to purchase a minimum amount of products each year for the first two years. The Agreement provided for the arbitration of disputes and contained language which expanded the scope of judicial review of arbitration awards beyond what was permitted under the Federal Arbitration Act (FAA).

When Ascension failed to meet the first year's minimum purchase requirements, Curasan initiated arbitration proceedings. The arbitrators found Ascension liable to Curasan for \$528,339 but offset that amount by \$173,964 for the repurchase of inventory in Ascension's possession. Ascension applied in Texas state court for partial vacatur of the award pursuant to Texas law. Curasan removed the case to federal court as a diversity case and sought vacatur of the entire award. The district court ruled on the motions and vacated the award on March 26, 2008. Learning of the U.S. Supreme Court's March 25th decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 128 S.Ct. 1396 (2008), the district court then vacated its decision and ordered further briefing on *Hall Street's* impact on the case. In *Hall Street*, the Court held that the exclusive grounds for vacating an arbitration award were Sections 10 and 11 of the FAA. Curasan contended that the FAA applied to the district court's review of the arbitral award, while Ascension claimed that the Texas General Arbitration Act (Texas Act) and Texas common law governed because it had applied for vacatur under Texas law.

District Court Confirms Arbitral Award

The district court reviewed the arbitration award under all three laws. Although the district court observed that it was "highly unlikely" the FAA applied, the district court concluded that the award would be confirmed if it were reviewed under the FAA. The district court noted that neither party had sought vacatur based on any of the FAA grounds nor did the record support vacating the award under the FAA. Curasan might have argued that the FAA applied, but it had not argued that the arbitrators committed misconduct of the type that forms the basis for vacatur under the FAA.

The district court next considered the award under the Texas Act and concluded that the results were the same as under the FAA. "Again, neither party argue[d] that the arbitrators have committed any of the misconduct enumerated in the statute nor does the record demonstrate any such misconduct." Additionally, the district court rejected Ascension's argument that the parties could contract to expand the scope of review under the Texas Act based on *Gateway Techs., Inc. v. MCI Telecommunications Corporation*, 64 F.3d 993 (5th Cir. 1995), because "the Texas cases cited by Ascension cite *Gateway* with favor while construing the FAA, not the

[Texas Act]." The Texas Supreme Court already determined in *Callahan & Associates v. Orangefield Independent School District*, 92 S.W.3d 841, 844 (Tex. 2002), that the grounds to vacate, modify or correct an arbitration award are limited to the grounds provided under the Texas Act.

Finally, the district court considered Ascension's argument that the award should be vacated as a "gross mistake" under Texas common law. In order to vacate an award on the basis of gross mistake, the party seeking vacatur must show that the arbitrators acted with "'bad faith or [a] failure to exercise honest judgment' rendering the award arbitrary and capricious." An honest judgment, "however erroneous, is not arbitrary and capricious." The district court concluded that Ascension failed to meet its burden of demonstrating gross mistake and that the record did not suggest otherwise.

Conclusion

The district court thus concluded that the award was confirmed under all three arbitration laws.

First Circuit Upholds District Court's Affirmance of Arbitral Award

UMass Mem'l Med. Ctr., Inc. v. United Food & Commercial Workers Union, Local 1445, Nos. 07-02527, 07-02528, 2008 BL 103126 (1st Cir. May 15, 2008)

On May 15, 2008, the U.S. Court of Appeals for the First Circuit upheld the district court's affirmance of an arbitration award entered in favor of United Food and Commercial Workers Union (Union).

Background

In October 2004, the Union submitted a grievance to UMass Memorial Medical Center (Hospital) on behalf of employees classified as "phlebotomists" over the Hospital's failure to compensate the phlebotomists with "differential pay . . . for holidays not worked." The Hospital rejected the grievance and, pursuant to the Collective Bargaining Agreement (CBA), the matter was eventually referred to arbitration. At the arbitration, the arbitrator found in favor of the Union and the Hospital paid the phlebotomists the appropriate differential amounts. The Hospital, however, refused to apply the arbitrator's decision to other employees affected by the payment policy. As a result, the Union filed a second grievance on November 9, 2005; this time on behalf of all Union employees. The Hospital denied the second grievance as untimely on the ground that the Union failed to raise the differential pay issue on behalf of all employees at the earlier arbitration when it had the opportunity to do so. Thus, the second grievance was also submitted to arbitration.

Pursuant to the CBA, all grievances were required to be presented within "seven (7) calendar days after the grievant knew

or should have known of the event giving rise to the grievance,” and grievances submitted outside this time frame were deemed waived. The arbitrator determined that the second grievance was timely, notwithstanding that the “filing of the grievance did not occur within seven days of one of the holidays listed in the CBA or within seven days of the employees receiving payment for those holidays.” The arbitrator found that the alleged breach was “‘continuing’ and ‘occurring each day the grievants [had] not been paid the appropriate rate.’” According to the arbitrator, it was irrelevant when the grievance was filed. Consistent with the outcome of the first arbitration, the arbitrator went on to find that the Hospital violated the CBA by failing to pay its employees differential pay.

In response to the arbitrator’s ruling, the Hospital filed a complaint in the district court seeking to vacate the arbitrator’s award on the ground that the arbitrator “exceeded his powers and overstepped his jurisdictional authority when he concluded that the grievance was timely filed.” The district court upheld the arbitral award, and this appeal followed.

Vacatur of the Arbitral Award Was Not Warranted

Pursuant to Section 10(a) of the Federal Arbitration Act, a court may vacate an arbitral award “where the arbitrators exceeded their powers” 9 U.S.C. § 10. In this instance, the Hospital argued that the district court erred in holding that the arbitrator did not exceed his powers when he determined that the Union’s grievance was timely.

At the outset of the opinion, the First Circuit noted that, “[i]n an action to vacate or confirm an arbitral award, we review the district court’s decision de novo, mindful ‘that the district court’s review of arbitral awards must be extremely narrow and exceedingly deferential.’” (Quoting *Bull HN Info. Sys., Inc. v. Hutson*, 229 F.3d 321, 330 (1st Cir. 2000)). Applying this standard of review, the Court determined that the district court did not err in holding that the arbitrator did not exceed his powers in finding the grievance timely.

In affirming the district court’s decision, the First Circuit distinguished *El Mundo Broadcasting Corp. v. United Steel Workers of Am.*, 116 F.3d 7 (1st Cir. 1997), relied on heavily by the Hospital. In *El Mundo*, the Union filed a grievance based on the employer’s failure to post a full-time editor position as required under the CBA. The arbitrator found the grievance timely, characterizing the violation as “continuous” and analogizing the failure to post a position to a situation where an employer changes a rate of pay and deprives employees of daily pay. The district court vacated the award and the First Circuit affirmed, finding that the posting of the position was a specific occurrence and not continuous in nature. According to the Court, “if specific occurrences, such as terminating an employee’s employment, were construed as continuous violations, employers’ rights to have issues settled promptly would be compromised in favor of allowing employees to file grievances at their convenience.” Here, “[t]he policy concerns that underlied the Court’s finding in *El Mundo* regarding an

employer’s right to have issues settled within a fixed period of time [did] not exist . . . because the Hospital did not have to compensate the employees for the prior holidays.” The Court also stated that the Hospital had no reason “to believe that the Union did not intend to pursue the same remedy for all employees after the Union was alerted to the Hospital’s unwillingness to apply the arbitral award to every employee.”

In sum, the First Circuit concluded that there was insufficient evidence to find that the arbitral award was unfounded or that the arbitrator exceeded his powers in finding the grievance timely.

Attorney’s Fees

Although the First Circuit rejected the Hospital’s argument and affirmed the district court’s decision upholding the arbitral award, the Court held that the Union was not entitled to attorney’s fees. The Court determined that the district court did not abuse its discretion in finding that the Hospital’s timeliness defense “was sufficiently justified to avoid payment of attorney’s fees.”

Conclusion

Accordingly, because “[t]his case fail[ed] to meet the exceedingly high threshold for judicial interference with arbitral awards,” the First Circuit affirmed the district court decision upholding the arbitral award in the Union’s favor.

Civil Practice & Procedure

Personal Jurisdiction

District Court Holds South African Infant Seat Manufacturer Subject to Personal Jurisdiction in California Products Liability Lawsuit

Lamm v. Bumbo, Nos. 07-cv-04807, 07-cv-05597, 2008 BL 102059 (N.D. Cal. May 13, 2008)

On May 13, 2008, the U.S. District Court for the Northern District of California denied defendant Bumbo (Pty) Limited’s (Bumbo-Pty) motion to dismiss a products liability lawsuit. Finding that Bumbo-Pty “was not only aware that its products would reach the forum state of California but also acted with the intent and purpose to serve the state,” the court held that it could exercise personal jurisdiction over the South African defendant. Nevertheless, the court dismissed the action for insufficient service of process.

Factual Background

According to the complaint, plaintiff Dylan Lamm, a minor child, sustained injuries when he fell out of a Bumbo Baby

Sitter infant seat. Dylan's parents filed this action, asserting claims of strict products liability, negligence, wrongful infliction of emotional distress and violations of California law. They received the Bumbo Baby Sitter from Wendy Whitson, who purchased it at defendant Target Corporation's Sonoma County, California store and who filed a separate class action for violation of state consumer protection laws, breach of express and implied warranties and unjust enrichment. Upon commencement of these lawsuits, the Bumbo Baby Sitter was recalled.

Defendant Bumbo-Pty, a privately-held South African company, manufactured the Bumbo Baby Sitter in Pretoria, South Africa. According to a declaration filed by the company, Bumbo-Pty did not have offices, accounts, employees or other contacts in the U.S., did not conduct board meetings or pay taxes in the U.S. and did not advertise or maintain a sales force in the U.S. However, on its website the company described itself as a worldwide exporter of the Bumbo Baby Sitter and the website listed Target as one of Bumbo-Pty's major customers, indicated that the company was granted a U.S. patent and mentioned various awards received from U.S. entities.

Bumbo-Pty argued that the California court lacked personal jurisdiction over it and that plaintiffs failed to properly serve their summons and complaint. Plaintiffs delivered the pleadings to Wartburg Enterprises, Inc., a Texas-based distributor of the Bumbo Baby Sitter. Plaintiffs also hand-delivered the pleadings to one of Bumbo-Pty's directors in South Africa.

Personal Jurisdiction Standard

The district court explained that California's long-arm statute extends a California court's jurisdiction to the full extent of federal due process, thus allowing the court to exercise jurisdiction over a defendant who has sufficient "minimum contacts" with California "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." (Internal quotation omitted.)

After determining that Bumbo-Pty lacked the "substantial, continuous, and systematic" contacts with California required for the court to exercise general jurisdiction over the company, the court set forth the Ninth Circuit's three part test for determining whether an exercise of specific jurisdiction was appropriate:

- (1) the nonresident defendant must purposefully direct his activities at the forum state or purposefully avail himself of the benefits and protections of the laws of the forum state, (2) the claim must be one which arises out of or relates to the defendant's forum-related activities, and (3) the exercise of personal jurisdiction must be reasonable.

(Citing *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1205 (9th Cir. 2006).)

Purposeful Availment

In analyzing whether Bumbo-Pty purposefully availed itself of the benefits and protections of California law by placing the Bumbo Baby Sitter into the stream of commerce, the district court explained that the U.S. Supreme Court articulated two tests for deciding this issue in *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987). Justice Brennan's test examines whether the defendant "places a product into a 'regular and anticipated' stream of commerce and is aware that the product is or may be directed into the forum state." (Quoting *Asahi*, 480 U.S. at 116–117.) According to Justice O'Connor, "a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream of commerce into an act purposefully directed toward the forum State." (Quoting *Asahi*, 480 U.S. at 112.) According to the district court, the Ninth Circuit has not yet determined which Supreme Court standard should apply.

The district court concluded that Bumbo-Pty purposefully availed itself of the benefits and protections of California law under both tests. Applying Justice Brennan's standard, the court found that defendant had a relationship with Target for the distribution and sale of the Bumbo Baby Sitter in Target stores throughout the United States, including California. The court relied on the fact that Bumbo-Pty's website listed Target as a major customer and that Target's website indicated that the company had over 200 stores in California. The court concluded that "Bumbo-Pty cannot plausibly claim, and does not in fact claim, that it is unaware that its product is being marketed and sold in California." Turning to Justice O'Connor's standard, the court again relied on Bumbo-Pty's website to find that the company's "deliberate overtures to retailers such as Target" showed that the company "acted with the intent and purpose to serve customers in the United States including customers in California." The court cited defendant's efforts to change the Bumbo Baby Sitter's warning label after the product was recalled as further evidence of the company's intent to "maintain the marketability of its product in the United States and California."

Other Factors Favored Exercising Specific Jurisdiction

Turning to the other elements of Ninth Circuit's three-part test for specific jurisdiction, the court found that the plaintiffs' claims arose out of Bumbo-Pty's forum related activities because defendant "manufactured the Bumbo Baby Sitter with knowledge, intent and purpose to sell it in California." In addition, the court held that it would be fair and reasonable to exercise specific personal jurisdiction over Bumbo-Pty based on the fact that (1) the company "purposefully interjected" over one million Bumbo Baby Sitters into the U.S. market, a significant number of which were likely sold in California, (2) defendant had experience with the U.S. legal system, (3) California had a great interest in adjudicating the lawsuit, and (4) resolving the dispute in South Africa "would not provide for the most efficient resolution of the controversy."

Service of Process

After concluding that it could exercise specific jurisdiction over Bumbo-Pty, the court examined whether plaintiffs' attempts at service of process satisfied the requirements of Rule 4 of the Federal Rules of Civil Procedure. Accepting defendant's assertion that Wartburg Enterprises was a separate and distinct entity from Bumbo-Pty, the court concluded that service on this Texas distributor was "insufficient to effect service upon Bumbo-Pty."

Next, the court examined whether plaintiffs' attempt to serve Bumbo-Pty in South Africa was proper. Noting that the parties were in agreement that Rule 4(f)(2)(A) of the Federal Rules permitted plaintiffs to serve Bumbo-Pty in a manner prescribed by South African law, the court concluded that South African law required delivery of the complaint by a sheriff to the defendant's corporate offices or by a party to an attorney of record. The court found that neither method of service had occurred and that plaintiffs failed to show that they satisfied any other applicable provision of the rules governing service of process.

Declining plaintiffs' request to allow an alternative method of service, the court dismissed plaintiffs' action for insufficient service of process. The court ordered plaintiffs to serve Bumbo-Pty in accordance with Rule 4 within 30 days.

Standing

District Court Rules Plaintiff Who Did Not Suffer Actual Injury Had Standing to Sue

Hedlund v. Hooters of Houston, No. 08-cv-00045, 2008 BL 100916 (N.D. Tex. May 13, 2008)

On May 13, 2008, the U.S. District Court for the Northern District of Texas denied defendants' motion to dismiss for lack of subject matter jurisdiction. Although plaintiff did not suffer "actual injury," the court found that "Congress can expand the range or scope of injuries that are cognizable for purposes of Article III standing by enacting statutes which create legal rights."

Background

Plaintiff Michael Hedlund brought this action against defendants Hooters of Houston a/k/a Texas Wings, Inc. and Hooters of America (collectively, defendants) alleging that defendants violated the Fair and Accurate Credit Transaction Act (FACTA), 15 U.S.C. §1681c(g). After making a payment by credit card at one of defendants' restaurants, Hedlund claimed that he received a receipt which contained his credit card's expiration date. Hedlund alleged that the receipt violated FACTA, which states "no person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction." Hedlund did not suffer nor did he seek

recovery for actual damages based on the receipt. Instead, he sought damages provided for by statute.

Defendants claimed that the court lacked subject matter jurisdiction because Hedlund did not suffer "actual damages" and therefore lacked standing to sue.

Elements of Standing

In evaluating defendants' motion, the court assessed the three elements of standing:

First, the plaintiff must have suffered an 'injury in fact,' which is an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there needs to be a causal connection between the injury the plaintiff alleges and the conduct of the defendant that the plaintiff is challenging. Finally, the injury must be likely fixed by favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

Defendants alleged that Hedlund lacked standing because he did not suffer an actual injury, such as identity theft, due to the alleged FACTA violation. However, the court determined that "[p]laintiff did not lack constitutional standing" because "Article III's requirement of actual or threatened injury may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." *Warth v. Seldin*, 422 U.S. 490, 500 (1975). Therefore, although no actual injury occurred based on the credit card's expiration date being printed on the receipt, FACTA provided for relief of either statutory or actual damages, if the plaintiff alleged a willful violation. Accordingly, the court found that plaintiff had standing and therefore denied defendants' motion.

Class Actions

Removal

Second Circuit Holds State Fraud Claims Relating to Issuance of Securities Are Removable Pursuant to CAFA

Pew v. Cardarelli, No. 06-05703, 2008 BL 102366 (2d Cir. May 13, 2008)

On May 13, 2008, the U.S. Court of Appeals for the Second Circuit reversed a district court's order remanding a securities class action suit to state court, holding that certain state law claims related to the issuance of securities could be heard in federal court under the Class Action Fairness Act of 2005 (CAFA).

Factual Background

Agway, Inc. (Agway), an agricultural supply and marketing cooperative, issued unsecured fixed-interest debt instruments

called Agway Money Market Certificates (Certificates) in order to raise capital. The Certificates were not offered on any national exchange. Eventually, Agway suspended sale of the Certificates and ended its practice of repurchasing them prior to maturity. In September 2002, Agway filed for bankruptcy.

In 2003, plaintiffs brought a purported class action lawsuit in New York state court on behalf of individuals who had purchased Certificates during the two-year period before Agway filed for bankruptcy. The suit alleged that two of Agway's officers, Donald Cardarelli and Peter O'Neill, as well as Agway's auditor, PricewaterhouseCoopers LLP, violated federal securities laws by fraudulently concealing in Agway's financial statements that Agway was insolvent and could discharge its debt only by issuing new debt instruments. After defendants removed the action to the U.S. District Court for the Northern District of New York, plaintiffs amended their class complaint to add a claim under New York's consumer fraud statute, N.Y. Gen. Bus. Law § 349(a), which creates a private right of action for victims of "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service." The district court dismissed the federal claim and declined to exercise supplemental jurisdiction over the state claim. On appeal, the Second Circuit affirmed on the grounds that "no reasonable investor could have been misled about the nature and extent of the risks associated with investing in Agway Certificates."

District Court Proceeding

In 2005, plaintiffs commenced the present lawsuit, also a purported class action, in New York state court. This suit alleged essentially the same facts as the first, but was predicated solely on Section 349. Defendants removed the action to the Northern District of New York under CAFA, which confers jurisdiction in the federal courts over certain securities class action suits, and in some instances permits removal of class action suits based wholly on state law.

Plaintiffs moved to remand, arguing that the suit fell under an exception to CAFA's removal jurisdiction, which provides that a securities class action cannot be removed if the suit "solely involves a claim . . . that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security." 28 U.S.C. § 1332(d)(9)(C). The district court granted the motion to remand.

Defendants filed a petition in the Second Circuit, seeking permission to appeal the order of remand.

Appellate Jurisdiction

The Second Circuit first considered whether to grant defendants' petition for an appeal. Ordinarily, orders of remand are not appealable. CAFA, however, provides that an appellate court "may accept" an appeal from a remand order. 28 U.S.C. § 1453(c)(1).

Plaintiffs challenged the Court's exercise of appellate jurisdiction, arguing that the case fell under an exception to CAFA's grant of appellate jurisdiction, 28 U.S.C. § 1453(d)(3), under which an appellate court cannot review a remand order if the class action, "solely involves . . . a claim that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security." This section mirrors the exception to CAFA's removal jurisdiction, Section 1332(d)(9)(C), which the district court applied below in granting plaintiffs' motion for remand.

Discussing the two identical statutory provisions, the Second Circuit stated, "CAFA's jurisdictional and removal provisions operate in tandem. If there is original jurisdiction for plaintiffs' underlying claim, we have appellate jurisdiction If the district court lacked jurisdiction over the underlying claim, we would dismiss the appeal for lack of appellate jurisdiction." Because the issue of whether the Second Circuit had appellate jurisdiction was identical to the question of whether removal was proper, the Court elected to exercise its discretion and decide both issues simultaneously. Moreover, the Court determined that the issue of whether a state law deceptive practices claim predicated on the sale of a security was removable under CAFA was "important and consequential" and a decision on the issue would "alleviate uncertainty in the district courts."

Whether Remand Was Proper

Because the parties did not dispute that the Certificates were "securities" within the meaning of Sections 1332(d)(9)(C) and 1453(d)(3) of CAFA, the only issue remaining before the Court was whether the plaintiffs' allegations stated a claim that "relate[d] to" the "rights, duties . . . and obligations" associated with the Certificates. The Court first found that "rights" created by the Agway Certificates were the right to a particular rate of interest and principal repayment on a certain date. Plaintiffs' suit, however, concerned defendants' alleged material nondisclosure concerning Agway's insolvency, and did not focus on those rights, nor did the suit attempt to enforce the rights of the Certificate holders *qua* holders. Opining that "[c]laims that 'relate to the rights . . . and obligations' 'created by or pursuant to' a security must be claims grounded in the terms of the security itself," the Court determined that plaintiffs' suit did not "relate to" the rights and obligations created by any security.

In its analysis, the Court rejected plaintiffs' argument that the statutory language of "rights . . . relating to or created by or pursuant to any security" was intended to include the right to "bring any cause of action that relates to a security." The Court noted that such an interpretation would defeat any limitation intended by the statute and would obviate the limitations imposed by other statutory exceptions to CAFA's removal and appellate jurisdiction, which limit federal jurisdiction over class action suits that solely concern certain specified securities. 28 U.S.C. §§ 1332(d)(9)(A), 1453(d)(1). The Court also supported its holding with a Senate Committee

Report, which stated that CAFA jurisdiction was not intended to extend to “litigation based solely on . . . the rights arising out of the terms of the securities issued by business enterprises” or “disputes over the meaning of the terms of a security.”

Conclusion

Accordingly, the Second Circuit granted defendants’ petition for an appeal and reversed the district court’s order remanding the suit to state court.

Evidence

Compromise and Offers to Compromise

Northern District of New York Refuses to Admit Evidence of Fee Licensing Negotiations Conducted Under Threat of Possible Litigation

Cornell Univ. v. Hewlett-Packard Co., No. 01-cv-01974, 2008 BL 103970 (N.D.N.Y. May 8, 2008)

On May 8, 2008, the U.S. District Court for the Northern District of New York held that negotiations involving license fee agreements were inadmissible under Rule 408 of the Federal Rules of Evidence because they took place under the threat of possible litigation.

Background

Prior to the filing of the current lawsuit, plaintiff Cornell University (Cornell) engaged in negotiations with defendant Hewlett-Packard Company (Hewlett-Packard) and a third party, Intel, over U.S. Patent No. 4,807,115 (‘115 patent). Cornell initially contacted Intel in 1988 to inform it that the introduction of one of Intel’s processors “led Cornell to believe Intel may want to license the ‘115 patent.” Several years later, Cornell sent another letter indicating that the release of another processor led Cornell to believe that Intel may have wanted to license the ‘115 patent. Intel responded the next year, claiming that none of Intel’s processors used any aspect of the ‘115 patent.

Cornell “strengthened its tone” in its correspondence with Intel and indicated in two 1996 letters that it believed the processors infringed the ‘115 and requested Intel to respond to “the serious nature of our allegations that Intel infringes [Cornell’s] patent.” Intel again denied that the processors infringed upon the ‘115 patent, but indicated a desire to “reach an understanding” on how the parties would deal with intellectual property issues. The parties then began conducting licensing negotiations. In 1997, they reached

a “Patent License Agreement” after “months of counter proposals back-and-forth.”

Cornell conducted similar negotiations with Hewlett-Packard. In 1998 and 1999, “Cornell offered to license [to] Hewlett-Packard . . . the ‘115 patent on the same terms as the Intel agreement.” The negotiations with Hewlett-Packard did not lead to a Patent License Agreement, and Cornell filed this lawsuit relating to Hewlett-Packard’s use of the ‘115 patent. Prior to trial, Cornell filed a motion *in limine* to prevent Hewlett-Packard from introducing evidence of the negotiations and the licenses that resulted from the Intel negotiations.

Rule 408

Rule 408 prohibits the admissibility of evidence of offers to compromise or settle claims, or evidence of “conduct or statements made in compromise negotiations regarding the claim,” when the evidence is “offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount.” Rule 408 is designed to encourage settlement and it protects negotiations between a party to a dispute and a third party.

Hewlett-Packard argued that “[o]ffers to license and license agreements are highly probative of a reasonable royalty and are admissible, except for those negotiated after an explicit threat of litigation.” The district court rejected this view, noting the long-standing rule that “[t]he avoidance of the risk and expense of litigation will always be a potential motive for settlement.” *Rude v. Westcott*, 130 U.S. 152, 164 (1888). In light of this rule, the U.S. Supreme Court “determined that a license negotiated under threat of litigation ‘cannot be taken as a standard to measure the value of the improvements patented, in determining the damages sustained by the owners of the patent in other cases of infringement.’” *Id.*

Following *Rude*, the U.S. Court of Appeals for the Sixth Circuit held that “[l]icense fees negotiated in the face of a threat of high litigation costs may be strongly influenced by a desire to avoid full litigation.” *Panduit Corp. v. Stahlin Bros. Fibre Works, Inc.*, 575 F.2d 1152, 1164 n. 11 (6th Cir. 1978).

The district court noted that “Cornell’s negotiations with both Intel and Hewlett-Packard occurred in the shadow of threatened litigation.” Even though no litigation resulted from the interactions with Intel, Cornell asserted that Intel had infringed the ‘115 patent and characterized its charge against Intel as “serious.” Hewlett-Packard offered the deposition statement of Cornell’s president that “Cornell would not ‘under any circumstances ever file an action for infringement of the ‘115 patent against Intel.’” However, the court rejected this as evidence that Cornell did not threaten Intel with litigation, because “[i]n the poker game of license negotiations, the nature of the exchange between the players, not the cards each is holding, sets the tenor of the game.” Therefore, the negotiations did not reflect an “arms-length transaction between willing bargainers, but instead show[ed] an effort to avoid the

expense and adverse publicity of litigation.” Consequently, the court held that the Intel licensing agreement negotiations were conducted under the threat of litigation.

Conclusion

Accordingly, the court granted Cornell's motion *in limine*, disallowing evidence of the negotiations between Cornell and Intel regarding the '115 patent.

Expert Testimony Sixth Circuit Affirms District Court Decision to Admit Expert Testimony Where Objections Went to Accuracy and Not Reliability

In re Scrap Metal Antitrust Litig., No. 06-04511, 2008 BL 102314 (6th Cir. May 15, 2008)

On May 15, 2008, the U.S. Court of Appeals for the Sixth Circuit held that the district court properly concluded that damages calculations performed by plaintiffs' expert were reliable. The Sixth Circuit held that defendants confused the credibility and accuracy of the expert's opinion with its reliability and thus affirmed the district court's decision to admit the expert's testimony into evidence.

Background and Procedural History

Plaintiffs Lincoln Electric Company and Profile Grinding, Inc. (collectively, plaintiffs) commenced an action in 2002 on behalf of themselves and a class of industrial scrap-generating companies located in Northeastern Ohio against defendants Columbia, Columbia National Group (Columbia's parent company), Harry Rock & Associates, M. Weingold & Co., Inc., DeMilta Iron and Metal; Bay Metal, Inc., Bluestar Metal Recycling, Inc. and Parkwood Iron and Metal, Inc. (collectively, defendants). Plaintiffs generate scrap metal, both ferrous (iron-based) and non-ferrous, and sell it to brokers and dealers, such as defendants, who then “haul, clean, sort, and process the scrap before selling it to end users, such as steel mills.” Plaintiffs alleged that defendants conspired to restrain and eliminate competition in the unprocessed industrial scrap metal market in Northeastern Ohio in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

In March 2004, the district court granted plaintiffs' motion to certify a class consisting of all scrap metal generators who sold their product to defendants and/or their co-conspirators between December 1992 and March 2000. Before the commencement of trial, plaintiffs settled with or dismissed all but three defendants. The remaining three defendants moved in 2005 to preclude damages testimony from plaintiffs' expert economist, Dr. Jeffrey Leitzinger. The district court denied the motion because it concluded that plaintiffs' arguments went to the weight, and not the admissibility, of Dr. Leitzinger's testimony.

The case proceeded to trial and resulted in the district court directing a verdict against plaintiffs for claims relating to non-ferrous scrap-metal sales on the ground that plaintiffs failed to establish any proof of injury or damages relating to such transactions. In addition, the jury returned a verdict only against defendant Columbia with respect to the claims relating to ferrous scrap-metal sales, and awarded plaintiffs \$11.5 million in damages. Pursuant to 15 U.S.C. § 15, the district court trebled that damages amount, then subtracted the amount received from the defendants who settled, and entered a judgment against Columbia in the amount of \$23,036,000.

Columbia moved for a judgment as a matter of law, and alternatively, for a new trial or a reduction of damages. After the district court denied both motions, Columbia appealed to the Sixth Circuit.

Dispute over Dr. Leitzinger's Testimony

Dr. Leitzinger was offered by plaintiffs to testify about the amount of damages incurred by plaintiffs as a result of defendants' anticompetitive behavior. Dr. Leitzinger made his calculations by using the “during and after” or “before and after” method which compares the difference in the amount of profits made by defendants during the alleged conspiracy and after. Dr. Leitzinger used actual data from transactions to make his calculations. However, to control for any other factors that might have impacted prices, other than the conspiracy, Dr. Leitzinger used index prices for the dealer-user transactions, which represented the prevailing market prices, as published on a weekly basis in *American Metal Market (AMM)* and *Iron Age* magazine's Scrap Price Bulletin (SPB).

After making his calculations, Dr. Leitzinger concluded that “Defendants' profits declined after the conspiracy, while the generators' profits rose.” Dr. Leitzinger used the SPB index to calculate ferrous scrap metal prices and determined that “Defendants would have paid plaintiffs 16.4 percent more for unprocessed ferrous scrap metal in the absence of an antitrust conspiracy.” Because defendants purchased \$127.6 million worth of ferrous scrap metal from the class during the class period, Dr. Leitzinger calculated the total damages amount to be \$20.9 million (\$127.6 million multiplied by 16.4%).

Similarly, Dr. Leitzinger used the AMM index to assess prices for the non-ferrous scrap metal market, but was “unable to identify any undercharge affecting dealers' purchase of non-ferrous scrap.” According to Dr. Leitzinger this was due “to his inability to assemble ‘enough data of the right quality to be able to really and truly see what had happened on the non-ferrous side.’”

Columbia objected to Dr. Leitzinger's use of the SPB index, even though it was commonly used by dealers as a benchmark for pricing processed ferrous scrap metal, claiming that it was unreliable because “on December 7, 1998 and October 4, 1999, *Iron Age* issued a correction to the SPB, stating that

thirteen of the eighteen categories of processed ferrous scrap had been reported incorrectly for an unknown period of time.” At his deposition, Dr. Leitzinger explained that the correction was “merely a result of the magazine’s ‘change in [its] method of reporting prices.’” However, Columbia submitted an affidavit from an *Iron Age* reporter who explained that the magazine made the adjustment because the SPB prices did not reflect the actual transaction prices for Northeastern Ohio. Thus, the change had nothing to do with a change in pricing measuring points as believed by Dr. Leitzinger, and as a result, Columbia contended that Dr. Leitzinger “mistakenly concluded that he could create a ‘consistent processed-ferrous-scrap-price data set’ by ‘backing out’ the amount of the SPB increases.”

Plaintiffs, in turn, asserted that Columbia’s objection was flawed for several reasons. First, plaintiffs urged that Dr. Leitzinger properly relied on the SPB index because that was what the “relevant industry actors did.” Second, plaintiffs argued that it was appropriate for Dr. Leitzinger to rely on those numbers when he made his damages calculations, regardless if the numbers were accurate or not, because they were relied upon by those in the industry. Third, plaintiffs claimed that Dr. Leitzinger correctly “backed out” of the SPB adjustments because that was exactly what the dealers did. Finally, plaintiffs contended that Columbia’s arguments were not supported by their own experts who testified at trial that “as long as the SPB index moved ‘roughly parallel’ to actual prices of processed ferrous scrap, inaccuracies in the index were not material.”

Rule 702

Rule 702 of the Federal Rules of Evidence states that:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The rule reflects the U.S. Supreme Court’s decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and provides courts with general standards to assess reliability, such as “whether the testimony is based upon ‘sufficient facts or data,’ whether the testimony is the ‘product of reliable principles and methods,’ and whether the expert ‘has applied the principles and methods reliably to the facts of the case.’” *Id.* Additionally, in *Daubert*, the Supreme Court also provided courts with a “non-exclusive checklist” for evaluating reliability, which includes such factors as “testing, peer review, publication, error rates, the existence and maintenance of standards controlling the technique’s operation, and general acceptance in the relevant scientific community.”

Sixth Circuit Affirms District Court’s Decision

The Sixth Circuit explained that Columbia was not suggesting that Dr. Leitzinger was not qualified or that his testimony was irrelevant, rather Columbia argued that Dr. Leitzinger used incorrect data and therefore, necessarily, arrived at an incorrect conclusion. According to the Court, Columbia’s argument was unpersuasive because it “fundamentally confuses the *credibility and accuracy* of Leitzinger’s opinion with its *reliability*.” (Emphasis in original). The Advisory Committee Notes to Rule 702 specifically state that a court should not “exclude an expert’s testimony on the ground that the court believes one version of the facts and not the other.” A court must only determine that an expert’s testimony is reliable, or “supported by appropriate validation – *i.e.*, ‘good grounds,’ based on what is known.” *Daubert*, 509 U.S. at 590. According to the Court, Columbia did not argue that Dr. Leitzinger’s opinion was unsupported, nor could it argue that Dr. Leitzinger should not have used the SPB index because uncontroverted evidence was offered at trial that the index was used by those in the industry. Hence, the Sixth Circuit found that the district court properly allowed Dr. Leitzinger to testify.

Similarly, the Sixth Circuit held that the district court was correct when it concluded that Dr. Leitzinger’s “backing out” of the SPB adjustments did not make his testimony unreliable. At trial, Dr. Leitzinger not only offered a foundation for his analysis, but he referenced a graph that contained “‘roughly parallel’ lines, one representing actual sale prices for processed ferrous scrap and the other representing the corresponding SPB index prices.” The Court noted that even defendants’ experts agreed that it did not matter whether the SPB index accurately reflected the price for the scrap metal; the only thing that mattered was that the index moved “‘roughly parallel’ to the actual prices.

Thus, the Court concluded that the district court properly admitted Dr. Leitzinger’s testimony because (1) his analysis was performed using a reliable method; (2) he reliably applied the method to the facts of the case and (3) Dr. Leitzinger’s testimony was subject to cross-examination and was scrutinized by defendants’ own experts. Whether Dr. Leitzinger’s testimony was accurate was appropriately left to the jury to decide because that question goes to the weight of the evidence and not to its admissibility. The Sixth Circuit noted that “the jury was free to give Leitzinger’s opinion little or no weight, and to credit instead defendants’ attacks on his decision to back out the adjustments.”

Finally, the Sixth Circuit determined that the district court did not err by not holding a *Daubert* hearing. The Court explained that there was an extensive record on the issue of expert testimony and the parties were given an opportunity to fully brief the *Daubert* issue. Moreover, the district court considered all of the relevant issues and provided a comprehensive analysis to support its finding that Dr. Leitzinger’s testimony was reliable. Accordingly, the Sixth Circuit affirmed the district court’s decision.

Work Product Doctrine

Northern District of Illinois Holds Private Investigator's Testimony is Protected Under Work Product Doctrine

Geraty v. Northeast Ill. Regional Commuter R.R. Corp., No. 06-cv-00815, 2008 BL 105584 (N.D. Ill. May 19, 2008)

On May 19, 2008, the U.S. District Court for the Northern District of Illinois held that the thoughts and impressions of a private investigator garnered during surveillance of a plaintiff were protected under the work product doctrine, and thus the investigator could not be compelled to testify.

Background

Plaintiff Lalee Geraty moved to compel the production of “a witness most knowledgeable about surveillance of plaintiff, pursuant to” Rule 30(b)(6) of the Federal Rules of Civil Procedure. Defendant Northeast Illinois Regional Commuter Railroad Corporation (Metra) refused to produce any information regarding the surveillance of Geraty, claiming that it was protected by the work product doctrine.

After Geraty filed the motion to compel, the parties met and conferred to discuss the basis for Metra's refusal to produce a witness. The parties continued to “agree to disagree” about the dispute, and following a hearing, the district court ordered Metra to advise the court of the factual basis for asserting the work product doctrine. Metra responded that it had hired a private investigator to investigate Geraty, and the investigator performed surveillance but did not take any photographs or videotapes. Thus, the issue before the court in the instant dispute was “whether to permit a deposition of an investigator regarding surveillance conducted at the request of Metra's attorneys during litigation and in anticipation of a trial of this case.”

Work Product Doctrine

The district court noted that there was no Seventh Circuit law directly on point. However, in *Fisher v. National Railroad Passenger Corp.*, 152 F.R.D. 145 (S.D. Ind. 1993), the court indicated that:

Under Rule 26(b)(3) [of the Federal Rules of Civil Procedure], documents and things prepared in anticipation of litigation are protected from disclosure unless the party seeking disclosure “has substantial needs for the materials in preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.”

Fisher, 152 F.R.D. at 156. In *Fisher*, plaintiff attempted to obtain surveillance tapes taken of him, but the court ruled that he failed to meet the burden under Rule 26, “because he

himself could testify about the nature and extent of his own injuries and the videotapes were not necessary to demonstrate these facts.” *Id.* The court held that when determining whether the work product doctrine applies, “the relevant inquiry was the difference between discovery that seeks ‘the contents of work product (prohibited) from one which inquires into facts unrelated to the work product (allowed).” *Id.*

In the instant case, there were no videotapes, “only potential testimony about what the investigator observed and inevitably communicated to Metra's attorneys.” Based on the reasoning set forth in *Fisher*, the court noted that Geraty had failed to offer a reason why the investigator's testimony was relevant or a “substantial need” to obtain the testimony, because she knew she had been surveilled at the request of Metra's attorneys and when it took place. As the court noted, what she did not know was “what the investigator observed and then related to [Metra's] attorneys.” This clearly fell within the gamut of the work product doctrine.

Conclusion

Accordingly, the court denied Geraty's motion to compel.

Patent Law

Claim and Issue Preclusion

Infringement Action Not Barred by Claim Preclusion Because Device in Earlier Action Was Not “Essentially the Same”

Acumed LLC v. Stryker Corp., No. 07-01115, 2008 BL 100945 (Fed. Cir. May. 13, 2008)

On May 13, 2008, the U.S. Court of Appeals for the Federal Circuit held that Acumed LLC's claim for infringement of U.S. Patent No. 5,472,444 ('444 patent) was not precluded by a prior judgment involving identical defendants. Finding the accused devices in the instant and prior actions were not “essentially the same,” the Federal Circuit reversed a decision of the U.S. District Court for the District of Oregon, which had dismissed the suit.

The Acumed-Stryker Infringement Actions

The '444 patent claims an elongated nail for fixing fractures of the proximal portion of the humerus, or upper arm. In 2004, Acumed sued Stryker Corp., Stryker Sales Corp., Stryker Orthopaedics and Howmedica Osteonics Corp. (collectively, Stryker) in the U.S. District Court for the District of Oregon, alleging that Stryker's T2 Proximal Humeral Nail (T2 PHN) infringed the '444 patent. See *Acumed LLC v. Stryker Corp.*, No. 04-cv-00513 (D. Or. Apr. 14, 2004). During the course of the litigation, Acumed learned that Stryker was developing a longer version of the T2 PHN called the “T2 Long.” After Stryker failed to respond to Acumed's request for information

regarding the commercial status of the T2 Long, Acumed filed a motion to compel production of said information, contending that the T2 Long was “substantially similar to the [T2 PHN] but for its length.” The district court subsequently offered Acumed the opportunity to add a T2 Long infringement claim to the action but Acumed declined, choosing to postpone any T2 Long claim in order to avoid delay. A jury later issued a verdict of willful infringement, and the district court entered final judgment in April 2006.

Shortly thereafter, Acumed filed the instant action, again in the District of Oregon, alleging infringement of the ‘444 patent by the T2 Long device. See *Acumed LLC v. Stryker Corp.*, No. 06-cv-00642 (D. Or. May 3, 2006). The district court dismissed the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure as precluded by the previous action. Acumed appealed to the Federal Circuit.

Federal Circuit Holds Stryker Failed to Establish Identity of Infringement Claims

Because general principles of claim preclusion were at issue, the Federal Circuit applied the law of the regional circuit, here, the Ninth Circuit, which requires that the following conditions be met for claim preclusion to apply: “(1) the same parties . . . were involved in the prior litigation, (2) the prior litigation involved the same claim or cause of action as the later suit, and (3) the prior litigation was terminated by a final judgment on the merits.” *Central Delta Water Agency v. United States*, 306 F.3d 938, 952 (9th Cir. 2002). However, the Federal Circuit found that the only one of these requirements in dispute – whether the patent infringement claims were the same – was an issue “particular to patent law” and thus analyzed that question under Federal Circuit law.

The Federal Circuit held that the district court failed to compare the accused devices in the actions – the T2 PHN and the T2 Long – to determine whether they were “essentially the same,” as required under *Foster v. Hallco Manufacturing Co., Inc.*, 947 F.2d 469, 478 (Fed. Cir. 1991). “Accused devices are ‘essentially the same’ where the differences between them are merely ‘colorable’ or ‘unrelated to the limitations in the claim of the patent.’” *Id.* at 480. The Federal Circuit concluded that the district court erred in ruling that the “essentially the same” test only applies where the accused device in the later action could not have been included in the earlier action. The Court found that neither U.S. Supreme Court nor Ninth Circuit precedent supported that contention; rather, it has been long recognized that claim preclusion does not bar a claim merely because it could have been raised in a prior action between the parties. See, e.g., *Hells Canyon Preservation Council v. U.S. Forest Service*, 403 F.3d 683, 686 n.2 (9th Cir. 2005). Because Stryker conceded that the two accused devices at issue were not essentially the same due to the longer length of the T2 Long, the Federal Circuit held that Stryker failed to meet its burden of establishing the two infringement actions were based on the same claim and, accordingly, reversed the district court’s dismissal of the current action.

Products Liability

Injury In Fact

District Court Dismisses Products Liability Class Action Related to Defective Cribs for Lack of Injury

O’Neil v. Simplicity, Inc., No. 07-cv-04070, 2008 BL 100715 (D. Minn. May 12, 2008)

On May 12, 2008, the U.S. District Court for the District of Minnesota dismissed a purported class action complaint arising out of a recall of unsafe cribs because plaintiffs failed to allege any cognizable injury.

Background

Defendant Simplicity, Inc. (Simplicity) manufactured cribs which were sold under the Simplicity name as well as under the names of several licensees, including defendant Graco Children’s Products, Inc. (Graco). Beginning in 2003, consumers began filing complaints with the Consumer Products Safety Commission (CPSC) concerning the drop sides of Simplicity’s cribs. In April 2005, an infant suffocated while sleeping in a Simplicity crib after he slipped into a gap between the drop side and the crib’s frame. The parents notified the CPSC and brought suit against Simplicity. The case was resolved by confidential settlement agreement. Subsequently, at least two other children died due to falling into the gap in the drop side and frame of the Simplicity crib. Additionally, CPSC received numerous reports of infants who were trapped between the crib’s frame and the drop side.

In September 2007, after the *Chicago Tribune* conducted an investigation, Simplicity’s cribs with drop sides were recalled. Simplicity would not accept returned cribs as part of the recall, but instead offered to send consumers hardware and instructions to immobilize the drop sides of the crib.

In 2003, plaintiffs John and Jill O’Neil purchased a Simplicity crib bearing the Graco name. The O’Neils used the crib without any problem until they learned of the recall in September 2007. Shortly after the recall, the O’Neils brought this suit asserting a number of state and federal claims for breach of warranty, consumer fraud and unjust enrichment, among others. They also sought a declaration that the cribs were defective and an injunction requiring Simplicity to replace or repair the cribs. The thrust of the O’Neils claims was that defendants unlawfully marketed the cribs as having a functional drop side after they became aware that the cribs were unsafe. Defendants moved to dismiss on a variety of theories, but most importantly, alleged that the O’Neils did not suffer a cognizable injury.

Cognizable Injury

The district court agreed with defendants, stating, “[w]here, as in this case, a product performs satisfactorily and never

exhibits an alleged defect, no cause of action lies.” The court explained that to state a claim, a plaintiff must allege both an actual manifestation of the defect as well as a resulting injury. In reaching this conclusion, the district court rejected plaintiffs’ assertion that the recall necessarily demonstrated that the crib they had purchased was defective because, in fact, the O’Neils never had any problem with their crib.

The court further rejected the O’Neils’ argument that the hardware offered by Simplicity to immobilize the drop side rendered the crib unsafe because consumers could not safely lift children over the full height of the crib side. As the court pointed out, plaintiffs never installed the hardware offered by Simplicity and, in any event, plaintiffs had failed to make these allegations in their complaint. The district court also found that plaintiffs’ request for injunctive relief could not save their complaint because the defective cribs were no longer marketed or sold and because the O’Neils had expressly disclaimed representation of any person who had suffered personal injury as a result of a defective crib.

Although plaintiffs argued that they were entitled to “benefit of the bargain” damages, that is that they were entitled to the difference in value between the product for which they had bargained – a safe crib with a functioning drop side – and the product they had received – a crib with a drop side that must be immobilized to insure safe usage – the court rejected their argument. The court determined that because the O’Neils never immobilized the drop side, the crib was not worth less than they anticipated. Accordingly, the district court granted defendants’ motion to dismiss.

Bloomberg News Daily Litigation Wrap Up

May 19 – May 23, 2008

Lawsuits/Pretrial

(May 19) *State Farm Auto Sued in Class Action Over ‘Make Whole’ Rule*

State Farm Mutual Automobile Insurance Co. was sued in federal court in central California by a man who claims he was not fairly reimbursed for the cost of a rental car when his car was damaged in an accident. Stuart Chandler seeks class action, or group status, for the lawsuit, his lawyer, Stephen M. Garcia, said in a statement. State Farm reimbursed Chandler for most of the cost of renting a car, leaving him to pay the balance of about \$63, according to the statement. State Farm then obtained the \$63 from the other driver’s insurer and kept the money, Garcia said. Chandler claims that California law provides a “make whole” rule that required State Farm to reimburse him for the balance. “Mr. Chandler’s case is just \$63 dollars and change,” Garcia said in the statement. “Imagine \$63 times the tens of thousands of claims State

Farm handles in California alone.” Phil Supple, a State Farm spokesman, said the company does not comment on pending litigation. The case is *Chandler v. State Farm Mutual Automobile Ins. Co.*, No. 08-cv-03104, U.S. District Court, Central District of California.

(May 20) *Supreme Court Upholds Tax Exemption for State Munis, AP Says*

The U.S. Supreme Court yesterday upheld the constitutionality of the tax rule that allows states to tax the income on municipal bonds from other states, while exempting from taxation their own municipal bonds, the Associated Press reported. The case, *Department of Revenue of Kentucky v. Davis*, came to the high court when George and Katherine Davis, who live in Kentucky, wanted to deduct the interest earned on out-of-state municipal bonds from their Kentucky tax returns. The Kentucky Department of Revenue said they couldn’t, AP reported. The Davises appealed the decision, saying it violated the Commerce Clause of the Constitution. The Commerce Clause prohibits laws that burden trade between the states. The Kentucky court found the state’s tax policy constitutional. On appeal to the U.S. Supreme Court, Justice Souter, writing for the majority in the 7-2 decision, cited concerns that changing the system for taxing the municipal bond market, valued at about \$2.5 trillion, would have a devastating effect. He said the current taxing system hasn’t hindered commerce among the states during the almost 90 years it has been in effect.

(May 20) *Glaxo Wins Dismissal of Investor Suit Over Avandia*

GlaxoSmithKline Plc, Europe’s largest drugmaker, won dismissal of a lawsuit claiming the company misled investors over prospects for its Avandia diabetes drug. U.S. District Judge Louis Stanton threw out the 2007 suit on May 9, saying investors had not alleged enough facts to support their securities-fraud claim that they were misled by company statements touting the drug. Avandia sales plunged last year after a May 2007 report in the New England Journal of Medicine linked the drug to a 43 percent increased risk of heart attacks, prompting U.S. and European regulators to order Glaxo to strengthen its warnings. The investor suit followed. “The statements referred to in the amended complaint do not show that the heart attack risk was either statistically significant or sufficiently serious to affect Avandia’s future earnings,” Stanton said in a 24-page opinion. Glaxo officials and David Rosenfeld, a lawyer for the investors who sued, did not immediately return calls for comment. London-based Glaxo said on April 8 that it faces 212 federal lawsuits over Avandia, plus 35 in state courts, with separate legal claims. Those suits are separate from the investor suit that Stanton dismissed. The Food and Drug Administration said on April 8 that Glaxo failed to properly disclose studies showing researchers had linked Avandia to deadly side effects. Avandia, approved by the FDA in 1999, was the world’s best-selling diabetes pill before safety concerns emerged. Worldwide sales dropped

37 percent to 877 million pounds (\$1.73 billion) in 2007. About 7 million people worldwide have taken Avandia, and about 1 million U.S. residents use the drug. Glaxo officials contend the drug is safe and have refused to pull it off the market. Among the statements cited in the complaint was an October 2006 comment to investors by Chief Executive officer Jean-Pierre Garnier that Avandia “is a big engine” and will be a “big driver for the company for years to come.” The case is *Borochoff v. GlaxoSmithKline*, No. 07-05574, U.S. District Court, Southern District of New York (Manhattan).

(May 21) *Microsoft to Face Trial Next Year Over 'Vista Capable' Claims*

Microsoft Corp., the world's largest software maker, faces a trial next year on claims it misled consumers about which computers can run its most advanced Vista operating system. U.S. District Judge Marsha Pechman in Seattle set the April 13, 2009, date yesterday, six weeks after suspending the case so Microsoft could seek permission to appeal her order certifying the complaint as a class action, or group lawsuit. A U.S. appeals court denied that petition on April 21. “We will be ready,” plaintiffs' lawyer Jeffrey Thomas, of Seattle's Gordon, Tilden, Thomas & Cordell, said in a phone interview. Thomas's firm filed the suit last year on behalf of people claiming Microsoft labeled some PCs as “Windows Vista Capable” even though they could only run the most basic version of the operating system and not a premium edition that allows for better graphics. The company used the labels to bolster computer sales in the months before Vista, released in January 2007, reached stores, according to the complaint. Microsoft offered different versions of Windows Vista, including Windows Vista Home Basic, to meet the “varied needs” of customers buying computers at different prices, the Redmond, Washington-based company said in an e-mailed statement. Pechman had last year set a trial date of October 27, 2008. She stayed the case on April 3. Disputing her decision to allow for a class action, Microsoft had asked the San Francisco-based appeals court if computer buyers from across the U.S. can sue as a group under Washington state consumer-protection laws. Thomas said it was too soon to say how many people may have been affected by the alleged mislabeling or what the case may be worth. “We're in the midst of discovery and reviewing documents,” he said. The case is *Kelley v. Microsoft Corp.*, No. 07-cv-00475, in the Western District of Washington (Seattle).

(May 22) AstraZeneca Plc, the U.K.'s second-largest drugmaker, was sued by Arkansas for falsely claiming its antipsychotic medicine Seroquel was safer than less-expensive drugs and failing to warn of its risks. AstraZeneca has engaged in a “course of corporate misconduct and misrepresentation” in violating numerous state laws, Arkansas Attorney General Dustin McDaniel said in a lawsuit filed May 20 on behalf of the state's behavioral health and Medicaid divisions. The complaint, filed in state court in Little Rock, accused AstraZeneca of engaging in “pervasive

false and misleading marketing” of the drug. The drugmaker “deceived physicians, consumers, the state and others regarding the comparative efficacy of Seroquel to other traditional and atypical antipsychotics,” according to the complaint. Seroquel, used to treat bipolar disorder, brought in \$4.03 billion last year, making it AstraZeneca's second-best-selling product after Nexium. The company is trying to broaden the medicine's use and earlier this month asked the U.S. Food and Drug Administration to approve the therapy to treat generalized anxiety disorder. AstraZeneca, based in London, said it's facing about 8,000 lawsuits filed by consumers who claim the drug caused diabetes and other injuries, according to filings with the U.S. Securities and Exchange Commission. AstraZeneca spokesman Jim Minnick denied the allegations in an e-mailed statement. “Seroquel has helped millions of people suffering from a variety of debilitating mental illnesses,” he said. AstraZeneca knew from medical literature dating back to the 1950s and its own preclinical studies that Seroquel, like older antipsychotic medications, had the potential to cause diabetes, diabetes-related injuries and cardiovascular complications, the complaint said. Before marketing Seroquel, the company should have been concerned about the drug causing neurological problems, weight gain, pancreatitis and hyperglycemia, lawyers for McDaniel claimed in the suit. In addition to hiding the drug's risks, AstraZeneca allegedly sought to increase the sales of Seroquel through an “elaborate and clandestine” promotion of non-medically necessary uses, according to the complaint. AstraZeneca “collectively sold or aided and abetted in the sale of Seroquel which was and is defective and unreasonably dangerous for all but a limited segment of the state's adult schizophrenic and bipolar population,” lawyers for the state said in the suit. Arkansas' lawsuit follows earlier complaints filed by Pennsylvania and Montana over the drug, Minnick said. Arkansas is seeking unspecified damages and civil penalties to recover money spent by the state to purchase the drug, provide care for Seroquel-related illnesses, and reimburse prescriptions for uses that weren't medically necessary. The case is *State of Arkansas v. AstraZeneca Pharmaceuticals LP*, No. 08-cv-05448, Circuit Court of Pulaski County, Arkansas (Little Rock).

(May 22) *Hyundai Motor Shareholders Sue Chairman Chung for Compensation*

A group of Hyundai Motor Co. shareholders filed a civil lawsuit against Chairman Chung Mong Koo, asking him to compensate South Korea's largest automaker following his conviction for breach of duty. The shareholders, including Solidarity for Economic Reform, filed the suit in the Seoul Central District Court yesterday, the Seoul-based group said in an e-mailed statement. The group is asking Chung and Vice Chairman Kim Dong Jin to pay 563.1 billion won (\$538 million) to the company, the statement said. The suit comes as Chung, South Korea's second-richest man, awaits a final sentence after being convicted of embezzlement and breach of fiduciary duty last year. The country's highest court last month overturned a lower court's suspension of

Chung's prison term. "South Korea has been showing too much leniency toward white-collar crime," Lee Seung Hee, a senior researcher at the civic group, said by phone. "We're seeking the compensation for more transparent, responsible management." Hyundai Motor's Seoul-based spokesman Jake Jang declined to comment on the shareholders' suit. Chung, 70, was convicted in February 2007 of embezzling almost 70 billion won. He was also found guilty of breach of duty by causing losses to the company and affiliates by helping weaker units and selling stock to himself and his son at below market prices.

(May 23) Morgan Stanley Employees Arrested in Stock-Loan Probe

Former employees of Morgan Stanley and Janney Montgomery Scott LLC were among a group of six people charged by U.S. prosecutors in a three-year probe of stock-loan desk workers who allegedly took millions of dollars in kickbacks. Four people arrested yesterday in New York by the Federal Bureau of Investigation include former employees of the two firms, FBI spokesman Jim Margolin said. The defendants face charges including conspiracy and money laundering. Two additional defendants are scheduled to appear at a later date. The government is investigating loan-desks and so-called finders, middlemen who track down stocks to lend to investors, said Robert Nardoza, a spokesman for Brooklyn, New York, U.S. Attorney Benton Campbell. The defendants face as long as 25 years in prison if convicted of conspiracy. The money-laundering charge carries a maximum term of 20 years. "Stock-loan traders at several large brokerage firms funneled millions of dollars in fraudulent finder fees to their co-conspirators, often where no finders' services had been rendered, in exchange for cash bribes," Nardoza said. The indictments unsealed yesterday describe alleged schemes involving several individuals who have already been charged in the case. New charges were added against Donna Macli, 45, a secretary for a dentist, and her husband, Thomas Macli, 51, a U.S. Postal worker. The couple allegedly accepted \$350,000 in phony finder fees paid to them by Donna Macli's brother, Andrew Caccioppoli, a former manager at Philadelphia-based Janney's stock-loan desk, who was indicted last year, according to the indictment. Also named in the new indictment is Darin Demizio, 42, a former supervisor at New York-based Morgan Stanley, the second-biggest securities firm by market value. Previously charged in the case, Demizio was accused yesterday of securities and wire fraud. He "routinely directed" Morgan Stanley stock-loan business to two finders, including Robert Johnson, 44, according to the indictment. Johnson claimed to be a stock-loan finder working at a firm called Tyde Inc., prosecutors claimed, adding that kickbacks were paid to two of Demezio's relatives. Johnson was named in a separate indictment on charges of conspiracy to commit securities and wire fraud as well as money-laundering conspiracy. Prosecutors accused him of paying kickbacks on stock loan trades to an unidentified trader at New York-based JPMorgan Chase & Co. Lawyers for the defendants could not be reached for comment. "We have fully supported and provided every assistance to the government's investigation,"

said Morgan Stanley spokeswoman Mary Claire Delaney. Karen Shakoske, a spokeswoman for Janney Montgomery, declined to comment. The main case is *U.S. v. Andrew Caccioppoli*, No. 07-cr-00078, U.S. District Court, Eastern District of New York (Brooklyn).

New Suits

(May 20) British Airways Pilots Seeks Court Guidance on OpenSkies Strike

British Airways Plc's pilots asked a London court to rule on whether they had the right to strike over the company's plan to set up a new trans-Atlantic unit. The British Air Line Pilots' Association opposes the airline's plan to set up OpenSkies, which will be separate from British Airways' U.K. operations and fly to the U.S. from Paris, their lawyer, John Henty QC, told the High Court in London yesterday. Even so, the pilots are unsure whether they are allowed to strike under European Union law, he said. British Airways Chief Executive Officer Willie Walsh has said the new carrier needs a lower cost base if it's to compete with larger network airlines. OpenSkies is part of the airline's response to an EU-U.S. agreement that will liberalize trans-Atlantic air travel starting March 31. British Airways argues that a strike would prevent the airline from exercising its right under EU law to establish operations in other EU member states, the company said in a statement. A strike would cause "huge and disproportionate damage" to the airline and the traveling public, according to British Airways. It estimates that a strike would cost 100 million pounds (\$194 million). Lawyers for the airline will present their arguments later in the hearing.

(May 23) AIG Sued by Florida Pension Fund Over Subprime Losses

American International Group Inc. and four of its executives were sued by a Florida pension fund for allegedly inflating the insurer's stock price by misleading investors about its subprime investments. The Jacksonville Police and Fire Pension Fund claims AIG, the world's biggest insurer by assets, hid losses tied to credit-default swaps. When AIG reported a \$7.8 billion first-quarter loss on May 8, defrauded shareholders lost billions, according to a complaint filed May 21 in federal court in New York. "AIG hid or recklessly ignored facts regarding the mounting losses on the company's assets and insurance products tied to the residential mortgage market, even as its top management continued to claim that AIG's actual exposure was 'close to zero,'" the pension fund said in its complaint. A copy was posted on the Web site of its law firm, Bernstein Litowitz Berger & Grossmann. The fund, which asks to represent other allegedly defrauded AIG investors, seeks unspecified damages. AIG spokesman Christopher Winans declined to comment. The case is *Jacksonville Police and Fire Pension Fund v. American International Group Inc.*, U.S. District Court, Southern District of New York.

Verdicts/Settlements

(May 20) *Wal-Mart Settles Whistleblower Suit Over Document Destruction*

Wal-Mart Stores Inc., the world's biggest retailer, settled a lawsuit by an employee who claimed she was harassed after disclosing the company's plan to destroy documents sought in a criminal case. Rita Miles, an assistant in Wal-Mart's labor relations department, claimed the company illegally retaliated after she told U.S. authorities about a plan to shred documents subpoenaed in the probe of former Vice Chairman Thomas Coughlin. The suit, filed in U.S. District Court in Fayetteville, Arkansas, in 2006, was settled May 16, according to a court record. Wal-Mart spokeswoman Daphne Moore said terms of the settlement are confidential and declined to comment further. Lawyers for Miles did not return messages. Coughlin admitted in 2006 that he stole from Bentonville, Arkansas-based Wal-Mart, pleading guilty to five counts of wire fraud and a count of failing to report income from the fraud on his taxes. In his guilty plea, Coughlin said he falsified expense reports to buy liquor, care for his dogs and upgrade his truck. In February, Coughlin was resentenced to 27 months home detention after an appeals court threw out an almost identical sentence as too lenient. Prosecutors didn't appeal a second time. In her suit, Miles said her department was "heavily involved" in Wal-Mart's internal probe of Coughlin's claim that his thefts were part of a secret company anti-union program. In January, U.S. District Judge Robert Dawson denied Wal-Mart's request to throw out Miles's suit. Wal-Mart claimed the documents were to be shredded as part of a project to scan them into a computer database and that no evidence was destroyed. Federal prosecutors in Arkansas said in August 2006 that Wal-Mart fully cooperated with their investigation of Coughlin and they found no evidence of any illegal anti-union program. The case is *Miles v. Wal-Mart Stores*, No. 06-cv-05162, U.S. District Court, Western District of Arkansas (Fayetteville).

On the Docket

(May 23) *Mattel Infringement Trial Over Bratz Dolls to Start May 27*

Mattel Inc., the world's biggest toymaker, will go before a California court May 27 to argue that MGA Entertainment Inc.'s Bratz doll was conceived while designer Carter Bryant was a Mattel employee. If the jury agrees, Mattel may pocket damages estimated at \$360 million and, based on its calculations, as much as \$500 million a year in MGA sales and licensing fees. The first phase of the trial will focus on evidence that Mattel claims will show that Bryant got the idea for Bratz and made sketches while still employed by the company. An agreement Bryant signed gives Mattel the right to the drawings if he made them while working there, U.S. District Judge Stephen Larson ruled on April 25. Bryant worked twice for Mattel: from 1995 to April 1998 and from January 1999 to October 2000, according to court papers. He then moved to MGA. Bryant and MGA maintain he worked on Bratz between stints at Mattel. Mattel settled a breach-of-contract suit with Bryant on May 19. The case is *Bryant v. Mattel*, No. 04-09049, U.S. District Court, Central District of California (Riverside).

*Litigation News by Elizabeth Amon, with reporting by James Attwood, Stephanie Bodoni, Martin Z. Braun, Heather Burke, Caroline Byrne, Laurel Brubaker Calkins, Seonjin Cha, Torrey Clark, Susan Decker, Katherine Espina, Jef Feeley, Margaret Cronin Fisk, Chris Fournier, Laurence Frost, David Glovin, Robert Greene, Andrew Harris, Patricia Hurtado, Tiffany Kary, Janelle Lawrence, James Lumley, Jon Menon, Phil Milford, Alex Nussbaum, Cary O'Reilly, Sophia Pearson, Edvard Pettersson, Robert Schmidt, Joe Schneider, Heather Smith, Hugh Son, Jeffrey Tannenbaum, Bob Van Voris, Paul Verschuur and David Voreacos. Editors: Peter Blumberg, Steve Farr and Glenn Holdcraft.

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