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In This Issue...

Featured Article

A Brave New World: The Dawn of Hyper-Complex Litigation - How the influx of imported products, the rise of cross-border and multinational litigation, and diminished injury requirements mean big products liability headaches for manufacturers in the years to come
Contributed by: *Laura C. Fey and Harley V. Ratliff, Shook, Hardy & Bacon LLP*.......... 1

Alternative Dispute Resolution

New York District Court Orders Plaintiff to Withdraw from Arbitration.......... 8
Texas District Court Declines to Vacate Award for Clearly Erroneous Findings of Fact.......... 9

Civil Practice & Procedure

Sixth Circuit Grants Mandamus Relief Related to District Court's Abuse of Discretion Regarding E-Discovery Orders.......... 10
U.S. Supreme Court Holds Assignee With Right to Sue but No Right to Recovery Has Standing to Bring Suit.......... 11
Texas District Court Remands "Suit Within a Suit" Legal Malpractice Case to State Court.......... 13

Class Actions

Fan's Wrongful Videotaping Suit against Bill Belichick and New England Patriots Allowed to Continue.......... 14

Damages & Remedies

Ninth Circuit Holds Plaintiff Entitled to Recover Lost Wages Resulting from an Emotional Condition Caused by Employer's FMLA Violation.......... 15
U.S. Supreme Court Cuts Punitive Damages Award Related to *Exxon Valdez* Oil Spill From $2.5 Billion to $507.5 Million.......... 16

Environmental Litigation

State Court Holds Contribution Claims Not Triggered Until After Property Owner Ordered to Cleanup Contaminated Site.......... 17
Oklahoma District Court Dismisses Lawsuit Challenging EPA's "Capping" Procedure under CERCLA.......... 18
D.C. Circuit Rejects Petition to Compel EPA to Decide Whether Greenhouse Gases from Vehicles Endanger Public Health.......... 19

Products Liability

Johnson & Johnson and Ortho-McNeil Dismissed from Remicade Suit.......... 19

Bloomberg News Daily Litigation Wrap Up

June 30 – July 4, 2008.......... 20

Featured Article

A Brave New World: The Dawn of Hyper-Complex Litigation - How the influx of imported products, the rise of cross-border and multinational litigation, and diminished injury requirements mean big products liability headaches for manufacturers in the years to come.

Article contributed by:
Laura C. Fey and Harley V. Ratliff

A Brave New World[1]

In the world of products liability, complex litigation has most often taken the form of the mass tort: multiple lawsuits arising out of a common incident (or a series of common incidents), litigated across various state and federal court jurisdictions. The classic example, of course, being asbestos litigation, which slogs on even today. Yet, as we near the end of the first decade of the 21st century, complex products litigation is becoming, for lack of a better description, *more complex*.

A legal treatise once defined complex litigation in the same manner that U.S. Supreme Court Justice Potter Stewart famously regarded obscenity: You know it when you see it.[2] For product manufacturers, the writing is on the wall. The simultaneous convergence and dispersal of mass tort products litigation across various countries, continents and jurisdictions is taking place. Stated more simply, big-ticket products litigation is on the move.

On one hand, products imported from abroad – most notably from China – have increasingly brought with them unexpected legal entanglements (including criminal prosecution), unwanted media exposure, and unending crisis management headaches for American companies. On the other hand, the plaintiffs' bar has demonstrated its intent to export domestic products litigation to foreign jurisdictions – primarily Canada – to maximize leverage, recycle domestic efforts and intensify strain on corporate defendants. More globally, many countries are moving, albeit some faster than others, toward a more American-style approach to mass-tort or aggregate litigation. In other, more extreme cases, foreign governments are pursuing manufacturers and their employees directly for civil and criminal liability arising out of the sale, use and testing of their products.

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The result for corporate defendants is a burgeoning litigation trade imbalance. The impact it will have on how such actions are planned, managed and litigated will be significant. Complex products litigation no longer begins and ends in local state and federal courts. From the initial document collection to the ultimate resolution, the traditional model for defending these actions is becoming obsolete.

Managing the defense of hyper-complex litigation means now, more than ever, being able to successfully coordinate not only state and federal personal injury actions, but also criminal, regulatory, governmental, and international efforts in a way that is efficient, economical and – most importantly – effective.

Importing Products; Importing Litigation

For years, complex products litigation has been the unfortunate province of a few, targeted industries. Many of these industry participants (*e.g.*, pharmaceutical and medical device manufacturers, tobacco companies and makers of chemical-based products) have, in turn, developed sophisticated in-house legal departments that grasp the breadth and pervasiveness – not to mention the international creep – associated with such litigation.

The Import Influx

Complex products litigation has, however, recently forayed into new territory: the imported consumer product. Many of these products – *e.g.*, pet foods, toothpastes, toy trucks, etc. – are traditionally innocuous and not typically associated with mass tort litigation.

Our country's reliance on imported products, particularly those from China, has increased dramatically in the past decade. In 1996, for example, agricultural and seafood imports from China totaled approximately $453 million. Ten years later, the total value was more than $4 billion.[3] The dependence on Chinese manufacturing and production has brought with it a demonstrated risk for increased products liability litigation domestically.

The litany of recent issues with imported products is, by now, well-known: pet food tainted with melamine; toothpastes mixed with a solvent found in anti-freeze; seafood contaminated with unapproved antimicrobial agents; and children's toys with allegedly dangerous levels of lead surface paint, to name a few. Extensive litigation has since followed.

For example, of the 12 products liability MDLs created in 2007 by the Judicial Panel on Multidistrict Litigation, the body responsible for making federal consolidation determinations, three were directly related to products manufactured in China: MDL-1850: *In re Pet Food Prods. Liab. Litig.*, MDL-1897: *In re Mattel, Inc. Toy Lead Paint Prods. Liab. Litig.*, and MDL-1893: *In re RC2 Corp. Toy Lead Paint Prods. Liab. Litig.* A fourth proposed MDL involving Chinese-made products recently has been transferred.[4] All three consolidated actions were created just months following the initial product recalls.[5] On May 22, 2008, Menu Foods Inc. announced that a tentative $24 million settlement agreement had been reached in the Pet Food MDL.[6]

Perhaps more troubling for corporate defendants is the fact that criminal proceedings have begun to be filed in the wake of these imported product recalls.

On February 6, 2008, the Federal Food & Drug Administration's (FDA) Office of Criminal Investigations "announced that two Chinese nationals and the businesses they operate, along with a U.S. company," ChemNutra, Inc., "and its president and chief executive officer had been indicted in separate but related cases."[7] The defendants were charged with "delivering adulterated food that contained melamine, a substance which may render the food injurious to health, into interstate commerce" and "introduction of a misbranded food into interstate commerce."[8] If convicted, the defendants face up to seven years in federal prison and fines potentially totaling millions of dollars.[9]

Likewise, criminal charges have been filed in California state court against four executives and two companies in the aftermath of the imported toothpaste recall.[10] On March 7, 2008, charges were brought against Los Angeles-based importers Vernon Sales, Inc. and Selective Imports Corp. for importing from China 90,000 tubes of toothpaste allegedly contaminated with diethylene glycol, a solvent that has been associated with kidney and liver disease.[11] The companies' four top executives were charged with a combined 16 counts of receiving, selling and delivering adulterated drugs and products.[12] Each of the 16 counts "carries a maximum penalty of one year in jail and a $1,000 fine."[13]

No End In Sight

The odds seem unlikely that the recent rash of imported product advisories and recalls, and the subsequent related litigation, both civil and criminal, is a short-term occurrence.

First, and as noted above, more and more products are imported into the United States. In 2006, two-thirds of all consumer recalls were related to imported goods. Nearly two-thirds of those goods came from China.[14] As long as there is an economic incentive to manufacture and import foreign products, the risk of exposure to unpredictable downstream products liability litigation will persist.[15] Consider, for example, the case of imported food. The United States imports approximately $65 billion in food goods annually.[16] As one scholar suggested, the result of the increasingly complex supply chain may be "regular food-borne outbreaks."[17]

Consider the case of Chinese shrimp. More than 150 million pounds of Chinese shrimp were imported into the United States during the past year.[18] The U.S. Department of Agriculture (USDA) has reported that as much as 10 percent of this shrimp contains salmonella.[19] The FDA, meanwhile, is

able to inspect less than one percent of the imported foods the agency is expected to monitor.[20] Where there are perceived gaps in the system, lawsuits tend to follow – regardless of whether actual injuries exist. Moreover, while potentially dangerous pathogens associated with food-borne illnesses are evolving, techniques in detecting these microbial agents are improving.[21] The result is more and better documented outbreaks of food-borne illnesses. In March 2008 at least eight domestic produce distributors voluntarily recalled cantaloupe imported from Honduras following reports of more than 60 Salmonella-related illnesses in the United States and Canada.[22] It was the second such recall in as many months.[23] Both incidents were publicized extensively on plaintiffs' firm web sites.

Second, traditional regulatory defenses and safe harbor provisions for many imported products are likely to be less effective than in other types of products litigation. For example, makers of pharmaceutical and medical devices have, for years, rightfully cloaked themselves with the protection of regulatory oversight and approval when confronted with products liability claims. Indeed, the U.S. Supreme Court recently affirmed this position in *Riegel v. Medtronic, Inc.*, barring all common-law claims challenging the safety and effectiveness of medical devices that had received FDA pre-market approval.[24] Although legislative efforts are underway, the perception has been created that imported consumer goods lack the kind of comprehensive regulatory oversight often associated with products approved by, say, the FDA. With *Riegel* (and potentially *Wyeth v. Levine*[25]) – likely cutting a sizable chunk out of their portfolio of once profitable work, industrious plaintiffs' attorneys will no doubt be looking to invest in potential litigation that they perceive to be less likely to be strangled by federal law.

Third, plaintiffs' attorneys have increasingly eschewed the need for clients with identifiable injuries, relying instead on so-called no-injury claims such as emotional distress, medical monitoring and consumer protection violations (*i.e.*, monetary losses associated with the purchase price of the product). In these instances – at least for the plaintiffs' attorneys involved – the mere act of recalling the product *is the injury*. Stated differently, under this expansive approach every consumer who purchases a recalled product becomes a *de facto* plaintiff waiting to be enrolled in the next mass action. The lead paint toy lawsuits are illustrative. Questions remain as to whether the level of lead found in these toys' surface paint, along with the likely potential exposure pathways, can cause the type of cognitive injuries – either presently or in the future – associated with lead exposure. Yet, the lack of clear causation evidence has not stopped the extensive filing of medical monitoring class actions and the formation of two multidistrict litigations.

Fourth, the incredible diversity of products manufactured abroad means no company or industry is necessarily immune from potential import-related products litigation – even the most highly-regulated. Most recently, for example, the pharmaceutical industry has seen a series of lawsuits stemming from products manufactured, if only in part, overseas.

Finally, the ability of American consumers to redress claims against exclusively foreign companies remains to a degree limited, meaning that domestic or multinational entities will likely continue to shoulder the bulk of defending liability in such cases in U.S. courts. Although China and other countries have products liability laws, it is unlikely that American consumers will attempt to actually pursue their claims abroad.[26] Conversely, while attempts to litigate against potentially liable foreign entities in U.S. courts are being made (*e.g., In re Menu Food Pet Food Prods. Liab. Litig.)*, such lawsuits raise issues of choice-of-law, venue, *forum non conveniens* and enforcement of judgments, making exclusively overseas targets markedly less attractive to plaintiffs' attorneys.

In the end, mass tort litigation is often triggered by the one bad headline, and imported product recalls have been front-and-center in the U.S. media for more than a year. With many of these situations involving perceived vulnerable classes (children, pets, etc.), the ongoing heightened media scrutiny with regard to consumer products – and the litigation that inevitably follows – should be expected to continue.

Beyond Our Borders: Litigation Abroad

While products imported from abroad are spawning mass tort litigation domestically, a new and equally troubling aspect of products litigation is creating complexity outside U.S. borders. For many years, the threat of international class or aggregate product litigation seemed like thunder in the distance – more a ghost story attorneys told their clients than a tangible business threat.

The likelihood, however, that companies will now have to litigate outside the United States, particularly cross-border, what were once thought to be traditionally domestic products liability cases is stronger than ever. The export of American products litigation has begun. Understanding this recent legal diaspora, and the challenges it poses to product manufacturers, is fundamental to the new management of modern mass tort litigation.

The Canadian Double-Down

At a January 2008 products liability symposium, a well-regarded New York City plaintiffs' attorney stood before a room of lawyers and in-house counsel. The topic of his presentation was, in part, to forecast the next direction of mass tort litigation. His message to those listening was clear.

"Canada is next."

For many companies, defending products liability litigation in Canada is very much *now*. Although law reforms taking place in Europe (and discussed below), may be ominous, class action litigation in Canada – often designed to mimic

a particular domestic mass tort counterpart – represents the most immediate products liability challenge for corporate defendants outside the United States.

Canada's experience with class action proceedings is fairly nascent. In the early 1990s, Ontario became the first Canadian province to introduce formal class proceedings.[27] Fast forward 15 years and, with the passing of its Class Proceedings Act, Nova Scotia became the most recent Canadian province to enact comprehensive class legislation.[28] In fact, Prince Edward Island remains the only Canadian province without some type of similar legislation.

While class action law in Canada has matured rapidly, plaintiffs' attorneys in the United States have found obtaining (or maintaining upon appeal) class certification involving personal injury actions in federal court increasingly difficult. The hurdle of overcoming individual issues of reliance and specific causation has often proved too high to justify certifying these types of classes. In addition, the Class Action Fairness Act (CAFA) has made it easier for defendants to remove such cases from state court to federal court. Too often rebuked at home, many plaintiffs' attorneys are now looking north of the border not only for classwide relief, but to maximize their domestic efforts as well, attempting, in essence, to broker two potential windfalls for the cost of litigating little more than one.[29]

The relative advantages for plaintiffs to litigate class actions in Canada – relative to other non-domestic jurisdictions – are well known. With the exception of Quebec, there is no real language barrier and travel is relatively convenient. The legal system, while different from the United States', is still grounded in the common law. Pre-trial efforts in the United States (*i.e.*, discovery, pleadings, expert witness development, etc.) can be recycled for purposes of Canadian litigation, reducing potential costs. Due to supply chain similarities and the availability of nearly identical legal theories, copycat pleadings can be easily mutated to fit the Canadian legal system. Often, plaintiffs' attorneys appointed to MDL leadership positions (*i.e.*, plaintiff steering committee, plaintiff leadership committee, lead liaison counsel, etc.) coordinate or lead from behind the scenes these parallel Canadian class proceedings; bringing with them their knowledge of the litigation and understanding of the key factual issues.

The threshold for certifying these new products liability class actions in Canada is proving considerably lower than in the United States, which is why more Canadian and U.S. plaintiffs' attorneys are filing parallel class action proceedings in Canada (sometimes in multiple provinces).

Take, for example, the recent litigation involving Medtronic, the Minnesota-based maker of implantable medical devices. On December 6, 2007, just months after a $400 million MDL settlement that covered products claims related to the company's defibrillators,[30] the Ontario Superior Court certified a class of patients implanted with certain of the company's same defibrillators.[31] Once again, the reliance on diminished injury requirements was notable. The court, in certifying the class, was not troubled by the fact that class members could not prove a present physical injury or a "foreseeable and recognizable psychiatric illness" as a result of the alleged product defect.[32] Rather, the court noted vaguely that these plaintiffs still "may be able to prove damages."[33] Less than five months after the decision in *Peter v. Medtronic*, the same Ontario court certified a class consisting of nearly 2,000 recipients of defibrillators made by a different manufacturer.[34] Another class action has been filed and is pending in Toronto against a third maker of implantable heart devices.[35]

These companies are not alone. Rather, the cases above are representative of the numerous class action proceedings presently being litigated in Canada and serving as the legal doppelganger to their American counterparts. And rulings such as the one in *Peter v. Medtronic* will likely serve to only further cement the increasingly symbiotic relationship between domestic and cross-border Canadian products litigation.

The Coming Wave: International Products Litigation

While litigation is charging ahead in Canada, "access to justice" movements – the concept that individuals should be allowed to redress consumer claims in court – have steadily gained steam in Europe and abroad during the past decade. What the long-term implications of this movement mean for corporate defendants remains unclear. What is known, however, is that international products litigation is becoming very much part of the modern mass tort rubric.

Three areas of interest are worth briefly addressing.

First, significant legislative developments in Europe are making the ability to redress product claims more readily available through aggregate or class-style litigation. The most notable recent development occurred on December 21, 2007, when "the Italian Parliament passed a law that significantly expanded the scope of representative actions permissible in Italian courts."[36] Although the new law, which is scheduled to take effect in June 2008, still does not allow for individual plaintiffs to bring such suits, it does potentially allow any consumer association to file a representative action and request damages on behalf of consumers for alleged tort liability, unfair trade practices or anti-competitive behavior, provided such unlawful acts damage the rights of a plurality of consumers and users.

The new law also includes traditional "opt-in" provisions and certification phases – concepts no doubt familiar to U.S. class action practitioners. Although the country still employs the "loser pays" rule, Italy does allow for contingency fee arrangements, and legal aid is available to litigants.[37] And Italy is not alone in moving forward with legislation designed to empower consumer litigants.

Similar, although more restrictive class action legislation, has been passed in Denmark and Finland. In Germany, the traditional

bar on contingency fee arrangements has been repealed. In many countries, a violation of the country's consumer code is itself the injury claimed, regardless of whether a showing of actual harm or reliance can be made – further demonstrating the increasing viability of no-injury claims not only in the United States, but also abroad. And with product recalls up by more than 50 percent in Europe, the litigation landscape abroad is more and more mirroring our own. Indeed, in one recent survey nearly half of all business leaders questioned believed that American-style litigation was increasingly taking hold in Europe.[38]

Second, one-off product litigation in jurisdictions that are geographically remote and perhaps unfamiliar both in terms of legal systems and cultural intricacies, continue to emerge. In these jurisdictions, traditional products liability claims can morph into quasi-criminal proceedings, pulling in not only the manufacturing entity, but also the employees charged with making decisions on the company's behalf.

In Nigeria, for example, multiple suits are presently being prosecuted by a variety of local governmental entities against foreign manufacturers relating to the sale, use and/or testing of their products in Nigeria. In June 2007, the Nigerian government began prosecuting civil and criminal proceedings (in Nigeria) against an international pharmaceutical company, seeking more than $7 billion in damages and arresting company officials, including the company's former medical director.[39] One plaintiff, the Nigerian State of Kano, has since demanded nearly $2 billion to settle the litigation.[40] In November 2007, the Nigerian government also filed suit against a number of tobacco manufacturers, requesting more than $42 billion in damages related to under-age smoking.[41]

The litigation in Nigeria is not without a rather troubling link to mass tort litigation in the United States. In both instances, the Nigerian government is represented by attorney Babatunde Irukera, who recently merged his 18-lawyer, Lagos, Nigeria-based firm with SimmonsCooper, the Madison County, Illinois, plaintiffs' firm best known for its asbestos work.[42] The global courtroom is, without question, getting smaller. Depending on the outcome, the lawsuits in Nigeria may very well serve as a bellwether for other countries and political regimes seeking financial and political capital from multinational product manufacturers.

Finally, practical management concerns related to domestic litigation, but involving foreign participants in foreign jurisdictions, have increasingly become an issue in complex products litigation. Although perhaps overlooked, individual personal injury lawsuits similar to those in the United States are often filed in international jurisdictions in the aftermath of a domestic mass-tort action. These cases typically persist after settlement of domestic claims, calling into question just how "global" these resolutions really are. In December 2007, for example, Mark Lanier, the well-known Vioxx plaintiffs' attorney, threatened (whether legitimate or not) that there could be as many as several thousand Vioxx cases filed in Germany, Israel and the United Kingdom.[43]

Coordinating the defense of these cases in-line with worldwide corporate objectives – rather than in an *ad hoc*, country-by-country manner – is another piece of the new complex puzzle.

Preparing for the Hyper-Complex

As mass tort litigation moves more readily across borders – both into and out of the United States – it is, undoubtedly, getting more complex. The real questions are: What is the import of all of this? How can companies prevent (or, at least, put themselves in the best possible position to defend) increasingly complex litigation and protect their brands? And what should companies expect when today's complex products litigation arrives when it is least expected?

The Best Litigation is No Litigation

The first piece of advice is, of course, always the easiest to give and the most difficult to accomplish: Avoid the litigation before it begins.

No two companies, regardless of industry or product, are similarly situated. And when it comes to litigation prevention and protecting brand reputation, each company must assess its own operations, supply chains and products in terms of potential liability risk. Fundamentally, preventing big-ticket litigation (and, indeed, litigation at all levels) requires an ongoing, individualized analysis. Despite the increasing risk and cost profile presented by today's complex products litigation, a surprising number of companies do not invest in proactive litigation prevention strategies. Indeed, one recent study found that 43 percent of European and Asian companies had not adopted formal risk-management policies or procedures; yet the directors of these same companies were spending "an average of 13 percent of their time discussing litigation and expect that amount to increase over the next three years."[44] The unfortunate trade-off in not investing time and money in preventing litigation is often more time and money spent in *litigation*.

Preventing litigation does not begin and end with the in-house legal department. Rather, it requires an integrated approach to system-wide business practices.

This starts with a company's employees, whose records and testimony ultimately become the critical component of any future litigation. Employees should understand potential litigation risks and how those risks can best be avoided in the normal course of their day-to-day duties – without sacrificing efficiency or productivity. Companies should take the time to ensure that their employees know and comply with applicable corporate governance standards; understand and follow good records creation and management practices; and recognize how their actions can affect the company's risk exposure.

Audits should be conducted on a regular basis to make sure that these practices are up-to-date and are being followed.

Another preventative measure is for companies to analyze the workings of their increasingly complex supply chains, and to ensure that proper protections are in place throughout the supply chain. The recent imported product litigation has, if anything, cast an uncomfortable spotlight on the failure of many companies to grasp the vast network of supply tributaries involved in the manufacture of their products. These gaps have increased risk exposure and mired these companies in litigation that is disruptive, expensive and potentially undermines long-standing brand reputation.

Take, for example, the Menu Foods' pet food recall, which is expected to cost the company in total an estimated $54 million (if not more). Lost revenues may linger long after the litigation concludes as pet owners scratch the company's products permanently from their shopping lists. Likewise for the toy companies involved in the lead paint recalls. Toy sales for these companies flattened during the critical 2007 Holiday season and investors took note. Mattel and RC2 Corp.'s stocks dropped 20 and 30 percent, respectively, during the same time period.[45] For these companies, the resulting litigation is but one part of a very expensive product problem.

How a product gets to market is a simple question, but for many companies, it is one without an easy answer. Moreover, although many companies have strong quality assurance programs in place – both here and abroad – such programs may not be enough to protect them from downstream products litigation in the United States. Companies now must not only watchdog their own facilities, but also must affirmatively address suppliers' responsibilities with respect to safety and quality, and insulate themselves from potentially harmful actions of their various third-party suppliers. Doing so means conducting risk assessments down the supply chain; analyzing and (if necessary) revising supplier agreements to properly address issues such as safety documentation and product quality; addressing supplier responsibilities (including responsiveness with respect to recalls, traceability, and crisis management); and reviewing applicable insurance coverage. Further, agreements should be reached with players in the supply chain as to how the burden of any litigation costs and any potential judgments will be shared. Companies should know who their suppliers are – and who their suppliers' suppliers are – and ensure that the proper protections are in place at every link along the ever-expanding chain. Failure to do so is at the heart of much of today's mass tort litigation.

Consumer products companies also should put into place recall and crisis management plans that *effectively* address how to best get the company's messages to the public. The selected members of the crisis management team should meet on a routine basis so that they know each other well before any crisis hits. The days of "no comment" are long gone. Companies must be prepared to take control of their message early, effectively, and in a manner that lets their consumers and the public know they are being forthcoming and are taking the issue seriously. Responding to a product crisis on an *ad hoc* basis inevitably results in critical decisions that are later regretted. Similar planning should go into ensuring that product labeling, warnings, and marketing messages are accurate and do not omit critical information.

Finally, companies should stay on top of emerging issues important to the company's industry, including litigation, legislation and regulation.[46] Companies should actively engage in the legislative and regulatory process with respect to proposed legislation and regulation they believe is likely to assist or hinder them in their business operations.

Bracing for the Onslaught

As our former secretary of defense Donald Rumsfeld so astutely (and infamously) pointed out, there will always be "unknown unknowns" that are, to some degree, impossible to prepare for. Thus, the reality remains that even the most robust due diligence (with respect to design, quality assurance, manufacturing, etc.) may not shield a company from being pulled into a world of increasingly complex products litigation. For many companies, defending themselves in this type of litigation is a new – and eye-opening – experience.

Companies unfamiliar with modern mass tort procedure can vastly underestimate the time, expense and planning required to effectively defend and ultimately resolve these types of litigations. For example, companies may make an unrealistic internal assessment as to potential case volume. A company might have ten reported events associated with its product and thus (understandably) expect ten cases to be filed, if that.

But with less concern for finding clients with actual injuries, plaintiffs' attorneys increasingly fill their inventory with litigant chaff. Indeed, the relationship between *actual injuries* and total case volume within a particular litigation has become a grotesquerie of our tort system. In addition, the 24-hour news cycle and the advent of the Internet have made it easier for plaintiffs' attorneys to more efficiently seek out large numbers of clients. Within several weeks of one recent imported product recall, a Google™ search for attorneys involved in the potential litigation registered more than half-a-million hits.

By signing up online, former customers are transformed with the push of a button into future plaintiffs, often without understanding the implications of their actions. All of this results in the number of cases ballooning well beyond what anyone, other than perhaps the plaintiffs' attorney, would consider remotely reasonable. Ten cases quickly become 100, 500 or 1,000 cases over the course of several months. Most of these end up in multi-district litigation, which, for better or for worse (and the jury is still very much out), has emerged as the predominate model for litigating mass torts in federal court.

Additionally, many companies – who thankfully are not on the regular roll call of mass tort defendants – are simply unaware of how vast the landscape is in which today's complex products litigation occurs. Although litigation may begin as a mass of personal injury actions, it often splinters into a host of different, albeit factually-related lawsuits. This may include all, or some combination of the following: States' attorney general actions, Department of Justice investigations, regulatory or administrative actions (FDA, SEC, CPSC, etc.), deceptive trade practices class actions, securities/investor suits, insurance/reinsurance recovery, third-party/secondary-payor claims, *Qui Tam* proceedings, and local criminal prosecution of the company or its employees.[47]

Think of it as a litigation pinwheel. Each of the above actions start as connected to the initial products litigation. But as the wind blows stronger, these derivative actions break free, taking on a life of their own and often lasting long after the initial products litigation has been resolved.

A coordinated approach to defending all aspects of the litigation is critical to the successful and efficient resolution of every suit. Consider the already onerous issue of paper and electronic discovery. As litigation becomes more complex, companies, and their outside counsel, must have the resources and know-how to successfully manage these global-scale document issues, including collection, review and production, in a consistent fashion.

As a final point, the importance of the earliest cases, including individual plaintiff's cases, can be overlooked. The positions taken in those cases, as well as the testimony given and discovery responses provided, can haunt the company in future cases. Further, a significant adverse verdict and/or a large settlement in an early case will enhance the probability that many other cases will follow. Plaintiffs' lawyers are often well-coordinated and communicate on a worldwide basis. It is essential that the company get the defense of these kinds of cases right the first time.

Conclusion

By most estimates, the idea of globalization as an economic principle did not take hold until the mid 1990's. More than a decade later, the concept is making its imprint on American litigation. For corporate defendants, this has resulted in an undesirable import/export dilemma. More and more, products arrive from overseas bringing with them unexpected litigation. At the same time, domestic litigation is heading outside of U.S. courtrooms as plaintiffs' attorneys look to expand the litigation playing field. Complex products litigation is taking more time and consuming more resources than ever. Further, it is having a significant impact on brand reputation and stock value. Companies must now, more than ever, be prepared to address the realities of these new litigation dynamics.

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[1] The authors would like to thank Kelly Foos for her assistance in preparing this article.

[2] *See* Jay Tidmarsh & Roger H. Transgrud, Complex Litigation: Problems in Advanced Civil Procedure 1 (Foundation Press, 2002); *see also Jacobellis v. Ohio*, 378 U.S. 184 (1964); *see also* Black's Law Dictionary (8th ed. 2004).

[3] *See* Marilyn Geewax, *Bush Creates Panel To Ensure Safety of Imported Food and Products*, Cox News Service (July 19, 2007).

[4] *See* MDL No. 1953: *In re Heparin Prods. Liab. Litig.*

[5] *See* Transfer Order, MDL-1850: *In re Pet Food Prods. Liability Litig.* (June 19, 2007 JPML) (transferring 13 initial actions related to allegedly contaminated pet food in the District of New Jersey); Transfer Order, *In re Mattel, Inc. Toy Lead Paint Prods. Liability Litig.*, MDL No. 1897 (transferring the 11 initial actions arising out of Mattel, Inc.'s recall of toys with allegedly elevated levels of lead paint to the Central District of California). Transfer Order, *In re RC2 Corp. Toy Lead Paint Prods. Liability Litig.*, MDL No. 1893 (transferring the 14 initial actions arising out of the recall of certain toys by RC2 Corp. and Learning Curve Brands, Inc. due to allegedly elevated levels of lead in surface paints).

[6] *See* May 22, 2008 Press Release, *available at* http://www.menufoods.com/recall. A statewide settlement in Hawaii also attained preliminary approval on May 19, 2008 from the U.S. Court of Appeals for the First Circuit. The $240,000 settlement, arising from the case *Lum v. Menu Foods, Inc.* (Civil No. 07-1-0849-05) is split in half, between paying claims and payments to Hawaiian humane societies. The class consists of Hawaii residents who purchased in Hawaii between November 8, 2006 and March 7, 2007 Menu Foods pet food that was recalled between March 16, 2007 and the present.

[7] *See FDA Investigation Leads to Several Indictments for Importing Contaminated Ingredients Used in Pet Food*, Food and Drug Administration Documents and Publications (Feb. 6, 2008).

[8] *Id.*

[9] *See* Complaint, *United States v. Sally Miller*, No 08-23 (W.D. Mo. Feb. 6, 2008).

[10] *See* Louise Story & Geraldine Fabrikant, *4 Executives Are Charged Over Tainted Toothpaste*, N.Y. Times, Mar. 7, 2008, at C3.

[11] *Id.* Although no deaths were reported in the United States, government officials in Panama concluded that at least 115 people died after ingesting a Chinese-made cold medicine also containing deithylene glycol. *See id.*

[12] *Id.*

[13] *See* Tiffany Hsu, *L.A. files charges on China imports*, L.A. Times, Mar. 7, 2008, at C3.

[14] Geewax, *supra* note 4.

[15] The issue with imported products is not limited to China. As former FDA Director of Import Operations and Policy told *The New York Times* last summer: "The reality is, this is not a single-country issue at all . . . [w]hat we are experiencing is a massive globalization." *See* Andrew Martin and Griff Palmer, *China Not Sole Source of Dubious Food*, N.Y. Times, July 12, 2007, at C1.

[16] Goody L. Solomon, *Watching for Iffy Imports: Skimpy U.S. Inspection Resources Are Raising Concerns*, Wash. Post, June 20, 2007, at F7.
[17] *See* Dan Thanh Dang & Larry Carson, *Food Recalls Likely To Be More Common; Foodstuffs' Increasingly Global Origins, Multiple Agencies Bar Thorough Checks*, Baltimore Sun, Nov. 6, 2007, at 1D.
[18] *See* Frank Ahrens, *FDA Halts Imports of Some Chinese Seafood*, Wash. Post, June 29, 2007, at D1.
[19] *See* Diedtra Henderson, *Chicken from China? Questionable Farming Practices Fuel Skepticism of US Plan to Import Poultry*, Boston Globe, May 9, 2007, at F1.
[20] Alexei Barrionuevo, *Food Imports Often Escape Scrutiny*, N.Y. Times, May 1, 2007.
[21] *See* Kenneth M. Odza, *Foodborne Illness and Practical Protections*, The Cooperative Grocer, Jan.-Feb. 2008.
[22] *See FDA Warns Not to Eat Cantaloupe from Honduran Grower*, Mar. 22, 2008. *See also* Sara Stefanini, *Recalls of Tainted Cantaloupe Continue to Rise*, Products liability Law 360, Mar. 31, 2008.
[23] *Id.*
[24] *See Riegel v. Medtronic Inc.*, 128 S. Ct. 999 (2008).
[25] *See Wyeth v. Levine*, 128 S. Ct. 1118 (2008). Before the Court in *Levine* is the issue of whether state-law tort claims are pre-empted to the extent they would impose liability for a drug manufacturer's use of labeling that the FDA approved after being informed of the relevant risk. If so, state-law claims that challenge such labeling would be impliedly pre-empted.
[26] *See* Article 41 of the PRC Product Quality Law; *see also* Article 106 of the General Principal Civil Law.
[27] Todd J. Burke, *Canadian Class Actions and Federal Judgments: Recognition of Foreign Class Actions in Canada*, 17 Bus. L. Today 49 (Sept./Oct. 2007) *available at* http://www.abanet.org/buslaw/blt/2007-09-10/burke.shtml.
[28] The act will not technically come into effect until it is "proclaimed."
[29] For a further discussion on recent developments in mass torts, including transnational and cross border litigation, *see* Paul D. Rheingold, Eric E. Hudson & Harley V. Ratliff, *Mass Torts Litigation: Looking Back but Heading Forward*, ABA Section of Litigation Joint CLE Conference (Snowmass, Colorado) January 11–13, 2008. Copies are available upon request.
[30] *In re Medtronic, Inc. Implantable Defibrillator Products liability Litigation*, No. 05-MDL-1726 (D. Minn.).
[31] *See Peter v. Medtronic, Inc.*, No. 05-CV-295910CP (Ontario Sup. Ct. Justice Dec. 6, 2007).
[32] *Id.* at 14.
[33] *Id.*
[34] *See* Carissa Wyant, *Guidant Suit Granted Class Action Status in Canada*, Minneapolis/St. Paul Bus. J., Apr. 11, 2008.
[35] *See* Joe Schneider, *St. Jude Sued in Canada Over Failures of Riata Defibrillators*, Bloomberg.com, Apr. 1, 2008, at http://www.bloomberg.com/apps/news?sid=a9oGFMBjmeT4&pid=20601082
[36] *See* Shook, Hardy & Bacon Class Action & Complex Litigation Alert, *Italian Parliament Passes New Representative Action Law*, Jan. 8, 2008 (available upon request).
[37] See "Bersani Decree" (Title 1 of Law 4 August 2006 nr. 248) available at ec.europa.eu/comm/competition/sectors/professional_services/conferences/20061230/lirosi.pdf.
[38] *See Litigious U.S. Ways Strangling Global Growth*, Newsmax.com, May 29, 2008.
[39] *See Nigeria files new Pfizer claims*, BBC News, July 20, 2007; *Pfizer Employees in Nigeria Court Over Fatal Drug Trials; Case to Resume March*, Thompson Financial, Feb. 4, 2008.
[40] *See Pfizer seeks settlement over drugs trial: Nigerian official*, Yahoo!News, Apr. 28, 2008, http://news.yahoo.com/s/afp/20080428/wl_africa_afp/nigeriauscompanydrugspfizer.
[41] *See* Christine Caulfield, *Nigerian State Drops $23B Tobacco Suit*, Products Liability Law 360, Feb. 25, 2008.
[42] Richard Lloyd, *Into Africa: SimmonsCooper's Novel International Expansion*, Am. Lawyer 24 (Mar. 2008).
[43] Julie Kay, *Vioxx Pact Isn't The End – It's The Beginning: Merck faces slew of U.S., Foreign suits*, Nat'l L.J. 1 (Dec. 3, 2007).
[44] Newsmax, *supra* note 38.
[45] *See* Justin Grant, *Recalls haunt toy companies in "Blue Christmas*," Reuters, Dec. 21, 2007.
[46] One important emerging issue affecting many industries is climate change. In light of the increasingly focus on the impact corporations have on the environment, corporations should consider better incorporating citizenship and sustainability into their core business strategy.
[47] For example, in the aftermath of a California meat packing company's recall of more than 140 million pounds of beef – the largest meat recall in U.S. history – local prosecutors filed felony and misdemeanor charges against the slaughterhouse manager and an assistant. *See* David Brown, *USDA Orders Largest Meat Recall in US History*, Washington Post, Feb. 18, 2008, at A1. *See* Victoria Kim, *Charges of Meat Plant Cruelty Filed*, L. A. Times, Feb. 16, 2008, at B1; http://www.meatingplace.com, Feb. 18, 2008. For more information on important developments in law, legislation, regulations and science impacting food and beverage companies, please contact Laura Fey to subscribe to Shook, Hardy & Bacon's weekly Food & Beverage Litigation Update.

Alternative Dispute Resolution

Federal Arbitration Act

New York District Court Orders Plaintiff to Withdraw from Arbitration

Carboni v. Lake, No. 06-cv-15488, 2008 BL 136200 (S.D.N.Y. June 20, 2008))

On June 20, 2008, the U.S. District Court for the Southern District of New York ordered plaintiff Michael Carboni to withdraw from an arbitration that he had brought before the National Futures Association (NFA).

Factual Background

Carboni originally brought claims against defendants Robert Lake and R.J. O'Brien & Associates, Inc. for defamation and tortious interference with business relations in the Supreme Court of the State of New York. According to Carboni, defendants had circulated an email that resulted in his blacklisting from the Commodities Futures Exchange. Defendants removed the action to the U.S. District Court for the Southern District of New York, and the district court subsequently held that the claims were subject to arbitration under the rules of the New York

Mercantile Exchange (NYMEX). Pursuant to Section 3 of the Federal Arbitration Act (FAA), the district court stayed the proceedings pending completion of arbitration. Thereafter, in December 2007, Carboni filed an arbitration claim with the NFA arbitration board. Arguing that Carboni could only arbitrate his claims at NYMEX, defendants moved to stay the arbitration.

District Court Rejects Plaintiff's Contention That NYMEX Arbitration Would Be Biased

The district court observed that "the NYMEX Rules make clear that arbitration under NYMEX Rules must proceed before an arbitration panel appointed by NYMEX." Carboni argued that an arbitration before NYMEX would be biased because of defendants' considerable influence and power within NYMEX. He claimed that partiality of the arbitration could be reasonably inferred since the arbitration panel as constituted under the NYMEX Rules would be composed of NYMEX members' employees.

Under the FAA, agreements to arbitrate are enforceable except on grounds at law or in equity for the revocation of a contract. The district court observed that plaintiff's "unsupported allegations regarding Defendants' influential status within NYMEX f[e]ll far short of a showing of fraud, duress, or unconscionability – the circumstances courts have identified as sufficient to warrant disregarding an arbitration agreement to which the parties have agreed." Comparing the present action to *Gilmer v. Interstate/ Johnson Lane Corporation*, 500 U.S. 20 (1991), where the U.S. Supreme Court considered arguments similar to Carboni's contentions, the district court concluded that plaintiff failed to make any showing that the NYMEX Rules and the FAA were inadequate to guard against partiality or bias.

In deciding whether to stay the arbitration, the district court noted that there was no legal authority permitting it to actually "stay" the arbitration proceedings filed before the NFA when the NFA was not a party to the action before the district court or to the NYMEX arbitration agreement. The district court instead interpreted defendants' motion to stay as a request for an order under Section 4 of the FAA, which provides that "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition . . . for an order directing that such arbitration proceed in the manner provided for in such agreement."

Conclusion

The district court granted defendants' motion and ordered plaintiff to withdraw his NFA arbitration claim. According to the court, "[i]f Plaintiff chooses to exercise his right to submit his dispute to arbitration, he must do so in accordance with the NYMEX Rules."

Vacatur

Texas District Court Declines to Vacate Award for Clearly Erroneous Findings of Fact

Wood v. Penntex Resources LP, No. H-06-cv-02198, 2008 BL 137637 (S.D. Tex. June 27, 2008)

On June 27, 2008, the U.S. District Court for the Southern District of Texas declined to vacate an arbitral award that plaintiff Scott Wood claimed was based on clearly erroneous findings of fact. The district court's decision came in light of the U.S. Supreme Court's decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008), which limited the grounds on which a district court could vacate an arbitration award to the four grounds specified in the Federal Arbitration Act (FAA).

Factual Background

The award in question was issued in an arbitration between Wood, the seller of a corporation called ERG Illinois, Inc., and defendants PennTex Resources LP (PennTex) and Lance Shaner, the purchasers. The Stock Purchase Agreement (SPA) governing the sale of ERG Illinois contained an arbitration provision and required PennTex to cover the damages, fees, costs and expenses incurred by Wood in a litigation that began before the sale. Under the SPA, Wood promised to either dismiss or release his individual claims upon receiving a full and complete release of all matters in that case. In May 2006, PennTex provided a full and complete release to Wood and demanded that he dismiss or release his individual claims. Wood refused to do so.

A month later, in June 2006, PennTex and Shaner initiated arbitration against Wood and ERG Illinois's parent company for special performance of Wood's contractual obligation to release or dismiss his claims. Wood responded with an action in the Southern District of Texas seeking a declaratory judgment that he was not obligated to arbitrate the release claim and that he would not be bound by any such arbitration. Penn Tex and Shaner counterclaimed to compel arbitration of the release claim against Wood. The district court granted the motion to compel.

At the end of the arbitration, the arbitration panel issued an award concluding that Wood became obligated to provide a release of his individual claims no later than June 4, 2007. Additionally, the award provided that PennTex had not fully paid all of Wood's attorneys' fees in the other litigation and ordered PennTex to pay Wood for the unpaid attorneys' fees. The award also ordered Wood to pay PennTex's attorneys' fees and expenses incurred in the arbitration and current litigation. PennTex moved in district court to confirm the award, while Wood moved to vacate it on the ground that the panel based two parts of its award on "clearly erroneous findings of fact." The arbitration provision in the SPA provided for vacatur if

the decision was based on clearly erroneous findings of fact, manifestly disregarded the law or exceeded the power of the arbitrator.

District Court Declines to Vacate Arbitral Awards for Clearly Erroneous Findings of Fact

The district court considered whether it could vacate the award in light of *Hall Street*. Wood claimed that he was not asking the district court to expand the grounds for vacatur but simply moving to vacate the award on the ground that the arbitrators exceeded their powers by basing parts of the award on clearly erroneous fact findings. Rejecting this contention, the district court observed that the "arbitration provision is clearly an effort by the parties to contract for a different basis for judicial review and vacatur than the FAA provides." The arbitration provision listed the clearly erroneous findings of fact ground as a separate ground for vacatur than the excessive-power ground. Though the provision stated that the arbitrators had no "power or authority" to make erroneous findings of fact, "it [wa]s clear that this phrase d[id] not limit the arbitrator's power but rather refer[red] to the circumstances under which the arbitrator's award will not be enforced by a court."

Under *Hall Street*, the district court may only vacate the award in accordance with one of the four statutory grounds specified in the FAA, and parties cannot provide for additional grounds for review and vacatur. Clearly erroneous findings of fact do not form one of the four statutory grounds. The district court declined to adopt Wood's interpretation of *Hall Street* permitting review of an award for clearly erroneous findings "if the arbitration agreement states that the arbitrators lack power to base an award on such findings." As explained by the district court, "Wood's reading of *Hall Street* would result in precisely the 'full-bore legal and evidentiary appeals' that the Court held the FAA precluded . . . . This reading would impermissibly circumvent *Hall Street*."

Conclusion

The district court thus denied Wood's motion to vacate the award and granted PennTex's motion to confirm it.

Civil Practice & Procedure

Electronic Discovery

Sixth Circuit Grants Mandamus Relief Related to District Court's Abuse of Discretion Regarding E-Discovery Orders

John B. v. Goetz, No. 07-06373, 2008 BL 135617 (6th Cir. June 26, 2008)

On June 26, 2008, the U.S. Court of Appeals for the Sixth Circuit granted mandamus relief from discovery orders in a class action lawsuit against certain Tennessee state agencies. The orders would have allowed plaintiffs' computer expert, assisted by federal marshals, to make forensic images of hard drives on state-owned and personal computers of 50 state employees. The Court concluded that the district court could have chosen "less intrusive means" of addressing the alleged discovery misconduct, such as sanctions. Accordingly, defendants' petition for mandamus was granted in relation to those provisions in the order which required forensic imaging of defendants' computers and assistance from the federal marshals.

Background

In 1993, the state of Tennessee received a waiver to replace part of its Medicaid program with a system called TennCare. Five years after the TennCare program was instituted, the instant class action was brought by 500,000 children enrolled in the TennCare program against the relevant state agencies seeking to require TennCare to provide certain early medical treatment.

Shortly after the complaint was filed, the parties entered into a Consent Decree, in which the problems with the TennCare program were set out and the state was given specific time frames to rectify the problems with the program. However, the state had difficulty meeting the deadlines in the Consent Decree and in 2001, plaintiffs moved for contempt. The district court appointed a special master to work on compliance with the Consent Decree. In 2004, the parties again had disputes related to the state's compliance with the Consent Decree.

In 2006, defendants claimed they were in compliance with the Consent Decree, but ultimately sought leave for discovery on certain issues. Plaintiffs also sought discovery of electronically stored information (ESI) related to the state's claimed compliance with the Consent Decree. Defendants converted the requested information to hard copies, but did not produce the requested information electronically. In turn, plaintiffs moved to compel production of the material in its native format. The court granted the motion subject to defendants' "right to 'claw-back' privileged documents."

On December 6, 2006, an "experts only" conference was held and a protocol for electronic discovery was formulated. However, the parties continued to have disputes related to electronic discovery. Subsequently, plaintiffs renewed their motion to compel. The court granted the motion stating "the core of this ESI discovery controversy is the absence of any effective attempt by the Defendants to preserve and segregate relevant ESI, since the filing of this action in 1998." Additionally, the court also determined "that defendants did not create any meaningful litigation hold until March 17, 2004, and even then, did not implement that litigation hold memorandum effectively." The court also stated that employees "were left 'to decide on their own what to retain without evidence of any written instruction or guidance from counsel on what is significant [or] material information in this complex action.'"

The court reserved sanctions until the completion of the ESI discovery.

The court ordered defendants to produce "all metadata and all deleted information on any computer of any of the designated custodians." Additionally, plaintiffs' computer expert was to "inspect the Defendants' computer system to assess whether any changes have been made to hinder the ESI production."

After receiving this order, the parties made numerous motions, including defendants' two motions for reconsideration and clarification and plaintiffs' motion to compel and motion for sanctions for defendants' failure to comply with the court's order. In response, the court issued two additional discovery orders.

The first order allowed for plaintiffs' computer expert to inspect defendants' computer system and "any computers of the 50 key custodians that contain relevant information to 'assess whether any production of information required by the Consent Decree or previous Order[s] of the Court . . . [have] been impaired or compromised or removed.'" Additionally, the order allowed plaintiffs' expert, escorted by federal marshals, to make forensic copies of any hard drives of the computers in question to assure the preservation of all ESI. The second order required that the "U.S. Marshal will assume custody of the forensic images and that the court will maintain those images under seal pending further order."

Defendants sought an emergency stay from the district court, which was denied. In denying the stay, the court explained that the two discovery orders were rendered "to protect against the Defendants' destruction of responsive information in light of the Defendants' persistent refusals to produce ESI in violation of the Court's orders." Defendants filed an emergency motion with the Sixth Circuit which granted a stay of the ordered discovery.

Mandamus Relief

The Sixth Circuit commented that "mandamus relief is an extraordinary remedy, only infrequently utilized by this court." (Internal quotations omitted.) In differentiating between "errors that are merely reversible and not subject to mandamus, and those errors that are of such gravity that mandamus is proper," the court looked to the following five factors:

> (1) [whether] the party seeking the writ has not other adequate means, such as direct appeal, to attain the relief desired; (2) [whether] the petitioner will be damaged or prejudiced in a way not correctable on appeal; (3) [whether] the district court's order is clearly erroneous as a matter of law; (4) [whether] the district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules; and (5) [whether] the district court's order raises new and important problems, or issues of law of first impression.

(Internal quotations and citations omitted).

In finding that all five factors weighed in favor of mandamus, the Court determined that the exposure of imaging numerous state-owned and privately owned computers raised "privacy and confidentiality concerns." Additionally, although noting that parties to litigation clearly have a duty to preserve ESI, the Court held that the district court's order for forensic imaging to preserve such evidence was "a clear error in judgment" and noted that sanctions would have been a better exercise of authority. The Court also found that due to the sensitivity of the confidential state matters that could be revealed by imaging defendants' computers, "these orders implicate federalism and comity considerations not present in typical civil litigation." The Sixth Circuit held that "the district court's forensic imaging orders constitute the type of demonstrable abuse of discretion that warrants mandamus relief." (Internal quotations omitted). Accordingly, defendants' petition for mandamus was granted to the extent the district court's order required forensic imaging of defendants' computers and as to those provisions requiring the federal marshal's assistance with the execution of the orders.

Standing

U.S. Supreme Court Holds Assignee With Right to Sue but No Right to Recovery Has Standing to Bring Suit

Sprint Communications Co. v. APCC Servs., Inc., No. 07-552, 2008 BL 133290 (U.S. June 23, 2008)

On June 23, 2008, the U.S. Supreme Court upheld the lower court's decision holding that collection firms to whom pay-phone operators assigned their right to sue long-distance carriers for a fee but not a portion of the recovery have standing to bring suit. Chief Justice Roberts filed a dissenting opinion, in which Justices Scalia, Thomas and Alito joined, arguing that because they would not share in the recovery at all, the collection firms lacked a personal stake in the litigation and therefore lacked standing.

Factual Background

This dispute stems from charges and fees incurred when a customer makes a long-distance phone call from a pay-phone using a calling card or a toll-free access number. When a customer makes such a call, he or she pays the long-distance carrier but not the pay-phone operator. Under federal law, the long-distance carrier is obligated to reimburse the pay-phone operator for these calls. If the long-distance carrier fails to reimburse the pay-phone operator, the operator can sue the carrier for the outstanding amount due.

Pay-phone operators frequently assign their claims against the long-distance carriers to collection firms known as "aggregators," who then file suit against the carriers

and assert numerous claims in one action. In this case, the aggregator (APCC Services) was assigned claims from approximately 1,400 pay-phone operators pursuant to an Assignment and Power of Attorney agreement, under which APCC obtained "all rights, title and interest" to the pay-phone operators' claims against the carriers. In a separate agreement, APCC agreed to remit any recovery obtained in the suits against the carriers to the pay-phone operators and in turn, the pay-phone operators agreed to pay APCC a fee for its service.

After APCC filed the instant action, the long-distance carrier defendants (collectively, Carriers) moved to dismiss the action on the basis of APCC's lack of standing to bring suit. The district court denied the Carriers' motion to dismiss, citing a "long line of cases and legal treatises that recognize a well-established principle that assignees for collection purposes are entitled to bring suit where [as here] the assignments transfer absolute title to the claims." (Quoting *APCC Servs., Inc. v. AT&T Corp.*, 281 F. Supp. 2d 41, 45 (D.D.C. 2003)). The U.S. Court of Appeals for the D.C. Circuit affirmed and the U.S. Supreme Court granted *certiorari*. In a five to four decision, the Supreme Court affirmed the district court's order and held that APCC had standing to sue the Carriers.

Assignees Historically Have Had Standing to Bring Suit

Under Article III of the U.S. Constitution, plaintiffs must show: (1) that they have suffered an injury in fact; (2) a connection between the defendants' conduct and the injury suffered; and (3) that their injury would be remedied by the relief requested from the court in order to have standing to bring suit. The Supreme Court examined the history of suits by assignors and assignees under pre-17th century English law through 19th century American law and determined that there is a "strong tradition" of finding parties who possess only the legal title to the claim – such as assignees who obtained title specifically for the purpose of collection – to have standing to file suit. Furthermore, this tradition extends to also cover circumstances in which the assignee is obligated to transfer the proceeds from the suit to the assignor. The Court found that the history and tradition conclusively established that "[l]awsuits by assignees, including assignees for collection only, are cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process." (Internal quotation omitted).

The Court also found that none of the Carriers' arguments justified departing from this tradition. First, the Carriers argued that APCC lacked standing because it did not suffer any injury in fact. However, the Court found that the assignment agreement transferred the claims to APCC "lock, stock, and barrel," and the Court had previously "stated unequivocally that 'the assignee of a claim has standing to assert the injury in fact suffered by the assignor.'" (Quoting *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 773 (2000)).

The Carriers next argued that APCC failed to show that the requested remedy would redress its injuries because APCC was contractually obligated to turn over any monetary recovery directly to the operators. However, the Court stated that this argument impermissibly focused on what APCC would ultimately do with the monetary recovery after the conclusion of the litigation rather than on the connection between the relief requested and the injury asserted. The injury in this case – the money owed from the Carriers for the long-distance calls – became APCC's pursuant to the assignment and any recovery would serve to redress that injury. As the Court stated, "[t]he injuries would be redressed whether the aggregators remit the litigation proceeds to the payphone operators, donate them to charity, or use them to build new corporate headquarters." Furthermore, the Court pointed out several analogous situations in which the recovery ultimately runs to a person or entity who is not a party to the litigation but the court still recognizes the plaintiff's standing to bring suit, including trustees who bring actions that will benefit their trusts and executors who file suit for the benefit of the estate.

Prudential Standing Doctrine Did Not Justify Dismissal

The Carriers next argued that APCC's case should be dismissed pursuant to the principles of prudential standing. The prudential standing doctrine encompasses judicially-created rules limiting the court's exercise of jurisdiction over cases that otherwise satisfy the standing requirements imposed under Article III. First, the Carriers invoked a line of Supreme Court cases in which the Court placed limitations on the standing of parties who were asserting legal claims on behalf of third parties. However, the Court distinguished these cases because they all addressed circumstances in which plaintiffs "seek to assert not their own legal rights, but the legal rights of others." Here, APCC had obtained all rights and title to the pay-phone operators claims. Accordingly, although the injury was originally suffered by the pay-phone operators, APCC was seeking to vindicate its own legal rights that it had obtained by virtue of the assignment.

Next, the Carriers argued that APCC was impermissibly aggregating claims without satisfying the requirements for class actions under Rule 23 of the Federal Rules of Civil Procedure. This argument was also rejected by the Court. Class actions are one available method for aggregating numerous claims, but it is not the only one. As the Court stated, "[b]ecause the federal system permits aggregation by other means, we do not think that the pay-phone operators should be denied standing simply because they chose one aggregation method over another."

Lastly, the Court rejected the practical problems that the Carriers claimed would arise were APCC allowed to bring suit. Specifically, the Carriers argued that the pay-phone operators were the real parties in the case yet they would not be bound the district court's orders, would not be subject to discovery obligations and would be free from any of the Carriers' possible counterclaims against them. To the extent that any of those practical problems were actually an issue, the Court held that the lower courts had adequate means of

addressing them, such as compelling the pay-phone operators to comply with third-party discovery requests or allowing the Carriers to join them as necessary and required parties under Rule 19 of the Federal Rules of Civil Procedure.

Accordingly, the Supreme Court upheld the lower courts' decision and allowed the case to proceed.

Chief Justice Roberts' Dissenting Opinion

Chief Justice Roberts, joined by Justices Scalia, Thomas and Alito, filed a dissenting opinion, arguing that APCC lacked standing to bring suit and the case should have been dismissed.

First, the dissenting justices questioned the history and early precedent cited by the majority in support of its claim that an assignee without any right to recovery traditionally had standing to sue, claiming that it was "equivocal" at best. Rather than following an established rule, Justice Roberts argued that the Court set out an unprecedented new rule in which a party no longer has to demonstrate a personal stake in the litigation to have standing. Because the APCC would not share in the recovery and will receive the same fee from the pay-phone operators regardless of the outcome of the case, they would have held that APCC has no personal interest in the litigation and should be deemed to lack Article III standing.

Along the same lines, Chief Justice Roberts argued that the majority "goes awry when it asserts that the standing injury focuses on whether the *injury* is likely to be redressed, not whether the *complaining party's* injury is likely to be redressed." The result, according to the dissenting justices, is the first time the Court allowed the exercise of jurisdiction over an action where the entire recovery runs to an entity not before the court. The dissent also asserted that the Court was mistaken in relying on the fact that the recovery will initially go to APCC in support of its conclusion that the redressibility requirement was met in this case. APCC's injuries would not be redressed by any recovery in the suit because it is legally obligated to immediately transfer the funds to the pay-phone operators. APCC's lack of control over what happens to the recovery, according to the dissenting justices, precludes the conclusion that it has a personal stake in the litigation.

Accordingly, the dissenting justices would have held that "[a]n assignee who has acquired the bare legal right to prosecute a claim but no right to the substantive recovery cannot show that he has a personal stake in the litigation" and remanded this case with instructions to dismiss.

Subject Matter Jurisdiction

Texas District Court Remands "Suit Within a Suit" Legal Malpractice Case to State Court

Eddings v. Glast, No. 07-cv-01512, 2008 BL 135324 (N.D. Tex. June 24, 2008)

On June 24, 2008, the U.S. District Court for the Northern District of Texas remanded a removed case from federal court back to state court, ruling that it lacked subject matter jurisdiction over the dispute. Plaintiffs James R. Eddings, Galt Medical Corporation and Xentek Medical, Inc. sued defendants Glast, Phillips & Murray, Richard E. Young and John A. Thomas in Texas state court alleging that defendants had committed legal malpractice during their representation of plaintiffs in an earlier lawsuit. Defendants removed the case to federal court on the ground that plaintiffs' malpractice claims required an evaluation of the patent dispute that was the subject of the prior litigation, and therefore raised a federal question. Plaintiffs contended that there was no federal question to be addressed and moved to remand the case to state court. Acknowledging that it was a "close call," the court granted plaintiffs' motion to remand, holding that it did not have subject matter jurisdiction over the dispute because at least one of plaintiffs' claims did not involve a substantial question of patent law.

Background

Plaintiffs filed a negligence action in Texas state court after defendants allegedly provided negligent legal representation to plaintiffs in a patent litigation. Plaintiffs alleged five instances of negligence, including (1) failure to timely produce evidence pertaining to development and production costs that would have been a basis for credit or offset against the judgment; (2) failure to make an offer of proof of development and production costs; (3) failure to request a claims construction hearing; (4) failure to properly raise and present Rule 50 motions for judgment as a matter of law; and (5) failure to request or compel discovery pertaining to an offer of sale defense. Defendants removed the case to federal court on the ground that the case presented a federal question, and plaintiffs filed a motion to remand the case to state court shortly thereafter.

"Arising Under" Subject Matter Jurisdiction

The motion for remand centered on whether the federal court had subject matter jurisdiction over the case. In general, federal courts have subject matter jurisdiction over all cases "arising under" the Constitution, laws, or treaties of the United States. 28 U.S.C. § 1331. "Arising under" jurisdiction is generally invoked by plaintiffs pleading a cause of action created by federal law or by defendants removing a case to federal court because the plaintiff's claim arises under federal law.

Within "arising under" jurisdiction, there is a less common variety of jurisdiction in which a state law claim raises a federal issue. In these cases, the existence of a cause of action under federal law is not necessarily a requirement for establishing federal subject matter jurisdiction; rather, the question is "whether a state-law claim necessarily raise[s] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any

congressionally approved balance of federal and state judicial responsibilities." The court here was required to decide whether such an "actually disputed and substantial" federal issue was present.

The District Court's Analysis - Did Each State Law Claim Raised a Disputed Federal Issue?

Plaintiffs moved to remand on the ground that their malpractice claim did not raise a substantial federal question. Defendants countered that to prove their attorney malpractice case plaintiffs would have to show four elements: (1) the existence of a duty; (2) breach of that duty; (3) that the breach proximately caused plaintiffs' injuries; and (4) that damages occurred. They contended that because a plaintiff must show a causal relationship in a malpractice action, the plaintiff "must prove a 'suit within a suit' by demonstrating that he would have prevailed in the underlying action *but for* his attorney's negligence." Defendants argued that although these were state law negligence claims, because this "suit within a suit" involved an underlying patent claim, it arose under federal law for purposes of "arising under" jurisdiction. Defendants noted that plaintiffs' petition included allegations that defendants failed to request a claim construction hearing and that procedural errors resulted in the waiver of plaintiffs' invalidity defenses – both of which involve substantial questions of patent law. In support of their argument, defendants cited two recent Circuit Court cases, *Air Measurement Techs, Inc. v. Akin Gump Strauss Hauer & Feld, L.L.P.*, 504 F.3d 1262 (Fed. Cir. 2007) and *Immunocept, LLC v. Fulbright & Jaworski, LLP*, 504 F.3d 1281 (Fed. Cir. 2007). In each case, the U.S. Court of Appeals for the Federal Circuit had ruled that a substantive question of patent law existed, thus conferring jurisdiction pursuant to 28 U.S.C. § 1338. Notably, however, in *Air Measurement Technologies*, the Court also held that "[i]f there is a theory upon which [plaintiffs] can prevail on their malpractice claim that does not involve a substantial patent law question, then patent law is not essential to the malpractice claim, and § 1338 jurisdiction is lacking."

Plaintiffs focused on this latter holding in their reply in support of their motion to remand, contending that a determination of patent law was not essential to their first theory of recovery – that defendants were negligent in failing to timely produce evidence pertaining to development and production costs that would have been a basis for a credit or offset of the judgment – and therefore that remand was appropriate. Defendants failed even to address the issue in their supplemental response despite discussing both *Air Measurement Technologies* and *Immunocept*. The court, "after careful consideration," concluded that patent law was not essential to plaintiffs' first theory of recovery and that it did not depend on any consideration of patent issues. In reaching this decision, the court cited the fact that plaintiffs were not the plaintiffs in the underlying lawsuit and that in considering the "suit within a suit," they were not required to prove that they would have succeeded on their patent infringement claims. It further noted that plaintiffs' claims related to procedural errors they alleged defendants to have made in the underlying lawsuit – rather than asserting that defendants' mistakes substantively led to the award of a judgment, plaintiffs simply contended that the procedural errors led to a greater judgment.

Conclusion

The court held that because plaintiffs' claims did not *each* involve a substantial question of patent law, it did not have subject matter jurisdiction pursuant to 28 U.S.C. § 1338, and thus granted plaintiffs' motion to remand the case to state court.

Class Actions

Pleadings

Fan's Wrongful Videotaping Suit against Bill Belichick and New England Patriots Allowed to Continue

Mayer v. Belichick, No. 07-cv-04761 (D.N.J. June 24, 2008)

On June 24, 2008, the U.S. District Court for the District of New Jersey granted plaintiff's request to amend his complaint in a putative class action claiming Bill Belichick, the head coach of the National Football League's (NFL) New England Patriots, violated both federal and New Jersey state law when the Patriots allegedly videotaped in-game hand signals used by the New York Jets' coaching staff to transmit defensive formations to Jets players.

Background

On September 9, 2007, NFL security guards observed a Patriots employee with a video camera on the sidelines of the Jets-Patriots game (won by the Patriots 38–14) at Giants Stadium in East Rutherford, New Jersey. The NFL seized the video camera. NFL policy forbids a team from videotaping an opponent's offensive or defensive signals, and the league later fined Belichick and the Patriots a combined $750,000 and took away their first-round pick in the 2008 draft. In a letter to the Patriots regarding the punishment, NFL Commissioner Roger Goodell wrote that "this episode represents a calculated and deliberate attempt to avoid longstanding rules designed to encourage fair play and promote honest competition on the playing field." The NFL destroyed the confiscated video tape and other related materials obtained from the Patriots.

On September 24, 2008, Jets' fan Carl J. Mayer commenced this putative class action against Belichick and the Patriots in New Jersey federal court on behalf of the thousands of people who attended Jets Patriots games at Giants Stadium. Seeking over $200 million in both compensatory and punitive

damages, Mayer sought to certify two classes. The first consisting of:

> All New York Jets' season ticket-holders and other ticket-holders who purchased tickets to games between the New York Jets and the New England Patriots in Giants Stadium since Bill Belichick became the head coach of the New England Patriots in 2000.

The second class consisting of:

> All individuals that are residents of the State of New Jersey and that purchased tickets to watch the New York Jets play the New England Patriots between 2000 and 2007 in Giants Stadium.

Causes of Action

The complaint alleged that defendants were liable for tortious interference with contractual relations; common law fraud; violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 (a), (b), (c), (d), and violations of "ticket-holders rights" as third-party beneficiaries. As to the tortious interference with contractual relations count, Meyer contended that Belichick's and the Patriots' videotaping "intentionally and knowingly interfered with the ticker-holders' contractual right to an honest match played." Meyer's RICO count alleged that Belichick and the Patriots used the "mail and/ or interstate wires as a material element of their scheme to defraud New York Jets ticket-holders." Meyer lastly advanced the novel theory that Belichick and the Patriots violated the class members' so-called "ticker-holders rights" when they engaged in the videotaping.

Senator Specter and Congressional Hearings

Responding to the court's June 4, 2008 notice that the suit would be dismissed for lack of activity, Meyer requested additional time to amend his complaint, noting that Senator Arlen Specter had begun an investigation into the videotaping incident and that information gained from any congressional hearings could "add certain facts to the complaint." Further explaining his delay, Meyer represented that his attorney was undergoing treatment at a cancer hospital.

On June 17, 2007, Senator Spector announced that he had decided not to call for congressional hearings regarding the Patriots' taping incident. Notwithstanding Senator Specter's announcement, the court granted Meyer's request, giving him until August 30, 2008 to file an amended complaint.

Conclusion

Accordingly, the court gave Meyer until August 30, 2008 to craft viable claims against Belichick and the Patriots.

Damages & Remedies

Lost Wages

Ninth Circuit Holds Plaintiff Entitled to Recover Lost Wages Resulting from an Emotional Condition Caused by Employer's FMLA Violation

Farrell v. Tri-County City Metro. Transportation Dist., No. 06-35484, 2008 BL 137664 (9th Cir. June 27, 2008)

On June 27, 2008, the U.S. Court of Appeals for the Ninth Circuit addressed the issue of whether the Family Medical Leave Act (FMLA), 29 U.S.C. § 2611, *et seq.*, "allows a plaintiff to recover damages for absences from work that were caused by an emotional condition that itself resulted from the employer's wrongful denial of FMLA leave."

Background & Procedural History

Plaintiff Frank Farrell began his employment with Tri-County Metropolitan Transportation District of Oregon (TriMet) in 1996. During a pre-employment examination, Farrell was diagnosed with diabetes. Five years later, in 2001, Farrell was also diagnosed with eczema, chronic obstructive pulmonary disease, asthma, emphysema and/or chronic bronchitis. In September 2003, TriMet denied several of Farrell's repeated requests for leave as a result of his medical condition. Shortly thereafter, Farrell was diagnosed with an adjustment disorder, anxiety and depression.

Farrell subsequently sued TriMet under the FMLA, the Americans with Disabilities Act of 1990, the Oregon Family Leave Act (OFLA) and the Oregon Rehabilitation Act. At the conclusion of the trial, the jury determined that TriMet wrongly denied Farrell's requests for leave under the FMLA and that those wrongful denials led to Farrell's "emotional stress or other mental problems" which caused Farrell to miss additional days of work. Consequently, the jury awarded Farrell $1,110 in lost wages "for days of work that he missed because of stress or other mental problems resulting from the wrongful denial of FMLA leave[.]"

As a result, TriMet filed a renewed motion for judgment as a matter of law. The district court denied the motion, finding that "the relationship between the FMLA violation and the lost wages is not so tenuous or remote as to preclude [Farrell] from recovering his economic damages in the form of lost wages." TriMet appealed to the Ninth Circuit. On appeal, TriMet conceded that it violated the FMLA by denying several of Farrell's repeated requests for medical leave and that its denials causes Farrell to experience emotional distress. However, TriMet argued that "Congress did not intend FMLA to permit the recovery of consequential or emotional distress damages [which] is what [Farrell] received here . . . when the jury awarded him damages for time loss induced by emotional distress."

Ninth Circuit Affirms Lost Wages Award

FMLA § 2617 states that an employer who violates Section 2615 of the Act is liable to an employee for damages that amount to "(I) any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation . . . ." *See* 29 U.S.C. § 2617. The Sixth Circuit held in *Brumbalough v. Camelot Care Ctrs., Inc.*, 427 F.3d 996, 1007 (6th Cir. 2005) that damages for emotional distress are not available under the FMLA because the Act "specifically lists the types of damages that an employer may be liable for, and it includes damages only insofar as they are the actual monetary losses of the employee such as salary and benefits and certain liquidated damages."

In the current action, the Ninth Circuit held that Farrell was not awarded damages for emotional distress, but rather "for days of work that he missed because of stress or other mental problems resulting from the wrongful denial of FMLA leave." According to the Ninth Circuit, unlike emotional distress, which requires calculating intangibles, Farrell's damages here could be easily quantified in accordance with Section 2617 by simply determining the wages that Farrell would have earned on the days that he missed as a result of TriMet's violations. Thus, the jury's verdict did not violate the FMLA's directive that employees bear the cost of their own psychological damages caused by an employer's violation of the FMLA. Rather, the verdict simply required TriMet to "compensate Farrell for the wages he lost 'by reason of [its] violation'" and was therefore not "a back-door means of recovery for psychic injuries."

Accordingly, the Ninth Circuit determined that TriMet violated the FMLA and affirmed Farrell's $1,110 lost wages award.

Punitive Damages

U.S. Supreme Court Cuts Punitive Damages Award Related to *Exxon Valdez* Oil Spill From $2.5 Billion to $507.5 Million

Exxon Shipping Co. v. Baker, No. 07-00219, 2008 BL 135592 (U.S. June 25, 2008)

On June 25, 2008, over 19 years after the *Exxon Valdez* oil spill, the U.S. Supreme Court reduced the punitive damages award against the Exxon Shipping Company (Exxon) from $2.5 million to $507.5 million, holding that a 1:1 ratio for compensatory to punitive damages was an appropriate measure for a punitive damages award in a maritime case.

Background & Procedural History

On March 24, 1989, the oil tanker *Exxon Valdez* grounded on Bligh Reef in Alaska, spilling 11 million gallons of oil into the Prince William Sound. Evidence at trial showed that the *Valdez* captain, Joe Hazelwood, had been drinking heavily prior to the accident; indeed, expert testimony estimated his blood alcohol content at the time of impact with the reef as approximately .241 – three times the legal limit for driving in many states.

After the accident, Exxon spent $2.1 billion to clean the area. Additionally, the United States government charged the company with criminal violations of various federal statutes, including the Clean Water Act, the Refuse Act of 1899, the Migratory Bird Treaty Act, the Ports and Waterways Safety Act and the Dangerous Cargo Act. In connection with these violations, Exxon paid a total of $125 million in fees and restitution. The company also paid $900 million toward restoring natural resources after the United States and the State of Alaska filed a civil suit, as well as $303 million in voluntary settlements with fishermen, property owners and other private parties.

After the settlements, the remaining cases were consolidated into one action against Exxon, Hazelwood and other defendants. The cases consisted of three groups seeking compensatory damages: commercial fishermen, Native Alaskans and landowners. A class of over 32,000 plaintiffs seeking punitive damages was certified. As the trial approached, the district court designated three phases: the first would determine defendants' potential for punitive liability by determining their recklessness; the second "set compensatory damages for commercial fishermen and Native Alaskans;" and finally, the third determined the amount of punitive damages against defendants.

In the first phase, the jury found defendants reckless and thus potentially liable for punitive damages. In the second phase, the jury awarded $287 million in compensatory damages to the commercial fishermen. In the final phase, the jury awarded $5,000 in punitive damages against Hazelwood and $5 billion against Exxon. The case was appealed twice to the U.S. Court of Appeals for the Ninth Circuit, which eventually remitted the punitive damages award against Exxon to $2.5 billion.

The Supreme Court granted *certiorari* to consider three issues: (1) whether maritime law allows punitive damages against a corporation for derivative liability; (2) whether punitive damages were pre-empted in this case by the Clean Water Act (CWA), 33 U.S.C. § 1251, *et seq.*; and (3) whether the punitive damages award in the case was greater than maritime law should allow.

The Court was evenly divided on the first issue. Thus, it could not issue an order, *see Durant v. Essex Co.*, 74 U.S. 107 (1869), and it therefore left the Ninth Circuit's opinion undisturbed. As to the second issue, the Supreme Court held that "federal statutory law does not bar a punitive award on top of damages for economic loss." That left just the third argument: whether the award for punitive damages should be reduced.

Development and Criticism of Punitive Damages

The Court determined that Exxon's argument – namely, that the punitive damages award exceeded "the bounds justified

by the punitive damages goal of deterring reckless (or worse) behavior and the consequently heightened threat of harm" – implicated the very nature of administering punitive damages, and it engaged in an analysis of the historical development of punitive damages. The Court noted that punitive damages were originally conceived to punish the party, to deter others from engaging in similar behavior and "to compensate for intangible injuries, compensation which was not otherwise available under the narrow conception of compensatory damages prevalent at the time." *Cooper Indus., Inc. v. Leatherman Tool Grp, Inc.*, 532 U.S. 424, 437–38 n. 11 (2001). However, as the types of compensatory damages available to plaintiffs expanded, the last motivation was lost, and "the consensus today is that punitives are aimed not at compensation but principally at retribution and deterring harmful conduct."

Punitive damages "have been the target of audible criticism in recent decades." The Court noted that the main problem was the "stark unpredictability of punitive awards." A discussion of studies documenting recent punitive damages awards revealed that the spread of punitive damage ratio to compensatory damage was great, indicating that "outlier cases subject defendants to punitive damages that dwarf the corresponding compensatories."

In recent times, the Court has attempted to address these "outlier punitive damages" in cases involving constitutional claims. In those cases, while the Court has refused to offer a mathematical formula to determine calculation of punitive damages, it has determined that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003).

However, in this case, the question was not the *constitutionality* of punitive damage awards, but "the desirability of regulating them as a common law remedy." Thus, the Court then turned to various methods to achieve the goal of barring "penalties that reasonable people would think excessive for the harm caused in the circumstances."

Regulation of Punitive Damage Awards

The Court noted that various state courts have "settled on criteria for judicial review of punitive-damages awards that go well beyond 'shock the conscience' or 'passion and prejudice' tests." The Court ultimately determined that these "verbal formulations, superimposed on general jury instructions" were not "the best insurance against unpredictable outliers."

The Court noted that "as long 'as there are no punitive-damages guidelines, corresponding to the federal and state sentencing guidelines, it is inevitable that the specific amount of punitive damages awarded whether by a judge or by a jury will be arbitrary.'" *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672, 678 (7th Cir. 2003). Thus, the Court, in *dicta*, advocated a system of regulating punitive damages akin to sentencing guidelines available in federal criminal cases. More specifically, the Court noted that "[t]here is better evidence of an accepted limit of reasonable civil penalty . . . showing the median ratio of punitive to compensatory verdicts, reflecting what juries and judges have considered reasonable across many hundreds of punitive awards." The median ratio in these cases has been less than 1:1, indicating that "the compensatory award exceeds the punitive award in most cases."

Therefore, the Court concluded that "a 1:1 ratio, which is above the median award, is a fair upper limit in . . . maritime cases." This ratio limit addressed "the need to protect against the possibility (and the disruptive cost to the legal system) of awards that are unpredictable and unnecessary, either for deterrence or for measured retribution."

Conclusion

The Court took "for granted the District Court's calculation of the total relevant compensatory damages at $507.5 million." *See In re Exxon Valdez*, 236 F. Supp. 2d 1043, 1063 (D. Alaska 2002). Thus, the punitive-to-compensatory ratio of 1:1 compelled maximum punitive damages in that amount. The Court vacated the judgment and remanded the case to the Ninth Circuit "to remit the punitive damages award accordingly."

Environmental Litigation

Accrual of Contribution Claims

State Court Holds Contribution Claims Not Triggered Until After Property Owner Ordered to Cleanup Contaminated Site

Pflanz v. Foster, Ind., No. 01-cv-00710, 2008 BL 130124 (Ind. June 19, 2008)

On June 19, 2008, the Supreme Court of Indiana reversed a trial court's order of dismissal, holding that the statute of limitations on a property owner's claim for contribution does not begin running until after the owner is ordered to cleanup the property.

Background

In 1976, Merrill Foster purchased a service station from Sunoco, Inc. In 1978, Foster stopped selling petroleum and discontinued use of the service station's on-site underground storage tanks (USTs). In April 1984, Foster sold the property to Richard and Delores Pflanz. Prior to the sale, Foster advised the Pflanzes that the on-site USTs were not operational and had been shut down. In truth, however, the USTs had not been closed and still contained some petroleum. The Pflanzes operated a business on the site for two years, at which time they began leasing the property to a third party.

In 2001, the Pflanzes learned that their property was contaminated when the Indiana Department of Environmental Management (IDEM) inspected the site and discovered that the USTs were leaking. Subsequently, the Pflanzes incurred over $100,000 in clean up costs.

In December 2004, the Pflanzes filed an action against Foster and Sunoco seeking contribution for cleanup costs pursuant to the Underground Storage Tanks Act (USTA), Indiana Code § 13–23, *et. seq*., and declaratory relief for future anticipated cleanup costs. Foster moved to dismiss, arguing that the action was time barred by the applicable statute of limitation. The trial court agreed with Foster and dismissed the Pflanzes' complaint.

In March 2006, the Pflanzes filed a second complaint, containing allegations substantially similar to those contained in the first complaint. The court, however, again dismissed the Pflanzes' complaint.

The Pflanzes appealed the dismissal, but the Court of Appeals affirmed, holding that since Indiana amended the USTA's contribution statute in 1991, the Pflanzes should have tested the property for contamination – such that the statute of limitations began to run no later than 1991. The Supreme Court of Indiana granted transfer to consider this appeal.

Statute of Limitations for Contribution

At the outset, the parties agreed that a ten-year statute of limitation applied to the Pflanzes' contribution claim. Therefore, the court reasoned that resolution of the case turned on when the statute of limitations began to run on the contribution claim.

A court determines when a cause of action has accrued, and thus when a statute of limitation begins to run, when each element of a cause of action can be shown. Under Indiana law, a cause of action accrues when a claimant knows or should have known of the injury through the reasonable exercise of ordinary diligence.

According to Foster, the statute of limitation accrued "when the Pflanzes knew or should have known about the contamination." However, the court noted the Pflanzes sought to recoup the costs of cleaning up on-site contamination rather than compensation for property damage. The court characterized damages in contribution cases as "the incurrence of a monetary obligation that is attributable to the actions of another party." As a result, those who bring contribution claims must wait until after the debt is incurred, or else the claim "would lack the essential damage element."

The court concluded that since the damages sought by the Pflanzes' were associated with the cleanup costs resulting from Foster's leaking USTs, the statute of limitations on that contribution claim did not accrue until after IDEM ordered the Pflanzes to clean up the site in 2001. Thus, the court held that the contribution claim was filed well within the ten-year statute of limitations.

Conclusion

Accordingly, the court reversed the trial court's dismissal, remanding to the lower court for further proceedings on the merits.

Article III Standing

Oklahoma District Court Dismisses Lawsuit Challenging EPA's "Capping" Procedure under CERCLA

Byford v. Johnson, No. 08-cv-00057, 2008 BL 105111 (N.D. Okla. May 16, 2008)

On June 16, 2008, the U.S. District Court for the Northern District of Oklahoma dismissed a lawsuit alleging that the Environmental Protection Agency (EPA) is endangering the health and welfare of individuals who live near Superfund sites because plaintiff failed to satisfy the three-part test for standing under Article III of the U.S. Constitution.

Background

Plaintiff's complaint asserted claims against the EPA under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601, *et seq*., alleging that EPA was endangering individuals who live near Superfund sites by burying hazardous materials and "capping" them with vegetation, to avoid properly disposing of the materials. Plaintiff's complaint sought to enjoin the EPA's alleged refusal to adopt permanent disposal solutions at Superfund sites.

Legal Standard

The U.S. Supreme Court recognizes three elements for standing under Article III of the U.S. Constitution. First, plaintiff must have suffered an "injury in fact" which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must have been a causal connection between the injury and the conduct complained of (*e.g.*, the injury must be fairly traceable to the defendant's conduct). Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

Plaintiff Failed to Allege Present or Imminent Injury

At the outset, the Oklahoma district court noted that to satisfy the three-part test for standing, a plaintiff must have "suffered a present injury or imminent injury, as opposed to a mere possibility, or even probability of future injury." *Morgan v. McCotter*, 365 F.3d 882, 888 (10th Cir. 2004). Here, the court found that plaintiff's complaint generally alleged that

the EPA engaged in wrongful conduct at every Superfund site by burying hazardous substances underground and that individuals living near Superfund sites would suffer injury from the EPA's failure to properly dispose of hazardous substances. Notably, however, plaintiff's complaint never alleged that he lived in or near any Superfund site or that he had suffered any type of injury or was threatened by hazardous substances from any specific site. Instead, plaintiff simply alleged that he was a citizen of the United States and a resident of Oklahoma, which the court found was insufficient to establish Article III Standing. The court also concluded that plaintiff lacked standing to raise claims on behalf of any third-party that may have been harmed living near any Superfund site.

Conclusion

Accordingly, the court dismissed the complaint for lack of standing since plaintiff failed to allege that he had suffered injury-in-fact.

Climate Change; Clean Air Act

D.C. Circuit Rejects Petition to Compel EPA to Decide Whether Greenhouse Gases from Vehicles Endanger Public Health

Commonwealth of Massachusetts v. EPA, No. 03-01361 (D.C. Cir. June 26, 2008)

On June 26, 2008, the U.S. Court of Appeals for the District of Columbia Circuit denied petitioners' writ of mandamus to compel the Environmental Protection Agency (EPA) to decide within 60 days whether greenhouse gas emissions from vehicles endanger the public health or welfare and therefore must be regulated under Section 202 of the Clean Air Act (CAA), 42 U.S.C. 7521(a)(1).

Background

In April 2007, the U.S. Supreme Court held that the EPA has the authority under the CAA to regulate carbon dioxide and other greenhouse gases from new motor vehicles. *See Massachusetts v. EPA*, 127 S. Ct. 1438 (2007). The Court concluded that the only way the EPA could avoid the obligation to regulate greenhouse gas emissions was by determining that greenhouse gases did not contribute to climate change or by providing some reasonable explanation as to why it has not exercised its discretion to determine whether they do.

Although more than a year had passed since the landmark *Massachusetts* decision, the EPA had still not taken any action in response to the ruling. Thus, on April 2, 2008, the Commonwealth of Massachusetts and numerous other states and environmental groups filed a petition with the D.C. Circuit seeking a writ of mandamus to compel the EPA to regulate greenhouse gas emission from motor vehicles pursuant to the *Massachusetts* ruling.

On June 26, 2008, a three-judge panel of the D.C. Circuit issued an order denying the petition without opinion. However, in a separate statement, Circuit Judge David S. Tatel concurred in part and dissented in part.

Mandamus Not Warranted

At the outset, Judge Tatel noted that for a court to determine whether an agency's inaction is unreasonable it must consider the six factors outlined in *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984) (TRAC). The Judge observed that several of the TRAC factors supported granting the mandamus. However, he concluded that mandamus was inappropriate, since neither the *Massachusetts* decision nor CAA § 202 imposed any specific deadline by which the EPA must make a determination as to whether any particular greenhouse gas endangered the public health or welfare. Moreover, Judge Tatel noted that petitioners could not point to any precedent in which the D.C. Circuit "granted mandamus based upon agency delay of a year or less."

Notwithstanding Judge Tatel's conclusion that mandamus was an inappropriate remedy in this case, he noted that since the EPA has indefinitely postponed deciding whether greenhouse gas emissions endanger the public health or welfare, he would have held the petitioners' motion in abeyance, requiring periodic updates from the EPA as an alternative to denying the petition outright.

Products Liability

Defenses

Johnson & Johnson and Ortho-McNeil Dismissed from Remicade Suit

Lopienski v. Centocor, Inc., No. 07-cv-04519, 2008 BL 135499 (D.N.J. June 25, 2008)

On June 25, 2008, the U.S. District Court for the District of New Jersey ruled that Johnson & Johnson (J&J) and Ortho-McNeil Pharmaceutical (Ortho) had been improperly joined as defendants in a products liability lawsuit concerning Centocor's rheumatoid arthritis drug Remicade. While acknowledging that both J&J and Ortho had ties to Remicade, the court dismissed the two companies from the suit because they were not "manufacturers" or "sellers" of the drug as defined by the applicable New Jersey Products Liability Act (NJPLA), N.J.S.A. 2A:58-C1, *et seq.*

Background

Beginning in August 2006, plaintiff Catherine M. Lopienski took Centocor's Remicade to treat her rheumatoid arthritis.

On August 9, 2007, Lopienski (an Ohio resident) brought suit in New Jersey state court against Centocor (a Pennsylvania corporation), J&J (a New Jersey corporation) and Ortho (a Delaware corporation whose principal place of business is in New Jersey), alleging that Remicade caused her to develop the fungal disease histoplasmosis and the blood condition pancytopenia. In her complaint, she asserted claims of strict liability under the NJPLA.

On September 20, 2007, defendants removed the case district court, arguing that Lopienski had fraudulently joined J&J and Ortho so as to prevent Centocor (the only non-New Jersey defendant) from removing the case to federal court. Federal jurisdiction exists under 28 U.S.C. § 1441(b) (diversity of citizenship) when no defendant is a citizen of the state in which the suit was brought. Both Ortho and Centocor are wholly-owned subsidiaries of J&J. Centocor developed and won approval to market Remicade before it became a wholly-owned subsidiary of J&J.

On October 19, 2007, Lopienski moved to remand the case back to New Jersey state court, arguing that J&J and Ortho were legitimate defendants.

New Jersey Products Liability Act

Since the New Jersey Products Liability Act applies only to product "manufacturers" and "sellers," the court assessed whether J&J and Ortho fit under those headings as defined by the Act. The New Jersey Products Liability Act defines "manufacturers" as "any person who designs, formulates, produces, creates, makes, packages, labels or constructs any product or component of a product." The Act further defines "product seller" as:

> any person who, in the course of business conducted for that purpose: sells; distributes; leases; installs; prepares; or assembles a manufacturer's product according to the manufacturer's plan, intention, design, specification or formulations; blends; packages; labels; markets; repairs; maintains or otherwise is involved in placing a product in the line of commerce.

J&J

Lopienski argued that since J&J was the parent company of Centocor and the listed manufacturer of Remicade, J&J should be deemed a manufacturer under the Act. Lopienski moreover claimed that J&J essentially ran Centocor by controlling its internal practices and policies. Additionally, Lopienski alleged that J&J conducted post-marketing surveillance on Remicade and commissioned studies for the purpose of modifying the drug's labels.

The court rejected Lopienski's argument based on J&J's parent company status as a "strained attempt at linking the two entities" and further held that Lopienski had not "alleged any facts that demonstrate that [J&J] assisted Centocor in any manufacturing functions or selling the product." Accordingly, the court ruled that J&J was not a proper defendant in the lawsuit.

Ortho

Lopienski claimed that Ortho was a proper defendant because it had "co-promoted Remicade, and co-sponsored clinical studies of the drug's safety and efficacy with Centocor prior to 2000, four years before [Lopienski] was prescribed Remicade." The court, however, found that this alleged nexus did not make Ortho a "manufacturer" or "seller" under the NJPLA.

Conclusion

Accordingly, J&J and Ortho were dismissed from the suit and plaintiff's motion to remand the action to New Jersey state court was denied.

Bloomberg News Daily Litigation Wrap Up

June 30 – July 4, 2008

Lawsuits/Pretrial

(July 1) *U.S. Asks Court to Direct UBS to Turn Over Accounts*

Prosecutorsasked a federal judge in Florida to issue a summons that would require Swiss bank UBS AG to turn over U.S. taxpayers' account information. The unprecedented step comes as a Justice Department investigation into the bank is heating up. Earlier this month, Bradley Birkenfeld, a former UBS private banker, pleaded guilty to conspiracy and said the bank helped wealthy U.S. citizens conceal $20 billion in assets and evade income tax laws. It is the first time the Justice Department has sought to serve a so-called "John Doe" summons on a foreign bank, said Justice Department spokesman Charles Miller. John DiCicco, deputy assistant attorney general in the Justice Department's tax division, said in a statement that the U.S. has been "working cooperatively" with UBS and the Swiss government to obtain the account information. "However, we are prepared to seek enforcement if that process is not successful," DiCicco said. Rohini Pragasam, a spokeswoman in New York for Zurich-based UBS, was not immediately available to comment. A "John Doe summons" would be served on UBS by the Internal Revenue Service, which uses the tactic when it is investigating possible tax fraud by people whose identities are unknown. The summons would direct UBS to produce records identifying U.S. taxpayers who have accounts with the bank in Switzerland who chose to have their accounts remain hidden from the IRS, the Justice Department said.

Birkenfeld said when he pleaded guilty on June 20 that he and his colleagues helped wealthy Americans hide money by telling them to put cash and jewelry in Swiss safety deposit boxes, buy artwork and jewels using offshore accounts and set up accounts in the names of others. Birkenfeld pleaded guilty to conspiring with his biggest client, California billionaire Igor Olenicoff, to help him evade $7.2 million in income taxes. Olenicoff, a real estate developer and chief executive officer of Olen Properties Corp., pleaded guilty December 12 to filing a false income tax return. He was sentenced to two years' probation and agreed to pay $52 million in back taxes, interest and penalties. "There is reason to suspect that, much like Olenicoff, many United States taxpayers used UBS's services to shelter their assets and, as a result, failed to file accurate tax returns," U.S. attorney R. Alexander Acosta in Miami said in a declaration filed with the court yesterday. IRS Commissioner Doug Shulman said in a statement that yesterday's court filing "sends a strong, unequivocal signal to anyone thinking of short-changing the nation and their fellow citizens by evading the tax laws." He said the secrecy surrounding offshore accounts "is rapidly fading."

(July 2) *Pfizer Must Defend Holder Suit Over Celebrex Claims*

Pfizer Inc., the world's biggest drugmaker, must defend a lawsuit accusing it of misleading investors about the prospects of two chronic pain relief drugs, Celebrex and Bextra. U.S. District Judge Laura Taylor Swain in New York yesterday allowed part of the lawsuit to go forward. The investors claimed Pfizer and its top officers deliberately hid or misrepresented the results of studies that suggested the drugs may have adverse cardiovascular effects. The complaint "alleges sufficiently that defendants knew or had access to information showing that their public statements were inaccurate," Swain said in a 34-page opinion. Celebrex was linked to heart risks at high doses in research released in November 2004, sending shares down as much as 7.6 percent on November 4, 2004. Bextra was among the drugs that a U.S. Food and Drug Administration reviewer identified as unsafe that month. Swain did not rule on the merits of the lawsuit and said only that the investors who sued had made enough allegations for some of the claims to go forward. "The main federal securities fraud claim survives," Geoffrey Jarvis, a lawyer for the investors, said. The remaining claims are "without merit," Pfizer spokesman Ray Kerins said in a statement. The case is *In re Pfizer IncSecurities Litig.*, No. 04-cv-09866, U.S. District Court, Southern District of New York (Manhattan).

(July 3) Apple Inc. was sued by two shareholders claiming Chief Executive Officer Steve Jobs and other managers backdated stock-option awards to maximize their personal profit. The complaint was filed in federal court in San Jose, California, by shareholder Martin Vogel, who had a similar case dismissed last year by U.S. District Judge Jeremy Fogel. Vogel and co-plaintiff Kenneth Mahoney said in the new complaint, again assigned to Fogel, that Apple executives hid the cost of the backdated options from shareholders, leading the company to file false financial statements. Vogel seeks class-action, or group, status to represent other investors affected by the backdating. The executives "granted themselves in-the-money options while falsifying company records and publicly filed documents to create the appearance that the options had been granted at the market price on an earlier date," according to the complaint filed June 27. The claims mirror allegations made by the U.S. Securities and Exchange Commission in a lawsuit against former Apple General Counsel Nancy Heinen, who is also named as a defendant in the shareholder suit. The SEC case is scheduled for trial next year. Apple spokeswoman Susan Lundgren declined to comment yesterday on the investor suit. Patrice Bishop, a lawyer representing shareholders, did not return a call seeking comment. Apple, maker of the iPod and iPhone music-and-video players, said in 2006 that it backdated 6,428 stock-option grants issued from 1997 to 2002. The company conducted an internal investigation, finding no misconduct by Jobs, who recommended favorable dates on some option grants other than his own. The company recorded $84 million in charges to correct its accounting. The case is *Vogel v. Apple Inc.*, No. 08-cv-03123, U.S. District Court, Northern District of California (San Jose).

Trials/Appeals

(July 2) *Wal-Mart Faces $2 Billion Labor Law Trial, Judge Says*

Wal-Mart Stores Inc. broke Minnesota labor laws, a state judge ruled, handing the world's largest retailer its third-straight defeat in a wage-class action trial and the possibility a jury may order it to pay $2 billion. The company required hourly employees to work off-the-clock during training and denied full rest or meal breaks in violation of state wage and hour laws, Hastings, Minnesota, District Judge Robert King Jr. held yesterday following a non-jury trial. King ruled Wal-Mart broke labor laws more than 2 million times and ordered the company to give employees $6.5 million in back pay. "Wal-Mart's failure to compensate plaintiffs was willful," the judge wrote in his 151-page decision. "Wal-Mart was on notice from numerous sources of the wage and hour violations at issue and failed to correct the problem." The lawsuit is one of more than 70 cases, including class actions, or group suits, in which Wal-Mart has been accused of wage-law violations. The retailer lost a $78 million jury verdict in Pennsylvania in 2006 over rest breaks and unpaid work and a $172 million verdict in California in 2005 over meal breaks. Both verdicts have been appealed. King's decision means Wal-Mart will face a second trial in Minnesota state court, this time before a jury. Minnesota labor law allows a fine of up to $1,000 per violation of wage and hour rules. With 2 million violations, that may total as much as $2 billion. At the October 20 trial, jurors will determine how much each violation is worth, and also consider punitive damages. Wal-Mart, based in Bentonville, Arkansas, is considering an appeal, said company

spokeswoman Daphne Moore. "Our policies are to pay every associate for every hour worked and to make rest and meal breaks available," Moore said in an e-mailed statement. "Any manager who violates these policies is subject to discipline." King "found that Wal-Mart is lacking in many respects," workers' attorney Justin Perl said in an interview. "Not only does this help our individual clients, but it sends a message to Wal-Mart that there are consequences for willfully depriving its hourly workers of their contractual and statutory rights." The company also faces class-action suits in state courts in New Jersey, Washington and Missouri. It fought off class certification in multiple states including New York, Illinois and Maryland. Denial of class-action status means individuals must spend more to sue the company on their own. Wal-Mart won a federal court ruling June 20 denying class status to workers in four states who claimed the company denied rest breaks and manipulated time cards to "shave" their pay. The ruling was likely to kill about 35 such actions filed in federal court, according to plaintiffs' lawyers. The case is *Braun v. Wal-Mart Inc.*, No. 19-CO-01-9790, District Court, Dakota County, First Judicial District, Minnesota (Hastings).

(July 3) *Citigroup Loses Appeal to Bar Police Reports in Parmalat Trial*

Citigroup Inc.lost an appeal to bar introduction of documents it considers prejudicial at a trial over whether the bank aided looting by corrupt insiders at Parmalat SA, the Italian dairy company that collapsed in 2003. The New Jersey Appellate Division ruled that Citigroup, the largest U.S. bank by assets, could not appeal a June 24 order letting Parmalat Chief Executive OfficerEnrico Bondi use Italian police reports of witness statements about looting. Citigroup argued in court papers that the reports were not proper evidence because they are "blatant hearsay." Superior Court Judge Jonathan Harris in Hackensack, New Jersey, ruled that Bondi's lawyers could show the documents to jurors, who began hearing the case on May 15. Andrea Hurst, a spokeswoman for New York-based Citigroup, did not return a call seeking comment. Citigroup was a banker for Parmalat, which emerged from bankruptcy and returned to the Italian stock market in 2005 after a two-year reorganization under Bondi. Parmalat is seeking $2 billion in damages. Jurors also are hearing a countersuit by Citigroup, which claims it lost $699 million because of Parmalat's fraud. Citigroup seeks $369 million from Parmalat, after recovering $330 million in other proceedings. The case is *Bondi v. Citigroup*, No. L-10902-04, New Jersey Superior Court (Hackensack).

Verdicts/Settlements

(June 30) *Bear Stearns Wins Trial Over Hedge Fund's Collapse*

Bear Stearns Cos.won a trial over claims by investors seeking $141 million for losses they suffered following the collapse of Manhattan Investment Fund Ltd., a hedge fund client of the bank's prime brokerage in the 1990s. Bear Stearns, a unit of JPMorgan Chase & Co., shouldn't be held liable for failing to discover fraud at the hedge fund, which filed for bankruptcy in 2000, an eight-person jury said June 27 in Manhattanfederal court. The fund's manager, Michael Berger, pleaded guilty the same year to charges that he lied about the fund's losses from shorting Internet stocks. A court ruling during Manhattan Investment Fund's bankruptcy proceedings had imposed on prime brokers a burden of proof to show they acted in good faith when dealing with fraudulent clients, said Howard Schiffman, a lawyer representing the Securities Industry and Financial Markets Association, or SIFMA. Bear's victory leaves open the question of what acts prime brokers need to take to prove they meet a good faith standard. "We've learned in the securities industry that processors need to function quickly and efficiently," Schiffman said, referring to prime brokers. "To try and make them an investigator is a mistake." The trial may establish "fact patterns" that future courts can use to establish guidelines for primer brokers in similar situations, Schiffman said. The verdict resolves eight years of legal wrangling since Manhattan Investment filed for bankruptcy in 2000. A New York bankruptcy judge ruled in February 2007 that Bear should pay at least $125.1 million to the collapsed fund. After an appeal, U.S. District JudgeNaomi Buchwald in Manhattan determined a trial was necessary to decide whether Bear acted "in good faith" when it accepted money from the fund. The jury found Bear Stearns was diligent with respect to its inquiries into the British Virgin Islands-based fund for all of the relevant time period, from December 9, 1998 to December 21, 1999. SIFMA, a trade association for more than 650 banks and asset managers, filed a brief in the case, cautioning the judge that if the jury upheld the bankruptcy court's decision and ruled against Bear, it would "significantly disrupt current precedent." Existing practices allow prime brokers to process trades efficiently, the group said. There is a "firmly established principle that a securities clearing firm and prime broker has no duty to inquire into the honesty and finances of its accountholders," the association said in its brief. Helen Gredd, a trustee for Manhattan Fund's bankruptcy estate, sued Bear Stearns on behalf of former investors, alleging it failed to probe fraud as the fund lost $400 million. Bear Stearns, threatened with bankruptcy after two offshore hedge funds collapsed, was bought by New York-based JPMorgan on June 2. Bear Stearns made $2.4 million in 3 1/2 years working as Manhattan Investment Fund's prime broker before notifying the Securities and Exchange Commission in 1999 of suspected fraud. During the nine-day trial, a Bear Stearns executive testified he'd learned at a December 1998 cocktail party that the fund was reporting returns of 20 percent to clients, while it had a $190 million loss in its account with Bear Stearns. The executive, Fred Schilling, the former head of prime brokerage sales, said he considered the discrepancy, but didn't notify regulators about it until a year later because he was told the fund had money with other prime brokers. Witnesses for Gredd testified Bear Stearns should have seen signs the fund didn't have other prime brokers, such as the absence of misdirected trades. They presented testimony from several third parties who said Schilling had expressed doubts about Berger's claims that

he made large gains shorting a rising tide of Internet stocks in 1998. Lawyers for Bear Stearns and Gredd didn't return calls seeking comment. The case is *Bear Stearns v. Gredd*, No. 07-cv-02511, U.S. District Court, Southern District of New York (Manhattan).

(July 3) *UnitedHealth Cuts Forecast, Settles Class-Action Suit*

UnitedHealth Group Inc., the largest U.S. health insurer, cut its full-year earnings forecast and agreed to pay $895 million to settle a federal class-action lawsuit related to stock options given to company executives. Full-year adjusted earnings per share are now expected to be $2.95 to $3.05, the Minnetonka, Minnesota-based company said in a statement yesterday. In April, the insurer had cut the forecast to $3.55 to $3.60 a share because of declining sales. UnitedHealth said yesterday that competitive pressures continued to weigh on gross margins in the second quarter. The forecast does not include any impact from the litigation settlement, because the timing of the payment is not known, UnitedHealth said. The proposed settlement is subject to the approval of the insurer's board, as well as the board of lead plaintiff California Public Employee's Retirement System and the court.

Litigation Departments

(June 30) *Oracle Lawyers May Face Sanctions in Investor Suit, Judge Says*

Lawyers for Oracle Corp., the world's second-largest software maker, may face sanctions for alleged intentional destruction or concealment of evidence in a shareholder lawsuit, a federal judge said. U.S. District Judge Susan Illston in San Francisco said she may order evidentiary sanctions in a securities fraud suit against the company and Chief Executive Officer Larry Ellison. She also asked lawyers on both sides to weigh in on whether imposing such sanctions prevents her from throwing out all or part of the case. "Evidentiary sanctions may be appropriate," Illston said in a June 26 order. Lawyers for shareholders claiming Ellison sold $900 million in stock on inside information and misled investors alleged that crucial emails and documents relating to the chief executive's conduct were destroyed or concealed. Oracle's attorneys said they have turned over 2 million pages of documents and called the claims "baseless." Mark Solomon, an attorney for the investors, and Patrick Gibb, Oracle's attorney, did not return voice-mail messages June 27. Sanctions may include fines or orders beneficial to the shareholders, such as establishing facts siding with investors or instructing the jury about the missing evidence, said Peter Henning, a former federal prosecutor and law professor at Wayne State University Law School in Detroit. Illston turned down the shareholders' request to rule in their favor because of the alleged evidence destruction. Her order may suggest that, while she believes Oracle's attorneys should face lesser sanctions, she's leaning toward granting part of Oracle's request to throw out claims in the lawsuit. "She may leave one claim alive, whatever is the best case, and let them try to establish it," Henning said in a telephone interview June 27. "Narrowing the case could encourage a settlement." The case is *Nursing Home Pension Fund v Oracle Corp.*, No, 01-cv-00988, U.S. District Court, Northern District of California (San Francisco).

On the Docket

(July 1) *UnitedHealth Seeks Dismissal of Investors' Backdating Suit*

Lawyers for UnitedHealth Group Inc. will ask a federal judge in Minnesota July 3 to dismiss a class-action lawsuit claiming the company illegally failed to disclose stock-option backdating to investors. The California Public Employees' Retirement System, the lead plaintiff for the class, said it lost about $23 million as a result of alleged securities law violations. The shareholders group includes those who bought or acquired UnitedHealth stock from Jan. 20, 2005, to May 17, 2006, as well as those who held shares during the company's 2002, 2003, 2004, 2005 and 2006 proxy solicitations. The class also includes shareholders who acquired UnitedHealth stock in its 2005 merger with PacifiCare. The case is *In Re UnitedHealth Group Inc. PSLRA Litig.*, No. 06-cv-01691, U.S. District Court, District of Minnesota (Minneapolis).

*Litigation News by Elizabeth Amon, with reporting by Ladka Bauerova, Stephanie Bodoni, Caroline Byrne, Laurel Brubaker Calkins, Cynthia Cotts, Laurence Viele Davidson, Ryan J. Donmoyer, Jef Feeley, Margaret Cronin Fisk, Karen Freifeld, David Glovin, Karen Gullo, Andrew M. Harris, Patricia Hurtado, Tiffany Kary, Carlyn Kolker, Bomi Lim, Christopher Martin, Karin Matussek, Michael McDonald, Phil Milford, Matthew Newman, Lars Paulsson, Edvard Pettersson, Alan Purkiss, Joel Rosenblatt, Bruce Rule, Robert Schmidt, Joe Schneider, Bob Van Voris, Gregory Viscusi, David Voreacos and Thom Weidlich. Editors: Cécile Daurat, Steve Farr, Glenn Holdcraft and David E. Rovella

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