



Featured Articles



Levick Strategic Communications protects companies during the highest-stakes crises. Among numerous awards, Levick was named **Litigation Communications Firm of the Year** by PR News.



Offering expertise in product testing, scientific evaluation and forensic analysis for over 40 years.

DRI Resources



DRI Blog | FTD Archives | Legal News

Join the DRI Community



In Strictly Speaking

The New Canada Consumer Products Safety Act

New York Places Burden On Design Defect Defendant To Show The Infeasibility Of An Alternative Design On Summary Judgment

Notes from the Chair

From the Blog Vice-Chair

Notes from the Editor

New International Standard on Consumer Product Safety

AT&T Mobility v. Concepcion: Death Knell of the Class Action?

Seminar Information

The New Canada Consumer Products Safety Act

by *Nicholas Kluge*



The *Canada Consumer Products Safety Act* (the "CCPSA") came into force on June 20, 2011, and radically alters the landscape of consumer product regulation in Canada. It

replaced the *Hazardous Products Act*, legislation from the 1960s that was widely considered out of date. This new legislation gives the federal government the power, for the first time, to order recalls and take other measures that have long been available to consumer product regulators in other western countries. It also gives rise to onerous adverse event reporting requirements and gives the regulator the ability to disclose confidential business information in some circumstances. The CCPSA is thus a major development for anyone doing business in Canada.

What the CCPSA Regulates

The CCPSA regulates "consumer products", defined as:

all products, including components, parts or accessories, that may reasonably be expected to be obtained by an individual to be used for non-commercial purposes, including for domestic, recreational and sports purposes, and includes its packaging.


Under this definition, products intended for professional use but that could be expected to be obtained by an individual for non-commercial purposes may be caught under the Act. Certain categories of products that would otherwise fall under this definition, but which are already regulated under other legislation, are specifically excluded from the ambit of the CCPSA. These excluded products include explosives, ammunition and firearms, cosmetics, medical devices, drugs, "natural health products", foods, pest control products, vessels and vehicles, animal feeds, and fertilizers.

What the CCPSA Prohibits



Committee Chair
John F. Kuppens
Nelson Mullins
(803) 255-9482

 john.kuppens@nelsonmullins.com

 Committee Vice Chair
Charles A. Stewart, III
Bradley Arant Boult Cummings
(334) 956-7608
cstewart@babco.com

 Newsletter Editor
Joseph D. Cohen
Porter & Hedges
(713) 226-6628
jcohen@porterhedges.com

[Click to view entire Leadership](#)

Seminar



[Nursing Home/ ALF Litigation Seminar](#)

**September 15-16, 2011
Boston, Massachusetts**

DRI Publications



**Product Liability
Cases and the
Duty to Warn**

The CCPSA prohibits the manufacture, importation, advertising, or sale of any consumer product that poses – or ought to have been known to pose – a "danger to human health or safety", defined as:

"any unreasonable hazard — existing or potential — that is posed by a consumer product during or as a result of its normal or foreseeable use and that may reasonably be expected to cause the death of an individual exposed to it or have an adverse effect on that individual's health — including an injury — whether or not the death or adverse effect occurs immediately after the exposure to the hazard, and includes any exposure to a consumer product that may reasonably be expected to have a chronic adverse effect on human health".

In guidance documents Health Canada, the federal government agency with responsibility for enforcing the CCPSA, has taken the position that "normal or foreseeable use" includes not only the primary, ordinary or intended use of a consumer product, but also "reasonably foreseeable" misuses. It is important to note that it is the potential to cause death, injury, or adverse health effects that attract the provisions of the Act. No actual harm need occur.

The CCPSA also prohibits advertisement or sale of consumer products that are already subject to a recall or other prohibitive order, or that are advertised, packaged or sold in a manner that is false, misleading or deceptive and that may be expected to create an erroneous impression regarding safety or certification of safety.

Who is subject to the CCPSA?

The CCPSA covers all parties in the chain of distribution of a consumer product distributed in Canada, from the manufacturer to the final retail seller (or person who gives the item away – no actual sale is necessary). A physical or legal presence in Canada is not required to be subject to the Act's provisions – a person need only have been part of the distribution chain of a product that was eventually distributed in Canada. The CCPSA does, however, specifically exclude advertising agencies, raw material suppliers, certification bodies and testing laboratories from its provisions.

Mandatory Incident Reporting

The CPSA incident reporting requirements have

provoked a great deal of controversy. The statute requires manufacturers, importers and sellers of consumer products to report to Health Canada all information they have regarding any "incident", anywhere in the world, relating to their consumer products within 2 days after becoming aware of an incident. "Incident" is very broadly defined to include: (a) an occurrence that resulted or may reasonably have been expected to result in an individual's death or serious adverse health effects; (b) discovery of a product defect or characteristic that may reasonably be expected to result in death or in serious adverse health effects; (c) incorrect or insufficient labeling of instructional information that may reasonably be expected to result in death or serious adverse health effects; or (d) a recall or other measure initiated for human health or safety reasons by a foreign or domestic government entity.

Furthermore, within 10 days of providing the first incident report to Health Canada, manufacturers and importers (but not retailers) must provide all the information in their control regarding the incident, detail any other products that they manufacture or import that could be involved in a similar incident, and detail any measures they propose be taken to alleviate potential dangers with respect to those products.

Until the expectations of Health Canada as to what is reportable are better understood, it is likely best to err on the side of caution and advise clients to report any incident that might fall within the definition. As experience with reports under the Act accumulates, clarity will develop as to the kind of occurrences Health Canada expects to warrant a CCPSA incident report.

Disclosure of Information

Another aspect of the CCPSA that has caused great concern to stakeholders is the ability of Health Canada to disclose confidential business information to foreign entities, or the general public, in some circumstances.

In the course of a person meeting its incident reporting obligations, Health Canada anticipates that confidential business information ("CBI") may on occasion be included in reports. To safeguard the confidentiality of that information, the reporter is to indicate at the time the report is provided to Health Canada that the information is confidential and ought not to be disclosed without prior consent.

Disclosure of CBI by Health Canada may occur without consent, however, in several different scenarios. Section 16 of the CCPSA permits disclosure of CBI to foreign governments and

persons where the proposed recipients of the CBI have signed an agreement to keep it confidential. Section 17 allows disclosure to anyone if a consumer product poses a "serious and imminent danger to human health or safety or the environment and if the disclosure of the information is essential". In both instances, disclosure may occur without prior warning to the person who provided the CBI. In addition, it is possible that CBI may be disclosed to the public as a result of Access to Information (the Canadian equivalent of Freedom of Information) requests.

Penalties

Criminal penalties for breaching the CCPSA – which can be brought against all employees, individuals as well as officers, and directors who participated in an offence – include fines of up to \$5,000,000 and/or a prison term of up to two years. Due diligence is a defense to these criminal charges, provided the person did not act knowingly or recklessly.

Violations of administrative orders made under the CCPSA are also subject to non-criminal monetary penalties, to which due diligence not a defense. In contrast to criminal sanctions, officers and directors are subject to personal liability for violations by employees in an organization who breached the Act while acting in the scope of their authority and the history of an organization's compliance, and the risk of danger from the breach, will likely be used to determine the appropriate administrative penalty, which will range from \$1,000 for minor incidents to \$25,000 for the most serious.

Conclusion

This article only scratches the surface of the sweeping changes the CCPSA brings to consumer product regulation in Canada. There are many important aspects of the CCPSA – record retention requirements, powers of inspectors to enforce the Act, and recall and seizure of non-compliant goods – that cannot be addressed in the small space available here. Should your clients do business in Canada, and particularly if they ship to or distribute any goods in the Canadian market, you should seriously consider consulting local counsel about the implications of the CCPSA for your clients.

Nicholas Kluge is a partner in *Gowlings'* Toronto office, practicing in the area of advocacy. His practice includes a wide variety of commercial litigation matters, with particular specialty in class action litigation defense and product liability. Nicholas has significant class action defense experience and has worked for

class action defendants from varied industries, including the consumer product, pharmaceutical, mining, pension, natural health product, securities and financial services sectors. Nicholas also carries on a general commercial litigation practice.

New York Places Burden On Design Defect Defendant To Show The Infeasibility Of An Alternative Design On Summary Judgment

by Paul V. Majkowski



In *Chow v. Reckitt & Colman, Inc.*, No. 81, 2011 N.Y. LEXIS 754 (N.Y. May 10, 2011), rev'g 69 A.D.2d 413 (N.Y. App. Div. First Dep't 2010), the New York Court of Appeals held that

in moving for summary judgment to dismiss a design defect claim based on the inherently known danger of a product, "a defendant must demonstrate that its product is reasonably safe for its intended use; that is, the utility of the product outweighs its inherent danger." *Id.* at **2. This burden includes demonstrating "through expert testimony that it was not feasible to design a safer, similarly effective and reasonably priced alternative product." *Id.* at **8. The product at issue in this case was a drain cleaner composed of 100% sodium hydroxide, *i.e.*, lye; the plaintiff suffered serious burns and loss of eyesight when the material splashed back onto his face. The result is seemingly anomalous insofar as the plaintiff has the burden to establish the purported design defect, and the plaintiff's expert's affidavit in opposition to summary judgment was deficient.

As described in a concurring opinion by Court of Appeals Judge Robert S. Smith, however, this result is the effect of the governing summary judgment standard under New York law. The New York rule on summary judgment places the burden on the movant to "make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" and requires the denial of the motion where this prima facie showing is not made "regardless of the sufficiency of the opposing papers." *Id.* at **10-11 (Smith, J., concurring) (quoting *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986)). Justice Smith notes that a different result would likely obtain under the federal courts' *Celotex* rule under which the moving party's burden to show the absence of a material issue of fact on matters for which the non-moving party has the burden of proof may be satisfied by "pointing out to the district court . . . that there is an absence of evidence to support

the nonmoving party's case." *Id.* at **11-12 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). (Notably, Judge Smith does not urge adoption of the *Celotex* rule, but merely "alerts" future design defect movants as to their burden.)

Apart from the cautionary reminder regarding New York summary judgment practice, this decision raises some important issues and implications. First, despite Judge Smith's remark that the defendant's evidentiary showing might not be "hard to meet." *id.* at **11, it is not difficult to imagine a summary judgment motion becoming extremely complex (and voluminous), for example, in a case involving an allegedly toxic product for which the showing might require testimony of multiple scientific experts. As a rule of thumb, the more complex the motion for summary judgment, the less likely it is to be granted. Second, in a similar vein, the introduction of such expert testimony inevitably gives rise to the probability of denial of a motion based on competing expert testimony. Third, the types of proofs required seem likely to encompass reliance on governmental or regulatory standards, which create the possibility of bad precedent by the endorsement of such standards by defendants. This can be a double-edged sword, as while the governmental approval of a product might show its safety, reliance might endorse unhelpful governmental regulatory standards that are predicated on risk assessments that do not equate to a finding of legal causation. Fourth, one of the takeaways from this ruling rearticulating the summary judgment standard under New York law and its distinction from the federal standard is the importance for a defendant to consider any options for removal to federal court of a product liability action commenced in New York State court.

Factual Background

The claims in the *Chow* case arise from the plaintiff's use of a drain cleaning product sold as "Lewis Red Devil Lye." *Chow*, 2011 N.Y. LEXIS 754, **1. Plaintiff was injured while using the product during his employment at a Manhattan restaurant to treat a clogged floor drain. Although he was unable to read English, he was aware of the proper procedure for handling and using the product by having observed others do so. The container provided the direction to spoon one tablespoon of the crystals into the clogged drain and then to wait for 30 minutes to check if the drain is clear, which can be done by "adding several cups of COLD water." The packaging also advised the user to use protective eyewear and rubber gloves, and warnings to "NEVER POUR LYE DIRECTLY FROM CONTAINER

INTO DRAIN" and to use a plastic spoon to dispense the liquids and to avoid aluminum utensils. On the occasion at issue, plaintiff placed three spoonfuls of the product into an aluminum container and added about three cups of cold water to the container. Plaintiff poured the solution down the floor drain from waist height, and immediately after his doing so, the solution "splashed back out of the drain and onto [his] face," causing serious burns and damage (loss of sight) to his left eye. *Id.* at **2-4.

Procedural History

Plaintiff, and his wife, brought an action sounding in product liability. The trial court granted defendants' motion for summary judgment on all claims, encompassing both the design defect and failure to warn theories asserted by plaintiff. On the issue of design defect, defendants did not rely upon expert testimony, but rather on an attorney's affirmation asserting that the product is inherently dangerous and its dangers were well known. In opposition, plaintiff submitted the affidavit of a chemist and chemical engineer, who opined that the Red Devil Lye had a propensity to cause splashback and that there were safer alternatives to the product.

On appeal, a divided Appellate Division, First Department, affirmed the grant of summary judgment, with two justices dissenting to the extent that summary judgment should have been denied as to plaintiff's design defect claim. The majority of the Appellate Division found that plaintiff's expert 's affidavit was "insufficient to raise a triable issue of fact because it [did] not set forth the foundation for his conclusion that his suggested alternatives are feasible." *Chow*, 69 A.D.2d at 415. As the majority critically observed of the expert's affidavit:

[He] also opines that a safer alternative to the product can be created by diluting it to a three to five percent sodium hydroxide composition. How he arrived at these percentages is unexplained. Also, without citing a basis for his opinion, Rosen simply concludes that his recommended dilution of the product would provide drain cleaning power strong enough to open clogged drains although it would take "somewhat longer to do the job." Similarly unsupported is Rosen's postulation that bottling lye in a water-based solution would not change its chemical composition or render it ineffective.

Id. The majority noted that "in considering the feasibility of a safer alternative design, 'it must be recognized that two differently designed products that . . . are generally similar in function, may nonetheless yield results so different in quality as to make it impossible to characterize the design of the safer product as a feasible alternative to

the design of the more hazardous product.'" *Id.* (citations omitted).

The case proceeded to the Court of Appeals on an appeal of the design defect ruling (plaintiff did not further appeal the denial of the failure to warn claims).

Court of Appeals

The Court of Appeals reversed and reinstated the defective design claim, concluding that "in accordance with settled summary judgment and products liability principles, that a defendant moving for summary judgment in a defective design case must do more than state, in categorical language in an attorney's affirmation, that its product is inherently dangerous and that its dangers are well known. Rather, to be entitled to summary judgment in such a case, a defendant must demonstrate that its product is reasonably safe for its intended use; that is, the utility of the product outweighs its inherent danger." *Chow*, 2011 N.Y. Lexis 754, at **1-2.

Contrary to the Appellate Division's criticism of plaintiff's expert submission, the Court of Appeals concluded that it was defendants' submission on summary judgment that was insufficient:

In support of their motion here, however, defendants state only, in effect, that lye is what it is, that everyone knows lye is dangerous, and that any variation in RDL's composition would, by necessity, result in a different product because such an altered product would not be 100% sodium hydroxide. While it is true that lye is dangerous and that this product is lye, a mere statement in an attorney's affirmation in support of a motion for summary judgment to that effect does not result in a shift of the burden to plaintiff to then explain how RDL could be made safer. At this stage, defendants cannot rely simply on the fact that their product is what they say it is and that everyone knows that lye is dangerous; that only begs the question at the heart of the merits of the defective design claim: knowing how dangerous lye is, was it reasonable for defendants to place it into the stream of commerce as a drain cleaning product for use by a layperson? Defendants offered no answer to this question, and thus, did not demonstrate their entitlement to judgment as a matter of law.

Id. at **5-6. Consequently, on a motion for summary judgment on a design defect claim, a defendant is required to demonstrate "through expert testimony that it was not feasible to design a safer, similarly effective and reasonably priced alternative product." *Id.* at **8.

In a concurring opinion, Judge Smith explained

that the court's "decision is the result not of the merit of plaintiff's case, but of a feature of New York procedural law," and, indeed, "[i]f a record identical to the present one were developed at trial, plaintiff would fail to meet his burden of proof and the court would be required to direct a verdict for defendants." *Id.* at **9-10 (Smith, J., concurring). Yet, as discussed above, under the New York summary judgment standard, "the inadequacy of plaintiff's expert's affidavit is irrelevant." *Id.* at **11.

Conclusions

Initially, New York practitioners, and those in other jurisdictions applying similar summary judgment standards, need to be mindful of this required proof in moving for summary judgment. But, in addition to the practical guidance, the *Chow* decision raises a number of significant issues and implications, some of which might affect overall case strategy and whether a defendant is best served by moving for summary judgment. A summary judgment motion to dismiss a design defect claim could become exceedingly complex and voluminous, for example, in a case involving an allegedly toxic product for which the showing might require testimony of multiple scientific experts. Such complex motions face a good possibility of not being granted, particularly where they involve competing expert testimony then offered by plaintiffs. Another potential downside is that a defendant's proof might encompass reliance on governmental or regulatory standards, which can be a double-edged sword. Governmental approval of a product might show its reasonable safety, but introducing governmental regulatory standards that are predicated on risk assessments and are not the equivalent of legal causation can be problematic. Finally, the unhelpful difference of New York summary judgment standard from the federal standard reinforces the importance for a defendant to consider any options for removal to federal court of a product liability action commenced in New York State court.

Paul V. Majkowski is a partner with Rivkin Radler LLP in Uniondale, New York. Mr. Majkowski litigates in the Firm's Product Liability & Toxic Tort practice group. He may be contacted at paul.majkowski@rivkin.com

Paul is also featured as one of this month's PLC Members in the Community. Be sure to read on to learn about how Paul gives of his time to help make this world a better place.

Notes from the Chair

by John F. Kuppens



Friends,

We had a very successful steering committee fly-in meeting in Chicago, and I want to thank our committee leaders for their time, energy, and ideas. 2011 has been a great year for our committee so far, and we are now in the midst of planning the 2012 PLC Conference, which will be held April 11-13, 2012, at The Venetian in Las Vegas. Nick Pappas is the Program Chair, and Anne Talcott is the Program Vice Chair. Please contact them if you are interested in being involved or have suggestions. Marketing Liaisons Chip Adams and Clint Fletcher can also use your help marketing the program.

Our stand-alone Strictly Automotive seminar will be held in Dearborn, Michigan in September 15-16, 2011. Roman Lifson is the program chair, Jeff Curran is vice chair, and Jack Laffey is the Law Institute liaison. Please plan to attend.

The **DRI Annual Meeting**, which will be held at the Marriott Wardman Park Hotel in **Washington, D.C. on October 26-30, 2011**, is going to be excellent. Here is a sample of the stellar educational programming:

- Supreme Court Cases in 2011
- The Over Criminalization of Business Conduct
- The 21st Century Juror
- "Miranda Warning" of Genetic Mapping
- Distracted Nation: Modern Technology
- Our Generational Divide
- Political/Wiki Leaks
- Expanding Threats to Judicial Independence

There are also numerous networking opportunities throughout the Annual Meeting week to compliment the program. Connecting with old and new friends has never been easier!

Take advantage of the \$200 discount and register for the Annual Meeting by September 28!

Finally, I want to extend my personal gratitude to Jennifer Cout, Lynn Conneen, Lisa Sykes, Katie Malinich, Beth DeMars, Charlene Graczyk, and the entire DRI staff for their excellent work. They make us all look good, and are vital to our success. Thank you all.

John F. Kuppens is a partner in Nelson Mullins Riley & Scarborough LLP's Columbia office. He has extensive experience in product liability counseling and litigation, pharmaceutical and medical device, toxic tort, premises liability, business litigation, and procurement.

From the Blog Vice-Chair

From the Blog Vice-Chair

by Michael R. Walker



One of the main goals of the DRI blog in the upcoming months will be to have a member of each SLG act as a blog liaison.

The DRI blog is great way to get your name out there in the public domain. It's also an easy way to get involved in DRI. As an SLG blog liaison, you would be asked to blog about recent news that is specific to your SLG practice area. It's really a quick and easy way to get involved.

In the next couple of months we will be asking the SLG chairs for the names of their SLG blog liaisons. If you are reading this and think you might be interested in acting as your SLG's blog liaison, please let your SLG chair or vice-chair know. Of course, if you have any questions regarding what the position will entail, you can contact myself, or Jobby Mathew at jmathew@hiltgenbrewer.com.

Michael R. Walker is an associate with the law firm of Gallagher, Walker, Bianco & Plataras, LLP in Mineola, New York where he practices primarily in products liability, medical malpractice, premises and automobile liability and general insurance defense litigation. Michael currently serves as the Products Liability Committee Blog Vice Chair. Michael can be reached at mwalker@gwbplaw.com.

From the Editor

Notes from the Editor

by Joseph D. Cohen



Well, this is it—my final column as the editor of *Strictly Speaking*. Truth be told, Josh Abramson is actually the editor at this point. He was just kind enough to let me have one final column.

I have really enjoyed being the editor of our Committee's newsletter. Over the past two years, this position has enabled me to meet and interact with so many new people around the country and even beyond. I have made new business contacts, new friends, and I've even had the opportunity to work on cases with folks who I met through DRI while serving in this position. So, at the risk of sounding like an Academy Awards speech, I truly need to thank a few people. Thanks to Cynthia Arends for getting me involved as her vice-editor (okay, so I was the only one who raised his hand, but I appreciate it nonetheless). I also want to thank John Kuppens and Chuck Stewart for appointing me as editor and for their support during my tenure. Finally, I cannot thank Lynn Conneen, Jennifer Cout and Char Graczyk of DRI enough. Lynn and Jennifer, despite their incredibly busy schedules are incredible resources for anything I ever seem to need from DRI; they provide amazing support. Char makes sure all the newsletters for all the committees keep moving like clockwork. I look forward to working with all of you in other capacities in the future.

I hope that those of you who are new to our committee will find your experience as fulfilling as I have and that those of you who are interested in getting involved will do so. We are lucky enough to have a chair and vice-chair who are committed to involving those who want to get involved.

Joe Cohen is a trial partner at the Houston firm of Porter Hedges LLP where he concentrates in products liability, pharmaceutical litigation, catastrophic injury and wrongful death actions and commercial litigation. In addition to serving as the Editor of *Strictly Speaking* and as the Chair of the E-Discovery SLG, Joe also serves on the Drug & Medical Device seminar planning committee and on the Technology Committee steering committee. Joe can be reached at jcohen@porterhedges.com or (713) 226-6628.

PLC Members in the Community



Stu Goldberg

Stu Goldberg was invited to spend four full days accompanying Congresswoman Marcy Kaptur to Israel last February as a representative of the Toledo Jewish Federation. Along with Congresswoman Kaptur (and Amy Kaplan of the

Cleveland Jewish Federation), Stu visited with Ron Dermer, Prime Minister Netanyahu's chief advisor, Gilad Erdan, Israel's Environmental Minister, and Dan Tirza, the architect of Israel's security fence. They explored several agricultural research and development programs, cross-cultural educational programs and two hospitals, one of which treats congenital heart defects in babies from Israel, Gaza and the West Bank; met with representatives of high tech companies headquartered in Israel; visited the archaeological sites at Kaesaria, Bet She'An and the Ancient City of David; and attended the opening of an international conference for community change held at Oranim College.

Stu is an owner of the firm of Eastman & Smith Ltd, and was sworn in as president of the Toledo Bar Association on June 14, 2011. Stu is a member of DRI and is on its Product Liability Committee.



Scotty Welch

Scotty Welch, a Shareholder in the Jackson, Mississippi, office of Baker, Donelson, Berman, Caldwell & Berkowitz, P.C., is a member of the Board of Directors of Harbor House of Jackson, Mississippi, a not-for-profit rehabilitation center, where, although not serving as counsel, his legal training comes in handy when the board deals with personnel issues, grants and, recently, a contract with the Veterans Administration and a professional certification process.

Scotty was formerly a member of the Mississippi Supreme Court Commission to Address Concerns for Impaired Lawyers from 2005 until 2009, when the commission completed its work and made recommendations to the supreme court. As such, he participated in numerous meetings at which problems of substance abuse and mental health, especially depression, among lawyers, judges and law students were discussed and studied. The commission concluded its work by making formal recommendations to the supreme court. The recommendations included promulgation of the ABA Model Rule on Conditional Admission, inclusion of substance abuse and mental health education in the state's CLE ethics requirements for both lawyers and judges, a study of the concerns of aging lawyers, and proposals to empower judges to refer lawyers to the

Mississippi Bar Lawyers and Judges Assistance Program (LJAP) and to permit referral of judges to LJAP by the Commission on Judicial Performance.



Paul da Costa

For the past four years, Paul da Costa has served on the Board of Directors of the New Jersey Center for Tourette Syndrome (NJCTS) (www.njcts.org). NJCTS is a collaboration among the Tourette Syndrome Association of New Jersey, the Rutgers University Cell and DNA Repository and hospitals throughout the State of New Jersey. NJCTS provides an innovative multi-disciplinary, multi-institutional approach to treatment for the thousands of New Jersey residents with tourette syndrome. In particular, NJCTS oversees the only university-based tourette syndrome clinic in the country, and NJCTS operates a cell/DNA sharing repository in conjunction with Rutgers University. The cell/DNA sharing repository makes clinical and genetic data and DNA cell line samples available to qualified scientists from around the world who are working on research into the causes and treatments for tourette syndrome and associated disorders.

Paul da Costa is a senior associate in the Newark, New Jersey office of Duane Morris LLP. His practice is focused on products liability, mass torts, medical liability and commercial litigation. Mr. da Costa is a member of DRI's Young Lawyers Steering Committee, as well as DRI's Product Liability, Drug and Medical Device, Medical Liability and Health Care Law and Trial Tactics Committees.



Paul Majkowski

Rivkin Radler partner Paul Majkowski, now a fourteen-year survivor of non-Hodgkin lymphoma, devotes significant time to the Lymphoma Research Foundation (LRF). Lymphoma comprises about 67 subtypes of cancers that affect the lymphatic system, and

is the most common blood cancer and the third most common cancer among children. Non-Hodgkin lymphoma has grown from being a relatively uncommon disease to being the fifth most common cancer in the United States, nearly doubling in incidence since the early 1970s, and, according to the American Cancer Society, over 65,000 new cases of NHL are diagnosed annually.

Paul serves the New York lymphoma community as president and advocacy chair of LRF's New York City Chapter, as well as the advocacy chair of the Foundation's Long Island chapter (which he helped co-found). To support LRF's mission to eradicate lymphoma and serve those touched by the disease, Paul works at the grass roots chapter level in the areas of patient awareness and education, in meeting and assisting newly diagnosed lymphoma patients; fundraising, by helping to organize an Lymphomathon walk; and advocacy for governmental funding and legislation for the lymphoma community, including visits to legislators and speaking on the LRF Advocacy Program. Paul was recently appointed to serve as a patient representative to FDA's Oncologic Drug Advisory Committee.

Product Liability Prevention

New International Standard on Consumer Product Safety

by Kenneth Ross



An effective product safety management program, before and after sale, is a key ingredient for any manufacturer, distributor or retailer to implement that will help minimize future product liability and contractual liability. I have previously written on this subject where I discussed various new standards and guidelines that have been disseminated concerning such management programs. See *Product Safety Management – Its Time Has Come, Strictly Speaking, Spring 2010*.

One project I did not report on has now issued its first draft. The International Organization for Standardization ("ISO") created a project committee called PC 243 in 2008 whose charter was to create an international standard for suppliers of consumer products. In May of 2011, ISO released a Committee Draft for comments referred to as ISO 10377 and entitled *Consumer Product Safety: A Practical Guide for Suppliers*.

It is anticipated that this standard will be completed and published in 2012.

Representatives from 19 countries have participated in the development of the standard,

while another eight countries have observed. The chair of the standards group is Dr. Elizabeth Nielsen, a safety expert who previously worked for Health Canada. In addition, there is active participation by representatives from Underwriters Laboratory.

The rationale for the creation of this new standard is to assist small and medium-sized product suppliers in trying to produce safe consumer products and comply with the new safety legislation and regulations that have recently been enacted by various countries. The problem perceived by the drafting committee is that many suppliers have "limited experience, few available resources, or practical reference documents to guide them through this process."

Specifically, this standard:

...presents what needs to be done to identify the hazards and to assess and manage the risks - from the design of the product, to the input of raw materials, to production, to distribution, to retail and to the ultimate product end-user and disposal. It does not necessarily explain how it should be achieved. This guidance standard should be particularly valuable to small and medium sized enterprises and suppliers who do not design or produce products but are responsible for their safety in many jurisdictions.

It is intended that this standard be consistent with international best practices and be able to be applied consistently across jurisdictions. The result, as hoped for by the committee, is that there are fewer injuries and deaths, fewer recalls, and fewer problems with customers and enforcement authorities.

The standard contains sections on basic principles and general requirements that apply to all suppliers including designers, manufacturers, importers, distributors and retailers. In addition, there are separate sections on safety principles for design, manufacturing and post-sale that apply to different portions of the supply chain.

Basic Principles and General Requirements

These two sections discuss promoting a product safety culture within the organization and outside the organization. In addition, they discuss the organization's commitment to providing safe

products and to ensuring that these products undergo continuous improvement.

Also, there are discussions concerning an organization's commitment to providing appropriate training of its employees, adequate resource allocation and appropriate records management and document control.

Lastly, the general requirements section discusses an organization's commitment to complying with all applicable laws, regulations and standards and to undertake activities which allow the product supplier to both identify and trace that product back to its original producer.

Safety in Product Design

This section describes best practices in design specifications, evaluation of "predictable" use and misuse, exposure analysis, hazard identification, risk evaluation and risk reduction. In addition, this section includes warnings and instructions and how to document the design specification process.

Safety in Production

This section deals with how to minimize or reduce product defects, production planning, order fulfillment, post production, production auditing and documenting the production process.

Safety in the Marketplace

This section discusses how product purchasers, such as importers, distributors and retailers, should assess and verify compliance with various laws, regulations and safety practices. In addition, this section talks about the ways in which they should collect and analyze data concerning products in purchaser's hands. This includes an assessment of product conformance, an analysis of warranty and service experience and appropriate ways to investigate product incidents.

This standard does not include a discussion of product recall best practices. The reason for this is that a separate committee, PC 240, is drafting a standard, ISO 10393, entitled Guidance Standard on Consumer Product Recall and Corrective Action: Code of Good Practice. This standard is somewhat behind ISO 10377 in its development, and probably will not be finished until late 2012 or sometime in 2013.

Annexes and Other References

The current draft of the standard contains several annexes which provide among other

things, a list of informative sources of information. In addition, near the beginning, there is a reference to a number of other ISO standards or guides pertaining to product safety.

Some of these other ISO documents deal with principles and guidelines concerning risk management, risk assessment and risk reduction in machinery safety, quality management systems and instructions for use.

Observations

I have been counseling manufacturers and product sellers on these issues for over 30 years. In addition, I have presented seminars and written many articles on product safety since the 1970s.

The available techniques and best practices in product safety were developed starting in the 1950s and became more widely known in the 1970s. A quick review of this draft standard seems to track the techniques that those of us in this area have been recommending for years. However, this standard performs a useful service by identifying and assessing these techniques and best practices and organizing and restating them in an understandable way.

Unfortunately, as one would expect, it is not as practical as companies would probably like it to be. It is impossible to create a standard or recommendations telling all companies how they should manage safety. Therefore, in the Introduction, it says "[The standard] does not necessarily explain how it should be achieved." This means that it still requires the supplier to decide which of these best practices are appropriate and necessary for their company.

There are very few absolutes in product safety management and product liability prevention. Some company's products have such a low risk that many of these best practices are not necessary to undertake. In addition, some products can be reasonably safe and pose no unusual risk if they just comply with applicable technical standards. However, the standard, as written (by liberal use of the word "should"), requires companies of any size and for any consumer product to implement certain processes and techniques which may not be needed for their particular company or product. The standard should provide more flexibility and be written so it doesn't create an unnecessarily high bar for all companies to meet.

In addition, the standard is general and somewhat vague in discussing some of these techniques. This is necessary in that there are

no clear answers to certain questions, such as what is tolerable risk or what are essential warnings and instructions for safe use of a product. For example, the standard defines tolerable risk as that "which is acceptable for a specific user group based on the current values of society." And then it says, "...if the risk cannot be reduced to a tolerable or acceptable level, the product should not be permitted to reach the marketplace." This is not that helpful for a company who just wants to know how safe to make its product.

This is certainly not meant as a criticism of the standard but merely to point out its limitations. The introduction to the standard states that it does not intend to explain how the goals of safety should be achieved, but merely provide a discussion of the techniques that should be considered by suppliers to assist them in assessing and managing consumer product safety. To that extent, it meets its goals. However, it should be rewritten to make it clear that no company needs to adopt all of the techniques described in the standard.

From my perspective, such a document can best be used to help educate suppliers on these techniques and best practices so that they can then decide which of these to adopt and implement in their company and which to reject. But, before making any such decisions, I suggest that they consult with outside legal and technical resources experienced in product safety and product liability. These outside professionals can help a company identify and quantify legal and practical risks involved in selling their products, help them decide on which of the techniques in this standard and other documents should be implemented, and help them document the rationale for their selections.

Given that this standard is being created by people who are experienced in product safety, any company producing consumer products should be knowledgeable about the final version of this standard and be prepared to justify their decision as to the techniques and practices they selected as appropriate for their company and their products. Some resourceful plaintiff's lawyer may use this document and others like it to try to prove that the defendant in their case fell below the minimum standard of care in establishing an internal safety program. This should be anticipated and guarded against.

Kenneth Ross is a former partner and now of counsel to *Bowman and Brooke LLP*, a national product liability defense firm. Ken counsels manufacturers on all aspects of product safety, regulatory compliance and product liability

prevention. He is co-chair of the Manufacturer's Risk Prevention subcommittee of DRI's Product Liability Committee. He can be reached at kenrossesq@comcast.net. Ken's other articles on product safety can be found at www.productliabilityprevention.com.

Young Lawyer Column

AT&T Mobility v. Concepcion: Death Knell of the Class Action?

by Matthew Kracht



Following the United States Supreme Court decision in *AT&T Mobility v. Concepcion*, 563 U.S. ____ (2011) ("*AT&T Mobility*"), speculation regarding the case's impact has run the spectrum. Some commentators believe the high court's decision signals the apocalyptic end of all forms of class action proceedings. Others view it as a small victory for businesses, with unknown but minimal long term implications. As with all things, the long term ramifications likely fall somewhere toward the middle of each end of the spectrum. Regardless, this decision will have at least *some* impact on product liability litigation as well as potential industry implications, including what advice counsel provides in drafting consumer contracts.

Case Facts

In 2002, Vincent and Liza Concepcion entered into an agreement with AT&T for the purchase and service of cell phones. *AT&T Mobility*, slip op. at 1. Per the agreement, the Concepcion's received "free" phones, but still were charged \$30.22 in sales tax based on the phones retail value. *Id.* at 3. Among other provisions, the contract contained an agreement to arbitrate claims, as well as a class action arbitration waiver. *Id.* at 2. Nevertheless, the Concepcion's initiated litigation in the U.S. District Court for the Southern District of California. *Id.* at 3. The matter was consolidated with a class action that alleged, among other things, false advertising and fraud. *Id.*

AT&T moved to compel arbitration. *Id.* The district court denied the motion based on the California Supreme Court decision in *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148. *Id.* In doing so, the court found that the inclusion of a class arbitration waiver was unconscionable, and accordingly AT&T Mobility's arbitration agreement was rendered unenforceable. *Id.* The Ninth Circuit Court of Appeals affirmed the decision, confirming the arbitration agreement was unconscionable and held that the *Discover Bank* rule was not preempted by the Federal

Arbitration Act ("FAA"). *Id.* at 3-4.

The United States Supreme Court granted certiorari, and in delivering the opinion for the majority, Justice Scalia held that the *Discover Bank* rule was preempted by the FAA. *Id.* at 4, 18. Scalia writes that "[t]he overarching purpose of the FAA...is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 9. Accordingly, in a 5-4 decision, the case was reversed and remanded. *Id.* at 18.

Preemption of *Discover Bank*

Section 2 of the FAA provides in part that an agreement to arbitrate is, "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2. The Concepcion's argued that California's unconscionability doctrine, as set forth in *Discover Bank* is a ground that exists in law or equity, thus satisfying the FAA's savings clause. *Id.* at 6. In response, the majority noted that although the savings clause "preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." *Id.* at 9. Doing so would permit a federal statute's savings clause to be destroyed by a common law right. *Id.* Therefore, the *Discover Bank* rule "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," and is preempted. *Id.*

Justice Breyer advocates a contrary view in the dissenting opinion by emphasizing the uniformity of application of the *Discover Bank* rule in prohibiting class action waivers in both arbitration agreements, as well as other contracts. *AT&T Mobility*, dissent at 3. Under *Discover Bank*, the prohibition on classwide actions are unconscionable where there is: (1) an adhesion contract; (2) small amounts of damages; and (3) an allegation of a scheme to deliberately cheat a large numbers of consumers from small amounts of money. *Id.* at 2. Thus, according to Breyer, the majority is ignoring the more nuanced application of California's unconscionability analysis, which California is free to apply pursuant to the FAA's savings clause. *Id.* at 2.

Footnote 6 of the majority opinion provides a somewhat curious, if not totally contradictory, instruction to States of how they may proceed when attempting to address concerns with

arbitration agreements. *AT&T Mobility*, slip op. at 12, n 6. On the one hand, Scalia writes, "[o]f course States remain free to take steps addressing the concerns that attend contracts of adhesion-for example, require class-action-waiver provisions in adhesive arbitration agreements to be highlighted." *Id.* However, he goes on to state that the steps taken may not "conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms." *Id.* This self-cancelling footnote provides no further "guidance" in this regard. Yet, it is a clear summary of Scalia assessment of the case: States can fashion the rules they want so long as they do not interfere with or impede the FAA.

AT&T Mobility should be viewed as a pro-arbitration decision. Along this vein, where state law conflicts with, or impedes the goals of the FAA, that law shall be preempted. More broadly, this decision communicates to lower courts that arbitration should be favored generally.

AT&T Mobility's Impact on Product Liability

Class Action Litigation

In addition to favoring arbitration generally, this decision has palpable anti-class action undertones that will significantly impact product liability litigation and industry practice. When drafted correctly, consumer contracts will have the ability to shield businesses from classwide proceedings entirely, and force consumers to bring their claims on an individual basis. This is precisely what AT&T prevailed in doing in this litigation. Correspondingly, attorney's will be more likely to advise corporate/business clients that their consumer contracts should contain arbitration provisions that prohibit classwide proceedings.

Though more nuanced terms will be necessary to create a valid and enforceable arbitration agreement containing a class waiver, at a fundamental level the basic requirements include: (1) a consumer contract; (2) arbitration provision; and (3) waiver of class claims.

Quite naturally, the types of consumer contracts most implicated by this decision, are those similar to the agreement in *AT&T Mobility*. These are agreements for products connected with some form of service, such as cell phones, cable/satellite television, in car communication systems, satellite radio, etc. This can logically be extended to other contexts where the underlying facts so dictate. Obviously, though, where there is no consumer contract, *AT&T Mobility* will not apply since there would be no requisite

arbitration provision or resulting FAA implications. Additionally, the decision, at least on its face, does not extend beyond consumer contracts, as the majority refers to its analysis in the consumer context no less than 12 times. Further, the *Discover Bank* rule, which *AT&T Mobility* struck down, only concerned consumer contracts of adhesion. *AT&T Mobility*, slip op. at 5-6. Thus, where there is no consumer contract at issue, *AT&T Mobility*, by its nature will not apply. Notably, also, is the majority's dismissal of the adhesive nature of consumer contracts because, "the times in which consumer contracts were anything other than adhesive are long past." *Id.* at 12.

Clearly, also, the consumer contract must contain an arbitration provision, otherwise the FAA preemption is inapplicable. The district court referred to AT&T's arbitration agreement in favorable terms, as quick and easy, and likely to promote full or even excess payment to the customer. *Id.* at 3. Accordingly, arbitration agreement with more "favorable" and consumer friendly terms are more likely to endure. Yet, the majority does not delve into an analysis of the arbitration agreement's terms. Nevertheless, where the agreement is similar to that in *AT&T Mobility*, it is more likely to avoid judicial scrutiny.

Finally, the consumer contract must include a provision waiving class actions. Language included in this regard must be drafted carefully in order to be clear and concise. In *AT&T Mobility*, the class waiver provided that claims could only be brought in the claimants, "individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding." *Id.* at 1.

The net result of a properly drafted and applicable consumer contract should effectively dispense any concern a business may have of being held hostage to a class action claim (legitimate or not). Additionally, as Justice Breyer's dissent aptly points out, plaintiffs' attorneys will be less likely to represent individuals with minimal damages claims, such as the *Concepcions*. *AT&T Mobility*, dissent at 9. Correspondingly, there will be a rise in claims that will never be submitted, to either arbitration or litigation, because consumers are not savvy enough to navigate the system or consider it cost prohibitive. Clearly this has the potential to significantly impact and benefit a company's bottom line.

Class Action Arbitration

In addition to the likely impact on class actions

generally, *AT&T Mobility* clearly limits the applicability of class arbitrations. At first blush, the decision only nullifies the *Discover Bank* rule that invalidated arbitration agreements which prohibited class arbitration. But, in light of additional United States Supreme Court jurisprudence, the *AT&T Mobility* decision is another building block supporting similar precedent that places limitations on class arbitration. These precedent beg the questions: what is next and how far will it go?

Class arbitration was previously discussed by the U.S. Supreme Court in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.* (2010) 130 S.Ct. 1758 ("*Stolt-Nielsen*"). *Stolt-Nielsen* and *AT&T Mobility* logically should be viewed in connection with each other as entwined precedent building upon one another, which will no doubt further progress following later decisions.

Stolt-Nielsen concerned antitrust litigation regarding shipping companies for parcel tankers. *Id.* at 1764. Following allegations of price fixing schemes, shipping customer AnimalFeeds brought a putative class action in the Eastern District of Pennsylvania. *Id.* at 1765. Pursuant to the applicable arbitration provision, AnimalFeeds demanded class arbitration. *Id.* The parties agreed that the arbitration provision was silent on the issue of class arbitration and submitted that issue to an arbitration panel. *Id.* at 1766. The panel concluded that class arbitration was permitted under the silent agreement, and the issue eventually made its way to the U.S. Supreme Court. *Id.* at 1766-67.

The high court noted the applicable standard to meet to vacate the award required a showing that the panel had exceeded its powers, so much so that the panel strayed from interpreting and applying the agreement and instead made their own public policy. *Id.* at 1767. Against this backdrop, the court nonetheless determined the panel in fact did exceed its powers and reversed the lower court's decision. *Id.* at 1777. In doing so, the court held that where an arbitration agreement is silent as to class arbitration, the intent to submit to class arbitration cannot be inferred. *Id.* at 1775. "This is so because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." *Id.* Thus, the *Stolt-Nielsen* decision stands for an important limitation on class arbitration, i.e., where class arbitration is not explicitly agreed to, it cannot be compelled.

AT&T Mobility picks up where *Stolt-Nielsen* leaves off in holding that States may not

invalidate arbitration agreements that prohibit class arbitration based upon a *Discover Bank* type unconscionability analysis. Much of the *AT&T Mobility* majority and dissenting opinions are spent addressing the pros and cons of class arbitration. This diatribe is not central to the *AT&T Mobility* decision, but covers a bulk of both the majority and dissent.

The majority notes that class arbitration "sacrifices" the key advantage of arbitration, its informality. *AT&T Mobility*, slip op. at 14. The lessened procedural rigor yields lower costs, greater speed and efficiency, and permits choosing expert arbitrators to resolve complex disputes. *Id.* Scalia cites staggering statistics supporting his claim that bilateral arbitrations are resolved speedily, while class arbitrations are essentially lethargic creatures. *Id.* Class arbitration also requires procedural formality, typically on par or similar to those found in the Federal Rules of Civil Procedure. *Id.* at 15. Otherwise, absent class members would not be bound by the arbitration. *Id.* Additionally, class arbitration significantly increases risks to the defendants due to the absence of multilayered review. *Id.* at 16. While defendants are more willing to dispense with review procedures for smaller claims, when the claims are multiplied by a class, the impact of any error can be immense. *Id.*

Conversely, Justice Breyer maintains that the majority is misplaced in its analysis, and the correct examination should be comparing class arbitration to judicial class action, and not class arbitration with bilateral arbitration. *AT&T Mobility*, dissent at 7. With this in mind, class arbitration is wholly preferable to class action litigation. *Id.* Breyer's argument in this regard is not persuasive, however, as the overarching umbrella of focus is on agreements to arbitrate and components thereto, but not class actions generally.

Justice Breyer further points to class arbitrations that have yielded large settlements with parties who were pleased overall. *Id.* at 8. Additionally, Breyer pragmatically points to the reality for a consumer who stands in the Concepcion's shoes, "[w]hat rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a \$30.22 claim?" *Id.* at 9. Though light on substance, Justice Breyer clearly wins the battle of one-liners with Scalia.

The discourse regarding the pros and cons of class arbitration in this decision is largely a continuation of what the high court commenced in *Stolt-Nielsen*. The logical question resulting, is why is the court doing this. It appears that the majority could have reached the same result

regarding the FAA's preemption of the *Discover Bank* rule without examination of class arbitration as a whole. However, the extended soliloquy is evidence of the majority's disdain for class arbitration as well as an open invitation for litigants to request writ on cases involving class arbitrations. The high court has essentially advertised its casting call for cases it can use to eviscerate the effectiveness (if any there is) and use of class arbitration. Why else would the majority spend such a considerable amount of time discussing an area that is not completely on point with the matter at hand-if not to invite future challenges? The wild card, however, may (oddly enough) be Justice Thomas, who only "reluctantly join[ed] the Court's opinion," on a textualist basis that the FAA's savings clause only permits the application of defenses based upon formation of the arbitration agreement such as fraud or duress. *AT&T Mobility*, concurring at 5. Nevertheless, Thomas would be unlikely to stand in the way of class arbitration reform.

Justice Scalia's contempt for class arbitration is clearly supported by the points he outlines. As Scalia points out, speed, efficiency, informality, etc., are all basic tenants of arbitration, none of which are provided in class arbitration. The court would do well to limit class arbitrations to the fullest extent possible, yet how many limitations the court can feasibly place remains to be seen.

Industry and Marketplace Considerations

Following the *AT&T Mobility* decision, businesses will now be more likely to include class action waivers and arbitration agreements in their consumer contracts. Arbitration is typically considered pro-business, and thus anti-plaintiff/consumer, in part, because it saves businesses time and money in providing a fast and efficient forum to resolve disputes, reduces defense costs, etc. Along these lines, the majority in *AT&T Mobility* finds that class arbitration does not further the tenants of arbitration because speed and efficiency does not exist in the class setting. Citing statistics of the American Arbitration Association ("AAA"), the majority notes that the average bilateral arbitration that occurred between January to August 2007 was resolved on the merits in four to six months. *Id.* at 14. Conversely, as of September 2009, the AAA had 283 open class arbitrations, of which none had resulted in a disposition on the merits. *Id.* Instead, 121 were still active and 162 were settled, withdrawn, or dismissed. Of the cases not active, "the median time from filing to settlement, withdrawal, or dismissal-not judgment on the merits-was 583 days, and the mean was 630 days." *Id.*

Arbitration is also considered pro-business because of the belief that businesses generally

prevail. Yet, the AAA concluded that between January to August 2007, consumers prevailed in 48% of cases in which they were the claimant, while businesses prevailed in 74% of cases in which they were the claimant. www.adr.org/si.asp?id=5027. While the AAA does not provide how many consumer claimant versus business claimant cases this sampling is derived from, it persuasively suggests that where consumers bring a claim they are at least as likely to prevail as not.

Pending Litigation

Following this decision, lower court's will be more likely to fall in line and compel arbitration when sought. In instances where the appropriate result is not clear cut, *AT&T Mobility* will certainly tip the scales in favor of arbitration. Given the nuances of the preempted *Discover Bank* rule, it is clear that cases will arise that test how far *AT&T Mobility* reaches. Certainly, appellate districts such as the Ninth Circuit will have noteworthy responses carving out exceptions to *AT&T Mobility*. Needless to say, the issue is far from settled.

Selected Related Case Law

On May 2, 2011, the U.S. Supreme Court vacated and remanded *Missouri Title Loans, Inc., v. Brewer, Beverly* 2011 WL531553, to the Supreme Court of Missouri for further consideration in light of the *AT&T Mobility* decision. This State decision held that a loan agreement containing an arbitration waiver was both procedurally and substantively unconscionable, and was therefore unenforceable. *Brewer v. Missouri Title Loans, Inc.*, 323 S.W.3d 18, 24 (Mo., 2010) ("*Brewer*").

As an additional basis, the court held that the class arbitration waiver did not act as an unambiguous exculpatory clause, i.e., exculpating the lender from liability, because it was unclear and ambiguous. *Id.*

Accordingly, in addition to the unconscionability analysis, the Supreme Court of Missouri added an additional basis for invalidating the arbitration agreement, that of ambiguity in the class arbitration waiver (exculpatory clause). The question now posed to the Missouri Supreme Court is whether the *Brewer* decision survives *AT&T Mobility*. The court will likely reverse itself on the unconscionability analysis, but the ambiguity basis remains unclear. The relevant inquiry in *Brewer* now becomes whether states can determine that ambiguity in the class arbitration waiver satisfies the FAA's savings clause. This matter has the potential to refine the *AT&T Mobility* decision and is one to keep an eye on.

Another interesting case from the Show Me State is the Eastern District's opinion in *Fay v. New Cingular, Wireless, PCS, LLC*, Slip Copy, 2010 WL 4905698 ("Fay"). *Fay* is strikingly similar factually to *AT&T Mobility* in that it concerns the unconscionability of an arbitration agreement stemming from purchase of cell phones and service from AT&T Mobility LLC, where activation fees were involved. *Id.* at 1. Unlike *AT&T Mobility*, the district court held that the agreement was not procedurally unconscionable because it merely concerned a cell phone service agreement, and the consumer could simply seek another provider. *Id.* at 3. Additionally, substantive unconscionability was not present because the "arbitration provision at issue is clearly not unduly harsh nor one-sided." *Id.* Accordingly, the motion to compel arbitration was granted at the district court level—which is likely what the majority in U.S. Supreme Court would have advocated for from the outset with *AT&T Mobility*.

Conclusion

The *AT&T Mobility* decision is clearly a thematic one of pro-arbitration and anti-class action. How far the ramifications of this decision will actually extend is unknown and unlikely to be decided soon. Nevertheless, the decision should have an appreciable impact on product liability litigation in the class action litigation and arbitration setting, as well as the advice attorneys provide their clients regarding consumer contracts.

Matthew Kracht is an associate in Murphy, Pearson, Bradley & Feeney's San Francisco office. His practice is focused on the defense of individuals and businesses in the areas of product liability, personal injury, construction defect, premises liability, class action, and insurance coverage. He attained his J.D., from Thomas Jefferson School of Law in 2006, and a B.A., in History from San Jose State University in 2001.

News & Announcements

Seminar Information

In an effort to provide more consistent and timely material to our seminars attendees, DRI is changing the way we distribute course materials in advance of a seminar. From this point forward, an email link will be provided to registered attendees two weeks prior to the event. This link will allow registrants to download and review the course materials in advance of the event – a CD-Rom will not be

mailed. When registrants arrive onsite for a seminar, they will receive an updated CD-Rom with course, any late paper submissions and onsite materials. This change, while small, ensures that we are delivering the resources to grow your practice in the most efficient way possible.

Special Offer



Have you visited DRI's new online portal, [DRI Today](#) yet? DRI Today is your one-stop resource to news, market updates, legal commentary and more all designed specifically with the defense attorney in mind. Browse the [DRI Blog](#) for interesting discussions or catch up on past articles from *For The Defense*. [DRI Today](#) provides a convenient resource to find information on any practice area topics with just the click of your mouse. Be sure to make [DRI Today](#) your homepage to keep up with the fast changing world of legal news. Don't forget to like [DRI on Facebook](#) and follow [DRI on Twitter](#)!