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THE DOLAN COMPANY

Recovering damages for undocumented workers

BY CORREY E. STEPHENSON | STAFF WRITER

As the number of undocumented workers rises, personal injury attorneys are increasingly struggling with how to handle illegal immigrants as clients.

In January 2010, the Department of Homeland Security estimated that 10.8 million undocumented individuals resided in the United States.

"Immigration is a hot button issue and there is a lot of hostility about undocumented workers in America," said Philip Harnett Corboy, Jr., a partner at Corboy & Demetrio in Chicago. "Jurors unfortunately come with a lot of biases against undocumented workers and as a result, they don't get the same consideration when it comes to the amount of money awarded in damages as would an American worker asking for the same amount of money damages for the same injuries."

When representing an undocumented worker, Corboy tries to take the issue of immigration status completely off the table.

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He can do this under Illinois law by choosing not to make a claim for future lost wages. When an undocumented worker doesn't request future lost wages in Illinois, his or her immigration status isn't introduced at trial, Corboy explained. He said this is the majority rule.

"It's a trade-off," Corboy admitted. But he argued that the loss of one type of damages outweighs the "immeasurable damage" the introduction of a plaintiff's status would have.

"We in the plaintiffs' bar are very cognizant of the fact that if a jury does find out that a plaintiff is undocumented the damages will be driven down on an arbitrary basis," Corboy said. "It's just the way America is at this particular moment."

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NLRB protects class actions, sends employers scrambling to comply

BY KIMBERLY ATKINS | STAFF WRITER

WASHINGTON – Just when attorneys thought the issue of class action waivers in mandatory arbitration clauses had been settled by the U.S. Supreme Court once and for all, a National Labor Relations Board ruling has called into question employers' ability to use arbitration clauses in employment contracts to prohibit class and collective actions.

The Board's ruling has employers scrambling to review their employment contracts to ensure that they are not committing labor law violations.

It also has union- and management-side lawyers debating whether it will be overturned.

"The Federal Arbitration Act allows parties to come to an agreement" about how disputes will be resolved, said Jeffrey A. Risch, a partner in the Chicago office of SmithAmundsen, where he chairs the firm's Labor and Employment Practice Group. "This decision by the NLRB is stepping on a body of law that it doesn't have the authority to step on."

But Cliff Palefsky, a partner in the San Francisco office of McGuinn, Hillsman

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FDA, medical device makers reach deal on paying user fees

WASHINGTON – The Food and Drug Administration and the medical device manufacturing industry have reached a tentative agreement on user fees under the reauthorization of the Medical Device User Fee Act.

Though all the details of the proposed recommendations for the reauthorization have not been finalized, the parties have agreed in principle to a system that would allow the FDA to collect $595 million in user fees over five years – roughly double what the government collected under the

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Recovering damages for undocumented workers

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Ronald V. Miller, Jr., a partner at Miller & Zois in Baltimore, agreed.

The loss in damages is generally minimal, because the majority of undocumented workers isn't highly paid and lack documentation for their income.

"Lost wages are often nonexistent," said Miller.

A person's immigration status is irrelevant when awarding damages for medical treatment, pain and suffering and emotional distress, he noted.

Bad dreams

Corboy's strategy paid off in a recent case where the firm received a $22.5 million settlement for a married couple, both illegal immigrants.

The couple was in their car, waiting for a train to pass, when 18 cars containing ethanol derailed, resulting in a massive explosion.

The fire ball engulfed the plaintiffs' car, immolating the wife and seriously injuring the husband.

The plaintiffs plead a negligence case, Corboy said.

Illinois law "doesn't require information to be provided about citizenship unless there is a claim for future lost wages," he said. "And in this particular case, we decided early on in the litigation not to seek future lost wages … for either our client or his deceased wife."

Robert J. Bingle, a managing partner at Corboy's firm, also represented the plaintiffs. He was "delighted" that the case settled.

"As well as you might try to ferret out prejudices there could always be some inveterate biases on a jury that could be a factor in damage awards," he said.

But even with the illegal immigration issue off the table on the front end, the attorneys had to fight to keep the plaintiffs' status out of evidence.

The defendants, including the railway company operating the cars and the operators of the track, sought to have a psychiatric exam included as part of the independent medical exam of the husband.

During that exam, the psychiatrist asked about the husband's dreams.

He replied by speaking about his continuing nightmares reliving his swim across the Rio Grande in order to enter the United States.

Corboy, who was present in another room but could hear the exam, called an immediate halt to the process and got opposing counsel and the trial judge on the phone.

"Any juror with a sense of geography or history would realize immediately what that meant about the background of [my client]," he said.

Given that the plaintiff had not made a claim for future lost wages, Corboy argued that the discussion of his dreams was irrelevant.

The court agreed. The trial judge ordered the psychiatrist to halt the dream line of inquiry and ruled that the plaintiff's answers would be excluded from evidence at trial.

Immigration status can affect recovery in other ways. Some defense attorneys will try to use that status to reduce the amount of an award.

Kristin L. Olson, a partner at Bullivant Houser Bailey in Portland, Ore., said she doesn't contest a plaintiff's right to sue or receive damages, but argues that earnings should be received in the currency of the plaintiff's home country.

"The argument is that he or she is working unlawfully and the legal system should not condone breaking the law," Olson said.

Case law in Oregon and in several other jurisdictions, including California, Florida, Kansas and New York, supports the position that immigration status is relevant to future earnings, she said.

To provide jurors with a dollar amount, she hires an economist to testify about a comparable position in the plaintiff's home country and how much an individual holding that job would earn.

Olson then submits the exchange rate on the date of the verdict to convert a jury's dollar award into pesos, for example.

Privacy concerns

Corboy said that issues in working with undocumented clients aren't limited to damages.

Many clients are afraid of being "outed" as illegal immigrants in the courtroom.

They tend to be "very private and are concerned about exposing themselves to the public by taking their case to trial," Corboy said, fearful of arrest by bailiffs or officers of the court.

"A lot of times as a plaintiffs' attorney you will settle a case you might not ordinarily want to, but your client doesn't want to go through with a trial," he said.

Corboy recalled several undocumented clients who opted to avoid court and settle even after he told them he thought they could get more money at trial.

Having an undocumented client "certainly puts the defense in a stronger position," he said.

Language barriers can also be a concern, because undocumented workers often don't speak English or are far more comfortable in their native language, Corboy noted.

At trial, this often necessitates the additional expense of an interpreter for the plaintiff as well as witnesses, Bingle said.

Corboy's firm has two Spanish-speaking employees who can help with discussions when a client comes into the office, but for formal settings like a deposition or at trial he prefers to use a professional translator.

Most translators take time before testimony begins to chat with the client and see if there are any issues, such as differences in dialect, which can impact the client's comfort level.

This preparation generally leads to "a more complete sentence or paragraph than a one-word answer," which can be a huge benefit in situations where an incorrectly answered question can affect the dynamics of the entire case, Corboy said.

Questions or comments can be directed to the writer at: correy.stephenson@lawyersusaonline.com

NLRB protects class actions, sends employers scrambling

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& Palefsky who represented the workers in the case, said "the ruling itself, as a matter of labor law, is unassailable."

"The NLRB recognized what has been an unbroken chain of Board rulings … confirming the ability of workers to file class action lawsuits as protected activity," he said.

Class actions – protected concerted activity?

In 2011, the Supreme Court held in *AT&T Mobility v. Concepcion* that state law could not prohibit companies from compelling consumers to arbitrate disputes individually. The law in question, which required that classwide consumer arbitration proceedings be available, violated the Federal Arbitration Act, the Court held.

Some experts suggested that the ruling would bring an end to class actions as attorneys had known them, spurring companies to place binding arbitration clauses barring class proceedings in contracts covering everything from consumer products to employment agreements.

But in its January ruling in *D. R. Horton*, the NLRB found that a mandatory arbitration clause in an employment contract precluding workers from filing joint, class or collective claims contending that their wages, hours or other working conditions violated Section 7 of the National Labor Relations Act.

Such concerted or class claims, the Board ruled, constitute protected activity under the Act. The Board also reasoned that barring class or collective claims in arbitration agreements also violated the Norris-LaGuardia Act, which "protects concerted employment-related litigation by employees against federal judicial restraint based upon agreements between employees and their employer," the decision said.

The Board distinguished *Concepcion* by noting that it involved a conflict between California state law and the Federal Arbitration Act. *D.R. Horton*, by contrast, involved the application of two federal statutes, so the preemptive application of the Supremacy Clause was not an issue.

After Concepcion, the use of ironclad arbitration clauses barring class proceedings became standard operating procedure for many companies seeking to avoid class action litigation. And the clauses weren't just found in the kind of consumer contracts at issue in Concepcion.

"Many employers rushed to put these kinds of clauses in their agreements to avoid classwide or collective liability from their employees" after Concepcion, said Jennifer L. Liu, an associate in the New York office of Outten & Golden.

The NLRB ruling, which applies to virtually all employers regardless of whether their workplaces are unionized, sent employers and their attorneys sprinting to reevaluate and amend their employment contracts.

The fact that the issue has split the circuits, creating an uncertain area of law unless and until the Supreme Court has its say on the matter, has only made labor lawyers' jobs tougher.

"It's hard," Risch said. "I'm tap dancing because of the uncertainty. I mean, this decision is probably going to get reversed. It's a bad decision. But am I going to advise my clients to forget about it [and] stick with the arbitration path? No, I'm not doing that."

Risch noted that the decision does not apply to non-employees.

"If I'm dealing with [contracts with] independent contractors, subcontractors, independent sales representatives and the like, I am still advising my clients about the effective use of arbitration agreements" barring class proceedings, he said.

Politics at play?

Risch, who represents management in labor matters, said he was not surprised that the NLRB took up the issue of arbitration and class proceedings in the wake of Concepcion.

"This is a very politically charged Board," Risch said of the NLRB, which at the time of the ruling had three members and was facing vocal criticisms from business groups and members of Congress for rules and decisions they said were staunchly pro-union and anti-business.

Risch said the D. R. Horton dispute had been pending for a while, and gave the NLRB a perfect opportunity to respond to Concepcion.

"When Concepcion came down, the Board had this case on its radar." he said. "When I saw this case coming down the pike, if I were a betting man I would have put a lot of money on the outcome."

In his view, the Board overstepped its authority by holding that classwide litigation – even litigation that may not involve labor disputes – constitutes protected concerted activity under federal labor laws.

But Palefsky disagreed.

"The right to act in concert is a substantive right" under federal labor laws, Palefsy said, adding that collective litigation is included within those substantive rights. "That is hugely significant."

The Board's reasoning could serve as a bellwether for other cases outside of the context of the NLRA. Courts could adopt the same analysis – that the FAA does not trump class litigation rights under other federal statutes – in cases involving federal laws such as Sarbanes-Oxley, Palefsky said.

"Even the Supreme Court said that you can't compel arbitration if it is inconsistent with the text of the legislative history of a federal statute," he said.

But the Board's ruling is not the last word. An appeal in the case has already been filed in the 5th Circuit.

Questions or comments can be directed to the writer at: kimberly.atkins@lawyersusaonline.com

Texas woman sues Merck over NuvaRing injuries

A Texas woman claims in a $10 million lawsuit against Merck that she suffered deep-vein thrombosis as a result of using the NuvaRing birth control device.

"Defendants failed to warn prescribing physicians and the public that the [NuvaRing] product was associated with more thrombotic events than the pill," states a complaint filed Jan. 9 in the U.S. District Court for the Eastern District of Texas.

The plaintiff in the case, Dawn Kregel of Denton, Texas, alleges that she started using a NuvaRing in early May 2010. According to Kregel's complaint, on June 26, 2010, she sought emergency treatment after noticing swelling in her left leg. Doctors later diagnosed her as suffering from deep vein thrombosis, allegedly caused by Merck's product.

NuvaRing is a vaginal contraceptive that releases estrogen and progestin. Its main advantage is convenience because it can be left in place for three weeks instead of taking a pill every day.

The device was originally manufactured by Organon Pharmaceuticals and its affiliates. Schering-Plough Corp. acquired the Organon entities in 2007. Merck in turn acquired Schering-Plough in 2009.

Merck now faces hundreds of product liability suits in state and federal court concerning the NuvaRing device. The lawsuits allege that NuvaRing has a design defect in the dosage and type of progestin used. Plaintiffs also claim that the manufacturers failed to warn about side effects, including blood clotting, pulmonary embolism, heart attack, stroke and deep vein thrombosis.

Kregel seeks $10 million in damages in her complaint, asserting claims for strict liability, negligence, breach of warranty, violations of Texas consumer protection laws, misrepresentation and fraud.

Regarding Kregel's claims for misrepresentation and fraud, the complaint alleges that the manufacturers "deliberately and carelessly made false and misleading statements" about the safety of the NuvaRing device and "concealed research" when presenting the medical device for approval by the Food and Drug Administration.

– PAT MURPHY

Contingent fee contract draws lawyer discipline

A Virginia lawyer has been admonished by the state bar for demanding a contingency fee from a client for non-monetary relief.

A three-judge panel imposed the public admonition on Thomas H. Roberts, saying they were concerned the fee agreement presented the possibility of a fee "adverse to the client."

According to the fee agreement provided by the bar, a client hired Roberts to represent her in a claim alleging she was battered, sexually harassed and fired by a Richmond, Va. general contractor.

The fee agreement called for hourly fees up to $365 an hour, with all but $100 deferred and payable only from any recovery in the case, plus 20 percent of any recovery in excess of the hourly fees, "whether money or things of value."

The agreement expressly called for the client to pay fees for "non-monetary relief," such as reinstatement, re-employment or an injunction.

The panel found the agreement did not contain "a sufficient method of calculation" to tell the client how the contingent fee would be determined based on equitable relief.

The judges affirmed a district committee's finding that the attorney violated Rule 1.5(c) of the Rules of Professional Conduct. That rule requires contingent fee agreements to state in writing the method by which the fee is to be determined, including percentages paid to the lawyer in the event of settlement, trial or appeal.

The panel of judges rejected a discipline committee finding that Roberts' fee was unreasonable. It concluded that a public admonition without terms was the appropriate sanction.

Roberts' counsel did not return a call for comment.

– PETER VIETH

A version of this story originally appeared in Lawyers USA's sister publication, Virginia Lawyers Weekly.

Bankruptcy filings down 11 percent in 2011

WASHINGTON – The number of new bankruptcy filings fell during the 2011 calendar year.

Though quarterly data released in November showed the first drop in filings since the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 took effect, the latest data showed the first drop in new bankruptcy cases over the course of an entire calendar year.

According to the Administrative Office of the U.S. Courts in Washington, bankruptcy filings fell 11.5 percent from the year before to 1,410,653.

As usual, the vast majority of cases filed – nearly 97 percent – involved non-business debts. Non-business debts dropped 11.3 percent from the year before, while business debts fell 15.1 percent, according to the most recently released data.

Chapter 7 filings fell 12.9 percent to 992,332 in 2011, while Chapter 11 filings fell 15.9 percent to 11,529 and Chapter 13 filings fell 7.5 percent to 406,084.

– KIMBERLY ATKINS

Groups ask court to block FDA's tobacco warning rule

WASHINGTON – Business groups are urging a federal court to uphold an order blocking the Food and Drug Administration from implementing a rule requiring tobacco product makers to place large, graphic warnings on product packaging.

In June, the FDA unveiled the new warnings – which feature graphic images such as diseased lungs, cancerous mouth sores and an autopsied corpse – and required them to be placed on the packaging of cigarettes and other tobacco products by the fall of 2012 pursuant to the Family Smoking Prevention and Tobacco Control Act.

But tobacco companies sued and won an injunction blocking implementation of the labeling rule. The FDA's appeal is now before the D.C. Circuit.

In amicus briefs filed with the court, the U.S. Chamber of Commerce and the Washington Legal Foundation argued that the labeling rule violates the First Amendment.

"The Supreme Court's restrictions on compelled speech should not be relaxed simply because, as here, the speaker being compelled is a commercial entity," WLF Senior Litigation Counsel Cory Andrews said in a statement after filing WLF's brief. "If the government wishes to convey a message, it should do so by using its own property and resources, not by commandeering the private property of others who disagree with that message."

In its brief, the Chamber of Commerce called the regulation a "radical departure from traditional government efforts to regulate speech insofar as they force commercial enterprises to disparage the very products that they are lawfully marketing."

– KIMBERLY ATKINS

New Hampshire considers ban on GPS

The New Hampshire legislature is considering legislation that would ban the use of GPS devices to track people absent consent or a court order.

HB445 was inspired in part by the story of a jealous boyfriend who paid $30 for a GPS device to track his girlfriend, according to the bill's sponsor, Rep. Neal Kurk.

"[N]o person shall use an electronic tracking device to track an individual without the consent of the individual or the parent or legal guardian of the individual, or a valid court order," according to the legislation.

Exceptions apply for the tracking of personal property (such as rental cars), to locate a person who is a resident of a nursing or assisted living facility or to find a person incarcerated in prison.

Violators of the law would be charged with a misdemeanor but the legislation also includes a private right of action for aggrieved individuals to bring suit for $1,000 or actual damages, plus court costs and reasonable attorney fees.

In an initial vote, the bill was approved by the Commerce and Consumer Affairs Committee by 25 votes, but it faces the Criminal Justice and Public Safety Committee before a final vote by the state House.

The use of GPS devices has been in the spotlight nationally.

Late last month, the U.S. Supreme Court held that the attachment of a GPS device to a vehicle – and the use of that device to monitor the vehicle's movements – constituted a search under the Fourth Amendment.

The implications of the decision will be felt in both law enforcement circles as well as cases involving privacy rights.

– CORREY E. STEPHENSON

Plaintiffs' lawyers challenge medical ghostwriters

Plaintiffs' attorneys are beginning to challenge the practice of medical ghostwriting, in which doctors lend their names to medical marketing literature, according to an article published in the medical journal Public Library of Science.

The practice has been uncovered during discovery in products liability litigation over drugs that plaintiffs allege are dangerous, including Neurontin, Paxil, Zoloft, Fen-phen, Vioxx and Prempro.

According to one of the article's co-authors, Bijan Esfandiari, a Los Angeles plaintiffs' attorney, pharmaceutical companies hire professional authors to write articles with a certain slant – such as favorably summarizing clinical trials or promoting off-label uses – and then shop the finished articles to doctors at prestigious institutions to lend credibility to their conclusions.

The articles are used by drug companies' sales force to market drugs to treating physicians, who often decide prescribe medication in reliance on the medical names on an article, Esfandiari said.

"It's cheating. It's like a student who sends someone else to take a test for them," said Esfandiari, an attorney with Baum, Hedlund, Aristei & Goldman.

Esfandiari advocates holding doctors who act as "guest writers" liable for fraud by naming them as defendants in personal injury suits over the drugs, or bringing claims under the federal False Claims Act for inducing Medicare reimbursement or anti-kickback statutes if the doctors received compensation.

So far, he is aware of only one case in which plaintiffs' attorneys have named ghostwriting doctors as defendants, a suit over the drug Risperdal in Philadelphia.

– SYLVIA HSIEH

CIVIL RIGHTS

School must accommodate parent's latex allergy

A parent with a latex allergy was "handicapped" under a local civil rights law and, therefore, entitled to a reasonable accommodation by her child's school, Maryland's highest court has ruled.

The decision reversed a state appellate ruling. (See "Parent with latex allergy can't sue school," Lawyers USA, Sept. 22, 2008. Search terms for Lawyers USA's website: Meade and Shangri-La)

The plaintiff suffers from a latex allergy. Employees at her son's private preschool used latex gloves to change diapers. The plaintiff advised the school of her condition and the school agreed to use non-latex gloves to change her son's diapers, but continued to use latex gloves to change the diapers of other children.

When the school refused to make its premises a latex-free zone and asked the plaintiff to withdraw her son from its preschool program, the plaintiff sued for violations of her county's civil rights code. Specifically, the plaintiff alleged that her latex allergy constituted an impairment that fell within the code's definition of "handicap," and that the school violated the local code by failing to provide her with a reasonable accommodation.

A jury concluded that the school engaged in discrimination and awarded the plaintiff $29,500.

The court here reinstated that verdict, rejecting the school's contention that the term "handicap" in the local law should be construed in accordance with the more demanding standard for defining "disability" under the Americans with Disabilities Act.

"[T]he evidence in this case was sufficient for the jury's finding that [the plaintiff's] latex allergy was an impairment which substantially limited her major life activities of socialization and parenting, and thus was a 'handicap' within the meaning of [the county code]. The evidence was also sufficient to support the jury's finding that [the plaintiff] had been denied the accommodations of the … school because of her handicap and that this constituted discrimination," the court said.

Maryland Court of Appeals. Meade v. Shangri-La Partnership, No. 128, Sept. Term 2008. Jan. 26, 2012. Lawyers USA No. 993-3537.

CRIMINAL

Georgia assisted suicide law is unconstitutional

A state law prohibiting anyone from offering to assist another in committing suicide violates the First Amendment, the Georgia Supreme Court has ruled in reversing judgment.

A state law provides that any person "who publicly advertises, offers, or holds himself or herself out as offering that he or she will intentionally and actively assist another person in the commission of suicide and commits any overt act to further that purpose is guilty of a felony." Violation of the statute is punishable by imprisonment for one to five years.

The defendants in the case, which include a nonprofit organization that promotes a right to assisted suicide, were indicted under the law. In seeking to have the charges dismissed, the defendants argued that the statute violated the right to free speech under the First Amendment and the state constitution.

The court agreed that the statute was unconstitutional.

"The state has failed to provide any ex-

IRS eases rule making injury awards non-taxable

Awards for physical injuries are no longer required to be derived from a vindication of "tort" rights in order to qualify for exclusion from a taxpayer's gross income, according to a recent rule amendment issued by the Internal Revenue Service.

The amendment addresses the rule interpreting §104(a)(2) of the Internal Revenue Code. Section 104(a)(2) excludes from gross income "the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness."

The regulation interpreting the statute previously provided that, to be non-taxable, damages received by a taxpayer must be based upon "tort or tort type rights."

The amendment to the regulation, which became effective Jan. 23, 2012, deleted the requirement that a judgment or settlement be based on tort.

In making the change, the IRS explained that the tort-type rights test was originally intended to distinguish damages for personal injury from damages arising from other types of claims, like breach of contract.

The test came into question in the mid-90s when the U.S. Supreme Court in *Commissioner v. Schleier* (515 U.S. 323) interpreted §104(a)(2)'s "on account of" test to exclude only damages directly linked to "personal" injuries or sickness, and Congress passed the Small Business Job Protection Act, which explicitly made only damages for personal physical injury or sickness excludable.

"These legislative and judicial developments have eliminated the need to base the §104(a)(2) exclusion on tort cause of action and remedy concepts," the agency said in announcing the amendment.

– PAT MURPHY

planation or evidence as to why a public advertisement or offer to assist in an otherwise legal activity is sufficiently problematic to justify an intrusion on protected speech rights. Absent a more particularized state interest and more narrowly tailored statute, we hold the state may not, consistent with the United

States and Georgia Constitutions, make the public advertisement or offer to assist in a suicide a criminal offense," the court said.

Georgia Supreme Court. Final Exit Network v. State, No. S11A1960. Feb. 6, 2012. Lawyers USA No. 993-3547.

Passenger can have driver's license suspended

An automobile passenger caught with a jar of marijuana between his legs could have his driver's license suspended for "using" a vehicle in the course of a drug offense, the Indiana Supreme Court has ruled in affirming judgment.

State law authorizes the suspension of the driver's license of an individual convicted of possession of marijuana if the sentencing court "finds that a motor vehicle was used in the commission of the offense."

In this case, the defendant was a passenger in a vehicle stopped for speeding. During the course of the traffic stop, police observed a jar of marijuana on the floor in front of the defendant's seat.

Police arrested the defendant and the trial court found him guilty of possession of marijuana. In addition, the trial court suspended the defendant's driver's license for 180 days, concluding that the state's license suspension law applied even though the defendant was not driving the vehicle.

The state supreme court agreed that the defendant's license could be suspended under these circumstances.

"Here, [the defendant] used the vehicle in committing the offense of possessing marijuana. When viewed in the light most favorable to the judgment, the evidence shows that [the defendant] possessed a jar of marijuana by keeping the jar on the floorboard in Front of him while he sat in the passenger seat. As a result, this is not a situation in which a defendant merely happened to possess a small bag of marijuana in his pocket without making any direct use of the vehicle to do so," the court said.

Indiana Supreme Court. Adams v. State, No. 29S02-1109-CR-542. Feb. 2, 2012. Lawyers USA No. 993-3544.

Evidence from rectal exam of drug suspect admissible

The good faith exception to the exclusionary rule applied to permit the introduction of evidence obtained as the result of an "unreasonable" search of a drug suspect's anal cavity, the 5th Circuit has ruled in affirming judgment.

Believing that the defendant was hiding crack cocaine in his rectum, police obtained a warrant for the use of "recognized medical procedures" to examine the defendant's anal cavity for drugs. After x-rays and a digital exam performed at a hospital proved inconclusive, police consulted with a doctor who suggested that the defendant undergo a proctoscopy while under sedation.

The proctoscopy was performed over the defendant's objection and, as a result of the procedure, 9.62 grams of cocaine base was recovered from his rectum.

The defendant moved to suppress the drug evidence, arguing that the proctoscopic examination violated his fundamental inter-

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FDA, medical device makers reach deal on paying user fees

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previous user fee program renewal. The new system will be implemented in September when the current program expires.

The user fee system authorizes the FDA to collect fees from medical device companies to fund a portion of the FDA's device review and approval process. Under the program, the FDA agrees to overall performance goals such as reviewing a certain percentage of applications within a particular time frame. Medical device industry officials from the Advanced Medical Technology Association, the Medical Device Manufacturers Association and the Medical Imaging and Technology Alliance have been negotiating the terms of the latest fee renewal with federal officials for more than a year.

The fees collected under the fee renewal terms will give the FDA additional funding to hire over 200 full-time equivalent workers by the end of the five-year program, FDA officials said in a statement.

The negotiations between the parties took place as the FDA's 510(k) process – the so-called "fast track" approval process for lower risk medical products – came under increased fire after critical medical journal reports and statements by public health advocates. These critiques led the FDA to announce that it would implement changes to its process of reviewing devices that are deemed low risk before they go to market.

The issue has been the subject of several hearings before the Senate Committee on Health, Education, Labor and Pensions.

The chairman of the committee, Sen. Tom Harkin, D-Iowa, praised the agreement.

"This user fee agreement will ensure that life-saving medical devices reach patients who need them quickly and safely [and] encourage innovation and ensure that the review process for new medical devices is consistent and transparent," Harkin said in a statement.

– KIMBERLY ATKINS

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est in his bodily integrity and dignity.

The court agreed that the examination was an unreasonable search under the Fourth Amendment "due to the exceeding affront to [the defendant's] dignitary interest and society's diminished interest in that specific procedure in light of other less invasive means."

However, the court concluded that the evidence should not be suppressed because the police acted in good-faith reliance on a valid search warrant.

In reaching this conclusion, the court held that "a warrant, like the one at issue, that authorizes a medical procedure search of a specific area of the body but does not prescribe any off-limits procedures will be subject to good faith unless the police misled the magistrate, the magistrate abandoned her judicial role, or the warrant so clearly lacked probable cause. None of those situations exists in this case."

U.S. Court of Appeals, 5th Circuit. U.S. v. Gray, No. 10-11150. Feb. 1, 2012. Lawyers USA No. 993-3541.

FAMILY

Calif. same-sex marriage ban unconstitutional

The ban on gay marriage approved by California voters is unconstitutional, the 9th Circuit has ruled.

The decision affirms a ruling by a U.S. District Court. (See "Ban on gay marriage is unconstitutional," Lawyers USA, Aug. 5, 2010. Search terms for Lawyers USA's website: Perry and Schwarzenegger)

In 2008, California voters passed Proposition 8, an initiative which limited marriage to a union between a man and a woman.

Proponents of gay marriage sued, alleging that Proposition 8 violated the Fourteenth Amendment.

The 9th Circuit agreed, concluding that proponents of Proposition 8 failed to demonstrate a legitimate reason for treating same-sex couples differently.

"All that Proposition 8 accomplished was to take away from same-sex couples the right to be granted marriage licenses and thus legally to use the designation of 'marriage,' which symbolizes state legitimization and social recognition of their committed relationships. Proposition 8 serves no purpose, and has no effect, other than to lessen the status and dignity of gays and lesbians in California, and to officially reclassify their relationships and families as inferior to those of opposite-sex couples. The Constitution simply does not allow for 'laws of this sort,'" the court said.

U.S. Court of Appeals, 9th Circuit. Perry v. Brown, No. 10-16696. Feb. 7, 2012. Lawyers USA No. 993-3546

PERSONAL INJURY & TORT

Similac maker may be liable for infant's brain damage

The maker of a powder infant formula may be liable for brain damage suffered by a newborn who contracted a form of meningitis after being fed the company's product, a U.S. District Court in Iowa has ruled in denying a motion to dismiss.

The plaintiff is the conservator for a child who suffered severe brain damage due to E. sakazakii meningitis that she contracted ten days after being born. The onset of the illness coincided with her ingesting infant formula made with Similac powder, an Abbott Laboratories product. The Similac formula was sent home with the child's mother in a hospital gift bag.

The plaintiff sued Abbott under various product liability theories, alleging that powdered infant formula is the only known source of neonatal E. sakazakii meningitis.

Abbott argued that the plaintiff could not maintain a manufacturing defect claim because it failed to plead Similac's intended design and how Similac deviated from its intended design.

But the court concluded that the plaintiff adequately pleaded a manufacturing defect claim, explaining that "the allegation that [Abbott's] intended design did not include the presence of E. sakazakii seems highly plausible, and constitutes a sufficient allegation of [Abbott's] intended design."

Further, the court concluded that the plaintiff adequately pleaded the existence of an alternative design for purposes of maintaining a design defect claim.

"[T]hough the plaintiff's suggested storage, maintenance and testing alternatives do not constitute alternative designs, biocidal treatment and the distribution of solely liquid infant formula do constitute proposed alternative designs sufficient to survive [Abbott's] motion to dismiss," the court said.

In addition, the court concluded that the plaintiff could proceed with claims based on inadequate warning, breach of express warranty, breach of implied warranty of merchantability and fraud.

U.S. District Court for the Northern District of Iowa. Security National Bank of Sioux City v. Abbott Laboratories, No. 5:11-cv-04017-DEO. Feb. 1, 2012. Lawyers USA No. 993-3550.

Navy vets can't proceed with asbestos suits

Manufacturers of machinery used in U.S. Navy ships are not liable for injuries

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caused by asbestos products manufactured by others but used in conjunction with their asbestos-free products, a U.S. District Court in Pennsylvania has ruled in granting summary judgment.

The three plaintiffs in the case served in the Navy in the 50s, 60s and 70s. Each of them developed mesothelioma after their service. The defendants included General Electric, Westinghouse and other companies that manufactured turbines, pumps, boilers and valves used in ships on which the plaintiffs served.

The plaintiffs sued for negligence and strict liability, alleging that their mesothelioma was caused by their exposure to asbestos in insulation, packing and gaskets used with the defendants' products. Although the plaintiffs could not show that the defendants made the asbestos products at issue, the plaintiffs argued that the defendants were liable for the intended and foreseeable use of asbestos parts in their original products.

But the court decided that the defendants had no liability under federal maritime law, holding that "a manufacturer is not liable for harm caused by, and owes no duty to warn of the hazards inherent in, asbestos products that the manufacturer did not manufacture or distribute. …. A plaintiff's burden to prove a defendant's product caused harm remains the same in cases involving third-party asbestos manufacturers as it would in other products-liability cases based on strict liability and negligence."

U.S. District Court for the Eastern District of Pennsylvania. Conner v. Alfa Laval, Inc., No. 2:09-cv-67099-ER. Feb. 1, 2012. Lawyers USA No. 993-3543.

Stryker hip suit isn't completely preempted

Federal law regulating medical devices doesn't completely preempt the claims of a plaintiff who alleged that a hip replacement product malfunctioned and caused him injury, the 5th Circuit has ruled.

The plaintiff underwent surgery involving the implantation of a Trident hip replacement system in his left hip. The Trident system is manufactured by Stryker Corp. The plaintiff later experienced loosening in the joint which required a surgical revision of his hip replacement.

The plaintiff filed a product liability suit, alleging that contamination of the shell of the Stryker device during the manufacturing process prevented bonding with his bone.

Stryker argued that the plaintiff's state-law claims were completely preempted by the Medical Device Amendments to the Food, Drug, and Cosmetics Act.

The court agreed that the plaintiff's breach of express warranty claims were completely preempted, as well as his claims for strict liability, design defect and negligence insofar as they were premised on failure to warn or a marketing defect.

However, the court concluded that there was no preemption of the plaintiff's strict liability and negligence claims to the extent they were based on manufacturing defects arising from a violation of Stryker's manufacturing practices or those approved by the U.S. Food and Drug Administration.

The court concluded that those claims were "parallel claims" permitted under *Riegel v. Medtronic* (552 U.S. 312). (See "State law claims over medical devices are preempted," Lawyers USA, March 10, 2008. Search terms for Lawyers USA's website: Riegel and Medtronic)

"We … hold that if a plaintiff pleads that a manufacturer of a Class III medical device failed to comply with either the specific processes and procedures that were approved by the FDA or the [FDA's Current Good Manufacturing Practices] themselves and that

this failure caused the injury, the plaintiff will have pleaded a parallel claim," the court said.

The court similarly concluded that there was no preemption of the plaintiff's claims for breach of implied warranty.

U.S. Court of Appeals, 5th Circuit. Bass v. Stryker Corp., No. 11-10076. Jan. 31, 2012. Lawyers USA No. 993-3539.

REAL PROPERTY & ZONING

Condo purchasers may have lost rescission rights

Condominium purchasers may have waited too long to exercise their right to rescind their contract pursuant to federal law requiring certain disclosures in land sales, the 6th Circuit has ruled.

In 2006, the plaintiffs entered into an agreement to purchase a particular unit in a condominium development. Two years later, the developer notified the plaintiffs that the unit was ready for closing.

Instead of closing on the property, the plaintiffs sued to rescind their purchase agreement under the Interstate Land Sales Full Disclosure Act. According to the plaintiffs, the developer violated the Act by failing to provide them with a property report.

The developer argued that the plaintiffs had forfeited their right to rescind by waiting more than two years before exercising their rights. Section 1703(c) of the Act generally requires the exercise of rescission rights within two years of signing.

The court agreed that the action was untimely under the statute, rejecting the

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plaintiffs' argument that the two-year limit was tolled by the developer's failure to provide them proper notice of their right to rescind in violation of §1711 of the Act.

"The [plaintiffs'] proposed construction – that [the developer's] failure to include notice of their right to rescind in the purchase agreement extends the period in which they could rescind under §1703(c) until two years after the disclosure was correctly made – would not give effect to the clause of §1703(c) establishing a two-year window from the date of signing within which the buyer must exercise the rescission right. …

"Therefore, we adopt the construction …which gives effect to both §1703(c)'s two-year limit and §1711's three-year statute of limitations. We hold that a purchaser or lessee must comply with both §1703(c)'s two-year limit for exercising the right of rescission and § 1711(b)'s three-year limit for filing suit based on the seller's refusal to honor the buyer's rescission," the court said.

While the court concluded that the plaintiffs' *statutory* rescission action was untimely, it remanded the matter for the trial court to consider whether the plaintiffs were entitled to equitable rescission.

U.S. Court of Appeals, 6th Circuit. Veneklase v. Bridgewater Condos, No. 10-1794. Feb. 6, 2012. Lawyers USA No. 993-3549.

City must have probable cause to inspect home

A city was required to satisfy the traditional probable cause standard in order to obtain a court order for the inspection of a home for zoning violations, the Connecticut Supreme Court has ruled in reversing judgment.

A neighbor complained to a city zoning inspector that the defendants kept junk cars at their home. The inspector went to the home and saw the cars from the street, but could not from his vantage point determine that the vehicles were in actuality unregistered. The city's zoning code includes in the definition of "junk" only those vehicles without current registration.

After the defendants refused to allow the inspector on the property, the city obtained an order enjoining the defendants from refusing to consent to an inspection.

The defendants argued that the order violated their Fourth Amendment right to be free from unreasonable searches.

The court agreed, rejecting the city's contention that, under the U.S. Supreme Court's decision in *Camara v. Municipal Court* (387 U.S. 523), the zoning inspection at issue constituted an administrative search for which an individualized suspicion of unlawful conduct was unnecessary.

Instead, the court concluded that the city was required to make a traditional showing of probable cause. It explained that the "search contemplated here is not in conformance with any general routine or area inspection scheme. Rather, the proposed search targets a single dwelling as the object of suspicion in response to a complaint regarding that property. In this sense, the proposed search of the property looking for specific zoning violations more closely resembles a search for specific evidence of a crime in a criminal investigation. Without a requirement of probable cause to believe that the search of the targeted property will uncover evidence of a specific administrative violation, the risk that a particular dwelling has been singled out arbitrarily as the object of suspicion remains high."

Connecticut Supreme Court. Town of Bozrah v. Chmurynski, No. SC-18424. Feb. 14, 2012. Lawyers USA No. 993-3548.