

Reinsurance & Direct Insurance

Supremes' Decision Expected Regarding Authority of Arbitrators to Decide Procedural Issues Not Addressed in Arbitration Agreement

Tort Reform

Illinois Supreme Court to Rule on Medical Malpractice Damages Cap

The Illinois Supreme Court is expected to rule soon on whether the State's medical malpractice law, which caps non-economic damages, is unconstitutional. *LeBron v. Gottlieb Memorial Hospital*, Nos. 105741 & 105745 (consolidated). The case was argued before the Court in November 2008 and was included on the Court's anticipated opinions list for December 17, 2009. For unexplained reasons, however, the Court did not issue its ruling on that date.

The challenged law, which was enacted in 2005, limits non-economic damages to \$500,000 for claims against doctors and \$1 million for claims against hospitals. In 2007, the Cook County Circuit Court ruled that the caps violated the Separation of Powers Clause of the Illinois Constitution. That decision was appealed directly to the Illinois Supreme Court.

The Court has twice overturned damages caps enacted by the legislature on constitutional grounds. If the Court again finds the caps on damages to be unconstitutional, the amount of malpractice verdicts almost certainly will increase. Whichever way it comes out, however, the decision will impact the future of tort reform in Illinois.

The United States Supreme Court will address an important question of arbitration law in *Stolt-Nielsen SA v. AnimalFeeds International Corp.*, No. 08-1198. The case was argued on December 9, 2009. A decision is likely before the end of the Court's current term in June 2010.

The specific issue before the Court is whether an arbitration panel has the authority to hear an arbitrable dispute as a class action where the arbitration clause is silent as to the parties' intent to arbitrate class claims. The arbitration panel had ruled that the case, involving antitrust issues, could proceed as a class action. The United States District Court for the Southern District of New York vacated that ruling, holding that it was in "manifest disregard of the law."

The United States Court of Appeals for the Second Circuit reversed, finding no manifest disregard of the law. The Second Circuit also rejected the argument that the arbitrators had exceeded their authority by finding an intent to submit class claims to arbitration where the arbitration agreement was silent on that issue. Only the latter ruling was the subject of the appeal to the Supreme Court.

Given the deference that courts generally accord arbitration awards, the Supreme Court's decision to hear this case, involving an issue of contract interpretation by an arbitration panel, is somewhat surprising. If the Court reverses the Second Circuit, its decision may expand judicial review of arbitral awards on certain procedural issues, such as hearing class claims or consolidation, that are not normally addressed in arbitration clauses. And although the Court has previously ruled, in a plurality opinion, that the issue of whether an arbitration clause permits class actions should be decided by the arbitrators rather than the courts, the Court could revisit that issue.

The *Stolt-Nielsen* case also is being watched closely to see if the Court makes any further pronouncement on the "manifest disregard of the law" standard for vacating arbitral awards. The Court appeared to abrogate that standard in *Hall Street Associates, LLC v. Mattel, Inc.*, 552 U.S. 576 (2008). Several Circuit Courts of Appeal are now split on whether the "manifest disregard" standard remains viable.

Trade Sanctions Regulation: Insurance Companies to be Told to Divest Investments in Iran

Spearheaded by the efforts of California Insurance Commissioner and 2010 gubernatorial candidate Steve Poizner, insurance companies can expect increased pressure from state insurance commissioners to divest their investments in countries subject to U.S. trade sanctions regulations.

On July 2, 2009, the California Commissioner issued a request pursuant to his office's general examination authority to 1,327 California licensed insurance companies for data concerning investments they may have in the Government of Iran, in securities denominated in the Government of Iran, and in entities that conduct business in the defense, nuclear, petroleum, natural gas and banking sectors of Iran. Initially, 1,111 companies responded to the request and disclosed billions of dollars in indirect investments in companies that do business with the Iranian energy, nuclear, banking and defense industries. After calling upon executives from 10 of the 216 non-responding companies to appear at a hearing on January 12, 2010, and testify under oath to "to explain why they ignored this critical data call," the California Commissioner announced that 100 percent of the 1,327 companies ultimately complied with his request for data.

The California Commissioner is expected to now issue a list of prohibited companies that do business with the Iranian energy, nuclear, banking and defense industries. Insurers will be given 30 days to notify the California Department of Insurance of the value of their investments in these prohibited companies and 90 days to divest their investments in these prohibited companies. Other states' commissioners are considering similar divestment initiatives, as well as a coordinated nationwide divestment effort.



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