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DAILY REPORT

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Newsreel

Cigarette makers lose appeal on 4,000 Florida suits

• Three major cigarette makers—Altria Group Inc.'s Philip Morris USA unit, R.J. Reynolds Tobacco Co. and Lorillard Tobacco Co.—lost an appeal affecting about 4,000 Florida smoker suits in federal court.

The 11th U.S. Circuit Court of Appeals in Atlanta on Thursday denied the companies' request to block lower courts from applying a 2006 Florida Supreme Court decision they claimed deprived them of fair trials in death and injury suits filed in the state.

The companies said that a series of factual conclusions endorsed by Florida's highest court in a 2006 class action that eventually was decertified, *Engle v. Liggett Group, 945 So.2d 1246*, can't fairly be used against them in individual smokers' trials.

Specifically, the Florida Supreme Court found what it called a "pragmatic solution" to retrying thousands of liability cases. It ruled that Florida common law would permit common findings to be "retained" in follow-on damage actions. In other words, some of the jury's class-wide findings would be given preclusive effect in subsequent individual trials of one-time class members.

The tobacco companies opposed giving preclusive effect to those findings, which included those that cigarette makers conspired to hide information on smoking's health effects and that they made false statements about their products.

The federal court said the findings "must be given the same preclusive effect in this

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VERDICTS & SETTLEMENTS

ZACHARY D. PORTER/DAILY REPORT

From left, McGuireWoods' Carolyn Chaney, David Forestner, Vicky Dracos and Wayne Phears represented the winning family-owned landfill business, Etowah Environmental Group, against Advanced Disposal Services.

Arbitration panel awards $27M in buyout dispute

'SMOKING GUN' LETTER leads to $4M in rare punitives in dispute over landfill

GREG LAND | gland@alm.com

AFTER AWARDING almost $23 million to a family-owned landfill business in a buyout dispute, an arbitration panel took the unusual step of adding more than $4 million in punitive damages against a company found to have hidden information regarding the deal.

Ironically, said H. Wayne Phears, who represented the winning business with McGuireWoods partner David J. Forestner, his side had tried to keep the case away from arbitrators. A decision from the Georgia Court of Appeals forced them before the panel that proved more than sympathetic to their arguments.

"My concern with arbitration is that it's always just a compromise," said Phears. "This one wasn't like that; the arbitrators were doing what they thought the law and the facts required. I've seen trials that didn't go as smoothly."

Phears likened the intense arbitration against a team of Balch & Bingham lawyers, led by his friend Michael J. Bowers, to "a couple of old dogs gnawing

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Arbitration panel awards $27M in buyout dispute

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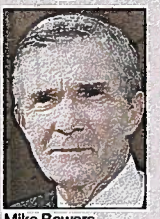
on each other for two weeks."

Bowers laughed when apprised of Phears' characterization.

"It was a hard-fought case. They did a good job," said Bowers, whose team included T. Joshua R. Archer, K. Alex Khoury, Righton Johnson and M. Ann Kaufold-Wiggins.



Mike Bowers

Bowers, himself an arbitrator, declined to discuss the specifics of the case or award, but agreed with Phears that the award of punitive damages in arbitration is unusual.

The case involved Forsyth County's Eagle Point landfill and the joint partnership that owned it, Federal Road LLC.

A Delaware company with landfill operations in six Southeastern states, Advanced Disposal Services Inc., or ADS, owned 75 percent of Federal Road. The other 25 percent was owned by Etowah Environmental Group, a company owned by several members of the Grogan family, who had launched their waste-hauling business years earlier with "one used dump truck," said Phears.

Etowah Environmental approached ADS in 2001 about entering into a partnership to operate the Eagle Point landfill, establishing Federal Road and allowing the landfill to benefit from Etowah's established source of waste customers. The Grogans eventually had more than $10 million invested in the partnership, according to an arbitration filing by Etowah Environmental.

In 2004, says the document, ADS "embarked on an aggressive and systematic effort to force Etowah and its shareholders to sell Etowah's interest in Federal Road for much less than its true value." Part of that effort involved making the landfill seem to be struggling financially by routing loads of trash to other ADS-owned landfills, transferring Federal Road equipment to other sites and using Federal Road funds to make political contributions "in a state where it did not even operate."

At the same time, according to the filing, ADS frequently demanded that the Grogans pitch in more money, issuing "capital calls" to Etowah totaling more than $6 million between 2002 and 2005.

Unbeknownst to the Grogans, in early 2006, the investment fund AIG Highstar offered to buy ADS, according to the filing.

In June 2006, ADS notified Etowah that it was absorbing the Federal Road partnership, with Etowah to be paid in ADS stock.

According to the operating agreement, such a move would require Etowah's approval, and the value Etowah's share of Federal Road would be appraised by a three-member panel: one would be appointed by ADS and the second by Etowah; those two would select a third.

But ADS instead appointed all three appraisers and went ahead with the AIG Highstar merger and the absorption of the Federal Road landfill, according to Etowah's document.

In August 2006, AIG Highstar paid $470 million for ADS, including Federal Road. In May 2007, the appraiser notified Etowah that it would receive shares in ADS stock valued at $8.5 million.

ADS then reduced that figure by another $1.3 million, reflecting capital calls it made on Etowah after it decided to sell to AIG Highstar.

Etowah felt that its interests had not been represented fairly and filed a complaint in Forsyth County Superior Court against ADS alleging conversion, fraud, breach of contract, conspiracy and other charges, but the trial court ruled that the operating agreement between Etowah and ADS mandated arbitration.

In March 2009 the Georgia Court of Appeals agreed, ruling that the operating agreement was governed by Delaware law, which holds that "when determining arbitrability, courts are limited to ascertaining whether the dispute is one that falls within the scope of the arbitration clause of the contract." That case was *Etowah Environmental v. Advanced Disposal Services*, 297 Ga. App. 126.

In May, a three-member American Arbitration Association panel consisting of Schreeder, Wheeler & Flint partner David H. Flint; Glaser Currie & Bullman partner Arthur H. Glaser; and Mayer & Harper partner Randolph A. Mayer convened to hear the case.

On July 1 they found that ADS owed a fiduciary duty to its minority partner, Etowah, and had violated that duty. Key to the case was a May 2006 letter to ADS Chief Executive Officer Charles Appleby in which AIG Highstar placed an estimated value of $65 million on the Federal Road portion of its original offer.

Appleby had responded by demanding more for ADS, but he reduced the portion designated for Federal Road to $45.5 million, meaning ADS would get almost $20 million in value that the arbitrators said should have been shared with Etowah.

The letter had never been disclosed during discovery, said Phears, but he and Forestner convinced the arbitrators to subpoena AIG Highstar's records, where a copy had been kept.

"That missing letter was the smoking gun," said Phears. "It had not been produced by the defendants; they'd shredded it."

Even after the letter surfaced, he said, "nobody could explain how [Federal Road's value] miraculously fell from $65 million to $45 million in the space of a few days."

The arbitrators found that the true value of Etowah's interest in Federal Road was $19.1 million, and added $4.8 million in prejudgment interest and more than $250,000 in damages for breach of fiduciary duty and nominal damages.

On the issue of punitives, the panel found that both Georgia and Delaware law allows for punitive damages when a party's conduct amounted to a "specific intent to cause harm."

The panel awarded $3.9 million against ADS for its breach of fiduciary duty and $250,000 in punitive damages against Appleby.

The total award, after a $1.7 million reduction for the unfunded 2006 capital call, was almost $27 million.

"The money has already been paid and is in an escrow account," said Phears, so there will be no more litigation in the case.

Bowers agreed.

"It's totally over," he said.

The case is American Arbitration Association file Nos. 30 180 Y 0671 07 and 30 180 Y 00456 09.