



Appellate Reports

Recent cases of interest to members of the plaintiff's bar

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Merck & Co, Inc. v. Reynolds

__ U.S. __, 2010 WL 1655827 (U.S. Supreme Court)

Who needs to know about this case:

Lawyers filing securities' law claims.

Why it's important: Clarifies the statute of limitation for § 10(b) of the Securities Exchange Act of 1934, holding that discovery of facts constituting the violation includes discovery of the facts showing scienter.

Synopsis: In November 2003 plaintiffs filed a securities-fraud action under section 10(b) of the 1934 Act alleging that Merck had knowingly misrepresented the risks of heart attacks posed by Vioxx. 28 U.S.C. § 1658(b) creates a two-year limitations period for actions under section 10(b). The limitations period under the statute begins to run once the plaintiff actually discovered or a reasonably diligent plaintiff would have discovered the facts constituting the violation – whichever comes first. Scienter – “a mental state embracing intent to deceive, manipulate, or defraud” – is an element of a violation of section 10(b), and is therefore among the facts that the plaintiff, or a hypothetical diligent plaintiff, must discover to trigger the running of the limitations period. It would frustrate the purpose of the discovery rule codified in section 1658 if the limitations period began to run regardless of whether the plaintiffs had discovered (or should have discovered) any facts suggesting scienter.

Nor is it sufficient that plaintiffs merely discover facts that suggest that the

defendant made a materially false or misleading statement; this is not sufficient to show the existence of scienter. For example, an incorrect prediction about the company's future earnings would not, by itself, automatically show whether the speaker deliberately lied or made an innocent error.

The Court also rejected Merck's argument that the limitations period commenced at the point where facts would lead a reasonably diligent plaintiff to investigate further (inquiry notice). This is because that point is not necessarily the point at which the plaintiff would already have discovered facts showing scienter, or the other elements of the violation. Because Merck did not show that a reasonably diligent plaintiff would have discovered the facts constituting the violation two years before the suit was filed, dismissal of the plaintiffs' lawsuit as untimely filed was not proper.

Stolt-Nielsen S.A. v. AnimalFeeds International Corp.

__ U.S. __, 2010 WL 1655826 (U.S. Supreme Court)

Who needs to know about this case:

Lawyers handling cases under the Federal Arbitration Act (“FAA”).

Why it's important: Holds that arbitrators exceed their power by adopting their own policy choice in area where arbitration agreement is silent, rather than identifying and applying a rule of decision from the appropriate source. This failure requires that arbitration award be vacated. Also holds that a party cannot be compelled to submit to class arbitration under the FAA unless there is a contrac-

tual basis to conclude that the party agreed to do so.

Synopsis: Shipping companies that controlled much of the world market for parcel tankers – seagoing vessels with compartments that are separately chartered to customers who wish to ship liquids in small quantities – were sued by a group of customers for price fixing. The standard contract to charter a compartment contains an arbitration clause. The clause is silent with respect to class arbitrations. The arbitration panel decided that, as a matter of public policy, class arbitration. Shipping companies challenged this ruling in the Supreme Court, which held that imposing class arbitration on parties who have not agreed to authorize class arbitration is inconsistent with the FAA and exceeded the arbitrators' power, requiring that their award be vacated.

The panel based its decision on recent arbitral decisions without mentioning whether they were based on a rule derived from the FAA or on maritime or New York law. Rather than inquiring whether those bodies of law contained a “default rule” permitting an arbitration clause to allow class arbitration absent express consent, the panel proceeded as if it had a common-law court's authority to develop what it viewed as the best rule for such a situation. Finding no reason to depart from its perception of a consensus among arbitrators that class arbitration was beneficial in numerous settings, the panel permitted class arbitration because it represented sound policy. An arbitrator's task is to interpret and enforce a contract, not to make public policy. Because the parties stipulated that their



agreement was silent on whether class arbitration was permitted, the arbitrators' task was to identify the rule of law governing in that situation, not to make a public-policy choice.

A party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so. Here, the arbitration panel imposed class arbitration despite the parties' stipulation that they had reached "no agreement" on that issue. The panel's conclusion is fundamentally at war with the foundational FAA principle that arbitration is a matter of consent. It may be appropriate to presume that parties to an arbitration agreement implicitly authorize the arbitrator to adopt those procedures necessary to give effect to the parties' agreement. But an implicit agreement to authorize class action arbitration is not a term that the arbitrator may infer solely from the fact of an agreement to arbitrate. The differences between simple bilateral and complex class action arbitration are too great for such a presumption.

Dukes v. Wal-Mart Stores, Inc.

___ F.3d ___, 2010 WL 1644259 (9th Cir. 2010)(en banc)

Who needs to know about this case: Employment lawyers and lawyers who bring class actions.

Why it's important: Affirms class-certification of a nationwide sex-discrimination claim against Wal-Mart brought by six women who worked in 13 of Wal-Mart's 3,400 stores, on behalf of a class consisting of all women who worked at Wal-Mart since 2001. The majority and dissent disagree on the size of the class, with the majority estimating it at 500,000, and the dissent saying 1.5 million members.

Synopsis: The majority's opinion is lengthy. It explains how the district court's certification order complies with the standards for class certification under Rule 23 of the Federal Rules of Civil Procedure. In particular, it finds that the standards for certification under Rule

23(a) are met [numerosity, commonality, and typicality; and that the class is adequately represented by the class representatives and their counsel, and that the case is manageable] and that certification was proper under Rule 23(b)(2)(b) [the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief ... is appropriate respecting the class as a whole]. There is also a lengthy dissent.

Judge Graber, in a three-paragraph concurring opinion wrote:

The majority and the dissent have written scholarly and complete explanations of their positions. What the length of their opinions may mask is the simplicity of the majority's unremarkable holding:

Current female employees may maintain a Rule 23(b)(2) class action against their employer, seeking injunctive and declaratory relief and back pay on behalf of all the current female employees, when they challenge as discriminatory the effects of their employer's company-wide policies.

If the employer had 500 female employees, I doubt that any of my colleagues would question the certification of such a class. Certification does not become an abuse of discretion merely because the class has 500,000 members.

In dissent, Judge Kozinski responded:

Maybe there'd be no difference between 500 employees and 500,000 employees if they all had similar jobs, worked at the same half-billion square foot store and were supervised by the same managers. But the half-million members of the majority's approved class held a multitude of jobs, at different levels of Wal-Mart's hierarchy, for variable lengths of time, in 3,400 stores, sprinkled across 50 states, with a kaleidoscope of supervisors (male and female), subject to a variety of regional policies that all differed depending on each class member's job, location and

period of employment. Some thrived while others did poorly. They have little in common but their sex and this lawsuit.

Many observers believe that, given the size of the class and the potential complexity of the action, and the split within the circuit, that the U.S. Supreme Court is likely to grant review.

Primiano v. Cook

___ F.3d ___, 2010 WL 1660303 (9th Cir.)

Who needs to know about this case: Lawyers dealing with *Daubert* objections concerning medical testimony.

Why it's important: Clarifies the standard under *Daubert* for admission of expert medical testimony, and reverses district court order excluding testimony of plaintiff's expert physician that the material in defendants' artificial elbow joint wore out so quickly that it must be defective. (See, *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579 [113 S.Ct. 278].)

Synopsis: Marylou Primiano, age 36, fell in her kitchen and broke her elbow in April 2000. The injury was particularly serious for her because she suffers from rheumatoid arthritis. Her physician replaced her elbow joint with a device made by the defendant, Howmedica, consisting of titanium pieces to replace the bone and polyethylene components to prevent metal from rubbing against metal. The operation appeared to be a success, but by July 2000 the elbow squeaked and by December her doctor could hear metal-on-metal contact, which he confirmed with an X-ray. In February 2001, he performed a second surgery, replacing various components with new ones. Again, the surgery appeared to go well, but within a month she heard "cracking" in the joint, and by June another surgeon recommended that the device be replaced. It was, and she ultimately had five surgeries to either install or revise various devices.

She brought a products-liability case against Howmedica. Howmedica moved for summary judgment. In its papers



Howmedica's experts, an orthopedic surgeon and a chemist, provided opinions that the polyethylene was as it should be, and the rapid failure of the prosthesis and excessive wear on the polyethylene components resulted from "malalignment of the prosthesis" along with increased risk of complication because of Ms. Primiano's rheumatoid arthritis and her age. The district court granted summary judgment for Howmedica because it excluded under *Daubert* the testimony of her medical expert, Dr. Weiss, that the extraordinarily rapid wear was caused by abrasive wear and generation of debris from movement of the titanium against the polyethylene. And he concluded that the prosthesis failed to perform in a manner reasonably to be expected by a surgeon using it, because it failed too early.

For scientific opinion, a district court applying *Daubert* must assess the expert's reasoning or methodology, using as appropriate such criteria as testability, publication in peer reviewed literature, and general acceptance, but the inquiry is a flexible one. Shaky but admissible evidence is to be attacked by cross examination, contrary evidence, and attention to the burden of proof, not exclusion. In sum, the trial court must assure that the expert testimony both rests on a reliable foundation and is relevant to the task at hand. *Kumho Tire Co. v. Carmichael* (1999) 526 U.S. 137 [119 S.Ct. 1167] holds that the *Daubert* framework applies not only to scientific testimony but to all expert testimony. It emphasizes, though, that the test

of reliability is 'flexible' and *Daubert's* list of specific factors neither necessarily nor exclusively applies to all experts or in every case. The list of factors was meant to be helpful, not definitive, and the trial court has discretion to decide how to test an expert's reliability as well as whether the testimony is reliable, based on the particular circumstances of the particular case.

The test under *Daubert* is not the correctness of the expert's conclusions but the soundness of his methodology. Under *Daubert*, the district judge is "a gatekeeper, not a fact finder." When an expert meets the threshold established by Rule 702 as explained in *Daubert*, the expert may testify and the jury decides how much weight to give that testimony. Testimony by physicians may or may not be scientific evidence like the epidemiologic testimony at issue in *Daubert*. Classic medical school texts explain that medicine is scientific, but not entirely a science, and that physicians often rely on their experience and judgment, making medical decision-making a process that is difficult to quantify or even assess qualitatively. Lack of certainty is not, for a qualified expert, the same as guesswork. The factors identified in *Daubert* may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony. Reliable expert testimony need only be relevant, and need not establish every element that the plaintiff must prove, in order to be admissible.

A trial court should admit medical expert testimony if physicians would accept it as useful and reliable, but it need not be conclusive because medical knowledge is often uncertain. The human body is complex, etiology is often uncertain, and ethical concerns often prevent double-blind studies calculated to establish statistical proof. Where the foundation is sufficient, the litigant is entitled to have the jury decide upon the experts' credibility, rather than the judge. Dr. Weiss was qualified to give his opinion. His background and experience, and his explanation of his opinion, leave room for only one conclusion regarding its admissibility: It had to be admitted. Once admitted, the opinion precluded summary judgment, because if the jury accepted it, then the Howmedica prosthesis "fail[ed] to perform in the manner reasonably to be expected." His methodology, essentially comparison of what happened with Primiano's artificial elbow with what surgeons who use artificial elbows ordinarily see, against a background of peer-reviewed literature, is the ordinary methodology of evidence-based medicine. The district court erred in excluding it.



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