VERDICTS & SETTLEMENTS

Damaged crops yield $40 million verdict

By Correy E. Stephenson
Staff writer

Two farmers received a total of almost $40 million from a Portland, Ore. jury after their nursery crops, including blueberry, rhododendron and Japanese maple plants, were destroyed by a faulty fertilizer.

The plaintiffs switched to a new fertilizer that was marketed as a controlled release product but was in fact a watered-down slow release with other nutrients mixed in, explained their attorney, Larry Baron of the Baron Law Firm in Portland.

AT-A-GLANCE

- The plaintiff's attorney alleged that the company never tested its product before promoting it to farmers.
- Both farmers explained that they lost good will among their customers, who turned to other farms to provide their plants.

On the left, the above picture shows healthy plants. On the right, it shows damaged plants that were treated with the fertilizer at issue in the case.

The result: dead plants, a damaged reputation for the farmers and huge financial losses.

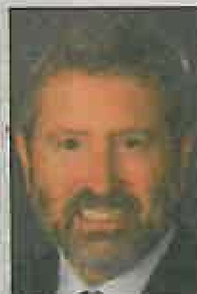
Baron argued that Sun Gro, the maker of the Multicote 15-9-12 fertilizer, essentially tried to create a cheaper product than the market leader by adding components that killed off the plants it treated. Worse, he alleged, the company never even tested its product before promoting it to farmers.

"Sun Gro put this together on the cheap," Baron said. "They wanted to get into the controlled release market but put no money into research or development and just mixed [Multicote] together themselves, never field testing it before they started marketing it."

After five weeks of trial, a 12-person jury responded with an award totaling just under $40 million for the two farmers.

Calls seeking comment from the attorneys for the defendants – Everett Jack of Davis Wright Tremaine in Portland for Woodburn Fertilizer and Wilbur-Ellis and William G. Earle of Davis Rothwell Earle Xochihua in Portland for Sun Gro – were not returned.

Derek Fee, a spokesperson for Sun Gro, said the company disagreed with the verdict but hasn't yet decided whether to appeal.



Plaintiffs' attorney Larry Baron

Toxic fertilizer

Jag Aujla, owner of JRT Nurseries in Aldergrove, British Columbia and Lynden, Wash., ran a large operation, primarily growing blueberries for sale to farmers who grow the plants as crops.

He also sold ornamentals like rhododendrons to nurseries, Baron said.

Aujla first used Multicote in 2007 based on the advice of his local salesperson, who recommended a switch from the market leader, Scott's Osmocote Plus fertilizer.

His crops suffered that year, said Baron, but Aujla had been absent from day-to-day operations at the firm in the wake of his teen-age son's death in a motor vehicle accident, and he assumed the crop failures were attributable to that absence.

But when he used Multicote again in 2008 and again saw his plants die, he concluded that the fertilizer was to blame.

The second plaintiff, Eelco De Zwaan, operated a much smaller farm, DeZwaan Nurseries, in British Columbia and only used Multicote in 2008 on Japanese maple trees.

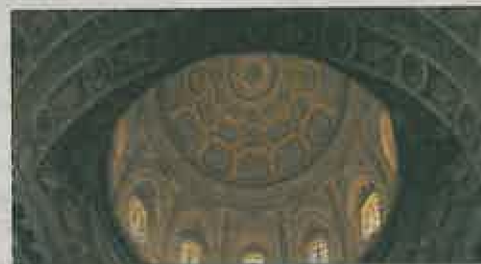
According to Baron, a controlled fertilizer releases its nutrients over a defined period of time and is commonly used for nursery plants like those grown by the plaintiffs. A quick release fertilizer can be toxic to such plants because it releases its nutrients too fast.

During discovery, Baron learned that Sun Gro had purchased other components, including a product called Fritt 503G, to mix with the controlled release nutrients in Multicote in order to make a cheaper product.

But because those other components were not controlled release and were not intended for a nursery setting, Baron said, their nutrients were released too quickly and

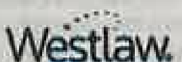
Continued on page 25

TRANSFORM LAW AND FACTS ... INTO IMPRESSIVE RESULTS.



Westlaw Litigator® tools help you practice productively and efficiently, without sacrificing the quality of your work product – so you deliver cost-effective and impressive litigation results. Westlaw Litigator tools integrate with the applications you use every day, provide remote access flexibility, streamline litigation tasks, and leverage the work of your entire litigation team. New additions such as Westlaw® CaseLogistix® – an industry-recognized, leading document review tool – allow you to produce the best work product.

Please visit westlawlitigator.com or call your West Representative at 1-800-762-5272. West Case Notebook™ | Westlaw CaseLogistix | West km™ | Westlaw Drafting Tools



© 2011 Thomson Reuters L-366185/2-11 Thomson Reuters and the Kinesis logo are trademarks of Thomson Reuters.

TOP DECISIONS

PERSONAL INJURY & TORT

Continued from page 23

invasive surgery.

But the state supreme court held that the state's courts "are not restricted to considering a single use of a multi-use product in design defect, threshold, risk-utility balancing."

Pennsylvania Supreme Court. Beard v. Johnson & Johnson, No. J-29-2011. March 22, 2012. Lawyers USA Nos. 993-3672 (majority) and 993-3673 (concurrence). You can link to the full text of either opinion by going to ***www.lawyersusaonline.com*** *and searching the Lawyers USA website.*

REAL PROPERTY & ZONING

Homeowner can't get flood coverage

A homeowner was not entitled to coverage under a policy issued under the National Flood Insurance Program because he failed to strictly comply with the policy's proof-of- loss requirement, the 2nd Circuit has ruled in affirming a summary judgment.

The plaintiff took out a standard flood insurance policy administered by the defendant on behalf of the federal government pursuant to the National Flood Insurance Act. The policy required the plaintiff to promptly file a proof of loss when making a claim.

The plaintiff filed a claim for damage to his home after a nearby creek flooded. In submitting a proof of loss, the plaintiff partially complied, but failed to designate a specific amount of damages as required by the policy.

The defendant denied the plaintiff's claim based on the incomplete proof of loss.

The court agreed that coverage could be denied on that basis, holding that standard flood insurance policy requirements must be strictly construed and enforced.

"In the context of federal insurance policies, the Supreme Court has long held that an insured must comply strictly with the terms and conditions of such policies," the court said.

It noted similar decisions from the 1st, 3rd, 4th, 5th, 6th, 8th, 9th and 11th Circuits.

In addition, the court rejected the plaintiff's argument that the defendant's initial denial of coverage on the basis of his incomplete proof of loss amounted to a "repudiation" under applicable New York law, thereby relieving him of the proof-of-loss requirements.

U.S. Court of Appeals, 2nd Circuit. Jacobson v. Metropolitan Property & Casualty Insurance, No. 11-0220-cv. March 6, 2012. Lawyers USA No. 993-3619. You can link to the full text of this opinion by going to ***www.lawyersusaonline.com*** *and searching the Lawyers USA website.*

WORKERS' COMPENSATION

Longshore Act maximum rate set at date of disability

The maximum workers' compensation benefits available to a longshoreman must be based on the national average weekly wage for the fiscal year in which he became disabled, the U.S. Supreme Court has ruled.

The decision affirms a ruling from the 9th Circuit.

Section 906(c) of the Longshore and Harbor Workers' Compensation Act caps benefits for most types of disability at twice the national average weekly wage for the fiscal year in which an injured employee is "newly awarded compensation."

In this case, the plaintiff was injured in fiscal year 2002 while working at a marine terminal. His employer voluntarily paid his benefits until fiscal year 2005. The plaintiff subsequently filed a claim for benefits under the Act. An administrative judge awarded the plaintiff benefits in fiscal year 2007.

However, the award was based on the fiscal year 2002 statutory maximum rate.

The plaintiff argued that he was "newly awarded compensation" within the meaning of §906(c) in 2007 and, therefore, his award should have been set at the higher statutory maximum rate for fiscal year 2007. (See "In workers' comp case, a question of time," Lawyers USA, Jan. 12, 2012. Search terms for Lawyers USA's website: Roberts and Sea-Land)

But the Court held that "that an employee is 'newly awarded compensation' when he first becomes disabled and thereby becomes statutorily entitled to benefits, no matter whether, or when, a compensation order issues on his behalf."

Justice Sonja Sotomayor wrote the majority opinion. Justice Ruth Bader Ginsburg filed an opinion concurring in part and dissenting in part.

U.S. Supreme Court. Roberts v. Sea-Land Services, Inc., No. 10-1399. March 20, 2012. Lawyers USA No. 993-3649.

Damaged crops yield $40M verdict for two farmers

Continued from page 12

in too high of a volume, killing the plants.

Defense: plaintiffs should have tested

The plaintiffs filed suit against Oregon-based Sun Gro and Wilbur-Ellis, a multinational corporation that actually manufactured the fertilizer by mixing the components.

According to Baron, the defense argued at trial that Aujla shouldn't have used the Multicote for two straight years and should have realized what happened to his crops.

Further, they argued that both farmers should have tested the product before using it on a larger scale basis, because not every fertilizer is made for every plant.

The defense "tried to have it both ways," Baron said. "First, they said their fertilizer was not dangerous, and yet they were saying that [the plaintiffs] should have realized it was dangerous" from testing it and stopped its use.

The defendants also presented testimony from a farmer who said his plants had done well with the Multicote, Baron said.

At trial, both plaintiffs took the stand, along with an expert who explained to jurors the losses their farms had incurred.

Aujla told the jury about his 2007 absence and why he used the fertilizer for a second year. Both farmers explained that they lost good will among their customers, who turned to other farms to provide their plants when Aujla and De Zwaan could not do so.

Jurors deliberated for roughly one full day before returning a verdict. Aujla was awarded $12 million in economic losses, an additional $22.5 million for the loss of customers and just under $5 million in interest. De Zwaan received $241,060 for his economic losses.

Plaintiff's attorneys: Lawrence Baron and Robert Udziela of the Baron Law Firm in Portland, Ore.

Defense attorneys: Everett Jack of Davis Wright Tremaine in Portland, Ore. for Woodburn Fertilizer and Wilbur-Ellis; William G. Earle of Davis Rothwell Earle Xochihua in Portland, Ore. for Sun Gro.

The case: *J.R.T. Nurseries, Inc. v. Sun Gro Horticulture Distribution, Inc.*; Feb. 15, 2012; Multnomah County Circuit Court; Judge Stephen Bushong.

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

VERDICTS & SETTLEMENTS

Continued from page 24

lion to six residents who say their lives have been made miserable by the stench from the 140-foot tall piles of trash.

The landfill, owned by Republic Services of Arizona, may appeal and will ask a judge to throw out the award.

But a lawyer for the residents says he will ask the judge to close the landfill or order it to change how it operates at the hearing.

During a two-week trial, people who lived near the landfill testified the smell is so bad at times they cannot stay outside.

Officials at the landfill say state regulators never had a problem with the odors.

Suit against toy maker settles for $1.2 million

The inventor of the iconic G.I. Joe action figure has agreed to pay $1.2 million to end a lawsuit filed by the backers of his follow-up venture, a line of toys based on Old Testament biblical heroes that never quite took off.

When Donald Levine, who invented G.I. Joe for Hasbro Toys in 1963, went looking for funds to launch his Almighty Heroes line, he turned to noted collector Stephen Geppi Sr., owner of Diamond Comic Distributors Inc. Geppi was a logical choice, as his $200,000 purchase of Levine's handmade G.I. Joe prototype in 2003 set a Guinness World Record for toy soldiers.

In October 2004, Levine and his son, Neil, along with Geppi and Kerby Confer, former chairman of the radio division of Sinclair Broadcast Group Inc., formed Family Values LLC to sell Almighty Heroes.

Targeting what was seen as a lucrative Christian marketplace, Almighty Heroes included action figures for such Old Testament stalwarts as David and Goliath, Moses, Samson, Jonah and Queen Esther, starting at $12.99 each. A $3,500 inflatable Noah's Ark was planned, as were tie-in DVDs and a cartoon show.

However, the partnership turned sour after years of missed payments, lack of accounting and the virtual disappearance of Neil Levine. Geppi and Confer filed a lawsuit against the Levines on Oct. 6, 2010, in Baltimore City Circuit Court seeking $688,000 in compensatory damages and $6.8 million in punitive damages.

In a March 20 consent judgment between Donald Levine, Geppi and Confer, the investors agreed to drop the lawsuit in exchange for $1.2 million and to dismiss their claims against Neil Levine without prejudice.

"The parties agree that a consent judgment will resolve the lawsuit," said Sean O'Kelly, a Wilmington, Del., attorney who is co-counsel for Donald Levine. "It's almost like a plea bargain in a criminal case."

The consent judgment has not yet been followed by a payment, according to Geppi and Confer's attorney, Andre R. Weitzman.

Geppi did not return calls for comment. Contact information for Confer was not available.

Reached by phone in Providence, R.I., Nan Levine, Donald's wife, said that Neil Levine was "out of the country" and she was not sure when he would be back. Donald Levine was unavailable for comment.

The partnership

Levine, 83 and a Korean War veteran, left Hasbro in 1975 to start his own toy company. Before the Almighty Heroes line, he created the Kenya doll, an African-American doll that was immensely popular in the 1980s.

Donald and Neil came up with the Almighty Heroes concept in 2004. The goal was to package the toys with biblical stories and appeal to patrons of Christian retailers as well as larger toy sellers such as Toys 'R' Us.

That October, Geppi and Confer agreed to pay a combined $300,000 for a 40 percent stake in the company.

According to court records, the Levines came back in April 2005 for a $504,000 loan to cover operating costs. The first and only payment on that loan came in April 2006 for $19,024.

In February 2008, the Levines asked for another $688,000 to prevent going into default and subsequent legal action against Family Values LLC. Geppi and Confer loaned them the money and increased their stake in the company to 60 percent.

According to the lawsuit, no more was ever paid on the loans and no reports on the company's activities and spending were ever given to Confer and Geppi. The increased stake in the company was never filed.

"There have not been any payments in years," said Weitzman, who practices in Baltimore.

It remains unclear what the status of Family Values and the Almighty Heroes action figures are. The company's website has changed hands and is now an unrelated, infrequently posted-to Japanese-language blog about people changing careers. The toys themselves can be found online at places like Amazon.com, but are sold at a steep discount through unrelated sellers.

Geppi's Diamond Select Toys and Collectibles LLC, which was supposed to distribute the toys, no longer lists them. Neil Levine, the president of Family Values, has been out of contact for some time and his last known address is a post office box at an OfficeMax store in Minneapolis.

"Neil has remained elusive," Weitzman said.

Plaintiffs' attorney: Andre Weitzman, Andre Weitzman & Associates in Baltimore.

Defense attorneys: Sean T. O'Kelly of O'Kelly & Ernst in Wilmington, Del.; Mark T. Mixter in Baltimore; (Martin H. Schreiber II, local counsel, withdrew in March 2012).

The case: Confermation LLLP v. Family Values LLC; March 20, 2012; Baltimore City Circuit Court; Judge John P. Miller.

– Ben Mook

A version of this article originally appeared in Lawyers USA's sister publication, the Maryland Daily Record.