

# *July 2011 MPT*

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▶ *FILE*

MPT-1: *In re Field Hogs, Inc.*



***Delmore, DeFranco, and Whitfield, LLC***  
**Attorneys at Law**  
**1800 Hinman Avenue**  
**Windsor, Franklin 33732**

**TO:** Examinee  
**FROM:** Carlotta DeFranco  
**DATE:** July 26, 2011  
**RE:** Arbitration Clause for Field Hogs, Inc.

Our firm has represented Field Hogs, Inc., for over seven years. Field Hogs manufactures heavy lawn equipment for the consumer market. We have represented Field Hogs in four lawsuits in Franklin. The last case received a lot of negative publicity, and the company is concerned about reducing the costs of litigation and avoiding negative publicity for any future claims.

Accordingly, Field Hogs has asked us to draft an arbitration clause to insert into its consumer sales contracts. I attach a copy of the firm's standard commercial arbitration clause, which has not been used in consumer transactions.

The client may be able to avoid litigation through arbitration, but also may face extra costs with arbitration. Please draft a memorandum for me in which you address the following:

- (1)(a) Would the firm's clause cover arbitration of all potential claims by consumers against Field Hogs under Franklin law? Why or why not? Be sure to explain how your conclusion is supported by the applicable law.
- (b) Would the firm's clause's allocation of arbitration costs be enforceable against consumers under Franklin law? Why or why not? Be sure to explain how your conclusion is supported by the applicable law.
- (2) Draft an arbitration clause for Field Hogs's consumer sales contracts that will be enforceable under Franklin law, and briefly explain how your draft language addresses the client's priorities, as described in the attached client meeting summary.

Do not concern yourself with the Federal Arbitration Act; focus solely on Franklin state law issues.

*Delmore, DeFranco, and Whitfield, LLC*

**OFFICE MEMORANDUM**

**TO:** File  
**FROM:** Carlotta DeFranco  
**DATE:** July 19, 2011  
**RE:** Client Meeting Summary: Bradley Hewlett, Field Hogs COO

Today, I met with Bradley Hewlett, chief operating officer of Field Hogs since its founding in 1998. Hewlett is well versed in Field Hogs's business and has the authority to make decisions concerning any litigation involving the company.

Field Hogs designs and manufactures heavy lawn, garden, and field maintenance equipment, which it markets to consumers. Its product lines include heavy-duty lawn mowers (the Lawn Hog line), medium-duty walk-behind brush mowers (the Brush Hog line), and heavy-duty walk-behind field-clearing equipment (the Field Boar line). Lawn Hogs mow large acreages that require frequent mowing, Brush Hogs clear fields of tall grass and saplings one inch or less in diameter, and Field Boars take down saplings up to three inches in diameter.

Field Hogs sells only in Franklin. Its products sell best in semirural areas surrounding major metropolitan areas—the right combination of income and demand.

Hewlett explained that because Field Hogs markets to consumers, it makes product safety a centerpiece of its research and marketing. It holds patents on several devices that prevent its machines from moving or cutting when the operator does not have a grip on the machine. All of Field Hogs's equipment can do real damage if not used properly, so the company invests enormous effort in making its safety features work well and durably, and in writing clear operating instructions.

Hewlett stated that Field Hogs made some mistakes in its product manuals a few years back that cost the company a lot of money. In fact, Hewlett stated, "While we've gotten very careful about what we do, we're also realistic. We know we can't keep everybody from misusing our products. Still, if we can avoid some costs on the really frivolous tort cases, that would greatly reduce our litigation expenses."

The *James* case, and the publicity surrounding it, was a wake-up call for the company. Hewlett stated:

That was the case where a Field Boar basically ran over the customer. It was terrible. We wanted to settle the case, even though we knew that the customer had misused the machine. But as you know, the customer wouldn't hear of it. The litigation costs and fees drew down our reserves, and until the verdict, we had trouble with potential lenders because of the bad publicity. We were very satisfied with the verdict in our favor, but as you told us, it could have gone either way, and a large judgment could have ruined us. We realized that you can't control what will happen with juries, and win or lose, the expenses of litigation can really get out of hand.

Hewlett added that the company is "very interested in arbitration, even though we know that it, too, can be very expensive." He went on to add that he hopes that arbitration will be less public, yield lower awards, and be less expensive than traditional litigation. Hewlett also anticipates that professional arbitrators will be more predictable than juries. With respect to the costs of arbitration, Hewlett stated, "We know that we'll have to pay for the arbitrator's time and that it's not cheap. But when we've arbitrated contract disputes with our suppliers, we've basically split costs down the middle, so we want to do that here, too."

Hewlett stated that Field Hogs definitely doesn't want to spend a lot of time litigating the validity of the arbitration clause. Hewlett is aware that Field Hogs's sales contracts already say that Franklin law applies, and he wants to know what Franklin law says about arbitration in such consumer transactions. Hewlett closed our meeting by saying, "It's especially important to know exactly what we can expect as our products get into the hands of more and more people, but avoiding jury trials is the most important thing to me."

I told Hewlett that we would do some research on the points raised in our meeting and get back to him.

*Delmore, DeFranco, and Whitfield, LLC*

**OFFICE MEMORANDUM**

**TO:** File  
**FROM:** Carlotta DeFranco  
**DATE:** January 20, 2011  
**RE:** Summary of Tort Litigation Against Field Hogs, Inc.

*Majeski v. Field Hogs, Inc.* (Franklin Dist. Ct. 2004): Plaintiff buyer sued for foot injuries resulting from improper use of safety handle on a Brush Hog. Plaintiff claimed inadequate warnings and defects in design and manufacture under negligence, warranty, and strict liability theories. During discovery, plaintiff conceded that his use of the machine did not comply with instructions printed in manual. RESULT: summary judgment for Field Hogs.

*Johan v. Field Hogs, Inc.* (Franklin Dist. Ct. 2005): Plaintiff buyer sued for serious leg injuries resulting from improper use of Brush Hog on a slope. Plaintiff's claims identical to those in *Majeski*. The company's manual was ambiguous about the maximum slope for recommended use. Trial court denied Field Hogs's motion for summary judgment. RESULT: verdict for plaintiff for \$1.5 million.

*Saunders v. Field Hogs, Inc.* (Franklin Dist. Ct. 2008): Plaintiff buyer sued for knee injuries incurred while standing in front of a Lawn Hog during operation by another. Plaintiff conceded operation of mower by her 10-year-old son; the company's manual did not clearly warn against use of mower by minor children. RESULT: verdict for plaintiff for \$400,000.

*James v. Field Hogs, Inc.* (Franklin Dist. Ct. 2010): Plaintiff buyer sued for permanent disfigurement in an accident involving a Field Boar, relying on defective design and manufacture theories. Discovery revealed factual conflict regarding plaintiff's compliance with instructions during operation of machine. The *Franklin Journal* published a three-part article about the case, focusing on the "Costs of Justice" for plaintiffs. RESULT: verdict for Field Hogs.

**Delmore, DeFranco, and Whitfield, LLC**  
**Standard Commercial Arbitration Clause**

Any claim or controversy arising out of or relating to this contract or the breach thereof shall be settled by arbitration. Arbitration shall occur in accordance with the rules and procedures for arbitration promulgated by the National Arbitration Organization.

## **National Arbitration Organization: Procedures for Consumer-Related Disputes**

### **Payment of Arbitrator's Fees**

If all claims and counterclaims are less than \$75,000, then the consumer is responsible for one-half of the arbitrator's fees up to a maximum of \$750. The consumer must pay this amount as a deposit. It is refunded if not used.

If all claims and counterclaims equal or exceed \$75,000, then the consumer is responsible for one-half of the arbitrator's fees. The consumer must deposit one-half of the arbitrator's estimated compensation in advance. It is refunded if not used.

The business must pay for all arbitrator compensation beyond the amounts that are the responsibility of the consumer. The business must deposit in advance the arbitrator's estimated compensation, less any amounts required as deposits from the consumer. These deposits are refunded if not used.

### **Administrative Fees**

In addition to the arbitrator's fees, the consumer must pay a one-time \$2,000 administrative fee.

### **Arbitrator's Fees**

Arbitrators receive \$1,000/day for each day of hearing plus an additional \$200/hour for time spent on pre- and post-hearing matters.