UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

RELIANCE INSURANCE COMPANY OF ILLINOIS, Plaintiff, v. RAYBESTOS PRODUCTS COMPANY, Defendants/Third Party Plaintiffs, v. UNITED STATES FIDELITY AND GUARANTY COMPANY, WESTCHESTER FIRE INSURANCE COMPANY and NATIONAL UNION FIRE INSURANCE COMPANY, Third Party Defendants.	)	CAUSE NO. IP97-0027-C-Y/B

MEMORANDUM OF WESTCHESTER FIRE INSURANCE COMPANY IN OPPOSITION TO RAYBESTOS PRODUCTS COMPANY'S MOTION TO VACATE ARBITRATION AWARD

EXECUTIVE SUMMARY

The motion of Raybestos Products Company ("Raybestos") and Raytech Corporation ("Raytech")[1] to vacate the award issued in the arbitration of this matter demonstrates a fundamental misunderstanding of the law (in particular, Seventh Circuit case law) concerning challenges to arbitration awards, is legally and factually flawed, and does not give this Court any basis to overturn the Award pursuant to the limited grounds on which this Court could potentially vacate an arbitration award. Raybestos cannot cite a single case that is factually "on

[1] Westchester does not oppose Raytech's motion to intervene as third party plaintiff. Westchester notes, however, that Raytech is incorrect in its motion to intervene (at p. 3) when it claims it was not made a party to the arbitration until April 10, 2006. In fact, Raytech was served with Westchester's counterclaims in August, 2005. In addition to not opposing Raytech's motion to intervene as third party plaintiff, Westchester likewise does not oppose the motion of Raybestos and Raytech for oral argument regarding the motion to vacate the arbitration award.

all fours" where an arbitration award was vacated. Accordingly, this Court should confirm the arbitration award, as requested in Westchester's motion to confirm award filed July 13, 2006.

Raybestos' motion is nothing more than a rehashing of arguments rejected when Raybestos resisted arbitration in the first instance, and a collateral attack on the Seventh Circuit's decision to send this matter to arbitration. Further, Raybestos' real complaint here is not with the arbitrators, but with its own failure to insist on a choice of law provision in the Westchester policies mandating application of Indiana law to all disputes, and that it agreed to arbitration at all.[2]

Raybestos' motion constitutes a paradigm of what clear precedent from the United States Supreme Court and the Seventh Circuit directs this Court to reject: a party resists arbitration in the first instance, and then asks a United States District Court to substitute its judgment for the judgment of the arbitration panel in the face of an adverse ruling. Further, Raybestos has not accurately described the case law (most particularly in the Seventh Circuit) recognizing the extremely limited basis upon which a court could possibly overturn an arbitration award. The case law could not be clearer that Raybestos' arguments fail. Loudly and clearly, the United States Supreme Court and the Seventh Circuit have explained that there is no substantive review of arbitration awards, and awards can only be vacated in exceptional cases on limited grounds not present here.

Apparently recognizing this, Raybestos tries to salvage its challenge to the logic and reasoning of the arbitration panel ("Panel") by shoehorning this claim into a situation where (1)

[2] Raybestos' problems actually go further than that, however, because even if it had wanted to insert a choice of law provision, it most likely would have chosen Connecticut law where the policies were negotiated and finalized. It is unlikely Raybestos would have asked for Indiana law because -- as the uncontroverted evidence shows -- these policies were driven by potential products liability that could have arisen in all fifty states. Further still, the Indiana insurance coverage cases Raybestos relies on were decided after the first two Westchester policies at issue here had been negotiated, and Indiana law on arbitration law affords arbitrators great discretion in order to reach equitable results.

the Panel demonstrated a "manifest disregard of the law" or (2) the Panel violated public policy. As discussed in greater detail below, the "manifest disregard of the law" standard is very limited in the Seventh Circuit and would require this Court to conclude that three esteemed judges clearly understood the law (here, the contract terms of the insurance policy and the rules governing AAA procedures) to be one thing, and then deliberately issued a decision that is the opposite of what they believed to be the true and correct result that should obtain. This would require an extraordinary fact finding by this Court, which simply cannot be supported by this record.

In fact, the record is exactly the opposite. The Memorandum and Order (Order" or "Award") issued by the Panel on August 10, 2005 is the epitome of educated, informed, and neutral decision-making. The Panel provides a detailed explanation of the facts underlying the dispute, the procedural posture by which the claim was presented to the AAA and the relevant terms of the insurance policies. The Panel then addresses the relevant case law concerning the ground rules for the dispute, including a discussion of *Baravati v. Josephthal, Lyon & Ross*, 28 F.3d 704 (7th Cir. 1994) (discussed *infra*), the case Raybestos places so much emphasis on, and Indiana law governing arbitrations, *e.g.*, *School City of East Chicago, Indiana v. East Chicago Federation of Teachers*, 422 N.E.2d 656 (Ind. App. Ct. 1981).

The Panel's detailed and well-reasoned opinion can by no means be deemed a manifest disregard of the law; it is in fact an erudite and refined explication of the applicable law governing this contractual dispute. There simply is no basis for Raybestos to suggest that because it disagrees with the conclusion of the Panel, the Panel somehow evidenced a manifest disregard of the law. While Raybestos may disagree with the law applied by the Panel in interpreting this insurance contract, there is nothing in the record to challenge the arbitrators'

understanding and application of the law, and there is no evidence of the Panel having a bias against Raybestos that would have led the Panel to disregard its understanding of the law.

There are no grounds upon which this Court could conclude that the Panel understood the controlling law, the insurance contract, and the facts of the claim to lead to a conclusion in Raybestos' favor and then -- for whatever reason nonetheless decided to render a ruling completely inconsistent with its understanding of the law. This is simply not the case. There is no reason for the Court to conclude (and Raybestos has not even tried to articulate one) that the Panel -- which conducted conflicts of interest checks and which was screened by the AAA and the parties -- had any bias or agenda which caused the Panel to rule against Raybestos despite believing "in their hearts" that Raybestos should prevail. Raybestos' analogy to a "personal whim" or "street justice" (Raybestos' Memorandum of Law at p. 10) is at a minimum baffling, if not offensive and disrespectful. By no means can the well-reasoned and detailed Order issued by the Panel to support the Award be deemed "personal whim" or "street justice," and this case does not meet the rigid standards of the "manifest disregard of the law" rubric, discussed *infra*.

Raybestos cannot seriously assert that the Panel did not properly understand the law, and any such assertion here could not support a motion to vacate in any event, so Raybestos accuses the Arbitration Panel -- comprised of three esteemed, impartial jurists -- of understanding but deliberately not following "the law." Significantly, Raybestos goes to great lengths to avoid any discussion of the contract terms of the insurance policy. Similarly, Raybestos does not define what it means when it says "the law" and does not explain how the detailed and well-reasoned order provided by the Panel does not definitively show that the Panel took great pains to understand and apply what the Panel understood "the law" to be.

Because Raybestos does not like the Panel's conclusion, Raybestos disparages the Panel's efforts to apply clear contract language -- a total pollution exclusion that totally excludes pollution -- to undisputed facts. The Panel tried to [and did according to Westchester] "enter a just and equitable remedy, taking into account the language of the agreement and the facts and circumstances presented on the motions for summary determination." (Order, Ex. 2 to Raybestos' Motion). The three judges who passed the enhanced arbitration selection process engaged in by the parties and were selected after the parties ranked their preferred arbitrators all know how to interpret a contract, and they did just that, under AAA Rule 43 -- the applicable law which Raybestos selected when it agreed to arbitration in its insurance contract with Westchester -- which mandates a "just and equitable" relief such as the one here.

There was clearly no bias on the part of the Panel, and the Panel applied the law pursuant to the rules of the American Arbitration Association to which Raybestos agreed in the insurance contract. The Panel followed fundamentally sound principles of contract interpretation, including freedom of contract, consistent with the results reached in most states, including Connecticut, where policies were issued and brokered, by applying clear language in the insurance policy which totally excludes coverage for pollution. The Award from the Panel does not represent a manifest disregard of the law: it is consistent with the law in the extreme majority of the states of the United States which honors total or absolute pollution exclusions, consistent with clear language in the policy, consistent with the facts of the claim, and consistent with the substantive standards of the AAA to which Raybestos agreed when it entered into this insurance contract.

Further, the "manifest disregard of the law" standard is severely limited in the Seventh Circuit. Justice Posner, for example, has been vehement that this judicially-created doctrine is

not part of the Federal Arbitration Act ("FAA") and is of limited value, if any, in the Seventh Circuit. In any event, there was no manifest disregard here, as even a cursory review of the detailed Order issued by the Panel shows. The Panel carefully analyzed the rules of the AAA, Supreme Court precedent, and Indiana law addressing the rules that govern arbitration. In short, there is simply **no** basis for this Court to overturn the award on the grounds of any purported "manifest disregard of the law."

Similarly, there is no public policy that was violated by the Panel. Raybestos and Raytech are sophisticated policyholders who entered into a legally enforceable contract which provided coverage for numerous types of claims, but which included a "Total Pollution Exclusion." Pursuant to the law of the vast majority of the states of the United States, there is clearly no insurance coverage for the Crawfordsville pollution claim. Contrary to Raybestos' claim that it violates public policy, the Order is consistent with numerous opinions issued in the extreme majority of the states of the United States. Raybestos cannot cite any specific statute or articulate any public policy that the Panel allegedly violated.

Raybestos accuses the Panel of thinking that it was "bound by nothing" yet it is Raybestos that seems to believe it is not bound by the contract it entered into with Westchester. Further, the Panel was quite clear that it was bound by the facts of the claim, the language of the insurance contract it was called upon to interpret, and the procedural and substantive rules of the AAA. The Panel took effort to analyze and interpret the cases cited by the parties (including United States Supreme Court precedent and Indiana substantive law on arbitration), and applied all of the foregoing in reaching its well-reasoned decision which clearly should be confirmed by this Court. Far from deliberately discarding what it understood the law to be, the Panel took great efforts to understand the law and apply it to the facts of the case before it.

Finally, the cases cited by Raybestos in its memorandum in support of its motion to vacate the arbitration award are easily distinguishable, and in many instances provide support for Westchester here. A fair reading of the relevant case law should lead this Court to confirm the Award.

FACTUAL AND PROCEDURAL BACKGROUND

As the Court is well aware, Raybestos sought leave from this Court to file a third party claim against Westchester after years of litigation involving another of Raybestos' insurers, Reliance Insurance Company. Reliance sued Raybestos for declaratory judgment on insurance coverage issues raised by the Crawfordsville, Indiana pollution claim which is the subject of this litigation. Westchester moved for an order compelling arbitration which this Court denied. The matter was appealed to the Seventh Circuit, which ordered the matter to arbitration. *Reliance Insurance Company v. Raybestos Products Company*, 382 F.3d 676 (7th Cir. 2004).[3] The Seventh Circuit was clear that "Raybestos must live up to its bargain and arbitrate its claims against [Westchester]." *Id.* at 680. This Court subsequently entered an order directing the matter to arbitration.

In selecting the panel for arbitration, the parties agreed that the AAA rules for complex litigation applied. The parties further engaged in the enhanced arbitrator selection process of the AAA. Ultimately the parties engaged a three-person panel comprised of three distinguished former judges -- Raybestos insisted on judges as opposed to non-judges who may have served as arbitrators. At no time did Raybestos claim that any arbitrator was biased or had any particular motive that would inspire the arbitrator to understand the law to require one result and then somehow reach a different result in the arbitration.

[3] Raybestos incorrectly cited to F.2d in its memorandum of law (at p. 3); the correct citation is 382 F.3d 676.

The parties agreed that there were no material facts in dispute such that the parties were able to file cross motions for summary judgment. After extensive briefing by all parties and after a lengthy hearing in Chicago on July 6, 2005,[4] the Panel issued the detailed Order, Exhibit 2 to Raybestos' motion to vacate arbitration award. The nine-page Order is detailed, addresses all facts, the relevant insurance policy language, the governing procedural and substantive law, and the most germane cases cited by the parties. No bias or personal agenda is evident in the Order. The Panel interpreted the contractual language against Raybestos, finding no coverage under the Westchester policies for the pollution at the Crawfordsville site.

Prior to the issuance of the Order, Westchester filed counterclaims against Raytech, which was also insured under certain Westchester policies at issue and which claimed rights to insurance recovery for the Crawfordsville pollution claim. Ultimately the parties agreed to a stipulated award which rendered the Panel's ruling against Raybestos to have the same force and effect against Raytech, which has moved to intervene as a third party plaintiff herein.

THE CONTROLLING LAW DIRECTS THIS COURT TO APPLY A STRICT STANDARD AGAINST CHALLENGES TO THE ARBITRATION AWARDS: DOING SO SHOULD LEAD THIS COURT TO CONFIRM THE ARBITRATION AWARD AND DENY RAYBESTOS' MOTION TO VACATE

Raybestos dances around the relevant cases, citing a few of them but never addressing the key elements of the extremely limited grounds upon which the Court could potentially vacate the Award.[5] Raybestos does not address the holdings of most of the cases it cites. It "cherry picks"

[4] The hearing transcript shows the absence of bias or any "personal whim" or "street justice." At the hearing, Arbitrator Brandt, for example, went out of his way to be fair to Raybestos, stating "I'll throw a lob to Raybestos here." Judge Brandt wanted to confirm there was no evidence prior to the Crawfordsville pollution claim of any assertion by Raybestos of any purported ambiguity in the total pollution exclusion. There is no such evidence. (*See* Transcript of July 6, 2005, AAA hearing at 20-31, Exhibit A hereto).

[5] Raybestos' failure to bring the cases discussed below to the Court's attention creates a false impression of Seventh Circuit case law governing a motion to vacate. In fact, Raybestos' motion flies in the face of the holdings of the leading cases on motions to vacate arbitration awards -- cases which establish extremely high burdens on a party challenging an arbitral award. Further, Raybestos has failed to cite the cases where the Seventh Circuit has

certain language from these cases without regard to the holdings of most of the cases it cites. There are also obvious and distinct factual distinctions between this case and the few cases where arbitration awards were disturbed. Not surprisingly, Raybestos cannot find any cases that are factually similar to the present matter where an award was vacated. Finally, as set forth below, Raybestos faces an extremely high hurdle in attempting to vacate the Award, which it simply cannot meet here.

"A court reviewing the award of an arbitrator applies a highly deferential standard of review." *Shearson Lehman Bros., Inc. v. Neurological Associates of Indiana*, 896 F. Supp. 844 (S.D. Ind. 1995). "[T]his deference [is based on] the notion that the parties executed a contract with an arbitration clause and agreed to be bound by the arbitrator's interpretation of the contract." *Id.* at 846. "[N]either error nor clear error nor even gross error is ground for vacating an award." *IDS Life Insurance Company v. Royal Alliance Assoc. Inc.*, 266 F.3d 645, 650 (7th Cir. 2001).

"Courts are not authorized to review the arbitrators' decision on the merits despite allegations that the decision rests on factual errors or misinterprets the parties' agreement." *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 36 (1987). *See also Health Services Management Corp. v. Hughes*, 975 F.2d 1253, 1258 (7th Cir. 1992) ("the court's function in confirming or vacating an arbitration award is severely limited. If it were otherwise, the ostensible purpose for resort to arbitration, *i.e.*, avoidance of litigation, would be frustrated." (citing *Booth v. Hume Publishing, Inc.,* 902 F.2d 925 (11th Cir. 1990) and *Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp.,* 274 F.2d 805, 808 (2d Cir. 1960)).

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struggled to define the "manifest disregard of the law" standard and the cases where that standard has been called into question and severely limited.

Eastern Associated Coal Corp. v. United Mine Workers of America, 531 U.S. 57, 62 (2000) explains that if "an arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, the fact that a court is convinced he committed serious error does not suffice to overturn his decision." *See also Baxter International, Inc. v. Abbot Laboratories*, 315 F. 3d 829, 831 (7th Cir. 2003) ("a mistake of law is not a ground on which to set aside an [arbitral] award."); *Butler Manufacturing Co. v. United Steel Workers of America*, 336 F. 3d 629, 632 (7th Cir. 2003) ("even if the arbitrator's award contains a serious error of law or fact it will be enforced"); *id*. at 636 ("Butler agreed to resolve this dispute in arbitration and cannot now complain that the bargained-for result -- an arbitrator's resolution of the dispute -- is not what it would have obtained in court").

Judge Posner has described the function of the Court when addressing a challenge to an arbitration award as:

> [T]he question for decision by a federal court asked to set aside an arbitration award … is not whether the arbitrator or arbitrators erred in interpreting the contract; it is not whether they clearly erred in interpreting the contract; it is not whether they grossly erred in interpreting the contract; it is whether they interpreted the contract. If they did, their interpretation is conclusive.

Hill v. Norfolk & W. Ry. Co., 814 F.2d 1192 (7th Cir. 1987).

Hill further explains that "once the court is satisfied that [the arbitrators] were interpreting the contract, judicial review is at an end, provided there is no fraud or corruption and the arbitrators have not ordered anyone to do an illegal act." *Id.* at 1195. As Judge Easterbrook explained in his dissent in *Anheuser Busch, Inc. v. Beer, Soft Drink, Water, Fruit Juice, Carbonic Gas, Liquid Sales Drivers*, *et al.*, 280 F.3d 1133, 1137 (7th Cir. 2002), arbitration "awards must be enforced even if they reflect factual, interpretive, or legal blunders." *Anheuser Busch*, 280

F.3d at 1149 (quoting *George Watts & Sons, Inc. v. Tiffany & Company*, 248 F.3d 577 (7th Cir. 2001).

Just last month, Judge Posner once again explained that "[i]t is tempting to think that courts are engaged in judicial review of arbitration awards under the Federal Arbitration Act, but they are not." *Wise v. Wachovia Securities*, 450 F.3d 265, 269 (7th Cir. 2006). Judge Posner went on to explain that:

> [w]hen parties agree to arbitrate their disputes they opt out of the court system, and when one of them challenges the resulting arbitration he perforce does not do so on the ground that the arbitrators made a mistake but that they violated the agreement to arbitrate, as by corruption, evident partiality, exceeding their powers, etc. -- conduct to which the parties did not consent when they included an arbitration clause in their contract. That is why in the typical arbitration, which … is concerned with interpreting a contract, the issue for the court is not whether the contract interpretation is incorrect or even wacky but whether the arbitrators had failed to interpret the contract at all [citations], for only then were they exceeding the authority granted to them by the contract's arbitration clause. *Id.* (Emphasis added).

In *George Watts & Son, Inc. v. Tiffany and Company*, 248 F.3d 577 (7th Cir. 2001), the moving party asked the court to modify an arbitration award to include an award of attorneys fees and costs. The movant had prevailed on the merits and asserted that under Wisconsin law the prevailing party had to be awarded attorneys fees and costs. The Seventh Circuit explained that it did not have to analyze whether Wisconsin law did in fact mandate an award of attorneys fees, concluding that the arbitrator was not bound by substantive state law (here, the Wisconsin Fair Dealership Law). The court reasoned that since the parties could have resolved their dispute without any attorneys fees component, the arbitrator could do the same. 248 F.3d at 580. Since the parties could have settled their dispute with each party bearing its own attorneys fees without violating Wisconsin law, the arbitrator's award denying attorneys fees did not violate Wisconsin law and was enforced as written. *George Watts & Son, Inc.* is dispositive here, in that challenges

based on substantial state law -- such as Raybestos' claim here -- must fail under the *George Watts & Son, Inc.* analysis unless the arbitrator directs the parties to violate the law.

Raybestos' failure to even cite, much less attempt to distinguish, *George Watt & Son, Inc.*, is puzzling, and most likely an implicit acknowledgement that this case is controlling and dispositive to Raybestos' detriment. *George Watt & Son, Inc.* affirmed an award in the face of a challenge that it deviated from putative substantive state law because the arbitrator "did not disregard the parties' contract, did not direct them to violate the law, and did not otherwise overstep the terms of his engagement." *Id.* at 581. This is precisely what happened here.

Further, in addition to being arguably defamatory and clearly at odds with the facts at issue here, Raybestos' claim that the Panel engaged in "invention of its own law" (Raybestos Mem., p. 14), is completely at odds with the Seventh Circuit law as articulated by Judge Posner in *Hill v. Norfolk & W. Ry. Co.* and *Wachovia Securities*. *See also Flexible Manufacturing Systems Pty. v. Super Products Corp.*, 86 F.3d 96, 100 (7th Cir. 1996) ("the fact that an arbitrator makes a mistake, by erroneously rejecting a valid, or even a dispositive legal defense, does not provide grounds for vacating an award unless the arbitrator deliberately disregarded what she knew to be the law."). Raybestos does not seem to understand the clear mandate of these cases: even if the Panel improperly rejected Raybestos' version of Indiana law [and Westchester disagrees with this claim], that would not provide a basis for this Court to vacate the Award. No reasonable person could read the Panel's Order and/or the transcript of the oral argument before the Panel and conclude that the Panel was not interpreting the contract. The fact that Raybestos does not like the conclusion reached by the Panel certainly does not mean that they did not interpret the contract. *Hill* is controlling here, and should lead this Court to deny Raybestos' motion to vacate the award, and to grant Westchester's motion to confirm the award.

Even if this Court believed the Panel should have applied Raybestos' version of Indiana law, that would not be enough to justify vacating the arbitration award. The United States Supreme Court has explained that "the fact that a court is convinced [the arbitrator] committed serious error does not suffice to overturn his decision." *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 1015 (2001), quoting *Eastern Associated Coal Corp., supra,* 531 U.S. at 62. *Garvey* explained that "even 'serious error' on the arbitrator's part does not justify overturning his decision where . . . he is construing a contract and acting within the scope of his authority . . . ." (citing *Eastern Associated Coal*), 532 U.S. at 62. Further, the U.S. Supreme Court explained that "established law ordinarily precludes a court from resolving the merits of the parties' dispute on the basis of its own factual determinations, no matter how erroneous the arbitrator's decision." *Id.*[6]

> [O]ur concern is limited to whether the arbitrator went beyond, or outside, the bounds of interpreting the contract before him while fashioning his award.

Id. Anheuser Busch overturned an arbitration award, but only because the Court was "convinced that in his opinion the arbitrator deliberately disregarded the clear language of the contract -- and thus his award failed to construe or apply the contract." *Id.* at 1138, n.2. The arbitrator in *Anheuser Busch* "actually admitted in his decision that he was going outside the very terms of the written contract." *Id.* at 1139. Under the *Anheuser Busch* framework, the Court's inquiry should simply be whether the arbitrators disregarded the language of the agreement. Here, the agreement is the insurance contract, and there can be no question that the Panel enforced that

[6] *See also Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983) and *Southland Corp. v. Keating*, 465 U.S. 1 (1984). The United States Supreme Court has made it clear federal public policy favors finality of arbitration awards and judicial deference to arbitration. This is especially true in contract claims. Applying this standard, the Seventh Circuit further elaborated that "the question is not whether the arbitrator misinterpreted the agreement, but only whether the arbitrators' inquiry disregarded the very language of the agreement itself." *Anheuser Busch, supra.*.

language after carefully and deliberately paying heed to and honoring the contractual language at issue.

Further, Raybestos bases its motion to vacate in large part on *Baravati*, but in that case the Seventh Circuit rejected the non-statutory ground of "manifest disregard of the law" as a basis for setting aside arbitration awards, noting that the term does not appear in the Federal Arbitration Act and that the inquiry is really whether the arbitrators exceeded their power (which Raybestos has not asserted here). Judge Posner explained that:

> We can understand neither the need for the formula nor the role that it plays in judicial review of arbitration (we suspect none -- that it is just words). If it is meant to smuggle review for clear error in by the back door, it is inconsistent with the entire modern law of arbitration. If it is intended to be synonymous with the statutory formula that it most nearly resembles -- whether the arbitrators 'exceeded their powers' -- it is superfluous and confusing. There is enough confusion in the law. The grounds for setting aside arbitration awards are exhaustively stated in the statute. Now that *Wilko* is history, there is no reason to continue to echo its gratuitous attempt at nonstatutory supplementation. So it will be enough in this case to consider whether the arbitrators exceeded their powers.

28 F.3d at 706.

More recently Judge Posner explained that the Seventh Circuit has "defined 'manifest disregard of the law' so narrowly that it fits comfortably under the first clause of the fourth statutory [FAA] ground [for setting aside an arbitral award]—'where the arbitrators exceeded their powers.'" *Wachovia Securities*, 450 F.3d at 268. In other words, Raybestos' claim of a manifest disregard is off-point: this Court would have to conclude, pursuant to Seventh Circuit case law, that the Panel exceeded the powers given them by the arbitration agreement. Raybestos hasn't even attempted to argue this, and any effort to do so should fail.

THE CASE LAW CITED BY RAYBESTOS ACTUALLY SHOULD LEAD THIS COURT TO CONFIRM THE AWARD

1) Raybestos Cannot Meet The Extremely High Standards For Vacating An Arbitration Award

The cases cited by Raybestos are easily and clearly distinguishable. For example, Raybestos cites *Anheuser Busch* (Raybestos Mem. at p. 10), but this cased involved a situation where the arbitrator "actually admitted in his decision that he was going outside the very terms of the written contract he was asked to interpret." 280 F.3d at 1139. What *Anheuser Busch* was addressing was a situation where the arbitrator "cast aside the [negotiated contract] and ignored the clear and specific language" to which the parties had agreed. 280 F.3d at 1142.

Here it is Raybestos which was asking the arbitrators to cast aside the negotiated contract and the clear and specific language of the total pollution exclusion. What the arbitrators did was adhere to and enforce the contract language, including the total pollution exclusion. The fact that Raybestos does not like the result does not mean that what the Panel did here is remotely similar to what the arbitrator did in *Anheuser Busch*.

Raybestos plucks certain quotes from the cases it cited, but never explains the holdings in those cases which almost exclusively involve confirmation of arbitration awards after the Court determined that the rigid and stringent standards for vacating an arbitration award were not met, even with more extreme facts than those at issue here -- *i.e.*, a "vanilla" purely private contractual dispute. In *Baravati, supra,* for example, Judge Posner explained that:

> Judicial review of arbitration awards is tightly limited; perhaps it ought not be called 'review' at all. By including an arbitration clause in their contract, the parties agree to submit disputes arising out of the contract to a non-judicial forum, and we do not allow the disappointed party to bring his dispute into court by the back door, arguing that he is entitled to appellate review of the arbitrators' decision.

28 F.3d at 706 (7th Cir. 1994).

Raybestos places a great deal of emphasis on *Baravati* in its brief. (Memorandum of Law, at p. 8). *Baravati*, however, is easily distinguishable. Justice Posner explained that *Baravati* "is unusual because the arbitrators, rather than being called upon to interpret a contract, their usual function, were called upon to determine whether one party had defamed the other." 28 F.3d at 707. Unlike the situation in *Baravati*, here there is a contract for the Panel to interpret, and there is no need for them to look to tort law such as the defamation tort law issue in *Baravati* to interpret the contract at issue here. There is nothing remarkable about the *Baravati* decision saying that the parties had not agreed to any ground rules for the tort of defamation and therefore the Panel had to look for some guidance. This is completely and easily distinguishable on the current situation where the parties did agree to the ground rules in advance when they entered into a written contract. *Baravati* further explains that "[i]t is commonplace to lead the arbitrators pretty much at large . . . in the formulation of the principles of contract interpretation. *Id.* at 710. Finally, *Baravati* suggests that even if Indiana had some law that purported to limit the ability of arbitrators to interpret contracts in cases such as the present dispute, such a statute or rule would almost certainly be pre-empted by the Federal Arbitration Act and the United States Supreme Court precedent relating thereto.[7] *See id.* at 711.

2) "Manifest Disregard of the Law" Is A Severely Limited Ground In The Seventh Circuit To Overturn An Award, But Even If It Were Recognized, Raybestos Cannot Show It Here

The main thrust of Raybestos' motion to vacate is that the three independent, esteemed judges who served as arbitrators here issued a ruling that can only be described as a manifest disregard of the law. This is not true factually, but, even if it were, this putative ground for vacating an award is not valid in the Seventh Circuit unless the award would result in a violation

[7] In fact, as discussed above and in the Order, Indiana law governing arbitration calls for "equity or fairness . . . not constrained by legal technicalities." *School City of East Chicago, supra,* 422 N.E.2d at 662.

of the law. *See IDS, supra*. ("The plaintiffs wisely do not invoke the controversial nonstatutory ground, 'manifest disregard of the law,' which we have limited to situations in which the arbitral award directs the parties to violate the law. 266 F.3d at 650, citing *George Watts & Son, Inc., supra, 248 F.3d at* 580-81 ("'manifest disregard' is limited to two possibilities: an arbitral order requiring the parties to violate the law … and an arbitral order that does not adhere to the legal principles specified by the contract")). *See also Butler Manufacturing, supra*, 336 F. 3d at 636 (explaining that *George Watts & Son, Inc.* "clarified that an arbitral decision is in manifest disregard of the law only when the arbitrator's award actually orders the parties to violate the law").

Assuming manifest disregard of the law is currently a viable independent ground to vacate an arbitration award in the Seventh Circuit, to prevail "the party challenging the award must demonstrate that the arbitration deliberately disregarded what the arbitrator knew to be the law in order to reach a particular result." *National Wrecking Co. v. Int'l Brotherhood of Teamsters*, 990 F.2d 957, 961 (7th Cir. 1993). Nothing could be further from what happened here than that standard. Here, it is obvious from a reading of the Order that the Panel strove to define "the law" and then applied it to reach the correct result, not "a particular result."

Although the Seventh Circuit in *National Wrecking Co.* did not use the word "bias," it clearly set forth a difficult hurdle for challenges to arbitration awards. Under Seventh Circuit precedent, to rule for Raybestos, this Court would have to find that the Arbitrators here knew that they should rule for Raybestos and then for some reason, be it bias or otherwise, decided to nonetheless rule for Westchester. There is simply no basis in the record, however, for the Court to conclude that there was any agenda or bias on the part of Arbitrators which would have led all

three[8] of them to agree that the law favored Raybestos, and then somehow agree to rule in favor of Westchester.

Raybestos even cites *School City of East Chicago, supra,* but that case -- cited first by Westchester and the Panel -- clearly supports the conclusion of the Arbitrators here, and should lead the Court to confirm the arbitration award:

> Since arbitration arises through contract the parties are essentially free to define for themselves what questions may be arbitrated, the remedies the arbitrator may afford, and the extent to which the decision must conform to general principals [sic] of law.
>
> Where, as here, the agreement contains a broad arbitration clause [footnote omitted] courts have generally held that arbitrators are not bound by the principles of substantive law. As stated in 6 Williston, Contracts § 1929 (rev. ed. 1938),
>
> > "If the arbitration agreement is silent with regard thereto, at common law and under most of the arbitration statutes, the arbitrators may declare law as they please, and no award will be vitiated because of their legal errors."
>
> [ ] The Indiana act includes provision that, "… (T)he fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award." 422 N.E.2d at 662.
>
> The reason for this traditional approach is the view that a part of what the parties have bargained for is dispute resolution based upon the sense of equity or fairness of an impartial umpire who is familiar with their problems and who should not be constrained by legal technicalities.

School City of East Chicago, 422 N.E.2d at 662.

In other words, even if Raybestos is correct that the Panel's analysis was governed by Indiana law, Indiana law on arbitration mandates that the Panel would not be bound by any alleged substantive law, much less Raybestos' idiosyncratic version of "the law."

[8] The concept of "personal whim" or "street justice" required to find that a single arbitrator understood the law to require one result and issued an award leading to the opposite result seems even more implausible here where a three-person panel issued the award. Short of conspiracy, "personal whim" seems highly implausible for multi-arbitrator rulings.

Curiously, Raybestos also cites to *Tatibouet v. Ellsworth*, 54 P.3d 397 (Hi, 2002), but in that case the Hawaii Supreme Court actually indicated its belief that the precursor to AAA Rule 43 (old AAA Rule 45) which set forth the "just and equitable standard" relied upon by the Arbitrators here, did provide "substantive law guidance." 54 P.3d at 406 n.6. This is yet another case Raybestos cites should actually lead this Court to confirm the Award.

Likewise, Raybestos' citation to *Todd Shipyards Corporation v. Cunard Line, Ltd.*, 943 F.2d 1056 (9th Cir. 1990) is puzzling, because in that case the court was clear that the "just and equitable" provision of Rule 43 is a substantive rule which allows arbitrators to award punitive damages." *Id.* at 1062-63. The *Todd Shipyards* case decision supported an arbitration award in all respects, including the challenge that the award of punitive damages was in conflict with New York substantive law. In other words, analogous claims made by the losing party in arbitration in *Todd Shipyards* were rejected, and this case provides no support for Raybestos' analogous claims herein. Yet again Raybestos' citation supports confirmation of the arbitration award.

3) No Clear Public Policy Was Violated

Raybestos also posits that this Court should vacate the arbitration award on public policy grounds. Raybestos does not articulate any alleged public policy which would favor Raybestos here. The present matter is a private contract dispute between large corporations, and will have no impact on the clean-up of the Crawfordsville site, which is substantially completed. Not surprisingly, the cases Raybestos cites do not involve pure private contracts, but instead all have a true public policy impact, and typically involve public employees and arbitration of employment disputes involving public entities.

For example, *Chicago Firefighters Union Local No. 2 v. City of Chicago*, 751 N.E.2d 1169 (Ill. App. 2001) dealt with the public policy of safe and effective fire protection services

being provided to the public. This case is not even remotely factually analogous to two private corporations in a dispute where one party seeks reimbursement for environmental clean-up which substantially has already taken place.

Similarly, *American Federation of State, County and Municipal Employees v. State of Illinois*, 529 N.E.2d 534 (S.Ct. Ill. 1988) involves the confirmation of an award because the very stringent standard for a violation of public policy was not satisfied there even though that case -- in contrast to the present matter -- clearly had public policy implications. *American Federation of State, County and Municipal Employees* involved care for elderly and infirm people and allegations of abuse by certain municipal employees. This could not be further afield factually from the present matter, and this case provides no support for Raybestos' claim that public policy is implicated by the private insurance contract which is the subject of the arbitration award Raybestos seeks to vacate. *County of DeWitt v. American Federation of State, County and Municipal Employees* likewise involves abuse of elderly patients in a nursing home.

In short, none of the cases Raybestos cites to bolster its public policy argument are relevant. The cases do not support an order from the Court vacating the award.

Curiously, Raybestos acknowledges in its memorandum of law that the legislature of the State of Indiana enacted a statute which would have overturned the very cases on Indiana insurance coverage law upon which Raybestos relies yet was "vetoed by the Governor." Memorandum at p. 17. The fact that ultimately this legislation was actually vetoed by the Governor certainly takes this case out of the realm of a "well- defined and dominant public policy." One of the three branches of Indiana government clearly believed that the cases finding coverage were in error and believe that it should be the public policy of the State of Indiana to enforce pollution exclusions. Given that two separate branches of the Indiana government

cannot agree on this issue, it is hard to understand how it could be deemed the clear public policy of Indiana.

Further, even if legislation passed by the Indiana General Assembly were not deemed to be the public policy of Indiana -- or at a minimum evidence refuting Raybestos' claim of a clear and well-defined public policy -- in light of a veto by Governor O'Bannon, Governor O'Bannon's statements issued in conjunction with his veto show the fallacies in Raybestos' public policy arguments here. First, Governor O'Bannon based his veto on his belief that the legislation "would codify what should be a private contractual matter between an insurer and its insured." ("Veto message from the Governor," Ex. B hereto). The veto Raybestos bases its public policy argument on (Raybestos Memorandum at p. 17) was itself based on Governor O'Bannon's belief this was a "private contractual matter." Second, Governor O'Bannon was concerned the bill "could deny coverage for claims having nothing to do with pollution in the ordinary sense of the word." This concern -- and any purported public policy expressed by this concern -- are not at issue here, where PCBs were released into the environment. PCBs in the environment have everything to do with pollution in the ordinary sense of the word.

Additionally, even if there were agreement within the branches of Indiana government on the question, it is debatable whether this involves actual "public" policy, because this dispute involves a purely private contractual matter. This is especially true here given that the clean-up has substantially been completed and the dispute simply involves Raybestos claim for reimbursement from Westchester.

Further still, the extreme majority of states, including the state where Raybestos and Raytech are domiciled and headquartered (Connecticut) routinely enforce absolute pollution

exclusions. In short, there is no public policy supporting Raybestos, even if this claim falls remotely within realm of the public exception to the presumption in favor of arbitration awards.

Raybestos cannot cite to any Indiana statute, in contrast to the cases it cites which were all based on specific articulated statutes and the related case law. Here, Raybestos can only point to certain decisions finding insurance coverage on the specific facts of those cases, but cannot point to a statute or clear articulation of any public policy impacted by Raybestos losing its contractual claim.

APPLICATION OF THE CONTROLLING LAW CAN ONLY LEAD THIS COURT TO AFFIRM THE ARBITRATION AWARD AND RAYBESTOS' RES JUDICATA AND COLLATERAL ESTOPPEL ARGUMENTS DO NOT TRUMP CASE LAW ON ENFORCEMENT OF ARBITRATION

All the relevant law discussed above should lead the Court to confirm the Award. In addition, Raybestos should not be allowed to circumvent the case law on arbitration with its *res judicata* and collateral estoppel claims. Raybestos' citation of *Miller v. Runyon*, 577 F.3d 189 (7th Cir. 1996), to support its *res* judicata and collateral estoppel argument could not be more misleading. *Miller v. Runyon* could not be clearer, however, in exploring the error in Raybestos' argument:

> [T]he scope of judicial review of arbitration awards is so limited that whether an arbitrator should or should not apply collateral estoppel [is] academic [as to motion to vacate arbitration awards], since error, as we have noted, presumably including an error in applying or failing to apply the doctrine of collateral estoppel, is not a ground for vacating the award. This is true when the issue arises in a challenge to the arbitrator's award. [citations omitted].

Although *dicta*, the Seventh Circuit Court of Appeals' explanation in *Miller v. Runyon* clearly demonstrates that a party in arbitration seeking to make collateral estoppel or *res judicata* arguments must -- as Raybestos did here -- make them in the arbitration forum. Once the arguments are ruled upon by the arbitrators, any alleged error by the Panel in interpreting these

doctrines is not a ground for vacating the arbitration award. Once again, Raybestos has actually cited a case which should prompt this Court to confirm the Award.

Raybestos made its *res judicata* and collateral estoppel arguments to the Panel, and these arguments were squarely rejected. Acknowledging that Westchester was not party to the litigation at the time this Court issued the Memorandum and Order attached as Exhibit 3 to Raybestos' motion, Raybestos concocted a "virtual representation" argument which was carefully considered and then unequivocally rejected by the arbitration panel. There are no grounds for Raybestos to seek review from this Court of the decision of the Panel rejecting Raybestos' arguments on *res judicata* and collateral estoppel. This argument was clearly articulated to the Panel (see Raybestos' motion for summary determination in the AAA proceedings, Exhibit 5 to Raybestos' motion to vacate arbitration award, at pp. 7-13). Similar to the choice of law issue, even if this Court were to conclude the Panel erred on the *res judicata* and collateral estoppel issues, any such alleged error would not justify vacating the Award under the United States Supreme Court and Seventh Circuit precedent discussed above. This is the type of claim of error that cannot support an order vacating an arbitration award, even if the Court agrees there was error. *E.g., Eastern Associates Coal Corp., supra.*

CONCLUSION

There is no basis for this Court to overturn the arbitration award. There was no "manifest disregard of the law" even under the broadest possible interpretation of this standard pursuant to Seventh Circuit precedent. In fact, the Panel expended considerable time and effort to understand and apply the law it believed governs this dispute. Further, no public policy is implicated by the Award, and no public policy was violated by the Award.

Accordingly, the motion to vacate should be denied, and this Court should enter an order confirming the arbitration award.

Date: July 28, 2006

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of July 2006, a copy of the foregoing was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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