

Man settles lawsuit over loss of smell, taste

Man alleged problems after one use of Zicam

BY CHRISTINE SIMMONS

christine.simmons@molawyersmedia.com

An Osage Beach man who sued over his loss of smell after taking the cold remedy Zicam recovered \$10,000 this year in a settlement from the case's multidistrict litigation in Arizona.

Raymond Carter Smith sued Zicam, its parent company Matrixx Initiatives Inc. and the product's manufacturer, Botanical Laboratories Inc., in April 2010 after he bought a Zicam product at a Walmart. After one use in 2009, he experienced a burning sensation that lasted for about 30 minutes and then noticed a complete loss of his senses of smell and taste, said his attorney, Stephen F. Aton, of Springfield.

"He could be eating filet mignon or dog food and he wouldn't be able to taste the difference," Aton said. The loss of smell also presented safety issues because Smith couldn't smell signs of danger such as fumes, smoke from a fire or leaking gas, the complaint alleged.

The Food and Drug Administration warned consumers in 2009 not to use some of the products, and Matrixx recalled them.

Smith's suit, originally filed in federal district court in Kansas City, was transferred to federal court in Phoenix for consolidation as part of multidistrict litigation, which encompassed other similar cases. More than 1,800 plaintiffs' cases were a part of the MDL, Aton said.

The defendants, in response to Smith's lawsuit, denied that Zicam is unsafe, causes a lack of smell or taste, or is otherwise dangerous or defective.

Plaintiffs' counsel learned that Matrixx had limited liquid assets and little insurance left, Aton said. He added that defendants indicated that if they had to defend all cases in court, they would seek bankruptcy protection.

"They were threatening bankruptcy all the way along," Aton said.

The parties' lead counsel ultimately agreed on a \$15.5 million settlement from the defendants. The settlement agreement required about 98 percent of plaintiffs to accept it, Aton said.

A special master, California attorney Catherine Yanni, was appointed to allocate the settlement proceeds, minus the attorneys' fees and costs, to the plaintiffs.

Aton said he and his client agreed to settle

■ \$10,000 settlement

OUT-OF-STATE

PRODUCT LIABILITY, FRAUD

■ **Venue:** U.S. District Court for the District of Arizona

■ **Case Number/Date:** 2:09-md-02096/Feb. 4, 2011

■ **Judge:** Frederick Martone

■ **Caption:** Raymond Carter Smith v. Matrixx Initiatives Inc., f/k/a Gum Tech International Inc., f/k/a Nekros International Marketing Inc.; Zicam LLC, f/k/a Gel Tech LLC; and Botanical Laboratories Inc.



Stephen F. Aton

■ **Plaintiffs' Attorneys:** Stephen F. Aton, Aton Law Firm, Springfield (for Smith); Charles Zimmerman, Zimmerman Reed, Minneapolis (lead counsel for plaintiffs)

■ **Defendants' Attorney:** Alan Lazarus, Drinker Biddle & Reath, San Francisco (lead counsel)

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because they thought they would wind up with little or no recovery if they didn't accept the settlement offer.

The special master originally gave \$7,500 to Smith. Aton said he believed his client deserved more because Smith completely lost his sense of smell and taste and had evidence to back up his claims. When Aton appealed for more, Yanni increased Smith's allocation to \$10,000 in February.

The plaintiffs' awards ranged from a few hundred dollars to \$25,000, Aton said, depending on the injuries and which product a particular plaintiff used.

Aton said that while \$10,000 was not adequate compensation for Smith, it was the

best his client could get, considering the defendants' limited resources.

"It does not even begin to compensate him for his personal injury," he said.

Alan Lazarus, who represented all three defendants, said the settlement negotiations were conducted pursuant to federal mediation privilege, "which precludes disclosure of the parties' positions taken and statements made during the course of negotiations."

Lazarus, of Drinker Biddle & Reath in San Francisco, declined to comment further.

Lead counsel for the plaintiffs in the MDL, Minneapolis attorney Charles Zimmerman, didn't return messages seeking comment.