FOLEY HOAG LLP

Product Liability **Update**

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Foley Hoag LLP publishes this quarterly Update concerning developments in product liability and related law of interest to product manufacturers and sellers.

Supreme Court Holds Defendant Cannot Moot Putative Class Action by Making Unaccepted Offer of Judgment for Complete Relief to Representative Plaintiff

In *Campbell-Ewald Co. v. Gomez*, No. 14-857, 2016 U.S. LEXIS 846 (S. Ct. Jan. 20, 2016), plaintiff filed a putative nationwide class action in the United States District Court for the Central District of California alleging the defendant multimedia developer violated the Telephone Consumer Protection Act ("TCPA") by sending unsolicited text messages to him and the other class members. Before plaintiff moved for class certification, defendant filed an offer of judgment pursuant to Fed. R. Civ. P. 68 to allow judgment to be entered against defendant on plaintiff's individual claim in the amount of triple the statutory damages, as is available under the TCPA where a "defendant willfully or knowingly violate[s]" the statute. The offer also included reimbursing plaintiff's costs, but not his attorneys' fees, and a stipulated injunction in which defendant denied liability but would henceforth be barred from sending any text messages that violated the TCPA. Plaintiff did not accept defendant's offer within the 14-day window provided by Rule 68. Thereafter, defendant moved to dismiss, arguing its offer of judgment mooted plaintiff's individual claims because it provided him complete relief and, because it was made before he had moved for class certification, the putative class claims were also moot. The district court denied the motion to dismiss but awarded defendant summary judgment on other grounds. On appeal, the United States Court of Appeals for the Ninth Circuit agreed the claims were not moot and also reversed the summary judgment decision, reinstating the action in its entirety.

Despite the non-final nature of the judgment below, the United States Supreme Court granted review to resolve a split among the federal circuits on the mootness issue—which was of considerable importance to class action litigation—and held plaintiff's claims were not moot. The Court began by noting that "[a]n unaccepted settlement offer—like an unaccepted contract offer—is a legal nullity, with no operative effect," and that under the terms of Rule 68 itself an "unaccepted offer is considered withdrawn." Accordingly, defendant's offer in this case, once rejected, had no continuing efficacy, the parties remained adverse and there was still a live case or controversy supporting federal court jurisdiction. In this respect, therefore, the case differed from a series of tax collection cases that the Court had held moot after the railroads paid the taxes claimed, as in those cases the plaintiffs had actually been paid. Further, while the putative class here lacked independent status because it was not yet certified, because plaintiff himself had a live claim he was entitled to the opportunity to argue for certification.

Finally, the Court acknowledged the dissent's argument that a no-mootness ruling would give too much power to individual plaintiffs to pursue a broad class action even though

they had been offered complete relief for any unlawful conduct as to them. But the Court countered that a contrary rule would give too much power to defendants who were guilty of unlawful conduct to avoid a potentially adverse class-wide decision solely by mooting the individual plaintiff's claim.

First Circuit Affirms Class Action Settlement Despite Disparity Between Refund Estimate in Class Notice and Actual Refund, Proof-of-Purchase Requirement for Objectors But Not Certain Claimants and Attorneys' Fee Award Following Defendant's Agreement Not to Oppose

In *Bezdek v. Vibram USA, Inc.*, No. 15-1207, 2015 U.S. App. LEXIS 22925 (1st Cir. Dec 31, 2015), plaintiff purchasers of "barefoot" running footwear brought a putative class action against the manufacturer in the United States District Court for the District of Massachusetts alleging false and deceptive marketing about the product's health benefits. A later-filed but similar putative class action from another federal court was transferred to Massachusetts and consolidated with the first case. After extensive written discovery but before plaintiffs moved for class certification, the parties submitted a proposed settlement agreement to the court for approval.

Under the terms of the settlement, defendant would create a $3.75 million fund from which refunds would be paid on a pro rata basis, the parties agreed it was reasonable to expect class members might receive refunds of $20 to $50 per pair, costs and attorneys' fees—which defendant agreed not to oppose if not exceeding 25% of the settlement fund—would be paid out of the fund and an injunction would order defendant to refrain from making representations about the product's health benefits unless supported by "competent and reliable scientific evidence." In addition, individuals could participate in the settlement for no more than two pairs without written proof of purchase; for a larger claim, or to object to the settlement, such proof was required. The district court preliminarily approved the settlement, certified a class for settlement purposes only and ordered notice sent to the class summarizing the settlement's terms. Although written objections to the settlement were filed, after a fairness hearing the district court approved the settlement as "fair, reasonable, and adequate" under Fed. R. Civ. P. 23(e)(2).

On appeal to the United States Court of Appeals for the First Circuit, the objectors argued that (i) the class notice was misleading because it posited a recovery of $20 to $50, whereas the actual per-pair refund was only $8.44, and the discrepancy could have affected whether or not class members objected, (ii) it was punitive to require only objectors to provide proofs of purchase, (iii) the injunctive relief was inadequate, and (iv) the attorneys' fees awarded were unreasonable due to defendant's agreement not to oppose them up to 25% of the recovery.

On the first argument, the appellate court found no misrepresentation in the notice, as the numbers provided were only an estimate and the notice specifically warned the actual refund could decrease depending on the number of valid claims. Moreover, despite the variance from initial estimates, the $8.44 actually awarded was a fair settlement because of the uncertainty of success at trial and the trial costs, which would decrease the net amount of any damages award. The court also rejected the objectors' argument that class counsel should have anticipated the higher number of claims or waived some of their own fees to compensate class members, as objectors cited no legal authority and simply imagining a better settlement would not mean such a settlement was reasonable or feasible.

As for the objector standard, the court held that while the imposition of a proof-of-purchase standard for objectors but not for at least some class members was a factor that could bear on fairness, that disparity alone was not enough to render an otherwise fair settlement unfair.

Regarding the challenged injunctive relief, the objectors argued it only required the manufacturer to do what it was already legally obligated to do. But the circuit court affirmed the district court's ruling that the requirement of competent and reliable scientific evidence to substantiate any health claims was a "valuable contribution," because allegedly false advertising formed the crux of the litigation.

Finally, on the attorneys' fees issue, the court cited its prior precedent that a "clear-sailing" agreement (*i.e.*, an agreement not to challenge a fee application) was not per se unreasonable.

While fee awards following such agreements must be afforded extra scrutiny, the award here survived both because it was reasonable when compared to the "lodestar" amount—counsel's hours worked multiplied by reasonable hourly rates—and because other courts had found fees of 25% of a recovery to be reasonable.

Massachusetts Federal Court Finds Hospital Implanting Surgical Device Not Fraudulently Joined to Defeat Diversity Jurisdiction Where (1) It Was Plausible Massachusetts Would Recognize Breach of Warranty Claim Against Hospital, (2) Preemption and Statute of Limitations Defenses Were Not Unique to Hospital, (3) Plaintiff's Claims Were Not Preempted Because "Parallel" To Federal Law and (4) Claims Were Timely Under "Discovery Rule"

In *Rosbeck v. Corin Group, PLC*, No. 15-12954, 2015 U.S. Dist. LEXIS 145621 (D. Mass. Oct. 27, 2015), plaintiff sued three manufacturers of an implanted hip resurfacing system and the hospital where the implantation surgery occurred in Massachusetts Superior Court alleging he suffered injuries caused by the release of chromium and cobalt from abrasion of the implant. Plaintiff brought claims against the manufacturers for negligence, breach of the implied warranty of merchantability (the Massachusetts near-equivalent of strict liability) and violation of Mass. Gen. L. ch. 93A (the Massachusetts unfair and deceptive practices statute), and alleged the implant's excessive wear and tear violated United States Food and Drug Administration regulations under the Federal Food, Drug and Cosmetic Act ("FDCA") and the manufacturers unrealistically lubricated the implant during simulator testing so it would appear to comply with the regulations. Plaintiff also asserted a claim for breach of the implied warranty of merchantability against the hospital for its sale of the allegedly defective product.

After defendants removed the case to the United States District Court for the District of Massachusetts, plaintiffs sought remand to state court, arguing the federal court lacked diversity jurisdiction because they and the defendant hospital were all Massachusetts citizens. One of the manufacturers opposed the motion to remand, arguing the hospital was fraudulently joined solely to defeat diversity because (1) Massachusetts has never recognized a breach of warranty claim for a medical product provided by a hospital, limiting its liability instead to medical malpractice, and any claim against the hospital was (2) preempted by the FDCA and (3) barred by the statute of limitations.

The court first noted that joinder of a defendant is fraudulent "where there is no reasonable possibility that the state's highest court would find that the complaint states a cause of action upon which relief may be granted against the non-diverse defendant." In accord with other jurisdictions, the court should apply a standard of review "more lenient than that for a motion to dismiss" and resolve any ambiguities in favor of plaintiff.

On the breach of warranty issue, while the Massachusetts Supreme Judicial Court ("SJC") had not ruled on it and the majority of states rejected hospital warranty liability in favor of malpractice, at least one other state supreme court had permitted such a claim and the SJC could plausibly follow this minority view. Defendants argued Massachusetts would follow the majority view because it had "demonstrated a public policy protective of hospitals" by creating medical malpractice tribunals to filter out frivolous claims and refusing to apply abnormally dangerous activity liability to hospitals, but the court was not persuaded that either fact meant the SJC would necessarily reject hospital warranty claims. In addition, Massachusetts' Uniform Commercial Code warranty provisions expressly covered transactions involving the provision of both a good and services, as here, even though the ultimate success of plaintiff's claim might depend in part on what facts discovery revealed about the hospital's role. Also, two other federal district courts had remanded similar cases where there was no appellate authority in those states regarding whether warranty claims could be asserted against hospitals.

The court also rejected defendant's arguments that joinder was fraudulent because plaintiff's claims were preempted or barred by the statute of limitations. First, the court recognized the "common defense rule," adopted in other jurisdictions and based on United States Supreme Court precedent, under which there is no fraudulent joinder if "[plaintiff's] claim against the non-diverse defendants is no weaker than his claim against the diverse defendants," *i.e.*, if defendant's argument applies to the case as a whole rather than just the allegedly fraudulently joined defendants. Here, the preemption and statute of limitations

arguments overlapped among the defendants as all were based on essentially the same set of factual allegations relating to non-compliance with the FDCA.

In addition, the court rejected the preemption and statute of limitations defenses on the merits. The FDCA preempts only state law claims based on requirements that are "different from, or in addition to," the requirements of federal law. Here plaintiff's state law claims stemmed "solely" from violations of the federal requirements, *i.e.*, the FDCA-based wear and tear regulations. Accordingly, plaintiff pled a claim that was "parallel" to and hence not preempted by federal law.

Regarding the three-year Massachusetts statute of limitations, under the "discovery rule" plaintiff's claim only accrued when he reasonably should have known he was harmed by defendant's conduct. Here, while plaintiff was informed his blood contained sharply elevated levels of chromium and cobalt in August 2011 and did not sue until April 2015, no reasonable person should have known at the earlier time that the implant system was the cause of the blood results. For all these reasons, the court granted plaintiffs' motion to remand.

Massachusetts Federal Court Applies Massachusetts Statute of Limitations to Claim Based on Product Use and Injury in Oklahoma, Where Plaintiff Saw Product Advertisement, Bought Product By Phone and Received Worker's Compensation Benefits in Massachusetts

In *Elliston v. Wing Enters.*, No. 15-11739, 2015 U.S. Dist. LEXIS 155256 (D. Mass. Nov. 17, 2015), plaintiff sued a ladder manufacturer incorporated in Utah in the United States District Court for the District of Massachusetts after he was injured when the ladder's leg buckled during use. Plaintiff saw advertisements for the ladder in Massachusetts, purchased the ladder by phone there and the ladder was delivered to his home there, but plaintiff never used the ladder until he brought it to his second home in Oklahoma, where the accident occurred. Defendant moved to dismiss, arguing Oklahoma's two-year statute of limitations applied and barred the claim, even though it was timely under Massachusetts's three-year statute.

The Court began by citing the Restatement (Second) of Conflict of Laws, § 142, which states that a forum will apply its own statute of limitations unless the claim would be barred under the limitations law of a state with a more significant relationship to the parties and occurrence. Defendant argued Oklahoma had a more significant interest in the action because it had a more significant relationship with the parties, product and occurrence than Massachusetts, but the court disagreed, finding Massachusetts had at least three substantial interests warranting application of its statute. First, the state had an interest in providing a remedy for Massachusetts residents who were injured and holding manufacturers of defective products responsible; while plaintiff had a secondary home in Oklahoma, that did not diminish his Massachusetts residency. Second, Massachusetts had an interest based on the defendant's advertising and sales in the state. Third, plaintiff held a Massachusetts construction supervisor's license, was a registered Massachusetts home improvement contractor and had received Massachusetts worker's compensation benefits due to his fall. While the fact that the product was used and plaintiff's injury occurred in Oklahoma was relevant, that was only one aspect of plaintiff's claim—among other things, the product had been neither designed, manufactured nor sold in Oklahoma. Accordingly, Oklahoma had only a minimal interest in the application of its statute of limitations, even though the analysis might be different if a more substantive law—such as one that sought to change the actual behavior of tortfeasors—were at stake.

Massachusetts Superior Court Applies Law of Colorado As Place of Injury in Claim Against Massachusetts Drug Manufacturer, As Massachusetts Did Not Have More Significant Relationship With Claim; Among Other Things, State's Product Liability Policy Focused on Deterrence and Compensation Was Not Superior to Colorado's Policy Balancing Those Concerns With Insurance Cost and Availability Concerns, Resulting in Cap on Non-Economic Damages Awards

In *Ogburn-Sisneros v. Fresenius Med. Care Holdings, Inc.*, No. 131756, 2015 Mass. Super. LEXIS 96 (Super. Ct. Oct. 19, 2015), plaintiff sued several related companies responsible for

the manufacture and sale of a kidney dialysis drug, alleging her decedent died as a result of defendants' failure to warn of the drug's risks. At issue was whether Massachusetts or Colorado law applied to the claims. Defendants were Massachusetts corporations and made all drug warning decisions in Massachusetts, but manufactured the drug in Ohio and Texas and distributed it throughout the United States. Decedent resided, was prescribed and received dialysis treatment, including the drug, in Colorado, and also died there.

The court began by noting that Massachusetts follows the Restatement (Second) of Conflict of Laws ("Restatement") for its choice-of-law rules. Under Restatement § 146, because plaintiff's claims were for personal injury, the law of Colorado—the state where the injury had occurred—should apply, unless some other state had a more significant relationship to the injury and parties. Restatement § 6(2) then lists six factors generally to be considered in determining which state has a more significant relationship to the injury and parties, and §145(2) lists three factors to be considered when applying § 6's principles in tort cases.

Turning to §6's general factors, the court first concluded that applying Colorado law was consistent with the interstate system's needs, because Colorado had substantial contacts with both the injury and parties. With respect to the product liability policies of the two states, while Massachusetts focused broadly on deterring the sale of defective products and compensating injured individuals, Colorado balanced a concern about these issues with concerns about dramatic increases in the cost of, and difficulty in obtaining, insurance, as a result of which it imposed a $250,000 cap on non-economic damages awards ($500,000 if a court found justification by clear and convincing evidence); accordingly, Massachusetts' policy was not superior to Colorado's. The §6 factors of certainty, predictability and uniformity were less important in tort cases than in contractual disputes where the parties give advance thought to the applicable law, and while it would be easier for a Massachusetts court to apply its own law, this factor could not outweigh all the other factors that weighed in favor of Colorado law.

The court then applied §145(2) and held Colorado had a more significant relationship to the injury and parties because the injury occurred there and the parties' relationship was centered there, as that was where decedent had been prescribed and received the drug. The conduct causing decedent's injury also occurred in Colorado, because under prior precedent the relevant conduct in a prescription drug product liability case is the use of the product and any accompanying warnings, which occurred in Colorado, not the decisions regarding warnings, which occurred in Massachusetts. For all these reasons, therefore, Colorado law applied.

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