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.

United States Supreme Court Permits Class Certification And Proof of Liability Through Statistical Evidence Based on Class Sampling Where Class Was Sufficiently Uniform That Evidence Would Have Been Admissible in Any Class Member's Individual Action, Holds Propriety of Award to Uninjured Class Members Not Raised Absent Order or Plan for Disbursing Class Recovery

In *Tyson Foods, Inc. v. Bouaphakeo*, 2016 U.S. LEXIS 2134 (S. Ct. Mar. 22, 2016), plaintiffs, employees who worked in certain departments at defendant's pork processing plant, brought a collective action under the Fair Labor Standards Act of 1938 ("FLSA"), and putative class action under an Iowa wage statute and Fed. R. Civ. P. 23(b)(3), in the United States District Court for the Northern District of Iowa. Plaintiffs sought overtime pay for all employees' hours exceeding forty a week because defendant had not credited the employees for time spent donning and doffing protective gear. The district court certified the action as both a class and collective action. Because defendant had failed to keep records of donning and doffing time as required by the FLSA, plaintiffs offered expert testimony at trial that used a study that estimated the average donning and doffing time per employee in each department based on representative sampling, applied the relevant average to each employee's individual time records and estimated the class was collectively owed $6.7 million. The jury ultimately awarded $2.9 million, and the United States Court of Appeals for the Eighth Circuit affirmed.

After granting review, the United States Supreme Court affirmed. The Court first rejected defendant's argument that "representative evidence" could never be used to treat all class members uniformly, and thereby certify a class under Rule 23(b)(3) on the ground that common questions in the action predominated over individual ones, where the facts as to individual class members—here their time spent donning and offing—actually differed. "Whether a representative sample may be used to establish classwide liability will depend on the purpose for which the sample is being introduced and on the underlying cause of action." Here, the record showed the experiences of class members were similar enough that "the experiences of a subset . . . can be probative as to the experiences of all." For that reason, the expert's study could have been used in any individual employee's suit to prove his entitlement to overtime, and therefore was properly used here. The Court also emphasized that the representative evidence was only necessary "to fill an evidentiary gap created by the employer's failure to keep adequate records," so the FLSA's remedial nature militated in favor of allowing plaintiffs to use the evidence rather than leaving them uncompensated for want of more precise proof.

The Court also noted that its conclusion was not in conflict with *Wal-Mart v. Dukes*, 564

U.S. 338 (2011), where the Court had rejected the suggestion that employment discrimination plaintiffs could certify a class and conduct a "Trial By Formula" using representative evidence. Unlike the present case, the experiences of the *Dukes* class members were so dissimilar that evidence of allegedly discriminatory actions as to a sample set would have had no probative value as to the experiences of the remaining class members, and thus no class member could have relied on such representative evidence in an individual action. Under those circumstances, permitting use of the evidence "would have violated the Rules Enabling Act by giving plaintiffs and defendants different rights in a class proceeding than they could have asserted in an individual action." Here, however, the representative evidence was not an impermissible means of "absolving the employees from proving individual injury" but rather "a permissible means of making that very showing."

Lastly, the Court rejected defendant's contention the class award was improper because there was no way to ensure that uninjured class members would not recover. Defendant argued that the jury's award of $2.9 million when plaintiff's expert had estimated $6.7 million in class-wide damages meant the jury had rejected parts of the expert's methodology, making it impossible to know which employees were in fact entitled to overtime consistent with the jury's conclusions. The Court explicitly acknowledged the importance of the question whether uninjured class members may recover damages, but concluded that because the trial court had not yet ordered disbursement of the award or specified how it would be disbursed, the question was not yet presented. The Court also suggested there might be ways the district court and parties could work backward from the amount of the award to determine which class members were actually entitled to recover.

United States Supreme Court Holds Citizenship of Real Estate Investment Trust for Diversity Jurisdiction Determined by Citizenships of All Shareholders and Trustees

In *Americold Realty Trust v. Conagra Foods, Inc.*, 2016 U.S. LEXIS 1652 (S. Ct. 2016), a group of corporations sued a real estate investment trust ("REIT") in Kansas state court alleging breach of contract for failing to compensate the group after its food perished in a fire at defendant's warehouse. Defendant removed the case to the United States District Court for the District of Kansas, asserting jurisdiction based on diversity of citizenship between plaintiffs and defendant. Plaintiffs did not challenge jurisdiction, the court accepted it and ultimately granted judgment for defendant.

On plaintiff's appeal, the United States Court of Appeals for the Tenth Circuit requested supplemental briefing on whether diversity jurisdiction actually existed. The court then concluded that the citizenship of a "non-incorporated artificial entity" such as a REIT is determined by the citizenship of all of its "members," which here included, at a minimum, all shareholders. Because the record did not identify the shareholders' citizenships, however, defendant had failed to demonstrate that those citizenships differed from those of the corporate plaintiffs and hence the district court had no jurisdiction. The United States Supreme Court granted certiorari to resolve confusion among the federal circuits as to how to determine the citizenship of unincorporated entities.

The court began by reviewing its earlier jurisprudence on diversity jurisdiction, emphasizing its "oft-repeated rule" that the diversity of a unincorporated entity depends on the citizenship of its members, but acknowledged it had never defined that term. Here, Maryland law—under which defendant was organized—provided that a REIT is managed for the benefit and profit of its shareholders, who also hold ownership and voting interests in the entity. Accordingly, such shareholders are equivalent to the shareholders of a joint-stock company or partners in a limited partnership, both of which the court had previously held to be members of their respective entities for the purposes of determining diversity.

The Court rejected defendant's reliance on a prior case in which the Court had held that where a trustee brings a suit in his own name on behalf of a trust, the relevant citizenship is that of the trustee as an individual. The Court noted that while "traditional trusts" were not distinct legal entities that could sue or be sued in their own names, some states had created legal entities such as the REIT here which, while nominally "trusts," did have the capacity to sue or be sued. Accordingly, the citizenship of such non-traditional trusts was determined by the citizenship of its members—here the REIT's shareholders—as well as its trustees.

The Court also rejected an amicus's argument that the citizenship of an unincorporated entity should be based on where it was

established or had its principal place of business, as the diversity jurisdiction statute provides with respect to corporations. The Court, however, “saw no reason to tear [] down” the “doctrinal wall” between incorporated and unincorporated entities by adopting this rule, noting that Congress could amend the diversity statute if it desired this result.

Massachusetts Federal Court Holds Argument Failure-to-Warn Claims In Multi-District Pharmaceutical Litigation Were Preempted By FDA’s Rejection of Citizen’s Petition Premature Before Discovery, and Arguments Claims For Unlawful Off-Label Promotion and Concealment of Information From FDA Were Preempted Too Case-Specific to Resolve at Early Stage

In *In re Zofran (Ondansetron) Products Liability Litigation*, 2016 U.S. Dist. LEXIS 7638 (D. Mass. Jan. 22, 2016), plaintiffs brought numerous suits around the country against the manufacturer of an anti-nausea drug, alleging it caused birth defects when used by pregnant women. Plaintiffs claimed defendant failed to adequately warn about the drug’s risks, and failed to comply with United States Food and Drug Administration (“FDA”) regulations by marketing the drug for off-label uses or withholding relevant safety information from the FDA. The Judicial Panel on Multidistrict Litigation created a multidistrict litigation (“MDL”) and transferred 208 cases to the United States District Court for the District of Massachusetts for pre-trial management.

Before the start of discovery, defendant moved to dismiss all suits arguing they were preempted by the Food Drug and Cosmetic Act (“FDCA”) because the FDA, which must approve all prescription drug warnings, had previously rejected a citizen’s petition requesting that the drug be reclassified to a higher pregnancy risk category and hence accompanied by stronger warnings about use during pregnancy. The court noted it was hesitant to decide the issue as presented because the preemption standard was whether there was “clear evidence” the FDA would have rejected the warning plaintiffs argued defendant should have given, an issue on which plaintiffs had not yet had the opportunity to gather any facts. The court also suggested, without deciding, that the FDA might treat a request for a labeling change by a citizen’s petition differently than an identical request by a manufacturer, so that the rejection of a citizen’s petition might not be dispositive. Further, given the case’s infancy, the court was not clear as to how the warning(s) for which the various plaintiffs advocated compared with those sought by the rejected citizen’s petition. Accordingly, the court held defendant’s failure-to-warn preemption argument was “premature at best,” and rejected it without prejudice to renewal at a later date.

Defendant also argued plaintiffs’ claims based on allegedly unlawful off-label marketing and concealment of safety information from the FDA were preempted by the FDCA because the claims conflicted with the FDA’s exclusive authority to police fraud under that act. Under prior case law, a state law claim is not preempted for that reason if the claim (1) merely incorporates, but does not rely solely upon, the FDCA violation and (2) is founded on conduct that would otherwise give rise to liability under state law. Because there were over 200 different cases, however, the court was unwilling to undertake the necessary analysis, “especially where the parties have devoted a total of only three pages of briefing to the issue.” While many claims might ultimately fail on these grounds, in order to address preemption the court would need to go through each claim in each case, identify the applicable state law and then assess whether the particular claim was preempted under the governing standard. Accordingly, the court also rejected this preemption argument without prejudice to its later renewal.

Massachusetts Federal Court Holds No Reasonable Jury Could Conclude Distributor Sold Machine That Injured Plaintiff Where Defendant Denied Sale, No Testimony Or Records Supported It And Evidence Plaintiff’s Employer Purchased Replacement Parts From Defendant Was Not Accompanied By Explanation As To Why

In *Al-Yaseri v. TMB Baking*, 2016 U.S. Dist. LEXIS 2244 (D. Mass. 2016), plaintiff alleged he was injured while working as a baker by a machine sold by the defendant distributor, and asserted claims for negligence and breach of the implied warranties of merchantability (the Massachusetts near-equivalent of strict liability) and fitness for a particular purpose.

Defendant admitted selling the model of machine that injured plaintiff but disputed it sold the particular machine, and moved for summary judgment arguing there was insufficient evidence from which a jury could conclude that it did.

The United States District Court for the District of Massachusetts began by repeating the rule that a plaintiff in a product liability action must show defendant manufactured or sold the product that injured him. Here, no reasonable jury could find defendant sold the machine because: (i) defendant's owner testified he did not sell the machine to plaintiff's employer; (ii) no records established such a sale; (iii) defendant's owner testified his company put stickers on the machines it sold and no such sticker was present; and (iv) plaintiff's employer testified he bought his equipment from two middlemen, but one of them denied buying from the distributor and there was no evidence as to where the other obtained his machines. Even if the jury discredited some of this testimony, there was no affirmative evidence—either direct or circumstantial—that the machine was sold by defendant. While plaintiff argued the jury could infer the sale because his employer purchased replacement parts from defendant, there was no evidence as to why the employer did that or that it generally bought replacement parts from the same company that had originally supplied the machine.

Massachusetts Appeals Court Holds Defendant's Failure to Properly Train Employees About Boom Lift's Safety Features, Improper Replacement of Safety Component and Repeated Failure To Detect Malfunctioning Safety Features In Inspections Constituted Gross Negligence Justifying Punitive Damages

In *Williamson-Green v. Equipment 4 Rent, Inc.*, 2016 Mass. App. LEXIS 23 (Mass. App. Ct. Mar. 3, 2016), a man inspecting a roof was more than one hundred feet high on a boom lift when it tipped over and crashed into a neighboring building, killing him. Decedent's administratrix sued the lift manufacturer and rental company in Massachusetts Superior Court, claiming their negligence caused the accident. Plaintiff alleged the lift toppled because its operator began lowering it while its riser was still fully extended, an operation that should have been prevented by the lift's riser interlock system—controlled by proximity sensors and a limit switch—but it was out of adjustment at the time of the accident. The jury awarded over $3.5 million in compensatory damages against both defendants and, finding the rental company's conduct "grossly negligent, wilful, wanton, or reckless," awarded $5.9 million in punitive damages against that defendant. The rental company appealed, arguing there was insufficient evidence to support the punitive damages award.

The Massachusetts Appeals Court affirmed. At trial, the employee responsible for inspecting and maintaining the lift testified he had received no training regarding the riser interlock system and was not even aware of its limit switch. Two years before the accident, he and another employee had replaced the proximity sensor later found to be out of adjustment without consulting the operator or repair manuals and without performing any measurements to verify they had properly installed the sensor. Between then and the accident, the lift underwent seventeen separate inspections without discovery of the interlock system problems, which plaintiff's expert testified proper testing on any of those occasions would have revealed. In light of this evidence that the interlock system had not been properly tested and was not working, and that defendant had reason to know that the lift was therefore highly dangerous to operate, defendant's inclusion of a tag on the lift saying it was "ready to rent" and "ready to use" was further evidence of gross negligence. On this record, the jury was justified in finding defendant "persiste[d] in a palpably negligent course of conduct over an appreciable period of time" and demonstrated "a manifestly smaller amount of watchfulness and circumspection than the circumstances require[d] of a person of ordinary prudence." Accordingly, the punitive damages award was proper.

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