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 Holds Class Certification Improper Absent Showing Plaintiffs' Damages Can Be Measured on a Classwide Basis through Use of a Common Methodology that Is Consistent with Plaintiffs' Liability Theory

In *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 2013 WL1222646 (Mar. 27, 2013), cable television subscribers sued a cable service provider and its subsidiaries in the United States District Court for the Eastern District of Pennsylvania, alleging defendants had pursued an illegal anticompetitive strategy known as "clustering" by which they acquired competitor cable providers' systems within a particular region while simultaneously selling their own systems outside that region to the competitor. Plaintiffs alleged that as a result of these "swapping" agreements, both defendants and their competitors dramatically increased their market shares in their respective regions, thus eliminating competition and holding prices for cable services above competitive levels in violation of Sections 1 and 2 of the Sherman Act.

Plaintiffs moved to certify a class of similarly-situated Philadelphia-area cable subscribers under Fed. R. Civ. P. 23(b)(3), which permits certification only if, among other things, "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members." The district court held that to meet this predominance requirement, plaintiffs needed to show both that (1) the existence of individual injury resulting from the alleged anticompetitive conduct was capable of proof by evidence common to the class, and (2) the damages resulting from that injury were measurable on a classwide basis through use of a common methodology. Although plaintiffs proposed four distinct theories as to how they had been injured by defendants' anticompetitive conduct, the trial court held that only one -- that defendants' clustering reduced the level of competition from "overbuilders," *i.e.*, competing companies that build cable networks in an area where another cable company already operates -- was capable of classwide proof. The trial court then found that under an economic regression model designed by plaintiffs' expert, the damages caused by deterrence of overbuilders could be calculated on a classwide basis, and the court certified a class under that theory.

On appeal to the United States Court of Appeals for the Third Circuit, defendants argued certification was inappropriate because plaintiffs' expert had acknowledged that his model measured damages resulting from all four of plaintiffs' theories of harm, not just the overbuilder-deterrence theory. Nevertheless, the circuit court affirmed certification, holding that objections to the scope of the expert's damages model were not appropriate at the class certification stage because such an inquiry would require reaching the

merits of plaintiffs' claims, contrary to certain language in prior decisions of the United States Supreme Court.

After granting certiorari, the Supreme Court reversed, holding the Court of Appeals had erred in refusing to consider defendants' arguments that plaintiffs' damages model was insufficient to establish their alleged damages on a classwide basis. Citing its recent decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (*see* **April 2012 Foley Hoag Product Liability Update**), the Court reaffirmed that class certification requires the court to determine that the prerequisites of Rule 23 are satisfied, even if that necessitates some degree of inquiry into the merits of plaintiffs' claim. Although damages calculations need not be exact at the class-certification stage, the Court held that any model supporting a plaintiff's damages case must at least be consistent with its liability case, particularly with respect to the anticompetitive effect of the violation. Here, because the trial court certified only one of the plaintiffs' four theories of harm, the class would be entitled to damages resulting only from that species of harm. It follows, then, that for purposes of establishing that damages are measurable on a classwide basis in accordance with Rule 23(b)(3), a model that does not even attempt to measure the damages attributable to the lone surviving theory is insufficient under the rule.

United States Supreme Court Holds Putative Class Representative's Purported Stipulation Limiting Classwide Damages to Less than $5 Million Is Non-Binding and Does Not Defeat Federal Court Jurisdiction Under Class Action Fairness Act

In *Standard Fire Insurance Company v. Knowles*, 2013 WL 1104735 (Mar. 19, 2013), a policyholder sued an insurer in Arkansas state court on behalf of a putative class for allegedly failing to include general contractor fees in its homeowner's insurance loss payments. Plaintiff's complaint purported to stipulate on behalf of himself and the class that they would seek to recover total aggregate damages of less than $5 million. Defendant removed the matter to the United States District Court for the Western District of Arkansas, and plaintiff filed a motion to remand arguing the amount in controversy fell below the $5 million threshold for federal court jurisdiction under the Class Action Fairness Act ("CAFA"). Although the trial court found the actual amount in controversy would have exceeded $5 million, the court nevertheless ordered remand because, in light of plaintiff's stipulation, the CAFA threshold had not been satisfied. The United States Court of Appeals for the Eighth Circuit declined to hear defendant's appeal from the remand order and the United States Supreme Court granted certiorari.

The Court first noted that 28 U.S.C. §§ 1332(d)(2) and (d)(6), as amended by CAFA, provide original federal court jurisdiction to class actions that, among other things, have an amount in controversy greater than $5 million, as calculated by aggregating the claims of the individual class members. In holding that a damages-limiting stipulation by a putative class representative cannot trump the statutorily-prescribed calculation, the Court observed that until a class is certified, the class representative lacks authority to bind the absentee class, including through a stipulation. The Court pointedly noted the possibilities that (1) the putative class representative might later be rejected by a court because his agreement to the artificial damages cap makes him an inadequate class representative, (2) another class member might be allowed to intervene with an amended complaint that lacks a damage-limiting stipulation, or (3) the court might reject or modify the stipulation, thus allowing class members to seek more than $5 million. Were any of these events to occur, federal court jurisdiction under CAFA would be appropriate.

Conceding that future events could modify the nature of the class and/or the binding nature of the stipulation, plaintiff argued that such possibilities were irrelevant because, for purposes of evaluating the amount-in-controversy requirement, CAFA permits the federal court to consider only the complaint as filed, not a modified complaint that might eventually emerge. The Court rejected this argument, however, holding that to treat a non-binding stipulation as if it were binding would "exalt form over substance," and contravene the primary purpose of CAFA to ensure "Federal court consideration of interstate cases of national importance." The Court noted that to hold otherwise would allow a $100 million action to be subdivided into 21 just-below-$5 million state court actions simply by including non-binding stipulations in the original complaints, which surely would conflict with CAFA's objective.

Massachusetts Federal Court Holds Non-Resident Defendant in Multi-Defendant State Court Litigation May Not Remove Case to Federal Court Before Service on at Least One Properly Joined Defendant

In *Gentile v. Biogen Idec Inc.*, 2013 WL 1189497 (D. Mass. Feb. 21, 2013), a New York citizen who suffered from multiple sclerosis was prescribed Tysabri, a drug manufactured by defendants. While on the drug, she died of progressive multifocal leukoencephalopathy, a brain disease thought to be caused by immunosuppressant drugs such as Tysabri. Plaintiff, the administrator of decedent's estate, sued the drug manufacturers -- Delaware corporations with their principal places of business in Massachusetts and California, respectively -- in Massachusetts Superior Court alleging the drug was defectively designed and defendants negligently failed to warn of its dangers.

Four days after plaintiff sued, and before either defendant had been served, the California-based defendant removed the suit to the United States District Court for the District of Massachusetts pursuant to 28 U.S.C. § 1441(a), on the ground that the suit was within the federal court's jurisdiction to hear suits involving parties of diverse citizenship. Plaintiff served the Massachusetts-based defendant the next day and the California defendant the day after. Thereafter, plaintiff moved to remand the case to state court, pursuant to § 1441(b), which provides that a case may not be removed "if *any* of the parties in interest *properly joined and served* as defendants is a citizen of the State in which such action is brought." (emphasis added). The court initially denied remand, but then on *sua sponte* reconsideration asked for supplemental briefing regarding whether § 1441(b) permits a non-resident defendant in multi-defendant litigation to remove a case filed in state court before any defendant has been served, in particular when a co-defendant is a citizen of the forum state and has been properly joined. On reconsideration, the court held that the plain language of the statute does not permit removal under such circumstances and ordered remand.

The court began its analysis by noting that federal district courts around the country have generally agreed that § 1441(b)'s plain language permits removal before service on any defendant, at least when done by a non-forum defendant prior to service upon a forum defendant; nevertheless, some courts have looked past this perceived plain meaning to reject pre-service removal for public policy reasons, particularly when attempted by the forum defendant. The court disagreed with these cases, however, holding that there is no tension between the text of and policy behind § 1441(b) when the statute is interpreted as requiring service on *some* defendant prior to removal. The court held that § 1441(b) assumes that at least one defendant already has been properly joined and served before removal is appropriate, as any contrary interpretation would render the statute's use of the word "any" superfluous. Thus the lack of any party being properly joined and served does not mean that § 1441(b)'s "exception" to removal is inapplicable, but rather means that "a more basic assumption embedded in the statute -- that a party in interest had been served prior to removal -- has not been met."

Moreover, the court held this interpretation is consistent with removal's history and purpose, which was to afford non-forum defendants the ability to seek the protection of federal court against any perceived local bias in the state court chosen by plaintiff. The "properly joined and served" limitation in § 1441(b) was added in 1948 to prevent plaintiffs from engaging in the gamesmanship of defeating removal by improperly joining forum defendants whom they did not intend to pursue. If the court were to allow a non-forum defendant to remove the case from state court before service even has been effected on any party, however, it would be rewarding a different kind of gamesmanship. With modern technology, defendants with resources to monitor dockets throughout the country can obtain notice of litigation against them before service can be effected, which is precisely what occurred here. Thus, the court held, "[p]recluding removal until at least one defendant has been served protects against docket trolls with a quick finger on the trigger of removal." Under the court's interpretation of § 1441(b), a plaintiff seeking to legitimately join a forum defendant and avoid removal must serve that defendant before any others, and if he serves any non-forum defendant first, either that party or any other is free to remove the case to federal court before service on the forum defendant has been completed. This interpretation, the court held, both preserves the congressional purpose of § 1441(b) -- namely, preventing abuse by plaintiffs in forum selection -- and closes an unintended loophole allowing abuse by defendants seeking to escape a plaintiff's legitimately chosen forum, all without doing violence to the statute's plain language.

Massachusetts Federal Court Holds Declaratory Judgment on Third-Party Claim for Indemnity Premature Where Underlying Liability Has Not Yet Been Determined, and Contractually Indemnified Party that Refuses to Allow Indemnitor to Control Defense Waives Right to Indemnity

In *Riva v. Ashland, Inc.*, 2013 WL 1222393 (D. Mass. Mar. 26, 2013), over 250 residences, 20 businesses and one school were damaged by an explosion at a plant that was jointly operated by a paint manufacturer and printing ink manufacturer. The explosion occurred after defendant, a chemical manufacturer, delivered several thousand gallons of flammable chemicals to the facility. A class action complaint on behalf of all persons and entities who sustained damages or injuries from the explosion was filed against the paint and ink manufacturers, but not the chemical manufacturer. In connection with the eventual settlement of that class action, all plaintiffs gave a full release to the paint and ink manufacturers and some plaintiffs agreed to indemnify the manufacturers from third-party claims for indemnity or contribution that might be asserted by any non-settling party, such as defendant, against whom any indemnifying plaintiff asserted a claim.

Thereafter, two individuals and one insurer -- some of whom had provided indemnity under the settlement agreement and some of whom had not -- filed a new putative class action against defendant, which in turn promptly filed a third-party complaint against the paint and ink manufacturers for indemnification under the terms of defendant's sales contracts. The court denied class certification in this second action, however, because the named plaintiffs' interests were not sufficiently aligned with the rest of the class due to the potential for a conflict to arise from application of the settlement agreement's indemnification provision to some but not all class members (*see* **April 2012 Foley Hoag Product Liability Update**).

A few days later, two new complaints were filed against defendant for damages arising out of the explosion, one by a group of plaintiffs with no indemnity obligations under the settlement agreement and another by plaintiffs who had agreed to indemnity. In both actions, plaintiffs sought recovery solely for damages arising out of defendant's actions alone, specifically excluding recovery for claims arising out of the ink manufacturer's conduct. In all three actions, defendant filed third-party claims for contractual indemnity and contribution against the ink manufacturer and then moved both for a declaratory judgment on those claims and summary judgment against plaintiffs' claims. The ink manufacturer, in turn, answered the third-party complaints and asserted its own claim for contractual indemnity against all plaintiffs that were indemnitors under the settlement agreement. These plaintiffs, contending that the right to control the ink manufacturer's defense against the chemical manufacturer's third-party claims was theirs alone, demanded that the ink manufacturer withdraw its answer and allow them to assume the defense, arguing that refusal to do so would waive the right to indemnification under the settlement agreement. When the ink manufacturer refused, the indemnitor plaintiffs counterclaimed for a declaratory judgment that they owed no indemnity obligations, breach of the settlement agreement and violation of Mass. Gen. L. ch. 93A (the Massachusetts unfair and deceptive practices statute), and moved for judgment on the pleadings on each counterclaim.

First, the court held that the terms of the sales contracts between the chemical and ink manufacturers would require the latter to indemnify the former against any judgment on plaintiffs' claims, as the indemnity obligation covered all claims "arising out of [the ink manufacturer]'s use, storage, handling or resale of the [chemicals]." Even though plaintiffs' complaint purported to exclude any claims arising out of the ink manufacturer's conduct, the court held the indemnification provision nevertheless applied because if the parties had intended to limit indemnity coverage to claims arising out of the ink manufacturer's negligence alone, they could have used qualifying terms such as "sole" or "exclusive" to describe the ink manufacturer's indemnifiable conduct. In spite of this conclusion, however, the court declined to issue a declaratory judgment that defendant was entitled to indemnity on the ground that the requested relief would be premature because under Ohio law, which governed the sales contracts, the duty to indemnify arises only after liability has been determined in the underlying action.

For similar reasons, the court denied defendant's motions for summary judgment on plaintiffs' claims, in which defendant had argued it could not be liable to plaintiffs as a matter of Ohio law, on account of the sales contract's indemnification provisions and the doctrines of circular indemnity and circuity of action. Under those doctrines, a plaintiff may not "proceed against itself" in actions like this one where the cost of any resulting judgment ultimately would be borne by plaintiff itself because of its indemnity obligations. Because determination of the ink

manufacturer's duty to indemnify was premature, so too was the related inquiry of the applicability of the doctrine of circular indemnity.

Turning to the indemnitor plaintiffs' counterclaims against the ink manufacturer for a judgment relieving them of their settlement agreement indemnity obligations, the court first held that, under Massachusetts law, plaintiffs' contractual duty to defend the ink manufacturer against third-party claims included a right to control the defense. This was especially appropriate here where, due to the settlement agreement's indemnity provisions, the indemnitor plaintiffs had a stronger incentive to defend the ink manufacturer against defendant's indemnification claims than the manufacturer itself. Because the general rule is that an indemnitee's failure to allow the indemnitor to take charge of the defense relieves the indemnitor of its indemnity obligation, and the ink manufacturer offered no justification for its refusal of the indemnitor plaintiffs' offer to defend, the court granted their motion for judgment on the pleadings.

Massachusetts Federal Court Holds State Law Negligent Manufacture and Distribution Claims Against Medical Device Manufacturer Not Preempted by Federal Food, Drug and Cosmetic Act Because Claims Sought to Impose Obligations Parallel to Those Imposed by "Good Manufacturing Practices" Regulations Promulgated Under Act

In *Chasse v. Stryker Corp., et al.*, No. 12-11694-PBS (D. Mass. Mar. 20, 2013), plaintiffs filed a class action complaint against the manufacturers of a hip replacement system that they alleged had been negligently manufactured and distributed. Plaintiffs alleged that defendants' violations of various federal regulatory requirements, including Current Good Manufacturing Practice ("CGMP") requirements of the Quality System Regulation, 21 C.F.R. Part 820, promulgated under the Medical Device Amendments ("MDA") to the Federal Food, Drug and Cosmetic Act ("FDCA"), constituted negligence under Massachusetts law. Defendants moved to dismiss the complaint on the ground that plaintiffs' negligence claim was preempted by the MDA's express preemption provision, 21 U.S.C. § 360k, which preempts any state law requirements that are "different from, or in addition to," any requirements imposed by the FDCA.

The court first noted that the key question raised by the motion was whether the complaint pleaded a "parallel" claim that avoids preemption under the United States Supreme Court's 2008 decision in *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008) (*see* **April 2008 Foley Hoag Product Liability Update**). In *Riegel*, the Court held the MDA does not prevent a state from providing a damages remedy for claims premised on a violation of FDCA regulations because the state duties in such a case merely "parallel," rather than add to or differ from, federal requirements. Defendants argued that CGMPs are not device-specific regulations and are therefore too general to constitute binding federal requirements that could form the basis for a "parallel" claim under state law.

In considering the motion, the court highlighted several federal trial and appellate court decisions that had addressed the same issue. The court acknowledged that some federal district courts, including the United States District Courts for the Western District of Pennsylvania and the Eastern District of New York, had reasoned that CGMPs are too general to serve as a basis for a parallel claim. The court found each of three circuit court decisions cited by defendants distinguishable, however, as none of them were specific to CGMPs and in each of those cases the holding rested in part on the determination that the plaintiff had failed to identify a specific regulatory violation that had allegedly caused his or her injury. In contrast, the Fifth and Seventh Circuit Courts of Appeals had addressed the precise issue involved here and held that CGMPs are "legally binding requirements" that can serve as the basis of a "parallel" claim, at least when their violation is alleged to have caused the plaintiff's specific injury. Persuaded by the reasoning of these two appellate decisions, the court denied defendants' motion.

Massachusetts Appeals Court Affirms Judgment for Turbine and Valve Manufacturers Because of Lack of Evidence Plaintiff's Mesothelioma Was Caused or Contributed to by Any Asbestos in Their Products

In *Whiting v. CBS Corp.*, 83 Mass. App. Ct. 1113 (Mass. App. Ct. Feb. 14, 2013), plaintiff's husband died from malignant mesothelioma allegedly developed as a result of his exposure to asbestos during service in the engine and boiler rooms aboard the U.S.S. Gaudalcanal between 1968 and 1972. The turbines and valves manufactured by defendants had been installed in

the boiler room along with other pumps, valves and pipes which used gaskets, packing and insulation that contained asbestos. In 2008, plaintiff sued the turbine and valve manufacturers in Massachusetts Superior Court, alleging her husband's mesothelioma was caused by exposure to their products and defendants had failed to warn of the products' dangers. After the Superior Court granted defendants' motion for summary judgment on the ground that there was no evidence defendants' products contained asbestos, plaintiff appealed.

The appeals court first noted that, to prove causation in an asbestos case, it is plaintiff's principal burden to show that a defendant's product contained asbestos and the victim was exposed to that asbestos. Here, the only evidence of decedent's potential exposure to asbestos came from a shipmate, who testified at deposition that he could not recall decedent working on the turbines but that he "would have" removed and replaced asbestos gaskets and packing in defendant's valves and other equipment. Other than the shipmate's testimony, however, there was no direct evidence that defendant's valves were in fact supplied with gaskets or packing at all, much less asbestos-containing gaskets or packing, and the turbines were supplied uninsulated, with any insulation being attached later by the United States Navy or its shipbuilder. In any event, any insulation originally installed on the turbines or valves would have been removed and replaced from unknown sources in two overhauls of the ship that occurred in the mid-1960s, years before decedent served on the ship. Finally, there was evidence that the engine and boiler rooms used valves made by as many as seven different manufacturers. Accordingly, because there was no evidence that asbestos products manufactured or sold by defendants contributed to decedent's development of mesothelioma, the judgment for defendants was affirmed.

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