ARNOLD & PORTER LLP

Product Liability Litigation Update

Recent Developments in the Law

May 2013 A publication of the Product Liability Practice Group

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Class Actions: Supreme Court Limits Plaintiffs' Strategy To Avoid Class Action Fairness Act Removal

In *Standard Fire Insurance Company v. Knowles*, 133 S. Ct. 1345 (2013), the Supreme Court issued its first opinion addressing the Class Action Fairness Act ("CAFA"), unanimously rejecting plaintiffs' attempt to defeat removal by using a precertification stipulation to limit damages below CAFA's $5 million amount in controversy threshold.

Knowles filed a class action lawsuit in Arkansas state court against Standard Fire, seeking to certify "hundreds, and possibly thousands" of similarly situated plaintiffs to collect underpaid property loss claims. Standard Fire removed the case to federal court under the CAFA provision which confers federal jurisdiction over interstate class actions where the amount in controversy exceeds $5 million. *See* 28 U.S.C. § 1332(d)(2). The district court remanded the case based on a stipulation that neither plaintiff, nor the class, would seek more than $5 million. The Supreme Court vacated the remand order, holding that "a plaintiff who files a proposed class action cannot legally bind members of the proposed class before they are certified." 133 S. Ct. at 1348-49. The Court further reasoned that treating a nonbinding stipulation as if it were binding would "run directly counter to CAFA's primary objective [of] ensuring 'Federal court consideration of interstate cases of national importance.'" *Id*. at 1350. And the Court observed that permitting remand would allow "the subdivision of a $100 million action into 21 just-below-$5-million state-court actions," an "outcome [which] would squarely conflict with the statute's objective." *Id.*

The *Standard Fire* decision blocks one of plaintiffs' frequent strategies for structuring class action pleadings to avoid federal jurisdiction, and suggests a broader intolerance for evasions of the statute's broad remedial purpose.

An in-depth Advisory on *Standard Fire* published by Arnold & Porter attorneys is available **here**.

Class Actions: Supreme Court Applies Rule 23(b)(3) Predominance Requirements To Damages Component At Class Certification Stage

In *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), the Supreme Court held in a 5-4 decision that a plaintiff seeking certification for a damages class under Rule 23(b)(3) must establish that damages are capable of being measured on a class-wide basis.

The Court found that the lower court erred when it failed to consider the sufficiency of plaintiffs' damages proof—a key inquiry that "bore on the propriety of class certification"—simply because defendants' arguments overlapped with the merits of the case. 133 S. Ct. at 1432-33. At issue was plaintiffs' proposed damages model, which was calculated assuming the validity of all four theories of antitrust impact initially advanced by plaintiffs, even though the district court ultimately accepted only one of them. Because a model purporting to serve as evidence of damages must measure only those damages attributable to the theory, the Court reasoned, plaintiffs' proposed model—which was incapable of isolating damages resulting from any one theory—could not "possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3)." *Id*. at 1433.

In applying Rule 23(b)(3)'s predominance and "evidentiary proof" requirement to the calculation of damages, the Court thus made clear that plaintiffs must have a sufficiently rigorous and developed class-wide damages model to get past the class certification stage. To assess the initial impact of *Behrend*, it is worth keeping an eye on *Whirlpool v. Glazer*, 678 F.3d 409 (6th Cir. 2012), a consumer class action certification case that the Court recently remanded to the Sixth Circuit for review in light of *Behrend*.

An in-depth Advisory on *Behrend* published by Arnold & Porter attorneys is available **here**.

Negligence: Oklahoma Supreme Court Finds Violations Of Federal Regulations Can Constitute Negligence Per Se Under State Law

In *Howard v. Zimmer, Inc*., 2013 WL 1130759 (Okla. Mar. 19, 2013), the Oklahoma Supreme Court, answering a certified question from the U.S. Court of Appeals for the Tenth Circuit, found that violations of federal regulations can constitute negligence per se under Oklahoma law. Plaintiff claimed his knee implant failed because the manufacturer left an oily residue on the implant in violation of federal good manufacturing process ("GMP") regulations. The Court allowed this state-law claim to proceed despite the provision of the Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. § 337(a), that all violations of the FDCA be enforced by the federal government.

The Oklahoma court distinguished between enforcing a federal regulation—which only FDA has authority to do—versus allowing a "parallel" state law claim for negligence per se to be grounded in a violation of a federal regulation. 2013 WL 1130759 at *7. The court observed that the U.S. Supreme Court recognized in *Riegel v. Medtronic, Inc*., 552 U.S. 312 (2008) that such "parallel claims" would not be preempted by federal law, and held that this is "precisely the situation presented here." 2013 WL 1130759 at *6. A vigorous dissent criticized the breadth of the majority's holding and questioned whether the GMP regulation at issue mandated only a process rather than a particular result and may not have been intended to benefit consumers.

The Oklahoma Court correctly noted that "[t]here is no unanimity in the courts which have addressed the issue of whether negligence per se claims should be allowed to proceed under the FDCA." *Id*. State law plays a critical role in the breadth of the so-called "parallel claims" exception to medical device preemption under *Riegel*, making this an issue to watch.

Primary Jurisdiction: California Federal Court Finds Primary Jurisdiction Inapplicable

In *Brazil v. Dole Food Company*, 2013 WL 1209955 (C.D. Cal. Mar. 25, 2013), the U.S. District Court for the Central District of California granted defendant Dole Food Company's motion to dismiss plaintiffs' class action claims alleging Dole's product labeling was "misbranded" based on failure to satisfy pleading standards. But before doing so, the court addressed and rejected Dole's argument that the case should be dismissed or stayed under the doctrine of primary jurisdiction. That point is noteworthy because it contrasts with another California district court's recent decision, *Astiana v. Hain Celestial Group*, dismissing another California false advertising claim under the primary jurisdiction doctrine. 2012 WL 5873585 (N.D. Cal. Nov. 19, 2012).

Plaintiff alleged that certain Dole food products were improperly labeled as "all natural, fresh, antioxidant, [and] sugar free" in violation of state and federal law. Dole raised several grounds for dismissal, including the primary jurisdiction doctrine, "under which a … claim [that] implicates technical and policy questions should be addressed in the first instance by the agency with regulatory authority over the relevant industry..." 2013 WL 1209955 at *9. Dole relied principally upon *Astiana*, in which the court deferred to FDA to determine for the first time whether promoting a cosmetic as "natural" violated the FDCA. But the *Dole* court distinguished *Astiana* because FDA had already established regulations addressing the alleged advertising violations at issue concerning Dole's products. The *Dole* court further found primary jurisdiction inapplicable because the case is "far less about science than it is about whether a label is misleading" and thus did not raise a "particularly complicated issue that Congress has committed to [the FDA]." *Id*. at *10.

The *Dole* case reinforces that a key to prevailing on a primary jurisdiction argument is showing not only that a case involves an issue which is subject to federal regulation, but one that implicates a novel and/or particularly complex issue that Congress has committed to a regulatory agency.

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