ARNOLD & PORTER LLP

Product Liability Litigation Update

Recent Developments in the Law

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Class Actions: Certification Of "Liability Issue Class" Under Rule 23(C)(4) After Comcast v. Behrend

In *In re Motor Fuel Temperature Sales Pracs. Litig*., 2013 WL 1397125 (D. Kan. Apr. 5, 2013), the court certified a Rule 23(c)(4) "issue class" of plaintiffs asserting consumer protection claims with respect to liability issues only. The "issue class" strategy has gained popularity among plaintiffs since the Supreme Court decision in *Wal-Mart v. Dukes* (2011) and may see increased attention in the wake of *Comcast v. Behrend* last month. Both *Dukes* and *Behrend* imposed rigorous predominance requirements for class certification, and plaintiffs may view issue classes as a way to navigate around those decisions.

In re Motor Fuel involved allegations that the defendant misrepresented the price of gasoline by selling it without disclosing or adjusting for the effect of temperature on the energy content of the fuel. Plaintiffs sought an issue class certification as to liability issues under Rule 23(c)(4), which states that "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues." In certifying the liability issue class, the *Motor Fuel* court stated that "liability" issues would include all substantive elements of plaintiffs' claims, including causation and injury, but not "questions of remedy" such as damages, injunctive relief, and restitution. The court noted that "[t]he possibility that individual issues may predominate the issue of damages . . . does not defeat class certification by making [the liability] aspect of the case unmanageable." 2013 WL 1397125, at *18. By carving out the individualized questions of damages from their purported class, Plaintiffs were thus left with a more discrete class which the court found sufficiently cohesive to pass Rule 23 muster.

The Second, Seventh and Ninth Circuits have split with the Fifth Circuit on the interplay between the predominance requirements of Rule 23(b)(3) and the issue class provision of Rule 23(c)(4). The former have held that a court may use Rule 23(c)(4) to proceed with class treatment of the common issues even if certification of the entire action would be unwarranted due to the prevalence of individual issues in the action as a whole. The Fifth Circuit, on the other hand, has held that a "district court cannot manufacture predominance through the nimble use of subdivision (c)(4)." *Castano v. Am. Tobacco Co*., 84 F.3d 734, 745 n. 21 (5th Cir. 1996). This remains an important issue to watch as courts sort out the implications of *Wal-Mart* and *Behrend*.

Gov. Jerry Brown Proposes "Update" To California's Notorious Warning Law

On May 7, 2013, California Governor Jerry Brown announced plans to reform Proposition 65 (formally known as the Safe Drinking Water and Toxic Enforcement Act of 1986), the 1986 voter initiative that allows private enforcers to bring actions "in the public interest" under the Act without requiring any showing of harm. Proposition 65 requires businesses to warn consumers before exposing them to any chemicals that California has determined cause cancer or reproductive harm. Over 90 percent of cases are brought by private plaintiffs, who can seek steep civil penalties of up to US$2,500 per violation per day as well as injunctive relief, while

their lawyers can seek attorneys' fees.

The Governor's proposals seek to reduce the financial incentives for plaintiffs to pursue meritless Proposition 65 claims. The Governor's press release proposes the following reforms: restrictions on attorney's fees, requiring a stronger factual showing by plaintiffs before they can initiate litigation, requiring greater disclosure of information by plaintiffs, and limiting the amount of settlement money that can be allocated for non-penalties. In addition, Governor Brown also announced that he will discuss providing the State with more flexibility in setting chemical levels required for warnings and ensuring the public has access to more useful information about exposure.

The Governor's staff intends to press for changes to be adopted in 2013, building on the momentum garnered by a narrowly tailored bill that was recently introduced in the State Assembly to allow businesses time to "cure" alleged Proposition 65 violations once they are notified. In the coming weeks, the Governor's office will convene working groups of stakeholders to consider these proposals. Businesses should be engaged in and monitor these stakeholder discussions.

Iowa Appellate Court Affirms Preemption Of Claims Against Generics And Rejects Innovator Liability

In *Huck v. Trimark Physicians Group*, 2013 WL 1749774 (Iowa Ct. App. Apr. 24, 2013), the Iowa Court of Appeals affirmed summary judgment in favor of both brand-name and generic manufacturers of metoclopramide in a case involving a plaintiff who took only the generic form. The Court affirmed dismissal of the claims against the brand-name manufacturers, holding that *PLIVA, Inc. v. Mensing*, 131 S.Ct. 2567 (2011), did not change Iowa law that a manufacturer cannot be held liable for injuries arising from a product it did not manufacture. As to Plaintiff's claims against the generic company, PLIVA, the Court held that they all amounted to attacks on the adequacy of the label and were thus preempted by *Mensing*.

On the innovator liability issue, the Court reasoned that *Mensing*'s holding on preemption of claims against generic manufacturers did not alter existing state law principles, which in Iowa require plaintiff to "prove that the injury-causing product was a product manufactured or supplied by the defendant." 2013 WL 1749774, at *4. Iowa thus joins the substantial majority of states which have rejected attempts to hold innovator companies liable for injuries allegedly caused by taking the generic version of a medication, and departs from the recent Alabama decision allowing innovator liability in *Wyeth, Inc. v. Weeks*, 2013 WL 135753 (Ala. Jan. 11, 2013).

As to preemption of the claims against the generic company, the court rejected Plaintiff's attempts to distinguish *Mensing* and expressly declined to follow the rationale of the recent Sixth Circuit decision in *Fulgenzi v. PLIVA*, 2013 WL 949096 (6th Cir. Mar. 13, 2013), which had allowed a failure-to-warn claim to move forward when the generic manufacturer failed to update its label to conform to the branded drug label. The Court also rejected Plaintiff's argument that PLIVA should have disseminated warnings consistent with approved labeling through other means, noting that Plaintiff also argued that the warning was inadequate, and "Iowa law does not provide a cause of action for failing to disseminate allegedly inadequate warnings." 2013 WL 1749774, at *3.

Huck provides further support for state courts to broadly enforce *Mensing* and to reject "innovator liability," notwithstanding the recent *Fulgenzi* and *Weeks* opinions.

For questions or comments on this newsletter, please contact the Product Liability group at product@aporter.com.