ARNOLD & PORTER LLP

Product Liability Litigation Update

Recent Developments in the Law

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CAFA Developments: Home State Exception is Not Jurisdictional; Request for Pre-Trial Coordination Does Not Give Rise to Mass Action

Two noteworthy federal appellate decisions involving the Class Action Fairness Act (CAFA) were decided in September. The first one involves the "home state exception," which provides that a federal court "shall decline to exercise jurisdiction" over class actions in which two-thirds or more of the class, and the primary defendants, are citizens of the state in which the action was filed. In ***Gold v. N.Y. Life Insurance Co.*, 2011 WL 2421281 (2d Cir. Sept. 18, 2013)**, the Second Circuit, joining the Seventh and Eighth Circuits, held that the home state exception is not jurisdictional and thus could be waived if not raised within a reasonable time. The court reasoned that to "decline to exercise" jurisdiction implied that federal jurisdiction existed in the first place, and that the court must actively decline to exercise it if the exception's requirements are met.

In the second decision, ***Romo v. Teva Pharmaceuticals USA, Inc.*, 2013 WL 5314334 (9th Cir. Sept. 24, 2013)**, a divided Ninth Circuit panel held that plaintiffs' petition seeking coordination of state actions "for all purposes" was not a proposal for the actions to be tried jointly that would render it a "mass action" under CAFA. CAFA defines a mass action as: "any civil action ... in which monetary relief claims of 100 or more persons are *proposed to be tried jointly* on the ground that the plaintiffs' claims involve common questions of law or fact . . . ." 28 U.S.C. § 1332(d)(11)(B)(i) (emphasis added). Defendants removed the case under CAFA's "mass action" provision after Plaintiffs' attorneys—which had divided their 1,500 clients among 41 separate lawsuits to avoid CAFA's 100-plaintiff threshold—sought to coordinate the actions pursuant to California's rule permitting coordinated proceedings.

In rejecting Defendants' argument that this created a mass action, the Ninth Circuit distinguished the case from the Seventh Circuit's decision in *In re Abbott Labs* (7th Cir. 2012), which involved Plaintiffs' explicit request for the consolidation of actions "through trial." Instead, the majority found that the plaintiffs' petition "stopped far short of proposing a joint trial" and focused solely on the coordination of pretrial matters. 2013 WL 5314334, at *3. In dissent, however, Judge Gould concluded that the plaintiffs' petition listed certain goals that could only be accomplished through a joint trial, therefore making the action removable under CAFA. *Id*. at *5.

Whether a statement, motion, or other actions by plaintiffs constitutes a proposal to try cases jointly for CAFA purposes remains a fact-specific inquiry. Defendants should remain vigilant for opportunities to remove cases when plaintiffs trigger CAFA's mass action provision by implicitly proposing that more than 100 cases should be tried together.

Medical Device Preemption: Negligent Surgery Advice Claim Not Preempted Under MDA

In ***Medtronic Inc. v. Malander***, an Indiana appellate court held that the Medical Device Amendments, 21 U.S.C. § 360k(a), did not preempt plaintiff's claim of common-law negligence based on allegedly faulty information provided by Defendant's representatives to Plaintiff's surgeon. 2013 WL 5583573 (Ind. Ct. App. Oct. 11, 2013).

The Indiana court held that Plaintiff's negligence claim escaped express preemption under the Supreme Court decision in *Riegel v. Medtronic* (interpreting § 360k) because the plaintiff was not alleging that the device maker should have given warnings that "are different from" or "in addition to" those required by federal law. The Court reasoned that the alleged negligence did not relate to "the labeling, design, or manufacture of the device," but rather to the negligence of Defendants' representatives in giving Plaintiff's physician allegedly faulty advice during a surgical procedure regarding the safety of the device. The Court noted that such interactions between company representatives and physicians in the operating room are not regulated by the FDA, but rather, are "localized situations [which] are traditional matters for the common law." 2013 WL 5583573, at *6. The Court further held that because Defendant voluntarily undertook to provide technical assistance to Plaintiff's surgeon, it assumed a legal duty to provide such support in a "reasonable and prudent manner."

Other courts have come out the other way on failure-to-train physician claims, finding the claims preempted. *See, e.g., Sons v. Medtronic, Inc.*, 915 F. Supp. 2d 776 (W.D. La. 2013); *Mattingly v. Hubbard*, 2008 WL 3895381 (Ky. Cir. Ct. Jul. 30, 2008). Whether such failure-to-train claims are preempted will no doubt be a source of continuing litigation as Plaintiffs try to find "loopholes" in the preemption regime established under *Riegel*.

Eighth Circuit: Economic Loss Doctrine Bars Claim Based on Faulty Product Recommendation

In ***Dannix Painting LLC v Sherwin-Williams Co.*, 2013 WL 5677043 (8th Cir. Oct. 21, 2013)**, the Eighth Circuit Court of Appeals held that a painting contractor's suit against Sherwin-Williams Co. for providing faulty recommendations about its paints was barred by Missouri's economic loss doctrine. Plaintiff sued on a negligent misrepresentation theory to recover the costs of removing the paint (which failed to adhere to the surfaces on which it was used) and redoing its paint job.

The economic loss doctrine limits the remedies for losses sustained by reason of defects in products sold to the warranty provisions of the U.C.C. In an attempt to circumvent the economic loss doctrine, Plaintiff argued that it was not asserting a product defect claim, but rather, that it was faulting Defendant's negligent product recommendation. The Court rejected Plaintiff's distinction between the advice given by the manufacturer and the product about which the advice was given as "a distinction without a difference." *Id*. at *4. It noted that, "[a]t root, Dannix's negligent misrepresentation claim derives from its disappointed commercial expectations—the paint it bought 'didn't stick' as expected"; this was the "essence" of a warranty action. *Id*. The Court moreover found that Plaintiff could not establish a negligent misrepresentation claim because the manufacturer "was not in the business of supplying information but, rather, offered advice and information merely as a service provided in connection with its retail operations." *Id*.

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