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In This Issue:

SEC Commish Hints At More Scrutiny Of Lawyers

SEC Commissioner Kara M. Stein recently suggested in prepared remarks that the SEC may take a closer look at the roles lawyers play in deterring corporate fraud. Noting that she was speaking only for herself, Commissioner Stein described the importance of good compliance for helping to avoid harm to investors and companies, and added that she "see[s] this harm up close and personal every week as [she] wade[s] through a stack of enforcement cases." Commissioner Stein explained that the SEC often relies on partnerships with "gatekeepers" both within and outside of financial firms -- such as executives or directors, counsel, and accountants -- to promote and ensure compliance, and that a recurring theme is a failure by such gatekeepers to prevent or disrupt financial misconduct.

Commissioner Stein noted in particular that lawyers are often absent from the cases she sees, despite their usual role as "trusted advisers." She argued that while in most cases lawyers do a good job, sometimes when they provide bad advice or effectively serve to assist fraud, their involvement is used as a shield against liability, both for themselves and for others. "Are we treating lawyers differently from other gatekeepers, such as accountants? I think we should carefully review the role that lawyers play in our markets, with a view towards how they can better help deter misconduct and prevent fraud," she said.

Product Liability: Fourth Circuit Limits Ability To Litigate Under Seal

The Fourth Circuit recently imposed limitations on the ability of consumer product manufacturers to litigate against the Government under seal. In 2011, the Consumer Product Safety Commission (CPSC) intended to post a report on its database linking an ErgoBaby baby carrier to the death of a small child. ErgoBaby—believing that the report was "materially inaccurate" and thus exempt from posting on the database, and that such a report would be disastrous to its business—filed a preemptive suit to enjoin the agency from publishing the report. In order to protect its reputation while the suit was pending, however, ErgoBaby filed under the pseudonym "Company Doe" and moved to have the entire case sealed, including most of the public docket. Over the objections of consumer advocacy group intervenors, the district court allowed the case to proceed entirely under seal, thereby giving ErgoBaby the chance to contest the proposed posting without being subject to the public scrutiny normally attendant such litigation.

The district court granted summary judgment on ErgoBaby's behalf, concluding that CPSC cannot publish a report when the odds of a connection between a product and the harm are no more likely than that of a "coin flip." The court also stated that, to be "related" to a product, an event must be "connected with" or "associated with" the product. And, the court found unconvincing CPSC's efforts to "establish the necessary nexus" between the report and the product. That portion of the district court's decision was not appealed and remains intact.

Consumer groups appealed the district court's decision to seal the majority of the case file, and prevailed. *Company Doe v. Public Citizen*, No 12-2209 (4th Cir. Apr. 16, 2014). The Fourth Circuit held that "when a party seeks to litigate under a pseudonym, a district court has an independent obligation to ensure that extraordinary circumstances support such a request by balancing the party's stated interest in anonymity against the public's interest in openness and any prejudice that anonymity would pose to the opposing party." And, in this case, the Fourth Circuit found that the ErgoBaby failed to meet that burden. The Court also more broadly noted that, "[w]hen parties call on the courts, they must accept the openness that goes with subsidized dispute resolution by public (and publically accountable) officials."

Consumer product companies continue to be free to sue CPSC in federal court to prevent CPSC from publishing reports on the saferproducts.gov website that contain inaccurate information. However, filing a suit against CPSC could bring more attention to the company and the misleading report—and therefore inflict more reputational damage—than letting the report be published on the database. On the other hand, some companies might feel compelled to head to court to discredit an inaccurate consumer report that CPSC intends to publish regardless of the public nature of the case. Only time will tell whether consumer product companies will be willing to pursue such a strategy.

California Class Actions: Trial Court Must Consider How Individual Defenses Will Be Tried When Certifying A Class

In a wage and hour class action that was tried to a plaintiffs' verdict, but decertified by the court of appeal, the California Supreme Court held that "a class action trial management plan must permit the litigation of relevant affirmative defenses, even when these defenses turn on individual questions." *Duran v. U.S. Bank Nat'l Ass'n*, No. S200923 (May 29, 2014). It affirmed the court of appeal's holding that the defendant's due process rights were violated when sampling was used to determine liability, and the defendant was not allowed to present facts establishing that a large number of individuals outside the sample did not have valid claims.

The Court emphasized that trial courts "must pay careful attention to manageability when deciding whether to certify a class action." On remand, the trial court could entertain a class certification motion, but the Court cautioned that "[a] trial plan that relies on statistical sampling must be developed with expert input and must afford the defendant an opportunity to impeach the model or otherwise show liability is reduced." The sampling method previously used by the trial court was flawed because the sample size was too small, not random, and resulted in an intolerably large margin of error.

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